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MOTIVE AND RETALIATORY EVICTION
OF TENANTS

Mack A. Player*

I. INTRODUCTION

RETA LiT A TORY EVICTION occurs when a tenant is evicted because of his lawful attempt to compel his landlord to comply with the law. At common law, the landlord could evict a tenant for reporting a housing code violation, walking on the grass, or any other conduct. Indeed, the landlord could evict a tenant without any reason at all. Similarly, if he chose to renew a tenancy, he was free, regardless of his motive, to raise the rent or alter the terms of the tenancy. The landlord's common law right to deal summarily with his tenants remained virtually intact until the late 1960's. Since the landmark decision of Edwards v. Habib, however, a growing number of courts and

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legislatures\(^7\) have restricted the landlord's traditional rights by prohibiting retaliatory eviction.

The crucial question in retaliatory eviction cases is whether the landlord's motive was retaliation. Proof of motive can pose serious problems for both the tenant and the courts. For instance, since few actions have a single motive, the courts must resolve the problem of competing motives. Should the presence of any improper motive render the eviction invalid? Or conversely, should the presence of any proper motive justify the landlord's action? Such questions are new to property law, but commonplace in labor law. The 40-year-old National Labor Relations Act (NLRA), for example, forbids discrimination against employees if the employer's purpose is "to encourage or discourage membership in any labor organization,"\(^8\) Similarly, Title VII of the Civil Rights Act of 1964 prohibits employers, labor unions, and employment agencies from discriminating against an individual because of race, color, religion, sex, or national origin.\(^9\) The judicial doctrines that have developed under these statutes may aid courts struggling with the role of motive in landlord-tenant litigation.

Before discussing motive, however, a brief discussion of the development and current statutes of the doctrine of retaliatory eviction is necessary.\(^10\) In the leading case, *Edwards v. Habib,\(^11\)* the Court of Appeals for the District of Columbia repudiated the common law view and held that a landlord could not evict a tenant in retaliation for reporting housing code violations. The court reasoned that housing codes cannot be effectively enforced unless tenants can report violations without fear of being evicted by a vengeful landlord; and suggested that use of the courts to effect a retaliatory eviction might constitute state action, and that state action punishing the tenant for complaining to housing authorities would violate the tenant's first amendment rights to free speech and to petition for redress of grievances.\(^12\) The following year, a federal district court in New York adopted these suggestions, thus establishing a constitutional basis for the retaliatory eviction


10. For a general review of retaliatory eviction see Indritz, supra note 7, at 95-101; Comment, supra note 1.

11. 397 F.2d 687 (D.C. Cir. 1968).

12. Id. at 690-98.
doctrine. The tenant in *Hosey v. Club Van Cortlandt* had organized other tenants to remedy housing code violations. The court held that the landlord's use of the state court to evict the tenant would constitute state action if his "overriding purpose" was to retaliate against the tenant for his organizational activity.

In the years since *Edwards* and *Hosey*, the basic principle that tenants should be protected from retaliatory eviction has been accepted in a virtually uninterrupted line of cases and statutes. Courts and legislatures have recognized that remedial legislation such as housing codes can be fully effective only if those the legislation was intended to protect can communicate freely with enforcement agencies. Allowing a landlord to retaliate against a tenant for reporting housing code violations would make other tenants less willing to report violations, thereby hindering enforcement of the code. Courts and legislatures have also recognized that granting rights to the individual tenant, while allowing the landlord to punish him for exercising those rights, is fundamentally unfair.


Courts have generally found state action when there was substantial government entanglement with the landlord, such as financial support, *McQueen v. Drucker*, 438 F.2d 781 (1st Cir. 1971), or when zoning laws prevented the tenant from finding alternative housing, *Lavoie v. Bigwood*, *supra*. Cf. *Mullarkey v. Borglum*, 323 F. Supp. 1218 (S.D.N.Y. 1970), in which the court found that the landlord had conspired with others to deprive the tenants of their first amendment rights. Jurisdiction then lay under 42 U.S.C. § 1985(2) (1970). Cf. *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) (conspiracy theory used to remedy employer discrimination).


16. *Edwards v. Habib*, 397 F.2d 687, 701-02 (D.C. Cir. 1968). Most remedial legislation expressly protects those for whose benefit it was enacted. See, e.g., NLRA § 8 (a)(4). In *NLRB v. Scrivener*, 405 U.S. 117 (1972), the Supreme Court recognized that a literal interpretation of § 8(a)(4) would not protect the employee, but nonetheless ruled that the policy of the statute prohibited the employee's discharge.

17. There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction . . . would not only punish the appellant for making a complaint which she had a . . . right to make . . ., but also would stand as a warning to others that they dare not be so bold, a result which, from the authorizing of the housing code, we think Congress affirmatively sought to avoid.


18. *Cf. NLRB v. Marine Workers*, 391 U.S. 418 (1968); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). Section 8(b)(1)(a) of the NLRA provides that nothing shall "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." Section 8(b)(1)(a) gives the union the
Although substantial agreement exists that tenants deserve protection, the scope of the protection varies from state to state. In some states, the doctrine has been given such an expansive meaning that "retaliatory eviction" has become a misnomer. Several courts have prohibited retaliatory rent increases,\(^{19}\) seven states prohibit all actions detrimental to the tenant, including rent increases, reduction in services, and constructive eviction.\(^ {20}\) In contrast, two states have enacted statutes that prohibit only the use of the state courts to effect retaliatory eviction, and allow retaliatory rent increases or nonjudicial eviction.\(^ {21}\) These statutes are obviously inadequate, for they give the landlord ample opportunity to intimidate his tenants.

