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INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

Police and Psychologist Section

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Martin J. Mayer is a name partner in the firm of Jones & Mayer (J&M) and serves as legal counsel to the Sheriffs and Chiefs of Police in approximately 70 law enforcement agencies throughout California. He serves as General Counsel to the California State Sheriffs Association (CSSA), the California Police Chiefs Association (CPCA) and the California Peace Officers Association (CPOA), and has done so for approximately 25 years. Mr. Mayer is also responsible to oversee the attorneys in the firm of J&M who serve as City Prosecutor in the 16 cities where the firm provides that legal service.

Prior to merging with the Law Office of Richard D. Jones, Mr. Mayer was a name partner in the firm of Mayer & Coble, which provided legal advice and representation to police and sheriff's departments and served as the City Prosecutor for several municipalities. He is a graduate of the City University of New York and St. John's University School of Law. He began his professional career in New York City as a deputy Public Defender and served in that capacity for five years. After relocating to California in 1975 he became the Director of the Criminal Justice Planning Unit for the League of California Cities. In 1980 he entered the private practice of law focusing on issues arising out of law enforcement.

Mr. Mayer is a graduate of the 6th FBI National Law Institute at Quantico, Virginia (designed for police legal advisors) and was the first attorney in private practice to be invited to participate in the program. He also served for nine years as a POST reserve with the Downey Police Department.

Mr. Mayer writes and lectures extensively, in California and nationally, on legal issues which impact on law enforcement including, but not limited to, the use of force, pursuits, discipline and due process, public records, personnel files, and the Public Safety Officers Procedural Bill of Rights Act. He presents on behalf of numerous statewide law enforcement associations and the California Commission on Peace Officers Standards and Training (POST). He has served on many POST committees as a subject matter expert and has participated in several POST Telecourses, which are used for training peace officers throughout the state. Mr. Mayer is also the 2005 recipient of the "Governor's Lifetime Achievement Award for Excellence in Peace Officer Training."

Published Articles

- *Religious Activities in the Workplace*
  California Sheriff, Vol. 24, No. 2, April 2009
- *Possession of Handguns: New Case Decisions*
  California Peace Officer, Fall 2008
- *Employee Computers, E-mails, Text Messages- A Matter of Privacy*
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- *Drug Testing of All Applicants for Municipal Employment is Unconstitutional*
  California Peace Officer, Summer 2008
- *Union Activity and First Amendment Rights*
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- *The Use of Medical Marijuana and One's Job*
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- *A Potential Avalanche of Released Felons*
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- *Confidentiality of Peace Officers- Personnel Files Under Attack*
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- *Fair Labor Standards Act & Police Personnel Administration*
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- *The ADA: Psych Evaluation; Background Investigation; Conditional Offer of Employment; Grievance Procedure* California Peace Officer, 1994
- *ADA: Some Questions & Answers*
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- *Americans With Disabilities Act: Some Do's and Don'ts*
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- *Penal Code Section 618--A Reason for Concern?*
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- *To Provide or Not to Provide: No Longer a Question for Internal Affairs Investigations*
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- *The Special Relationship Syndrome*
  California Peace Officer, December 1989
- *Officer Involved Shootings: A Procedural and Legal Analysis*
  Journal of California Law Enforcement, Vol. 23, No. 2, 1989

Speaking Engagements (Examples)

- *California Commission on Peace Officer's Standards & Training (POST) 1980 - present*
  Executive Development Program
  Police Mid-management Course
  County Chiefs and Sheriff's Associations Annual Training Retreats
- *California Peace Officer's Association (CPOA)* *1979 - present*
  Discipline and Due Process
  Legal Update (2 day session)
  American's With Disabilities Act (ADA)
- *California Police Chief's Association (CPCA)* *1979 - present*
  Role of the Chief of Police
- *American's for Effective Law Enforcement (AELE)* *1989 - 2006*
  Civil Liability Issues Affecting Law Enforcement
  Discipline and Law Enforcement
- *Labor Relations Information System (LRIS)* *1995 – 2005*
  Labor Relations and Disciplinary Procedures

