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CCRCs AND LEVEL OF CARE TRANSFERS— LIFE AFTER BISHOP GADSDEN

By: STEVEN M. MONTRESOR, ESQ.

A recent case from South Carolina has implications for continuing care retirement communities (“CCRCs”) throughout the country. The case, Bell v. Bishop Gadsden Retirement Community, involved alleged discriminatory practices concerning level of care transfers and the use of mobility aids.

The Plaintiff, Blanche W. Bell (“Bell”), resided in the Bishop Gadsden Retirement Community (“Bishop Gadsden”), a licensed CCRC, in Charleston, South Carolina. In its standard residency agreement, Bishop Gadsden restricted entry to people who were medically certified to be in good health, were able to move about independently, and were able to take care of themselves in normal living activities. When Bell moved into Bishop Gadsden, she was able to take care of all of her personal needs without assistance.

After moving into Bishop Gadsden, Ms. Bell developed Amyotrophic Lateral Sclerosis, or Lou Gehrig’s disease, a progressive muscle weakness that substantially limited her ability to walk, stand, and perform various self-care tasks. As the disease progressed, Ms. Bell required the use a power wheelchair for mobility. To get in and out of her chair and safely perform self-care tasks, she also required assistance from others. She hired personal assistants with her own funds, which enabled her to continue to live in her apartment. Although cognitively alert, she needed assistance to live independently in her apartment unit for the rest of her life.

Bishop Gadsden had a policy, however, that limited domestic help to eight hours per day and permitted the retention of personal assistants only on a temporary basis. Those whose needs exceeded these limits were required to move to the nursing home facility on Bishop Gadsden’s grounds or to leave the community. Because of her heightened needs, Bishop Gadsden determined Ms. Bell could not remain in her apartment. Bishop Gadsden advised her that she must either transfer to Bishop Gadsden’s nursing home or vacate Bishop Gadsden. Ms. Bell was told that if she failed to transfer, a nursing home bed may not be available and she would be considered in breach of contract and subject to eviction.

Ms. Bell sued Bishop Gadsden for violations of the Fair Housing Act (“FHA”) and the Americans with Disabilities Act (“ADA”), alleging discrimination based on disability or handicap. The FHA, as amended by the Fair Housing Amendments Act of 1998, applies to all housing providers and prohibits discrimination in the sale or rental of a dwelling because of handicap; in the terms, conditions or privileges of sale or rental because of a handicap; or in the provision of services or facilities in connection with a dwelling available for sale or rental. The FHA requires a housing provider to furnish accommodations necessary to afford handicapped persons equal opportunity to use and enjoy a dwelling. Likewise, the ADA prohibits discrimination against disabled persons and requires that public accommodations be accessible to disabled persons.

“Reasonable accommodation” rules implemented pursuant to the FHA require housing providers to make modifications in policies, procedures and practices when necessary to provide services to individuals with disabilities. These modifications must be made, unless the modifications would fundamentally alter the nature of the goods or services at issue. For example, the rules would not require that a dwelling be made available to a person if tenancy would constitute a direct threat to health or safety of others or would result in substantial physical

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USING AN ASSUMED OR TRADE NAME TO CONDUCT BUSINESS

BY: LORIE A. TAYLOR, ESQ.

Many corporate entities conduct business under a trade name. If the trade name varies from its legal name set forth in a corporate entity's articles of incorporation, statement of registration, certificate of limited partnership, or certificate of organization, then the corporation should consider registering its trade name with the Commonwealth of Pennsylvania Corporation Bureau as a fictitious name.

Even though failure to register a trade name as a fictitious name will not impair the validity of a contract or act of the corporate entity, corporate entities using a trade name should exercise caution when contracting under a trade name. A corporate entity may be subject to payment of a civil penalty of \$500 if the corporate entity uses a trade name prior to registration of the trade name as a fictitious name or after a fictitious name registration is cancelled or otherwise terminated.