Just as there is no agreement on what forms of retaliation to forbid, so too disagreement exists regarding the tenant activities to be protected. Virtually all authorities agree that reporting a housing code violation is a protected activity.\(^ {22}\) The Wisconsin Supreme Court\(^ {23}\) and at least two statutes\(^ {24}\) add the proviso that the landlord is free to evict the tenant if no violation actually exists. Because tenants can seldom be certain that a housing code violation exists, the Wisconsin doctrine inhibits complaints to housing authorities. Fortunately, the weight of authority is that the tenant is protected if he acts incorrectly but in good faith.\(^ {25}\) Another proviso was added in *Toms Point Apartments v.*

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\(^{20}\) CAL. CIv. CODE § 1942.5(a) (West Supp. 1973); CONN. GEN. STAT. ANN. § 19-375a(a) (Supp. 1974); DEL. CODE ANN. tit. 25, § 5516(a) (Supp. 1972); HAWAIi REV. STAT. § 521-74(a) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 186, § 18, ch. 239, § 2A (Supp. 1973) (prohibits all reprisals); MINN. STAT. ANN. § 566.03(2)(3) (Supp. 1974); N.Y. UNCONSOL. LAWS § 8590(2)(5) (McKinney 1974); accord, UNIFORM ACT § 5.101(a); MODEL CODE § 2-407(1).


\(^{24}\) DEL. CODE ANN. tit. 25, § 5516(c)(6) (Supp. 1972); HAWAIi REV. STAT. § 521-74(b)(6) (Supp. 1973); accord, MODEL CODE § 2-407(2)(f).


Goudzward by a New York court which denied relief to a tenant because the landlord repaired the premises before seeking to evict him. Permitting a landlord to evict a tenant once repairs are made destroys all incentive to report violations, because the tenant can not benefit from the improved housing conditions. Fortunately, like the Wisconsin doctrine, Toms Point has remained an aberration. Several jurisdictions protect a broad range of tenant activities besides complaints to housing authorities. Typical protected activities include tenant meetings to discuss common problems, formation of tenant associations, complaints to the landlord, litigation against the landlord, and lawful rent withholding. Safeguarding tenant meetings and organizational activity seems especially justified, because otherwise the landlord could forestall tenant revolts by acting prior to the lodging of formal complaints. Statutes in at least four states, however, protect only the tenant's right to report housing code violations. In interpreting one of these statutes, the Hawaii Supreme Court has ruled that a landlord is free to retaliate for a tenant's organizational activities.

Of course, not all tenant activities should be protected. A tenant

32. CAL. CIV. CODE § 1942.5 (West Supp. 1974); CONN. GEN. STAT. ANN. § 19-375a (Supp. 1974); HAWAI'I REV. STAT. § 521-74 (Supp. 1973); ILL. REV. STAT. ch. 80, § 71 (1973); accord, MODEL CODE § 2-407. One commentator has suggested these statutes do not preclude courts from imposing broader protection. 22 HASTINGS L.J. 1365 (1971). Contra, Comment, Retaliatory Eviction in California: The Legislature Slams the Door and Boards Up the Windows, 46 S. CAL. L. REV. 118 (1972). In NLRB v. Scribener, 405 U.S. 117 (1972), the Court prohibited retaliation against employees who had aided a National Labor Relations Board investigation, although the NLRA by its terms protected only those who filed charges or testified at a hearing.
33. Aluli v. Trusdell, 508 P.2d 1217 (Hawaii 1973). The court rejected all first amendment arguments, suggesting the tenant remains free to speak and to carry on organizational activity.
who causes the code violation of which he complains is clearly not entitled to protection from eviction. Fundamental fairness does not require that the tenant be protected from the natural consequences of his own wrongdoing. Similarly, the landlord should not be forced to tolerate groundless complaints made in bad faith.

Retaliatory eviction has at least two elements in every jurisdiction: the tenant's exercise of a protected right and an action taken by the landlord detrimental to the tenant. Since the landlord is free to act for any legitimate reason or even without any reason, the tenant in the vast majority of jurisdictions must also demonstrate that the landlord's motive was improper. Some statutes require direct proof of the landlord's motive regardless of the length of time between his action and the tenant's exercise of a protected right. Under these statutes, the tenant never enjoys a presumption of improper motive. Other statutes aid the tenant by creating a rebuttable presumption of illegal motive if the landlord acts within a given period following the protected activity. Except in one state, if the landlord acts after this period ends, the tenant may still prove improper motive without the aid of the presumption.

A different approach is taken by a Connecticut statute and the


35. Retaliatory eviction statutes generally require a good faith complaint. By implication, they would not protect bad faith complaints. But see UNIFORM ACT § 5.101 (a); cf. Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969) (under title VII, even malicious complaints by employees concerning employment practices are privileged); Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963) (unions cannot discipline members for even malicious statements). For a criticism of the "absolutist" approach in labor law cases see Beaird & Player, Free Speech and the Landrum-Griffin Act, 25 ALA. L. REV. 577, 591-93 (1973).


38. See ILL. REV. STAT. ch. 80, § 71 (1973); N.Y. UNCONSOL. LAWS § 8590 (McKinney 1974); R.I. GEN. LAWS ANN. § 34-20-10 (1969).


40. The California statute apparently precludes court consideration of the defense of retaliation if more than 60 days lapse between the tenant's activity and the landlord's action. See CAL. CIV. CODE § 1942.5(a) (West Supp. 1973).

