Law Offices of Mary L. Topliff
Workplace Wave

Recent Developments In Disability Law: From Fitness For Duty Exams To Accommodations To Updated Regulations

By Mary L. Topliff, Esq.

The following article presents selected case law updates under the federal Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA), as well as legislative developments.

Ninth Circuit Clarifies Standards for Fitness for Duty Exams

In the midst of my various speaking engagements this summer and fall on the topic of fitness for duty medical exams, the Ninth Circuit Court of Appeals weighed in with the case of Brownfield v. City of Yakima (9th Cir. 2010). As with most reported cases on this subject, the court found in favor of the employer, who had required that the plaintiff-police officer undergo a fitness for duty medical exam as a condition of continued employment.

Brownfield had been a police officer for over four years and had undergone a fitness for duty exam early on in his employment after suffering a head injury in a car accident. Several years later, he took issue with another police officer, accusing him of unethical practices and other work concerns. Brownfield began compiling notes about his co-worker's perceived shortcomings, which culminated in a meeting with his superiors. During the meeting, Brownfield was insubordinate causing him to be temporarily suspended. Following the suspension, he acknowledged that he was consumed by anger at the meeting.

Several months later, a series of incidents occurred that led the police department to refer Brownfield to a fitness for duty exam. He engaged in a disruptive argument with another officer and again, became visibly upset and was not speaking in full sentences. He then reported that he felt a loss of control while handling a traffic stop when a young child in the vehicle began taunting him. Another officer reported comments from Brownfield, such as "It's not important anyway," "I'm not sure if it's

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worth it," and "It doesn't matter how this ends."
Brownfield cooperated in a fitness for duty exam, resulting in a medical finding that he was unfit for police duty and that his disability was permanent. He was transferred from administrative to FMLA leave at that point. Brownfield's primary care doctor later released him to return to work and another doctor provided a second opinion that Brownfield's emotional and behavioral problems were amenable to treatment. When the police department required that he undergo a fitness for duty exam with another doctor, he refused to attend and the city terminated him, prompting the lawsuit.

The ADA explicitly authorizes employers to require employees to undergo fitness for duty exams so long as they are job-related and consistent with business necessity. The Brownfield court noted that business necessity is not the same thing as "mere expediency." A prior Ninth Circuit case, Yin v. California, noted that when an employee's health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a fitness for duty exam. Another Circuit Court upheld a fitness for duty exam when a police officer displayed unusually defensive and antagonistic behavior but whose job performance was otherwise satisfactory. That court held that the ADA does not require a police department to forego a fitness for duty exam to wait until a perceived threat becomes real. Thus, the Brownfield court agreed that prophylactic psychological exams may sometimes satisfy the business necessity standard, particularly where the employee is engaged in dangerous work, provided the exam is not a pretext to harass an employee or is a fishing expedition regarding non-work-related medical issues.

The court reiterated that business necessity is a high standard that must be proven through objective evidence. It may be met even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire whether the employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient to justify an exam. There must be a genuine reason to doubt whether the employee can perform job-related functions.

The court held that the police department had established an objective, legitimate basis to doubt Brownfield's ability to perform the duties of his position as a police officer, given his highly emotional responses on various occasions occurring closely in time. The court noted that a minor argument with a coworker or isolated instances of lost temper would likely fall short of establishing business necessity. However, Brownfield engaged in repeated volatile behavior and, as a police officer, he would likely encounter extremely stressful and dangerous situations during work. Thus, a fitness for duty exam was consistent with the ADA.

This case provides helpful guidance to employers faced with making these challenging decisions. Employers are well-served by ensuring that they have "objective evidence" supporting their requirements for fitness for duty exams and remembering that the business necessity standard is a high one. See below for more tips on how to comply with these legal obligations.

Courts Refine Interactive Process and Reasonable Accommodation Requirements

California's Fair Employment and Housing Act (FEHA) sets forth a separate and distinct legal obligation for employers to engage in an interactive process with employees and applicants regarding disability accommodation requests.

Specifically, it requires that an employer "engage in a timely, good faith, interactive process" in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition. However, the law and regulations provide little guidance on when this process is triggered and at what point an employer would be certain that it had complied.

The case of Milan v. City of Holtville (Cal. App. 2010), clarifies when the process is triggered. Although the court's opinion was subsequently depublished and cannot be relied on as precedent, it provides guidance on how the courts will likely view these issues.

