

Discrimination Complaints: How to Avoid Them and How to Respond to Them

August 2, Wilmington, NC

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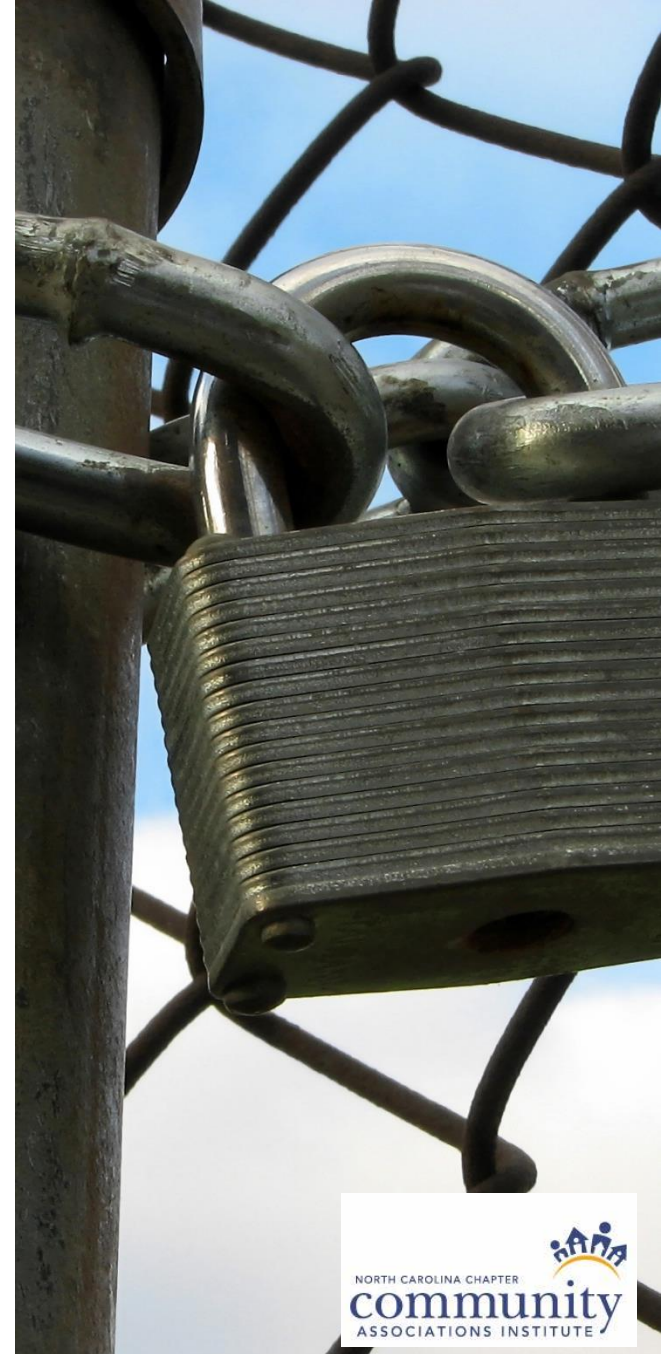
INTRODUCTION

- It is becoming more and more common for Community Associations, at some point in time, to have discrimination charges filed, or threatened to be filed, against them.
- Most of the time, such threats and charges are the direct result of the association enforcing the terms of its governing documents and compelling residents to do something they don't want to do.
- Sometimes these threats and charges are valid and many times they are not. How can you tell?



WHAT IS DISCRIMINATION IN THE COMMUNITY ASSOCIATION CONTEXT?

- The Fair Housing Act and NC FHA establish "Protected Classes" of people making it unlawful to treat persons differently due to their protected class.
- Protected Classes under the FHA and NCFHA include:
 - Race
 - Color
 - Religion
 - Sex
 - Handicap
 - Familial status
 - National origin



WHAT IS DISCRIMINATION IN THE COMMUNITY ASSOCIATION CONTEXT?

The two (2) classes that affect HOA's the most are the handicap and familial status classes.

Handicap. Defined as a physical or mental impairment which substantially limits one or more of a person's major life activities; a record of having such impairment, or being regarded as having such an impairment.

