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PSYCHOLOGICAL FITNESS FOR DUTY EXAMS: CAREFUL IMPLEMENTATION IS THE KEY TO AVOIDING LIABILITY

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Employers have an affirmative duty to provide a safe working environment for employees. According to statistics gathered by the Occupational Safety & Health Administration, nearly 2 million American workers report having been victims of workplace violence each year. These statistics highlight that workplace violence is of significant concern for employers and employees and employers must take proactive measures to insure a safe work environment for their employees. Under certain circumstances, such measures may include requesting a psychological fitness for duty examination for an employee the employer reasonably believes poses a direct threat to other employees.

Fitness for duty examinations are a tool often utilized by employers to insure employees are either capable of performing the essential functions of their job or they are not a significant risk to the health and safety of others. However, if not requested and implemented properly, fitness for duty examinations can trigger liability under the American's with Disability Act (ADA) and New Jersey Law Against Discrimination (NJLAD). Prior to the Appellate Division opinion issued earlier this week in *The Matter of Paul Williams, Township of Lakewood*, New Jersey employers did not have the benefit of any guidance from New Jersey courts interpreting the ADA and Equal Employment Opportunity Commission (EEOC) Enforcement Guidance concerning an employer's use of fitness for duty examinations.

In the Matter of Paul Williams

According to a recently issued opinion by the New

Jersey Appellate Division, employers may order an employee to attend a psychological fitness for duty examination, or any other medical fitness for duty examination, if certain strict criteria are met. In *The Matter of Paul Williams*, the Appellate Division reversed the decision of the Office of Administrative Law affirming the dismissal of the employee for his failure to attend a fitness for duty examination because the court determined that the information upon which the employer relied to schedule the psychological fitness for duty examination was not credible. The employer received an anonymous letter stating that the unnamed co-workers of the employee were concerned about his mental health and their safety due to tirades and outbursts exhibited in the work environment. This letter was received eight months prior to the date the psychological fitness for duty examination was first requested and the plaintiff's supervisor had never observed any poor performance or the type of behavior cited in the anonymous letter. In addition, the employer never conducted any investigation into the allegations contained in the letter before demanding that the employee attend the examination.

Going forward, New Jersey employers now have guidance on utilizing fitness for duty exams under the ADA and the EEOC Enforcement Guidance. Specifically, the fitness for duty exam must meet the following requirements.

The Fitness for Duty Exam request must be Job related and consistent with business necessity

For a psychological or medical fitness for duty examination to be permissible under the ADA, the examination must be job related and consistent with business necessity. The EEOC has defined “job-related and consistent with business necessity as “when an employer has a reasonable belief, based upon objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.” A direct threat is further defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

There are several specific circumstances under which the standard for “job related” and “consistent with business necessity” can be met:

- (1) the employer knows about the particular medical condition,
- (2) has observed performance problems and reasonably can attribute the problems to the medical condition,
- (3) receipt of reliable information by a credible third party that an employee has a medical condition or
- (4) the employer has observed symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or pose a direct threat.

Factual Basis for Fitness for Duty Exam must be direct observation or reliable information

An employer must reasonably believe, through direct observation or reliable information received from credible sources that the employee’s perceived medical condition is affecting his performance or the employee poses a direct threat. When analyzing the credibility of the source of information concerning the employee, the court again incorporated the EEOC Guidance and stated an employer should consider five factors: (1) the relationship of the person providing the information to the employee about whom it is being provided; (2) the seriousness of the medical condition at issue; (3) the possible motivation of the person providing the information (4) how the person learned the information (e.g. directly from the employee at issue or from someone else) and (5) other evidence that the employer has that bears on the reliability of the information provided.

Employers should carefully analyze the specific facts supporting their decision to schedule an employee for a fitness for duty examination and ensure they have met all of the above criteria cited by the New Jersey Appellate Division. Employers should also consider consulting experienced counsel to help navigate them through this detailed analysis.

If you have any questions regarding use of a fitness for duty examination in New Jersey, please contact Eileen Oakes Muskett at 609.572.2355 or emussett@foxrothschild.com or a member of Fox Rothschild’s Labor and Employment Department.

