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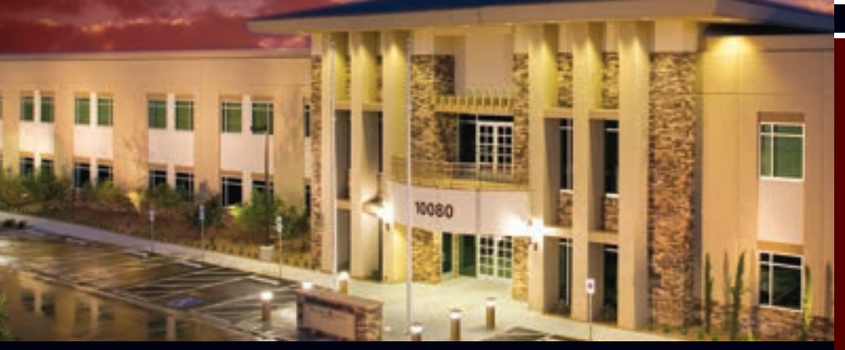
Robert E. Werbicky
Senior Counsel
Las Vegas Office

Jonathan S. Chung
Associate
Las Vegas Office

Astrid A. Perez
Associate
Reno Office



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10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NEVADA 89145
702.385.2500

5371 KIETZKE LANE
RENO, NEVADA 89511
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"Long COVID" as a Disability: Employers Take Note

Landlord Held Not Liable for Tenant-On-Tenant Harassment

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Legal Matters

SPRING 2022

"Long Covid" as a Disability: Employers Take Note

Post-acute COVID syndrome, which is also known as "long haul COVID" or "long COVID," refers to individuals infected with COVID-19 who experience new or recurring symptoms for months after their initial infection. Approximately 11 million people in the U.S. have reported experiencing long COVID, an estimated 10 to 30 percent of people infected. Many of these individuals had a mild initial infection.

Symptoms can include shortness of breath, respiratory problems, muscle aches, anxiety, depression and fatigue, and can interfere with an individual's ability to work. While many individuals with long COVID may not think of themselves as disabled, the federal Americans with Disabilities Act (ADA) defines a "disability" as a condition that "substantially limits" a major life activity like sleeping, breathing or working.

That means long COVID symptoms may indeed rise to the level of a disability for which an employer must provide reasonable accommodations under the ADA. It also means if an employee with long COVID makes a written or oral request for an accommodation, the employer must initiate an interactive process where the employer is entitled to limited medical documentation to verify the disability and to ask questions to clarify the reason for the accommodation and explore alternatives.

What kinds of accommodations might an employer consider for a worker with long COVID symptoms? Possibilities include a modified or part-time schedule, rest periods during a shift, temporary reassignment to a vacant, less taxing position or providing equipment to help the employee do his or her work. This could be as simple as giving someone whose duties typically require standing for long periods a stool to lean on or sit on rather than spending the whole shift on their feet.

Additionally, accommodating an employee under the ADA doesn't mean the employer has to give the worker whatever they ask for. The employer simply needs to provide what is necessary to enable the worker to perform the essential tasks of the job. For that matter,

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employers need not excuse the worker from performing his or her essential job functions, reduce required productivity levels, provide personal items or provide an accommodation that creates an unreasonable hardship for the employer.

The ADA also does not require employers to provide accommodations to allow employees to help disabled family members, but related obligations may arise under federal or state family leave laws. ■

Landlord Held Not Liable for Tenant-On-Tenant Harassment

Landlords don't have enough control to be held liable for tenant-on-tenant harassment, a federal appeals court has ruled. The decision in *Francis v. Kings Park Manor* upheld the dismissal of a tenant's claims against a landlord who didn't take action against another tenant who harassed him.

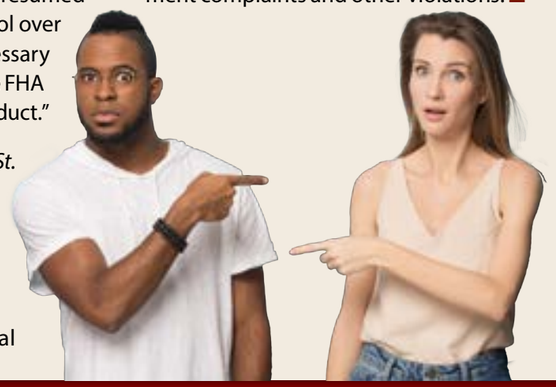
In this case, tenant Raymond Endres harassed the plaintiff, Donahue Francis, with racial insults and a death threat. Francis reported the incidents to police and the landlord. The landlord allegedly told its property manager "not to get involved." Endres continued to live at the property until his lease was up. He was, however, arrested and ultimately pleaded guilty to harassment violations.

