

Group of landlords challenging DATCP landlord, tenant administrative codes

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A group of southeastern Wisconsin landlords wants to suspend several administrative codes that govern how they interact with tenants, while opponents argue the code is the law.

In a brief filed recently in Waukesha County Circuit Court, the landlords argue the Department of Agriculture, Trade and Consumer Protection codes are unconstitutionally vague, while another related to voiding rental contracts exceeds the state agency's authority.

The plaintiffs include five landlords and one prospective landlord that manage properties in the Waukesha and Milwaukee areas. DATCP and the state Department of Justice are listed as defendants.

But Community Justice attorney Carousel Bayrd told WisPolitics the codes being challenged are word for word what the Legislature wrote in landlord and tenant law.

Chapter 704 cross references Chapter ATCP 134. She said if those suing have a problem with the code, they have a problem with the written statute, and they cannot blame DATCP for using the Legislature's writing.

"Much of the administrative code that they're challenging is verbatim what's in the Wisconsin statutes," Bayrd said.

Kareem Bearden, a commercial truck driver who owns two rental units in Milwaukee, says the codes are confusing and make it difficult to act as an effective property manager. In a recent interview, he noted all the rental income from the duplex goes toward his elderly mother's medical expenses.

"Personally, I'm just trying to make sure I'm still able to, you know, feed and take

care of my family, my mother and everything,” he said. “And I don’t want to risk the chance of ... doing anything unlawful.”

He and the other plaintiffs are seeking a temporary injunction of certain DATCP regulations as the case proceeds. These are related to landlords’ ability to withhold money from a security deposit, how security deposit withholding statements are organized, and when and for how long landlords are allowed to enter a tenant’s dwelling, according to the brief. Plus, the brief argues the agency has no authority to render rental contracts “void and unenforceable” under a separate code.

One section points to a DATCP code that bars landlords from withholding part of a renter’s security deposit to pay for “normal wear and tear” or other damages or losses “for which the tenant cannot reasonably be held responsible” under applicable law. It argues the way the code is worded is “impermissibly vague,” making it difficult for landlords to know what they’re allowed to withhold.

Bayrd argued other codes being challenged as unclear don’t seem unclear at all. They’re really just establishing guidelines for what is reasonable as far as a landlord’s right to entry and other possible issues between landlords and tenants, she said.

DATCP is not acting beyond the scope of the Legislature because the codes are verbatim what the Legislature has already allowed in Chapter 704, she argued.

Ryan Walsh, an attorney in the Madison office of law firm Eimer Stahl LLP, is one of the lawyers representing the plaintiffs.

“The problem here is, these aren’t just civil regulations,” he said in an interview. “These are regulations that come with criminal penalties.”

He explained most criminal laws include a “mental state” requirement, such that someone can’t be found liable unless he or she intended to do something wrong, or was reckless or otherwise considered blameworthy. In contrast, these DATCP regulations “have no mental state requirement whatsoever,” meaning the crimes they cover are “what we call strict liability crimes,” he said.

According to Walsh, even with the “best lawyer in the world” advising on how to handle a particular tenant situation, the state could later decide actions taken by the landlord weren’t necessary.

“They can now charge you with a crime punishable [by] up to a year in jail,” he said. “That means, under the constitution, under the due process clause, if they want to use that authority, they have to be extremely specific about what you have to do and what you must not do.”

The brief argues the DATCP codes don’t meet that standard. If successful, the lawsuit would ultimately result in a permanent injunction, Walsh said.

“All that we’re asking is that we, others in the state, not be held strictly liable under criminal laws for what are essentially good faith acts,” he added. “Kareem is trying to do the right thing. Our other plaintiffs are trying to do the right thing.”

A hearing on the motion for temporary injunction is scheduled for Sept. 25, Walsh said.

See the brief:

<https://www.wisbusiness.com/wp-content/uploads/2023/08/2023.07.11-004-Pls-Brief-iso-Motion-for-TI.pdf>

See Bearden’s affidavit:

<https://www.wisbusiness.com/wp-content/uploads/2023/08/2023.07.11-010-Affidavit-of-K.-Bearden.pdf>