

Community Association Management *Insider*[®]

NOVEMBER 2012

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Faulty Construction Lawsuit Empowers Calif. HOA

A recent California dispute between a San Francisco Bay area homeowners association and the builder of its 255-unit residential community shows that associations do have a resource when faced with potential building claims. The Cambridge Place Owners Association put the builder—one of the nation's largest homebuilders—on notice of plumbing and sewer failures, water intrusion, and siding issues, among other problems, through California's pre-litigation statute commonly known as "The SB 800 Process." The large-scale community association filed suit for numerous construction defects and building standard violations at the development, which was completed in 2009. Both sides hope to resolve the case quickly through mediation.

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FEATURE

Avoid Four Pitfalls When Disciplining, Terminating Employees

Last month, the *Insider* showed you the importance of using a workplace involvement program to engage employees in both their work and the association. However, regardless of the steps that you take to create a pleasant work environment and motivate your employees, eventually, you'll have to deal with an employee who doesn't perform well and must be let go. All management companies go through this process at some time, regardless of the due diligence they've performed to get competent, hard-working employees or how much they've vetted candidates for positions within the company. But terminating an employee isn't as easy as it might seem.

Handle Employees Appropriately from the Start

A poorly handled termination can be costly if it turns into a lawsuit. And lawsuits brought by former employees are increasingly common. But aside from having to pay to defend itself from claims of wrongful termination, the association might also have to deal with another

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REPAIRS & MAINTENANCE

Check Seven Items During Roof Inspection

In our last issue, the *Insider* stressed the importance of following a year-round maintenance plan and suggested that you put roofing at the top of your list of tasks to prioritize. If your association is responsible for the maintenance of roofs in the community, it's particularly important to have them inspected before winter. After all, most roof damage occurs during winter. Harsh weather conditions—such as heavy rain and snow, strong winds, and extreme temperatures—can cause substantial damage to a building's roof. But many community associations worry about their roofs only after these conditions cause damage, such as leaks.

A reactive approach can lead to premature roof failure and costly interior damage. You can prevent these problems by having your roof inspected by a qualified inspector *before* harsh weather hits. Follow

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Editor: **Elizabeth Purcell-Gibney, J.D.**

Executive Editor: **Heather Ogilvie**

Director of Production: **Kathryn Homenick**

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Community Association Management Insider [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)] is published by Vendome Group, LLC, 6 East 32nd Street, New York, NY 10016.

Volume 12, Issue 5

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Four Pitfalls (continued from p. 1)

sticky situation: a disgruntled ex-employee who reveals too much if he feels that his termination isn't justified or wasn't handled well.

Every workplace decision—especially terminations—should be guided by job-related criteria, not by an employee's race, sex, or personal life, or by your personal opinions. Making business-related and job-related decisions about problem employees can help you avoid discrimination lawsuits. And as a general rule, you should treat your employees with respect. Employees who feel that they've been humiliated or disrespected by the way you've disciplined or terminated them are more likely to look for revenge through the legal system. They also are more likely to be less discrete. Some association employees have access to confidential information, financial records, and other sensitive information. An upset ex-employee could decide to disclose information that could be very detrimental to the association—for example, the terms of a confidential construction defect settlement, says New Jersey attorney and *Insider* board member David J. Byrne. And disclosure in that situation could jeopardize the association's receipt of the funds, he stresses. If disclosures about various private things are made to owners, all kinds of political annoyances could break out, adds Byrne.

Termination Traps

If a termination violates any laws, such as the Americans with Disabilities Act (ADA), it won't be just the board of directors who could be sued—you might've opened yourself up to liability as well. If you decide to not fire the employee and to instead give him a warning, beware that disciplining an employee also can be perilous if not handled appropriately. Avoid the following seven pitfalls to protect the association and yourself from costly legal trouble when disciplining or terminating employees and adapt our Model Letter: Describe Grounds for Firing in Written Letter, to document the reason why the employee was fired.

