

from *Metro Apartment Manager*, December 2007

QUESTION OF THE MONTH

Q: We are thinking of making some of our apartments nonsmoking. Can we do that without tripping over fair housing law?

A: The simple answer to the question is: yes. But if you had said, “Can we do that without *considering* fair housing” the answer would have been no. Only those interested in how we get to the answer, or in the implications of the answer, should read on.

Fair housing laws say we should not treat people differently who belong to assorted protected classes: race, color, national origin, religion, sex, disability, familial status, source of income, marital status, and—in the Metro area—age, sexual orientation, gender identity, and type of occupation. If you ponder that list, you will see that the law addresses factors about us (I say us because we all belong to more than one protected class) that are, while not immutable, nonetheless not particularly within our control. That might not be entirely true about religion, but one only has to think about Northern Ireland, or Bosnia, or Iraq to realize that in most times and places religion is not so much a choice as it is a description of who we are, and with serious consequences.

One can make the same argument about marital status, source of income, and type of occupation. And some feel that sexual orientation and gender identity are choices but we won't have that discussion here today.

Another way of thinking of fair housing law is that protected class descriptions cover who we are but not how we behave or what we do. And smoking is a behavior. It is also a behavior that has consequences to you, the landlord.

I think of turnover as my largest controllable (at least, sort of controllable) expense. While security deposits often cover my turnover expense, it doesn't always happen that way. One element of turnover expense is cleaning; and one factor that affects the cleaning expense is smoking. The apartment lived in by a smoker is a lot harder to clean than one occupied by a nonsmoker. The nicotine gets into everything and is virtually impossible to get out. I have one apartment where the smoking is so intense that the smoke alarm gets so gunked up I have to replace it about every two years.

Because it is a behavior—similar to owning pets—that has one incurring expense, a landlord can charge for it. I have done that. But I've found it's hard to monitor and hard to collect.

On a recent trip that had me staying at a variety of motels, I noticed that some offered me no

smoking rooms and some didn't. When I asked at one for a nonsmoking room, the answer was that all their rooms were nonsmoking. Has smoking in America (or more particularly, Oregon) declined so much that it makes economic sense to prohibit it in motels? The answer, apparently, is yes. Well then, how about in apartments?

A recent study completed by Campbell DeLong Resources Inc. for the American Lung Association of Oregon and several public agencies asked just that question and the results are striking. The study determined that only 26% of renters smoke. But interestingly 82% of renters don't allow smoking anywhere in their homes and another 7% allow smoking only in selected areas of their homes. That means some smokers don't smoke in their own homes. Nationally over the last forty years, smokers have declined from 42% to 21% of the population. So it is reasonable to conclude that the 26% will continue to decline.

That means a landlord who won't rent to smokers is shrinking his potential market by only a quarter. But it may even be less than that. The Campbell DeLong study found that 78% of renters believed that even minimal exposure to second-hand smoke posed a serious health risk and 76% of renters—other things being equal—would prefer to live in smoke-free housing. Over half of renters acknowledged that they would pay a premium for such housing.

Only a small minority of properties in the Metro area prohibit smoking anywhere on the property. But it is clear from the few statistics cited above that any landlord of a smoke-free property will have a competitive advantage. Not only will that property have lower maintenance and turn-over costs, but the smoke-free environment is a positive selling point and will attract potential residents. That competitive advantage probably won't exist twenty years from now, but today it does.

While the number of smokers has decreased over the last several decades, the decrease hasn't affected all groups equally. And once we use the word *groups*, we have to remember to consider fair housing. According to a survey conducted by the federal Centers for Disease Control, for instance, only 13% of Asians smoke, while over 40% of American Indian/Alaska Natives do. 42% of those with a GED smoke while only 7% of those with a graduate degree do. Significantly more men (25%) than women (20%) smoke. And 28% of the 18-to-24-year olds smoke, while under 10% of over-65s do.

So, while prohibiting smoking can be beneficial for landlords, it can have a differing impact on members of certain protected classes. I have written before about disparate impact, which can lead to a fair housing violation. Remember that the law prohibits rules that result in members of certain protected classes being treated differently from others. Violations of law don't require intent, only the effect. (Rules prohibiting families with children from living on a second floor might be well-

intentioned, but they are nonetheless illegally discriminatory.)

So it can be shown that prohibiting smoking does affect members of one protected class more than another. For instance, prohibiting smoking will negatively impact Native Americans, and men, and young people. Nearly every decision a landlord makes, however, disparately impacts members of protected classes. When you turn someone down for poor housing references or insufficient income, for instance, that person is undoubtedly one sex or another, one race or another, one religion or another (or none), et cetera.

So both federal and state law provide tests for determining if an action, while having a disparate impact, should be considered legal or not. That means weighing three factors: the disparateness, the business reason, and the availability of alternatives. Prohibiting smoking fails all three tests. The disparateness isn't that great: it isn't 80-20, for instance. Second, the underlying business reason is sound and has a real economic basis. And, third, there are no ready alternatives.

It is right to consider the fair housing implications of policies. Having done so in this case, though, the bottom line is that the policy is not unlawfully discriminatory.

By the way, if you would like to see the Campbell DeLong study, which was prepared for the American Lung Association of Oregon, a link is on my web page.

My usual reminder: each circumstance is unique, so your case will be different. Before you act, be certain about what you do. Don't rely solely on this general advice; read the law and consult others as appropriate.

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