Can Tenants in Privately Owned Apartments Be Drug Tested?

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Abstract

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Drug use is a serious problem in many apartment complexes where innocent tenants are victimized by violent crime, robberies and burglaries perpetuated by drug dealers and users. Recently the popular press has been reporting that apartment owners are requiring prospective and existing tenants to submit to drug tests. This article addresses the legalities of drug testing tenants under federal law in privately owned apartment. Federal statutes that may offer tenants legal recourse against landlords include the Fair Housing Act Amendments of 1988, the Rehabilitation Act of 1974, Section 504, and the Civil Rights Act of 1866.

Introduction

In recent years, the popular press has reported that landlords of privately owned apartments are requiring their tenants to submit to drug tests. This is occurring both when tenants apply for an apartment as well as to qualify for a renewal of the lease. The testing continues even though the landlords are quite aware that they are engaging in a screening practice in which the law is highly unsettled and unpredictable (Chatman, 1994; Bowers, 1996; and Babwin, 2000). Thus, it is quite likely that they may be violating both federal and state laws. Ethical issues, particularly regarding privacy, also exist.

Drug testing, of course, is nothing new. Drug testing employees, which began in the early 1980s, has become pervasive today (Blackburn, 1986). By the late 1990s, nearly half of all employers had drug-testing programs in place (Schepler, 1998). Even high school athletes and those seeking welfare and other public programs are being subjected to drug testing (Lang, 2000).

Drug testing tenants has gained particular attention since the passage of the Anti-Drug Abuse Act of 1988. Contained within this Act is the Public Housing Drug Elimination Act that requires Public Housing Authorities (hereinafter PHAs) to

include a lease clause requiring the eviction of ''any member of the tenant's household, or any guest or other person under the tenant's control'' who is engaged in any drug related criminal activities (Anti-Drug Abuse Act of 1988, 1988, Sec. 11901). This includes selling, buying or using drugs, on or near the premises. Indeed, in justifying this get tough attitude the Act states that:

1. Drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income tenants;
2. The increase in drug-related and violent crime not only leads to murder, muggings and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; and
3. Local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally–assisted low-income housing, particularly in light of the recent reductions in federal aid to cities, [Anti-Drug Abuse Act of 1988, 1988, Sec.11901 (3) – (5)].

Although privately owned apartment owners are not required by law to include the eviction requirement in their leases, many suffer from the same problems as those who manage PHAs. They too must combat the effects drugs may have on terrified tenants who, at times, are caught between warring drug gangs, harassed by drug users or robbed or mugged by drug addicts who need money to feed their habits. Extensive property damage by drug activity and neglect can also occur (Shill, 1993). Thus, it is not surprising that the law-abiding that live where drug testing occurs, are clearly in favor of the practice. Moreover, one executive of an affordable housing complex, who has seen positive results come from drug testing, feels that it will soon ''mushroom'' within that housing sector (Babwin, 2000).

Perhaps an even greater justification for testing is the fact that private apartment owners must contend with possible lawsuits and even civil forfeiture due to drug activity (Shoffner and Sumnik, 1991). For example, landlords have been held liable to crime victims claiming that their injuries are due to the condition of the landlord's property or for failure to warn (Glesner, 1992). This can include injury caused by drug activity. State public nuisance statutes may also impose fines on landlords, require them to evict certain tenants or even force closure of the property for up to a year when there is drug activity occurring on their property (Lang, 2000). Quite possibly the worse case scenario for a landlord is when a property is subjected to federal civil forfeiture statutes. Under these laws, even without a criminal conviction and with a lesser burden of proof, a property can be forfeited to the government for any illegal drug activity in which the property is linked to drugs (*U.S. v. 900 Rio Vista Boulevard*, 1986). For these reasons, it is not difficult to understand why landlords must rid their properties of drug activity. As one executive aptly explained, ''[i]f we went to court, we'd say '[h]ow can you hold us liable and not allow us to correct the problem?' ''(Babwin, 2000).

