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Donna D. Berger, Esq. Editor

## “YOU’RE FIRED”

### Employment Issues: What Every Association Needs to know

By: Jamie Goldberg, Esq.

In the age of the *Apprentice*, the words “you’re fired” have been given new meaning. As a contestant on the *Apprentice*, being fired does not mean that you will be applying for unemployment and worrying about how you will pay your bills and feed your family, it means you will be signing your next book deal and although you may not be working for Donald Trump, you will certainly have no trouble paying your next electric bill. In the real world, however, saying the words “you’re fired” is not quite as glamorous as when it is said by “the Donald” himself. This article is intended to give you a brief overview of some employment issues that may affect your association if you are considered an employer under the law and you are faced with the decision of whether to fire an employee.

It is important to understand that Florida is a right to work state and employment is considered “at-will.” This means, you can fire an employee for a good reason, a bad reason, or no reason at all, as long as you do not fire an employee for reasons which violate the law. For example, you can fire an employee for repeatedly violating policies and procedures or you can fire an employee because an employee has violated your trust. However, you cannot fire an employee because your employee is pregnant or because your employee is a minority. Such reasons violate both state and federal law and there are very real consequences for taking such actions.

Although most decisions to terminate an

employee are appropriate and made because the employee has violated the employer’s policies and procedures, there is no 100% guarantee that you, as an employer, can avoid being sued by an employee. Some of the most common lawsuits faced by associations are for violations of the Americans with Disabilities Act (“ADA”) and violations of Title VII of the Civil Rights Act of 1964. Also, lawsuits concerning non-compete agreements and worker’s compensation issues are fairly prevalent.

Under the ADA, it is illegal to discriminate against an employee because of a disability or perceived disability. Even if an employee is not actually disabled, the employer could be in violation of the ADA if it limits the employee’s job duties because of a belief that the employee is disabled within the meaning of the ADA. Under the ADA, a “disability” is defined as a physical or mental impairment that substantially limits one or more of the individual’s major life activities; a record of having such an impairment; or being regarded as having such an impairment. An employer may be



required to make a “reasonable accommodation” for an individual with a disability, so long as the individual is **qualified** and the accommodation does not **impose an undue hardship** on the operation of the employer’s business. Bottom line, if an employee is disabled or is perceived as being disabled under the ADA, you, as the employer, will be required to provide the employee with a reasonable accommodation unless the employee is no

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**“YOU'RE FIRED” cont.**

longer qualified to perform the functions of his/her job duties. For example, you can terminate a maintenance worker who cannot ever return to hard labor due to a disability where the position requires the maintenance worker to perform hard labor. However, if you are concerned about a possible violation of the ADA, it is better to consult with your attorney prior to making that decision and to protect the interests of the association.

Title VII prohibits discrimination in employment based on race, color, religion, sex, or national origin. Employment refers to hiring, firing, compensation, and other terms, conditions, and privileges of employment. Possible penalties for violations of Title VII include back pay, benefits, reinstatement, reasonable attorney's fees, compensatory damages, and punitive damages. Most violations of Title VII are initially filed with the Equal Employment Opportunity Commission (“EEOC”). In Florida, once a discrimination charge is filed, the EEOC has 300 days to investigate the charge and issue a determination. The EEOC has no enforcement power; however, if it finds a violation, the EEOC can file suit in federal court on behalf of the affected employee(s). When faced with the issue of terminating an employee whom you believe may bring a charge for violation of Title VII, it is best to consult with your attorney prior to taking any such action. Although most Title VII lawsuits do not have very high dollar verdicts, awards of attorney's fees are often twice the amount of the actual damages awarded.

Another issue that often affects associations is lawsuits involving non-competition agreements. Since the recent amendment to the Florida “Unfair Competition” statute, lawsuits involving non-competition agreements have significantly dropped. Florida law now requires that the parties have a written agreement, that a legitimate business interest needs to be protected, and that it would be “unfair” for a person to go to a competitor under specific circumstances. Prior law allowed courts to strictly view non-competition agreements under contract law terms. Terms of prior non-competition agreements were generally upheld with modifications usually only made to the time and geographical scope of the agreement. Such issues usually arise with regard to hiring a management



company and/or independent manager or security guards.

