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INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

POLICE PSYCHOLOGISTS' SECTION
CASE DECISIONS AFFECTING POLICE PSYCHOLOGISTS

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CASE DECISIONS AFFECTING POLICE PSYCHOLOGISTS

- **Ordering an employee for a fitness for duty evaluation is not subject to arbitration.**

Stow Firefighters, IAFF Local 1662 vs. City of Stow, #25090, 2011 Ohio 1558, 2011 Ohio App. Lexis 1370; addnl. decision, #25209, 2011 Ohio 1559, 2011 Ohio App. Lexis 1367, Ohio Court of Appeal (9th Dist. 3-31-11).

After suspending firefighter Rod Yoder for harassing behavior, acting discourteously, disrespectfully and unprofessionally, towards a member of the city park's department, the city ordered him to submit to a fitness for duty evaluation (FFDE). He was placed on involuntary paid leave which, following the FFDE, was changed to unpaid leave until the psychologist released him to return to duty. Subsequently he was discharged from employment because his leave time had expired and the psychologist had not yet released him for duty.

While he was on paid leave, the IAFF filed a grievance on his behalf arguing, among other things, that the city acted unreasonably by placing him on paid leave pending the FFDE and that there was no justification for ordering the evaluation. The arbitrator reduced the three day suspension to a one day suspension and concluded that the city did act unreasonably by placing him on leave pending the FFDE although finding that the city had reasonable cause for ordering the evaluation. The matter was appealed to the Court of Common Pleas and subsequently to the Ninth Judicial District Court of Appeal for the State of Ohio.

The Appellate Court ruled that the "arbitrator's determination that the union's grievance was arbitratable did not draw it's essence from the collective bargaining agreement and the trial court, therefore, should have vacated the entire arbitration award as requested." The Appellate Court stated that "although the arbitration provision is broadly worded, only disputes regarding terms or provisions of the agreement may be arbitrated. The city has argued that issues related to fitness for duty evaluations are not subject to the arbitration clause because such evaluations are not included in the terms of provisions of the collective bargaining agreement."

The Appellate Court stated that "the question is whether the arbitrator's decision that the fitness for duty evaluation properly falls under those actions of management which are covered by Article IV of the Collective Bargaining Agreement can be rationally derived from the contract?"

The Court goes on to indicate that certain rights and responsibilities of the city are included in the agreement but only to indicate the type of rights retained by the city. "The list includes the right and responsibility to direct, supervise, evaluate, or hire and select employees." The Appellate Court states that "the plain language of the agreement seems to indicate that the city has reserved for itself the right to evaluate its employee's fitness for duty. The union has not pointed to any term or provision of the Collective Bargaining Agreement that modifies the city's reserved right to order an employee to submit to a fitness for duty evaluation so as to subject disputes regarding such evaluations to arbitration."

- **"Not fit for duty" doesn't necessarily mean psychologically unfit.**

Eaddy vs. City of Bridgeport, #09cv1836, 2011 U.S. Dist. Lexis 39853, 24 AD Cases (BNA) 832 (4-12-11).

Arnetha Eaddy was dismissed as a probationary police officer with the Bridgeport Connecticut Police Department on the basis that she was "not fit for duty." She sued, claiming among other things that the city "terminated her employment because it regarded her as being afflicted with a physical disability, in violation of the ADA."

Following her involvement in heated arguments with other members of the Bridgeport Police Department, Ms. Eaddy went home feeling "stressed out" and checked herself into a hospital for a short period of time. Following her hospitalization, Police Chief Bryan Norwood ordered her to undergo a fitness for duty examination by Dr. Arnold Holzman. Dr. Holzman concluded Ms. Eaddy was deceptive during the evaluation and that it was "highly likely" that she was "not fit for duty."

Both the city and Dr. Holzman argued that he did not make any finding or determination that Ms. Eaddy was disabled. In his report he stated "I cannot provide a valid determination regarding her behavioral functioning at this time." Furthermore, it was argued that Dr. Holzman "did not even address the question of whether Ms. Eaddy suffered from a psychological impairment."