Francis filed suit against the landlord in federal court, alleging violations of the Fair Housing Act (FHA), among others. On appeal, the 2nd Circuit dismissed the suit against the landlord. The court ruled that a landlord "cannot be presumed to have the degree of control over tenants that would be necessary to impose liability under the FHA for tenant-on-tenant misconduct."

Previously, in *Wetzel v. Glen St. Andrew Living Community*, a second federal appeals court, the 7th Circuit, had ruled that the Fair Housing Act "creates liability against a landlord that has actual notice of tenant-on-tenant harassment based on a protected status, yet chooses not to take any reasonable steps within its control to stop that harassment."

In the latest case, the 2nd Circuit attempted to explain the difference between the two cases. Wetzel lived in a senior living community with shared living areas and services, and the landlord had the ability to restrict access and services provided to harassing tenants. In the *Francis v. Kings Park Manor* case, a traditional tenant-landlord relationship existed.

Analysts suggest the battle may continue. Arguably contradictory viewpoints in the federal appeals courts suggest the issue could be headed for the U.S. Supreme Court. In the meantime, it may behoove landlords to review their leases regarding language around tenants' rights to "quiet enjoyment" and develop consistent response plans to discriminatory harassment complaints and other violations. ■



Employers Must Handle Virtual Interviews with Care, Given Risks

During the pandemic, employers who needed to hire new workers were forced to conduct job interviews virtually on platforms like Zoom. This obviously made the interviewing process safer at the time, and many employers liked the efficiency of virtual interviewing so much that they've decided to make it a permanent fixture of the hiring process.

However, like many things that seem to make life better for employers, virtual interviewing has its legal risks, and it's important to consult with an employment attorney to ensure you're not walking into a lawsuit. The biggest risk is discrimination suits.

For one thing, a company that requires job candidates to interview virtually is assuming that the candidate has access to the necessary technology, like high-speed internet service at home and a computer with a camera. But studies from the Pew Research Center show that older job candidates are less likely to have such technology. Another Pew study shows that Black and Latino job candidates are far less likely to own home computers than white candidates.

Meanwhile, federal discrimination law and most state discrimination laws prohibit both age and race discrimination. "Disparate impact" claims (where someone asserts that a policy that appears neutral on its face disproportionately harms job candidates and workers from a particular group) are covered by many of these laws. To address the risk of disparate impact, employers adopting virtual interviewing need to be flexible and provide other options for candidates who don't have the necessary technological capacity at home. For example, they might consider allowing camera phones or conducting the interview as a phone conference call instead. Similarly, some candidates may have disabilities that make it hard to do a virtual interview. In such cases, the federal Americans with Disabilities Act may require employers to provide reasonable accommodations that allow the candidate to participate, or they may need to consider evaluating the candidate in some other way.

It's also probably a good idea to make it a practice to have job candidates blur their backgrounds or use a fake background when conducting a virtual interview. Otherwise, there's the risk of the employer gaining a window into the candidate's private life and learning things they wouldn't be allowed to ask about in an interview. If the candidate then doesn't get the job, he or she might claim they were rejected for discriminatory reasons, such as racial bias or concerns about caregiver responsibilities.

The fact that some state anti-discrimination laws are even stronger than federal law presents another trap for employers. If you're interviewing a candidate located in one of those states, that state's employment laws may apply. An attorney can help you navigate this situation so you don't inadvertently conduct an interview in a way that's acceptable where you live but violates state laws where the candidate lives.

A further area of risk is recording video interviews. It's understandable to want to record an interview for later review and to get additional people involved in the decision-making. But it's critical to review different states' privacy and wiretapping laws before doing so, because they differ. Some states only require that only one party to the conversation approve of a recording while other states require approval from all parties. The best approach is to obtain consent from all participants, including the job candidate, and to do so in writing. ■