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# Landlord News

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## RENEWAL POLICIES REDUCE EXPOSURE AND STRENGTHEN YOUR DEFENSE AGAINST FAIR HOUSING DISCRIMINATION COMPLAINTS

We handle countless day-to-day situations for our clients. Unfortunately, sometimes situations illustrate the lack of a needed policy or procedure. Potential fair housing retaliation scenarios usually demonstrate that many communities do not have a well thought-out and consistently applied non-renewal policy. All too frequently we are told, "I don't know what our non-renewal policy is". You have the right to establish reasonable policies and procedures to manage your property, especially renewal policies based on resident conduct. Training your onsite staff to consistently carry out a well-designed non-renewal policy will significantly reduce potential fair housing exposure, including exposure to fair housing retaliation claims.



Several recent situations have raised potential fair housing retaliation claims. One, a resident slips and falls on the property, and then files a lawsuit against the property. Two, a resident on a single occasion storms the management office, and behaves in an aggressive, rude, and hostile manner which interferes with property operations to the point that the onsite team fears for its safety. Three, a resident has countless issues, and even though the onsite team has

bent over backwards to address the resident's concerns, the resident is not satisfied and will never be satisfied. In all three cases, the communities want to non-renew, and have legitimate non-discriminatory business reasons for non-renewing. However, in all three cases, prior to the communities notifying the resident of the non-renewal, the residents made requests for reasonable accommodations.

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## HOW DOES A FIRE AFFECT A TENANCY

*"Your own property is concerned when your neighbor's house is on fire". ~Horace.* This saying rings true, but is especially true for those neighbors that share walls within a multi-family dwelling. Fire in an apartment building often involves more than one unit. Many building occupants may be affected. The dense nature of apartment living allows for the spread of smoke, heat, and fire. Fire is always unexpected. Preparing for it shouldn't be. Responding to a fire requires quick decisions and fast actions in a setting that can be loud, smoky, dark, and hot. Lives and property can be saved by being prepared before fire strikes.

An estimated 108,400 multifamily residential building fires are reported to U.S. fire departments each year and cause an estimated 450 deaths, 3,800 injuries, and \$1.1 billion in property loss. These fires account for 28 percent of all residential building fires responded to by fire departments across the Nation.



Because several fires at

Denver metro apartment complexes have occurred in recent months including on the properties of Firm clients, HTS wants to review how to deal with the aftermath of a tenant fire. More specifically, what are property owners' rights and responsibilities after a rental property fire?

### DOCUMENT AND INVESTIGATE

The rights and obligations of the parties affected by a fire will depend on the extent of the damage and the cause of the fire. To make sure the cost of damage repairs are properly allocated to the tenant, landlord, and

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Assuming that the communities follow through with a non-renewal notice, these situations all meet the legal criteria for a fair housing retaliation claim. The resident exercised a fair housing right. The community took adverse action against the resident, non-renewing a resident is adverse action. Further, the resident will argue that the community only non-renewed because the resident exercised a fair housing right by asking for a reasonable accommodation. The community will counter that it had a legitimate non-discriminatory business reason for not renewing (being sued, resident's behavior, resident's dissatisfaction). However, the resident will counter that the reasons are just a pretext. Specifically, the stated reasons were not the real reason for the non-renewal, but were only given to justify the decision.

You may be able to convince the Colorado Civil Rights Division ("CCRD"), or a jury that you had legitimate non-discriminatory business reasons for a non-renewal. However, this is more difficult than you may think. The business legitimacy of your reasons, and whether they are a pretext to cover up discrimina-



tory action, will largely be determined by your past actions. When residents sued you in the past, did you non-renew those residents? When a resident has had an altercation with the onsite team, to the point that the staff fears the resident, did you non-renew

the resident? When a resident was dissatisfied no matter what, did you non-renew the resident? Regardless of the specific situation or what the resident did, did you non-renew similarly situated residents in the past? Similarly situated residents are called comparators.