Milan was a municipal water treatment plant operator who had suffered two herniated disks in a workplace accident. Approximately nine months after the accident and during the workers' compensation claim process, Milan was examined by a doctor retained by the city who had been informed that Milan's job involved a significant amount of lifting, bending and twisting. The doctor concluded that Milan would not be able to return to work. The city initially did not take any action based on this conclusion, opting to see if Milan's condition improved. A few months later, the city's workers' compensation administrator advised Milan that its doctor did not believe that she would be able to return to her prior job. The city further informed Milan that she could dispute the city's determination that she could not return to her job by returning a form. The employee was offered and accepted vocational rehabilitation and retraining benefits. She thereafter did not contact the employer about returning to work.

Milan testified that she was shocked by the termination because the city had not contacted her about whether her condition had improved after the doctor's examination nine months earlier. According to her treating physician, Milan could return to a job that did not require significant physical activity. Nearly a year later, Milan's doctor sent a letter to the city's workers' compensation administrator that she could return to the plant operator job with some lifting and other restrictions. However, the employer terminated Milan because she could not return to her customary position and there was no job available that she could reasonably perform. Milan then sued the city, contending that it had failed to accommodate her disability since she was capable of performing the essential functions of her job.

The trial court found that when the city received its own doctor's report, it had an obligation to engage with Milan in an interactive process to determine whether her disability could be accommodated and that the city had failed to do so. It further held that the city failed to accommodate Milan.

On appeal, the court relied on the prior California appellate court case of Gelfo v. Lockheed Martin Corp., which stated that the interactive process is essential to accomplishing FEHA's goals and the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an undue burden on employers. This process is a mechanism to allow for early intervention by an employer, outside of the legal forum, for exploring reasonable accommodations.

The court further stated that FEHA's specific terms require that the employee initiate the interactive process. As the Gelfo court held, each party must participate in good faith, undertaking reasonable efforts to communicate their respective concerns and provide information to each other. As such, liability hinges on the objective

circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith.

The Milan court then held that Milan had not met her obligations under the statute. It found that her lengthy absence from work, at the least, required that she communicate to the city that she wanted to return to work. Since she did not do so, the employer had no legal obligation to engage in the interactive process.

Another recent federal court case, Equal Employment Opportunity Commission v. UPS Supply Chain Solutions (9th Cir. 2010), addressed both the interactive process and reasonable accommodation obligations under the ADA. There, the EEOC brought suit on behalf of a deaf UPS employee, Mauricio Centeno, alleging that UPS failed to reasonably accommodate him by providing a sign language interpreter for certain staff meetings, disciplinary sessions and training. Centeno's primary language was American Sign Language and he was only able to read and write English at a grade school level, of which UPS was aware.

Centeno was employed as a junior clerk in the accounting department for eight years. He was required to attend staff meetings in which a variety of topics were discussed. Over the years, he requested that a sign language interpreter be provided for him at these meetings. For a few years, UPS provided alternatives, such as another employee contemporaneously taking notes. It then provided an interpreter for monthly but not weekly meetings. An EEOC investigator instructed Centeno not to attend meetings in which there would be no interpreter. When Centeno so informed UPS, he was written up for insubordination.

Centeno's performance reviews for several years identified a goal of improving his Excel skills, suggesting that he take a course. He told his supervisor that he could not understand the on-line training content. After the EEOC filed its complaint, UPS provided an interpreter to assist Centeno with the training.

Centeno also had an incident in which he behaved inappropriately towards his co-workers. This prompted a meeting with Human Resources and his supervisor, in which an interpreter was provided. However, a written warning was then prepared and delivered to Centeno in a meeting, without an interpreter. Centeno said that he did not understand various terms in the warning and was provided a dictionary to look up the words. He was later provided with the company's anti-harassment policy and a questionnaire, without the assistance of an interpreter.

The trial court granted UPS's motion for summary judgment, concluding that UPS properly engaged in the interactive process and provided a variety of accommodations to Centeno. On appeal, the Ninth Circuit court noted that for an accommodation to be reasonable, it must be effective in enabling the employee to perform his or her job duties. Further, UPS did not present evidence that Centeno's requested accommodations would have created an undue hardship.

With respect to the interactive process, the court observed that it is triggered when an employee requests an accommodation. It noted that the duty to accommodate is a continuing duty that is not exhausted by one effort. This process, thus, continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. The court noted that this continuing obligation fosters the framework

of cooperative problem-solving envisioned by the ADA.

