

# THE ASSOCIATION AS AN EMPLOYER

You may have run for a position on your homeowner, condominium or cooperative association (“Association”) board as a way to meet your neighbors and to have a say in questions that impact you and the community. However, you may not have considered that as a board member you may need to make decisions regarding those who are employed by the Association.

In your role as board member you may need to participate in the hiring of a security guard, a repairperson, or a groundskeeper. You may also be involved in managing the performance of employees and/or terminating their employment. Associations, like other business organizations, must comply with a myriad of complex federal, state and local employment laws. It is important that employment decisions are made for legitimate business reasons because if they are not, employees may believe that the association is treating them differently because they are a member of a protected class.<sup>1</sup>

Federal employment laws such as Title VII of the Civil Rights Act of 1991, as amended, protect employees from discrimination based on race, color, religion, sex (including pregnancy and related conditions, sexual orientation, and gender identity) and national origin.<sup>2</sup> Other federal laws prohibit discrimination based upon age, disability and genetic information.<sup>3</sup> In addition to federal employment laws, associations must also comply with state and local anti-discrimination laws, which in many cases are broader than the federal laws and/or prohibit discrimination against additional protected classes, such as marital status or prior arrest or conviction record.<sup>4</sup>

The federal anti-discrimination laws, as well as many of the state and local laws, also prohibit employers from retaliating against an employee if the employee, or someone with whom they closely associate, files a complaint of discrimination, participates in a discrimination proceeding, or otherwise opposes discrimination. This means that an employer may not take a materially adverse employment action, such as demoting the employee or terminating their employment, against an employee who has engaged in activity protected by the anti-discrimination laws. If an employee files a discrimination claim with the EEOC or participates in an EEOC investigation or lawsuit, the employee is protected from retaliation by the employer. It does not matter if it is ultimately found that the employer did not discriminate against the employee, the protection still applies. As such,

even if the EEOC issues a finding of no probable cause in relation to a discrimination claim, it could still find that the employer retaliated against the employee for filing the claim in the first place.<sup>5</sup> Retaliation is the most frequently made allegation when a discrimination claim is being made in the federal sector.<sup>6</sup> In fact, retaliation allegations made up 51.6% of complaints filed with the Equal Employment Opportunity Commission (EEOC) in 2022.<sup>7</sup>

Harassment is also a form of employment discrimination that violates most anti-discrimination laws. Under federal law, harassment is “unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age (beginning at age 40), disability, or genetic information (including family medical history).”<sup>8</sup> Harassment is unlawful under federal anti-discrimination laws when it either becomes a condition of employment or when it is severe or pervasive so that a reasonable person would consider it intimidating, or abusive. Harassing conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.<sup>9</sup>

## The Charge Process

If an employee feels their employer discriminated against them, they can file a charge of discrimination with the EEOC or a complaint with a state or local fair employment practices agency.<sup>10</sup> Typically, the employer will be notified that a charge has been filed against it, and the employer will be given the opportunity to respond to the allegations by filing a position statement. Once the position statement is filed, the EEOC usually conducts an investigation. The EEOC will issue a finding of either probable cause that discrimination occurred or a finding of no probable cause that discrimination occurred. If the EEOC issues a probable cause determination, they will often provide the parties with an opportunity to conciliate the matter to try to reach a settlement. If that is unsuccessful, the employee will be provided with a “right to sue” letter and may then file a lawsuit in court. Even if a no probable cause finding is issued by the EEOC, the employee may still file a complaint in court.<sup>11</sup>

## Claim Example:

*In EEOC v. Vail Run Resort Community Association, Inc. et al., the EEOC sued a condominium association for sexual harassment, national origin discrimination and retaliation. The complaint alleged that the housekeeping manager sexually harassed employees who were Mexican women, and that the defendants retaliated against employees who informed management and the owner of the harassment. The manager spoke about sex, propositioned female employees, showed female employees graphic sexual pictures on his phone and physically assaulted them. He targeted Mexican employees by threatening them that they would be terminated and deported if they did not comply with his advances or told anyone about his behavior. Fellow employees complained to management but management took no action, and failed to conduct an investigation into the alleged behavior. The lawsuit was settled for \$1,020,000.<sup>12</sup>*

## Conclusion – Mitigating the Risk of Employment Discrimination Claims

Employment law is complicated and changes rapidly. As a business, the association will likely need to hire individuals to perform work to support its well-being. In hiring and contracting with others to perform work, the association becomes an employer, and as such will need to abide by federal, state and local employment laws. It is unlikely that the association and its board members are well versed in

the relevant law and therefore should have a heightened self-awareness when making decisions related to the hiring and firing of those they employ. In these situations, the expertise and advice of an employment attorney may help to avoid making a costly mistake.

Below are some things to think about as an association that retains the help of others through an employment relationship.

- Recognize that the association is an employer with respect to those workers it employs and must follow all relevant federal, state and local laws
- Promptly respond to concerns voiced by employees
- Treat those who work for the association consistently and fairly
- Take care when making employment decisions and consider consulting with an attorney before a decision is made
- Employment decisions should be based on legitimate business reasons
- Document your decision-making process
- Communicate the association's decisions to employees so that they understand the reasons for employment actions
- Train managers and others involved in the employment decision-making process

Endorsed by:



Underwritten by:



Administered by:



<sup>1</sup> <https://www.eeoc.gov/regulations/questions-and-answers-eeoc-final-rule-disparate-impact-and-reasonable-factors-other-age>

<sup>2</sup> [https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964#:~:text=Title%20VII%20prohibits%20employment%20discrimination,Pay%20Act%20of%202009%20\(Pub.](https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964#:~:text=Title%20VII%20prohibits%20employment%20discrimination,Pay%20Act%20of%202009%20(Pub.)

<sup>3</sup> Id.

<sup>4</sup> <https://www.cga.ct.gov/PS97/rpt/olr/hlm/97-R-0006.htm#:~:text=State%20law%20is%20broader%20than,whereas%20federal%20law%20does%20not>

<sup>5</sup> <https://www.eeoc.gov/youth/retaliation-1>

<sup>6</sup> Id.

<sup>7</sup> <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022>

<sup>8</sup> Harassment, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/harassment>

<sup>9</sup> <https://www.eeoc.gov/youth/retaliation-1>

<sup>10</sup> Under Title VII and other federal anti-discrimination laws, the employee must first exhaust their administrative remedies before they can sue their employer in court. There are some federal laws, such as 42 U.S. Code § 1981, that do not require exhaustion of administrative remedies.

<sup>11</sup> <https://www.eeoc.gov/filing-charge-discrimination>

<sup>12</sup> <https://www.eeoc.gov/newsroom/vail-condo-association-will-pay-over-1-million-settle-eeoc-national-origin-discrimination>

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