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HOA COMMUNICATOR

FAIR HOUSING FOCUS:

"AN EYE FOR AN EYE" CAN BLIND YOU

RETALIATION: GROWING TREND IN FAIR HOUSING CLAIMS

Most civil rights statutes contain provisions designed to prevent retaliation against anyone who has exercised a statutory right to stop alleged discrimination. Federal and state Fair Housing laws provide a basis for retaliation claims. Retaliation claims are separate and in addition to underlying claims of discrimination or a denial of a reasonable accommodation or modification. Fair Housing experts, who track jury verdicts and administrative rulings, say that retaliation is a fast growing trend in Fair Housing liability. In employment cases, some of the largest jury verdicts for plaintiffs are based on retaliation claims. This segment of the Fair Housing Focus is designed to educate Associations and their managers on what constitutes retaliation and how to watch for and avoid liability for retaliation claims.

For those readers who did not know they come from a very progressive state, Colorado has been on the forefront of civil rights' legislation for years. As we pointed out in our last segment of the Fair Housing Focus, Colorado passed the nation's first Fair Housing laws in what is known as the Colorado Anti-Discrimination Act ("CADA"). CADA protects against housing retaliation. Under the federal Fair Housing Act Amended, at 42 United States Code § 3617 ("FHAA"), retaliation is defined as threats, coercion, intimidation, or interference with housing that is designed as retribution for someone exercising his her or her rights under the FHAA. Retaliation is a simple concept. It means getting back at someone.

The Components of a Retaliation Claim

Federal case law has taken the above retaliation definition and clarified what the requirements of a claim are. The legal elements of what actually constitutes retaliation come from employment law. They are as follows:

(1) The homeowner, resident, purchaser, etc. exercised a protected right under the relevant civil rights' statute;

(2) The Association and/or its management company was aware of the exercise of that right;

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WHAT IS THE STATUTE OF LIMITATIONS FOR COLLECTIONS ON ASSESSMENTS?

Prior to a September decision by the Colorado Court of Appeals, the answer to how long you have to sue a homeowner for past due assessments would have been six years. Colorado Revised Statute allows a six-year statute of limitations on all determinable amounts. So what's the problem, when there are clearly six years to collect? The recovery of amounts for special assessments and fines are the problem.

The recent case is actually about medical debt. The hospital argued that the amount of the debt was "determinable," so they had six-years to sue the patient. The court said that to be determinable the amount due must be "capable of ascertainment by reference to an agreement or by simple computation." The court decided that because the patient could not determine what the amount of the bill was going to be when they were in the hospital, the debt was under the three-year breach of contract statute of limitations, instead of six years.

By analogy, when a homeowner buys their home, the amount due for monthly assessments, except small increases along the way, is easily calculated. However, how can the homeowner calculate the amount due for special assessments and charges for fines when they purchase the home? If the association charges a special assessment every three years, **we could argue that the special assessment is determinable. However, by its nature, a special assessment is normally for common expenses that**

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3600 S. Yosemite Street Suite 828
Denver, CO 80237
Ph: 303-699-3484 Fax: 720-449-0160
www.htspc.com

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(3) The Association has taken some type of adverse housing action through coercion, intimidation, etc.; and

(4) There is a relationship (cause-and-effect) between the protected activity and the adverse housing action.

Some examples of adverse housing action in the homeowner association context are: levying fines, initiating collection actions, enforcing covenants, initiating an assessment lien foreclosure action, etc.

What is harder to define is the exercise of a protected right. The exercise of a protected right includes, the filing of a Fair Housing civil rights complaint with either the Department of Housing and Urban Development ("HUD") or the Colorado Civil Rights Division ("CCRD"), a Fair Housing claim in court, participating as a witness in a HUD or CCRD investigation or as a witness in court, or assisting someone in the preparation of a HUD or CCRD complaint. Simply complaining about discrimination or making a request for an accommodation or modification, based on a disability, can be the exercise of a protected right. In fact, general complaints or requests for accommodations are the basis for many retaliation claims. Believe it or not, a person claiming retaliation does not have to prove that he or she was actually discriminated against. He or she just has to prove that there was a good faith basis to believe there was discrimination.

