

RETALIATION UNDER THE FAIR HOUSING ACT - Proceed Cautiously: Don't Make a Bad Situation Worse

This resident has been trouble for a long time. Over the last 5 months, you have thought about evicting him at least a half dozen times over too many issues to remember. Of course, the other residents who are complaining the most will not cooperate. All of that is now in your rear view mirror. It's midway through month five of a six-month lease. The problem resident's lease is up at the end of next month. All you have to do is serve a notice of non-renewal (Notice to Quit). Problem solved, or so you think.

The mailman brings the mail. The mail contains a letter from the Colorado Civil Rights Division ("CCRD") charging you with housing discrimination. The accuser is the resident you are about to post with a notice to quit. If you serve the notice to quit, have you retaliated against the resident? Everyone knows that housing discrimination is illegal. However, few know that retaliation is in itself a form of housing discrimination and also illegal. Retaliation is separate and in addition to any original housing discrimination charge.

What is retaliation? Retaliation means to pay back an injury in kind. You hurt me; I'll hurt you. Under federal law, it is unlawful to coerce, intimidate, threaten, or interfere with any person because he exercised a Fair Housing right. Federal law also makes it illegal to retaliate against any person because he/she encouraged or assisted another person in exercising his/her Fair Housing rights. The classic example would be the resident who helps someone file a Fair Housing complaint against the property. Both the resident filing the charge and the assisting resident are protected by the Fair Housing laws.

The federal regulations establish specific prohibited retaliatory conduct. You may not retaliate against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act. You may not intimidate or threaten any person because that person is

engaging in activities designed to make other persons aware of, or encouraging such other persons to exercise, rights granted or protected by the Fair Housing laws. You may not threaten any employee or agent with dismissal or an adverse employment action, or take such adverse employment action, for any effort to assist any person in the exercise of their Fair Housing rights.

A resident claims retaliation. To prevail, the resident would have to prove all of the following. The resident exercised a Fair Housing right. You were aware that the resident exercised such right. After the resident exercised a Fair Housing right, you subsequently took adverse action against the resident. You took adverse action against the resident because he exercised his Fair Housing right. In lawyer talk, this is called a causal link. A causal connection is established when two events are related, and the second event happens because of or in response to the first event. For example, if a resident exercises his Fair Housing rights and you then take negative action against him because he exercised his rights, a causal connection is established between the exercise of his rights and your adverse action. If the resident had not exercised his rights, you would not have taken negative action against him.

What constitutes the exercise of a Fair Housing right? A resident's exercise of a right is not always obvious. Clearly, if a resident filed a housing discrimination charge with HUD or the CCRD, a resident has exercised a right. While maybe not as obvious, all resident requests made by disabled residents for reasonable accommodations or modifications are the exercise of a right. The resident has the ability to make these requests because of rights granted to him under the Fair Housing laws. This does not mean that you have to automatically grant every request. However, it does mean that any adverse action taken in response to these requests potentially could be considered retaliation. For this reason, you should always grant or deny any requests for reasonable modifications or accommodations based on the facts and the law. You should never deny any request solely because the resident has exercised a Fair Housing right.

For the most part, property managers do not blatantly retaliate against residents who exercise their Fair Housing rights. For example, managers don't say, "Because you

filed a Fair Housing complaint, I am going to evict you.” Usually, there is no such smoking gun. Rather, retaliation is frequently much more subtle. For example, a resident who files a Fair Housing complaint might suddenly find his maintenance requests being ignored. For these reasons, Fair Housing complaints based on retaliation are frequently proved by circumstantial evidence. Circumstantial evidence is the proof of a fact from which other facts may reasonably be inferred. For example, if a resident lived at the property for ten years without incident and was constantly renewed but now has been served with a notice to quit after filing a Fair Housing complaint, the court could infer from these facts that the property retaliated against the resident for filing the Fair Housing complaint.

Timing is very important in retaliation cases. If a resident exercises a Fair Housing right, you need to carefully think through your next move. The resident’s exercise of a Fair Housing right closely followed by you taking adverse action against the resident can be strong circumstantial evidence that you took the adverse action because the resident exercised a Fair Housing right. How much time has to go by between the time the resident exercises a right and the time you can take adverse action against the resident? Unfortunately, like many legal questions, there is no clear answer. However, the law is clear that taking adverse action against a resident after the resident has exercised a Fair Housing right does not automatically mean that you have retaliated against the resident. In other words, it does not necessarily follow that an adverse action following a complaint must have been taken in retaliation for filing the complaint.

A resident does not become untouchable once they have filed a Fair Housing complaint. When you take adverse action against a resident after the resident has exercised a right, you are not required to prove an absence of retaliatory motive. Otherwise, this would invite the filing of frivolous complaints for the purpose of setting up later claims of retaliation. Thus, after a resident files a Fair Housing complaint, he is not untouchable from all adverse actions. The resident must still prove his claim of retaliation. However, you do need to proceed with caution, and carefully evaluate your actions to determine whether they could be considered retaliatory. By evaluating your

actions against the criteria in this article, you can determine whether any contemplated adverse action is retaliatory in nature.

If done after the exercise of a Fair Housing right, some actions clearly would be retaliation. Assume that the resident has loud parties. Further assume that the resident has been having loud parties for two years, you knew about the parties, and other residents have also had loud parties. You have never taken any action against this resident or any other resident for loud parties. If this resident filed a Fair Housing complaint and you then attempted to evict this resident for loud parties, you would be retaliating against this resident. Your claim that the eviction was filed because of the loud parties is “pretext.” Pretext is a phony reason or not the true reason. Another clear example of retaliation is the perfect resident who has been renewed five times. However, after this resident files a Fair Housing complaint, you serve this resident with a notice to quit.

You can avoid the “you didn’t renew me because I filed a Fair Housing complaint” situation. Property management is about documentation. All too frequently property managers fail to adequately document. Not all, but the vast majority, of retaliation claims based on not renewing a resident can be avoided if you properly document. You should have a policy regarding non-renewals. This policy should be consistently followed and applied to all residents. As part of the policy, onsite staff should meet monthly to discuss non-renewals. At the meeting, the staff should discuss the reasons for not renewing a particular resident. If a decision of non-renewal is made, you should document this decision with a memo to the resident’s file. If the resident files a Fair Housing complaint and then a notice of non-renewal is served, you can strongly argue that the non-renewal decision was made prior to the Fair Housing complaint and not because the resident exercised a Fair Housing right. Similar to any other Fair Housing policy, this policy must be consistently followed. If you decide to not renew Mr. Smith because he argues with staff, you must follow the same course with all other residents.

You should always consider the potential for retaliation charges if you are about to take adverse action against any resident who has exercised a Fair Housing right. To

determine whether any action could be considered retaliation against a resident who has filed a Fair Housing complaint, ask yourself the following questions: Do I have a legitimate non-discriminatory business reason for taking the adverse action against the resident? If the resident had not exercised a Fair Housing right, would I be taking this action? In other words, were you going to take this action anyway? How carefully have you documented the reasons for taking the action prior to the time the resident exercised a Fair Housing right? If any other resident did the same thing, would you be taking this same adverse action? When other residents have done this in the past, have you consistently taken the adverse action that you're about to take now?

If the answers to any of these questions is no or you have not documented the situation very well, you probably should not take the proposed adverse action because a strong argument could be made that you are retaliating against the resident in violation of the resident's Fair Housing rights. Of course, there are exceptions to every rule. If you need assistance in evaluating a difficult potential retaliation scenario, do not hesitate to contact us. We are always available to assist you.