American Bar Foundation's Model Residential Landlord-Tenant Code, which provide with some exceptions that the landlord cannot evict or raise the rent for a set time after the tenant engages in a protected activity. After this time expires, he is free to retaliate against the tenant. Although the Model Code relieves the tenant of the burden of proving motive, it does not serve the policy underlying the doctrine of retaliatory eviction because it leaves the landlord sufficient leverage to intimidate tenants into remaining silent about housing code violations.

The draftsmen of the Model Code justified their mechanical approach to the problem of retaliatory eviction by suggesting that most tenants would be unable to prove that the landlord had a retaliatory motive. The Edwards court also recognized that establishing motive might prove difficult, but observed that the same problem exists under the NLRA. Proof of motive is also essential in actions arising under title VII, which prohibits employers from discriminating on the basis of race or sex. Like the tenant, the employee has the burden of proving the presence of improper motive. Since employers, like landlords, are rarely foolish enough to express their discriminatory motives, the problem of proof facing the employee is virtually the same as that facing the tenant. As the Edwards court implied, if the problem of proving motive can be solved in labor law, it can also be solved in landlord-tenant law.

II. PROOF OF MOTIVE UNDER TITLE VII AND THE NLRA

The employee need not introduce direct evidence of the employer's motive. Instead, with the help of a complicated system of

42. CONN. GEN. STAT. ANN. § 19-375a(a) (Supp. 1974) (6 months); MODEL CODE § 2-407(1) (6 months). See MODEL CODE § 2-407, Comment (1), Commentary.

43. The draftsmen admitted the numerous exceptions included in § 2-407 undermined its basic policy. Moreover, the time period fixed by the Code, 6 months, is far too short.

44. MODEL CODE § 2-407, Commentary. They also noted that at the time they drafted the code no penalties attached to the finding of retaliatory eviction. The draftsmen consequently provided for recovery of triple damages or 3-months rent by a successful tenant. § 2-407(3); accord, DEL. CODE ANN. tit. 25, § 5516(d) (Supp. 1972).


46. See, e.g., McDonnell Douglas v. Green, 411 U.S. 792 (1973); NLRB v. Shen Valley Packing Co., 211 F.2d 289 (4th Cir. 1954); Indiana Metal Prods. Corp. v. NLRB, 202 F.2d 613 (7th Cir. 1953).

47. Even early in the NLRA's history, most employers did not openly acknowledge anti-union motivation. 2 NLRB ANN. REP. 71-72 (1937).

evidentiary presumptions, he can establish the employer's intent by introducing evidence of the employer's conduct, the context in which it occurred, and its consequences. The cases are perhaps best grouped into two categories: single-employee discrimination cases, in which the employer singles out one employee for special treatment such as discharge, transfer, demotion, or discipline; and group-discrimination cases, in which an employer adopts and uniformly applies a policy covering a large number of employees, such as a minimal test requirement, lockout, or salary adjustment. The courts' approach to proving motive depends on the category to which the alleged discrimination belongs.

In single-employee cases under Title VII, the Supreme Court has held that when a plaintiff proves that he is a member of a class protected by the Act, that he has applied for a job he is ostensibly qualified to hold, that he was rejected or discharged, and that the position remained open to other applicants, he has established a prima facie case of illegal discriminatory motive. In other words, he has produced sufficient objective evidence to raise a presumption that the employer's motive was discriminatory. Although the ultimate burden of persuasion never leaves the plaintiff, the burden of going forward shifts to the employer. If the employer fails to rebut the plaintiff's prima facie case, the plaintiff will be deemed to have carried his burden of proof.

A similar analysis is used in cases arising under the NLRA. In single-employee discrimination cases, proof that the employer disciplined or discharged an employee soon after learning that he was engaged in a protected activity establishes a prima facie case of illegal discrimination. In group discrimination cases, when an employer's policy disproportionately harms those who have engaged in protected activities, the factfinder may infer that the employer's motive was discriminatory. And, as in single-employee discrimination, the factfinder need not accept the employer's unsupported claim of innocence. The employer must come forward with evidence of a valid business just-

51. See, e.g., NLRB v. Treasure Lake, Inc., 194 F.2d 56 (1st Cir. 1952); Holly Farms Poultry Indus., 194 N.L.R.B. 952 (1972); Metallic Bldg. Co., 98 N.L.R.B. 386 (1952). Of course, additional evidence of anti-union animus or other unfair labor practices strengthens this presumption. See, e.g. NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (9th Cir. 1970); Cab Serv. Parts Corp., 207 N.L.R.B. No. 43, 84 L.R.R.M. 1588 (1973).
52. In NLRB v. Walton Mfg. Co., 369 U.S. 404, 409 (1962), the Court stated that "the denial of one who has a motive to deny may be uttered with such hesitation, discomfort, annoyance or defiance as to give assurance that he is fabricating, and, if he is, there is no alternative but to assume the truth of what he denies." Cf. Radio Officers v. NLRB, 347 U.S. 17, 42-48 (1954).
tification for his policy. If he fails, the factfinder must find improper motivation.

Thus, if the employer fails to counter the employee’s prima facie case, he will generally lose, whether the case involves single-employee or group discrimination. If the employer does produce additional evidence, however, the type of discrimination becomes important, and whether the case arises under title VII or the NLRA also becomes important. McDonnell Douglas v. Green, a single-employee discrimination case arising under title VII, indicates that a bare prima facie case, when rebutted by strong employer evidence of proper motivation, cannot sustain the employee’s claim. The Green Court noted, however, that additional circumstantial evidence, such as a history of discrimination or statistical evidence of discrimination, could provide further proof of the employer’s motive. If the plaintiff produces this additional evidence, then the factfinder must weigh the evidence produced by both parties. Single-employee cases under the NLRA do not appear to go as far as Green in requiring the plaintiff to parry evidence of business justification. Apparently, proof of a discriminatory act closely following an employee’s protected activity is sufficient to support a finding for the employee, even if the employer has advanced plausible business reasons for his action. The employee need not introduce additional evidence to support his prima facie case.