In considering whether there is a close relationship between the protected activity and the adverse housing action, timing is key. The closer in time between the adverse action and the protected activity, the worse it looks for a housing provider. This is because courts and civil rights investigators draw the inference that such close timing proves a retaliatory motive. Consequently, it is crucial to know when someone has exercised a protected activity.

WHEN TO BE ON GUARD FOR POSSIBLE RETALIATION CLAIMS

An Association should be aware of potential retaliation issues when either a current or prospective homeowner, other resident, or some other person has exercised a protected Fair Housing right. This could mean that they filed a Fair Housing complaint with HUD or CCRD against the Association and/or the management company, filed a Fair Housing claim in court, complained to either the Board, a Board member, or the management company about a Fair Housing-related issue, or has made a request for a reasonable accommodation and/or modification. This last category is critical. All too often, housing providers get frustrated in dealing with accommodation and/or modification requests. It is important to watch your step in the actions you take after someone has exercised a protected right. Does that mean you cannot ever enforce your rules against someone who has exercised a protected right? Absolutely not. The key is to make sure you are careful in enforcing such rules and documenting the basis for enforcement. A heightened level of care is warranted.

HOW TO AVOID AND PROTECT AGAINST RETALIATION CLAIMS IN ENFORCING RULES

Before you enforce a rule against someone who has exercised a protected right, whether as a Board member or a community manager, you should ask the following questions:

✔ What is the rule we want to enforce against this individual?

✔ Have we documented carefully the problems we have had with this particular individual?

✔ Has our documentation been done contemporaneously with the problems?

✔ Would we take this action regardless of the prior protected activity?

✔ Have we enforced this particular rule evenhandedly and can we document this?

✔ Have we offered this individual a hearing or other opportunity to be heard and respond?

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If you have enforced the rule at hand fairly and documented it well, you should not be afraid of retaliation. The following scenario illustrates this point. Holly Homeowner purchases a home in a no-pet condominium community. Simply put, Holly is a difficult person to deal with. She is constantly complaining, disrupts board meetings, and is openly hostile towards her Board and management company. The Board is sick of her and it's understandable. One month ago, Holly asked that the Board make an exception to the no-pet policy and allow her a companion animal for a mental disability. After carefully evaluating the request and seeking information from her mental health care provider, the Board approves her accommodation request.

Currently, Holly has a handful of covenant violations the Board feels it must address. They are most upset that she has recently painted her front door bright pink. The normal enforcement tool is a warning letter and a series of fines. The fines are not imposed until after a hearing is offered. Can the Board enforce rule violations against Holly, given that she has exercised her Fair Housing rights by asking for a reasonable accommodation? The answer is the all-important lawyer cop-out answer: "it depends!" How the Board has handled other issues will answer this question.

If the Board can show that it is enforcing these same types of covenant violations against all other homeowners, then it has a legitimate, non-retaliatory reason for taking the enforcement action against Holly. If however, the Association has been lax in enforcing these types of violations, Holly may have the basis for a retaliation claim. If another homeowner has painted their door neon orange and the Association has not issued warning letters and/or fines to that homeowner,it may appear that Holly's retaliation claim is valid. If the Association has been consistent in enforcing the particular rule against other offenders, keeps proper documentation, and has offered Holly a hearing before issuing a fine, then the Association's issuance of the fine against Holly is not likely to be deemed retaliation. In fact, under those set of circumstances, we would green-light the Association enforcing the rules with a fine.

The key is to document the actions the Board takes consistently and thoroughly. If a particular homeowner or individual is a problem, document the problems as they arise, and not after the fact. Take it from a trial lawyer that has dealt with these issues in jury trials: documentation that is contemporaneous with the problem is better than some type of memo or other documentation that is done later and traces the problem back in time. People determine another's motivation based on circumstantial evidence. Documentation by the Association that shows a non-retaliatory motive is incredibly valuable in Court. Civil rights cases are about inferences. If the Association has documented issues with a problem homeowner or resident as the problem arises, the documentation will go a long way in demonstrating the Association's non-discriminatory, non-retaliatory motive, for enforcing its rules.