Contracting Without Registering a Trade Name. A corporate entity that fails to register a trade name as a fictitious name may not maintain an action against another party in the Commonwealth of Pennsylvania until the corporate entity registers the trade name as a fictitious name. Corporate entities using an unregistered trade name should make sure the corporate entity name is identified as the contracting party, not

the unregistered trade name. By way of example, "XYZ, Inc. d/b/a The Zipper Connection" is the proper way for a corporate entity with an unregistered trade name to enter into a contract. The corporate entity should not contract solely under the unregistered trade name, "The Zipper Connection."

Contracting With a Registered Trade Name. For contracting purposes, corporate entities using a registered trade name do not need to use the proper corporate entity name with the registered trade name as the contacting party. The contract may be entered into under the trade name as the contracting party since it is registered with the Corporation Bureau. Examples of the use of a registered fictitious name for contract purposes:

ABC, Inc. has registered its trade name "The Alphabet" as a fictitious name with the Corporation Bureau. The corporate entity may use the name "The Alphabet" to enter into contractual relations without reference to ABC, Inc. It is not improper for the corporate entity to contract under the name "ABC, Inc. d/b/a The Alphabet."

If you have questions regarding the use of a trade name, please contact either Doug Yohe or Lorie Taylor. 

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damage to the property of others. As such, a tension often exists between the desire of a resident to age in place, and what would be a reasonable accommodation to allow the resident to age in place. Nonetheless, potential violations occur if a CCRC or senior housing provider refuses to make a reasonable accommodation that does not fundamentally alter the CCRC's program if it is necessary to afford the disabled person an equal opportunity to use and enjoy a dwelling.

In her suit, Ms. Bell sought a protective order barring the facility from: (1) inquiring into the nature and severity of her disabilities; (2) requiring that she prove her ability to move about or perform other tasks independently; and (3) making involuntary transfers to a more restrictive living situation based on disability. She also challenged Bishop Gadsden's failure to reasonably accommodate her disabilities when it restricted her use of personal care attendants. Bell objected to the provider's dining hall rule that residents could not sit at the table with ambulatory aids or use personal assistance with their food. Finally, she objected to the restriction of certain field trips to ambulatory residents. At the outset of the case, Bell sought a court order prohibiting Bishop Gadsden from evicting her from her apartment pending an outcome of the litigation. Bishop Gadsden relented and entered into a consent order, which is a court order adopting an agreement of the parties. The consent order allowed Bell to continue her residency in her apartment during the pendency of the case. In exchange, Bell agreed to provide her own personal care, and agreed to accept full and sole responsibility and liability for the care received.

After filing suit, Ms. Bell died, and her estate continued the litigation. Ultimately, the case was settled prior to trial. The parties entered into a final consent order, in which Bishop Gadsden admitted no liability but agreed to allow residents to use personal assistants and assistive devices under certain terms and conditions, and paid the

attorneys fees incurred by Bell and her estate. The parties agreed that Bishop Gadsden residents would continue to have the right to use electric wheelchairs, electric scooters, electric carts and powered chairs. The order required the use of these devices to be contingent upon a physician's certification of medical necessity and ability to operate the device in a safe manner.

Bishop Gadsden also agreed to adopt a revised transfer policy, which was attached to the consent order. Under the revised transfer policy, residents can be transferred at the initiation of the provider only if certain criteria were met, such as the resident posing a danger to the health, safety and well-being of the resident or others. A resident could also be transferred if the needs of that resident exceed that which may be provided adequately or safely in the current residence. The revised transfer policy also set forth a detailed dispute resolution procedure if a resident wished to challenge a transfer initiated by the provider.

As a result of the consent order, the issue of how the FHA and the ADA affect a life care community resident's choice to age in place still remains unaddressed by federal court. Nonetheless, the Bishop Gadsden case highlights the liability risks associated with policies, practices and procedures that may be viewed as preventing residents in "independent living" or personal care from aging in place. In light of the Bishop Gadsden case, a housing provider's policies, protocols and actual practices regarding admissions, and in particular, level of care transfers and mobility aids, should be closely reviewed to ensure that they are compliant with the provisions of the FHA and ADA. The AARP was involved in the Bishop Gadsden case as co-counsel, and has publicized the results of the case both online and in its AARP magazine, heightening the case's profile. In light of this publicity, CCRCs would be well served to proactively examine their policies, practices and protocols. 

