

Mind Your Business – Tia’s Tips for Better Rental Management

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Mind your Manners: Statutory requirements for landlord behavior

Landlord-Tenant law governs a lot between the relationship between rental owners and their customers, but how many know that there are state and federal laws that pose legal requirements on their conduct with tenants? In a nutshell, here’s the dos and don’ts:

Landlords shall:

1. Act reasonably
2. Act in good faith
3. Mitigate damages

Landlords shall not:

4. Discriminate
5. Retaliate
6. Evict without Due Process (Constructive Eviction)
7. Contract with Unconscionability

Let’s look at each of these concepts and how they impact housing providers.

Reasonableness

To act reasonably within the landlord/tenant relationship is often referred to as the reasonable person standard.

Wikipedia defines this as, “...the omission to do something which a reasonable person, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable person would not do...A reasonable person does not insist on always holding to the letter of the law, nor are they unduly strict, stern, or harsh. Rather, they strive to be gentle in their dealings with others, taking into consideration their circumstances. They are willing to listen to others and, when appropriate, to yield to their wishes and adjust their requirements...The care taken by a prudent person has always been the rule laid down.”

That’s a great definition. What would an uninvolved reasonably intelligent third party think of your words or actions? Do your words and actions fit the definition, or not? Sometimes people can get so entrenched in whatever their position is on a particular subject that they lose the ability to see the full picture and their behavior contributes to an escalation of a problem. I used to tell my children, it doesn’t matter what anyone else does, you are still required to behave properly and mind your manners.

There is no excuse in the adult world (or in a court of law) that will excuse your improper words or actions even if someone else's behavior is abusive or out of control. You can't get out of a speeding ticket by telling the officer that you were just keeping up with the speeder ahead of you, and the same is true for how landlords deal with residents. Objectivity can be a challenge for all of us and that's probably why many faiths emphasize trying to see things from the other person's point of view. Landlords who struggle with anger or extreme emotions in their daily lives should hire a property manager.

Good Faith

Good faith is the concept of honesty, truthfulness and trustworthiness, and is defined in ORS 90.100 (20) as, "...honesty in fact in the conduct of the transaction concerned." Furthermore, ORS 90.130 imposes the obligation of good faith by landlords, "Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performance or enforcement."

What does good faith look like? It looks like telling the truth, and not lying by omission in regards to something that can impact a resident. It creates a presumption that landlords will deal with tenants honestly and fairly, so as not to impact their rights to receive the benefits of a contract. It imposes the obligation to be fair, open and honest – regardless of the outcome. Anything a landlord does that could be considered misleading, dishonest or that takes advantage of a tenant's lack of knowledge of their rights could be construed as acting in bad faith. Does that mean landlords have to educate tenants on their rights? No, but... taking advantage of, or benefitting from another's ignorance isn't really acting in good faith is it?

Discrimination

Discrimination means treating people who belong to a protected class differently than people who do not. Protected classes are:

- Federal – Race, Color, National Origin, Religion, Sex, Familial Status (families with children), and Disability;
- State of Oregon – Marital Status, Source of Income (including housing subsidies), Sexual Orientation, and Gender Identity.
- Some cities in Oregon have additional protected classes. Eugene, for example, has added protections for Type of Occupation, Ethnicity and Domestic Partnership.
- Active duty military and victims of domestic violence have protections under the law that can impact a landlord's ability to refuse to rent a property, terminate a tenancy, or charge lease-break fees to a protected resident.

What actions by a landlord constitute discrimination? Denying an application, applying stricter screening criteria, misrepresenting available units, or requiring higher deposits based on a person's membership in a protected class is discriminatory behavior. So is failing to take action against a resident in a multifamily complex who is targeting or persecuting another based on their membership in a protected class. It's also against the law to terminate the tenancy of a victim of domestic violence, sexual assault or stalking, refuse to allow assistance animals for disabled residents, or refuse to rent to a single parent, among other examples.

Most landlords are pretty savvy about avoiding these kinds of actions, but many seemingly innocent decisions can be considered discriminatory when they result in creating disparate impacts on protected classes of residents. For private landlords that most often happens in the areas of advertising, screening and the use of house rules. Take care to scrupulously follow Fair Housing law in your rental business.

When advertising, avoid trouble by describing the property, not the kind of people you think should live there. When showing, it's best practice to provide an application to anyone who indicates an interest in renting the property. And while you can certainly refuse to accept an incomplete application or set of applications, best not to refuse to accept a completed application to avoid any appearance of discrimination, regardless of whether or not you think the person will qualify. Everything you need to know about the applicant will be discovered during the screening process.

