Chapter 5

Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers: Legal and Practice Implications

Martin J. Mayer
Jones & Mayer, USA

David M. Corey
Corey & Stewart, USA

ABSTRACT

Courts throughout the United States have ruled that that the “awesome powers” entrusted to law enforcement officers, and the safety-sensitive nature of their positions, impose on their public employers a responsibility to ensure that they are fit to perform their duties. But, as with an officer’s powers, the authority of a police employer to mandate a psychological fitness-for-duty evaluation (FFDE) is not without boundaries. This chapter addresses the legal authority of a police employer to require an FFDE, the limits to that authority, and the implications of these constraints both for police employers and the psychologists who conduct these evaluations on their behalf. Written by two prominent experts in police employment law and police psychology, this chapter concerns itself with both the law and professional standards of practice. Key topics include the legal threshold for requiring an FFDE, limitations to the content of an FFDE report, and evaluator qualifications.

INTRODUCTION

A long series of statutory and case law authority dating back more than 50 years establishes both the right and the obligation of police employers to ensure that their officers are physically and mentally fit to perform their job duties and exercise the powers of a law enforcement officer (Bonsignore v. City of New York, 1982; Conte v. Horcher, 1977; People ex rel. Ballinger v. O’Connor, 1982). Although quite broad, the authority of a police employer to order an officer to submit to a psychological fitness-for-
duty evaluation (FFDE) is not without restrictions. The law—comprised of statutes and regulations, and court decisions that interpret the meaning and application of both—also places constraints on the scope of the evaluation, the acquisition and communication of private information, the role of a mental health expert in making employment decisions, and, in some jurisdictions, who is qualified to perform these evaluations. Standards of practice and ethics also serve to guide a police psychologist’s decisions concerning the antecedent conditions, informed consent, assessment methods, reporting constraints, and other considerations associated with FFDEs (American Psychological Association [APA], 2015; International Association of Chiefs of Police [IACP], 2013).

Indeed, it is where the law and standards of psychological practice intersect that the parameters of a proper FFDE can be found. In this chapter, we focus on this intersection and discuss emerging trends in the law and their practice implications for both the police employer and psychologist. This chapter is not intended to provide legal advice, which necessarily requires an attorney’s consideration of the facts of a particular case in combination with state and federal law, provisions of any collective bargaining agreement, institutional policies and procedures, and local risk management decisions. Furthermore, this chapter is intended to supplement, not supplant, existing treatises on the topic (e.g., APA, 2015; Corey, 2011; Corey & Borum, 2013; Fischler, McElroy, Miller, Saxe-Clifford, Stewart, & Zelig, 2011; Gold & Shuman, 2009; Piechowski & Drukteinis, 2011; Rostow & Davis, 2004; Stone, 2000) by focusing on contemporary issues and controversies.

The Legal Threshold

Once an employee is on the job, actual performance is generally the best measure of the employee’s ability to do the job (Equal Employment Opportunity Commission [EEOC], 1995). Courts have long held that capricious, retaliatory, or punitive demands for psychological evaluations of incumbent employees “based solely on the will and not the reason of the public employer; would constitute an arbitrary and unlawful imposition of terms and conditions of public employment” (Hill v. City of Winona, 1990, at 661, footnote 1, emphasis added; see also McGreal v. Ostrov, 2004; Merillat v. Michigan State University, 1994; Watts v. Alfred, 1992). On the other hand, courts also have given broad authority to employers to mandate medical evaluations of their employees, particularly those engaged in safety-sensitive work, when doing so serves the goal of reducing the risk of injury to the employee or others. The standard for justifying an FFDE is often referred to as the “threshold” (cf. APA, 2015; IACP, 2013). We next discuss three elements of the legal threshold question: when FFDEs may be conducted (including when they do not violate an employee’s legal rights), when they should be conducted, and when they should not be conducted.

When Fitness-for-Duty Evaluations May Be Conducted

The Americans with Disabilities Act of 1990 (ADA, 1990) is the federal statute with the greatest controlling authority over an employer’s ability to require a medical evaluation of an employee. However, it must also be noted that state laws may provide greater protections than do the ADA. In California, for example, the Fair Employment and Housing Act (FEHA, 2011) is just such a law.

According to the ADA, when an employer has a reasonable belief, based on objective evidence, that a police officer may have a psychological condition that impairs his or her ability to perform essential job functions or poses a direct threat, an FFDE is “job-related and consistent with business necessity”
Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers

(42 U.S.C. §12112[d][4][A]; 29 C.F.R. §1630.14[c]). Case law has established that an employer need not wait for objective evidence of impaired performance before justifying an FFDE when the employee is engaged in dangerous work.

In Brownfield v. City of Yakima (2010), a federal circuit court upheld the validity of a police chief’s order for an FFDE even before there was any evidence of impaired work performance, noting, “Police officers are likely to encounter extremely stressful and dangerous situations during the course of their work. When a police department has good reason to doubt an officer’s ability to respond to these situations in an appropriate manner, an FFDE is consistent with the business necessity” (at 1147, citations omitted, italics added). Setting new legal ground, the Court held that the business necessity standard can be met even before an employee’s work performance declines when the employer is engaged in dangerous work and “is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job” (at 1146, citations omitted).