- "Major Life Activities" not defined by FHA
 - Caring for one's self
 - Performing manual tasks
 - Seeing, hearing, speaking, and breathing
- Discrimination based on handicap primarily occurs when an association refuses a reasonable accommodation or modification to a handicapped resident when such accommodation or modification is needed.



WHAT IS DISCRIMINATION IN THE COMMUNITY ASSOCIATION CONTEXT?

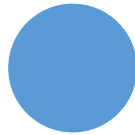
Familial Status. Includes unequal treatment of children under the age of 18 who live in the community, pregnant women, and families based on their size or content.



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TYPES OF DISCRIMINATION



DISCRIMINATORY TREATMENT

Where the victim is expressly treated differently than others in the community based on his/her protected class. Possibly children from playing on common area.



DISPARATE IMPACT

When a neutral rule has the effect of discriminating against a protected group. Rule that prohibits Big Wheels in the community.



HARASSMENT

Unlawful for Association to allow harassment within community because of Protected Class, if the Association has the ability to intervene.



HARASSMENT

HUD provides that there are two types of harassment under the FHA:

1. Quid Pro Quo Harassment – an unwelcome request or demand to engage in conduct, due to race, color, religion, sex, national origin, disability, or familial status, where submission to the request or demand is made a condition related to the provision of services or facilities.
2. Hostile Environment Harassment – Unwelcome conduct that is sufficiently severe or pervasive as to interfere with the provision or enjoyment of services or facilities based on a person's race, color, religion, sex, familial status, national origin, or handicap.



HARASSMENT

- Community associations are now directly liable for the discriminatory acts of third parties, such as a resident, guest, or outside vendor.
- Community associations are now liable for failing to take prompt action to correct and end a discriminatory housing practice by a third party, where the person knew or should have known of the discriminatory conduct and had the power/authority to correct it.



THE EASE OF PLACING A COMPLAINT WITH FHA/HUD

The questionnaire only asks 5 questions: What, Why, Who, Where, and When!

1. What happened to you? (How were you discriminated against?)
2. Why do you believe you are being discriminated against?
3. Who do you believe Discriminated against you?
4. Where did the alleged act of Discrimination occur?
5. When did the last act of Discrimination occur?



THE EASE OF PLACING A COMPLAINT WITH FHA/HUD

Example of a costly sentence for which a \$30,000 damages plus defense was paid:

That being said, the Board/Association is under NO obligation to install a ramp. It is being done as a potential part of the larger paver project. That being said, the Board is still gathering information regarding a potential ramp, because if they do decide to put one in they want to do it right. No one is stalling and nothing was ever promised to anyone about a ramp, and I am not sure what the references to an elevator is about. There are no plans, nor were there ever any plans for the installation of one. The Association is not out of ADA compliance as these units were built over 30 years ago and are grandfathered. If the tenant has a handicap they should not have rented the unit.



RELIGIOUS REQUESTS

- Can an HOA deny rental of the clubhouse based on the proposed use of the space? A Church Service, Religious Ceremony, Religious meetings?
- What about hanging a Mezuzah, Crucifix, Hindu Toran above your door in a Condo?
- Requests to remove Holiday lights in late January? What about Maha Shivarati Friday February 21, 2020?



SERVICE ANIMAL VS. COMFORT ANIMAL

- Does the service animal need to show documents or medical papers?
- What about a comfort animal?
- What is the definition of a service animal?





WHAT TYPE OF INSURANCE COVERAGE PROTECTS AN ASSOCIATION AGAINST DISCRIMINATION CLAIMS?

Director and Officer Liability!



DIRECTORS AND OFFICERS INSURANCE

Who and what should be covered?

- Directors, officers, committee members, volunteers, employees
- Community manager
- Developer appointed Board members and officers
- Past, present, and future Directors and officers
- Spouses of officers and Directors
- Cost of defense to claims and lawsuits
- Non-monetary remedies
- Defamation
- Discrimination
- Failure to maintain insurance

DIRECTOR AND OFFICERS



Endorsed vs. Standalone Policy?

