Community Association Management *Insider*®

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FEATURE

How to Properly Terminate Association Employees

All management companies and associations have to deal with a problem employee at some point, no matter how carefully they hire employees or how diligently they try to create a good work environment. For many managers or directors, deciding whether and how to discipline or fire an employee is one of the most stressful parts of the job.

"Directors can't afford to ignore or mishandle employment problems, since a botched employment situation can be costly if it turns into a lawsuit," says Manhattan attorney Jonathan Weinberger, an employment law expert. Lawsuits brought by former employees are increasingly common and costly.

In one case, a security guard sued a community association, claiming that it fired him in violation of the Age Discrimination in Employment Act of 1967. Eventually, a Florida district court denied the association's request for a judgment without a trial. It concluded that a jury might

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BUDGET PREPARATION

How to Respond to Unforeseen Budgetary Challenges

There are times when even good planning cannot prevent significant and unforeseen budgetary challenges beyond an association's control. The latter half of this year has seen an increase of foreclosures that are affecting entire communities as members are abandoning homes and leaving dues unpaid. And when associations are short on funds, boards may struggle to juggle costs to prevent members from having to make up all the difference.

Whether it is an uptick in foreclosures in your community or other reasons that have caused your association to experience a budget shortfall, your board must act prudently to compensate for any deficit so that it can minimize negative consequences to the community. We'll review the reasons for budget shortfalls and offer some general guidelines, provided by certified public accountants Jules Frankel and Gary Rosen of Wilkin & Guttenplan, P.C., to consider when your board encounters circumstances beyond its control.

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Properly Terminate (continued from p. 1)

decide that the reason for the employee's termination was not legitimate and was discriminatory [Roe v. Oakmont Resort Condominium Assn., Inc., September 2006].

Having a second-rate staff can lead to angry members and damage to your community's reputation. With the help of Weinberger, we have put together seven tips for protecting yourself from legal trouble when dealing with, or terminating, employees.

Give Regular Performance Evaluations

A performance evaluation is your early warning system for employment problems, and—in case you wind up in court—your proof that you acted reasonably. In the worst cases, evaluations can be valuable proof in a lawsuit, illustrating that you put a poor performer on notice and gave him a chance to improve. In the best situations, evaluations can motivate a poor performer to turn into a valued worker.

An effective evaluation system can help you identify and reward good employees, thereby fostering loyalty and providing motivation. And it reduces the risk of complaints and litigation by ensuring that employees feel that they are treated fairly.

In the age discrimination lawsuit example cited above, the association's yearly performance reviews did not indicate that the security guard was a problem employee. Other than a problem with a changing shift schedule, the association's assistant general manager testified that the security guard's yearly reviews indicated that he had done his job adequately before the events leading to his firing occurred.

Adopt and Follow Sound Policies

An employee handbook is an indispensable workplace tool that can help you communicate with and manage your staff, and help protect you from lawsuits. What you include in your employee manual or handbook will depend on how you run your community. For example, you may insist that your security guard not leave his post unless a replacement arrives.

In the case above, there were two instances in which the guard had left his post before his replacement arrived. Before the first instance, the association management had never told the guard that he could not leave his post until a replacement arrived. And in the second instance, the guard tried to notify management that his replacement had not arrived. When he couldn't reach anyone directly, he clocked out and left his post unattended. At the time of the guard's termination, there was no written policy requiring him to wait.

All these details indicate to a court that the association may have unlawfully terminated the employee.

Also, the employee handbook listed nine offenses that require immediate dismissal, and the evidence showed that the guard was never accused of any of them.

Once you adopt policies, you must follow them. If you bend the rules, your employees will not take them seriously. Apply the same standards of performance and conduct to all of your staff. Employees quickly sour on an employer who plays favorites or punishes scapegoats. Successful discrimination lawsuits start when you treat employees differently even though they are in the same situation.

Keep Good Records

If a worker sues you, you will have to not only remember and explain what happened, but also prove that your version of the story is accurate. To make your best case, keep careful records of every major employment decision or event for each employee—including evaluations, disciplinary warnings, and reasons for firing. By documenting specific instances of misconduct and poor performance, a director or manager will have a far better chance of proving just cause for the dismissal.