Without a specific non-renewal policy, the similarly situated question is difficult to answer for many reasons. Because there is no policy, the onsite team often doesn't know the answer to this question. Frequently, we are told either that "I don't know" or "this has never come up before". OK, it's never happened before. "Then tell us the reasons why residents don't get renewed, what's the policy?" "We don't have a policy, we just make the call on a case-by-case basis". "Alright, you've told us this resident was never going to be satisfied. If the CCRD goes through all of your files, did you renew other residents that complained all the time?" "I'm not sure, we may

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insurance company, damages should be documented with both photographs and/or video as well as written descriptions. The written description should be objective (i.e. what did you see, hear, smell, or feel), not subjective (what you believe). An objective report example is: "On Sept. 1, at 10:05 a.m. I walked through the unit. The tenant and I were present. The kitchen and living room have a thick layer of soot on the ceilings. There is an odor of smoke throughout the unit. The Tenant told me that he believes the fire started in the kitchen when the oil in a deep fryer he was using caught fire."

Even though an expert, such as the fire department or insurance adjuster, will prepare a report, do your



own report as well. If the fire is ever the source of litigation, you will have a witness with first hand knowledge of the damage, as well as a report and visual

documentation to refresh their memory. Also, don't forget to investigate surrounding units for hidden damage. A small fire in one unit can potentially cause water damage or damage to shared electrical or ventilation systems affecting adjoining units.

### INSURANCE

While many landlords are reluctant to submit claims because of high deductibles or to avoid premium increases, you should consider filing a claim after a fire. Damages may be more serious than they originally appeared, and failure to file a timely claim may give the insurance company a reason to deny coverage. To avoid this issue, you should familiarize yourself with the notice requirements in your insurance policies. Also, be sure to submit claims to all insurance carriers, including the tenant's renter's insurance, if appropriate.

### WHO PAYS FOR DAMAGES?

Unfortunately, as with most legal questions, the answer to who pays for the damages is that it depends. It depends on the lease terms, the cause of the fire, and the extent of damage. Some of the factors that must be taken into consideration are as follows:

1. Whether the property is residential or commercial. (Residential landlords have additional duties to maintain the premises under the warranty of habitability).

2. The cause of the fire: Was the fire caused by the tenant, an electrical system failure, multiple causes, or is the cause unknown? A fire department report may also help determine cause.

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have". Because there is no policy, there is no consistency. Additionally, the lack of a policy results in a lack of comparators. The reason it has never come up before is because there is no policy. If there were a policy that residents who cannot be satisfied are non-renewed, over time there would be an example of another resident who was not renewed because he was never satisfied.

Without comparators, the playing field gets tilted in the resident's favor. First, it opens the door to credibility issues. "Let me get this straight. You non-renewed Ronnie Resident because he was always dissatisfied? You



say this has never come up? You run a 400 unit property? You have been there for 5 years? You have seen thousands of residents come and go?

Yet, you never had a resident who was constantly dissatisfied"? If it is a common issue, but has never come up before, it can create the impression that you are just making it up as you go along. No policy and a corresponding lack of comparators also places the entire emphasis on the reasons given for non-renewing the resident at issue, and whether your reasons were pretextual. A well thought-out policy and the result of that policy places the emphasis on the policy, its rationale (the legitimate non-discriminatory business reasons for the policy), and the fact that the policy has been applied to other residents. With no policy, in a worst case scenario, there could be a comparator bomb in your files. You think it has never come up before. However, are you willing to bet the ranch that the CCRD or some aggressive attorney won't find an example of another resident in your files that had the same issue, but was renewed?

A solid non-renewal policy addresses the comparator issue and much more, and thus greatly reduces your exposure. A non-renewal policy will eventually almost always generate favorable comparators over time. However, if a situation arises before the policy generates any comparators, you can now defend your actions based on the policy alone. The policy was adopted for legitimate non-discriminatory business reasons. For example, if the resident has sued the property, the property will expend time and money defending the lawsuit. Some, if not most, residents who sue the property are litigious in nature and may look for any reason to sue again.

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3. How badly the property is damaged
4. How long will it take to make repairs.
5. The terms of the lease regarding catastrophe or destruction of the premises, repairs and the parties' duties to provide insurance.
6. Whether the tenant is current on rent.
7. Is the lease term fixed or month-to-month.

A lease may specify particular rights and obligations of each party if the property is destroyed. For example, a lease may give either a tenant or a landlord the right to cancel the lease after premises destruction. In the absence of specific lease provisions, the law provides the following:

**A. Terminating the Lease.** A tenant has the right to occupy the property until the tenancy is terminated by law or a governmental entity has ordered that the property be vacated, such as the building being condemned. The lease may be terminated (1) at the end of the term, (2) by agreement of the parties after the fire, or (3) by the landlord if the lease allows for termination in the event the property is damaged or destroyed. If the lease allows the landlord to terminate if the property is damaged and the tenant refuses to vacate, a landlord may give a notice to quit. If the tenant refuses to vacate after receiving such notice, a landlord may be required to evict the tenant before regaining legal possession of the property.