This article discusses the various federal laws governing multi-family housing that might limit a private landlord's ability to drug test tenants. Presently, there are no

federal laws, to the author's knowledge, which expressly forbid tenant drug testing. Still, while no prohibition exists, Title VIII of the Civil Rights Act of 1968 (also called the Fair Housing Act) and its 1988 Amendments (Fair Housing Amendments Act, 1988) and the Rehabilitation Act of 1973 are designed to protect disabled tenants. The Fair Housing Act, as well as the Civil Rights Act of 1866, additionally outlaw race discrimination in housing. Drug testing tenants may, in certain circumstances, violate these laws by illegally discriminating against these protected groups.

It should be noted that this article does *not* include a discussion of drug testing tenants living in PHAs or in any housing project in which a federal, state or local governmental entity or its agents conduct the tests. According to Lang (2000), who discusses drug testing tenants in public sector housing, these tenants are not only protected by the various laws discussed in this article, but are additionally shielded by the Constitution of the United States or state constitutions. For example, if a tenant in a PHA is drug tested, it would be considered a search under the Fourth Amendment to the U.S. Constitution. Therefore, the intrusion, in order to be legal, would have to fall within what are considered the ''reasonable societal expectations of privacy,'' (Lang, 2000: 481). At the same time, tenants who are drug tested by a private landlord are not afforded these constitutional protections, although some or all of the foregoing federal laws would, as mentioned, generally apply.

Drug Testing Tenants: Does it Violate the Rights of Disabled Tenants?

Two important federal laws protect the rights of disabled tenants. These are the Title VIII of the Civil Rights Act of 1968, commonly called the Fair Housing Act (hereinafter FHA) and the Rehabilitation Act of 1973.

The Fair Housing Act

The Fair Housing Act, when initially passed, created four protected classifications: race, color, religion and national origin, with sex added in 1974. In 1988, the FHA was significantly amended when the Fair Housing Amendments Act of 1988 (hereinafter FHAA) was approved. Two new protected classifications were added: handicap or disability and familial status.

The FHA is of particular importance because of its very broad coverage of housing in both the public and private sectors. For example, all the dwellings that the federal government owns or operates, such as PHAs, are covered, as well as all dwellings in which the owners receive federal aid or grants or loans guaranteed or insured by the U.S. government. Any state or local governmental dwelling in which federal aid is involved, is similarly covered. Still, even in the absence of direct or indirect federal aid, the FHA extends to most multi-family dwellings in

the private sector. The most notable exception are units or rooms in dwellings occupied by no more than four families when at least one unit is owner occupied, as well as those operated by religious organizations and clubs (Aalberts, 1999).

Once it is established that a dwelling is covered under the Act, it is illegal to discriminate against any handicapped individual who may be seeking the housing or who may reside in it. A handicap under the FHAA is defined as:

1. A physical or mental impairment that substantially limits one or more of a person's major life activities;
2. A record of having such an impairment; or
3. Being regarded as having such an impairment.

However, such terms do not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of the Controlled Substances Act Title 21 (Fair Housing Amendments Act, 1988, Section 3602(h)(1) – (3).

It should be noted that the FHAA also allows landlords to exclude both those tenants who may be a risk to other tenants or property, as well as those convicted of manufacturing or distributing a controlled substance. Thus, the overall tone of the FHA discourages drug activity.

Still, this generally anti-drug course of action must be reconciled with the statute's primary goal of protecting certain groups, including the handicapped. For example, the FHAA's legislative history specifically provides that: ''Just like any other person with a disability, such as cancer, or tuberculosis, former drug dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery,'' (House Report, 1988: 14).

Even so, the House Report does make it clear that the former drug addict must be in the process of recovering from drug addiction by participating in a treatment or self-help program. Moreover, a number of cases have echoed this requirement (*e.g., U.S. v. Southern Management Services*, 1992).

Violating the Rights of Disabled Housing Applicants. One of the most likely scenarios in which a landlord might violate the rights of the handicapped under the FHAA involves tenants who are former users, but are now seeking to rid themselves of their illegal habit by entering into a legitimate recovery program. If a former addict applies for a lease and is drug tested, it is possible that the person may still test positive for the drug. The reason is that many drugs can remain in a person's system for months after the cessation of drug use. For example, the intoxicating ingredient in marijuana, THC, exists in the body when the user is high on the drug. But its by-product, the THC metabolite lingers in the body for months thereafter. Yet, many urine tests seek only to discover the existence of the THC metabolite, which can indicate either present use or use by a recovered drug user (Blackburn, 1986).