In the federal law enforcement context where the legal standard for justifying a psychological FFDE is not the ADA, but rather 5 C.F.R. § 339.206 (cf. Slater v. Department of Homeland Security, 2008), the legal threshold is lower for positions in which a reasonable probability of substantial harm can be anticipated from the nature of the position (Lassiter v. Department of Justice, 1993). In Butler v. Thornburgh (1990), a federal circuit court held that “where the employee’s position implicates the safety of others, and the potential harm is severe, even a low probability that the harm will occur may be sufficient to establish a direct threat” (at 876). Other courts have reached similar decisions (e.g., Hogarth v. Thornburgh, 1993; Myers v. Hose, 1995).

Indeed, in Brownfield v. City of Yakima (2010), the Court acknowledged that its “consideration of the FFDEs’ legitimacy is heavily colored by the nature of Brownfield’s employment” (at 1146) as a police officer. The Court pointed out that officers are engaged in “extremely stressful and dangerous situations” and are placed “in positions where they can do tremendous harm if they act irrationally” (at 1147, citing Watson v. City of Miami Beach, 1999). In City of Greenwood v. Dowler (1986), an Indiana appellate court held that the attempted suicide of a police officer was sufficient grounds to terminate a police officer, whereas it might be inadequate to warrant termination of other public employees. The appeals court panel wrote,

A policeman frequently works alone, wields authority, carries lethal weapons which he is empowered to use in proper circumstances, and exercises wide discretion continuously while on and off duty. He must, at a moment’s notice, be prepared to pursue dangerous criminals and shoot them if necessary, or be shot. He may expect high speed chases. He is confronted with extricating hurt, dead, and dying people from vehicular accidents. In short, it is not an occupation for the fainthearted, a person with weak nerves, or a person with questionable emotional maturity. Such unfortunate afflictions go to the very heart of the qualifications of a police officer. Lack of control and bad judgment can result in grave consequences …. From all the evidence, reasonable people may conclude (though reasonable people could disagree) that [the officer] had become sufficiently emotionally unstable as to be unreliable as a policeman in stress situations. (at 1085-1086)

The “business necessity standard” articulated in the ADA has generally been understood to require some level of objective evidence giving rise to reasonable concerns about a particular individual’s medical fitness to justify an employer-mandated FFDE. This interpretation derives from the EEOC’s enforcement guidance:
An employer’s reasonable belief that an employee’s ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition must be based on objective evidence obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination. Such a belief requires an assessment of the employee and his/her position and cannot be based on general assumptions. (EEOC, 2000, Question 5)

The EEOC’s long-held position has been that the ADA’s business necessity standard does not permit medical testing of an incumbent employee unless and until the employer has an individualized, reasonable suspicion of impairment or direct threat due to a medical condition. As a result, the practice of routinely referring police officers involved in shootings and other traumatic events for fitness evaluations has been argued to violate the ADA’s prohibition against medical examinations that are not job-related and consistent with business necessity (cf. Corey, 2011; Trompetter, Corey, Schmidt, & Tracy, 2011). Recent federal case law challenges this position.

For example, in EEOC v. U.S. Steel Corporation (2013), the Court examined U.S. Steel’s union-approved practice of conducting random drug and alcohol testing on its probationary employees, which the EEOC insisted was in violation of the business necessity standard. However, the Court held that the alcohol testing policy—which had no individualized assessment component based on suspicion, reasonable or otherwise, but rather was an “across-the-board” policy devoid of any individual consideration—served the business necessity of eliminating hazards in the workplace.

In finding for U.S. Steel, the Court held that the medical examination or inquiry at issue must genuinely serve the asserted business necessity and be “no broader or more intrusive than necessary” (at 61, quoting Conroy v. New York State Dep’t of Correctional Servs., 2003). The Court concluded, “Where employers advancing safety as the business necessity demonstrate that the medical test or inquiry ‘makes even a small contribution to reducing the risks posed by unfit [employees], it is amply justified’” (at 66, quoting Transport Workers Union of Am., Local 100, AFL-CIO v. N.Y. City Transit Auth., 2004), particularly when “employees are charged with performing dangerous and safety-sensitive duties” (at 70).

Notably, the EEOC conceded that the business necessity exception articulated in 42 U.S.C. § 12112(d)(4)(A) encompasses periodic across-the-board drug and alcohol testing of police officers, firefighters, private security officers, and other positions affecting “public safety.” In EEOC v. U.S. Steel, the Court rejected this exemption as being too narrow:

Even if police officers and firefighters can be distinguished as being public servants whose jobs are to protect the public, the agency ignores that private security officers, bus drivers, flight attendants, and nuclear plant operators have no such overriding duty to protect the public. These are jobs that, if performed badly, could result in harm to others in the general public. Yet, there is no reason to deem the lives of those in the general public less worthy of protecting than the lives of one’s co-workers. Where the guiding principle of the business necessity exception is to permit employers to take preemptive steps to protect people from injury, the Court sees no reason to make a distinction in the kinds of people that such employers are allowed to protect. The life of a person is no less valuable simply because he or she decided to work in a factory rather than take a walk through the park. (at 83)

Under the reasoning of EEOC vs. U.S. Steel (2013), police employers may be able to adopt a policy to routinely evaluate police officers who have been exposed to a significant trauma (e.g., officer-involved shooting) or stressful assignment (e.g., prolonged undercover or child sex crime unit assignment) with
Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers

high potential to impair job functioning when the purpose of the policy is to protect the officer, fellow officers, or the public; the scope of the evaluation is no broader or intrusive than necessary; and the medical examination is reasonably expected to reduce the risk of harm. Again, it must be noted that individual state laws and/or labor agreements might require the employer to meet with and secure support from the relevant labor organizations, as did U.S. Steel in this case.