**B. Responsibility for Repairs.** A landlord of a residential property has the obligation to maintain the rental premises in a manner that is fit for human habitation. (C.R.S. § 38-12-503) Unless a landlord can prove under



the civil standard, "preponderance of the evidence," that the tenant was responsible for the fire, the landlord is responsible for making and paying for the repairs. However, if

a tenant's negligence causes the damage, the tenant must repair damage to the property. Additionally, the tenant has a duty to cooperate with the landlord while repairs are completed. Leases usually contain provisions requiring the tenant to permit entry to facilitate repairs. A tenant who refuses to cooperate may be served with a compliance notice, and the tenancy may be terminated if the default is not cured.

**C. Rent Payments.** If the property is completely destroyed and the lease is terminated, the tenant is not obligated to pay future rent. If tenant caused the damage to the property, the tenant has an obligation to pay the

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Lawsuits typically allege that the onsite team failed to do its job, was negligent, or even incompetent. Lawsuits create a hostile relationship between the resident and onsite team. Resident lawsuits can affect the ability of the onsite team to provide resident services to the suing resident, and to other residents. Lawsuits can go on for a long time. The onsite team shouldn't have a cloud hanging over them while the lawsuit takes its course. You had the foresight to determine that the likelihood of a resident eventually suing the property was significant, and in order to avoid allegations that your actions were retaliatory (made in response to the lawsuit), you decided what your response was going to be if the issue ever came up.

A non-renewal policy strikes at the heart of a resident's retaliation claim by addressing the critical issues of timing, intent, and causation. Adverse action against a resident (non-renewing the resident) shortly after exercise of a fair housing right is strong circumstantial evidence of discriminatory intent. Further, timing evidence by itself could prove that the "cause" for the non-renewal was in retaliation for the exercise of a fair housing right. If you adopted your non-renewal policy prior to having any idea about a resident's issue, timing had nothing to do with it. You were only carrying out a policy based upon a legitimate non-discriminatory business reason. Also, you could not have intended to discriminate against the resident, because the decision to non-renew was made well before you knew the resident had an issue. Because the decision is automatic, based on policy, the resident will have great difficulty successfully arguing that your reasons for not renewing were a pretext.

While your policy can and should be built up over time based on your experiences with residents, based on situations reported to us, you may want to consider one or more of the following policies. Except for fair housing lawsuits or complaints, the community will not renew any resident who sues or threatens to sue the community. The community will not renew any resident who has three or more aggressive, rude, discourteous, or hostile interactions with the onsite team. The community won't renew residents who have a single altercation with the onsite team that results in onsite staff fearing for their safety, including a threatening altercation, and regardless of whether the resident was arrested or charged with a crime. The community will not renew residents who demonstrate, in the onsite staff's reasonable judgment, ongoing dissatisfaction with the community or the staff regardless of significant efforts to satisfy the resident.

Almost all of our clients have non-renewal policies. The problem is that most of them are not in writ-

ing, and the people on the ground (the onsite teams) are either not aware of the policies or do not understand them. Policies may address some or all of the issues discussed in this article, or may include additional policies. Your non-renewal policy should also address both monetary and non-monetary lease violations to promote consistency and to avoid fair housing problems. For example, you won't renew a resident that has been late three or more times, has been served two or more demands for rent or possession, or that has been served more than one three-day demand for compliance or possession for a non-monetary issue.

Only you can determine what non-renewal policies you should adopt based on your experience, and on legitimate non-discriminatory business reasons. However, you cannot just arbitrarily adopt policies. Any policy has to be supported by legitimate non-discriminatory business reasons. The legitimate non-discriminatory business reasons for most policies are obvious. If you can't come up with legitimate non-discriminatory business reasons



for policy, the policy should not be adopted. To avoid being accused of making them up at the time a resident issue arises, and to promote consistency, you must put your non-renewal policies in writing and make sure that your teams are trained to consistently enforce them. The onsite team should specifically document a resident's file in writing when it is known that a resident will not be renewed pursuant to the policy.