Take Action When Necessary

Once an employment problem comes to your attention, don't hide your head in the sand. Take action quickly, before it turns into a mess.

Start with an oral warning. Give the employee at least one oral warning about any conduct you want stopped. The warning should explain exactly what the employee did or did not do, and why you don't want the misconduct repeated.

If the employee ignores the oral warning and breaks the rules again, give him at least one written warning. Write a letter to the employee, describing the misconduct in general terms, and warn him that if the misconduct continues, further disciplinary action will be taken—including suspension and dismissal, if necessary. In this issue, see our Model Letter: Use Warning Letter if Employee Ignores Oral Warning, for an example of a written warning.

When you give the employee the warning letter, have him acknowledge that he has received it, by signing your copy of the letter. Otherwise, at a future arbitration hearing or court date, the employee could deny having gotten it.

If the employee continues to ignore your warnings and repeats the same misconduct, it is time to fire the employee. In this issue, we give you a Model Letter: Give Employee Written Statement of Reasons for Termination, which you can adapt and use to satisfy any written notice requirements.

Make Fair Job-Related Decisions

Every workplace decision should be guided by job-related criteria—not by an employee's race, sex, or personal life, or by your personal biases. Make sure your decisions are business-related. Not only does this make economic sense, it will also help you avoid lawsuits for discrimination.

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MODEL LETTER

Use Warning Letter if Employee Ignores Oral Warning

If an employee ignores your first oral disciplinary warning, adapt and use the following letter for a written warning. This letter includes a section for the employee to sign your copy of the letter to acknowledge having received it.

[*Insert date*]

Joe Jones, Maintenance Staffperson
123 Any Avenue
City, State 12345

Dear Mr. Jones:

I am giving you this written warning because you have failed to heed the oral warning I gave you on [*insert date*]. At that time, I warned you against taking unexcused absences from work and being dishonest.

Now you have again broken the management's rules. On [*insert date*], you told me that you had finished a job I assigned to you one week earlier, namely, the removal of construction materials piled on the roof.

Your repeated failure to abide by the rules has caused concern as to whether you can do your job properly. I will have no choice but to dismiss you if you do not start taking your responsibilities seriously and follow the rules.

To acknowledge that you have received and understand this letter, please sign where indicated below and return this copy to me.

Yours truly,
John Smith, Supervisor

I hereby acknowledge getting a copy of this warning letter on [*insert date*]:

Signed by Joe Jones _____

Properly Terminate

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As a general rule, you should treat your employees with respect. Employees who are deprived of dignity, who are humiliated or treated in ways that are just plain mean, are more likely to look for revenge through the legal system—and juries are more likely to sympathize with them.

For example, if you publicize an employee's personal problems or shame an employee in front of his coworkers for poor performance, you can expect trouble.

Allow Open Communication with Employees

Employers get in trouble when they discipline employees who complain of harassment or discrimination. Employers should take action to deal with the problem itself, and not with the employee who brought the problem to your attention.

Adopt an open-door policy, and put it into practice. This will help you find out about workplace problems early on, when you can nip them in the bud. And it will show your employees that you value their opinions, an important component of good employee relations.

Be Discreet

Loose lips about employee problems are a surefire way to bring the law down upon your head. An employee could sue you for defamation or could haul you into court for causing her emotional distress, for creating a work environment that is hostile toward her, or for poisoning prospective employers against her. The stakes are high, so protect yourself by giving information on a need-to-know basis only.

MODEL LETTER

Give Employee Written Statement of Reasons for Termination

Here is a Model Letter that you can adapt and use if an employee's misconduct persists after he has received an oral warning. Keep the letter simple, and describe the grounds for termination in a general way.

[*Insert date*]

Joe Jones, Maintenance Staffperson
123 Any Avenue
City, State 12345

Re: IMMEDIATE DISMISSAL

Dear Mr. Jones:

Effective immediately, you are dismissed from your position as Maintenance Staffperson. This dismissal is based on your chronic failure to follow management rules, despite both oral and written warnings.