In a recent development of significance to association employment issues, the National Labor Relations Board (“NLRBa”) indicated that associations may be deemed joint employers of the employees who are hired by these management companies and may be required to adhere to very specific protocol should a labor union attempt to organize the management company's employees.

Although the findings by the NLRB are being appealed, such a finding if upheld, may have far reaching implications making it imperative for an association to protect itself in the event of any future union activity. Such protective measures can include, but are not limited to, ensuring that an indemnification provision exists in the contract between the association and the management company/manager or the association may relinquish all control over employees hired by the management company and placed on the association premises in which event the association would most likely not be treated as a joint employer by the NLRB.

Lastly, associations are often faced with on the job injuries. Worker's compensation laws are designed to compensate employees who have been injured or killed in work related accidents according to a fixed monetary scheme, without resorting to litigation. Florida worker's compensation system is premised on a trade-off system between employers and employees. Employees receive worker's compensation benefits for on-the-job injuries and the limited worker's compensation benefits are the exclusive remedy against the employer, even when the employer was negligent. Of course, if an employee is injured on the job, it is imperative that the association notify both its legal counsel as well as its insurance agent. Failure to do so may resort in further legal ramifications to the association.

While firing an employee may never be an easy decision, even if you are Donald Trump, you can minimize your exposure to an employee lawsuit. Probably the single most important piece of advice is to document, document, document. Usually, employees are fired for reasons. Although employment in Florida is “at-will,”

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**“YOU'RE FIRED” cont.**

having no provable, legitimate, non-discriminatory reason for firing an employee can greatly increase your exposure to a lawsuit.

In addition to the aforementioned advice, the following measures can also minimize your exposure to a lawsuit:

- Do not act too quickly in making a decision to terminate. An impartial investigation can often provide the factual support for the termination;
- Do not act too slowly either. It can create the appearance that you condone the employee's actions and also creates the appearance that another reason exists for the termination when you eventually terminate the employee;
- Always adequately and thoroughly investigate the allegations against the employee before taking action;
- Follow your own written termination policies and procedures;
- If possible and appropriate, give the employee an opportunity to take corrective action, before termination;
- Take action against other employees for the same offense;
- Consider alternatives to termination in appropriate cases;
- Give the employee the “real reason” for termination if asked. Do not provide a false or misleading

reason for termination especially to a government agency such as the EEOC if investigating a charge;

- Fully consider the legal impact of the laws barring discrimination based on race, sex, age, disability, family medical leave act, pregnancy disability leave, ADA, and worker's compensation, as well as laws protecting whistleblowers. It is important to have at least some understanding of the laws that affect employment relations;
- If possible, have a witness present when you fire someone;
- Afford the employee being fired some dignity during and after the firing process;
- Do not give letters of reference to terminated employees that praise positive qualities and/or misrepresent their qualifications or conceal their shortcomings or misdeeds; and
- Do not discuss an employee's termination with persons who do not have a need to know, that could lead to a lawsuit against you for defamation, breach of the right to privacy, and negligent/intentional infliction of emotional distress.

Although, as stated, you can never 100% guarantee that you will not be sued by an employee after termination, you can minimize your exposure and limit potential claims brought against you. If you have questions concerning the possible termination and/or termination of one of your employees, you should contact your legal counsel to guide you through the process.

## DOES THE ASSOCIATION HAVE A DUTY TO A PROSPECTIVE PURCHASER TO ADVISE OF POTENTIAL UPCOMING ASSESSMENTS

By: Mark D. Friedman

In the aftermath of the hurricanes many community associations have been confronted with whether pending assessments must be reported to potential purchasers. Many have asked whether a fiduciary duty exists on the part of the Association to volunteer such information.



In *Maillard v. Dowdell*, 528 So.2d 512 (Fla. 3d DCA 1988), the purchaser of a condominium unit which contained serious structural defects brought a claim against, among other parties, the condominium association for breach of fiduciary duty for failing to disclose those defects to the plaintiffs who were prospective

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**UPCOMING ASSESSMENTS *cont.***

purchasers of the unit. The trial court granted a motion to dismiss by the condominium association finding that the statutory duty of condominium association to the unit owners, pursuant to Section 718.111(1)(a), Florida Statutes, does not extend to prospective purchasers. The appellate court upheld the trial court's order of dismissal. Therefore, the association was not required to disclose information to prospective purchasers concerning the defective condition of the condominium building prior to sale.