Ms. Eaddy retained and was evaluated by her own psychologist Dr. Stephen Sarfaty who concluded that she was fit to return to her position as a police officer. Dr. Sarfaty also "strongly supported a course of psycho-therapy for Ms. Eaddy." It is undisputed that Dr. Sarfaty also did not make any finding or determination that Ms. Eaddy was disabled.

Ms. Eaddy claims that the city terminated her employment "because it regarded her as being afflicted with a physical disability in violation of the ADA." The District Court stated that "to establish a *prima fac*ie case of discrimination of the ADA, a plaintiff must present evidence that animus against the protective group was a significant factor in the position taken by the municipal decision makers themselves or by those to whom the decision makers were knowingly responsive."

The Court stated that it must "first consider whether Ms. Eaddy has presented evidence that animus against a class protected by the ADA was a significant factor in the defendant's decision to terminate Ms. Eaddy's employment." The District Court stated that "although Ms. Eaddy suggests that at one point she suffered from a "temporary disabling psychological condition," neither party has argued that Ms. Eaddy is or was disabled under either of the two definitions of disability in the ADA. This case turns on an argument about whether Ms. Eaddy was "regarded as" disabled?"

The Court noted that "the first question in this case is whether the defendant perceived Ms. Eaddy as having an impairment that caused her to be substantially limited in the major life activity." In reviewing her arguments, the Court stated that "the fact that Chief Norwood described Ms. Eaddy's behavior as "irrational, irate, and uncooperative

as well as paranoid" in his letter to the Civil Service Commission is not evidence that he viewed her as having a disability under the terms of the ADA. There is no indication in Chief's Norwood's letter that he was using the terms "irrational" and "paranoid" in a clinical sense."

The Court stated that "Chief Norwood's reference to Ms. Eaddy being paranoid is not a suggestion that Ms. Eaddy suffers from paranoid delusions in the psychiatric sense, but rather that she is irrationally distrustful with her peers and the police department."

In citing to Francis vs. City of Meridean, 129 F.3d 281 (2nd Cir. 1997) the District Court states that, "the Second Circuit has previously rejected a plaintiff's claim that poor judgment, irresponsible behavior and poor impulse control... constituted a mental impairment within the meaning of the ADA." The District Court went on to state that "indeed, all the evidence suggests that Chief Norwood and the defendant simply regarded Ms. Eaddy as unfit to perform the duties of a police officer,"

"A belief that the plaintiff is not competent to perform a particular job does not constitute a belief that the plaintiff is substantially limited in the major life activity. When the major life activity in question is working, the plaintiff must be perceived as unable to perform a broad class of jobs." In this case, stated the court, "the fact that the defendant discharged the plaintiff from the position of police officer implies no more than it deemed the plaintiff unfit for one particular type of job."

- **Having a disability is not a defense against discipline if it results in a threat to another's health or safety.**

Wills vs. Superior Court of Orange County, # G043054, 2011 Cal. App. Lexis 577, 24 AD Cases (BNA) 1150, California Court of Appeal (4th Dist. 4-13-11).

Wills worked for the Orange County Superior Court until she was terminated for violating its policy against verbal threats, threatening conduct and violence in the workplace. She sued the court alleging it terminated her for conduct related to her mental disability. She argued that the Fair Employment and Housing Act (FEHA) prohibits an employer from terminating or disciplining an employee for workplace misconduct caused by a disability.

The trial court granted the Orange County Superior Court's summary judgment motion on the grounds that (1) Wills failed to exhaust her administrative remedies on the FEHA causes of action; and (2) her "misconduct provided a legitimate, non-discriminatory basis for terminating her employment." The court stated that "Wills disability discrimination claim fails because an employer may reasonably distinguish between disability caused misconduct and the disability itself when the misconduct includes threats or violence against co-workers. In these circumstances, terminating the employee based on the misconduct does not amount to discrimination prohibited by FEHA."