The Supreme Court has approached the problem of proving motive in group-discrimination cases differently, by establishing a class of cases in which the employer’s actual motive is virtually irrelevant. In Griggs v. Duke Power Co., which arose under title VII, an employer utilized standardized tests to screen job applicants. A disproportionate percentage of blacks failed the tests. The lower court found, however, that the employer had adopted the tests in good faith for the purpose of upgrading the quality of the work force. Nonetheless, the Supreme Court held that if the tests had a racially discriminatory impact, the employer had to establish a “business necessity” for their use. Use of

56. Id. at 436. It was not entirely clear whether the Court was ruling that motive was not an element or whether improper motive would be conclusively presumed unless the employer had business justification for conduct that discriminated against a particular race. Given the language of § 703(a)(1), which prohibits discrimination “because of such individual’s race,” proof of motive would seem necessary. Similarly, § 703(a) of the Act allows an employer “to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of race.” 42 U.S.C. § 2000e-2(h) (1970). The terms “designed, intended or used” seem to indicate that the statute requires proof of an improper motive. Hence, Griggs probably should be read to mean that an employer’s action having a discriminatory impact creates a presumption of improper motive that can not be rebutted without proof of business necessity.
the tests without substantial business justification, the Court indicated, would violate title VII. Some group-discrimination cases arising under the NLRA follow a somewhat similar analysis. The Court has ruled that certain employment practices are "inherently destructive" of protected employee rights. Unless the employer demonstrates a business justification for an "inherently destructive" practice, the employee's complaint will be sustained as a matter of law. Even if the employer does demonstrate a business justification, the factfinder may balance the business justification against the employee's interest and conclude, even in the absence of direct evidence of improper motive, that the employer has violated the NLRA.

Not all employer policies detrimental to employee rights, however, are inherently destructive. But even those considered to have comparatively slight impact create a presumption of improper motive. Unless the employer produces evidence of a proper motive for adopting the policy, the employee is vindicated as a matter of law. Actions that have comparatively slight impact carry much weaker inferences of discriminatory motive, however, than do inherently destructive practices. If the employer demonstrates a business justification for a practice with comparatively slight impact, the employee cannot safely rely on his prima facie case of discrimination for the Court has said that "the factfinder must [then] find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an anti-union animus."10

The initial determination that an employer's action has an inherently destructive or comparatively slight impact is crucial, since it controls whether the employee must counter evidence of business justification. The "inherently destructive-comparatively slight" dichotomy is apparently a response to the unique wording of the NLRA, which requires both interference with a protected right and an intent to interfere with union activities. When single-employee discrimination follows union activity, the employer's intent can be directly inferred from his acts. But a two-step inference is needed when an employer adopts a general policy of uniform application. First, the inference must be drawn that the policy interferes with a protected right. Then, the factfinder must infer from this interference that the employer intended to affect union activities. Labeling an action as inherently destructive facilitates the inference that it was designed to discourage membership in a labor organization, whereas the "comparatively slight" label enables the factfinder to uphold the employer when interference is minimal and economic justification exists.

59. In one type of group-discrimination case, however, the "inherently destructive-
The benefit to be gained by transplanting the "inherently destructive" and "comparatively slight" concepts to landlord-tenant law seems slight. Only one rather unsuccessful attempt has been made to use these labor law doctrines in a landlord-tenant case. The labor cases clearly demonstrate, however, the utility of presumptions in litigation involving proof of motivation. The labor law experience can provide invaluable guidance in developing a system of presumption for landlord-tenant law.

III. PROOF OF MOTIVE: 
A SUGGESTION FOR LANDLORD-TENANT CASES

A. The Tenant’s Prima Facie Case

Under present law, the tenant must carry the ultimate burden of persuasion; that is, he must prove that the landlord had an improper motive. Presumptions of improper motive can help him carry this burden. To create a presumption of improper motive, the tenant must establish a prima facie case of retaliation. Proof that the tenant engaged in activity protected by law, that the lessor had knowledge of his activity, and that within a relevant time the lessor acted to the tenant’s detriment should be sufficient to establish a prima facie case.

comparatively slight" analysis has no application. In Textile Workers v. Darlington Co., 380 U.S. 263 (1965), the Supreme Court indicated that the closing of an entire business, even though discriminatorily motivated, did not violate the NLRA. Since the NLRA regulates only the employer-employee relationship, it has no effect when that relationship ceases upon the worker’s discharge. If the employer closes only part of his business, however, a violation of the NLRA can be found if the employer acts to chill unionism elsewhere in his enterprise. The parties whose rights are violated are not the discharged employees but the workers at the remaining plants. To prove discrimination, however, they must demonstrate not only that the closing chilled protected activities elsewhere in the business, but also that the employer foresaw the result of his action.


61. A complaint, letter, or personal confrontation would establish the lessor’s knowledge. As in labor cases, knowledge of the tenant’s activity could also be established by inference. See NLRB v. Ampex Corp., 442 F.2d 82, 86 (7th Cir. 1971). Activity that is open and notorious, well publicized, or easily observable by the landlord is presumed to be within his knowledge.

