Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

AUGUST 2017

FEATURE

It's important to define "harassing behavior" and learn how to deal with bullying members.

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PRODUCED IN CONSULTATION WITH

community ASSOCIATIONS INSTITUTE

Protect Board Members from Harassment

Because the decisions that a board makes very rarely please everyone, you could find yourself having to prevent unacceptable behavior toward board members. A board may have just approved a large special assessment to finance an improvement, and some owners may not be pleased with how the association's finances are being handled. Most displeased owners may focus their energies on building consensus and replacing current board members. But there are some members whose tempers will flare and who will handle their displeasure with the board in completely inappropriate ways in the short term.

Common harassing behaviors include shouting obscenities at the board during the meeting and possibly continuing to yell insults at the board president after the meeting ends. The member may barrage the board members with emails, and continue with verbal assaults for months after a decision has been made.

The question of whether this member's behavior constitutes harassment is not entirely clear-cut. It depends in part on the circumstances and the personalities of the individuals involved. Many board members would almost certainly feel harassed by this aggressive behavior, while others might find it merely annoying and brush it off. It greatly benefits community association managers to define harassing behavior and learn how to deal with bullying members.

Defining Harassing Behavior

Defining the point at which annoying behavior becomes harassing or abusive isn't easy, but it is important because before associations can deal with harassing behavior, they first have to define it, and then make it clear that harassing behavior, however defined, will not be tolerated.

Most likely, your declaration gives each member the right to "quiet enjoyment" of her unit. This legal term means that she has the right to live in and enjoy her unit without being disturbed, harassed, or threatened by the property manager, an employee, or other members

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or residents. Most declarations ban members and other residents from making excessive noise or engaging in any other behavior that disrupts the quiet enjoyment of others. But it helps to have a "zero tolerance" clause to fall back on, that specifically deals with abusive, harassing behavior.

Your association can add a model clause like ours to its community declaration and/or association bylaws. The clause makes it clear that no one may engage in any harassing or abusive behavior or any intimidation or aggression—either verbal or physical—directed at any member or other resident. It's also smart to ban abusive behavior directed toward guests, occupants, management, employees, and vendors. Ask your attorney about adapting this language for your use:

Model Language

Members and other Residents shall not engage in any abusive or harassing behavior, either verbal or physical, or any form of intimidation or aggression directed at other members, residents, guests, occupants, invitees, or directed at management, its agents, its employees, or vendors.

The language still leaves room for debate about the point at which annoying behavior becomes abusive, or a strong expression of opinion becomes intimidating, but it is a place to start and a basis for taking action against members who cross the line.

Meet with Harassing Member

In most situations, the manager should meet with the abusive member and speak to him about his behavior. The exception is if the abusive member has threatened

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COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)] is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

Volume 17, Issue 1

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violence or has engaged in violence already. If this is the case, you should call the police. Write down the date and time of the meeting with the abusive member.

All parties involved should consider scheduling a mediation meeting. Mediating the hostility in a more objective environment may be the most effective thing to do to restore harmony to your community. Harassing situations almost always develop because owners have become frustrated about something such as an unsolved, slowly solved, or an unsatisfactorily solved problem.

Other causes include a failure of the board or the manager to respond to the owner's concern or the owner's perception that his concern has not been acknowledged or taken seriously. In these cases, the manager should start the meeting by listening. Sometimes angry people simply need an opportunity to explain a problem or vent their frustration. And at all times, the manager should remain professional. If the harassing member starts shouting, the manager should not shout back. If the manager mirrors the abusive behavior, the situation will escalate.

Draft Warning Letter

If after the meeting, nothing was resolved and the harassment continues, the association's attorney should write a letter to the offending member describing the behavior, noting that it violates the association's rules, and stating that the individual will be subject to fines or other specified sanctions and possibly legal action if the behavior doesn't stop.

The letter should go beyond telling an owner that his behavior is unacceptable. It should also suggest an alternative means of dealing with the underlying problem.