Pitfall #1: Failing to document incidents. The best step you can take when any type of issues arises with your staff is to keep good, accurate records. Don't assume that you'll be able to remember exactly what happened during the events that led to an employee's disciplinary action or termination. Records prove that your version of the story is accurate. What should you record? Every major employment decision or event for each employee—including evaluations, disciplinary warnings, and reasons for firing—should be documented. They'll help you prove "cause" for the firing as well as establish that you didn't terminate the employee in retaliation for anything or carry out the termination in violation of any laws.

A recent employment discrimination case in Arizona underscores the need for managers to carefully document employee reviews, complaints, and even conversations about performance issues that arise. There, the employee of a property management company sued the company and the association for which it worked under the ADA

after it fired her for not being able to spend a set minimum number of hours in its office.

For the first two years of her employment, the employee made necessary visits to the community where she worked and met with the association's board of directors when asked to, but—with permission from her supervisor—did the majority of her paperwork at home to accommodate a gastrointestinal condition that causes debilitating episodes that would be problematic in an office setting. During the time that the employee worked primarily from her home, she never revealed the specific medical condition to her supervisor, although he was aware that she had one.

After the supervisor allegedly received complaints about the lack of time the employee was personally available, he spoke with her several times to let her know about the complaints about her unavailability and that she needed to spend more time in the office. The management company then announced that all employees would have to spend a minimum number of hours per day in the office. After she failed to meet the requirement, the employee received a verbal warning. She was later fired, but the termination was rescinded when the employee revealed that telecommuting was necessary because of her specific medical condition and provided a letter from her doctor.

The employee then submitted a reasonable accommodation request form to her supervisor, stating that she has an existing medical condition that requires a reasonable accommodation for her health—the availability to telecommute from home with a customized schedule as practiced for the past

several years. But she was told that her old position wasn't available anymore and a new position necessitated her being in the office for the same required number of hours that she hadn't been able to meet previously. The employee sued the management company and the association and won.

The case came down to documentation. The employee provided written proof that she had “direct and frequent” contact with necessary parties and that they didn't voice complaints to her about her being unavailable. She also had a doctor's letter stating that she had an existing medical condition that prevents her only from committing to precise daily business or working hours, but that it doesn't prevent or restrain her from successfully performing and accomplishing the essential functions of the existing job responsibilities as described as she had in the past several years, which includes attendance to board meetings or office meetings and daily or weekly field inspections.

For its part, the management company had no written record of any complaints, the supervisor's discussions with the employee, or the warning. While the management company stated that the employee's restriction to 10 hours of office work per week was “inconsistent with the essential function of her position,” it had no proof that the job actually required her to be in the office for longer than that period of time to successfully perform.

The trial court said that the management company and association couldn't prove any of their claims. It noted that they had previously agreed, in writing, that during the time the employee had

been permitted to work part-time from home she: never took a full day off work or missed a meeting; worked 40 hours to 60 hours per week; never missed a single board meeting for her property because of an episode; worked between one and four hours in the office every day; and sometimes worked in the office all day. The trial court also pointed out that the employee had “glowing” recommendation letters from people she had worked with. The trial court ruled in favor of the employee, determining that the management company and association had failed to accommodate her and had retaliated against her in violation of the ADA [*Bogers v. Rossmar & Graham Cmty. Assn. Mgmt.*, May 2012].

Pitfall #2: Flawed, inconsistent policies. An employee handbook is an invaluable tool for managing staff members. What you include in your employee manual or handbook will be community-specific. But inconsistent policies can lead to a lawsuit. That's because a court might side with a terminated employee who argues that he was fired for failing to follow a policy that was unclear or overlapped with or contradicted another rule. Inconsistencies might demonstrate to a court that you've unlawfully terminated an employee.

An employee handbook can also be helpful if you use it to lay out hard-and-fast rules that justify termination if they're broken. For example, if your employee handbook lists five offenses that require immediate dismissal, and your employee commits one or more of them, you'll have an easier time justifying a termination that's based on that objective, not subjective, criteria.

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Four Pitfalls (continued from p. 3)

Remember that once you adopt policies, you *must* follow them. If you don't apply the rules uniformly and don't hold all of your staff to the same standards of performance and conduct, it'll send a mixed message that can lead to resentment from employees who are held to the rules when others are allowed to bend them. A terminated or disciplined employee has a good chance of winning his lawsuit if he can prove that you treat employees differently even though they are in the same situation.

