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Employer Use of Fitness For Duty Evaluations

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To ensure that law enforcement officers are able to perform their duties safely, The Michigan Commission On Law Enforcement Standards (MCOLES) places a high priority on fitness standards prior to issuing a candidate a license to be a peace officer (R 28.14204). From the date they are hired, officers must be physically and mentally stable, and their employers must monitor them to ensure that no mental or physical impairment adversely affects their performance. Employers want to ensure mid-level management and supervisors have the skills necessary to detect at risk employees early so they can refer them to top management for consideration of a Fitness For Duty Evaluation (FFDE).

This edition of the LEAF Newsletter discusses issues an employer must consider and address before requiring a FFDE. The goal is for the employer to handle all FFDE incidents consistently and fairly while protecting the rights of the employee and the employer.

Being unfit for duty encompasses a broad spectrum of behaviors and physical conditions that can impair employees' ability to perform their essential job tasks or work safely. Fitness questions often arise when a trainer reports that an officer cannot meet required proficiency standards for firearms, subject control, or vehicle

operations. Getting complaints about an employee's bad behavior may also be an indicator that there may be a fitness issue. Not being fit for duty becomes an even bigger problem if there is an outbreak of contagious or infectious diseases and affected employees report for work. For these reasons, employees should consider implementing an FFDE.

What Are The Steps?

Employers who decide to have an FFDE program and require employee participation in it, when necessary, must review and consider existing labor agreements as well as health and employment related laws as they develop policy and procedure. In addition, they should consider issues involving liability for the actions of the employee, the safety of other employees and the public, and protecting the department's reputation for integrity.

Employers must plan for FFDE outcomes including suspension of the employee from regularly assigned duties, duty restrictions, and employee accommodation requests. An extreme outcome of an FFDE might be the declaration of workplace quarantine because of contamination by an infectious disease, so there should also be an

emergency plan that addresses entity business continuity.

Furthermore, in looking at establishing an FFDE program, employers must recognize that if no reasonable physical or psychological problems are observable some incidents of an employee's unacceptable job performance or misbehavior may simply be a discipline issue.

Before sending an employee for an FFDE, a number of steps must be in place. The most important is a written job description that defines in detail the essential job functions of the position. This is vital for employers because it establishes the parameters for job performance, enables healthcare providers to determine fitness for duty, and helps employers to defend any resulting job actions. MCOLES, 2006 Job Task Analysis for the position of patrol officer is available at <http://www.michigan.gov/mcoles/0,1607,7-229--161687--00.html> to aid in this task. If no established policy or language exists, developing an FFDE program falls within the definition of wage, hours and other terms of employment, which are mandatory subjects of bargaining with any labor representatives. (Section 15 of PERA, *Detroit Police Officers Association v City of Detroit*, Mich 44, 53; 214 NW 2d 803 (1974)). In addition, a requirement that an already-hired employees submit to fitness for duty requirements such as drug and alcohol testing, psychological testing, or physical examination as a condition of employment is a mandatory subject of bargaining. (City of Detroit, 1989 MERC Lab Op 788, aff'd 184 Mich App 551 (1990); City of Detroit, 1990 MERC Lab Op 67; County of Allegan (Sheriff's Department), 1992 MERC Lab Op 134;).

The policy should address when and who can order an FFDE, what steps the employer will take, and what the employee must do. It is vital that the employee receive respectful treatment. It is also essential that the employees understand that FFDE participation is a job assignment and failure to participate can lead to disciplinary action up to and including termination.

Another step is the determination of how the employer will select a qualified medical provider and how second opinions and disputed findings and final determination evaluation will be resolved. Since an FFDE may include the use of medical and physical exams that may be considered intrusive, defining the examination/testing standard of care protocol may resolve questions going forward.

The FFDE policy should state what information the employer expects to receive from the medical provider and how information confidentiality and privacy will be maintained. Medical information should be handled as required by privacy regulation such as the ADA, FMLA, HIPAA, GINA and MCL 423.501 et seq., *Bullard-Plawecki Employee Right To Know Act*. For more information on privacy issues see the October 2011 LEAF Newsletter, *Requiring Return-to-Work Doctor Slips for Sick Time* at http://www.mml.org/insurance/shared/publications/leaf_newsletter/2011_10.pdf

Issues Of Law

Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000).

