

Felony or Fair Housing? Where is the Line Drawn?

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Whether acting for your own residential rental property or on behalf of one of your clients, you are a landlord in the “popular culture” meaning of the word. You provide rental housing in exchange for monthly (or weekly) rent payments. In a perfect world, this would be the extent of the description of the relationship ... but we clearly do not live in Wonderland and Alice we are not. Landlords in the 21st Century are savvy businessmen and businesswomen; we have extensive leases (333 lines of text in one of the standardized forms currently in use), litigation-tested clauses governing tenant *and* landlord conduct, and a body of statutes called the Arizona Residential Landlord and Tenant Act, A.R.S. §§ 33-1301 *et sequitur*, that collectively dot the proverbial “I” and cross the proverbial “T” in the business of residential rental management.

In the evolution of landlord-tenant law, the development of the “crime-free” program came about as a natural extension of the relationship. To put it concisely, tenants agree to not utilize the leased premises to facilitate criminal behavior (including, but not limited to, assault, prostitution, and the manufacturing of narcotics). The *Act* incorporates these conditions in A.R.S. § 33-1368(A), but many landlords have utilized specific lease addenda that cover “Crime-Free/Drug-Free Housing.”

Before these crime-free addenda, however, landlords adopted an application regimen that included background checks, both for credit-worthiness and for criminal background. The wise landlord investigated his or her tenants, on a limited scope, to be sure that the tenants would not be “bad” renters. How much of a ban is appropriate? Take, for example, this hypothetical landlord, who has applied a policy that any felony conviction, whether violent or not, is grounds for summary rejection of the application.

A horrifying statistic was reported recently by CNN, that one in one hundred Americans – one percent! – has spent time in prison. If one of these individuals applies to reside at your rental premises, and your background check determines that there is a felony conviction in his or her past, our hypothetical landlord would reject the applicant. What happens, however, if the felony was in 1983, and wasn’t for a violent crime? Is rejecting a prospective tenant for a crime committed during the first Reagan Administration proper, or is it a potential Fair Housing complaint? The answer is murky, but as the “Magic 8 Ball” might say, “signs point to yes” – to both.

As of today, there is no guidance from the U.S. Department of Housing and Urban Development, nor is there any bright-line rule on point from the Federal Bench. When there is no precedence under Title VIII (the Fair Housing Act), the courts look for guidance in Title VII (employment) cases. The EEOC, which is charged with investigating Title VII complaints, utilizes certain standards to weigh the merits of such claims, and the Courts are likely to apply the same standards the EEOC uses when adjudicating Title VIII allegations.

Where a charge involves an allegation that the Respondent employer failed to hire or terminated the employment of the Charging Party as a result of a conviction policy or practice that has an adverse impact on the protected class to which the Charging Party belongs, the Respondent must show that it considered these three factors to determine whether its decision was justified by business necessity:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.

Where there is evidence of adverse impact, an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII.

This topic petered out in the mid-1980s, as fact patterns did not differ radically from established precedential decisions. The question that all landlords face is whether the complainant-applicant can show that the policy disproportionately excludes persons of an identifiable group, under a “disparate impact” standard. Each case is different, but it is generally best to avoid fair housing investigations rather than to be subject to one but prevail. After all, the costs of defending against a fair housing complaint cannot be recovered from either the investigating agency or the complainant.

Despite the landlord having the right to summarily ban all applicants with felony convictions, it is advisable to apply a standard that is more limited. Violent felonies and narcotics sale are solid grounds for denial, but that fraud conviction from 1983 might be a problem. As in everything in life, moderation is key. Vigilant landlords may want to exclude anyone with even the hint of a ding on the applicant’s record, but wise landlords will apply a rejection policy that does not charge headlong against Title VIII.