



Landlord News

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RENEWAL (NON-RENEWAL) POLICIES REDUCE EXPOSURE AND STRENGTHEN YOUR DEFENSE AGAINST FAIR HOUSING DISCRIMINATION COMPLAINTS

Tschetter Sulzer has now handled over 100,000 day-to-day situations for our clients. Sometimes situations illustrate the lack of a critical policy. 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 tenant 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.

Common situations that raise potential fair housing

retaliation claims illustrate the need for non-renewal policies. Example one, a tenant slips and falls on the property,



and then files a lawsuit against the property. Example two, a tenant 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 tenant has countless issues, and even though the onsite team has bent over backwards to address the tenant's concerns, the tenant 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 tenant of the non-renewal,

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TSCHETTER SULZER SERVES CLIENTS FOR 100,000TH TIME!

The hallmark of TS is Client Service. For over two decades, clients have been calling the Firm, greeting us with the same four words, "I've got a situation." In the November & December edition of the Landlord News we announced a contest, for clients to guess the date and time the 'TS' Situation Board would log our 100,000th 'Situation.' Call.

At 1:31 pm on Wednesday, February 26, 2020, our legal team handled the Firm's 100,000th Situation! Since our Landlord clients needed regular situation advice, Mark conceived of the situation desk to meet this need. As a value-added service to established clients, the situation desk provides basic legal advice for no charge to create a partnership with our clients. Always being available for our clients ensures that they do not hesitate to call us about day to day legal questions because of concerns about incurring fees. Mark and Vic have always believed that better informed clients are less likely to get into trouble and if, and when they do it is usually less serious.

We are always here to answer your legal questions, but more importantly, we are here before you even have a question. TS is the leading provider of Educational Legal Workshops, Training and Webinars for Multi-Family Housing Providers in Colorado. You can Check out the TS Events schedule at thslawfirm.com/events.

This month, we are excited to announce that



Ozzy Antonetty with Steadfast Management had the closest guess, winning a \$500 Visa gift card and Terri Sergeant with Elkco Properties came in second winning a \$250 Visa gift card. Let this be a reminder to

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COMPLAINTS CONTINUED FROM PAGE 1

the tenants make requests for reasonable accommodations (exercise a fair housing right).

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 tenant exercised a fair housing right. The community took adverse action against the tenant, non-renewing a tenant is adverse action. Further, the tenant will argue that the community only non-renewed because the tenant 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, tenant's behavior, tenant's dissatisfaction). However, the tenant 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 discriminatory action, will largely be determined by your past actions. When tenants sued you in the past, did you non-renew those tenants? When a tenant has had an altercation with the onsite team, to the point that the staff fears the



tenant, did you non-renew the tenant? When a tenant was dissatisfied no matter what, did you non-renew the tenant?

Regardless of the specific situation or what the tenant did, did you non-renew similarly situated tenants in the past? Similarly situated tenants 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 tenants 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".

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TSCHETTER SULZER SERVES CLIENTS FOR 100,000TH TIME! CONTINUED FROM PAGE 1

all of our clients that reading the Landlord News pays big!

Ozzy started his career in property management 8 years ago as a Community Ambassador working in student housing in Fort Collins. His favorite part of the job comes from empowering his employees to learn and grow in their careers. When he was presented with his prize, he told us that it couldn't have come at a better time. His birthday is over the weekend and he plans on using the gift card to make his snowboarding trip to Jackson Hole as memorable as possible. Happy Birthday, Ozzy! We can't wait to hear about your trip.

Terri is a 12-year veteran of the rental housing industry. She was initially hired as a temporary employee but in less than a month, she proved herself to be so valuable she was made Manager. According to Terri, she loves working in property management because no two days are alike. Whether she's talking with her residents, working on new community projects, or her attorneys stop by to give her a gift card, her days are never boring. Terri let us know that she plans on using the gift card to update her spring wardrobe. Congratulation, Terri!



Thank you to everyone who participated in our contest. We look forward to celebrating our 250,000th Situation with all of you at a future date. It will be here sooner than you can imagine.



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“Alright, you’ve told us this tenant was never going to be satisfied. If the CCRD goes through all of your files, did you renew other tenants that complained all the time?” “I’m not sure, we may 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 tenants who cannot be satisfied are non-renewed, over time there would be an example of another tenant who was not renewed because he was never satisfied.

Without comparators, the playing field gets tilted in the tenant’s favor. First, it opens the door to credibility issues. “Let me get this straight. You non-renewed Tommy Tenant 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 tenants come and go? Yet, you never had a tenant 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 tenant 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 tenants. 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 tenant 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 tenant has sued the property, the property will expend time and money defending the lawsuit. Some, if not most, tenants who sue the property are litigious in nature and may look for any reason to sue again. Lawsuits typically allege that the onsite team failed to do its job, was negligent, or even incompetent. Lawsuits create a hostile relationship between the tenant and onsite team. Tenant lawsuits can affect the ability of the onsite team to provide tenant services to the suing tenant, and to other tenants. 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 tenant 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 in advance that you would non-renew all tenants who sue if the issue ever came up.

A non-renewal policy strikes at the heart of a tenant’s retaliation claim by addressing the critical issues of timing, intent, and causation. Adverse action against a tenant (non-renewing the tenant) 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 tenant’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 tenant, because the decision to non-renew was made well before you knew the tenant had an issue. Because the decision is automatic, based on policy, the tenant 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 tenants, 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 tenant who sues or threatens to sue the community. The community will not renew any tenant who has three or more aggressive, rude, discourteous, or hostile interactions with the onsite team. The community won’t renew tenants 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 tenant was arrested or charged with a crime. The community will not renew tenants who demonstrate, in the onsite staff’s reasonable judgment, ongoing dissatisfaction with the community or the staff regardless of significant efforts to satisfy the tenant.

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Almost all of our clients have non-renewal guidelines or even policies. The problem is that almost none of them are in writing, and the people on the ground (the onsite teams) are not either aware of them or how to consistently apply 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 tenant 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 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 tenant 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 tenant's file in writing when it is known that a tenant 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 tenant from holding you hostage over a potential retaliation claim. Tenants 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 tenant, 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 tenants regardless of protected class status.



IMPORTANT TS MARCH DATES

- March 12th** **BARHA Advanced Fair Housing**
8:30-11:30 am
The Avalon Ballroom
6185 Arapahoe Ave, Boulder
- March 12th** **BARHA Luncheon Talk**
Top 5 Legal Hotspots for Landlords
The Avalon Ballroom
6185 Arapahoe Ave, Boulder
- March 18th** **WEBINAR WEDNESDAY**
TOPIC TBD
9:00 am - 10:00 am
Online
- March 24th** **AASC**
Advanced Fair Housing Workshop
1:00 - 4:00 PM
AASC Headquarters
1365 Garden of the Gods Rd. #120
Colorado Springs
- March 24th & March 26th** **NO EL PASO COURTS**
- March 26th** **Advanced Fair Housing Workshop**
1:00 - 4:00 pm
TS Lower Level Conference Room
3600 S. Yosemite St.
Denver, CO . 80237
- March 30th** **NO DENVER COURT**
CESAR CHAVEZ DAY (OBSERVED)

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.