The ADA permits employers to adopt physical qualification requirements that are necessary provided all reasonable efforts are made to accommodate otherwise qualified individuals. The ADA specifically provides that medical exams must be job related and consistent with business necessity. The basis for the employer to require an FFDE must be founded on a reasonable belief and based on objective evidence that:

1. the employee's medical condition impairs his or her ability to perform his or her job function, or
2. the employee poses a direct threat to the safety of others because of his or her medical condition .

Employers cannot use the FFDE to determine if the employee has a medical condition or disability but

may use the information to assess if the employees can perform their jobs safely.

All an employer needs to know from a FFDE is whether the employee is healthy enough to be able to perform their job functions without restrictions and without risk to other employees. There is no need to know any specific medical diagnosis unless the condition requires the implementation of universal precautions. If the medical provider determines that an employee is fit to work with restrictions or an employee proposes accommodation, the employer can request more specific medical information. The disability-related material will help assess whether the employee can safely and properly perform his or her job responsibilities and if the requests for restrictions or accommodation are reasonable. Careful consideration must be made to employee requests for accommodation. It is important to consult with a Human Resource Specialist or Legal Counsel when evaluating the reasonableness of an accommodation request.

Michigan Persons With Disabilities Civil Rights Act,
MCL 37.1101 – 1607

In general, this Act protects persons with a physical or mental condition that substantially limits one or more major life activities. The Act does not allow for discharge or discrimination against an individual because of a disability or genetic information or based on physical or mental examinations that are unrelated to the individual's ability to perform the duties of a particular job or position. An employer cannot limit, segregate, or classify an employee in a way that deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a disability or genetic information

At the same time, the disability cannot interfere with job performance if the employer arranges an accommodation that the Act requires. The employer must supply a disabled employee with the equipment and devices to permit him or her to do the job, unless doing so poses an undue hardship on the employer. Under the Michigan Act,

the person with the disability must suggest an accommodation that the employer finds reasonable and not an undue hardship. If the employer denies the accommodation as an undue hardship, the employee must prove, by a preponderance of evidence, that the requested accommodation would not pose an undue hardship on the employer.

MIOSHA

The Michigan Occupational Safety and Health Administration's General Duty Clause requires the employer to provide a workplace free from recognized hazards. The hazards could reasonably include medical qualification requirements when their absence would create a "recognized hazard causing or likely to cause death or serious physical harm." This position is consistent with the ADA, which specifies an employer is allowed to implement such requirements when failure to do so would pose a "direct threat" to health or safety.

The Courts

Audrey Forbush, the Law Enforcement Action Forum Legal Advisor from Plunkett Cooney PC, points to a number of court decisions that offer guidance to employers when dealing with issues surrounding fitness. In the first decision, *Sullivan v River Valley School District*, 197 F.3d 804 (6th Cir. 1999) the court agreed that an employer's ordering an employee to undergo mental and physical examinations does not suffice to show that an employer regards an employee as disabled. The court affirmed the district court's grant of summary judgment to the District.

Sullivan, a tenured teacher for the School District, began acting strangely. In a meeting before the School Board, Sullivan allegedly engaged in disruptive and abusive verbal outbursts, shoved papers in the faces of individual members of the board, and refused to stop when asked by the board president. Subsequent to the meeting, Sullivan disclosed confidential information about one of his student's to a local newspaper, wrote a letter to the student government criticizing the group's faculty sponsor in language deemed

inappropriate by the District, and then failed to report for a meeting with the Superintendent to discuss these incidents.

Sullivan's behavior led the Superintendent to believe that Sullivan might be dangerous and mentally unstable. The school district contacted a psychologist who was provided with documents and support material for evaluation. The psychologist reported that he did not think Sullivan dangerous, but did think Sullivan might have psychiatric disorder and recommended a more formal assessment. The Superintendent took the assessment to the Board who authorized Sullivan's suspension. What followed were a number of missteps by the Superintendent and the administration in following proper protocol for handling a matter of this type, which complicated it more and led to Sullivan making additional charges.

Sullivan supposedly made threats to the School Board and failed to comply with orders to produce records and to undergo mental and physical fitness-for-duty examinations. The School Board decided that the various purported acts of misconduct and insubordination by Sullivan were grounds for discharging him. The Michigan State Tenure Commission eventually changed the termination to a three-year suspension and directed Sullivan to undergo mental and physical examinations at the school board's expense. He refused to undergo the examinations, did not return to work and sued.