Section 718.111(1)(a), Florida Statutes, provides in relevant part:

The officers and directors of the association have a fiduciary relationship to the unit owners.

While Maillard concerned a condominium, the identical language regarding the fiduciary relationship between the Association and unit owners is found in Section 719.104(8)(a) (Cooperative Act) and similar language is found Chapter 720 (Homeowners' Association).

Section 720.303(1) provides in relevant part:

The officers and directors of an association have a fiduciary relationship to the members who are served by the association.

As such, the holding in Maillard is arguably applicable to all types of community associations.

Additionally, the Condominium Act, Section 718.111(12)(e)(1), Florida Statutes, provides that the condominium association is not required to provide a prospective purchaser with information about the condominium or the association other than information or documents required by Chapter 718, to be made available or disclosed. The disclosure requirement is found in Section 718.116(8), Florida Statutes, which provides that within fifteen days after receiving a written request from a unit owner purchaser, or mortgagee, the association shall provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the unit owner with respect to the condominium parcel. There is no requirement to provide information on future or pending assessments.

In the Comprehensive Rider to the FAR/BAR Contract for Sale or Purchase of Condominiums, paragraph 3 reads: "Seller has no knowledge of any pending special assessment except as follows:

\$\_\_\_\_\_ imposed for the following purposes:\_\_\_\_\_."

The Rider puts the onus on the unit owner-seller to provide this information to the prospective purchaser. The Association, if asked by a current unit owner, must provide such information to the unit owner so that he or she may accurately complete this form. However, if the unit owner does not provide accurate information to the prospective purchaser, the Association is not under an obligation to do so in the unit owner-seller's place.

While technically an Association is not obligated to make such disclosures to prospective purchasers and is not required to respond to such inquiries, any response offered by an Association should never be misleading. Accordingly, if the Association is asked whether there are pending future assessments, it should indicate that the Association does not involve itself in disclosures to prospective purchasers and that the purchasers should pursue any information they want about the condominium building or future assessments from the seller. The Association may also wish to consider the advisability of confirming such discussions in writing to avoid any future mischaracterizations of the conversation. Additionally, if the Association goes beyond its legal responsibility there is the potential for being sued by a unit owner-seller if the contract for sale is subsequently voided by a prospective purchaser who receives such information about the community during conversations with the Association's representatives. The fact that the disclosure may have been completely truthful is not necessarily a shield against a potential lawsuit against the Association.

The rules stated above are inapplicable when a condominium, homeowners' association or cooperative is acting as the seller of the unit, such as in the case of a developer controlled association where the developer is still selling properties or a foreclosed unit which the Association purchased and now seeks to resell. In Johnson v. Davis, 480 So.2d 625 (Fla. 1986), the Supreme Court of Florida held that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used."

## LET'S SAY IT AGAIN FOLKS!

### 31 Fla.L. Weekly D610a

# UNITED GRAND CONDOMINIUM OWNERS, INC. v. THE GRAND CONDOMINIUM ASSOCIATION, INC., 3DCA, Case No. 3D05-1627. L.T. Case No. 04-27106

A mixed use condominium is not subject to Section 718.1255(4)(a) of Chapter 718, which reads, in pertinent part, "prior to the institution of court litigation, a party to a dispute shall petition the division for non binding arbitration."

The Grand (the Association) is a mixed use condominium with 810 residential units, 141 retail units, 259 commercial units and a parking unit. Certain residential units were unhappy with the association and formed their own non-profit corporation called U.G.C. Owners (the Owners). The Owners passed out and posted flyers on the condo property and held meetings in their units. The Association filed suit in the circuit court to stop this activity. The Association had not filed a petition with the Division prior to instituting the law suit, in the circuit court, for injunctive relief and damages.

The Owners filed a Motion to Dismiss the case because The Grand had not filed the prerequisite petition with the Division. The circuit court denied the owners' Motion to Dismiss. The Owners appealed.

