Like many condominium associations, Ready Creek Villas relied on a third-party vendor for their landscaping maintenance. Things went pretty well for the first eighteen months, but then the landscaper made some personnel changes, including hiring a new worker named Freddie Jay. Freddie was a talker. Whether he was pruning, mowing or spreading fertilizer he was always trying to engage people in conversation -- especially the female residents.

The comments Freddie made weren't always appreciated and he seemed to spend a disproportionate amount of time trimming the hedge by the Association's pool, sometimes staring at the female residents while they sunbathed. With each passing day his behavior seemed to become increasingly disturbing and his comments more off color.

Homeowners and their guests were feeling harassed and many felt so uncomfortable they simply avoided going outside or frequenting the Association's pool. After enduring this behavior for several months the homeowners got together and lodged complaints with the Board. The Board contacted the landscape vendor and asked that Freddie be moved to somebody else's homeowners association. When asked why, an embarrassed and uncomfortable Board President responded, "Uh... we...uh... are just not happy with his work. He's just not up to the task."

Instead of moving Freddie elsewhere, the owner of the landscape company decided to terminate Freddie - citing Ready Creek Villa's comments.

Freddie was 63 years old at the time he was fired, nearly twice as old as the rest of the workers on the landscaping crew, and he was convinced he was fired as a result of his age. Broke and unemployed for months, Freddie hired an attorney and chose to sue the landscape maintenance contractor, the Association and the Association's management company, claiming age discrimination. In California it is illegal to discriminate or harass any employee who is over the age of 40. Pursuant to the law, age, like race and gender, is a protected class. The Age Discrimination in Employment Act (ADEA), enacted in 1967, serves to protect individuals who are 40 years of age or older from employment discrimination based on age.

Freddie wasn't an employee of the condominium association. How in the world could the Association and their management agent be sued? Freddie wasn't THEIR employee- they had no direct employees. Worse yet, in reviewing the contract it appeared the landscape maintenance company had no obligation to indemnify the Association or the management agent - and actually, to make matters worse, the Association DID have an obligation to defend and indemnify the management agent (except for circumstances of gross negligence or willful misconduct - which clearly didn't apply here).

This predicament underscores the importance of Employment Practices Liability Insurance (EPLI) coverage. Whether the association secures a stand-alone EPLI policy or relies on an enhancement to the Association's Directors and Officers Coverage, the coverage is extremely important. The more robust, stand-alone D&O policies not only provide coverage for employment-related discrimination allegations but the definition of insured has been broadened to include the community manager or management companies. In a circumstance like the one presented by Freddie Jay, the D&O Liability carrier providing the enhanced D&O form would be obligated to pick up the defense costs and, if Freddie's allegations have merit, indemnity for both the Association and the community manager.

It's important to note that not all D&O policies provide EPLI coverage and HOA boards should check with their insurance professional to confirm if (1) an EPLI enhancement is included; (2) if the community manager is protected; and (3) if it would address a third-party exposure. (This type of claim is described as a "third-party" since Freddie wasn't the employee of the Association, but an employee of a third party: the landscape maintenance firm.) At the end of the day, Freddie and his legal team must prove their allegations and if he believes the Association and the community manager were engaged in discriminatory behavior, then it is completely understandable (albeit very frustrating) that he would name both parties in his lawsuit.

By Timothy Cline, CIRMS

Timothy Cline Insurance Agency, Inc.