Whether the tenant actually engaged in a protected activity may be irrelevant if the landlord acts in the belief that he did. Although the retaliatory eviction statute by their terms protect only the tenant who actually complains, e.g. CAL. CIV. CODE § 1942.5 (Supp. 1974); UNIFORM ACT § 5.101(a), it seems unfair to permit the eviction of a tenant who has not in fact acted. Faced with a similar problem the NLRB has held that an employer who discharges an employee on the mistaken belief that he had engaged in protected activity is guilty of an unfair labor practice. San Juan Lumber Co., 144 N.L.R.B. 108 (1963).

62. In neither labor law nor landlord-tenant law have courts established definite time limits for operation of a presumption. A number of statutes, however, do establish a time frame within which the presumption of discrimination operates. See note 36 supra. This approach has the benefit of predictability and ease of operation, but operates almost as an invitation to the landlord who desires to retaliate. He may simply wait until the applicable period has passed and then safely evict the tenant.
On the other hand, if the lessor increases rent, reduces services, or evicts the tenant before the tenant engages in protected activity or before the lessor learns of the protected activity, no inference of improper motive would arise.\(^6\)

**B. Methods of Rebutting the Presumption of Improper Motive**

Once the tenant has established a prima facie case of retaliation, the lessor has the burden of producing evidence of proper motivation. The amount of evidence the landlord must present to avoid a directed verdict for the tenant is unclear. The minimum amount of evidence he can present is a plea of innocence, unsupported by any objective facts. The labor cases provide little guidance as to whether an unsupported plea of innocence is sufficient to avoid a directed verdict. Cases arising under the NLRA indicate that, if believed, a plea of innocence is sufficient to overcome a prima facie case of improper motivation,\(^4\) whereas *Griggs v. Duke Power Co.*,\(^5\) which arose under title VII, indicates that evidence of subjective good faith, standing alone, is entitled to no weight.

Whether as a matter of law the landlord must have objective "business justifications" for his eviction may have little practical importance. When faced with a tenant who was evicted shortly after exercising a protected right, the factfinder will naturally expect some justification by the lessor, and will not be disposed to believe that the lessor acted on an illogical whim. Thus, lack of objective corroboration will doom most landlords to an adverse judgment like that faced by employers unable to present justification for discharging known union activists. Nevertheless, the lessor's unsupported claim of innocence should be sufficient to avoid a directed verdict.

The law of retaliatory eviction, like that of discriminatory discharge, provides that a tenant can be evicted for any legitimate reason, or for no reason at all. A landlord who evicts a tenant for no reason at all has only his own testimony to rebut a tenant's prima facie case. Requiring him to present objective evidence to avoid a directed verdict would in effect destroy a rule of substantive law.

Whether necessary as a matter of law, or only as a practical matter, business justification is critical in refuting a tenant's prima facie showing of discrimination.\(^6\) Business justifications that would rebut

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\(^66\). Many retaliatory eviction statutes specifically list the defenses that a landlord may assert. *See*, e.g., Conn. Gen. Stat. Ann. §§ 19-375a(b)(c) (Supp. 1974); Del. Code Ann. tit. 25, §§ 5516(c), (e) (Supp. 1972); Hawaii Rev. Stat. §§ 521-74(b), (d) (Supp. 1973); Model Code §§ 2-407(2), (4); Uniform Act § 501(c). Most statutes,
a presumption of retaliatory motive fall into three categories: tenant misconduct, economic motivation, and physical necessity. Physical necessity is present when a repair requires that the apartment be unoccupied.

Misconduct is perhaps the most obvious justification for evicting a tenant. Retaliatory eviction statutes generally provide that damage by the tenant will justify either eviction or a rent increase to cover the cost of repair. Making groundless complaints to the authorities is another form of misconduct justifying eviction. A landlord need not tolerate malicious harassment by tenants. To protect the tenant who makes a good faith but erroneous complaint, the courts should require the landlord to establish that the tenant knew the complaint to be false, or made it with conscious disregard of its truth or falsity. Moreover, tenant misconduct, like employee misconduct, cannot be used as a pretext to retaliate for protected activity. Tenant misconduct is simply evidence that the landlord’s motive was not retaliation; no amount of misconduct will excuse a retaliatory eviction. If the landlord has condoned similar tenant misconduct in the past, if he applies a rule unequally to other tenants, or if he vacillates in giving reasons for the eviction, the inference is that the landlord acted not because of the tenant’s misconduct, but out of a desire to retaliate.


68. A landlord’s honest but mistaken belief that the tenant had caused the damage would negate a prima facie showing of retaliatory motive. Of course, the factfinder would probably not accept a defense of honest mistake unless the landlord could present strong evidence to establish the reasonableness of his erroneous belief.

Superficially, NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964), in which the Court reinstated union organizers who had been discharged on the erroneous, good faith belief that they had threatened physical violence, is authority against allowing the landlord the defense of mistake. The Court in Burnup, however, relied on a section of the NLRA in which intent is irrelevant. It did not controvert the lower court’s conclusion that an honest mistake would justify discharge if improper motive were an element of the offense. Since an improper motive is necessary to find a retaliatory eviction, an honest mistake would provide a defense to a charge of retaliation.