In the use of house rules, discrimination occurs when it has a **disparate impact** on residents in protected classes. This is the creation of artificial, arbitrary and unnecessary policies that erect barriers or have a discriminatory impact on members of protected classes, regardless of how they are applied. A well-meaning landlords' policies may be "facially neutral," in that they are applied equally to all, but it's the disparity in outcomes and their impact on a specific protected class that creates the problem. HUD language prohibits policies that, "...predictably creates, increases, reinforces, or perpetuates segregated housing patterns of race, color, religion, sex, handicap, familial status, or national origin." That doesn't mean landlords can't make rules, only that those rules must serve a substantial, legitimate, nondiscriminatory interest and that there is no other practice that would have a less discriminatory impact.

The concept of discrimination also applies to how a landlord imposes rules or occupancy limits. ORS 90.262 requires that when implementing rules on a tenancy, that the rules be fair, reasonable and non-discriminatory, and not be implemented so as to evade a landlord's obligations. For occupancy standards, this statute provides that occupancy shall not be more restrictive than two per bedroom without good reason.

Retaliation

Retaliation is defined by landlord-tenant law as increasing rent, decreasing services, serving a notice of termination, or bringing or threatening to bring an action for possession after the tenant has done one or more of the following:

- Complained to, or expressed to the landlord in writing the intent to complain to a governmental agency charged with oversight for building, health or safety codes; mail delivery laws and regulations; or discrimination in rental housing.
- The tenant has made a complaint to the landlord that is related to the tenancy;
- Formed or joined a tenants' union;
- Testified against the landlord in any judicial, administrative or legislative proceeding;

- Successfully defended an FED (eviction) action brought by the landlord when the notice served by the landlord was defective or imperfect, or the timing of the notice was miscalculated; or
- Indicative of their intent to assert or invoke the protection of any right secured to tenants under any federal, state or local law.

There are exceptions to the use of the retaliation defense by a tenant in a courtroom:

- The complaints by the tenant were unreasonable in their timing or manner;
- The violation of housing codes were caused by the tenant;
- The tenant has defaulted on rent (unless they deposit full rent into court); or,
- Compliance with building codes requires the tenant to vacate.

Mitigation

ORS 90.125 specifies that either party to the rental transaction may recover monetary damages against the other as a remedy for action or inaction that results in a legitimate loss, but that the aggrieved party has the duty to mitigate those damages. Mitigation in law is the principle that a party who has suffered loss has to take reasonable action to minimize the amount of the loss suffered.

If a tenant signs a fixed-term lease for one year, but moves out and stops paying rent after a few months, the landlord may be able to sue for breach of contract, but the landlord must mitigate the tenant's damages by making a reasonable attempt to find a replacement tenant.

If a water pipe breaks in the unit, the tenant has the duty to do their best to prevent damage by whatever action necessary, such as turning off the water either in the unit or at the street, notifying the landlord or agency immediately, and mopping up the water to the best of their ability to prevent further damage.

Each party owes mitigation duties to the other.

Constructive Eviction

Constructive eviction is defined by landlord/tenant law as unlawful ouster or exclusion, or willful diminution of services.

1. Unlawful ouster means that landlords may not just lock tenants out when they don't pay rent or violate one or more terms of their rental agreement, but must proceed within the guidelines of the law. Landlords are prohibited from even attempting or threatening to unlawfully remove a tenant from the premises.
2. Willful diminution of services means willfully interrupting heat, running water, hot water, electric or other essential service, and allows punitive damages for attempting or threatening to interrupt essential services. If a tenant moves in without transferring utilities to their name the landlord must serve legal notice to the tenant to transfer and pay or move out, not just stop the services.

Let that sink in. Yes, even attempting or threatening to violate a tenant's rights as listed above can result in punitive damages, even if you never actually do it.

Unconscionability

Unconscionability is a doctrine in law that describes terms that are so extremely unjust, or overwhelmingly one-sided in favor of the party who has the superior bargaining power, that they are contrary to good conscience. According to ORS 90.140, "If the court finds that a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result."

Unconscionability is determined by a number of factors, including power imbalance, age, mental capacity, or intoxication that make a contract unenforceable because no reasonable person would otherwise agree. As a defense, the contract has to have been unconscionable at the time it was made, and is determined only by a judge.

The takeaway

Minding your business means minding your manners when dealing within the parameters of Landlord-Tenant law. There is never anything to be gained by escalating bad situations with a tenant, but a whole lot to lose. So, deal fairly, document scrupulously, and keep your emotions under control!

This column offers general suggestions only and is no substitute for professional legal counsel. Please consult an attorney for advice related to your specific situation.