Pitfall #3: Irregular or no performance evaluations. In addition to the consistency that an

employee handbook provides for your staff, a regular performance evaluation schedule can keep employees on track and let them know before it's too late whether they need to change their behavior. Most important, a performance evaluation is the best proof that you acted reasonably when terminating an employee. For example, if a performance evaluation reflects that an employee was warned ahead of time to do or refrain from doing something at work or that the employee repeatedly broke rules, you'll be able to more easily justify firing him. Demonstrating a pattern of violations helps you avoid an employee's claim that the firing was arbitrary.

Performance evaluations also put a poor performer on notice

and give him a chance to improve, possibly turning him into a valued worker, which saves you time and money because you won't have to go through a hiring process to replace him. An effective evaluation system can also help you reward good employees. Like handbook rules being consistently enforced, regular performance evaluations can give employees the feeling that they're being treated fairly.

In addition to performance evaluations, you should adopt an open-door policy that allows employees to talk to you about workplace problems—either that they are experiencing or that they are generally concerned about—early on. If you find and address a problem immediately, it won't get even close to the litigation stage.

Pitfall #4: Neglecting complaints. Once an employment problem comes to your attention, 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.

MODEL LETTER

Describe Grounds for Firing in Written Letter

If you must terminate an employee, make sure that you send him a termination letter and keep a copy of it for your files with any other documentation you have regarding the employee's performance, such as warnings that you've given. Remember to include the cause for dismissal in the letter. Ask your association's attorney about adapting this letter for use at your community.

[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

Use Letter to Document Termination, Satisfy Notice

If you ultimately must terminate the employee, remember to send him a written termination letter describing the misconduct that resulted in the firing. A termination letter is also useful for satisfying any written notice requirements. Your letter, like our Model Letter, should give an overall description of the employee's

violations [Letter, par. 1]. It also should describe specifically the most recent incident that led to the firing [Letter, par. 2]. If the employee admitted to any wrongdoing, make sure to document that

in the letter as well [Letter, par. 2]. Make sure to keep a copy of the letter along with other documentation you have for the employee in your files.

Insider Source

David J. Byrne, Esq.: Herrick, Feinstein LLP, 210 Carnegie Center, Princeton, NJ 08540; www.herrick.com.

RECENT COURT RULINGS

► Owner Must Pay Assessments Required by PUD Covenants

Facts: A homeowner in a planned unit development (PUD) refused to pay the required assessments to the PUD. The owner sued the PUD seeking relief from the imposition of dues, fines, and liens filed by the PUD against her property and seeking damages for slander. The PUD sued the owner for unpaid assessments. A district court found that the PUD had the authority to impose assessments against the owner's property and determined the exact amount owed. The owner appealed.

Decision: The appeals court upheld the lower court's decision.

Reasoning: The appeals court pointed out that the owner's warranty deed plainly stated in its legal description that her property was within the PUD, and that the property was subject to covenants. The amended declaration for the PUD was recorded, meaning that the owner was "charged with constructive notice of its contents, including provisions imposing covenants running with her property," said the appeals court.

The owner's obligations to the PUD were imposed by the covenants running with the land, and she was bound by the amended declaration's relevant provisions by the purchase of her property within the development, the appeals court concluded. Also, because the PUD was the prevailing party in the lawsuit, it was entitled to costs and disbursements.

■ *Wheeler v. Southport Seven Planned Unit Development*, September 2012

► Board's Enforcement Actions Within Scope of Its Authority

Facts: A unit owner sued the association, claiming that it had abused its power by amending and enforcing the rules and regulations concerning the leasing of units, parking, and pet ownership, and authorizing the assessment of late fees for unpaid common

area charges. The owner claimed that, as a result, he shouldn't have to pay late fees for his unpaid common area charges. He asked a trial court for a judgment in his favor without a trial, but the court refused to grant the request, instead declaring that the fees and fines are not null and void and ordering him to pay the past-due charges. The owner appealed.

Decision: A New York appeals court upheld the decision of the lower court in favor of the association.