Cause for Dismissal. You have again broken the rules by using the association's charge account at XYZ Hardware Store for your personal benefit. When confronted, you admitted that over $120 in charges had no connection to the condominium building, but were diverted for your own unauthorized use.

You are dismissed from your position effective immediately. Your dismissal is based on this incident and your prior record.

Yours truly,
John Smith, Supervisor

Insider Source

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For More Information...

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THE INSIDER GOING ENVELOPE-FREE STARTING IN JANUARY

Community Association Management Insider is taking another step toward going green and having a positive impact on the environment. Starting with the January 2009 issue, the print version of the ***Insider*** will have a new look and will be delivered to you envelope-free, as a self-mailer. Although you will see a change in the design and mailing format, the ***Insider*** will continue to be jam packed with the great how-to information you've come to rely on.

Budgetary Challenges

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Reasons for Budgetary Shortfalls

Even with good contingency planning, boards may still encounter situations in which they incur a significant expense for which they had not adequately budgeted. These circumstances generally fall into the following categories:

Market forces. Changes in the costs of goods and services can have a significant impact on an association. Over the past several years, associations have seen an increase in insurance premiums. Oil prices, which have a direct impact on an association's utility costs, have risen as well.

Nature. This could be anything from a heavier-than-anticipated snowfall to structural damage caused by windstorms or pollution. For example, in California, the fire season used to start in August and end by Christmas. Now, as a result of drought, electrical storms, and antiquated forest management policies, California fires can appear year-round, and the number of blazes across the state are estimated to double this year.

Inadequate budgeting. As common elements age, boards are aware that they can require increasing levels of maintenance and repair. But oftentimes, the appropriate levels of repair needed in a given year are unpredictable when the budget is prepared. The unpredictability makes it difficult for boards to accurately forecast a budget for general repairs and maintenance.

Another example of inadequate budgeting would be a common mistake, such as a budget that does not reflect a contractor's annual price increase that has already been approved in the contract with the association.

Capital "crunch." This relates to the possibility that common elements may have failed unexpectedly or the repair or replacement expense of something in the community is substantially greater than what was anticipated.

Options for Addressing Budgetary Shortfalls

Although each association's specific circumstances are unique, here are some strategies boards can evaluate and review with their professional advisors to be able to address their specific needs.

Utilize prior year's accumulated surplus. If such a surplus exists, then depending on the nature, magnitude, and timing of the expense, it may be appropriate to spend some or the entire surplus to resolve an outstanding obligation.

Use prior year's accumulated working capital contributions. At the time of closing on a home, many associations collect working capital contributions that are used for the association's working capital needs. Rosen recommends that associations maintain approximately three months of operating expenses in this fund. If there is an excess of three months of expenses in the fund, the board should consider using it to address an unexpected need.

Reduce other expenses. This is always prudent. However, it is rare that an expense reduction by itself is enough to provide the needed funds for unforeseen circumstances.

Defer an expense. If the payment arrangement with a vendor can be renegotiated and deferred, it might assist with current cash flow needs.

Amend current year's budget. Certain expenditures, such as a sizeable increase in insurance premiums, affect both current and future members. In this situation, it may be advisable to amend the maintenance budget immediately and increase maintenance fees accordingly.

Impose special assessment. You may consider imposing a special assessment—that is, an extra one-time payment members must make for a specific purpose—on your members. Although your association's governing documents almost certainly provide for the possibility of special assessments, members tend to expect their monthly payments to stay about the same. And, unlike modest annual increases in regular assessments, special assessments can strain the budgets of your members.

You may want to consider this option when individuals in the community directly benefited from the service delivered, such as snow removal. In these instances, it is recommended that the special assessment occur as soon as possible so that the residents who benefited from the service fund the expense.

