Legal Update for Police Psychologists – 2008

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Compiled by
Wayne W. Schmidt
AELE Law Enforcement Legal Center
www.aele.org
aele@aol.com

Psychological Evaluations

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Administrative Leave

Placement of an officer on paid administrative leave pending the result of a psychological fitness-for-duty evaluation, following a use of force incident, does not constitute a materially adverse action that would support a retaliation claim. Nichols v. So. Ill. Univ., #06-2688, 102 FEP Cases (BNA) 519, 2007 U.S. App. Lexis 29865 (7th Cir.), affirming 432 F.Supp.2d 798.

View at: http://caselaw.findlaw.com/data2/circs/7th/062688p.pdf

Adverse Personnel Action

Federal court grants a summary judgment to the city in an action where a woman officer claimed that the city retaliated against her for filing a prior lawsuit by asking her to submit to a fitness for duty examination when she had no record of deficient performance. Her appointment with a psychologist was voluntary and management took no action as a result of her visit, even though the psychologist found her unfit for duty. Semsroth v. City of Wichita, #06-2376, 2008 U.S. Dist. Lexis 35379 (D. Kan.).

View at: http://www.aele.org/law/2008FPAUG/semsroth-wichita.html

Fourth Amendment Claim

Ohio appellate court sustains the suspension and demotion of a fire lieutenant for failing to submit to a psychological exam following a 5-month absence from work after undergoing back surgery. A separate action against the union for failing to seek arbitration also was dismissed. A psychological evaluation request was reasonable and is not an unlawful search of his mind. Jenkins v. City of Sandusky, #E-07-067, 2008 Ohio App. Lexis 3966 (6th App. Dist.).

View at: http://apps.co.lucas.oh.us/Courts/Appeals/DecisionsPDF/3834.pdf

Note: A Fourth Amendment claim was more fully discussed in a 2005 case before the Seventh Circuit. The judge who authored the opinion is Richard Posner, who is famous as a writer, philosopher and commentator. He wrote:

> "... let us consider whether subjecting a public employee to a probing psychological examination is a search. If it is, then it may well have been an unreasonable one in this case, and thus violate the Fourth Amendment ... But we need not decide this, as we do not think a psychological test is a search. * * *
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> "The invasion of privacy caused by submitting to the kind of psychological test given to the plaintiff in this case may well have been more profound than the invasion caused by a blood test, a breathalyzer test, or a urine test, though we cannot say for sure; the test is not in the record -- all we know is that, according to the complaint, "the battery of psychological tests examined [her] personality traits, psychological adjustments and health-related issues." * * *
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> "... we do not think that the Fourth Amendment should be interpreted to reach the putting of questions to a person, even when the questions are skillfully designed to elicit what most people would regard as highly personal private information. ... The implications of extending the doctrine of those cases to one involving mere questioning would be strange. In a case involving sex or some other private matter, a government trial lawyer might be required to obtain a search warrant before being allowed to conduct a cross-examination -- or the judge before being allowed to ask a question of the witness.
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> "Police might have to obtain search warrants or waivers before conducting routine inquiries, even of the complaining witness in a rape case, since they would be inquiring

> about the witness's sexual behavior. Questioning in a police inquiry or a background investigation or even a credit check would be in peril of being deemed a search of the person about whom the questions were asked. Psychological tests, widely used in a variety of sensitive employments, would be deemed forbidden by the Constitution if a judge thought them unreasonable.
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> "The Fourth Amendment was not drafted, and has not been interpreted, with interrogations in mind. We are not surprised to have found no appellate case that supports the plaintiff's position -- which by the way shows that the district judge was absolutely correct in ruling that the individual defendants had a good defense of immunity.
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> "Our conclusion that the plaintiff has not stated a Fourth Amendment claim does not leave people in her position remediless -- or indeed leave her remediless. States are free to protect privacy more comprehensively than the Fourth Amendment commands; and [the plaintiff] is free to continue to press her state-law claims in state court, where they belong."

Greenawalt v. Indiana Dept. of Corrections, #04-1997, 397 F.3d 587, 2005 U.S. App. Lexis 2384 (7th Cir. 2005).

View at: http://caselaw.lp.findlaw.com/data2/circs/7th/041997p.pdf

Punishment for Refusal to Submit to Exam or to Cooperate

Appeals panel affirms a Merit Systems Protection Board decision to uphold the termination of an employee for insubordination. Management ordered the employee to undergo a fitness-for-duty evaluation after the he made improper requests for records. Moreover, the record supported a finding that management did not fire him in violation of the Whistleblower Protection Act. Sweeney v. Dep't of Homeland Sec., #2007-3091, 2007 U.S. App. Lexis 21813 (Unpub. Fed. Cir.).

View at: http://www.cafc.uscourts.gov/opinions/07-3091.pdf

Releases & Waivers

Ninth Circuit affirms dismissal of a suit filed by a rejected police applicant that failed a psychological evaluation that cited her stubborn nature and impulsivity. The appellate panel enforced a pre-employment waiver of legal rights "for any acts, or omissions in the course of the investigation into background, employment history, health, family, personal habits and suitability for employment ..." The waiver was not effective against another claim that she was rejected because she had filed an EEOC complaint against a neighboring city. Nilsson v. City of Mesa, #05-15627, 503 F.3d 947, 2007 U.S. App. Lexis 21912, 101 FEP Cases (BNA) 901, 19 AD Cases 1418 (9th Cir.).

View at: http://caselaw.findlaw.com/data2/circs/9th/0515627p.pdf

Weingarten Representative

Arbitrator holds that bargaining unit members are entitled to be accompanied by a Weingarten representative, if requested, at a fitness for duty evaluation required by a superior. Although the union did not claim medical expertise, "union representation during a fitness for work examination is necessary to ensure that the employee's rights are not being violated during the course of the examination ..." AFGE L-596 and DoJ Fed. Bur of Prisons (FCC Coleman, FL), Grievance 06-540891 (Sherman, 2007).

View at: http://www.aele.org/law/2008FPFEB/afge506-bop.pdf

Note: The Weingarten decision has not been adopted in a few states, and only applies to members of a recognized bargaining unit.