This court found that the circuit court was correct in denying the Motion to Dismiss. This court found that the Division of Florida Land Sales, Condominiums and Mobile Homes ("Division") had enacted a rule stating that:

*No petition for arbitration would be accepted by the Agency unless the dispute arises regarding a residential cooperative or condominium, and involves a residential unit or units.*

The court further stated that in a prior case which involved this same mixed use Association the Division had



dismissed a petition for arbitration filed by the Association. In that related case the Division stated that The Grand was a mixed use rather than a residential condominium. Cantwell v. Grand Condo. Ass'n. No. 2004-03-1188 (July 1, 2004) (Mnookin, Arb.)

Also, important to note, this court stated further that the Division is legislatively charged with administering the statute, therefore the Division's interpretation of a statute is given great weight and should not be overturned unless clearly erroneous. See e.g. Brenner v. Department of Banking and Finance, 892 So.2d 1129 (Fla. 3DCA 2004).

This court upheld the prior interpretation by the Division of this section of the statute because the court did not find anything in the Division's rule which conflicted with its legislative mandate (administering the statute).

Therefore, of importance from this ruling are two findings:

1. A mixed use condominium is not subject to the mandatory non-binding arbitration requirement of 718.1255 4(a) prior to instituting a civil law suit.
2. The ruling of the Division, which is legislatively mandated to administer Chapter 718, will stand unless it is found to be clearly erroneous.

## A BREATH OF FRESH AIR

### *Merrill v. Bosser*

#### (Trial Court Opinion)



Secondhand smoke gets a lot of negative press. It lingers in the air hours after cigarette smokers are no longer present and reportedly causes or exacerbates a wide range of adverse health effects including cancer,

respiratory infections, and asthma. Statistics regarding the adverse effects of secondhand smoke are readily available and yet, smoking cigarettes is a legal activity, perhaps one you yourself enjoy in your home. Can engaging in a legal activity in your own home create liability? Well according to one of the Broward County Judges it can, if the excessive smoke causes damages and otherwise interferes with the peaceful possession of a neighboring unit.

Ms. Merrill moved in to her condominium unit sometime in 2003 and didn't have any problems with secondhand smoke until her neighbor allowed a tenant to occupy his unit. The neighbor, Mr. Bosser, lived one floor up and one unit over from Ms. Merrill. He smoked approximately a pack of cigarettes a day in his home. Once the tenant, who was also a heavy smoker, moved in, Ms. Merrill and her family not only noticed the smell of smoke, but actually saw smoke seeping into her unit on a regular basis, particularly in the bathrooms.

The smoke was so bad at times that Ms. Merrill and her family members had to sleep elsewhere. She installed air purifiers in her unit, but that didn't help. She complained to the condominium association board who then installed a fan to draw the smoke from the unit to the vents on the roof, but that didn't help. The smoke was so excessive that it triggered her smoke detector! Finally the condominium association ordered the tenant to vacate the unit, which alleviated the problem for Ms. Merrill and her family.

Mr. Bosser probably thought the dispute was resolved at that point. The complaints regarding smoke

intrusion stopped and the tenant was no longer residing in the unit. However, Ms. Merrill believed that she was entitled to reimbursement for expenses she incurred as a result of the excessive smoke and filed a lawsuit to recover those expenses.

The Court, noting that the smoke was so detrimental under the circumstances, ultimately ruled that Ms. Merrill was entitled to damages pursuant to three (3) separate legal theories:

1. Trespass. The Court noted that secondhand smoke that travels from one property to another would not normally be considered a trespass, but under these circumstances it "disturbed the possession" of the other property.
2. Common Law Nuisance. The Court concluded that the smoke went far beyond a "mere inconvenience or customary conduct" and interfered with Ms. Merrill's property rights.
3. Breach of Covenant. The Court concluded that there was a breach of the covenant of quiet enjoyment, which was contained in the Declaration of Condominium.

Ms. Merrill recovered the expenses she incurred when forced to vacate the unit as a result of the excessive smoke and also

recovered her costs of bringing the lawsuit. Please note, this is a trial court decision



and therefore does not carry any precedent, meaning that it does not have to be accepted by other trial courts or judges and may be appealed. However, it does provide an example of what action may be taken by a property owner directly against another property owner under these types of circumstances.