

A Long Term Care and Senior Housing Law Update

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Department of Justice and Major Continuing Care Provider Enter Into Groundbreaking Consent Order

On August 27, 2007, the United States Department of Justice and Covenant Retirement Communities West, Inc. (“Covenant”) entered into a Consent Order resolving *United States of America v. Covenant Retirement Communities West, Inc.*, a disability discrimination action brought under the federal Fair Housing Act in the United States District Court for the Eastern District of California. The Consent Order established a \$530,000 common fund for paying damages to aggrieved persons and requires that each person whom Covenant previously required to take a motorized mobility aid test be paid compensation both for their time taking the test and for the test fee. The Consent Order also required a \$30,000 payment to “vindicate the public interest” under the Fair Housing Act.

The Fair Housing Act was originally enacted as part of the Civil Rights Act of 1964 and prohibits discrimination on the basis of race, religion, sex, national origin, familial status or disability by providers of housing, including owner-operators of continuing care facilities such as Covenant. In order to bring a civil action to enforce the Fair Housing Act, the Justice Department must allege (1) a pattern or practice of discrimination of resistance to the full enjoyment of rights granted by the Fair Housing Act; or, (2) a denial of rights granted by the Fair Housing Act that raises an issue of general public importance.

The lawsuit encompassed certain continuing care retirement communities. The disability discrimination claims centered on Covenant’s policies and procedures with respect to residents and potential residents who were “handicapped,” as defined in the Fair Housing Act, because they used mobility devices such as canes, walkers, wheelchairs and scooters. In its lawsuit, the Department of Justice alleged that Covenant had violated the Fair Housing Act in the following ways:

- Discrimination on the basis of disability in the sale, rental, or availability of dwelling units;
- Discrimination on the basis of disability in the terms, conditions, or privileges of sale or rental of a dwelling unit;
- Discrimination on the basis of disability in the provision of services or facilities in connection with a dwelling unit;
- Made, printed or published, or caused to be made, printed or published, a notice or statement with respect to the sale or rental of a dwelling that indicates a preference,

limitation, or discrimination based on disability or an intention to make such a preference, limitation or discrimination; and

- Represented to persons with disabilities that a dwelling is not available for sale or rent when such a dwelling was available for sale or rent.

The policies and procedures at issue varied from facility to facility, but included:

- Requiring residents using motorized scooters to take driving tests at their own expense and to sign a “Motor Driven Scooters” Agreement;
- Requiring residents using motorized scooters to purchase liability insurance, name the facility as an additional insured and/or hold the facility harmless;
- Imposing prohibitions or restrictions on the use of mobility devices in dining rooms and other common areas;
- Requiring pre-approval by the facility administrator, a doctor’s written order, and a safety assessment of the vehicle before use of a motorized device was allowed;
- Requiring residents with mobility aids to live in assisted living units rather than independent living units;
- Requiring evaluations by physical therapists and certification with respect to “visual acuity” prior to use of a motorized mobility aid; and
- Imposing requirements at the resident’s expense with respect to designated parking areas, demonstration of ability to self-transfer and yearly testing and assessments.

Although motivated by a concern for the safety and well-being of all residents, these types of policies have been found by the Justice Department to be prime candidates for Fair Housing Act enforcement actions.

The Consent Order resolving the Covenant lawsuit had several important features that provide additional guidance and increased certainty for the senior housing and long-term care industry going forward. The Consent Order specifically enjoined a number of specific practices, including requiring residents with “motorized mobility aids” to purchase liability insurance, to hold the facility harmless or name it as an additional insured, prohibiting residents with any mobility aid (cane, walkers, wheelchairs and motorized aides) from using the aid in any common use building or dining room, refusing to allow residents using mobility aids to live in independent living units, and steering such persons to assisted living facilities when independent units are available and the resident is otherwise qualified for independent living.

In addition, the Consent Order prohibits setting “any conditions on, or otherwise restricting, the use of motorized mobility aids by persons who are ‘handicapped’ within the meaning” of the Fair Housing Act, unless such use would “constitute a direct threat to the health or safety of others or would result in substantial physical damage to the property of others.” Reasonable traffic and parking rules, such as speed, yielding and optional parking areas are permitted under the Consent Order.

Public notices of non-discrimination, the adoption of a “Mobility Aids Policy,” and training with respect to the terms of the Consent Order and the Mobility Aids Policy are also required. The Department of Justice will monitor compliance with the Consent Order for a three-year period.

The form of the Mobility Aids Policy incorporated into the Consent Order is important because it could be viewed as a model policy that the Justice Department has specifically approved. Major features of the policy include:

- A general statement that all residents and visitors to a facility who use mobility aids due to a disability are to be free from all discrimination or harassment and have full access to campus facilities and residential units;
- A prohibition on restricting qualified residents from access to any living unit and to any common area on a campus open and available to the public; and
- A prohibition on requiring a resident or visitor with a physical impairment that substantially limits his or her ability to walk and who uses a mobility aid, including a motorized mobility aid, to prove that he or she needs to use a mobility device.

Owners and operators of long-term care facilities can, and should, heed the elements of this Mobility Aids Policy because they appear to reflect the Department of Justice’s current standard for compliance with the Fair Housing Act’s anti-disability discrimination provisions.

For more information or for a copy of the decision, please contact the Long Term Care and Senior Housing Law Group at Lane Powell:

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