DO NOT CHANGE RULES TO DEAL WITH AN EXISTING PROBLEM

Changing rules in order to enforce against an individual who has caused problems or done something that bothers the Board of Directors, but who has exercised a protected right, can definitely create retaliation issues. A recent Georgia Court of Appeals case proves this. In (*Bailey v. Stonecrest Condominium Association, Inc.,)* the Georgia Court of åppeals overturned a decision about retaliation and decided a jury should decide whether an Association retaliated against an owner by passing a no-renting policy in retribution for the owner renting to an African American woman with a child. At issue was the Board of Directors' decision to ban all leasing after a proper vote based on its by-laws. The allegation was that the Board did not decide to pass the no-renter policy until after the plaintiff homeowner had rented to the African American tenant. The plaintiff homeowner claimed that it was retaliation to pass this measure after finding out that she had rented to a tenant in a protected class. In short, the retaliation allegation was that the measure was passed to interfere with her protected rights. While this decision did not decide whether this was retaliation, the decision made it a jury's role to determine

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whether it was retaliation. As stated above, juries do not like retaliation claims.

The key instruction we can glean from a case like *Stonecrest* is that a Board should not pass, change, or augment a rule at a time when it has an existing issue with a homeowner or other resident. It should be done after the resolution of such a problem. For example, if an Association has had unclear policies about disability issues such as Assistance Animals, it should not suddenly pass a policy or rule when dealing with an existing accommodation issue. Rather, if there is a need to change a policy, it should be done after making sure there are no pending issues, in order to show what the policy will be going forward. Instituting a policy while there is an issue with a current individual can appear to be interference with that person's federally protected rights under the Fair Housing Act.

PROTECTING BOARD MEMBERS AS VOLUNTEERS

Board members are volunteers. They do not sign up for the responsibility of helping govern a community in hopes of getting sued. As we frequently emphasize, Board members, under Colorado law, enjoy protection against liability for the vast majority of their decisions. Board members, as volunteers, are not legally liable for their individual decisions and actions unless such decisions and actions involve willful and wanton misconduct. What does this mean? It means what a court or jury says it does. Simply put, it is conduct that is in reckless disregard of a member's rights. Because retaliation involves intent to get back at someone for exercising a protected right, retaliation claims can be asserted against individual Board members. Retaliatory acts can equate to willful and wanton misconduct, in that a judge or jury could determine that the retaliation was done in reckless disregard for the homeowner's rights. Remember, retaliation involves proof of a motive to get back at someone.

As a result, each Board member involved in an adverse housing action should keep documentation about his or her role, and make sure that documentation is kept safe and can be produced. In the case above about Holly Homeowner, if a Board member voted to issue a fine, that Board member should keep documentation as to why he or she voted for such action, the documentation he or she reviewed, and the process. All Board members can protect each other against retaliation claims by asking the questions above, pertaining to whether they would take this action independently of any rights the homeowner or resident has exercised.

LET'S REVIEW

While retaliation claims and administrative actions against housing providers are on the rise, the same care and consistency that makes a strong Board will provide the documentation to defeat allegations of retaliation. Evenhanded enforcement of the community's rules, and good documentation concerning the same, protects the Association and the management company from so many allegations. Associations need to: (a) know what types of events can trigger allegations of retaliation; (b) document their reasons for taking enforcement action; and (c) make sure to treat everyone the same.

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are out of the ordinary. Don't forget that judges are unpredictable. If we have to go to trial on a collection case, denying an award for certain charges is the judge's prerogative.

We do not want clients to lose the ability to legally collect all charges legitimately added to a homeowner's ledger. This decision has not yet been published and may still be reversed by the Colorado Supreme Court. But to be on the safe side, we are currently recommending Associations use the three-year statute of limitations for collection of special assessments and fine charges. Make sure you get your collections out as soon as possible to avoid missing your window of opportunity.