

AUGUST 2007

Why Running your Employees over in the Parking Lot is not the Best Solution to Your Personnel Problems

By: Susan Richards Salen, Esquire

Many community associations are also employers. As such, community associations often must go through the painstaking and painful process of diligent screening, hiring, employee evaluations, documentations and yes, the dreaded separation from employment as any other employer. Invariably, a community is faced with a “problem employee.” Rather than resorting to drastic measures to deal with the problematic employee, such as running over the employee in the parking lot (which undoubtedly would cause both the community’s insurance and your auto insurance rates to rise significantly, let alone the possibility of a lawsuit), here are some more practical ideas of how to deal with problem employees.

Hire Better. Despite its obviousness, this idea is often over-looked. In a tight job market it is easy to “take whatever you can get” to fill a need. In the long run, however, making do until you find the right candidate can save hours of hand-wringing and counseling time later. Consider using an employment agency to assist in the screening and initial interviewing. In many

fields, the qualified candidates look for jobs through these agencies rather than through traditional newspaper classified advertisements. You should also recognize, if you have not already, that the world is changing and internet job posting services should be considered. As a word of caution, using the most cutting-edge technology possess additional risks. For example, many leading authorities are recommending that employers do not even open video resumes in order to avoid claims of discrimination in hiring on the basis of race, sex, disability, age or even religion, or any other protected category which could potentially be discerned by appearance.

Be Proactive in Initial Evaluations and Counseling. Many employers use a “90-day introductory period” contract clause in order to weed-out employees who are not a good fit with a position or organization at an early stage. There are many advantages to this introductory period, but only if the employer is diligent in consistently implementing and following through during the introductory period. If all supervisors are not properly trained in the implementation and execution

of the introductory period, the policy will result in more employment law claims. In addition, the actual policy should be reviewed by an employment lawyer. Inexact wording of a 90-day introductory period could result in the waiver of the employment's "at-will" status. Any policy must contain specific language that makes it clear that employment for any given period of time is not guaranteed and that employment may be terminated during the introductory period and after the completion of the introductory period (even after successful completion of such introductory period). Accordingly, unless your policy is properly drafted and the implementing personnel properly trained in the implementation and execution of the introductory period policy, it should not be used.

Training/Communication. Of course, as with other areas of the law relating to community associations, the community association as an employer is presented with more difficulties than the average for-profit employer. Many times, the "problem employee" is not a supervisor but a member of the association or worse yet, a member of the board of directors! Unfortunately, the community association may not fire its members and the governing documents of many association documents do not empower the board to remove directors. Care must be taken in navigating these particular problem areas as the community association wants to protect its employees but also wants to avoid a fair housing claim and employment discrimination claims, not to mention protection of the employee. Early interaction with a lawyer is invaluable in this particular instance.

Assuming, however, that the problem does not involve residents or rogue board of directors, but supervisors and other employees, the more time that you spend training managers, supervisors, even board members and employees means less time that you may spend dealing with problem employees and lawyers. If your managers know what the signs are that an employee is being sexually harassed by a supervisor and properly reacts to such a problem early a potential expensive legal claim may be averted altogether, which leads me to the next point, proper employment policies are essential.

Proper Employment Policies/Job Descriptions. Generally, any employer with 15 or more employees must have written employment policies for prohibition of unlawful discrimination in the terms and conditions of employment (i.e., discrimination on the basis of sex, religion, national origin, race, disability and any other protected category), among other standard policies. If the employer is in a jurisdiction with a local human rights ordinance or state statutes, it may be appropriate to have some written employment policies in effect with four or more employees. In addition, the Fair Labor Standards Act (FLSA), which requires the payment of minimum wage and over-time hours, applies to most community associations under either enterprise coverage (3 or more employees and gross annual volume of sales of \$500,000.00) or individual coverage (protecting employees who are regularly engaged in the production or handling of goods for interstate commerce). Please note that individual coverage is broad enough to cover any community association employee who

routinely uses cleaning products bought in interstate commerce. Accordingly, in most instances community associations will likely have to comply with the FLSA.

Job descriptions that accurately describe essential job functions, level of discretion and judgment, administrative duties and/or supervisory duties are key tools in ensuring compliance with laws such as the Americans with Disabilities Act (ADA), FLSA and other federal, state or local laws. Here again, an employment lawyer is needed. While using an employment manual that you got from a friend or your own employer's employment manual may be a good start, that manual may not be applicable to your particular association's profile (not to mention that it may constitute proprietary information belonging to others). For example, using an employment manual from a government entity may contain a compensatory time-off policy that would be illegal for the community association to provide to the majority of its non-exempt hourly employees.

Accurate, Honest, and Fair Annual Written Performance Evaluations. At least annually, accurate and fair performance evaluations are an essential tool in the employer's arsenal. This thankless and oft-overlooked employment tool is the Achilles' heel of many an employment case. No one likes to give anyone bad news, even employers. However, the first question any employment lawyer will ask the employer, hopefully before the employer has fired the employee: "what do the annual performance evaluations show?" More often than not, the annual reviews have not been completed or are not accurate. Consequently, when that

same supervisor who has not taken the time to complete the employment evaluation asks you to fire Mary Jo, the answer will be not until there is some more accurate documentation in the file.

However, it should also be noted that it is important for the evaluations to be fair, even-handed and most importantly honest. You will have morale problems if there are no positives in any employment evaluation. Juries punish employers that it perceives have been unfair and let's face it there are more employees than employers on any given jury. Moreover, in Virginia, recent case law has held that employment evaluations are not *per se* privileged communications. Therefore, statement of facts contained in employment evaluations may constitute defamatory statements if they are untrue. Conversely statements of opinion such as an employee is to "verbose and vocal in her opinions to the degree that prevented open dialogue" are not actionable. Accordingly, care must be taken in the preparation of written employment evaluations and the same is true with any documentation that is being placed in the employee's file.

What is Proper Employment Documentation for the Problem Employee. Proper documentation is done contemporaneously with the problem and not months of documentation done after-the-fact and last minute in order to stuff the employment file for the employment lawyer or because the employer now wants to terminate the employee's employment. Such documentation is worthless and simply leads to an argument that all of such documentation is pretextual. Training of

supervisors and managers in this area is essential. If performance improvement plans are used, such plans must be used consistently and to the extent possible uniformly implemented and executed.

Knowing When It is Time to Escort the Employee to the Parking Lot. Recognizing when it is time to end the employment relationship is one of the most important skills an employer can develop. The horrendous employee is the easiest call. It is often the marginal, long-standing, just below par employee that causes the most problems. The employer hasn't fired the employee because (1) it costs, time and money to replace the employee; (2) the employee is not perceived as being that bad; and (3) inertia. However, continuing to employ the substandard employee, particularly one that has routinely been passed over for promotion, but with adequate performance reviews is fertile ground for an employment claim. Weeding out those employees is difficult but necessary.

Contact your Friendly Empathetic Employment Law Attorney for Advice as Soon As Possible. Of course, an ounce of prevention is worth several thousand pounds (or dollars) of legal fees later. In the art of employment counseling, the lawyer's goal is to train the employer to: (1) know when to contact the lawyer for advice – preferably sooner rather than later; and (2) how to avoid the problems in the future. A quick review of the situation, analysis of the contents of the employment file, and discussions with employees with first-hand knowledge of the situation may result in the employment lawyer saying the magic words: “It is time to run this employee . . . out of the office.”

Ms. Salen has been practicing the art of employment law in the Washington D.C. Metropolitan Area for 20 years and does not counsel or advise her clients to run employees over in the parking lot.