USERRA RULES CHANGE *BY: GLENN R. DAVIS, ESQ.*

New regulations issued by the U. S. Department of Labor (“DOL”) interpreting the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) became effective on January 18, 2006. The Act, which replaced the old Veterans’ Re-employment Rights statute, took effect in 1994 and was an outgrowth of the Gulf War. It provides for leaves of absence without pay for military or Reserve duty for both full-time and part-time employees. In addition to providing an employee with reemployment rights, USERRA provides an employee and his or her dependents with continuation coverage under the employer’s health plan, as well as participation in all traditional pensions, profit sharing, 401(k), or other compensation arrangements. The new DOL rules fill in the detail on how to administer health and retirement benefits, as well as administratively facilitate a qualified employee’s return to work.

As noted, USERRA grants employees who leave work for military service the right to continue their employer-based health coverage for up to 24 months while they are in the military. Even if they do not elect continuation coverage, the employer must reinstate the employee into the plan upon reemployment, without a waiting period or other exclusion. USERRA’s benefit is similar to, but not identical to, COBRA coverage. USERRA covers all employers regardless of size while COBRA covers only employers of 20 or more employees. Additionally, while COBRA provides specific time periods for coverage elections, USERRA sets no time frames for electing continuation coverage. DOL has decided to allow employers to develop their own reasonable rules for USERRA coverage, rather than adopting the COBRA time frames. While DOL has adopted this flexible approach for employers, the approach requires employers to adopt a USERRA policy that establishes and details a reasonable procedure with time frames. If the employer fails to establish reasonable rules, the employee will have until the end of the 24-month USERRA coverage period to elect continuation. In that event, and should an employee so elect and pay the required premium at any time before the end of the 24-month period, the employer must provide coverage retroactive to the date the employee entered military service. Should the employer’s insurer not reinstate coverage for the employee retroactively, the employer must self-insure that retroactive coverage.


USERRA’s employee contributions are also similar to, but not identical to, COBRA. If the employee’s leave is fewer than 31 days, the employee pays the regular employee share of coverage. If the leave is greater, the employee may be required to pay up to 102% of the full premium. If the employee fails to pay for continuation, the employer may develop reasonable rules to terminate the coverage.

It is important to understand the interplay between USERRA and COBRA as the similarities and differences add complexity to the issue surrounding continuation coverage of health care benefits. It is now essential for employers to have detailed USERRA policies that discuss the continuation coverage issues. Previously, it was acceptable to have a short policy merely acknowledging military leave obligations under USERRA and state law.

USERRA also addresses pension benefits. The broad principle is that employees who are away on military leave are treated as if the military leave had not occurred. In other words, an acceleration of

benefits is applied upon reinstatement so that uniformed personnel’s benefits are the same as they would have been if he/she had been continuously employed with the employer. The DOL regulations provide a generous time frame, the greater of three times the period of service, or five years, for the employees to make up contributions they would have otherwise made during the period of service to 401(k) plans. USERRA also requires employers to make retroactive contributions to defined benefit plans. The time deadline for this employer contribution is the later of 90 days after the employee’s return to work or date on which the contributions otherwise would have been due. This 90-day deadline represents one of the few employer friendly changes to the rules.

The new rules of USERRA make it important for employers to adopt a written policy which addresses its benefits and pension obligations. It also requires the employer to implement fiscal planning for contributions the company will need to make on behalf of employees who take leave for uniformed service.

Should you need assistance with regard to your USERRA policy, please feel free to call Glenn Davis or Angela Thomas. 

STAFF POSTING REQUIREMENTS IN NURSING FACILITY SETTING

BY: TANYA DANIELS HARRIS, ESQ.

The Centers for Medicare and Medicaid Services (“CMS”) released the final rule regarding the posting of nurse staffing information on October 28, 2005, and became effective December 27, 2005.