Another scenario could occur with the use of hair tests. But hair tests, now being used by many employers, may be poor at identifying current drug use, and in fact, usually only detect drug use that occurred weeks and even months ago. Hair tests may also be racially biased, a topic that will be addressed later (Lang, 2000).

A last scenario could involve persons who take legal drugs for certain disabilities that may create false positives. In this situation, both prospective and existing tenants could be victimized illegally. For example, certain anti-anxiety medication can create a false positive for benzodiazepines, while migraine medication and even over-the counter allergy medicine can emit a false positive test for LSD. A common antibiotic, amoxicillin, may even generate a false positive result for cocaine (Lang, 2000). If a tenant is denied housing or is evicted for testing positive for an legal drug, this could constitute an illegal form of discrimination assuming the tenant satisfies the statute's definition of handicapped. As law professor F. Willis Caruso Sr. explains, ''[t]here are people with asthma and other disabilities who may be using controlled substances and it's perfectly legal . . .'' [t]here is substantial risk of excluding somebody [from renting an apartment] with a disability,'' (Babwin, 2000).

One possible solution would be to question the prospective or existing tenant as to whether or not they are in a drug recovery program or are a current user of certain legal drugs. Some testing programs presently use that approach (Babwin, 2000). Still, this method may create, or be perceived as creating, a ''Catch 22'' for the applicant or tenant. For example, some landlords may have had unpleasant experiences with drug users and may, after discovering this information, choose not to rent to anyone who has ever used drugs for fear that they may return to their prior lifestyle. Moreover, certain people who use legal drugs may be reluctant to reveal what they are taking since they feel it may stigmatize them or suggest a weakness for drugs in general. For example, tenants who are on certain medications, such as anti-depression drugs, may feel that they will be perceived as being mentally unstable and therefore as an undesirable tenant. And some may simply feel it is no one's business but their own and has no bearing on their suitability as a tenant.

These attitudes and perceptions may give rise to successful lawsuits. A violation of the FHA can occur if a disabled person feels housing is being withheld because of the perception of being disabled due to use of a legal drug, or because of a history as a drug addict. Moreover, such an aggrieved party must, in order to prosecute the case, only prove what is called a prima facie case of disparate treatment (Schwartz, 1986). This means the individual must demonstrate that: (1) there is a disability; (2) an application was submitted and the individual was qualified to rent; (3) the application was rejected; and (4) the housing opportunity remained available. Once these factors are proven, the burden shifts to the landlord to demonstrate that the individual was not rejected because of disabled status, but instead for a legal reason. Still, if the landlord's apparently legal reason appears to be a pretext for the illegal discrimination, the rejected individual will have yet a further opportunity to prove rejection because of the disability.

This burden-shifting scheme was borrowed by the FHA from a similar provision created under Title VII of the Civil Rights Act of 1964, which also protects certain groups from discriminatory employment practices (*McDonnell Douglas v. Green*, 1973). The approach, which essentially places the burden on the defendant to prove his innocence, was established due to the fact that prospective employees generally lacked access to the information necessary to prove their cases and because employers were viewed as giving apparently legitimate reasons that in reality masked their true intentions (Aalberts, 1999). Both of these reasons also apply to the landlord-tenant relationship and so have been adopted in housing discrimination cases (Chambers, 1996).

The burden-shifting method is significantly easier than the traditional burden of proof required in a civil case. In civil cases, the plaintiff must bear the entire burden of proof or ''a preponderance of the evidence.'' However, the burden-shifting approach may still pose an overwhelming hurdle for many tenants to jump over, particularly in the affordable housing sector in which drug testing usually occurs. For these reasons, the discussion below proposes an alternative approach.

Policy Discussion. One means of legally and ethically solving the foregoing dilemma may be to borrow from a framework proposed under the Americans with Disabilities Act of 1990. Indeed, the ADA, passed three years after the FHAA, incorporates many of the same ideas proposed by its housing counterpart and so offers useful guidance by analogy. Both statutes, for example, protect the disabled using virtually the same definition. Both require that the disabled must be given a reasonable accommodation for their disability, and offer the employer or landlord the similar defense under hardship or burden (Aalberts, 1999). Moreover, both laws protect former drug users (Lang, 2000).

