Fitness for Duty

You are sitting in your office reviewing recent employment cases when a Major for your police department walks in and asks "got a moment? Sure doesn't look like you are doing anything except reading- let me run this by you." He proceeds to tell you that one of his sergeants has told him that Officer Smith seems to behaving erratically. Officer Smith, a former officer of the year and decorated veteran of the police department, has a solid reputation as a good street cop. However, according to his Sergeant, he recently has become irritable and withdrawn and has begun to receive a few complaints from citizens that he has been rude and "short-tempered" when responding to routine calls. It is also no secret that the Sergeant and Officer Smith are not exactly the best of friends. Several have mentioned that the Sergeant, who was recently promoted, is uncomfortable around Officer Smith because Officer Smith has obtained a de-facto leadership role with the younger officers and is considered an "officer's officer" who is willing to stand up to management. He recently signed up to speak before city council about what he perceived was management's blind eye towards the growing threat posed by street gangs and that the management of the department needs to quit coddling these little criminals and let officers do their jobs by locking them up.

The Major wants to know whether he should send Officer Smith for a fitness for duty exam (FFDE) or just write him up for the discourteous behavior and note the problems in his yearly performance evaluation.

The above hypothetical illustrates the dilemma that routinely confronts administrators and their counsel in reviewing requests that an employee be ordered to submit to a FFDE: Should the employer take a proactive position and order an exam prior to the occurrence of a significant and severe episode. In doing so, will the employer be subject to a legal challenge by the employee for damage to his reputation or discrimination under the ADA? Or does the employer adopt a wait and see position and hope that the officer does not commit an act that exposes the Department to a claim of negligent supervision and retention.

This paper will examine this dilemma from the perspective of the evaluator, employer and finally the employee in hopes of providing its reader with a better understanding of the complexities involved with FFDE's and the types of legal challenges an employer can anticipate.

What is a fitness for duty exam (FFDE)

According the to guidelines published by the International Association of Chiefs of Police Psychological Service Section an FFDE is "a formal, specialized examination of an incumbent employee that results from (1) objective evidence that the employee may be unable to safely or effectively perform a defined job and (2) a reasonable basis for believing that the cause may be attributable to psychological factors. The central purpose for an FFDE is to determine whether the employee is able to safely and effectively perform his or her job functions."[i]

The IACP guidelines are drafted for evaluators who specialize in police FFDE; however, some of the recommendations are relevant to issues confronting the employer and its legal counsel. The guidelines recommend that three thresholds be in place before

requiring an employee be ordered to obtain a FFDE. First, any referral must be directly observed and not based on speculation. Third party speculation about a person's behavior is insufficient. Second, since an FFDE is intrusive upon the employee's privacy, the employer should determine that other options are not appropriate. If the employee's behavior does not clearly demonstrate an inability to perform his or her job functions, then other alternative should be utilizes. Third, when in doubt the manager seeking the FFDE should discuss the concerns surrounding the employee with their legal counsel.[ii]

In addition, the guidelines provide the following recommendations: first, the examiner should be a licensed psychologist or psychiatrist who is familiar with the essential job functions of the person to be examined and is experienced in diagnostic evaluation; second, the evaluator should obtain a written agreement between the evaluator and the employer which establishes the employer is the client and not the employee; third, the evaluator should make certain that the referral process is made pursuant to a written policy adopted by the employer which requires all relevant background information be shared with the evaluator.[iii] (in the event the employer refuses or is legally prohibited from sharing all information, then the employer should note that some information is being withheld);[iv] fourth, obtain informed consent from the employee describing the nature and scope of the evaluation;[v] and finally, the evaluator should also obtain written authorization from the examinee to release information to the employer.[vi]

According to the guidelines, the evaluator should document not only the material reviewed and the types of psychological testing conducted, but also a comprehensive interview with the examinee and follow up interviews with third parties. In the event an interview with a third party is conducted "care should be taken to obtain informed consent form the employer, the examinee, or from the third party, as appropriate."[vii]