When it comes to fair housing, discretion is your enemy. Making the non-renew call on a case-by-case basis is a recipe for disaster. A well thought-out non-renewal policy will greatly eliminate discretion and promote consistency. A non-renewal policy can also prevent a resident from holding you hostage over a potential retaliation claim. Residents can and do file fair housing discrimination complaints, including retaliation claims. If the Colorado Civil Rights Division knocks on your door for non-renewing a resident, a non-renewal policy puts you in the strongest position to defend. If the policy has been in place for awhile, the policy is likely to demonstrate that you have consistently and conclusively non-renewed other similarly situated residents regardless of protected class status. Even if the policy hasn't generated any comparators to use in your defense, the policy will almost conclusively show that you lacked a discriminatory or retaliatory intent.

# GRRR! DOJ RULES ON PIT BULL ISSUE

There is always something new emanating from the DOJ. The United States Department of Justice ("DOJ") enforces the Fair Housing laws in connection with the HUD. Periodically, the DOJ will hand down guidelines "to provide clarification and guidance" on existing laws. Unfortunately, as in this case, these guidelines usually only cause more confusion. The DOJ recently issued a new ruling concerning the use of "service animals" in places of public accommodations under the Americans with Disabilities Act ("ADA"). This ruling will result in a new federal regulation. This ruling specifically deals with the subject of dog breed restrictions. It concludes that you cannot prohibit certain breeds of dogs based on local laws or concerns that a certain breed may have a propensity or history of unprovoked aggression.

The DOJ ruling impacts various municipalities, like Denver, who have banned pit bulls. DOJ's ruling means that municipalities with ordinances which ban pit bulls, must not enforce such ordinances in the context in which a disabled individual has a pit bull as a "service animal" and wishes to take such animal into places of public accommodation. Under this ruling, DOJ does not define companion animals as service animals. However, DOJ makes it clear that if a pit bull is being used as a service animal in the public accommodation context, then the ordinance must provide an exception. They conclude that limiting of specific breeds for service animals by local or state jurisdictions would impinge on the rights of disabled persons.



While this ruling pertains to places of public accommodation, under the ADA, and not the federal and state Fair Housing laws, we share this important development with you because it may foreshadow how DOJ and/or HUD will view pit bulls in the housing industry. The next interpretation could be that "companion animals" are necessary for the "mental health" of an individual and it would not be appropriate or consistent to limit their right to specific animal breeds.



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full rental amount due under the lease. If the damage is not caused by the tenant, and the tenant remains in possession of the damaged property, the tenant's obligation to pay rent may be reduced or eliminated depending on the severity of the damage, unless the landlord pays for the tenant's alternate housing. A tenant with comparable alternate housing must pay rent to the landlord at the lease rate.

**D. Other Issues.** If a fire is caused by a landlord's negligence, the landlord may be liable for the tenant's lost wages, inconvenience, and damaged personal property. Many landlords now require tenants to maintain renters' insurance and to name the landlord and property manager as an additional insured. Renters' insurance can provide an additional source of recovery for both the landlord and tenant, but a landlord should consult with an attorney to be aware of the associated risks and to ensure that the lease contains the necessary language to protect the landlord.

### CONCLUSION

It is helpful to know what is involved when a fire occurs on your property and equally helpful to be aware of how to minimize the occurrence of a fire on your property by being proactive. As the old saying goes "An



ounce of prevention is worth a pound of cure". In the case of fire, understanding where and how residential fires begin and following a few basic rules

will help reduce the risk. Owners or managers of rental properties should develop and provide to residents a building specific Fire Emergency Guide. The Fire Emergency Guide will provide your residents with a suggested evacuation plan and information about accessible fire protection equipment in the building. A copy of the Fire Emergency Guide should be given to each resident when they move in and when changes are made. Every multi-housing provider needs a minimum emergency plan and preparedness standard for their property. Remember a practiced escape plan will help residents and staff keep a cool head if fire should ever break out on your property or in your apartment complex.



