EMPLOYMENT LAW UPDATE

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❖ Fitness for Duty Exams

I. Definition

A medical (physical or psychological) examination to ascertain whether an employee is able to perform the essential functions of his or her position.

The rules are different than for job-related pre-employment physicals and physicals that are conditions of a voluntary promotion (not a career path progression), which generally allow post-offer medical questions and examinations designed to determine whether the applicant can perform the essential functions of the position for which the individual has applied.

The rules are also different than for periodic testing of personnel in positions affecting public safety, which is permissible under the ADA.

II. Americans with Disabilities Act implications

a. The ADA prohibits inquiries of existing employees about disabilities unless the inquiry is "job-related and consistent with business necessity." This must be based on a reasonable belief, based on objective evidence, that the individual is unable to perform his or her job or will pose a direct threat to the safety of others due to a medical condition.

b. An employee ordered to undergo a fitness for duty exam can be disciplined (up to and including termination) for refusal to comply.

c. An employee ordered to sign an appropriate waiver allowing the doctor to report the examination results to the employer can be disciplined (up to and including termination) for refusal to comply. See, Davidson v. Bridgeport, 487 Fed.Appx. 590 (2d Cir. 2012); Anderson v. City of Dallas, 116 Fed.Appx. 19 (5th Cir. 2004).

d. An employee ordered to provide prior medical documents needed for the fitness for duty examination can be disciplined (up to and including termination) for refusal to comply. See, Thomas v. Corwin, 483 F.3d 516 (8th Cir. 2007).

e. Sufficient grounds to order a fitness for duty exam include the following instances: when a police officer is reasonably perceived as even "mildly paranoid, hostile, or oppositional" (Watson v. City of Miami Beach, 177 F.3d 932 (11th Cir. 1999); a police officer's four instances of highly emotional responses in routine circumstances within a one month period (Brownfield v. City of Yakima, 612 F.3d 1140 (9th Cir. 2010); paranoia, anxiety, and incoherence by a police sergeant discussing a disciplinary matter (Davidson v. City of Bridgeport, 2011 WL 1304436 (D. Conn. March 31, 2011); affd., Davidson v. City of Bridgeport, 487 Fed.Appx. 590 (2d Cir. 2012); a police department clerical employee's absences of approximately one month due to reported work-related stress and anxiety (Thomas v. Corwin, 483 F.3d 516 (8th Cir. 2007); when a customer service representative makes what are perceived to be threatening statements during a routine meeting with his manager (Owusu-Ansah v. Coca-Cola Company, 715 F.3d 1306 (11th Cir. 2013).

f. A fitness for duty examination ordered on a routine basis following a leave of absence could violate the ADA, depending on the circumstances. See, Franklin v. City of Slidell, 2013 WL 1288405 (E.D. La. March 27, 2013).

g. In a series of letters addressing matters related to anabolic steroid use, the EEOC opined that a police agency can require officers to report any use of anabolic steroids, can discipline officers using steroids illegally, but cannot send officers using steroids by prescription for a fitness for duty (or require other medical certification) unless there is a specific reason to believe the officer is unable to perform his duties or poses a direct threat.

III. Other legal considerations

a. Fitness for duty examinations that are found to be discriminatory or retaliatory may violate other federal laws. Denhof v. City of Grand Rapids, 494 F.3d 534 (6th Cir. 2006); McGreal v. Ostrov, 368 F.3d 657 (7th Cir. 2004).
b. Some state or local laws or employer policies may regulate fitness for duty exams.
c. Applicable collective bargaining agreements may restrict the employer's ability to order such exams.
d. Information discovered during a fitness for duty exam may give rise to accommodation requirements under the ADA or leave under the FMLA (and could lead to workers' compensation claims).
e. Medical information obtained in any fashion may only be disclosed as allowed by the ADA and state medical disclosure protections.

❖ Case Law Updates

FAIR LABOR STANDARDS ACT

Allen v. City of Chicago, 2011 WL 941383 (N.D. Ill. 2011), 2013 WL 146389 (N.D. Ill. 2013) – Chicago police sergeant's granted provisional class certification on an FLSA complaint seeking compensation for himself and others similarly situated who were allegedly required to use their PDA's to receive phone calls, emails, voice mails and text messages while off the clock. The court further found that general language in the parties' collective bargaining agreement requiring all disputes to be submitted to grievance and arbitration did not preclude this federal court claim (without deciding whether these rights were waivable under any circumstances).

Sutherland v. Ernst & Young, 726 F. 3d 290 (2d Cir. 2013) – Relying on the recent decision of the U.S. Supreme Court in American Express v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013), the Second Circuit upheld the preclusive effect of an employment agreement requiring mandatory and individual arbitrations of FLSA claims.

FIRST AMENDMENT

Singer v. Ferro, 711 F.3d 334 (2d Cir. 2013) – Plaintiffs are all supervisors or officers in the Ulster County, NY Sheriff's Office. While at work and using SO equipment, Plaintiff Singer created a spoof based on Absolut Vodka advertisements. He placed pictures of several SO officials' photos on the bottle and captioned the bottle "Absolut Corruption." He showed it to five fellow employees and then discarded it in the trash can. Another employee retrieved it and showed it to SO supervisors. Plaintiffs allege that they were thereafter subject to minor work-related actions they categorize as retaliatory. The Court ruled that under the circumstances, the creation of the "parody" did not constitute protected speech.