- *International Association of Chiefs of Police (IACP)* — *1997 - present*
  Police Psychologist Committee – "Impact of Psychologists on Law Enforcement
  Legal Officer's Section – "Union Impact on Internal Affairs Investigations"
- *California State Sheriffs' Association (CSSA)* — *1990 - present*
  Legal Update at Annual Conference
- *California State University at Long Beach, Department of Criminal Justice* — *1992 -2000*
  Legal Issues Affecting Internal Affairs Investigations
- *California Association of Law Enforcement Background Investigators* — *1997 - 2000*
  Legal Update Impacting Upon Background Investigations
- *League of California Cities Annual Conference* — *1998*
  Chief of Police Department – Legal Update
  City Attorney Department –Civilian Review Boards

DETAILS OF NEW CASELAW

1. ***Emotional Problems and Corrective Efforts.***

Lee v. City of Madera, 2008 U.S. Dist. LEXIS 95438 (E.D. Cal. 2008)
Court reaffirmed the importance of having fitness-for-duty evaluations and counseling for officers. "[I]f the court were to hold that a jurisdiction has the duty to fire an employee at the first indication that person may have some deficit in the required mental or emotional prerequisites of the job, the entire basis for on–the-job training and supervision [i.e., counseling and evaluations] would be undercut..." Id. at 27.

SUMMARY: "In the complaint, [one of] Plaintiff's allegation of liability... was based on allegations that individual Defendants Beck, Webster and Markle 'had been involved in several other incidents involving unreasonable use of force on others they had arrested, which incidents, Plaintiff believes, should have been or were known to [Madera City Defendants.]' ... [Plaintiff] alleges that the Madera City Defendants' refusal to address the individual Defendants' past practices involving the use of excessive force constitutes evidence of inadequate training amounting to deliberate indifference to the rights of the persons the police come into contact with." Id. at 23-24.

"'Plaintiff's theory ... is that [Officer] Beck was an inexperienced police officer who has documented problems with fear, lack of assertiveness/failure to engage and lack of knowledge and experience and mishandled a simple traffic stop. [Plaintiff alleges that] This shows a failure in training and/or supervision policy by the City of Madera.' ... Plaintiff alleges Beck's supervising officer and evaluator, Sgt. Cartwright, prepared a 6 page memo in 2003 that memorialized the above-stated observations. The memo was allegedly included in a counseling meeting on May 2, 2003, and subsequently was incorporated into Beck's evaluation of August 16, 2003." Id. at 25-26.

RESULT: Department's Motion for Summary Judgment on federal cause of action for civil rights violations was granted by the Court. "From Plaintiff's proffer of facts, it is apparent the Madera City Defendants had in place a system for making employee evaluations, and for using those evaluations for counseling or training purposes. The fact Beck may not have been fired at the first indication that she was fearful or in some other way unfit for the rigors of police duty in no way demonstrates deficient training and supervision, let alone deliberate indifference to training and supervision needs. Indeed, if the court were to hold that a jurisdiction has the duty to fire an employee at the first indication that person may have some deficit in the required mental or emotional prerequisites of the job, the entire basis for on-the-job training and supervision would be undercut. The facts adduced by Plaintiff, taken as a whole indicate that sometime in the vicinity of the April 23 traffic stop, Beck was evaluated and found to have some problems with regard to assertiveness and fearfulness. *It is also apparent those issues were being addressed through existing counseling and evaluations structures.*" Id., at 26-27 (Emphasis added).

2. ***Inquiring About Nature of Illness When Sick Leave Requested.***

Pa. State Troopers Ass'n v. Miller, 2008 U.S. Dist. LEXIS 76816 (M.D. Pa. 2008)
ADA violated by policy requiring reporting of type of illness when an officer requested sick leave. While scheduling concerns and ensuring fitness for duty qualified as legitimate business necessities, the specific policy being used violated the ADA because it required the reporting of all illnesses when sick leave was used, but did not require reporting if sick leave was not requested, thus the business necessity was not achieved with the policy.