Under the final rule, nursing facilities are required to post daily at the beginning of each shift the nurse staffing data for the licensed and unlicensed nursing staff who are directly responsible for the care of residents during each shift. The categories of licensed and unlicensed nursing staff include registered nurses, licensed practical nurses or licensed vocational nurses, and certified nurse aides. The nurse staffing data must specify the total number of nursing staff employed or contracted by the facility as well as the total number of hours worked by the nursing staff. The nurse staffing data must also include the name of the facility, the current date and the resident census.

The final rule requires nurse staffing data to be clear and legible and posted in an accessible location within the facility. If a member of the public requests to review a facility’s nurse staffing data, the facility has an obligation to provide that individual with the data at a cost not to exceed the community standard. The facility also has a duty to retain the nursing staff data for the longer of either 18 months or as otherwise required by state law.

If you have any questions regarding compliance with this final rule, please contact Kimber Latsha or Tanya Harris. 



2006 SEMINARS

Pa. Assoc. of Community Bankers Leadership Conf.	April 21, 2006 Camp Hill, PA	"Hiring & Retention"	Angela L. Thomas, Esq.
Pennsylvania State Assoc. of Township Supervisors	April 24, 2006 Hershey, PA	"Unhappy Endings: Preparing for Employee Discipline and Termination Meetings"	Angela L. Thomas, Esq. and Glenn R. Davis, Esq.
PACAH	April 25, 2006 Gettysburg, PA	"Six Deadly Sins Employers Can Commit"	Glenn R. Davis, Esq. and Angela L. Thomas, Esq.
LDY&M	April 26, 2006, Harrisburg, PA April 27, 2006, Frazer, PA	2006 Long Term Care Law Compendium	
Pa. Coalition of Charter Schools Conference	May 2, 2006 Harrisburg, PA	Legislative Update	Kevin M. McKenna, Esq.
LDY&M	May 4, 2006 Cambridge Springs	Employment Law Seminar	Glenn R. Davis, Esq. and Angela L. Thomas, Esq.
Bucks County LTC Consortium	May 4, 2006	"Responding to Adverse Events"	Kimber L. Latsha, Esq.
Pa. Assoc. of Community Bankers Human Resources Conference	May 11, 2006 Camp Hill, PA	"Domestic Violence and the Workplace"	Angela L. Thomas, Esq.
Pa. Assoc. of Community Bankers Human Resources Conference	May 11, 2006 Camp Hill, PA	"The Latest and Greatest from our Legislators and Regulators"	Glenn R. Davis, Esq. and Angela L. Thomas, Esq.
NJANPHA	June 1, 2006 Atlantic City, NJ	"Non-Compliance Nightmare – Are You Prepared"	David C. Marshall, Esq.
NJANPHA	June 1, 2006 Atlantic City, NJ	"Six Deadly Sins Employers Can Commit"	Angela L. Thomas, Esq. and Glenn R. Davis, Esq.
NJANPHA	June 1, 2006 Atlantic City, NJ	"Discrimination in Housing – Mobility Aids and Levels of Care"	Kimber L. Latsha, Esq.
PBI	June 15, 2006 Philadelphia, PA	"Registration and Disclosure Requirements for CCRCs"	Kimber L. Latsha, Esq.
PANPHA	June 21, 2006 Hershey, PA	"Marketing Pressure Points"	Kimber L. Latsha, Esq.
PANPHA	June 22, 2006 Hershey, PA	"When the Attorney General's Office Knocks on the Door"	Kimber L. Latsha, Esq.
PANPHA	June 23, 2006 Hershey, PA	"Mergers and Acquisitions"	Kimber L. Latsha, Esq.
PANPHA	June 23, 2006 Hershey, PA	"Six Deadly Sins: Common Employer Mistakes"	Angela L. Thomas, Esq. and Glenn R. Davis, Esq.
Pa. Assoc. of Community Bankers Annual Conference	September 9, 2006 San Diego, CA	"Protecting Your Company's (Other) Assets"	Angela L. Thomas, Esq. and Glenn R. Davis, Esq.