If you are dealing with someone who just got carried away by the emotion of the moment or the frustration of an issue and overreacted, a letter threatening sanctions and suggesting another way the owner can deal with the problem is usually all that's required. Remember that the ability to fine or suspend privileges varies from state to state and may also be regulated by your governing documents. So be sure to check with your attorney before threatening to take these actions in a letter.

Restraining Order Can Help

You can do more, if it's necessary. Consider seeking a civil restraining order in court, the details of which will depend on the nature of the offending actions. A board member who is on the receiving end of endless, abusive telephone calls or who is regularly assaulted verbally in public by an angry owner might seek an order prohibiting this owner from sending him emails and/or ordering him to remain a specified distance away.

Courts do not issue restraining orders lightly. In most cases, the harassing actions must be part of a pattern rather than isolated incidents, and the targeted individual must feel threatened by the actions. If the board members are dealing with actual physical threats, call the police immediately. Even if you don't think the threats are real, having the police respond is a reasonable precaution. Having

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a police report on file will also strengthen your hand if you eventually seek a civil restraining order against this individual.

Is Using Funds Appropriate?

Some members may question whether it is appropriate for individual board members who are being harassed to use association funds to fight back by having the association's attorney write letters to the offending owners or represent the board members in civil proceedings. This is an appropriate use of association funds because the board members are being harassed because of their actions as board members and the harassing behavior is preventing them from doing the job for which they were elected, which makes the harassment an association issue and a legitimate association expense.

Also, it is important to note that seeking a restraining order is not a hugely expensive undertaking. These cases are usually heard quickly and do not require extensive preparation or court time. ♦

RISK MANAGEMENT

Avoid Fair Housing Trouble Over Assistance Animals

Pets can enrich the lives of their owners, and many associations understand this and do allow members to have pets. However, dealing with pets in condominium communities requires balancing the freedoms pet-owning members enjoy on their privately owned property with the rights neighboring members have to enjoy their property. Some communities avoid this balancing act by banning pets entirely; others impose strict pet size and quantity limitations on members.

Regardless of whether your community bans pets, to comply with the Fair Housing Act (FHA), you may have to let a disabled member in your condo community keep an assistance animal in his unit. But what happens when an assistance animal becomes a nuisance to other members? And if you allow pets in your community, which of your pet rules, if any, can you apply to assistance animals? Here are the answers that can help you comply with the FHA.

What You Need to Know About Assistance Animals

An assistance animal provides assistance to a person with a disability. Dogs are the most common assistance animals, but other domesticated species, such as cats or birds, can also be assistance animals. The benefits of seeing-eye dogs or hearing dogs for people with physical disabilities are obvious, as these animals are trained to perform simple tasks such as alerting owners to oncoming traffic or retrieving dropped items.

Also, members with psychiatric disabilities can benefit significantly from "emotional support" or "companion" animals. Courts have interpreted—and

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guidelines from the Department of Housing and Urban Development (HUD) have spelled out—that animals used for these supports qualify as a type of service animal. Emotional support animals have been proven effective at alleviating symptoms of psychiatric disabilities, such as depression and post-traumatic stress disorder, by providing therapeutic nurture and support.

An assistance animal can be any breed or size; communities can't place limitations on their size or weight. This is because an assistance animal is not a pet; rather, it is considered to be more of an assistive aid, like a wheelchair. The law generally requires a community to make an exception to its "no-pet" policy so that a member with a disability can fully use and enjoy his unit.

Member Requests for Assistance Animals

The FHA protects the right of people with disabilities to keep assistance animals, even when a community's rules explicitly prohibit pets or impose strict limitations on pets. Sometimes the need for an assistance animal is obvious, such as a blind person's need for a guide dog.

But if the disability or need for an assistance animal isn't clear, an association may ask a member to provide written verification from a doctor or other medical professional who, in his professional capacity, has knowledge about the member's disability and the need for "reasonable accommodation"—that is, permission to keep an assistance animal despite any association rules banning pets. For an example of what information constitutes verification, see our *Model Letter: Verify Member's Need for Assistance Animal*.

