KEOUGH MOODY

December 2023 Newsletter

We at Keough & Moody wish you all a very happy holiday season. We thank you for all of your support this past year. We look forward to 2024!

Discrimination: A Claim That Must Be Taken Seriously

This past year or two, we have seen more lawsuits filed in the circuit courts of Illinois by unit owners against community associations, individual board members, and/or management companies than in years past. For this reason, we often talk about trends in

the courtrooms and how we judges rule in cases involving community associations. However, we cannot forget to monitor the decisions made by the Human Rights Commission or the appellate court related to charges of discrimination.

A decision may be rendered by the Human Rights Commission after a complainant files a complaint or charge of discrimination with the Illinois Department of Human Rights ("IDHR"). When a complainant believes that he has been discriminated against, he can file such a complaint. These complaints can be filed *without* the assistance of an attorney, without the payment of a filing fee, and are fairly easy to complete. Once filed with the IDHR, an investigator is assigned to the case and the investigative process begins. The party named as a respondent is not served by the sheriff or special process server, but instead by mail from the IDHR. Because a community association is a corporate entity, it must appear through an attorney. Sometimes the association's insurance coverage will cover these types of claims and the carrier will assign insurance counsel to defend the association. Unfortunately, most of the time, there is no coverage and the association has to pay for its own defense (and it cannot seek reimbursement of the attorney's fees incurred from the owner who filed the complaint).

During the investigation, the association will have to answer questions, provide documents, have witnesses interviewed, and perhaps, even participate in a conference with the complainant and investigator. At the conclusion of the investigation, the IDHR's investigator will issue a finding which simply concludes whether there is substantial evidence to support the claim or whether the matter lacks substantial evidence. That is, the investigator from the IDHR is *not* concluding that the respondent did, in fact, discriminate. Instead, he is simply stating whether there is substantial evidence to support the claim. If the investigator determines that substantial evidence is lacking, the matter is completed. The petitioner can ask that the matter be reviewed, but if such a request is not made, the matter is concluded.

The investigator can also issue a finding that states there appears to be sufficient evidence to support a claim of discrimination. In other words, the investigator can say, in essence, "this should be looked at further." When this finding is made, the case then moves from the IDHR to the Human Rights Commission ("HRC"). The HRC's process is more analogous to the process followed within the circuit courts of Illinois. There is an administrative law judge assigned to the case, the parties must follow the rules of Civil Procedure, the parties engage in practices similar to those within the circuit court, i.e., motion and discovery, and the administrative law judge enters orders. Like in the circuit court, there are hearings that occur in the HRC. If the parties do not reach a settlement, at the conclusion of the HRC, the administrative law judge will issue a recommended order and decision. Like a case before the circuit court, the party against whom the HRC made a finding can appeal. The appeal then proceeds with the appellate court.

This past year, the HRC has issued many orders in matters involving community associations, which sustain the findings of the IDHR that substantial evidence was lacking warranting the dismissal of the claim. The HRC has also issued several orders, in matters involving community associations, dismissing a claim for a petitioner's failure to participate or act as ordered in a pending claim. However, an order was entered by the HRC on September 26, 2023, in the matter of *Illinois Department of Human Rights and Valarie Hemmingway and Crawford Estates and MC Property Management*

Corporation (“Hemmingway Matter”), that made the administrative law judge’s Recommended Order and Decision of May 1, 2023, the Order of the Commission. This order caught the attention of us within the industry.

In the *Hemmingway* Matter, the complainant alleged she resided and owned a condominium unit on the second floor of her building, within the condominium association. The building where complainant’s unit is located does not have an elevator. Complainant alleged she was disabled and had limited mobility. Because of her disability, complainant requested an accommodation from the condominium association. She requested electronic notices of board meetings and invoices related to amounts she owed, as she wanted to avoid using the stairs from her unit to the lobby where her mailbox was located. She was told that meeting notices are with the invoices that can be retrieved by logging into a website. Yet, complainant alleged since she was in arrears, her access to this website was blocked. This led to her missing five meetings.