Garcia v. Hartford Police Department, 706 F.3d 120 (2d Cir. 2013) – Court upheld summary judgment for the City in a case filed by a Hispanic sergeant who claimed that his lack of promotion following two disciplinary incidents and his statements to the press regarding one of the incidents constituted both discrimination and retaliation as a result of protected speech. Although the court found that plaintiff's statements to the press were protected speech, the court found no evidence that the failure to promote was retaliatory. The case is also interesting for its treatment, for purposes of summary judgment, the report of Plaintiff's expert Dr. Leonard Territo.

Ellins v. City of Sierra Madre, 710 F.3d 1049 (9th Cir. 2013) – Holding that a jury could find that initiating a "no confidence vote" against the Chief of Police by Plaintiff who was the head of the union constitutes speech as a private citizen, the Court denied the City's motion for summary judgment.

Peele v. Burch, 722 F.3d 956 (7th Cir. 2013) – Plaintiff supported the losing Mayoral candidate and following the defeat of his candidate was quoted by the local press criticizing the election coverage and the position taken by the local sheriff in support of the other candidate. The day after the publication of these comments, plaintiff was called into the Chief's office and told that he was being transferred from the detective bureau to a desk job of "station duty officer." Finding these allegations sufficient to state a claim for violation of the 1st Amendment, the district court's decision granting summary judgment to the defendants was reversed.

Montone v. City of Jersey City, 709 Fed. 3d 181 (3d Cir. 2013) – Police sergeant allowed to proceed on her claim that she was not promoted based on her political support of the opposing Mayoral candidate. Plaintiff was number 5 on the promotional list when Chief Troy was appointed by the new Mayor and took over the department. During the Chief's approximately twenty month tenure, twenty six vacancies occurred in the rank of lieutenant and no promotions were made. Deposition testimony included statements that related the lack of promotions to retaliatory motives against plaintiff.

AMERICANS WITH DISABILITIES ACT

Kelley v. Correctional Medical Services, 707 F.3d 108 (1st Cir. 2013) – Plaintiff, a nurse in a correctional facility, allowed to proceed on her claim of retaliation under the ADA after being terminated for insubordination. The Court found that her evidence of numerous previous ADA requests for accommodation could be found to have so irritated her employer that her termination was retaliatory.

McMillan v. City of New York, 711 F. 120 (2d Cir. 2013) – Plaintiff was a case worker for a NYC social services agency. His schizophrenia and related medication interfered with his ability to arrive at work on time. The Court of Appeal noted that "while a timely arrival is normally an essential function, a court must still conduct a fact-specific inquiry…." In this instance, evidence that the City had a flex-time policy and in previous years, plaintiff's tardiness had been explicitly or tacitly approved created an issue of fact that resulted in a reversal of the summary judgment previously entered for the City.

Milton v. Texas Department of Criminal Justice, 707 F.3d 570 (5th Cir. 2013) – Under the ADA, prior to amendment by the ADAAA, employee who was allergic to scented products used in her workplace (candles and wall plug-ins used to cover dust and musty smells in a century old building) did not suffer from a "disability" within federal law.

TITLE VII (DISCRIMINATION/RETALIATION)

Kuhn v. Washtenaw County, 709 F.3d 612 (6th Cir. 2013) – Plaintiff claimed that his discharge from his position as a deputy sheriff violated Title VII (racial discrimination, harassment and retaliation) as well as several other laws. Many of his allegations were based on the department's investigation of rape charges made by a female suspect arrested by plaintiff. These charges were not sustained. The Court held that internal investigations into suspected employee misconduct, at least absent any evidence of bad faith, do not constitute adverse employment actions.

Desardouin v. City of Rochester, 708 F.3d 102 (7th Cir. 2013) – Plaintiff, a female supervisor in the Rochester Police Department, alleged that her supervisor made sexual advances by inquiring on a weekly basis whether her husband was "taking care of [her] in bed." Her complaints to the Department's Office of Integrity were unavailing. The Court of Appeal reversed a finding of summary judgment for the City, finding that the weekly repetition of this vulgar and humiliating comment over a two to three month period could be sufficient for a jury to find for the plaintiff on her claim of sexual harassment.

MISCELLANEOUS CASES

Seitz v. City of Elgin, 719 F.3d 654 (7th Cir. 2013) – City of Elgin police officer apparently accessed the police database for information he used to assist his private real estate business.

This was allegedly discovered by the officer's then wife, a fellow police officer, who allegedly accessed his email account, printed off emails showing this use and sent these copies anonymously to the corporation counsel. Upon learning of this, the police chief notified the officer that he was initiating a misconduct investigation. Among the resultant lawsuits is this one, filed by the officer and his business partner accusing the City of violating the Federal Wiretap Act and the Stored Communications Act by receiving and using the improperly obtained emails. The Court found that these federal laws did not create any private cause of action against a municipal employer under these circumstances.

Simmons v. Gillespie, 712 F.3d 1041 (7th Cir. 2013) – Plaintiff, a police officer whose suspension was reversed by a state appellate court, sued the City seeking back pay for the improper suspension. The Court dismissed the case, holding that the due process clause only requires process, not monetary relief for the prevailing party.