SUMMARY: "This action seeks declaratory and injunctive relief and challenges the sick leave policy of the Pennsylvania State Police under the Americans with Disabilities Act ("ADA")... Pennsylvania State Troopers Association and its president, Bruce A. Edwards, (collectively "PSTA") allege that the policy violates the ADA because it requires police officers to disclose the nature of their illness when requesting sick leave. PSTA contends that the policy may result in officers divulging information about disabilities, thereby contravening the ADA's prohibition on medical inquiries. Defendant Jeffrey B. Miller ("Miller"), who is commissioner of the Pennsylvania State Police, ("PSP"), counters that the inquiry is essential to PSP's operation because it enables police supervisors to plan for adequate shift coverage and to ensure that officers are fit for duty upon return from leave... The challenged provision... appears in PSP Field Regulation ("FR") 1-2.11(A) [and] provides: 'Notification of Illness or Injury (Off Duty): Members who know that they will be unable to report for duty due to illness or injury they incurred while off duty shall immediately notify their supervisor (or ensure such notification) of the nature of the injury or illness, where they will be recuperating, and the expected date of return to duty. Supervisors shall also be advised of any changes in the above which may occur after the original notification was given.'"

"On May 26, 2006, PSTA commenced the instant action, the sole issue in which is whether the notification clause of FR 1-2.11(A) violates the ADA by requiring members to inform supervisors 'of the nature of the[ir] injury or illness.' ... Miller contends that PSP supervisors utilize the information provided by members to arrange for shift coverage during a member's absence and to ensure that an ill member is fit for duty upon return to work. He therefore asserts that the illness notification clause furthers a business necessity and is lawful under the ADA" [because] "First, the policy allows police supervisors to assess the likely duration of members' absences and plan for adequate shift coverage. Second, disclosure of members' illnesses allows supervisors to evaluate whether members are fit to return to active duty after absence or whether they should be placed on restricted duty assignments."

"PSTA alleges that the asserted business necessities do not require implementation of a generally applicable illness notification policy and that several unchallenged PSP regulations adequately address Miller's concerns." Id. at 1-5, 15-16.

RESULT: "While a general medical reporting requirement might pass muster under the

ADA if the employer demonstrates that it is a vital component of the employer's operation, FR 1-2.11(A) falls short of this threshold ... PSTA's motion for summary judgment seeking declaratory and injunctive relief will therefore be granted." Id. at 49-50. While the Court affirmed "that arranging adequate staff coverage and ensuring members' fitness for duty qualify as business necessities," the Court found the specific policy of the Department to accomplish these goals violated the law. The "illness reporting clause is broader than necessary because PSP could accomplish similar goals by requiring members to provide only an estimated date of return without describing their medical condition" and because the "notification policy [which] provides supervisors with information from which to evaluate members' abilities... falls short of this business necessity because the policy operates based upon members' *use of sick leave* rather than upon the member's *medical condition or employment duties*." Id. at 16, 32-33, 49-51 (Emphasis in original).

"PSP has relied upon sick leave use as a convenient proxy for the identification of conditions that might, but that are not certain to, affect a member's fitness for duty. PSP has failed to craft the policy in a manner that identifies a limited class of illnesses and a limited class of members that threaten to impair PSP's law enforcement functions. In sum, FR 1-2.11(A) is neither vital to the business of PSP nor narrowly tailored to serve the avowed business necessity... fn. 11 This holding prevents PSP from imposing a reporting requirement upon medical conditions that have no effect on a member's fitness for duty. It does not prohibit PSP from soliciting information about a discrete class of conditions that PSP believes may impair a member's abilities. PSP may also impose a general reporting requirement on lengthier absences provided that it demonstrates that such absences affect fitness for duty... FR 1-2.11(A) requires many members who are fit for duty to report conditions that do not affect their employment, rendering it overbroad... The policy is simultaneously underinclusive because it fails to detect performance-inhibiting ailments of members who do not request time off work." Id. at 36-37, 40-41.