In addition, the court noted that "the ADA authorizes an employer to terminate or refuse to hire a disabled individual who poses a direct threat to the health or safety of other individuals in the workplace that a reasonable accommodation cannot eliminate.

Under the ADA, this is an affirmative defense on which the employer bears the burden of proof."

- **Creating "permanent" light duty assignments for disabled employees may create serious problems**.

  Cuiellette vs. City of Los Angeles, California Court of Appeal, #B224303, 194 Cal. App.4th 757, 123 Cal.Rptr.3d 562 (2nd Dist.4-22-11).

  The city appealed from a judgment of $1,571,500.00 awarded in favor of the plaintiff, a Los Angeles Police Department officer. He claimed disability discrimination and failure to accommodate under California's Fair Employment and Housing Act (FEHA). The primary issue addressed was whether or not the employer had an obligation to provide permanent light duty assignments and under both ADA and FEHA such an obligation did not exist. However, if such assignments existed already, a burden was placed on the employer to reasonably accommodate the employee if possible.

  "If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available." The Court notes that "the employer is not required to create new positions or "bump" other employees to accommodate the disabled employee. What is required is the duty to reassign a disabled employee if an already funded, vacant position at the same level exists." The evidence proved that the city maintained several ***permanent*** "light duty" assignments and filled the assignments with sworn officers whose disabilities prevented them from performing the otherwise essential functions of a sworn police officer.

  It was un-refuted that the plaintiff was able to perform the essential functions of the light duty assignment into which he had been placed but that he was ultimately sent home when it was determined that he was one hundred percent disabled. The Court stated that "the cities decision to send him home was an adverse employment action based on discriminatory criteria. Furthermore, noted the Court, "because the L.A.P.D. maintained permanent, light duty positions that its staffed with police officers who could not perform all of the essential duties of a police officer, the relevant inquiry is whether the plaintiff was able to perform the essential duties of a light duty assignment he was given on his return to work and not whether he was able to perform all of the essential duties of a police officer in general." (Emphasis added.)

- **Claims of discrimination can be refuted by showing justifiable reasons for adverse actions taken.**

  McHugh vs. City of Tacoma, Washington, #C10-5450, 2011 U.S. Dist. Lexis 63641 (D. Wash. 6-16-11).

  Geraldine McHugh was a field investigator for the city's Department of Public Utilities. Another employee, Candace Callaway, was her best friend and learned from McHugh that she suffered from bipolar disorder. McHugh showed her bruises from self-inflicted injuries and Callaway witnessed McHugh bite herself in a fit of rage. Their friendship ended when the city promoted McHugh to a position of field investigator, but

promoted Callaway to a supervisory position over her. Subsequently, McHugh sought an accommodation from the city due to her admitted attention deficit disorder (ADD), stating that her disorder made it difficult for her to be productive in the morning. An accommodation was reached.

Thereafter, McHugh was disciplined for insubordination for failing to go to an assignment. She admitted at her arbitration hearing "that she knew that failing to obtain prior approval before taking time off work violated her supervisor's orders and she did not dispute that failing to follow a supervisor's directives could be subject to disciplinary action."

Callaway was informed by another employee that McHugh stated she was planning to kill herself and had purchased the book entitled "101 Ways to Kill Your Boss." Callaway relayed that information to a fellow supervisor and subsequently to Human Resources. H.R. recommended contacting the police which was their standard procedure when someone makes a threat to kill themselves or others. The Tacoma Police Department responded and began an investigation. The investigating officer believed the threats to be credible, took McHugh into custody and transported her to the Triage Center for Puget Sound Hospital where she was evaluated and released six hours later. The city then placed her on administrative leave and ordered her to take a fitness for duty exam before she could return to work.

At first she refused the directive but, eventually, completed one out of the two required days of psychological evaluation. Based on her refusal to submit to the full fitness for duty evaluation the city terminated her employment. She appealed to an arbitrator who ordered her reinstated to her position as a field investigator subject to taking the fitness for duty exam. McHugh then sued claiming among other things disability discrimination. The city moved for summary judgment as to all of her claims and the Court granted the motion for summary judgment in part and denied it in part.