The report provided to the employer should provide not only a "clearly articulated opinion that the examinee is presently fit or unfit for unrestricted duty" but also "a description of the employee's functional impairments or job relevant limitations; and an estimate of the likelihood of, and time frame for, a return to unrestricted duty, and the basis for that estimate."[viii] The guidelines specifically recommend that the evaluator not provide an opinion regarding necessary work restrictions or reasonable accommodations.[ix]

In reviewing the guidelines it is understandable that the evaluator wants to insulate him or herself from pitfalls of litigation. To the extend this is possible the evaluator is protected by requiring accurate and complete information about the examinee from the employer. Second the evaluator does not make a recommendation concerning employability but only whether he or she is fit for duty. The decision to terminate or look for an accommodation is left to the employer.

From the employee's perspective.

Being told that one must report to a fitness for duty exam is unlikely to be met by the employee with open arms. The responses range from simply "this is not fair" to filing state or federal litigation for unlawful disability discrimination, age discrimination, and retaliation. He or she may also assert a claim for violation of free speech, deprivation of

equal protection, or deprivation to a liberty interest under the 14th Amendment's Due Process Clause. It should be no surprise that an employee ordered to take a FFDE may resist through a legal challenge when one takes into consideration that he or she may already be under some psychological duress. One need not be a psychologist to recognize that someone who feels persecuted to begin with may resist any suggestion that he or she may is the source of the problem.

The Employer's Perspective

The decision by management to require a FFDE is rife with legal pitfalls. The case of *Thomas v. Corwin, 483 F.3d 516 (8th Cir. 2007); 2007 U.S. App. LEXIS 7601* is an excellent case to review – not only because of the legal challenges posed by the plaintiff in resisting an FFDE, but the facts, in this author's mind, are typical of the every day workplace Thomas started her employment with the Kansas City Police Department as a civilian in 1977 and eventually began working as an investigative typist. She transferred to another division in 1999, but returned to the juvenile unit in 2000. At the time she returned, she was aware of a workforce shortage and the unit's policy of limiting consecutive vacation days to no more than 16. Nevertheless, upon arrival in the unit she submitted a request to take 20 consecutive vacation days which her supervisor promptly denied according to the units vacation policy. Thomas' supervisor asked her to resubmit the request and upon receipt she approved her new request for 17 consecutive vacation days. After returning from vacation, Thomas met with her supervisor and informed her that she was concerned about safety and security within the unit and that she was being treated differently than the male employees. Specifically, she thought that it was unfair that the men (sworn officers) were allowed to carry guns, but she (non-sworn) was unarmed and not even able to carry pepper spray. According to Thomas, she was advised by her supervisor to think seriously before filing a grievance against the Department.

A short time later, Thomas was found asleep at her desk and her supervisor required her to file a memorandum explaining the incident. Although not formally disciplined, Thomas complained that younger male officers have fallen asleep, but they were not required to file a memorandum.

Later on, Thomas reports to work late and misses a staff meeting. Once again, upon being requested to file a memorandum explaining her tardiness, she states that other male employees under similar circumstances were not required to file a memorandum.

In January 2001,she submits another vacation request for 32 consecutive days which was denied and asked to resubmit. In February 2001, Thomas meets with her supervisor and a Captain for the police department where she is advised that her request for 32 vacation days may constitute insubordination. Thomas was also advised her that her work performance was deficient in several areas including excessive time away from her desk and using office equipment for personal reasons. In May of 2001, Thomas receives her yearly performance evaluation wherein she received a rating of satisfactory. The evaluation contained both complimentary comments and areas of concern which included "unusual behavior" such as falling asleep and being late. Thomas was advised to seek medical advice concerning her fatigue.

By the end of May, however, Thomas advised KCPD that she could not return to work because she was suffering from "job-related stress" and that her primary care

physician recommended that she not return to work for a limited period of time. Thomas was eventually cleared to return; however the Department advised her that before returning she must under go a fitness for duty examine for the following reasons: absenteeism; refusing to advise the department that she was suffering work related stress; and the Department's potential liability if she returned to work without an evaluation.