3. ***Justifying a Fitness for Duty Exam.***

Wisbey v. City of Lincoln, 2009 U.S. Dist. LEXIS 30819 (D. Neb. 2009)
Dismissal of FMLA and ADA lawsuit related to allegations of unwarranted fitness-for-duty evaluation. The "plaintiff's fitness-for-duty examination was ordered because the information within the plaintiff's FMLA request and accompanying medical certification indicated that due to the plaintiff's mental impairments, her sleep, energy level, motivation, and ability to concentrate were intermittently impaired... In such a case, a fitness-for-duty examination is job related and consistent with business necessity."
Id. at 26-27.

SUMMARY: "The plaintiff argues that requiring the plaintiff to have a fitness-for-duty examination proves the City perceived the plaintiff as disabled and violated 42 U.S.C.A. § 12112(d)(4)(A) of the Act.... Plaintiff claims the undisputed facts establish that the defendant regarded her as disabled and terminated her employment in violation of the ADA.... [Plaintiff] further argues the City violated the ADA by failing to engage in the

interactive process to determine whether reasonable accommodations were available... The plaintiff claims there is no evidence that her continued employment with the City posed any risk to the health and safety of others... there was no business necessity justifying the City's decision to require plaintiff to submit to a fitness-for-duty examination, and that requiring the medical exam violated plaintiff's rights under the ADA... The plaintiff further argues the City violated the FMLA by disciplining the plaintiff for exercising her right to medical leave... and when plaintiff submitted a request for intermittent medical leave, the City unlawfully retaliated by requiring the plaintiff to submit to a fitness-for-duty examination and ultimately terminating plaintiff's employment..."

"...the City notes that the plaintiff does not allege she is disabled, but only that she was regarded as disabled. The City claims the plaintiff was not discharged based on a perceived disability, but rather on the independent medical determination that the plaintiff was, in fact, unable to perform her job as an emergency dispatcher.... City claims it had a reasonable basis for questioning whether the plaintiff could perform her job, and under such circumstances, demanding a fitness-for-duty examination is not evidence of discrimination... The City further argues that suggesting the plaintiff apply for Long Term Disability benefits under the City's LTD plan does not indicate the City regarded the plaintiff as disabled for the purposes of the ADA... The City also argues it had a legitimate, nondiscriminatory reason for terminating the Plaintiff's employment; specifically, Wisbey was terminated because she was found unfit for duty by a physician.

As to the plaintiff's FMLA claim, the City argues there is no evidence the plaintiff was subjected to an adverse employment action for exercising her rights under the FMLA because requiring a fitness-for-duty exam is not an adverse employment action, more than a temporal connection between the request for FMLA and plaintiff's employment termination is necessary to satisfy the causation requirement, and the City had a legitimate nondiscriminatory reason for terminating the plaintiff's employment... Finally, the City never denied the plaintiff's request for, and never interfered with her right to take, family medical leave." Id. at 26, 11-14.

RESULT: Termination of employee upheld and ADA and FMLA claims dismissed. "The plaintiff's fitness-for-duty examination was ordered because the information within the plaintiff's FMLA request and accompanying medical certification indicated that due to the plaintiff's mental impairments, her sleep, energy level, motivation, and ability to concentrate were intermittently impaired. The City was thereby placed on notice, and was reasonably concerned, that the plaintiff may have difficulty maintaining the level of alertness and concentration required of an emergency dispatcher."

The plaintiff advised the City that she was experiencing intermittent problems with her concentration, energy level, motivation, and sleep. In such a case, a fitness-for-duty examination is job related and consistent with business necessity. Although the City was not aware of any past episodes wherein the plaintiff was unable to perform her job due to mental impairments, the City was not required to 'forgo a fitness for duty examination to

wait until a perceived threat becomes real or questionable behavior results in injuries.' Boyd v. City and County of San Francisco 2009 U.S. App. LEXIS 17615

In the termination letter given to the plaintiff, the City suggested she may wish to apply for Long Term Disability benefits under the City's policy. This suggestion does not prove the City perceived the plaintiff as disabled based on erroneous or stereotypical assumptions concerning persons suffering from a mental health disorder. The City made this suggestion after a doctor found the plaintiff was not fit for duty and the decision to terminate the plaintiff's employment was made. Under such circumstances, reminding the plaintiff of potentially useful employee benefits was appropriate and cannot be construed as evidence that the City violated the ADA." Id. at 27-28.

