



Colorado Supreme Court Holds Alleged Violations of Colorado Fair Housing Act May be Asserted as Affirmative Defense in Residential Evictions

The Colorado Supreme Court recently handed down its decision in *Miller v. Amos*, which presents an issue of first impression in Colorado: whether a tenant defending a residential eviction case may assert the landlord's alleged violation of the Colorado Fair Housing Act (CFHA) as an affirmative defense. The Court in *Miller* found in the affirmative, holding that such an affirmative defense is available to residential tenants.

As [previously summarized](#), the facts of *Miller* are fairly straightforward. The landlord, Amos, had allowed the tenant, Miller, and her son to reside with him in his home. Miller and Amos agreed that, in lieu of monetary rent, Miller would "provide pet care and light housekeeping services." Amos eventually sued Miller to evict her and her son from his house. Miller asserted that Amos's attempts to evict her were discriminatory and retaliatory, in violation of the CFHA, based on Miller's rejection of Amos's alleged sexual advances. The county court held that Miller could not assert this alleged violation of the CFHA as an affirmative defense in the eviction case and that her remedy was limited to suing Amos for damages caused by his alleged violation.

Additionally, *Miller* is the rare case that made its way to the Colorado Supreme Court through the state's county court system. Because of this posture, the Colorado Court of Appeals was not asked to review the trial court (the county court). Instead, after a trial to the county court, the district court sat as the reviewing court, and upheld the county court's determination that a residential tenant could not assert alleged CFHA violations as an affirmative defense. Given this procedural history, the Court's holding in *Miller* is perhaps unsurprising.

The Court disagreed with the county court and the district court's conclusion that the CFHA provides only affirmative relief in the form of a claim for money damages resulting from an alleged violation. The *Miller* court reached this conclusion based both on the purpose and the text of the CFHA.

Starting with purpose, the CFHA was enacted to serve "substantial public policy objectives" and with a "broad remedial intent." These remedies, however, as the Court stated, "are incidental to its central purpose of eradicating discriminatory practices." On the other hand, Colorado's eviction statute "provides a quick mechanism for resolving possession disputes between landlords and tenants." To further the expeditious resolution of eviction proceedings, Colorado's eviction laws allow a landlord to evict a tenant through a notice to quit process, which, unlike other eviction methods, does not require the landlord to state a reason for the eviction. The Court, however, noted that, although the landlord is not required to state a reason and may terminate a tenancy for any reason, this right is not absolute.

For instance, in defending an eviction, a tenant is permitted under the eviction statute to file a written answer that sets "forth the grounds on which the [tenant] bases the [tenant's] claim for possession, . . . present every defense which then exists . . ." The Court found that one such defense is an alleged violation of the CFHA. Specifically, under the CFHA it "is an unfair housing practice, unlawful, and prohibited" for a landlord "to refuse to . . . rent or lease any housing[,] . . . or otherwise make unavailable or deny or withhold from an individual any housing because of" characteristics or class membership protected by the CFHA.

The Court in *Miller* then read this broad language in the CFHA together with the language of the eviction statute permitting a tenant to assert "every defense" to conclude that a tenant may assert alleged CFHA violations as an affirmative defense. The Court also went on to bolster this conclusion by reiterating that Colorado law permits defendants in a lawsuit to raise equitable defenses to legal causes of action, including eviction cases.

So, the *Miller* court concluded that it was error to prohibit Miller from asserting alleged violation of the CFHA as an affirmative defense and reversed the district court and the county court.

This holding has immediate implications for residential landlords. Although the *Miller* court did not elucidate a framework under which lower courts should judge claims of an alleged CFHA violation as an affirmative defense in an eviction proceeding, it is likely that courts will employ the burden shifting test used in other types of discrimination suits. That is, the tenant will likely be required to make a *prima facie* showing of discrimination. If the tenant can do so, the landlord will then be permitted an opportunity to show a legitimate, non-discriminatory reason for the eviction. The tenant will then be tasked with presenting evidence that the landlord's reason is merely pretext for a discriminatory eviction. If the tenant cannot do so, then the eviction will likely be permitted to proceed.

Because courts are likely to proceed in this manner, and even though landlords frequently will not be required to state a reason for an eviction if they initiate eviction through a notice to quit, landlords should ensure that their files reflect a legitimate, non-discriminatory reason for any given eviction, such as non-payment of rent, lease violations, and the like. Additionally, landlords should expect that residential eviction proceedings will move more slowly than in the past and potentially involve expensive, slow-moving discovery.

This blog post was drafted by [Jacob Hollars](#), a partner in the Spencer Fane Denver office. For more information visit www.spencerfane.com.