Complainant also requested that ice and snow accumulation around her front door and the garage entrance be removed in a timelier fashion, as the delays made it unsafe for her to walk in these areas. She had to walk through these areas to get to her car, the bus stop, and the dumpster. Respondent replied that it had a contract with a snow removal company that only comes out when there is a certain amount of snow.

Respondents stated that the requested accommodations were neither reasonable or necessary.

The HRC’s order concluded that the respondents failed to properly respond or refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford one with an equal opportunity to use and enjoy a dwelling unit. Hence, it concluded that the respondents were liable for violating the law that prohibits discrimination based on disability. The HRC concluded that the complainant proved by a preponderance of the evidence that she suffered emotional distress because of the respondents’ actions. The HRC awarded the complainant $25,000 for emotional distress damages and it entered an order recommending that respondents cease and desist from violating the law in the future. The HRC concluded that a civil penalty was not warranted in this case. Finally, respondents were ordered to pay *$58,805.00* to complainant’s attorney as the complainant was entitled to an award for attorney’s fees.

In another case, which started in the IDHR, on November 22, 2023, the appellate court issued an order in *Bastani v. The Human Rights Commission, The Department of Human Rights, 55 W. Erie Association and Phoenix Rising Management Group* (“Bastani Matter”). The complainant in the *Bastani* Matter filed an appeal because the HRC issued a decision that sustained the dismissal by the IDHR. In her complaint before the IDHR, complainant alleged that the association and its managing agent refused to fix water damage to her interior walls, which resulted from a leaking downspout, because of her Middle Eastern national origin or ancestry. She also alleged that non-Middle Eastern residents had water damage to their units paid for by the association. Complainant also alleged she was not reimbursed for her flowers and other garden supplies she purchased for the common areas, when other non-Middle Eastern unit owners were reimbursed for purchases they made to the common areas. Complainant also alleged that the association

and management refused to allow her to participate in board meetings and failed to include her requests made at the board meetings in the minutes because of her national origin or ancestry, but they allowed non-Middle Eastern unit owners to participate, and they included their requests in the meeting minutes.

Respondents in the *Bastani* Matter did not dispute that there was damage to the interior of the complainant's unit. However, they disputed the association was responsible for paying for the damage per the association's bylaws. Respondents indicated that a legal opinion was obtained from their legal counsel to support this decision. Copies of the bylaws and legal opinion were tendered by the respondents. Respondent association did not dispute it made repairs to another owner's unit for damage to the interior of the unit, but that was done *before* the association had a management company and without legal advice. Respondents provided evidence of a check that showed complainant was reimbursed for her expenditures. Respondents stated that the board did not note her requests for repairs in the board meeting minutes because the board had already determined on the advice of counsel that they were not responsible for this damage and that this had been told to the complainant. Respondents also stated that complainant was offered to have board minutes amended to reflect her requests, but complainant failed to submit the request.

The IDHR found that complainant was not the only unit owner of Middle Eastern ancestry within the association, and the other Middle Eastern unit owner was not discriminated against. The IDHR noted that complainant admitted she was reimbursed for expenditures she incurred for the common areas. The IDHR initially dismissed the charge for lack of substantial evidence. The complainant requested that the HRC review the dismissal and thereafter, the IDHR agreed to further investigate whether the reasons for refusing to fix the water damage, failing to reimburse the expenses, and refusing to allow her to raise complaints at board meeting was pretext for unlawful discrimination.