Under the ADA, an employer is not allowed to ask prospective employees the nature or severity of their disabilities unless it is directly job related and consistent with business necessity. Moreover, an employee cannot be asked to undergo a physical exam until after an offer of employment. If the employee does receive a physical after the offer and then has the offer revoked, a strong inference arises that the offer was withdrawn due to a disability that was discovered as a result of the physical. However, under the ADA, an employer is required to reasonably accommodate a disabled employee so long as the accommodation does not create an undue hardship on the employer, which essentially means that the expense of the accommodation greatly overtaxes its resources (Americans with Disabilities Act, 1990).

For landlords, a drug test could be analogized with the procedures used by employers requiring physicals. For example, an applicant for an apartment might be tendered an offer to lease after being screened for all non-disability related criteria, such as credit worthiness, etc. After the offer, the tenant could provide the landlord with information regarding past drug use and details of his recovery program. The prospective tenant should also be provided with a list of legal drugs that might emit false positives. From this list the individual should only be

required to reveal the drug that may cause the false positive and nothing more. If the landlord subsequently revokes the offer to lease, a strong inference exists that the landlord is now excluding the applicant due to a former drug use which, under the FHAA, is a disability. If, however, the landlord still requires the drug test, the landlord would have the burden of proving that the test is detecting current drug use and that there is no false positive. If the landlord fails to meet this burden and will not offer to lease to the applicant, the landlord will likely be in violation of the FHAA.

Duty to Reasonably Accommodate the Tenant. A landlord might argue that the foregoing scheme is too expensive and burdensome. Still, under the FHAA, a landlord must reasonably accommodate the disabled. This means that the owner must ''make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person [the disabled] equal opportunity to use and enjoy a dwelling,'' [Fair Housing Amendments Act, 1988, Sec. 3604(f)(3)].

Of course, the FHAA does not impose on a landlord the requirement that it must make an *unreasonable* accommodation for tenants either. In *Anast v. Commonwealth Apartments* (1997), for example, a court was asked whether a very ill tenant should be given additional time, as a reasonable accommodation, to pay her rent. The court ruled that, although the landlord does not have to do everything that is ''humanly possible to accommodate a disabled person,'' it must weigh the cost to the landlord against the benefit to the tenant (*Anast v. Commonwealth Apartments*, 1997: 801).

An argument can be made that tendering an offer to lease *before* an applicant is drug tested and asked to divulge drug related information, is in fact a reasonable accommodation a landlord is required to give a tenant. For instance, it could be argued that it is necessary and therefore reasonable for protecting former users or those currently using legal drugs. Still, the landlord can assert that this drug-testing scheme is not reasonable in terms of time and money and is outweighed by the administrative costs and time the policy imposes on the landlord's business operations.

The Landlord's Defense. Under the FHAA, landlords are allowed, as a defense, to demonstrate that the accommodation of a disabled tenant imposes an ''undue burden'' or ''fundamentally alters'' the landlord's business (*Judy B. v. Borough of Tioga*, 1995). Hence, the undue burden defense relates to the cost and administrative burdens the accommodation may impose, while the fundamentally alter defense turns on whether the business is fundamentally altered by the accommodation (Aalberts, 1999).

In the policy scheme discussed above, a landlord would certainly have to spend more time and money when processing a prospective tenant than in the past. For instance, the landlord would have to double check whether the new tenant is in or has completed a reputable recovery program. The landlord may also have to pay for a more expensive test, which is designed to detect only present drug use

or check for false positives before it can legally reject the potential tenant. Clarifying this issue, by weighing the burdens versus the benefits of this proposal, may have to be decided ultimately by a court or governmental body.