The Department provided the evaluator a log of stress related leave, and medical notes from Thomas' doctors advising she could not return to work. The referral letter did not ask the evaluator to opine whether Thomas could return to work, however he assumed that he was to determine if psychological problems interfered with Thomas ability to work.

Prior to the evaluator issuing a report, Thomas filed a 9 page grievance which included allegations that she was being subjected to disparate treatment because of her age and gender. In addition, she was subjected to increased scrutiny because of her initial complaints of an unsafe working environment and disparate treatment.

The evaluator issued an initial report indicating that he needed to obtain additional medical reports from Thomas' physicians to explain the source of her stress. He also noted that her concerns about an unsafe work environment were "disproportional" to the level of her alleged stress. Thomas refused to sign a release form allowing her doctors to send her medical records to the evaluator. After several attempts to get Thomas to sign the release she was terminated and her job was filled by a younger female.

Thomas sued in federal court for claims arising under the Americans for Disability Act, 42 U.S.C. Sections 12101-12213, Age Discrimination in Employment Act (ADEA) 29 U.S.C. Sections 621-634, Gender Discrimination under Title VII of the Civil Rights Act (Title VII); Retaliation under the ADA and Title VII and invasion of privacy under state law. The City filed a Motion for Summary Judgment to all claims which was granted by the District Court and upheld by 8th Circuit Court of Appeals.

ADA Restrictions on Requiring Medical Exams – Vital to Business Necessity

The Court noted that 42 U.S.C. § 12112(d)(4)(A), "prohibits an employer from requiring a medical examination or inquiring into the disability status of an employee "unless such examination or inquiry is shown to be job-related and consistent with business necessity." This provision applies to all employees, regardless of whether the employee has an actual disability." *Thomas v. Corwin, 483 F.3d 516,527 (8th Cir. 2007)*

> "To demonstrate compliance with § 12112(d)(4)(A), the employer bears the burden to show the asserted "business necessity" is vital to the business and the request for a medical examination or inquiry is no broader or more intrusive than necessary. *Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 97-98 (2d Cir. 2003).* 'Courts will readily find a business necessity if an employer can demonstrate . . . a medical examination or inquiry is necessary to determine . . . whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties (such as frequent absences . . .)," or "whether an employee's absence or request for an absence is due to legitimate medical

> reasons, when the employer has reason to suspect abuse of an attendance policy." *Id. at 98; see, e.g., Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 811 (6th Cir. 1999)* (holding "there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job" to uphold an employer's request for an exam). The examination or inquiry need not be the only way to achieve a business necessity, but it must be a reasonably effective method to achieve the employer's goals.
> *Id*.

Here, the court noted that KCPD had reason to be order the exam because Thomas refused to discuss why she was suffering work related stress and to put her back into the same environment would put both her and the department at risk.

Age Discrimination Claim – Refusal to Cooperate with FFDE Exam.

Thomas alleged three ADEA claims: 1.) requiring her to file memorandum each time she was late or requested leave in violation of the Department's policy; 2) requiring her to participate in the FFDE process; and 3) terminating her because she refused to participate in FFDE process. In reference to requiring her to participate in the FFDE process, the court found that Thomas failed to show any evidence that KCPD's requirement that she undergo a FFDE was related to her age.

> Finally, Thomas puts forth a prima facie case of discriminatory discharge under the ADEA because she is at least forty years of age, was terminated by KCPD, was meeting KCPD's legitimate performance expectations, and was replaced by a younger employee. *See Haas, 409 F.3d at 1035*. Thus, the burden shifts to the defendants to articulate a legitimate, nondiscriminatory reason for their actions. By refusing to provide Dr. Harris the opportunity to review her medical records and to discover the root of Thomas's stress and anxiety, Thomas created a stalemate in which KCPD had little choice but to terminate Thomas rather than return her to the position from which Thomas's stress and anxiety originated. Thomas's refusal to cooperate with the reasonable requirements of her FFD evaluation and her violation of KCPD's rules of conduct provided the defendants with legitimate, nondiscriminatory reasons to terminate Thomas. *Id at 529.*