Since this case is an appeal from a motion for summary judgment, the court focused on whether there were any factual disputes and held that there were. It rejected UPS's argument that its accommodation of providing notes of the meetings to Centeno was effective rather than contemporaneous sign language interpreting. The court held that Centeno was unable to participate in the meetings, he had made clear that he did not understand the notes from the meetings and asked for different modifications, thus UPS should have been aware that the modifications it provided were ineffective. With respect to the Excel training, the court held that there was a factual dispute as to whether UPS delayed providing Centeno with the accommodation he needed in order to receive the training. Finally, the court found that UPS should have been aware that Centeno needed a sign language interpreter to understand the company's anti-harassment policy.

These two cases clarify that the interactive process is triggered by an employee's request for an accommodation. Once an accommodation is provided, it is the employer's duty to make sure that it is effective.

How to Comply With These Legal Obligations

- Avoid making assumptions about employees' medical conditions and prognoses.
- Be mindful of triggers for interactive process and/or fitness for duty exams (e.g., employee's request for accommodation, employee's self-disclosure of medical issue, employee's inability to perform job duties, or employee creating safety concern for self/others).
- Identify safety-sensitive positions.
- Be proactive in preparing detailed, accurate job descriptions that pertain to each employee's job functions, including all physical and mental requirements.
- Keep track of incidents that triggered fitness for duty exam requests to ensure consistency in handling.
- Treat each accommodation issue individually while being consistent. Be serious about exploring accommodation options.
- Prepare and implement a Standard Operating Procedure for disability accommodation and fitness for duty processes, including considerations of all policies/programs which may be implicated such as workplace violence prevention, workers' compensation, leaves of absence, performance management, absence management, and return to work.
- Obtain appropriate medical expertise for guidance with denials of return to work due to safety concerns or risk of reinjury.
- Provide education and training to front-line managers.
- Be diligent about documenting the interactive process, medical certification, and accommodation determinations.
- Ensure that your programs and decision-making on these issues comply with federal and applicable state law. California's disability laws are broader in scope than the ADA and apply to employees working in California, regardless of the company's principal place of business.
- Remember that accommodations must be effective and that medical restrictions can change over time, along with accommodation needs, so set up a regular check-in process with employees.

The Law Offices of Mary L. Topliff can help your organization ensure compliance with these myriad legal issues and their practical impact. ■

California Agency Proposes New Disability Regulations

The California Fair Employment and Housing Commission (FEHC) has issued proposed revisions to the regulations regarding pregnancy disability under FEHA. These regulations were modified in August and October during the public comment period, although they have not yet been formally adopted. The most recent version includes a clarification that the total number of work days equating to four months of job-protected pregnancy disability leave is 122 days (compared to 88 work days in the current regulations). They also add a prohibition of discrimination against an employee for her "perceived" pregnancy, clarify job accommodation and transfer issues and provide sample posting notices and a medical certification form.

The FEHC is also in the process of issuing proposed revisions to the regulations addressing FEHA disability accommodations and related issues. These proposed revisions have not yet been published publicly. However, the FEHC conducted an informational seminar this fall. Some of the highlights of the new regulations are: a definition for temporary disabilities not covered by FEHA, examples of triggers for the interactive process, and a requirement that accommodations must be effective.

For more information on these issues, contact the author at topliff@joblaw.com ■

My Leadership California Experience

By Mary L. Topliff, Esq.

In an earlier Workplace Wave, I wrote about my participation in the Leadership California Class of 2010, California Issues and Trends Program. The program provides focused development of women leaders, exposing them to critical public and private sector issues and enhancing their competitive knowledge on California.

Along with 55 very impressive women from all over the state, we explored different themes during four sessions, each in a different part of California. In Sacramento, we learned about the legislative landscape and met a number of legislators and other government officials. In San Francisco, we focused on California's heritage and how it shapes our future. In Los Angeles, we reviewed the opportunities and challenges of California's economy, including a very interesting trip to the Port of Los Angeles. In San Diego, our session covered sustaining the quality of life in California through innovation and toured the California Institute for Telecommunications and Information Technology at UCSD.

My favorite part of the program was touring an amazing, inspiring community in San Diego. Founded in 1995, the Jacobs Center for Neighborhood Innovation began working in partnership with the Jacobs Family Foundation and residents of San Diego's Diamond Neighborhoods to build a stronger community through entrepreneurial projects, hands-on learning relationships, and the creative investment of resources. My classmates and I were in awe of the transformation of this community, accomplished by a true partnership with the residents, 3,000 of whom worked on teams to advance the work. One result is a community-owned commercial venture at the Village at Market Creek, with even more plans in the works.

For anyone interested in applying for the Leadership California 2011 Class or if you would like more information, please go to www.leadershipcalifornia.org. ■