Violating the Rights of Disabled Tenants Seeking Lease Renewal. In some landlord-sponsored drug testing programs, both prospective as well as existing tenants are asked to submit. For example, one account indicates that tenants are asked to undergo a drug test in order to renew a lease once a year (Bowers, 1996; and Babwin, 2000). If the test is positive, the tenant is evicted. Still, under the FHAA, it is also illegal to evict disabled tenants. For example, in the case of *Valenti v. Salz* (1995), a tenant with a history of nervous breakdowns, the plaintiff alleged that he was evicted after his landlady became aware of his former disability. The tenant in *Valenti*, however, was required to prove only a prima facie case of disparate treatment. As discussed, proving a prima facie case is easier than the traditional burden of proof required of the plaintiff in a civil case. In FHA eviction cases, the plaintiff only needs to demonstrate a disability, that the landlord was aware of the disability, that the tenant was ''ready'' to continue occupying the premises and ''able'' to pay the rent and that the landlord still seeks to evict the tenant (*Valenti*, 1995). Once a prima facie case is established, the burden then shifts to the landlord to prove that the purpose behind the eviction was made for legitimate, nondiscriminatory business reasons. If a landlord is apparently able to justify the eviction, the plaintiff can further challenge the justifications as a pretext or covering up of an otherwise illegal reason (Aalberts, 1999).

Policy Discussion. Once a tenant has resided in an apartment for a year and is successfully engaged in a recovery program, the tenant would likely have little fear of testing positive for former drug use. Of course, a landlord might still be weary of a person who is a former addict even if the individual tests negative. Likewise, if a tenant is taking legal drugs for health and other reasons, a landlord might still be fearful that the individual could slip back to his or her former ways. For example, someone taking methadone, which aids recovering heroin addicts, might be suspected of this. False positives can also create potential problems. In these cases, the burden shifting approach used in *Valenti* offers a tenant a better chance to ferret out the landlord's true intentions for an eviction, thereby protecting the legal rights of the disabled tenant. However, as suggested for prospective tenants, a better policy may be to offer a renewal of the lease before the tenant is asked to submit to a drug test or reveal legal drug information.

Rehabilitation Act of 1973

The Rehabilitation Act of 1973, Section 504, like the FHAA, protects the disabled in housing. Section 504 uses virtually the same definition of handicap as both the FHAA and the ADA. It also protects those with a history of drug use, but like the other statutes, does not protect current users and provides for reasonable policing of drug use that includes drug testing. This Act's coverage is narrower

in scope than is the FHAA. To invoke the Act, the owner of the apartment in question must receive rent subsidies, such as those provided under HUD Section 8, or low-income tax credits under Internal Revenue Code, Section 42 (Lang, 2000). Still, only one tenant would need to receive a Section 8 subsidy to be afforded protection for all tenants in the complex (Kanter, 1994).

Policy Discussion. A landlord who drug test tenants in a multi-family dwelling covered under Section 504 might use the same policy as that suggested earlier for complying with the FHAA. In fact, it is very likely that any apartment covered under Section 504, would also be covered under FHAA, since the FHAA's broader jurisdiction includes all housing that receives federal subsidies and credits, including the kind mentioned earlier, as well as most multi-family housing in the private sector.

Drug Testing Tenants: Does it Violate the Rights of Minorities?

Drug testing might also violate the rights of minorities. Both the FHA (1968) and the Civil Rights Act of 1866 (1866) protect the rights of tenants who may be discriminated against according to their race. The following is a discussion of those Acts and race discrimination.

The Fair Housing Act

As stated earlier, the FHA was passed in 1968 to protect certain groups including those discriminated against by race. In certain instances, drug testing tenants might violate the rights of minority groups in several ways. Much of the drug testing of tenants today involves multi-family housing in cities with large, heavily minority populations like Chicago and Cleveland (Babwin, 2000). Often these privately owned apartments are located in poor, high crime neighborhoods. This raises issues of discrimination, either intentional or the kind that disparately impacts and therefore more heavily affects, certain races and not others. Indeed, as one commentator has stated: ''. . .tenants in expensive, luxury apartments may not be willing to submit to drug testing, even if they are not drug users. Moreover, landlords are more concerned with testing tenants in high crime areas in which drugs are likely to be more common, than those who reside in expensive, luxury apartments. If a landlord tests only its complexes in areas where drug use is prevalent, there may be discrimination challenges,'' (Lang, 1999).