73. Nonpayment of rent is the most obvious economic justification for eviction. See Uniform Act § 5.101(c)(2). Of course, a simple failure to pay rent should be distinguished from rent withholding to force the landlord to bring the premises into com-
taxes, costs, and capital improvements can justify a rent increase. An undue delay between increased costs and a rent increase, however, may establish the pretextual nature of the increase, particularly if the rent is increased soon after tenant's protected activity.\textsuperscript{74} A rent increase may also be considered retaliatory if it exceeds the increase in the landlord's costs or if the increase is not distributed evenly among all tenants.\textsuperscript{75}

Whether the cost of bringing a building into compliance with housing codes justifies a rent increase presents a difficult policy question.\textsuperscript{76} Tenants may be unwilling to complain if they must bear the cost of repair. On the other hand, a landlord may be financially unable to absorb the cost of repair, especially if he has charged low rent for the deficient premises.\textsuperscript{77} Furthermore, once he repairs the premises, the landlord will have to increase his maintenance expenditures to prevent deterioration. He cannot be expected to operate at a loss.\textsuperscript{78} Although requiring those who benefit from repairs to shoulder at least part of the cost is not unfair, the complaining tenant in an apartment complex should not have to bear the entire cost alone. The cost should be spread evenly to all tenants in the complex. Furthermore, the lessor cannot recoup the costs in a short period. Rather, he must amortize them over the effective life of the improvement, thus minimizing adverse impact on the tenant. Singling out a small group of tenants to bear the entire cost, or attempting to recover the total costs in a short period should be considered indicative of a desire to retaliate.

Another economic justification for a rent increase is the simple desire to raise profits, a legitimate motive in a capitalist society. As compliance with housing codes. See Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

74. The statutes that specify landlord defenses to a charge of retaliatory eviction uniformly permit the lessor to pass on increased costs, provided they were incurred within 4 months of the rent increase. See state statutes collected in note 66 supra; but see \textsc{Uniform Act} §§ 5.101(a)(c).

75. See \textsc{Model Code} § 2-407(4)(b).

76. The Model Code and \textsc{Uniform Act} apparently preclude passing on this cost. \textsc{Model Code} § 2-407(4)(b); \textsc{Uniform Act} § 5.101(c).

77. Tenants may be willing to accept unsafe or unsanitary conditions in return for reduced rent. Nonetheless, permitting such conditions controverts the basic policy of most housing codes. Increasingly, courts are recognizing that lessors have an implied obligation to rent only fit premises. See Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968); Lemle v. Breeden, 462 P.2d 470 (Hawaii 1969).

78. As a possible solution, the landlord might be required to prove his financial inability to absorb the cost of repair and maintenance. Cf. Robinson v. Diamond Housing Corp., 463 F.2d 857 (D.C. Cir. 1972). That approach, however, creates a host of problems: Should financial inability be the same for a corporate landlord which may have income from other apartment complexes or even other enterprises as for, say, a retired pensioner dependent upon income from perhaps only one building? Does "financial inability" occur only when red ink appears on the balance sheet? Or when the pensioner's profit is so low that he has to reduce his standard of living? What should be his standard of living?
a practical matter, however, the landlord may have difficulty convincing the factfinder that he desired only to increase his profit, not to punish a tenant, especially if the rent increase followed closely on the heels of a protected tenant activity. The factfinder is even less likely to believe him if the rent increase was excessive or discriminatory.

Ironically, the tenant who succeeds in forcing the landlord to undertake repairs may find the landlord arguing that he has to evict the tenant to do the necessary work. Such evictions are justified only if they are a physical necessity. Evidence that the repairs were not extensive or could have been accomplished in a short time would tend to disprove the landlord's claimed justification. Even a finding of physical necessity, however, does not necessarily justify severing all relations with the tenant. In labor law, an employer may lay off or discharge an unneeded employee. But if the employee has engaged in protected activity, and if other work he is capable of performing is available within the plant, the employer's failure to retain him raises a permissible inference of unlawful discrimination. Similarly, an employer's refusal to rehire strikers creates an inference of improper motive. By analogy, the landlord's failure to offer an available unit to the tenant, and his refusal to give the tenant first option to rent the repaired premises, would tend to prove that the landlord had a retaliatory motive, even if eviction were absolutely necessary to repair the unit. Permitting severance would discourage tenants from complaining of major housing deficiencies. With no benefit to be gained, the tenant would have no reason to complain. Thus, enforcement of the housing code would be hindered, defeating the policy underlying the doctrine of retaliatory eviction.

Under some circumstances, however, the landlord need not offer the tenant other housing when repair work necessitates the tenant's eviction. For example, evidence that repair of the tenant's unit was part of a general plan undertaken before the tenant acted would tend to prove that the landlord lacked a retaliatory motive.

So far, two ways that the landlord can rebut a presumption of retaliation have been considered: he can show that he acted on a whim.
or that he had a valid business justification. A different form of rebuttal was offered in *Robinson v. Diamond Housing Corp.*[^83] in which the landlord claimed that he intended to remove the unit from the rental market altogether. He had tried for more than 4 years to oust the tenant, who was justifiably withholding rent because the unit violated the housing code. The landlord sought to recover possession because he was unwilling to make the necessary repairs. He argued that he had the right not to have any tenants at all in the unit.

Had the landlord lived in a state following the Model Code approach, he might have succeeded. The Model Code prohibits the landlord from evicting a tenant within 6 months after the tenant engages in a protected activity[^84], unless the landlord seeks in good faith to remove the unit from the market for at least 6 months[^85]. The phrase "in good faith" is ambiguous. It could mean that the landlord's motive must not be retaliation. But since the draftsmen were critical of statutes requiring proof of motive in retaliatory eviction cases, "good faith" probably means only that the landlord must honestly intend to keep the premises off the market. Under this definition of "good faith," a landlord can retaliate against a tenant with impunity, provided he keeps the premises off the market. If the tenant were withholding rent, as in *Robinson*, the landlord would lose nothing.