4. Due Process When Terminated After Fitness for Duty Exam

Riggins v. Goodman, 572 F.3d 1101 (10th Cir. Colo. 2009)
Plaintiff police officer sued defendant city officials contending that he was discharged without adequate procedural safeguards after he suffered from a psychiatric episode that caused him to take administrative leave for eight months. Plaintiff alleged the Police Chief effectively terminated him before due process was allowed, and that when he did appeal there was bias because the "Police Chief made the initial termination recommendation and then presided over Riggins's first pre-termination hearing." The Court ruled that a letter from the Police Chief was notification of a pending termination, and not termination itself, and that "the City's three-step appeals process provided adequate pre-termination due process...and that the decision was not...the result of a biased process." Id. at 33, 1-2.

SUMMARY: "Riggins was employed as a police officer with the Louisville, Colorado Police Department. In May 2004, he experienced a psychiatric episode in which he complained that someone was after him, his hotel room was bugged, and there was a computer chip implanted in his head. His wife reported the incident, and he was taken to a hospital and placed on mental health hold. As a result, Riggins was placed on administrative leave and relieved of his duties with the police department. In September 2004, the City received from Riggins's psychiatrist a report that Riggins appeared to be able to return to work, but that he would recommend a separate fitness for duty exam. In a later report, the doctor also indicated that he anticipated Riggins taking medications for at least another six months. He stated that if a patient discontinued his medications prematurely, he might risk a recurrence of his previous delusional symptoms.

The City referred Riggins to a psychologist for a fitness for duty determination. In November 2004, the psychologist examined Riggins and opined that he was psychologically fit to return to duty as a police officer. The psychologist cautioned, though, that 'the public safety factors associated with [Riggins's] position require that his return be done in a carefully planned program with close supervision in order to monitor and assess his abilities to function safely and effectively as an officer.'...the City sought the opinion of a psychiatrist who advised caution in the resumption of duties for

employees taking antipsychotic or antidepressant medications. That doctor submitted a report on January 6, 2005 questioning whether Riggins was ready to return to duty as a law enforcement officer. After reviewing the various reports, Police Chief Bruce Goodman determined that Riggins was unable to resume his duties, and began proceedings to terminate Riggins." Id. at 1104.

On January 26, 2005, [Police Chief] Goodman sent Riggins a letter stating '[t]his letter is to advise you of the City's decision to terminate your position . . . effective . . . February 7, 2005.' ...[The] letter also explained the administrative process available to contest the decision, including the opportunity for a hearing and the right to object to the 'proposed termination' before a "final decision" would be made... Goodman's letter outlined five reasons for Riggins's termination [including]... the lack of an unconditional, unqualified medical fitness for duty release... The letter continued, '[f]rom a public safety standpoint, we can not endorse your being a police officer with the Department.' Goodman concluded: 'this is the toughest personnel decision I have ever made.' Goodman's letter triggered the City's three-step appeal process."

[The terminated officer] Riggins filed civil rights and disability claims against the City officials, including a § 1983 claim... He contends the defendants violated his due process rights because he was not afforded adequate pretermination due process and because of bias.... The City officials argue that... Riggins was entitled to notice of the proposed termination, an explanation of the evidence against him, and an opportunity to respond--all of which he received.... In response, Riggins contends the January 26, 2005 letter discharged him. He thus argues the hearings afforded to him took place after he was terminated and could not cure the lack of adequate pretermination process... Riggins also contends the defendants violated his constitutional right to a fair tribunal because the City's decision makers were biased. He contends the City's investigatory and adjudicative functions were combined in the same personnel; he emphasizes that the same individuals approved the initial decision to terminate him and then presided over the hearings contesting the decision. He argues they had already made up their minds that he should be terminated prior to presiding over the hearings." Id. at 1105-1106, 1109, 1112

RESULT: The court granted summary judgment to Defendant Department and found pre-termination rights were maintained by the Department and that the process was not biased.

