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Police Psychological Services Section

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CASE DECISIONS AFFECTING POLICE PSYCHOLOGISTS

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• Assisting law enforcement in an interrogation

Crowe, et al v. County of San Diego, et al, #05-55467, 608 F.3d 406, 2010 U.S. App. Lexis 894 (9th Cir.).

A civil rights lawsuit was filed by individual family members as a result of an investigation and prosecution of innocent teenagers for a crime they did not commit. The 12 year old sister of Michael Crowe, who was 14 years old, was murdered and he, along with two other teenagers were accused of the crime. Ultimately, it was discovered that a transient was the perpetrator and he was eventually tried and convicted of her murder.

However, the Ninth Circuit U.S. Court of Appeal, revived several aspects of the case, which had previously been dismissed, and remanded it for trial in federal court in San Diego. The Court reversed a lower court's ruling, dismissing the case against four Escondido police officers and another one from Oceanside finding that the police illegally coerced false confessions from the three teenagers.

Among many named as defendants is Dr. Lawrence Blum who had consulted with the police regarding the interview of Michael Crowe. The Court stated that "prior to the interview, police contacted Dr. Lawrence Blum, a clinical psychologist, and asked him to consult with them during the interview.

Dr. Blum was briefed by police, watched portions of the videos of Michaels's previous interviews, and then observed the fourth interview from a monitoring room. Dr. Blum commented on Michael's demeanor, personality, and responses to questions. The interview lasted more than six hours."

Dr. Blum also was involved in assisting the police prior to the interview of one of the other teenagers, Joshua Treadway. The Court noted that "Joshua was interrogated for approximately 13.5 hours." In addition to the three officers who conducted the interrogation, the Court said that "defendant Blum was present and provided advice to the detectives."

The Court pointed out that the "plaintiffs' theory of liability as to Blum is that he conspired with the Escondido police and is thus liable for unconstitutional acts committed by other defendants. A private individual may be liable under section 1983 if [he] conspired or entered into joint action with a state actor."

The case will now proceed at the trial level regarding the defendants named in the litigation.

❖ Fitness for duty evaluation resulting in termination of employment

Yanke v. City of Oakland, 2010 U.S. Dist. Lexis 30627 (N.D. Cal.).

Yanke had been an Oakland police officer since 1992. In 2000 he had been sent for a fitness for duty evaluation (FFDE) and was found to be fit for duty by the City's doctor. In 2004, the plaintiff's doctor excused Yanke from work due to stress. Eventually, in 2005, he was cleared for light duty but found "temporarily not fit for duty for any type of patrol car, on a motorcycle or walking a beat." He was then assigned to the Information Technology Unit where he performed above expectations.

In November, 2006 the City ordered him to submit to another FFDE. Testing included administration of the MMPI-2 test and the plaintiff refused to answer 30 of the 600

questions. As a result, the City's doctor said the profile was invalid, thought that Yanke was trying to hide something, and found him to be not fit for duty. After one year of light duty he was offered a civilian position which he refused and he was ultimately placed on indefinite sick leave without pay.

After filing a petition for a writ of mandamus in state court, which was denied, he sued in federal court claiming violations of his constitutional rights. The City moved to dismiss on the basis that the rights at issue in the federal case were the same as those raised in state court. The federal district court ruled that it "agrees that *res judicata* (Latin for "the thing has already been judged") bars Plaintiff's federal claims because they are based on the same primary right as Plaintiff's claims in the state court litigation."

The federal court notes that "the state appellate court determined that Defendant's conduct was justified. The appellate court found that Defendants gave Plaintiff adequate notice of the results of the fitness for duty examinations, and there was no dispute that Plaintiff received a copy of the final report or that he was aware of the basis for [the] lack of fitness finding."

Furthermore, "the City's actions were sufficient to provide Yanke with notice that he could not continue to receive his salary and benefits as a police officer because he was unfit to perform the essential duties of his job, with or without accommodation." The Plaintiff "lacked fitness for duty as a police officer and had no right to indefinite modified duty …."

❖ **Even if FFDE is justified, questions posed must also be justified**

Scott v. Napolitano and Department of Homeland Security, 2010 U.S. Dist. Lexis 42882, 23 AD Cases (BNA) 165 (S.D. Cal.).

Scott was hired in 1991 as a uniformed federal protective officer and, thereafter, promoted to Special Agent/Criminal Investigator. He worked for the Federal Protective Service (FTS) which provides security and law enforcement services to federally owned and leased buildings, facilities, properties and other assets. In November, 1998 he was diagnosed with having an adjustment disorder with mixed depression and anxiety. He was placed on work stress disability for several months and then on long-term disability until February, 2002.

In 2004 he filed a Workers' Comp claim for sinusitis/rhinitis which had been exacerbated by wildfires and construction work at his office. In September, 2004, he claimed work related tendonitis of the upper right arm and shoulder area. In early 2005 he was to attend a two day law enforcement training course which was a "rigorous program" requiring "that all attendees have a baseline fitness level required for FPS law enforcement positions."

His doctor, however, had place certain weight restrictions on him and prior to the start of the training, his supervisor "excused Plaintiff from participating in the training and revoked his law enforcement authority, securing Plaintiff's vehicle and weapon."