The *Robinson* Court rejected the landlord's argument and held that unless he was going out of business altogether, he did not have an absolute right to withdraw a unit from rental use. Instead, evidence of the landlord's desire to contract his business must be weighed against the presumption of retaliation. The court ruled that to rebut the presumption, the landlord must show that he was unable, not simply unwilling, to repair the unit[^86]. Thus, in at least one jurisdiction, even

[^84]: MODEL CODE § 2-407. DEL. CODE ANN. tit. 25, § 5516 (Supp. 1972), and HAWAII REV. STAT. § 521.74 (Supp. 1973), are patterned on the Model Code but place no time limit on the prohibition.
[^85]: MODEL CODE § 2-407(2)(d). Section 2-417(2) contains other exceptions to the 6-months requirement. The Model Code also permits the landlord to recover possession if he seeks in good faith to occupy the premises as his own abode. Id. § 2-407(2)(b). The discussion in the text of § 2-407(2)(d) is equally applicable to § 2-407(2)(b).
[^86]: *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 866-69 (D.C. Cir. 1972). The court relied heavily on Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965), in which an employer, acting from an anti-union animus, closed one plant while continuing to operate elsewhere. Assuming the row house Mrs. Robinson rented was one of a large number the landlord owned at the same site, the courts' analogy was inappropriate; for the eviction was really analogous to closing a portion of a single plant. If the house was the only one the landlord owned at that location, the court simply misapplied Darlington. If removing her house from the market was the equivalent of closing an entire plant, *Darlington* teaches that only the other tenants, not Mrs. Robinson, had the right to contest her eviction. See note 59 supra. Had the court correctly applied Darlington, it would have remanded for a determination of whether the landlord intended to interfere with the rights of the other tenants, and whether eviction had the forseeable impact of accomplishing that intention. Instead, the court remanded to per-
if the landlord removes the unit from the rental market after evicting
the tenant, the doctrine of retaliatory eviction applies.

C. The Effect of Rebuttal Evidence on the Tenant's
Prima Facie Case

If the landlord produces objective evidence to justify a challenged
action, should he be entitled to a directed verdict if the tenant presents
no evidence beyond his prima facie case? Or should the factfinder
consider the landlord's unrebutted evidence as probative, but not con-
trolling? Neither labor law, evidence law, nor the Uniform Act pro-
vides a clear answer. In McDonnell Douglas v. Green,87 which arose
under title VII, the Court held that an employee must rebut objective
evidence of business justification. The rule is the same under the
NLRA when the presumption of discrimination arises from an action
that has a "comparatively slight" impact on protected rights.88 On
the other hand, if the presumption arises from an action "inherently de-
structive" of employees' rights, the employees need not rebut evidence
of business justification. To obtain any guidance from the labor cases,
the courts would first have to adopt the awkward analytical framework
of the labor cases. The rules of evidence pertaining to presumption
provide no more guidance. One school of thought insists that a pre-
sumption is merely a device for allocating the presentation of evidence
and disappears once contrary evidence is introduced; a second school
insists that if the presumption has an evidentiary basis, the factfinder
may rely on it even in the face of contrary evidence.89 Section 5.101
(b) of the Uniform Act says that when a presumption arises "the trier
of fact must find the existence of 'the fact presumed unless and until
evidence is introduced which would support a finding of its non-exist-
ence." The Act says nothing, however, about what happens to the pre-
sumption once counterevidence is introduced.

Although the courts have not directly addressed the issue, they
seem unwilling to allow the mere introduction of bona fide business
mit the factfinder to determine whether the landlord was retaliating against Mrs. Robin-
son. To be sure, the court said that the landlord should not be permitted to close a
unit to intimidate remaining tenants, 463 F.2d 860, 867, but the court did not direct
the production of any evidence of an intent to intimidate other tenants.

To say that the Robinson court misapplied Darlington is not to say that it reached
the wrong result. It is to suggest that Darlington is of doubtful merit, because the court
permitted an employer who remained in business to punish employees for exercising
their rights.

88. See NLRB v. Great Dane Trailer, Inc., 388 U.S. 26, 35 (1967) (Harlan, J.,
NLRB, 380 U.S. 300 (1965).
89. O'Brien v. Equitable Life Assur. Soc'y, 212 F.2d 383 (8th Cir. 1954); Annot.,
5 A.L.R.3d 19 (1966); UNIFORM RULES OF EVIDENCE 14 (1953); U.S. DIST. CTS.
RULES OF EVIDENCE 3-03.
reasons to destroy the tenant's prima facie case. The court in Robinson, for example, went to great lengths to emphasize the factual nature of the competing inferences, and labelled the eviction "inherently destructive" to ensure that the jury would be allowed to resolve these inferences. Other courts have ruled in favor of the tenant even though economic justifications for the eviction were offered.⁹⁰

Requiring the tenant to rebut the landlord's proof of objective business justification may be asking the impossible. Unlike the employer, who may provide employees with additional evidence by revealing an anti-union bias in the course of an organizational campaign, a landlord seldom has occasion to make public antitenant comments. Unlike the plaintiff in a title VII suit who can rely on statistical proof,⁹¹ the tenant is unlikely to have access to past histories or statistical comparisons to support his prima facie case. Thus the tenant may be hard-pressed to find additional evidence. Once one tenant's eviction is upheld because the landlord presented a modicum of unfuted evidence, other tenants may be reluctant to cooperate with housing officials.

