Selected Recent Cases for Police Psychologists

Compiled by the AELE Law Enforcement Legal Center

Compensation Awards – Psychic Injuries

A California Compensation Board award for a psychiatric injury must be supported by evidence that the condition was not the result of legitimate disciplinary action.

In California, a worker's psychiatric injury is not compensable "if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action." In this case, a probation officer sustained a psychiatric injury after encountering trouble at work.

An agreed-on medical psychiatric evaluator concluded that the injury was not substantially caused by personnel actions, and the Workers' Compensation Appeals Board awarded compensation.

However, in a supplemental report, the psychiatrist had concluded that that one-third of the officer's injury was caused by an internal affairs investigation. The county appealed.

An appellate court panel found that the award was not supported by the evidence. The psychiatrist had no authority to decide what was or was not a personnel action.

The award was vacated and the matter remanded to the Board for further action. *County of Sacramento v. Workers' Compensation Appeals Board*, # C067739, 215 Cal. App. 4th 785, 156 Cal. Rptr. 3d 326, 2013 Cal. App. Lexis 311.

Fitness for Duty Exams – Due Process

In Illinois, a psychologist who performs a FFDE is not entitled to receive more than a bottom-line conclusion from another psychologist hired by the officer.

Michael Campion, a psychologist, concluded that a Pekin, Illinois, police officer was unfit for duty.

On his own initiative, the officer then underwent three evaluations from other psychologists who came to a contrary opinion. The chief ordered the officer to provide Campion with their conclusions, supported by evaluations and data.

When he refused, he was suspended for 20 days. The officer appealed. An appellate court held in a divided decision that, as a matter of Illinois law, the chief could require an officer to provide no more than a psychologist's bottom line. Since the chief had asked for facts and reasons, his order was unlawful. *Simmons v. Pekin*, #3-08-0944, 2009 Ill. App. Lexis 4146 (Unpub. 3rd Dist.).

The officer also sued in federal court, contending that the due process clause of the Fourteenth amendment required the city to make up the pay he lost as a result of the board's decision. The 7th Circuit found that "Illinois offered Simmons ample process. He had a full hearing before being suspended. After the board ruled that he had been insubordinate, he enjoyed judicial review."

The Circuit panel added that the district judge should not have used a §1983 suit to resolve a claim that rested entirely on a proposition of state substantive law. *Simmons v. Gillespie*, #12-3381, 712 F.3d 1041 (7th Cir. 2013).

Note: The officer also brought multiple actions in state court. One suit was found to be untimely. *Simmons v. Pekin*, 2012 WL 7006506, 2012 Ill. App. Unpub. Lexis 2060 (3d Dist.).

Fitness for Duty Exams – Negligence

Damage suit against a psychologist who recommended a suspension due to an officer's alleged personality disorder was dismissed by the judge.

The officer in the above case also filed a damage action against Dr. Michael Campion, alleging professional negligence and misrepresentations. The trial court dismissed the suit, finding that there was no duty owed to the plaintiff and there was no provider-patient relationship.

The appellate court concluded that Dr. Campion had a duty to report any lack of fitness of a police officer. Moreover, he did not unlawfully interfere with the officer's employment relationship.

The appellate panel noted that Dr. Campion had rendered an opinion, not a statement of fact – and could not be sued for misrepresentations. *Simmons v. Campion*, #3-12-0562, 2013 IL App (3d) 120562, 991 N.E.2d 924 (2013).

Note: Multiple claims and defenses were raised on appeal. Please read the case for essential details.

Medical Separations – Due Process

Arizona appellate court holds that a termination for a physical or mental disability is a termination "for cause" and may be just as stigmatizing as a termination for disciplinary reasons. The employee's right to due process is the same in either situation.

An Arizona highway patrol officer's personal psychologist advised management to temporarily relieve him from duty so that he could be treated for psychosis and paranoid schizophrenia, which was causing him to see demons in traffic violators. His psychologist stated that officer had given him permission to make this disclosure.

The Patrol ordered a fitness for duty evaluation (FFDE). In the report, the Patrol's psychologist summarized officer's self-reported history, his medical records, and interviews with his wife and his personal psychologist. He also interpreted his performance on various psychological tests and concluded that the officer was unfit for duty because of serious psychiatric symptoms.

Later, management ordered a second FFDE with the same psychologist. That report updated the officer's history and treatment progress, interpreted his performance on re-administered psychological tests, and opined that he was still not fit for duty.