Borrow funds. There are some scenarios in which obtaining financing can be an appropriate and viable approach to address the association's funding needs. Borrowing funds may be used with, or instead of, the previously listed options. Associations usually resort to obtaining a loan only for

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Budgetary Challenges

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capital replacement projects, such as repairing or replacing roofs and sidewalks. But borrowing could also be appropriate when capital reserves would be depleted to the point that they could no longer sufficiently cover other anticipated capital replacement projects, a special assessment may be unaffordable, or a project would need to be extended over a time period that would create undue hardship or inconvenience to the members.

Insider Sources

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Q & A

The INSIDER *welcomes questions and comments from subscribers. You can submit your questions through the "Ask the Insider" feature of our Web site,* www.communityassociationinsider.com.

Defenses Against Defamation Lawsuits

Q My association publishes a community newsletter and hosts a community Web site. I can readily imagine a situation in which a disgruntled member or local business falsely accuses the board of defamation for something that may be published in the newsletter or on the Web site. What are the defenses against defamation lawsuits?

A Recently, an association in Knoxville, Tenn., found itself in a $20 million lawsuit for an article it published in its community newsletter. The article raised concerns about patients getting prescriptions at a nearby pain clinic and then filling them at the nearest pharmacy. The article quoted unnamed police and Drug Enforcement Agency sources, alleging that the practice had led to several armed robberies and drug deals in the parking lot of the shopping center where the pharmacy is located.

Soon after the story was published in the community newsletter, a local newspaper picked up the story. The pain clinic's doctors then filed a $20 million lawsuit against the local paper's parent company and the homeowners association for libel, slander, and interference with business practices.

It remains to be seen how the lawsuit will play out. Generally speaking, defamation is the issuance of a false statement about another person, which causes that person to suffer harm. Specifically, slander is a form of defamation that involves the making of oral defamatory statements. And libel involves the making of defamatory statements in a printed or fixed medium, such as a magazine or newspaper.

There are three hurdles that a defamatory statement must meet in order for a member or business to prevail in a defamatory lawsuit against an association:

Untrue. To be defamatory, the statement must be untrue. If the association is ever sued for defamation based on something it published in the community newsletter, a court will dismiss the case if the association can prove that the statement in question was true. Truth is an absolute defense to an action for defamation. Therefore, it's wise to print only those facts that you can verify.

Damaging. The member or business must show that the alleged defamatory statement caused real and substantial harm to its reputation or business.

Knowingly false. A suing member or business must also show that the association knew the statement was untrue, but published the statement despite that knowledge. An association may have transmitted a message without awareness of its content, and in this case may raise the defense of "innocent dissemination."

FDIC Limits and the Emergency Economic Stabilization Act of 2008

Q I am the treasurer of a condominium association. I am concerned about how the Emergency Economic Stabilization Act may affect the safety of our association's accounts with banks. Our association collects monthly maintenance payments from members and deposits the funds into three accounts

that are used for operating expenses, security deposits, and large-project reserves. Please explain how our accounts might be affected by the act.

A While the passage of the financial "bailout" legislation has dominated recent headlines, the biggest aspect of the Emergency Economic Stabilization Act of 2008 that will be of interest to associations is the increase on Federal Deposit Insurance Corporation (FDIC) limits.

One of the broad-reaching components to the act was the increase of the FDIC's insurance coverage from $100,000 to $250,000. This increased coverage is effective now until Dec. 31, 2009.

Therefore, under the FDIC's deposit insurance regulations, all deposits held by the same entity in the same "right and capacity" or single ownership or joint ownership at the same depository institution are added together and are now insured for up to $250,000 in the aggregate. Deposits of an unincorporated association, such as a condominium association, are insured separately from the accounts of the persons or entities comprising the association.

In the situation you describe, it appears that the funds in at least two of your condominium association accounts—the operating account and the reserve account—are funds owned by the association and deposited on its own behalf. As such, these funds would be added together for the purpose of determining insurance coverage and be insured for a maximum of $250,000. If the funds in the third account are also association funds deposited on its own behalf, those funds would also be included in the aggregation.

However, if the funds in the security-deposit account are actually being held by the condominium association on behalf of someone else, such as the member who made the security-deposit payment to the association, then those funds are eligible for separate coverage from the association's own funds. In this case, the security-deposit funds are insured as if they were deposited in the name of the members themselves, rather than the association, provided certain record-keeping requirements are met.