## New Definitions For Old Words

**ADULT:** A person who has stopped growing at both ends and is now growing in the middle.

**BEAUTY PARLOR:** A place where women curl up and dye.

**CANNIBAL:** Someone who is fed up with people.

**CHICKENS:** The only creatures you eat before they are born and after they are dead.

**COMMITTEE:** A body that keeps minutes and wastes hours.

**DUST:** Mud with the juice squeezed out.

**EGOTIST:** Someone who is usually me-deep in conversation.

**GOSSIP:** A person who will never tell a lie if the truth will do more damage.

**HANDKERCHIEF:** Cold Storage.

**INFLATION:** Cutting money in half without damaging the paper.

**MOSQUITO:** An insect that makes you like flies better.

**RAISIN:** Grape with a sunburn.

**SECRET:** Something you tell to one person at a time.

**TOOTHACHE:** The pain that drives you to extraction.

**TOMORROW:** One of the greatest labor saving devices of today.

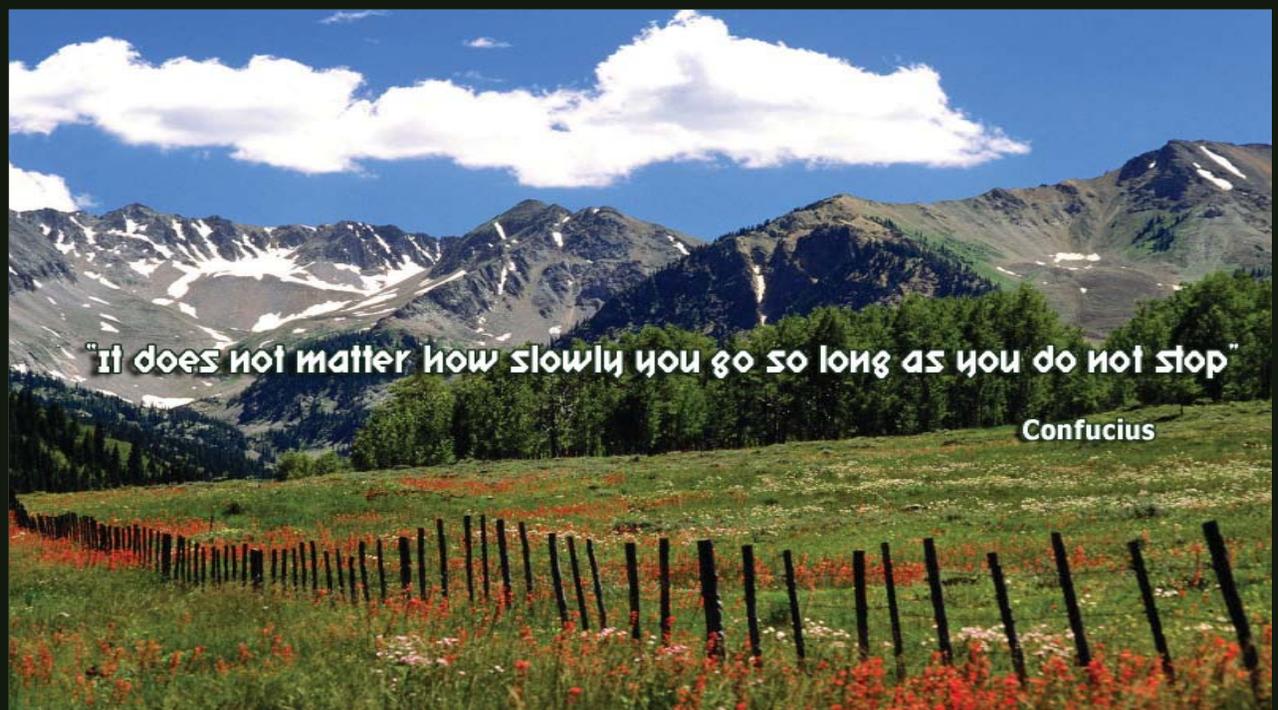
**YAWN:** An honest opinion openly expressed.

**WRINKLES:** Something other people have. I have character lines.

**JURY:** Twelve persons chosen to decide who has the better lawyer.

### IMPORTANT HTS SEPTEMBER DATES

September 6th	<b>ALL COURTS CLOSED LABOR DAY HOLIDAY</b>
	<b>HTS Closed LABOR DAY HOLIDAY</b>
September 13th & 15th	<b>DOUGLAS COURTS CLOSED JUDICIAL CONFERENCE</b>
September 15th	Basic Fair Housing HTS Lower Conference Center 3600 S. Yosemite Street Denver, CO 8:30 a.m. - 11:30 a.m.
September 23rd	North Client Lunch Dave & Busters Westminster 11:30 a.m. - 1:00 p.m.



"It does not matter how slowly you go so long as you do not stop"

Confucius