Courts have consistently ruled that a member requesting an emotional support animal as a reasonable accommodation must demonstrate a relationship between his or her ability to function and the companionship of the animal. However, an association may not ask for details about the member's disability or require medical records.

Also, an association can't require the assistance animals to be certified or have specific training. Assistance animals are often individually trained to assist the disabled member, and the member may train his own assistance animal. Also, there is no national standard for evaluating the training or performance of any type of assistance animal, including guide dogs.

Rules for Avoiding Fair Housing Trouble

Rule #1: Set reasonable rules regarding assistance animals. Although you generally can't apply your community's pet rules to assistance animals, you can set reasonable rules specific to assistance animals. And you should enforce such rules. For example, you can require disabled members to take proper care of their assistance animals, including walking them in designated areas only, assuming they can have access to those areas.

But if it's not reasonable for a particular member to comply with your community's assistance animal rules, you must make an exception to accommodate the member. For example, a member who is sight-impaired may not be able to scoop

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his dog's waste. In such a situation, you may have to work with the member to seek a solution that eliminates the need for the member to scoop the dog's waste, while addressing your need to maintain the community's sanitary conditions.

Rule #2: Enforce state, local health and safety laws. Fair housing law lets you enforce state and local health and safety laws as they apply to owners of assistance animals, such as requiring animals to be inoculated and spayed or neutered. It also lets you enforce local leash laws, scooping laws, and noise codes, if applicable in your locality. It would be unreasonable to require you to break the law to accommodate an assistance animal.

Some states and localities forbid certain species or breeds of animals to live in residential buildings. Since 1999, ferrets have been illegal in New York City residential buildings and are illegal to keep as pets in California. In Maryland, Pit Bull dogs can be banned from residential buildings.

Rule #3: Treat all assistance animals the same. Treat all assistance animals in your community the same, unless doing so is unreasonable. Owners of tradition-

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MODEL LETTER

Verify Member's Need for Assistance Animal

Sometimes, a member's disability isn't obvious—for example, a mental disability. In that case, an association is entitled to ask for supporting materials that document the member's need for an assistance animal such as an emotional support animal. The letter below is an example of the kind of information you need from a professional who's familiar with the member's disability before you'll grant the member's request to keep the assistance animal in a no-pet community. You can give the letter below to the member, who can then give it to a professional who's familiar with his disability to use as a guideline in drafting his own letter. It's important to note that the letter need not provide specifics about the member's disability.

[*Name of professional (e.g., therapist, physician, psychiatrist, rehabilitation counselor) and professional's address*]

[*Insert date*]

Dear Association:

[*Member's Name*] is my patient, and has been under my care since [*insert date*]. I am intimately familiar with his history and with the functional limitations imposed by his disability. He meets the definition of disability under the Fair Housing Act. Because of mental illness, [*Member's Name*] has certain limitations regarding [*insert condition, e.g., social interaction/coping with stress/anxiety, etc., but no specifics about disability*]. To help alleviate these difficulties, to enhance his ability to live independently, and to fully use and enjoy his unit, I am prescribing an emotional support animal that will assist [*Member's Name*] in coping with his disability. I am familiar with the therapeutic benefits of assistance animals for people with disabilities such as that experienced by [*Member's Name*]. Upon request, I will share citations to relevant studies, and would be happy to answer other questions you may have concerning my recommendation that [*Member's Name*] have an emotional support animal. Should you have additional questions, please do not hesitate to contact me at [*insert tel. #*].

Sincerely,
[*Signed by the professional, e.g., therapist, physician, psychiatrist, rehabilitation counselor*]

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al service animals don't have more rights than do owners of emotional support animals. Fair housing laws make no distinction among assistance animals.

If, on the other hand, it's unreasonable to treat all service animals the same, you may not have to. Fair housing law entitles only disabled members to reasonable accommodations. But these distinctions are highly fact-specific, so if you think it's unreasonable to treat a particular member's assistance animal the same way you treat another's, get advice from your community's attorney before deciding how to handle it.

