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Challenging Times, Creative Solutions and Fair Housing

Lynn N. Dover, Esq.

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Vacancy rates are rising; rental rates are falling; resident retention is becoming more difficult; water, sewer and trash rates are increasing; and the overall economic forecast looks bleak – there is no doubt that these are challenging times for the rental housing industry. Competition for residents is stiff, and property owners and management companies are being forced to come up with new, creative ideas for filling vacancies and retaining current residents.

But could some of these creative ideas pose a potential fair housing risk? For instance, if you negotiate rental rates with a prospective resident in order to close a deal but that same lowered rental rate or opportunity to negotiate is not offered equally to all prospects, could you be opening yourself up to a potential claim of discrimination? Let's examine some of the issues.

In general, whatever you offer should be offered equally to all applicants – if the rent on apartment 201 is \$1,200.00 for Applicant A, then it should ideally be the same price for Applicants B, C, D, etc., in order to avoid claims that you are somehow treating applicants differently based on who they are (i.e., their protected class). Likewise, if move-in specials are being offered during a particular time period, that special should ideally be offered equally to all prospective residents during that time period.

But what if maintaining those ideal policies results in a continued inability to fill vacant apartments? This is a “buyer's market.” If a prospective applicant can get a better deal from one of your competitors, he or she is likely to take that deal and move into the competitor's property where the rent is lower and the move-in special is more attractive instead of moving into your property.

Similarly, your current residents can easily go on-line and find out how much apartments are renting for at your property (for new residents) – or for that matter, how much similar units are renting for at your competitors' properties. If you refuse to negotiate a current resident's lease renewal rate, that resident can move to a competitor's property (or move out and reapply as a new resident at your property) almost as easily as he or she can sign a new lease at a higher rental rate. You then have additional costs to turn the unit that the resident vacated, and if the resident moved off your property, you have yet another vacant unit to market.

Negotiation occurs all the time in the commercial leasing setting without claims of discrimination. Why not employ these same strategies in the residential setting? One reason is that commercial properties are not covered by fair housing laws, whereas residential properties are. There are two types of discrimination that fair housing enforcing agencies will investigate: intentional discrimination and disparate impact (discriminatory effect) discrimination. It is this latter category that bears discussing in the context of the above examples.

Disparate impact discrimination occurs when a policy that is seemingly neutral (non-discriminatory) on its face has a discriminatory effect on one or more of the classes of persons protected by fair housing laws when that policy is put into practice. For instance, an occupancy standard of one person per bedroom appears to be a neutral policy because it is applied equally to all applicants. But if the applicants are families with children, that policy makes it very difficult, if not impossible, to rent an apartment at your community. The larger the applicant

household, the more likely it is that the household includes children. Accordingly, the policy has a disparate impact on the protected class of familial status.

In the context of lease negotiations, a prospective or current resident would need to prove that the policy of negotiating leases has a disparate impact on one or more protected classes. For instance, it might be alleged that certain groups of people are less likely to ask whether the price can be negotiated, such as single mothers (protected by the classes of marital status and/or gender) or persons from certain cultures (which could be a race and/or national origin/ancestry issue). A policy that is found to have a disparate impact can still be considered non-discriminatory if 1) there is a legitimate business necessity behind the policy and 2) there is no less discriminatory way to accomplish that legitimate business necessity.

To illustrate why it is important to use caution in your rent offerings, let's imagine a complaint was filed by a prospective resident, alleging that African-American applicants were treated differently in the apartment preview and application process. Let's further imagine that testers had been sent to the property to see whether people were being treated differently based on their race. The first tester was offered different terms than those proposed to the second tester later in the day. The first tester was African-American – the second tester was not. The allegation was true – which at first looks like a clear problem. However, if the company was able to demonstrate through its documentation that there was a non-discriminatory reason for the difference, it could make all the difference in the outcome of the complaint. For instance, if saved emails showed that due to a high vacancy rate, upper management had established a new move-in special and the instruction to implement the move-in special came to the property after the first tester had departed, the company would likely prevail in the case.

The point of the example is this: be sure to have documentation of the date, details and source for all specials and other incentives. If possible, have a policy where the decision maker (i.e., the person authorizing the incentives) is someone in upper management who does not work on-site. Have a list of all available units and prices for everyone who has an interest and update the list immediately when new incentives become available. Make sure the incentive opportunity is made available to all prospective and/or current residents. Guest cards documenting what a prospective resident is looking for in the apartment search are also extremely helpful. For instance, if an applicant fills out a card stating he or she is interested in an "immediate" one bedroom and then complains that he or she wasn't told about a good deal coming available next month on a two bedroom, the guest card helps to establish why that might have happened. Be sure to retain all documentation for at least three, preferably four, years.

In the context of negotiating deals to fill apartments or retain current residents, business necessity might be able to be shown through vacancy logs and other financials for the property. In order to show that there was no less discriminatory way to accomplish the business necessity, a property may need to show what other marketing/resident retention methods have been tried without success. In addition, owners and management companies may need to consider whether there are any less discriminatory methods that have not yet been tried and, if so, consider trying them prior to resorting to lease negotiations.

The bottom line is that owners and management companies may need to weigh the potential risks of any proposed policy against the potential benefits that implementing the policy brings to the property.

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