Reasoning: The appeals court found that the association established that the board's actions in amending and enforcing the rules and regulations concerning the leasing of units, parking, and pet ownership were within the scope of its authority, and done "in good faith and in furtherance of the condominium's legitimate interests," and that the bylaws authorized the assessment of late fees for unpaid common area charges.

The appeals court noted that in cases where it has to review a board's actions, absent claims of fraud, self-dealing, unconscionability, or other misconduct, the court must use the "business judgment rule." That is, the appeals court had to limit its inquiry to whether the action being complained about was: (1) authorized; and (2) taken in good faith and in furtherance of the legitimate interests of the condominium.

The owner failed to show that the board's exercise of authority wasn't legitimate, or was fraudulent or self-dealing. Under the bylaws, the board has broad authority to collect common charges and expenses from the unit owners, to adopt and amend reasonable rules and regulations concerning the use of the units and the common elements, and to levy fines for violations of the rules and regulations, noted the appeals court. Moreover, the bylaws contain restrictions on the leasing of units, said the appeals court.

Because the association established that the board's actions in amending and enforcing the rules and regulations at issue in the case were within the

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Recent Court Rulings (continued from p. 5)

scope of its authority, and done in good faith and in furtherance of the condominium's legitimate interests, the appeals court upheld the decision of the lower court in its favor. Further, the association demonstrated that the bylaws authorized the assessment of late fees for unpaid common area charges, so the appeals court sent the case back to the lower court for a declaration that the fees and fines are not null and void, as the owner had asserted.

■ *Cave v. Riverbend Homeowners Assn., Inc.*, October 2012

➤ Association Not Liable for Unforeseen Violence

Facts: The owner of a home in a gated community was injured during a home invasion. The owner sued the association, which managed, maintained, and controlled the community. She alleged, among other things, that the association's negligence in failing to maintain adequate security at the two entrance gates of the community was the proximate—that is, direct—cause of her injuries. The association asked a trial court for a judgment in its favor without a trial. The trial court granted the request, and the owner appealed.

Decision: A New York appeals court upheld the lower court's ruling in favor of the association.

Reasoning: The appeals court noted that, generally, owners of residential developments have a common-

law duty to take minimal precautions to protect tenants from foreseeable harm—including a third party's foreseeable criminal conduct, and that the residential development owner has a duty to minimize the foreseeable danger from criminal acts when past experience alerts it to the likelihood of criminal conduct on the part of third parties.

Here, the association established that it was entitled to a judgment in its favor without a trial because it provided evidence that entry into the community through either of its two entrances required use of a magnetic key card system for which only owners or their tenants received cards, owners were issued distinct community identification cards, security cameras recorded the entrances by non-owners and non-tenants, the community was patrolled by local police officers, and the entry of non-owners and non-tenants was controlled by officers who demanded identification from visitors and only permitted them entry if the officers had previously received authorization from an owner or tenant of the community.

Moreover, the association showed that it had memos directing its police officers to bar entry to the attacker, as well as a photograph of the attacker, posted in the security booths located at both gated entrances to the community. Significantly, the attacker's name wasn't on the call-in log sheet for the day of the attack, and no officer manning a patrol booth that day had seen him enter the community by any normal, foreseeable means.

■ *Diaz v. Sea Gate Assn., Inc.*, September 2012

Repairs & Maintenance (continued from p. 1)

this checklist of items that your inspector should examine and things he should look for during such an inspection.

Inspect Roof Before Winter

Having a roof inspection before the harsh winter weather hits is particularly important because an inspection will:

- Help you identify potential problems before winter weather conditions make them actual problems;

- Allow you to address existing problems before conditions such as snow and ice make them worse and more difficult to repair;

- Save you money in the short term because it's always cheaper to repair and maintain your roof than to rebuild or replace it—and it's even more expensive to have roof work done during winter; and

- Save you money in the long-term by extending the life of your roof.

Fall Roof Inspection Checklist

Here's a checklist of seven items your inspector should examine and what he should look for during a roof inspection:

- Active leaks.** Your inspector should look for any leaks in your roof, as well as the sources of these leaks. Locating the sources may be difficult, but it's necessary and often the most complex part of the inspection. A leak's location inside the building may not corre-

late with the location of the source of the leak on the roof. And if you repair the leak but not the source, new leaks will develop.