Sullivan appealed the federal district court's grant of summary judgment to the District on his claims of discrimination and retaliation in violation of the Americans with Disabilities Act and the Michigan Handicappers Civil Rights Act. The Sixth Circuit Court of Appeals affirmed the district court ruling that Sullivan failed to provide evidence sufficient for a jury to infer that he received adverse treatment due to being regarded as disabled. In its ruling, the court said, "Because we agree that an employer's ordering an employee to undergo mental and physical examinations does not suffice to show that an employer regards an employee as disabled." In adopting a case from the Eighth

Circuit, *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998) the court ruled:

As noted by the district court, the Eighth Circuit has held specifically that an employer's awareness of behavior that one might associate with an impairment does not of itself show treatment of an employee as disabled and that requiring an employee to see a psychologist before returning to work does not run afoul of the ADA:

An employer's request for a mental evaluation is not inappropriate if it is not obvious that an employee suffers from a disability. A request for an evaluation is not equivalent to treatment of the employee as though she were substantially impaired. Employers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims under §§12112(a) and 12102(2)(C).

The court went on to say "A request that an employee obtain a medical exam may signal that an employee's job performance is suffering, but that cannot itself prove perception of a disability because it does not prove that the employer perceives the employee to have an impairment that substantially limits one or more of the employee's major life activities. Deteriorating performance may be linked to motivation or other reasons unrelated to disability, and even poor performance may not constitute a disability under the ADA. Under the Act, working qualifies as a "major life activity"."

Reasonable and Objective Documentation

Forbush then points to *Kroll V White Lake Ambulance Authority* (WLAA), 691 F.3d 809 (6th Cir. 2012), as an example of how important it is to maintain complete documentation of behaviors and follow established policy. Kroll worked as an EMT and was considered to be a good employee. While employed, she had an affair with a married co-worker and began to act out by having several

outbursts at work. For example, Kroll was driving an ambulance in emergency mode with a patient on board while screaming into a cell phone. Her supervisor became concerned that Kroll's behavior made her unable to perform her job safely and told her to get some counseling or she could not continue to work. Kroll refused because she could not afford the expense. She left the meeting with the supervisor and did not return to work. Kroll then sued claiming that the demand that she attend counseling violated the ADA's prohibition against employers requiring a medical examination.

The district court granted summary judgment in favor of the Authority holding that as a matter of law that the counseling WLAAs ordered Kroll to attend does not constitute a "medical examination" under the ADA, 42 U.S.C. § 12112(d)(4)(A) *Prohibited Examinations and Inquiries*. The Sixth Circuit vacated the ruling saying Kroll presented sufficient evidence that a jury could find the psychological counseling was medical examination under the ADA. They went on to say that, if the counseling was job related and consistent with business necessity then the Authority might be entitled to judgment.

Forbush opined that this case is a good example of an employer having good intentions by instructing an employee to get help yet violating the ADA. The Authority failed to establish that the medical exam was job-related and consistent with business necessity. They needed to provide objective documentation of Kroll's specific behavior that led them to the reasonable belief she was unable to perform her job function and was a direct threat to the safety of others.

Policy, Documentation, Consistent Application

Another recent decision out of the Sixth Circuit Court of Appeals is *Wardia v. Justice & Pub. Safety Cabinet Dep't of Juvenile Justice*, 2013 WL28094 (CA6, KY) (Unpublished). Forbush feels this case illustrates the benefits of having a job description that lists specific job tasks, of documenting poor performance, and of following department policy and labor agreements.

Wardia, a Youth Worker employed at a Juvenile detention facility, developed a permanent injury despite surgeries in 2008 and 2009 and could no longer apply physical restraints, an essential function of his job. Although applying restraints was rare, the written job description specifically listed performing restraints as one of the essential functions of the job. To ensure Youth Workers were able to properly perform the essential job function, they underwent mandatory safe-physical-management-skills training for three months upon entry and on an ongoing monthly basis.

When Wardia's doctor notified the Department that Wardia's injury was permanent, the department placed him on leave without pay, effective October 18, 2009, to be considered as having resigned one year later. Just short of the year, Wardia asked for accommodation, was denied and terminated. Wardia filed suit, alleging violations of the Americans with Disabilities Act ("ADA") and the Kentucky Civil Rights Act. The district court granted summary judgment for the Department, holding that the ability to perform physical restraints of juveniles was an "essential function" of a Youth Worker, and that permanent assignment to the control room was not a reasonable accommodation, as the ADA does not require employers to create a new position. Wardia appealed.