As to the issue of discrimination and retaliation the Court stated that McHugh "points to no evidence of direct discriminatory intent" but went on to note that she could still establish a prima facie case of intentional discrimination. To do so, she must show that (1) she's a member of a protective class under Title VII; (2) she performed her job adequately; (3) she experienced an adverse employment action, like termination; and (4) she was treated differently than similarly situated employees outside the protective class were treated. If the employee establishes a prima facie case, the burden shifts to the employer to set forth justifiable, non-discriminatory reasons for the actions it took.

The Court denied her claim of discrimination stating that "McHugh does not adequately dispute that the city had legitimate, non-discriminatory reasons for calling the police, placing her on administrative leave, and terminating her employment. In short, even if McHugh was successful in establishing a prima facie case, no pretext has been established, which is required to succeed in her claim ...."

- **Under ADA, a medical impairment must affect a major life activity.**

  Looney vs. Washington County, Oregon Sheriff's Office, #09-1139, 2011 U.S. Dist. Lexis 75624 (D. Ore. 7-13-11).

  Plaintiff was employed as a Deputy Sheriff with the Washington County Sheriff's Office (WCSO) and, in 2007, filed a Workers' Compensation claim for post-traumatic stress disorder (PTSD) which had been triggered by his responding as an officer to two fatal crashes in 2005, both of which involved decapitations. His Workers' Compensation claim had been accepted.

  Prior to his Workers' Compensation claim, an unrelated internal affairs investigation was initiated and partially sustained. During the I.A. investigation, based on statements made by Looney, concerns were raised as to whether he could safely perform the duties of a patrol deputy. He was sent to Dr. David Corey for a fitness for duty evaluation, which he failed. The doctor's evaluation indicated that plaintiff could work as a corrections deputy.

  The plaintiff refused to accept the position with the corrections department, was placed on leave because of his failing the fitness for duty examination, was escorted out of the sheriff's office in view of his co-workers, and a department wide e-mail was sent to all employees, advising them that the plaintiff could not enter the secured portion of the Washington County Sheriff's Office without an escort. His personal physician ultimately released him, finding he did not have a disability which needed accommodation. Dr. Corey re-evaluated him and found him fit for duty.

  Three months later he received a below standard performance evaluation and was again subjected to an I.A. investigation regarding mishandling of evidence and back dating forms following a hit and run incident. Those allegations were sustained and he received a forty hour suspension, a work improvement plan, and formal notice that further misconduct would result in his termination. Plaintiff did not grieve the imposition of that discipline. He was referred again to Dr. Corey for another fitness for duty evaluation and he was again found fit for duty.

  Several weeks after that, pursuant to a judge's order, he arrested a mentally disabled individual at a group home. An I.A. investigation was again initiated, alleging, among other things, unprofessional conduct, untruthfulness, lack of courtesy and neglect of duty. Those allegations were also sustained by the sheriff. Looney was ultimately terminated from employment on February 27, 2009. He appealed to an arbitrator who ruled that the Washington County Sheriff's Office "had proven by clear and convincing evidence that it had just cause for firing plaintiff."

  He ultimately filed complaints with the Oregon Bureau of Labor and Industries and with the Federal Equal Employment Opportunity Commission. He appealed the arbitrator's ruling and the County moved for summary judgment on all seven claims contained in the plaintiff's complaint. The county's motion for summary judgment, on all claims, was granted in part and denied in part.

As to the claim of disability discrimination, the Court notes that the plaintiff asserted that his post-traumatic stress disorder qualifies him under ADA, as a "qualified individual with a disability." In order to meet that definition, a person must be able to show, among other things, that he or she "has a physical or mental impairment that substantially limits one or more major life activities."

The Court stated that there were three factors to be considered in determining whether an individual has substantial limitations in a major life activity; they are (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; (3) the permanent or long term impact or the expected permanent or long term impact resulting from the impairment.