❑ **Field membrane.** The field membrane is the surface of covering of your roof. When inspecting the field membrane, your inspector should look for splits, ridges, eroded areas, punctures, blisters, or separating seams. Although these conditions may not be a problem now, they could quickly become one during winter.

❑ **Perimeter flashings.** Flashings, which are usually made of sheet metal, are designed to waterproof the roof. Perimeter flashings, which tie in the roof system to the building, are particularly vulnerable to damage from material shrinkage and movement of building components. If not properly attached, they can be dislodged by strong winds. Your inspector should check to make sure the perimeter flashings are sealed and properly secured.

❑ **Penetration flashings.** Penetration flashings are used in areas

where the roof is penetrated by things such as skylights, ducts, and HVAC equipment. As with perimeter flashings, your inspector should check to make sure these are sealed and properly secured.

❑ **Roof-related sheet metal.** Your inspector should check other pieces of roof-related sheet metal, such as metal coping caps, counter-flashing, expansion joint covers, perimeter fascia metal, and termination bars. The inspector should check to see whether the sheet metal has loose fasteners, an inadequate number of fasteners, or poorly maintained caulking at its edges. Sheet metal that has such conditions may develop leaks or get damaged by the wind. Also, the inspector should make sure that the sheet metal joints are properly sealed and that the sheet metal is secured to the roof so that strong winds can't damage it.

❑ **Drainage.** Poor drainage is a common problem on low-sloped roofs. If roof drainage devices—including drains, scuppers, gutters, and downspouts—are clogged,

water can accumulate on the roof and create “ponding.” This can lead to leaks and deterioration of the roof system. And if the ponding is severe, in extreme cases your roof can collapse. It's important that drainage devices are free of debris and other obstructions. So when checking your roof's drains, your inspector should make sure that all drains are open and allow water to exit, and that all gutters and downspouts are secure and free of debris. And if you're in a region that gets a lot of snow, consider putting a red pole near each drain so that your staff members can easily locate them to clear them after a snowfall.

❑ **Adjacent conditions.** Your inspector should check things such as ductwork, skylights, wall penetrations, seals to doors on the roof, and HVAC equipment. Leaks attributed to the roof are often actually due to defects in these items. And remember to have your roof reinspected after any major weather event, such as a blizzard.

DOS & DON'TS

✓ **Set Annual Budget According to Governing Documents' Requirements**

Don't overlook the requirements of your declaration and bylaws when you set your annual budget. If you do, you might not be able to enforce the assessments you charge your members. Example: Your association sues a member to collect unpaid assessments. The member says that the declaration requires the board to adopt the association's budget and to give each member 14 days' advance notice of the meeting at which the budget is going to be discussed. The member says that, instead, you—not the board—set the budget; the member got no notice of any meeting; no notice of a meeting was posted on the property;

and no meeting was held. A court is likely to rule that because the association didn't comply with its own declaration, it can't collect unpaid assessments from the member.

✓ **Draft Inclusive Pet Bylaw**

If your community allows only certain kinds of pets, write a bylaw that states which types of animals are welcome, and say that “all other types” of animals are forbidden. If you try to specify the animals that aren't allowed, you're bound to leave something out. Worse, if you allow pets and think that means you don't have to write a pet bylaw at all, you

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Dos & Don'ts (continued from p. 7)

could be in a for a big surprise. Let's say you have no pet policy and state law doesn't prohibit people from owning exotic cats, like cougars. If a member brings an exotic cat to live with him, you'd have to try to force him to get rid of the animal by claiming that he's violating the general nuisance provision of the association's governing documents. But if a court rules that keeping an exotic cat doesn't violate those provisions, there's nothing you can do.

✓ *Flag Members' Delinquent Accounts*

It can be difficult for the person who actually receives members' checks to know which are from delinquent members and must, therefore, be inspected more closely. This is even more problematic for associations whose members send their payments directly to a lockbox. One way to resolve this is to flag the account. This means that the association makes a notation on delinquent members' accounts that only checks for the full amount due should be cashed and that all other checks should be turned over to you.

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