- Cost vs. Coverage

WHAT SHOULD AN ASSOCIATION DO WHEN IT RECEIVES A COMPLAINT BASED ON DISCRIMINATION?

1. Forward a copy of the correspondence to your insurance agent
2. Contact the Association's attorney to evaluate the claim
3. Investigate – interview residents and complaining member

WHAT SHOULD AN ASSOCIATION DO WHEN IT RECEIVES A COMPLAINT BASED ON DISCRIMINATION?

4. Is the claim against the Association?
5. Is the claim against a third-party?
6. Does the Association have the authority to rectify the situation?
7. Remedy the situation if possible. Take corrective action.
8. Maintain the record for at least 3 years.





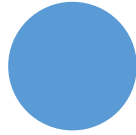
WHAT IS "CORRECTIVE ACTION"?

WHEN A HARASSMENT COMPLAINT IS REAL

- A prompt investigation – speak to the complainant, the alleged offender, and any other individuals involved
- Examine the governing documents to determine if enforcement procedures are permitted in these situations (hearing, fine, amenity restrictions)
- Issue verbal or written warnings that the discriminatory conduct stop
- Depending on how severe the harassment is, report it to local law enforcement
- Consider legal action, such as restraining orders
- Document all efforts and discuss the process with counsel
 - Minutes – closed session



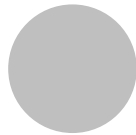
THINGS TO REMEMBER



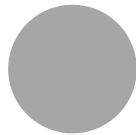
Make sure your Association has the proper type of insurance coverage and in the proper amount.



Acting in a consistent manner assists with defense of a disability claim.



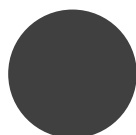
It does not cost the plaintiff anything to maintain the dispute.



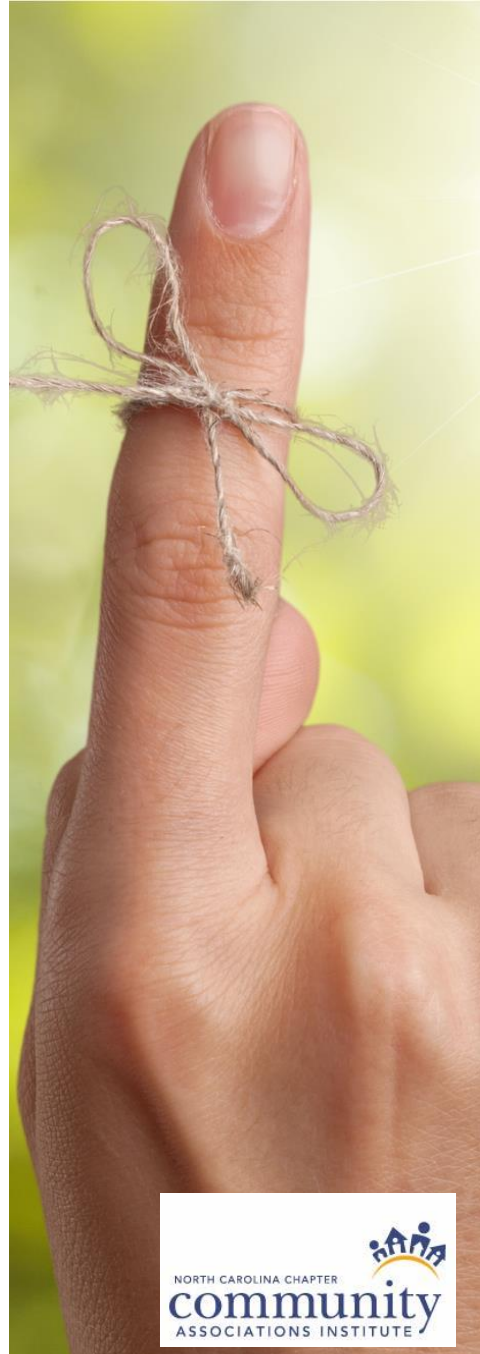
There is generally an insurance deductible. Think about settling for this amount before things get heated up.



Don't wait to get attorney and insurance agent involved.



Be reasonable.





QUESTIONS?

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