D. The Problem of Mixed Motives

Underlying the requirement that the tenant rebut proof of business justification is the assumption that the justification was the sole motivation of the eviction. But as the Supreme Court has noted, "[I]n human experience, such situations present a complex of motives."⁹² Improper and proper reasons may underlie a landlord's action in varying degree. A primary desire to retaliate may coexist with the desire to increase profits; an overwhelmingly legitimate motive may be tinged with elements of spite. When should the presence of an improper motive warrant a finding of retaliatory eviction?⁹³

No answer could be more favorable to landlords than that given by the Wisconsin Supreme Court in Dickhut v. Norton, which was that the tenant must prove the landlord acted for the sole purpose of retaliation. The landlord is rare whose lawyer cannot unearth some evidence of a proper motive, and the factfinder would have to disregard this evidence completely to hold for the tenant. Seldom would a de-

fense of retaliation be sustained. Consequently, tenants would fear to assert their rights. The "sole purpose" approach thus eviscerates the doctrine of retaliatory eviction.

The answer most favorable to tenants is that retaliation should be found whenever an improper reason played any role in motivating the landlord. The almost complete immunity this approach provides tenants from retaliation would encourage them to exercise their rights and to cooperate with housing authorities. But it would also give tenants virtual immunity from their own misconduct, for a sympathetic jury could always find on the basis of the tenant's prima facie case that the landlord was partially motivated by a desire to retaliate.

The problem of competing motives is often encountered in labor law. In theory, an employer acts illegally when motivated in whole or in part by an improper motive.\(^\text{94}\) In practice, however, courts reviewing NLRB decisions frequently reverse findings of improper motive when business justifications are strong and evidence of improper motive rests on weak inferences.\(^\text{95}\) Thus, as a practical matter, improper motive must play a substantial role in the employer's decision.

This substantial motivation test, at first glance, seems an attractive compromise. But unlike labor cases, which arise in an administrative context, retaliatory eviction claims will usually be tried to a jury. Over the years, an administrative agency can develop a working understanding of what the appellate courts will consider a substantial motivation, but the term gives little guidance to a jury. For similar reasons, the "overriding reason"\(^\text{96}\) and "dominant purpose"\(^\text{97}\) tests suggested by some courts and legislatures should be rejected. These tests require the jury to engage in the highly metaphorical task of weighing motives. A test that encouraged the jury to make a more factual inquiry would be preferrable.

The best test appears to be the "but for" test of tort law. Under this test, the jury asks, "Would the tenant have been evicted if he had not engaged in a protected activity?" The rationale for adopting this test is that the tenant who would not have been molested if he had

\(^{94}\) NLRB v. Barberton Plastics Prods. Inc., 354 F.2d 66, 68 (6th Cir. 1965); NLRB v. American Mfg. Co., 351 F.2d 74, 79 (6th Cir. 1965); NLRB v. Symons Mfg. Co., 328 F.2d 835 (7th Cir. 1964). A number of courts, however, have indicated that inquiry must be directed to the employer's "predominate motive." A.P. Green Fire Brick Co. v. NLRB, 326 F.2d 910, 912 (8th Cir. 1964); NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 175 (2d Cir. 1961).

In NLRB v. Brown, 380 U.S. 278, 288 (1965), the Court used, in passing, the phrase "primarily motivated." Cf. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937) ("true purpose").


not engaged in a protected activity deserves to be protected. This test encourages the free reporting of housing code complaints, but also permits the landlord to rid himself of a destructive tenant even if partly motivated by retaliation. The test is easy for a jury to understand and apply. Finally, it should allow trial and appellate judges to exercise some control over juries that may be overly sympathetic to tenants.

IV. Conclusion

In the last decade, courts and legislatures have begun to protect tenants who attack substandard housing conditions from retaliation by landlords. If a landlord attempts to evict or increase the rent of a tenant who has engaged in a protected activity such as reporting a housing code violation, the tenant can raise the defense of retaliatory eviction. In virtually all jurisdictions, an essential part of this defense is proof that the landlord's motive was retaliation. Admittedly, proving motive can pose serious problems for the tenant. The Model Code attempts to avoid these problems by eliminating the element of motive; under the Model Code, a tenant cannot be evicted during a fixed period of time after he engages in protected activity. But the period of time is so short, and the rule contains so many exceptions, that the tenant is really unprotected from retaliation by a determined landlord.

Underlying the Model Code is the assumption that the problem of proving motive is insurmountable. The experience of courts dealing with labor statutes such as the NLRA and title VII indicates, however, that the problem of proving motive can be solved. Although the specialized doctrines evolved in labor law cannot be directly adapted to landlord-tenant law, they can offer valuable guidance.

In particular, the labor cases demonstrate the value of presumptions in dealing with the problem of proving motive. A tenant who can show that the landlord raised his rent or attempted to evict him soon after he engaged in protected activities, should be considered to have raised a presumption of improper motive. Unless the landlord introduces rebuttal evidence, the tenant should be entitled to a directed verdict. On the other hand, if the landlord introduces credible rebuttal evidence, by making either a showing of business justification or a sworn denial that he had a retaliatory motive, the case should go to the jury. The tenant should not be required to counter the rebuttal evidence with further proof of retaliatory motive. The question the jury must answer is whether the landlord would have acted as he did if the tenant had not engaged in protected activities.

This system of allocating the burden of proof is designed to protect tenants from retaliatory eviction without unduly restricting the landlord's ability to deal with his tenants. Placing too heavy a burden of proof on the tenant might undermine the policies underlying the
doctrine of retaliatory eviction; placing too heavy a burden on the landlord might leave him at the mercy of any tenant who engaged in protected activity. Rather than attempting to reconcile the competing interests of the landlord and tenant by establishing a detailed regulatory scheme, this system of presumptions is intended to allow an intelligent case-by-case resolution of the conflict.