In this case, the Court stated "plaintiff has not established that he suffers from a mental or physical impairment that affects one or more of his major life activities as defined in (ADA). Plaintiff contends that his PTSD is disabling because it prevents him from working as a police officer when he is not on medication. Plaintiff acknowledged in his briefing that he could have worked as a corrections officer, but chose not to. The inability to work in a single job is not an impairment that affects a major life activity... as it does not rise to the level of being prevented from "walking, seeing, hearing, speaking, breathing, learning, or working."

VITA

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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."

Recently Mr. Mayer was selected as one of Southern California's "Super Lawyer" for the year 2011 in the areas of government law, employment law and police litigation.

<u>Published Articles</u>

- *"Changes to HR 218"*
  California Peace Officer, Winter 2011

- *"The Pregnant Employee: Rights & Responsibilities of the Employer"*
  California Sheriff – Published by the California State Sheriff's Association
  July 2011
- *Major Modifications to Miranda*
  California Sheriff – Published by the California State Sheriff's Association
  June 2010
- *The Sheriff, the Board & the Budget*
  California Sheriff – Published by the California State Sheriff's Association
  April 2010
- *The Dishonest Officer: Still Being Debated*
  California Peace Officer, Winter, 2010
- *Major Modifications to Miranda*
  California Sheriff, June, 2010
- *The Sheriff, the Board & the Budget*
  California Sheriff, April 2010
- *ADA and the Hiring Process*
  The Police Chief, September, 2009
- *The Duty to Train Officers*
  The Operator – Published by the Ohio Tactical Officers Association
  Winter, 2009
- *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*
  California Sheriff, Vol. 23, No. 4, October 2008
- *Drug Testing of All Applicants for Municipal Employment is Unconstitutional*
  California Peace Officer, Summer 2008
- *Union Activity and First Amendment Rights*
  California Sheriff, Vol. 23, No. 3, July 2008
- *The Use of Medical Marijuana and One's Job*
  California Sheriff, Vol. 23, No. 2, April 2008
- *A Potential Avalanche of Released Felons*
  California Sheriff, Vol. 22, No. 4, October 2007
- *An Officer's Use of Force: What is Reasonable?*
  California Sheriff, Vol. 22, No. 3, July 2007
- *Multiple Case Decisions Impact Peace Officer's Bill of Rights*
  California Sheriff, Vol. 22, No. 2, April 2007
- *Medical Marijuana: Law Enforcements "Rock and a Hard Place"*
  California Sheriff, Vol. 22, No. 1, January 2007
- *Public Employees, Politics and the First Amendment*
  California Sheriff, Vol. 21, No. 4, October 2006
- *Cost Recovery of Expenses Responding to DUI Incidents*
  California Sheriff, Vol. 21, No. 3, July 2006
- *Confidentiality of Peace Officers- Personnel Files Under Attack*
  California Sheriff, Vol. 21, No. 2, April 2006
- *FLSA – Who is Exempt?*
  California Sheriff, Vol. 21, No. 1, January 2006
- *Utilizing the Department's Legal Counsel at Major Incidents*
  The Police Chief, Published by IACP, May 1998, Vol. LXV, Number 5
- *Fair Labor Standards Act & Police Personnel Administration*
  Journal of California Law Enforcement, Vol. 29, No. 2, 1995
  The Police Chief, Published by IACP, April 1997, Vol. LXIV, Number 4

- *The ADA: Psych Evaluation; Background Investigation; Conditional Offer of Employment; Grievance Procedure* California Peace Officer, 1994
- *ADA: Some Questions & Answers*
  California Peace Officer, Vol. 13, No. 4, 1993
- *Americans With Disabilities Act: Some Do's and Dont's*
  Journal of California Law Enforcement, Vol. 26, No.1, 1992
- *Penal Code Section 618--A Reason for Concern?*
  Journal of California Law Enforcement, Vol. 24 No. 3, 1990
- *To Provide or Not to Provide: No Longer a Question for Internal Affairs Investigations*
  Journal of California Law Enforcement, Vol. 24 No. 4, 1990
- *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 Sheriff's 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