Wardia did not dispute that "the potential for physical confrontation . . . exists on a daily basis." Rarity alone will not support denial of summary judgment; courts will first look to the seriousness of failing to perform the low-probability job function. Here, inability to properly restrain juveniles could have serious consequences for the safety of staff and juveniles at the facility. (Inability to restrain prisoners "could be a serious threat to security"). Indeed, if the Department did not mandate safe-physical-management skills for its staff, it might subject itself to liability from injured employees and juveniles. *Hoskins v. Oakland County Sheriff's Department*, 227 F.3d 719 (6th Cir. 2000).

Reasonable Time To Heal Struck Down

A fourth case -- relevant to employers with injured employees who are unable to perform the essential job functions of their jobs and have little or no chance of returning within a reasonable time -- is *Lamoria v. Health Care & Ret. Corp.*, 584 N.W.2d 589, 600-01 (Mich. Ct. App. 1998), vacated and reinstated in pertinent part at 233 Mich.App. 560 (1999). This case involves a variety of different discrimination claims, all of which are important. However, Forbush feels the issue of determining a reasonable period of disability before business necessity requires that an injured employee be terminated and the position filled is especially difficult. In dealing with Lamoria's Handicappers Civil Rights Act claim and the trial court's decision, the Court of Appeals gave the following explanation:

...the trial court stated: The court, in *Ashworth v. Jefferson Screw Prods. Inc.*, 176 Mich.App. 737, 743 [440 N.W.2d 101 (1989), determined that "The HCRA covers only those whose disability is unrelated to the ability to perform the job. The handicapped person seeking employment must be capable of performing the duties of the position. *Carr v. General Motors Corp.*, 425 Mich. 313, 321-322 [389 N.W.2d 686 (1986)]. A disability that is related to one's ability to perform the duties of a particular position is not a "handicap" within the meaning of the HCRA. *Id.*, pp. 315-316 [389 N.W.2d 686]." [sic] Therefore, Ms. LaMoria is not handicapped within the meaning of HCRA since it is undisputed that she could not perform the duties of her job.

Neither were defendants required to give plaintiff more time to heal. The HCRA does not require that an employer leave a job open until plaintiff's handicap is removed. *Ashworth* at 745, 440 N.W.2d 101. In addition, the employer's duty to make "reasonable accommodation" does not extend to granting plaintiff a medical leave until such time as she would be able to perform the requirements of her job.

Wilson v. Acacia Park Cemetery Ass'n, 162 Mich.App. 638, 643-644 [413 N.W.2d 79] (1987); *Carr, supra*. Ms. LaMoria had already been off work for her injury from August 1993 through August 1994. An employer's duty to accommodate handicapped employees does not extend to new job placement, *Rancour v. The Detroit Edison Co.*, 150 Mich.App. 276, 279 [388 N.W.2d 336] (1986), lv. den. 428 Mich. 860 (1987), *Ashworth, supra*.

Therefore, defendants were not required to offer plaintiff "light duty" work, nor were they required to continue plaintiff's leave of absence when she had already been off work for more than six months, she needed additional surgery and recuperation time, and even then may not be able to perform her job duties. This court, having considered all documents presented by the parties, finds there is no genuine issue of material fact and no factual development could establish this claim. Therefore, defendants' motion to dismiss the HCRA claim is granted.

Forbush cautions employers that this case does not allow employers to terminate employees because they were injured. Employers must meet the terms of the Family and Medical Leave Act and/or existing medical leave policies. They should also evaluate the situation on a case-by-case basis before taking action. Once again, Forbush expressed how important it is to have clear policy, practice, and stated conditions for obtaining leaves of absence and/or time off for a disability due to on or off the job injuries. Return to Work programs should have a thirty-day audit time to ensure there is work available and that a qualified medical provider has set medical restrictions for the employee if they are to remain in the program.

Employers should never regard employees as handicapped if there is no medical certification for that conclusion. Employers must be careful not to establish accommodations for employees who fail to perform the essential job functions for their position unless the accommodations have been requested and supported medically. If an employee

is physically unable to do the job or is behaving in a manner that is disruptive and violates policy and rules, then a Fitness For Duty Evaluation may be a good step toward resolving the problem.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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