In the FHA cases involving race, a violation can occur when the landlord's actions create a discriminatory racial effect and there is no acceptable justification for the effect. It should be noted that discriminatory motive does not have to be proved, which generally means an easier burden of proof for the plaintiff (Schwartz, 1986). Furthermore, according to legal expert Schwartz, racial effect can be proven in a number of ways. The most obvious effect arises when a landlord uses criterion

for selecting tenants that is directly racial in nature. An example of this would be a landlord that purposely refuses to rent to African-Americans.

A second effect, known as a racially correlated criterion, occurs when a facially neutral criterion is imposed as a means for screening a tenant. An example would be if the landlord required a prospective tenant to earn three times his income as a criterion for qualification as a tenant. Income is, of course, facially neutral, since all races earn incomes. Income, however, is correlated to race since African-Americans generally have lower incomes than whites. Thus, this criterion possesses a racial effect that may be illegal since it disparately impacts African-Americans, who are protected under the FHA. In this case, in order to be legal, the landlord would be required to show that the income criterion produces such a beneficial effects that it outweighs the burden placed on a particular race (Schwartz, 1986).

The last racial effect examines the product of the landlord's selection criterion. This occurs when the criterion for selection possesses no known correlation with race, but a racial effect still exists. For example, assume that the criterion used is a history of late payments of rent and that no known correlation exists between this criterion and race. If, however, the results indicate that the racial makeup of the general population accepted for housing is significantly different than the make-up of the general population, then a FHA violation may exist. The landlord can still defend the use of this criterion by showing that there is an acceptable justification for using it that outweighs the racial effect. Moreover, for this to approach to work, a large enough sample must exist to produce a statistically significant result (Schwartz, 1986).

Arguments can be made that drug testing as a process for screening tenants creates a racially discriminatory effect. Say, for example, a landlord owns a number of complexes in various neighborhoods throughout a city, but only drug tests those tenants in the poorer, predominately minority complexes. If the outcome of the testing causes the exclusion of mainly the minorities who test positive, there is an obvious racial effect imposed on one race and not the other. Although not all the African-American tenants are excluded, those who are rejected for leaseholds will still largely be African-American, as well as being drug users. White drug users wishing to rent an apartment in the non-minority complexes, on the other hand, will still be able to do so. Moreover, although it appears that the landlord's criterion for selection of tenants is purely racial, the landlord's racial motives, as stated earlier, does not have to be proven, although it certainly can aid in proving racial effect.

If a landlord tests every of tenant in all the complexes, a case may be made that a racially correlated criteria still exists if drug use is in fact correlated with race. That is, if drug testing excludes drug users and drug users are disproportionately minority, than a racial effect arises. However, with the overwhelmingly negative evidence of the effect drugs have on rental property for both owners and tenants, the justification for drug testing tenants can be made despite the racial effect.

That is, ''the beneficial effects of drug testing may outweigh the harmful racial effect,'' (Schwartz, 1986: 294).

One drug testing procedure, however, may be more difficult to defend. Some landlords may wish to use hair tests on all their tenants of all races to detect drug use. According to one expert, [m]ost drugs, including cocaine and marijuana, bind and incorporate into the hair of African-Americans ten to fifty times greater than drugs are incorporated in the hair of Caucasians,'' (Lang, 2000). At worse, if a landlord knows this information, it could be inferred that the landlord intentionally uses the test to exclude African-Americans. That is, it is using a racial criterion to exclude African-American tenants. At best, the test possesses a racially correlated criterion, which more heavily burdens one race over another. Although detecting drug use among tenants is an acceptable justification, it cannot outweigh the effects of the test itself, which is discriminatory per se in its results.

Policy Discussion. The foregoing discussion suggests that a landlord, in order to avoid potential legal and ethical pitfalls, must carefully implement a drug testing policy that avoids the appearance of race discrimination. Testing all complexes, regardless of race, should be obvious. The test procedures and type of tests used should also be uniform. For example, some employers use an independent contractor, which closely monitors those taking the test. Moreover, all drug tests are not equal in quality and accuracy (Lang, 2000). To be fair and to avoid the appearance of a discriminatory effect, the same independent contractor and the same tests must be applied to all who are tested in *all* the complexes. To be safe, if a landlord has both African-American and white tenants, hair tests should not be used, which some experts assert, exerts a racial bias.