Management then decided to separate the officer for medical reasons. A Merit System hearing panel found, by a preponderance of the evidence, that the officer was unable to perform the essential functions of his job due to medical reasons. It upheld his termination, and that decision was appealed.

The Arizona Court of Appeals addressed several issues. First, the panel rejected the state's argument that argument that the officer's property interest in his employment was diminished because he was terminated for a non-disciplinary reason and not "for cause." A termination for a physical or mental disability is a termination "for cause" and may be just as stigmatizing as a termination for disciplinary reasons. An employee's right to due process is the same in either situation.

However, the officer's argument that he was denied due process also was rejected. He received adequate pre-termination and post-termination due process, despite having not been provided copies or a detailed description of the FFDE reports before his termination. The panel upheld his involuntary separation. *Turner v. Arizona Law Enforcement Merit System Council*, #1-CA-CV/11-0531, 2012 Ariz. App. Unpub. Lexis 1244, 2012 WL 2803752.

Psychological Screening of Applicants

Massachusetts Supreme Court confirms a holding that the Boston Police failed to meet the burden of showing that an applicant was psychologically unfit to be a police officer.

A female candidate for a position as a police officer received conditional offers of employment from the Boston Police Department on three occasions, but each time was found psychologically unfit during a screening by department psychiatrists and was bypassed.

A civil service commission, following a hearing, found that the department had failed to meet the burden of showing that she was psychologically unfit to be a police officer and ordered that her name be restored to the list of candidates certified for available appointments.

A trial court, upon review, vacated that order. The Supreme Judicial Court of Massachusetts reinstated the order. It found that the commission acted erroneously in considering expert testimony offered in another proceeding in making its decision, but there was sufficient independent evidence apart from that in the record to support the commission's order, including that an opinion relied on had been based on "unsubstantiated and subjective" criteria that lacked adequate factual support," and an arbitrary predisposition against the candidate.

Boston Police Dept. v. Kavaleski, #SJC-10972, 463 Mass. 680, 978 N.E.2d 55, 2012 Mass. Lexis 1005.

Psychotherapist Privilege – Discovery

Whether an employer is entitled to discover a psychotherapist's reports depends on the specificity of an employee's claims. Discovery is not appropriate for "garden-variety" emotional distress claims, but is necessary if the employee alleges debilitating medical conditions.

Two former police officers sued the Municipality of Anchorage for racial discrimination and retaliation. One is African-American, and the other is Hispanic. They claimed that the Anchorage police dept. created a hostile work environment and that they were treated disparately because of their races. They also sought damages for mental anguish.

The city applied for an order to compel the officers to sign releases authorizing the disclosure of their medical, pharmacy, and psychological counseling records, which a superior court granted. The officers appealed.

Neither plaintiff had sought medical treatment or counseling, nor taken any medication related to their mental anguish claims.

The Alaska Supreme Court concluded that the assertion of garden-variety mental anguish claims in an employment discrimination case does not automatically waive the physician and psychotherapist privilege.

The critical question, wrote the justices, was whether the officers placed their mental or emotional conditions at issue by asserting a claim for mental anguish damages and thereby waived the privilege.

The justices noted that "some courts allow discovery for serious psychological conditions, but recognize the physician and psychotherapist privilege for garden-variety mental anguish claims."

If plaintiffs do not allege that they have a medically diagnosable injury or that they have received treatment related to their emotional distress, an Alaskan employer "is entitled to bring this information to the jury's attention."

Several courts have distinguished "garden-variety" mental anguish from more serious conditions, such as depression, humiliation, embarrassment, sleeplessness, and nervousness. But, "a claim is not a garden-variety anguish claim if it involves a diagnosable mental disease or disorder, medical treatment or medication,

longstanding, severe, or permanent emotional distress, physical symptoms, or expert testimony."

Here, one of the plaintiffs alleged symptoms that suggest that he suffered from a diagnosable mental condition, and is not a garden-variety claim. On remand, he should be permitted the opportunity to limit his claim to garden-variety mental anguish. "If he does not, then he may be ordered to provide the requested medical discovery." *Kennedy v. Anchorage*, #S-14762, 306 P.3d 1284, 2013 Alas. Lexis 104.

- ***Admonition***: The law differs between states, and sometimes between appellate districts in the same state. Lawyers often disagree as to the meaning of a case or its application to a set of facts. More recent cases could change an outcome. These cases are only provided as a "starting point" for research.

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