The further investigation showed the association examined the cause of the water intrusion to complainant's unit. The investigation showed that the association stated it would pay for tuckpointing if needed, but on the advice of counsel it would not be responsible for the damage to the interior of her unit. An owner within the association provided testimony that water infiltrated his unit at the same time that it did for the complainant, but no interior work was done to his unit and the association did not pay for any work to the interior of his unit. Evidence was tendered that complainant was told after a board meeting that the board could vote on any notes or additions to the minutes she would submit. Complainant acknowledged she learned of the board's decision not to pay for her interior repairs, but she maintained when she learned of this, the board did not reference her claim.

At the conclusion of the additional investigation, the IDHR dismissed the charge for lack of substantial evidence. Complainant requested that the HRC review the dismissal. The HRC sustained the IDHR's findings. Complainant then filed an appeal with the appellate court. On appeal, the appellate court only reviews the HRC's decision and not that of the IDHR. When reviewing the decision, the appellate court does not reweigh the evidence or substitute its judgment for the HRC. Instead, it reviews the matter to determine if the HRC abused its discretion.

In the *Bastani* Matter, the appellate court concluded that the complainant failed to

demonstrate that the HRC abused its discretion by sustaining the dismissal of the charge for lack of substantial evidence. The appellate court held that the HRC's conclusion that the respondents provided a plausible explanation for not repairing the damage to the interior of the unit was not against the manifest weight of the evidence. Likewise, it was not against the manifest weight of the evidence that the complainant was reimbursed for her expenditures and that any delay was not related to the complainant's ancestry. Lastly, the HRC's conclusion that complainant's claim was not included in the board minutes because the claim had been denied and because complainant did not request an amendment to the minutes was not against the manifest weight of the evidence. Hence, the decision of the HRC was affirmed.

These two above cases are extremely different. While the*Bastani* Matter does reflect the orders or decisions we often see entered when a charge of discrimination is filed, the *Hemingway* Matter demonstrates how wrong a charge of discrimination can proceed for an association. The *Hemingway* Matter also demonstrates the importance of taking these claims seriously. As a reminder, it is important to have the association's legal counsel involved from the beginning when an owner alleges discrimination or requests an accommodation. As we often say, we are not magicians and we cannot change facts. Yet, we can help a board be proactive and create the proper paper trail so it can prevail when claims, like those above, are made.

Even in the *Bastani* Matter when the results are favorable to the association, the association is still incurring legal fees to defend itself before the IDHR, HRC and on appeal. Keep in mind, in the *Bastani* Matter, the complainant first filed a charge of discrimination with the IDHR in 2014. The appellate court did not rule until November 2023. The *Bastani* Matter lasted over nine (9) years! It is a reminder of how important it is to take all steps to protect the association as soon as a claim of discrimination is alleged. As it is better to end a nine-year battle with such a victory, than with a judgment against the association and a hefty bill for legal fees.

THE Q&A CORNER

Question: Our bylaws provide that the board of directors cannot enter into a contract that

is for a term beyond two (2) years. Is this legal?

Answer: The Court in *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condominium Association* ruled that a condominium association lacked authority to enter into a contract that was for a term in excess of two years since the association's bylaws provided that the board of directors could engage the services of a manager or managing agent, but that no management agreement may run for a period of beyond two years. Because the association executed a management agreement in excess of two years, the court ruled the contract was void. Therefore, yes, a provision like that within your governing documents is legal. Before entering into any contract, the association's bylaws must be reviewed to confirm that the association has the authority to enter into such an agreement. If there is a restriction within the bylaws as to the length of the contract, the board must be sure to comply with the restriction, so as to avoid the contract being declared void. As a reminder, before executing the contract, the board of directors should also confirm that it has the authority to have the services performed as described in the contract, i.e., confirm it is an association and not an owner responsibility.

Save the Date!

February 9, 2024

Save the date for the 2024 IL Condo-HOA Conference & Expo presented by the Illinois Chapter of Community Associations Institute where Gabby and Dawn will be presenting!

Learn more about the 2024 IL Condo-HOA Conference & Expo

If you have any questions about what is in this Newsletter or if we can provide any assistance to your community, please contact us.

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