Civil Rights Act of 1866

The Civil Rights Act of 1866 (1866) (hereinafter CRA of 1866) was passed shortly after the Civil War in order to confer property rights to newly enfranchised African-Americans. Specifically, Section 1982 of the Act states that ''[a]ll citizens of the United States shall have the same right in every state and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property,'' (Civil Rights Act of 1866, 1866, Sec.1982). Like other post-Civil War civil rights acts, the statute essentially lay dormant until 1968. In that year, it reemerged as an important tool for fair housing in both private and public housing when the Supreme Court ruled in *Jones v. Meyer* that any discrimination in both the public and private sector, based on race and color involving property was illegal.

The CRA of 1866 Section 1982 in some ways is broader and in some ways narrower than Title VIII of the FHA. It is broader because it contains no housing exemptions in either the public or private sector. Thus, while the FHA exempts privately owned multi-family housing with four or fewer units if owner occupied, the CRA of 1866 would apply to even a single-family dwelling. Still, the latter

act is narrower since it only possesses race (and by implication color) as a protected classification, whereas the FHA specifically protects sex, religion, familial status, disability and national origin. Even so, Section 1982 has been construed broadly to protect national origin claims. Also, while FHA claims can be proven by showing disparate effect, Section 1982 claims must demonstrate proof of discriminatory intent, which is generally much more difficult to achieve (Schwemm, 1996).

Like the FHA, Section 1982 of CRA of 1866 could be applied if a drug-testing program appears to be targeting minorities. Thus, if a landlord tests only predominately minority complexes, but not the more affluent non-minority complexes, allegations of the intent to discriminate against tenants because of their race can be inferred. In addition, if a landlord requires drug tests of minority tenants in smaller housing units, such as duplexes and even single-family dwellings, Section 1982 could be invoked if the action appears to be motivated by race.

Policy Discussion. The foregoing demonstrates that a landlord cannot give even the appearance of favoring one racial group over another when conducting drug tests. All testing must be conducted in a colorblind manner. The avoidance of hair tests is also advisable since they may be racially biased.

Future Research Issues

The discussion thus far demonstrates that various federal anti-discrimination laws may apply to drug testing tenants. State laws may also come into play in a variety of ways. For example, most states have anti-discrimination laws in housing, which mirrors or gives even greater protection to its citizens than do the foregoing federal laws.

Moreover, while drug testing tenants is very recent, and therefore has likely not been addressed under state laws, laws regulating employee drug testing have been well established for over a decade. Employee drug testing, when it was first instituted, was controversial and spawned numerous lawsuits. This resulted in court cases, as well as state statutes that have created a more predictable legal environment. Thus, one future direction for research may be to examine various state laws on employee drug testing and by analogy, apply them to offer guidance and policy direction regarding the legality of this practice in housing.

Conclusion

Clearly, relationships between landlord and tenant can often be contentious. Landlords, on the one hand, must safeguard their investments and protect their other tenants from those who are disruptive and dangerous. Failing to do so can result not only in an unsuccessful business, but can generate lawsuits by tenants

and others who are harmed, and even government intervention as severe as civil forfeiture.

Still, for the landlord, the information received regarding the suitability of a prospective tenant and even information on those who are presently leasing, is typically asymmetrical. Traditional screening services that seek financial as well as private information on living and behavioral habits, can aid landlords, but are ethically and legally controversial and often ineffective (D'Urso, 1997).

In the past decade, a growing number of landlords have sought to lessen the risk of leasing to those who may be involved in drug activity. Testing tenants for drug use, although still rare, is likely to escalate particularly in the affordable housing sector. In light of the consequences to landlords who ignore drug activity in and around their apartments, it is not surprising that many have resorted to this tactic.

However, much like drug testing employees, drug testing tenants is fraught with legal and ethical problems. Although no federal laws presently prohibit the practice, the law is still very unsettled. Potential for infringing on the rights of certain protected groups, such as the disabled and minority tenants, is probable.

This article presents the potential legal pitfalls in drug testing tenants, as well as discussing the policies for minimizing the apparent risks. It is hoped that a clear and worthwhile dialog will soon begin concerning this issue in order to protect both the property rights of both landlords and law-abiding tenants, as well as the civil rights of those groups who are meant to be shielded under federal anti-discrimination laws.

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