Retaliation Claim only if FFDE Causally Linked to Retaliatory Motive

The Court assumed that requesting a FFDE was an adverse employment action[x], however there must be a causal connection between the alleged protected activities and the retaliatory conduct

> We will assume, for purposes of argument that Thomas's FFD evaluation, requested by the defendants in June 2001, constitutes an adverse employment action, and that Thomas's complaints regarding discriminatory treatment within the Juvenile Unit constitute protected activity. Nevertheless, we conclude Thomas fails to demonstrate any causal connection between the alleged protected activities and the retaliatory conduct. To prove a causal connection, Thomas must demonstrate the defendants' "retaliatory motive played a part in the adverse employment action." *Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893, 896-97 (8th Cir. 2002)*. Evidence giving rise to an inference of retaliatory motive on the part of the employer is sufficient to establish the requisite causal link. Id. at 897. "An inference of a causal connection between [protected conduct] and [an adverse employment action] can be drawn from the timing of the two events, but in general more than a temporal connection is required to present a genuine factual issue on retaliation." *Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1119 (8th Cir. 2006).* In this case, the FFD evaluation request in June 2001 directly followed Thomas's three-week absence from work due to "work-related stress." There is no allegation Thomas engaged in protected activity on some date close in time to KCPD's FFD evaluation request, and Thomas fails to put forth sufficient evidence supporting an inference of retaliatory motive on the part of the defendants. Furthermore, even if Thomas could put forth a prima facie case, the defendants proffered legitimate, nondiscriminatory reasons for requesting the FFD evaluation, which Thomas fails to rebut.

As seen from above, the complex relationship between the competing interests of the employer, evaluator and employee should be a cause of concern for the employer's counsel. The decision to order an FFDE must take into consideration ADA, FMLA, anti retaliatory provisions of Title VII and state privacy claims for action. The following is a checklist for counsel to consider when dealing with a request for FFDE.

- Is the FFDE being used as a substitute for a disciplinary action?
- Is there another appropriate alternative such as confidential employee counseling?
- Has the employee filed any complaints with the EEOC or grievances with your HR department? If so, is there any indication that the FFDE is being wielded as a retaliatory device. Take a look at the employee's performance ratings to see if there is an unexplained drop in performance or an unreasonable increase in objectives.
- Was the employee out on sick or FMLA leave prior to the order? If so the decision to order must be made in conjunction with FMLA guidelines.

- Do you have a written policy establishing a uniform FFDE referral process?
- Is the request for an FFDE referral based on objective first hand evidence rather than innuendo or third party hearsay.
- Does the behavior affect an essential job function?

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[i] A copy can be located at http://www.iacp.org/div_sec_com/sections/psych.htm

[ii] Id.

[iii] The information that should be shared includes "performance evaluations, previous remediation efforts, commendations, testimonials . . . disciplinary actions, incident reports of any triggering events, medical records, or other supporting or relevant documentation related to the employee's psychological fitness for duty." See Fitness for Duty Exams http://www.iacp.org/div_sec_com/sections/psych.htm

[iv] Id.

[v] The consent "at a minimum should include a description of the nature and scope of the evaluation, the limits of confidentiality, including any information that may be disclosed to the employer without the examinee's authorization, the potential outcomes and probable uses of the examination; and other provisions consistent with legal and ethical standards for mental health evaluations conducted at the request of third parties."

[vi] Id.

[vii] Id.

[viii] Id.

[ix] Id. "It is recognized that some examiners may be asked to provide opinions regarding necessary work restrictions, accommodations, interventions, or causations. Nevertheless, the determination as to whether or not a recommended restriction or accommodation is reasonable for the specific case and the agency, is a determination to be made by the employer and not the evaluator."

[x] But see *Burlington Northern & Santa Fe Railway Company v. Sheila White*, 126 S. Ct. 2405, 2412, 165 L. Ed 2d 345(2006) which clearly states that an adverse employment action is not a prerequisite for retaliation.