He was thereafter directed to submit to a physical FFDE and, as a result of further information, a psychological FFDE, as well. The coordinator of such evaluations described him as suffering from "mental health issues: Mr. Scott appears to be apprehensive with heightened states of anxiety and we are concerned with a potential of hostile encounters with the public." In addition, there were concerns expressed by his supervisor "regarding statements allegedly made by Plaintiff referring to a management conspiracy."

Plaintiff refused to submit to "a comprehensive physical examination but, rather, would only permit an examination regarding his recurring sinusitis or rhinitis and repetitive motion injury to the upper right arm and shoulder." As a result, no physical examination was conducted and the psychiatric examination was cancelled.

He then appeared for his routine "birth month examination" and underwent a full physical exam. He was also provided with a medical questionnaire but he refused to answer several of the questions indicating that they violated his rights under the American with Disabilities Act (ADA). He was ordered to respond to all of the questions and when he continued to refuse he was terminated from employment.

The Court ruled that "the characterization of the exam as a "periodic exam" or "fitness for duty" exam makes no difference to the outcome of the case. Both periodic physicals and fitness for duty exams are permissible as long as they are 'job related and consistent with business necessity.'" The Court stated that "there is no question that ensuring that an armed officer can perform his job properly and safely is a business necessity."

Furthermore, pursuant to the Equal Employment Opportunity Commission (EEOC), "if an employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition, the employer may make disability related inquiries or require the employee to submit to a medical exam."

Notwithstanding the above, the employer may not make "far ranging disability related inquiries or require an unrelated medical examination. Similarly, periodic medical examinations of employees in positions affecting public safety are permissible *if narrowly tailored to address specific job related concerns*." (Emphasis in original.) In the instant case, however, "the exam went beyond its proper scope in requiring Plaintiff to answer the questions at issue."

The questions sought broad "information about illnesses, mental conditions, or other impairments Plaintiff has or had in the past. The questions were not narrowly tailored to address Plaintiff's current ability to work."

The Court then stated that it "emphasizes that it does not hold that a law enforcement agency cannot make inquiries regarding an employee's mental health or subject the employee to a mental examination. The Court's holding is limited to the questions on the medical exam form … which were overbroad in scope and time."

❖ A justified FFDE does not violate ADA

Brownfield v. City of Yakima, 612 F.3d 1140, 2010 U.S. App. Lexis 15324 (9th Cir.).

Brownfield joined the Yakima Police Department, as a police officer, in November, 1999. Approximately one year later he suffered a head injury in an off duty car accident. He returned to full duty in July, 2001 and received positive evaluations for the next three years. Beginning in June, 2004 he began complaining about another officer, Dejournette, who worked with him on the Drug Abuse Resistance Education (DARE) program and other matters. Over a period of time, he compiled notes documenting Dejournette's perceived shortcomings.

On May 11, 2005 he met with his Sergeant and Lieutenant to discuss his "problems" with Dejournette. During the meeting he used profanity and, despite an order from the Lt. to

remain, he left the meeting. When the Sgt. went looking for him, he found Brownfield in another office at which time he cursed at the Sgt. and demanded that the Sgt. leave the room.

Brownfield was temporarily suspended for insubordination and stated that he had been "consumed" with anger and fear. In September, 2005, after four more incidents involving expressions of anger, including a domestic violence call from his estranged wife, he was ordered for a FFDE.

The City's doctor, Dr. Decker, diagnosed him as suffering from "Mood Disorder due to a General Medical Condition with mixed features" which manifested itself in "poor judgment, emotional volatility, and irritability and which could be related to Brownfield's 2000 head injury." Decker concluded that Brownfield was unfit for police duty and that his disability was permanent.

Brownfield was placed on leave pursuant to the Family Medical Leave Act (FMLA). Following another off duty traffic accident he was treated by his personal doctor, Gondo, for minor physical injuries. In February, 2006, Dr. Gondo released him for full duty based on his recovery from those injuries but made no mention of the psychological problems. As a result, he was ordered to submit to another FFDE.

He participated in an initial exam but subsequently refused to follow through on a follow up to the FFDE. He was notified that he would be terminated if he continued to refuse to cooperate. He again refused, a pre-termination hearing was conducted, and he was terminated on April 10, 2007. He then filed suit alleging violations of the ADA and FMLA.

He claimed the City violated the ADA by ordering the FFDEs. The court stated that under the ADA "an employer may not require a medical examination to determine whether an employee is disabled unless such examination or inquiry is shown to be job related and consistent with business necessity." The court, citing to decisions from other circuits, stated that it *was legal* to order a FFDE "for a police officer who displayed unusually defensive and antagonistic behavior towards his co-workers and supervisors, but whose job performance was otherwise satisfactory."

The court went on to state that "the ADA does not require a police department to forego a fitness for duty examination to wait until a perceived threat becomes real or questionable

behavior results in injuries." Furthermore, the court found that "the City had an objective, legitimate basis to doubt Brownfield's ability to perform the duties of a police officer." In addition, "when a police department has good reason to doubt an officer's ability to respond to these situations in an appropriate manner, a FFDE is consistent with the ADA."

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