Rule #4: Charge member for damage assistance animal causes to common areas. You can hold disabled members financially responsible for any damage, beyond reasonable wear and tear, that their assistance animals cause to common areas. For instance, if a member's emotional support dog chewed up the carpeting in the clubhouse, and you must replace the carpeting, you can charge the member for that damage.

However, if your community allows pets under limited circumstances, you must be consistent and also hold nondisabled members financially responsible for any damage their pets cause. Therefore, if a nondisabled member's pet destroys the clubhouse carpeting, you should charge that member for the damage, just as you would charge a disabled member.

Rule #5: Ban assistance animals that create undue financial or administrative burden. Fair housing law doesn't require you to make unreasonable accommodations to members' disabilities. If a member's assistance animal causes your association undue financial or administrative hardship by continually destroying your common areas, you need not allow the animal to stay. Because these are delicate, fact-specific situations, it's best to speak with your association's attorney before taking any action.

Rule #6: Ban assistance animal that hurts someone. You don't have to make accommodations that pose a direct threat to members in the community. For example, if a disabled member's seizure-response dog bites someone, you can tell the member to get rid of the dog. If the member refuses, you can take legal action to have the dog removed.

Rule #7: Don't require assistance animals to be identified as such. Don't require assistance animals to wear their licenses, a special identification tag, or the like, as proof of their status as assistance animals. Fair housing seeks to eradicate discrimination in housing and to ensure that disabled members are treated equally with nondisabled members. Having an assistance animal's status across it could embarrass the member. You can, however, require all animals in the community, including assistance animals, to wear appropriate identification or inoculation tags, if that is required by state or local law. ♦

Further Information: For more on the legal, regulatory, and practical issues presented by resident requests for assistance animals, you can download the recording of Vendome's one-hour webinar, *"Assistance Animals: What Housing Providers Need to Know," here.*

Q&A

Determining 'Special Employee' Status for Association Employee's Recovery

Q I manage a community association through a property management company. The association itself has some employees—namely, a superintendent for repairs—but I am the person who controls his workload. The employee had an accident on the property and filed a workers' compensation claim. He's also trying to sue the association and the management company for a second recovery. I was under the impression that there couldn't be a double recovery for an injury in this type of case. Is it possible that the employee could prevail if he files his lawsuit?

A That depends on what type of employee he is. If he's deemed a "special employee" of the property management company, then he would be limited to whatever he has gotten from workers' comp. A recent New Jersey case dealt with the issue of special employees versus typical employees, with the appeals court ruling in favor of the association. The court reviewed the factors that determine a special employee and explained why that's an important distinction.

Relevant Case Background

In that case, an employee of a condominium association claimed that he tripped and fell on a broken step while walking down an exterior staircase at the condo complex. While he had an employment contract with the association, the association's property manager—who worked for an independent property management company hired by the association—delegated many of his tasks. The employment contract provided that "all assignments of work related duties will be through the property management company," and the employee could not "delegate, subcontract or transfer any part of his job without the authorization of the property manager."

At one point, the property manager recommended to the board of directors of the association that the employee should be terminated for his inappropriate behavior to a resident in addition to other infractions. The board agreed and voted for the employee to be discharged. The property manager met with the employee at the property management company's office to advise him of the board's decision and his termination.

As a result of the injuries sustained in his fall, the employee filed a workers' compensation action and received benefits. He subsequently sued the association seeking compensation for his injuries. The association asked a trial court for a judgment in its favor without a trial. The association argued that the employee had the relationship of a "special employee" with the association and property management company and, therefore, his third-party claim was barred

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under the workers' compensation statute. The trial court found that there was an actual contract between the employee and the association and an "implied contract" between the property management company and the employee. It concluded that the company had the right to control and did control the employee's job duties of the inspection, repair, and maintenance of the property. The court was satisfied that there was sufficient evidence presented to find that a special employment relationship existed. It ruled in favor of the association. The employee appealed.

Employment Status Factors Weighed

A New Jersey appeals court upheld the trial court's decision. The Workers' Compensation Act provides an employee with an "exclusive remedy" against the employer for injuries "arising out of and in the course of the employment," said the appeals court. In exchange for receiving workers' compensation benefits, the employee surrenders common law tort remedies against his or her employer and co-employees, except for intentional wrongs, it explained.