First, the deposit account records of the insured depository institution in which the funds are held must disclose that the funds are held on behalf of someone else. Indicating a custodial, agency, or other relationship in the title of the account can satisfy this requirement. For example, "XYZ Homeowners Association, Custodian" will work to identify the account.

If no such relationship is disclosed, the FDIC will determine that the association owns the security deposit funds. Also, the specific interest of the principals in the account must be able to be determined, either from the deposit account records of the insured institution or from records maintained in the ordinary course of business by or for the named fiduciary depositor.

If your security-deposit account qualifies for "pass-through" coverage as described above, the amount of funds in the account attributable to each member would be added with other funds owned in the same right and capacity by the member in other accounts in the same institution, and insured in the aggregate for that principal, up to a maximum of $250,000.

For More Information...

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Search Our Web Site by Key Words: defamation; libel; slander; FDIC; deposit insurance; Emergency Economic Stabilization Act of 2008

RECENT COURT RULINGS

➤ City Can Deny Road Services to Condo Development

Facts: Unlike other roads in the city, the roads in a subdivision-style condominium development were owned by the association, which hired contractors to maintain them and perform tasks such as snow removal. The association sued the city for denying road services and creating a heavier burden on members than on owners of single-family homes.

Ruling: A Wisconsin district court dismissed the association's lawsuit.

Reasoning: The court ruled that the city's policy is not illegitimate, even if it disproportionately burdens a certain class of taxpayers. For example, the U.S. Constitution gives legislators the authority to decide whom they wish to help with their tax laws and how much help those laws ought to provide.

Here, the city places a heavier financial burden on members of condominium subdivision-style developments because, unlike single-family homes, such condominiums belong to associations with the means to provide their own services. Therefore, the court ruled that the city had a rational basis for not providing road services to these developments.

- Pheasant Run Condo. Homes Assn. v. City of Brookfield, September 2008

➤ Law Firm Allowed to Represent Developer

Facts: A dispute arose between a condo association and a developer after the developer obtained a permit to construct a parking garage adjacent to the condominium building for its commercial property. In its plans, the developer reduced the parking available for association members and did not provide for guest parking, contrary to agreements made when the condo association sold the land to the developer's predecessor. The association sued the developer.

During the lawsuit, a member asked the court to disqualify a law firm representing the developer on the basis that the same law firm previously represented the member in connection with her condo purchase. The trial court granted the member's request, and the developer appealed this decision.

Ruling: A California appeals court reversed the lower court's decision to disqualify the law firm.

Reasoning: The court ruled that there was no substantial relationship between the law firm's representation of the member and its subsequent representation of the developer. The court stated that the current dispute is mainly legal in nature, requiring interpretation of various land-use restrictions, and the member failed to show that any confidential factual information previously gained from representing the member could possibly influence the legal issues now before the court.

- Ctr. Assocs., L.P. v. Superior Court, November 2008

➤ Association Not Liable for Member's Slip-and-Fall Injury

Facts: A member sued his condo association and the management company for injuries he suffered when he slipped on an ice patch. The association had a contract with a snow removal service. The member alleged that because of the negligent removal of snow, several large patches of ice accumulated on the walkway. The trial court dismissed the member's lawsuit because under Illinois law, anyone in charge of residential property is not liable for any personal injuries allegedly caused by a sidewalk's snowy or icy condition unless the person's acts amount to clear wrongdoing. The member appealed, claiming that the law did not apply to parties that enter into contracts with snow removal companies.

Ruling: An Illinois appeals court upheld the lower court's dismissal.

Reasoning: The court ruled that the snow removal company was an agent of the association. The court stated that, except in cases of clear wrongdoing, lawmakers had intended the law, with the immunity, to encourage people to clear their sidewalks of snow and ice. Therefore, it would be undesirable for any person or agent to be found liable for personal injury damages due to his snow removal efforts.

- Divis v. Woods Edge Homeowners' Assn., October 2008