"As an initial matter, the process afforded to Riggins more than adequately satisfied due process requirements... Goodman's January 26, 2005 letter notified Riggins that he had made an initial decision to terminate him, and informed him of the reasons for his termination and the basis for it. The letter also instructed him on his rights to appeal and identified the City's policies that allowed him to contest the 'proposed' termination *prior* to his termination becoming effective. The letter stated that only after an appeal--if requested--would a 'final decision' be made...Riggins took advantage of these procedures, submitting testimony and documents through counsel. These procedures stemmed from the City's employee manual that plainly sets forth the process and advises

that discharge will not occur until the culmination of the appeals. Riggins contends the letter constituted discharge [but] he ignores the plain language of the letter..."
Id. at 1109-1110. (Emphasis in original).

"In many small public agencies human resource personnel wear multiple hats... To the extent Riggins complains that Goodman as Police Chief made the initial termination recommendation and then presided over Riggins's first pre-termination hearing, we see no constitutional problem. Riggins's allegations do not establish that Goodman was actually biased. The mere showing that a supervisor initially recommended a dismissal and then met with the employee prior to that employee's termination is ordinarily insufficient to establish a constitutional violation." Id. at 1112, 1114.

5. Dismissal of Evaluating Psychological Firm.

Campion, Barrow & Assocs. v. City of Springfield, 559 F.3d 765 (7th Cir. Ill. 2009)
This case was discussed last year when it was decided by a U.S. District Court. Since then, the U.S. Court of Appeals for the Seventh Circuit has confirmed the lower court decision, finding that the dismissal of the firm which provided psychological services to the Department was proper and was not in retaliation for the firm's outspoken advocacy of positions on marriage, abortion, etc.

"**SUMMARY:** Plaintiffs, a psychologist and his firm, appealed an order of the United States District Court for the Central District of Illinois, granting summary judgment to defendant city in plaintiffs' action under 42 U.S.C.S. § 1983 and state law, asserting violations of the First Amendment, retaliation, and breach of contract after the city terminated its relationship with the psychologist to provide psychological services to police and fire departments.

On appeal, the court held that the district court did not err in concluding that city council, rather than the mayor, had final policy-making authority over the choice of the provider for psychological services. There was no evidence of an established municipal custom giving the mayor the de facto power to unilaterally handle the psychological testing contract. Further, under 65 ILCS 5/8-1-7(a) and the municipal code, only the city council could authorize the agreement to change the contract. The court also found that the psychologist failed to show that his affiliation with an organization with conservative views on such topics as marriage, abortion, homosexuality, and stem cell research was a motivating factor for the city council's decision to switch psychologists. The record also revealed nothing untoward about the use of the emergency procedure for passing the ordinance that authorized the execution of a contract with the new provider. The psychologist failed to introduce anything affirmatively indicating that the authorized decision maker, the city council, was retaliating against him either because of his speech, or because of his association with the organization.

RESULT: The court affirmed the district court's judgment." *Lexis Summary*

6. Police Psychiatrist's Opinion Regarding "Suicide by Cop."

Boyd v. City & County of San Francisco, Aug. 7, 2009 (9th Cir.)
City, defendant, presented expert testimony of Dr. Emily Keram, a forensic psychiatrist, who testified that her analysis of the circumstances surrounding the death of the person shot by a San Francisco officer led her to conclude that the decedent " had been attempting to commit "suicide by cop," and had purposefully drawn police fire to accomplish this result." Her testimony was challenged by the Boyd family and the Court of Appeal concluded that "the district court did not abuse its discretion in admitting Dr. Keram's testimony."

The Appellate Court held that "the role of the courts in reviewing proposed expert testimony is to analyze expert testimony in the context of its field to determine if it is acceptable science. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."