However, in a situation where an employee of one entity is borrowed by another employer—here, the association's employee being borrowed by the property management company—that employee may prevail in a common law action against the borrowing employer depending on whether the employer is determined to be a "special employer." If the borrowing employer is determined to be a special employer, then the borrowed employee is precluded from bringing an action against the special employer. A special employment relationship exists where: (1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work.

Courts also use two additional factors in determining special employment: Whether the special employer pays the lent employee's wages, and has the power to hire, discharge, or recall the employee. The most significant factor is "whether the special employer had the right to control the special employee."

On appeal, the employee contended that the trial judge erred in finding a special employment relationship. Specifically, the employee argued that he did not have an implied contract with the property management company, the work he performed at the association was not the same character as the business of the property management company, and the property management company did not have the right to control the details of his work.

The appeals court began with a determination of whether there was an implied contract between the employee and the property management company. An employment contract "may be express or implied," and a contract for hire does "not require formality," said the appeals court. While agreement to the offer of employment "must be manifested in order to be legally effective, it need not be expressed in words." The assent can be "implied from conduct without words." In determining whether an implied contract exists in the context of a special

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employment relationship, the focus is on the relationship between employee and each of his potential employers, the appeals court stressed.

Here, although the employee's employment contract stated he was an employee of the association, it further advised that all of his work assignments would be through the management company. If the employee was going to be away from the property for an extended period, he had to advise the management company.

After the property management company became the property manager, the employee received assignments from the property manager in addition to his everyday duties at the complex. The property manager was the conduit between an owner who needed something done in his unit and the employee. The employee not only picked up his paycheck at property management company offices, it was there that he was fired. The appeals court agreed with the lower court's finding that there was an implied contract between the employee and the property management company.

The appeals court didn't agree with the employee's assertion that his duties were not of the same character of the work of the property management company. Under its contract with the association, the property management company was required to "manage, operate and maintain the Property in an efficient and satisfactory manner in accordance with standard management practices." In doing so, the property management company could "employ adequate personnel to exclusively perform services at the Property, including but not limited to janitorial, security and maintenance functions." The general repairs and maintenance of the property fell under the scope of the property management company's duties as property manager. The employee described his job duties as superintendent to include the inspection, maintenance, and cleaning of the property as well as remedying and repairing any complaints in residents' units communicated to him by the property manager. The employee was described by the property manager as the "eyes and ears" of the property management company at the property. The employee's role, in performing the repairs and maintenance of the property, served to complete and satisfy a large component of the property management company's duties to the association.

The third factor of the special employment test, described as "the most significant factor," is whether the special employer had the right to control the special employee. The property manager, along with several board members, testified that the property manager was the employee's supervisor who provided his work assignments. All work requested by any homeowner was conveyed to employee by the property manager; the employee had been instructed not to have any direct contact with the residents. In addition, the employee testified that when the property manager came to the property he would instruct the employee to do various tasks with which he would comply. The board members considered the property manager to be the employee's supervisor. One member recalled a meeting in which the board directed the employee that he was to follow all instructions given to him from the property manager. The appeals court decided that it was satisfied there was sufficient evidence presented to support the trial

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judge's finding that the property management company had the right to and did control the employee.

The employee was not on the property management company's payroll, but the appeals court gave little weight to this factor and stated that that piece of information wasn't necessary to determine if a special relationship exists. The appeals court disagreed, however, with the employee's argument that the property management company did not have the power to hire or fire him. After multiple instances of inappropriate behavior for which the employee received letters of reprimand from the property manager, a recommendation was made by the property manager to the board that the employee should be terminated. In a "joint decision," the board agreed.

Because the appeals court was satisfied that the trial judge properly weighed the relevant factors and determined that the employee was a special employee of the property management company, the employee was barred under the workers' compensation statute from bringing a third-party claim against the property management company [Innarella v. Wedgewood Condo. Assn., June 2017]. ♦