Practice guidelines that cast such employer policies as violating the ADA’s prohibition against unwarranted medical examinations and inquiries on the basis that they are contrary to the EEOC’s enforcement guidance should be revisited. However, the fact that such medical evaluations may be legally permissible does not necessarily render those evaluations equivalent to FFDEs, inasmuch as these latter evaluations, by definition, tend to be evaluations in which the referral is justified by objective and individualized evidence. In addition, local employer/employee labor agreements might limit the employer’s ability to compel such tests.

Each of the federal cases just discussed (Brownfield v. City of Yakima, 2010; EEOC vs. U.S. Steel, 2013; Lassiter v. Department of Justice, 1993; Slater v. Department of Homeland Security, 2008; Transport Workers Union of Am., Local 100, AFL-CIO v. N.Y. City Transit Auth., 2004) joins a legacy of similar cases establishing that neither the ADA, nor the Code of Federal Regulations, bars an employer from requiring a medical evaluation as a condition of an employee’s continued employment when (1) the employer is engaged in safety-sensitive work; (2) the consequences of impaired work performance may have catastrophic consequences for the employee being referred for evaluation or for others; and (3) the mandated evaluation is reasonably expected to serve the employer’s safety goals.

Until recently, the courts have held the position that employees released from medical leave under the Family & Medical Leave Act (FMLA) of 1993 are to be afforded special consideration, and this position has also been reflected in professional practice (Corey, 2011). More recently, this position has come under challenge.

The FMLA stipulates that when an employee returns from medical leave the employee is entitled to be reinstated to his or her position or an equivalent position (29 U.S.C. § 2614[a][1]). If the employer has a uniformly applied practice or policy requiring it, the employer also may require each employee taking FMLA leave to provide certification from the employee’s health care provider that the employee is able to resume work (29 U.S.C. § 2614[a][4]). Most courts have interpreted the FMLA as prohibiting an employer from compelling an employee returning from FMLA leave to submit to an independent evaluation of his or her fitness for duty once certified by the treating health care provider as ready to return to work, although pre-leave or post-return behavior may justify an FFDE (Albert v. Runyon, 1998; see also Brumbalough v. Camelot Care Centers, 2005). When an employer is able to establish that it would have ordered an FFDE had the employee not taken leave, courts have generally held such an examination to be permissible once the employee has been reinstated (Carrillo v. National Council of Churches of Christ in the USA, 1997).

In White v. County of Los Angeles (2014), the Court held that an employer is permitted to seek its own evaluation of an employee’s fitness for duty—after returning the employee to work but before returning him or her to duty—when it is not satisfied with the employee’s health care provider’s certification and there was a “pre-leave” basis to justify an FFDE. Susan White was employed as a Senior District Attorney Investigator with the Los Angeles County District Attorney’s Office, a position requiring peace officer status under California Government Code § 1031. In 2009, White began experiencing emotional difficulties and was observed acting erratically at work “with very high emotional highs and very low lows.” In
early 2010, White made a poor tactical decision while serving a search warrant, which jeopardized her own and others’ safety and led to her coworkers being concerned that she was psychologically unstable.

White disclosed to coworkers and her supervisors that she was on medication, and she was seen crying, anxious, and exhibiting mood swings. Although White’s behavior improved briefly after her supervisors discussed their observations with her, concerns about her fitness for duty culminated in early 2011 when she gave court testimony containing significant factual errors. Shortly after, White tearfully told her supervisors that she needed to take off a month for inpatient and outpatient treatment, which was later extended to three months. At the end of that treatment period, White’s health care provider wrote a letter to her employer stating that she would be able to return to work and perform the essential functions of her position, effective September 7, 2011.

On September 6, 2011, the employer notified White that she would be placed on paid administrative leave and reassigned to her home effective September 7, 2011. She was subsequently ordered to submit to an FFDE. White sought a court injunction against the FFDE, arguing that requiring her to perform the medical reevaluation violated her right under the FMLA to be restored to employment on her doctor’s certification alone. The lower court issued a permanent injunction preventing the District Attorney (DA) from requiring White to submit to the FFDE based on her pre-leave conduct, stating, “Nobody is disputing based on the facts of 2010, 2011 that Ms. White should be reevaluated. The whole point of the [FMLA] is that she was[,] by her own psychologist.”

The DA appealed and the Court of Appeal addressed the question of whether, after an employee has been returned to work as required by the FMLA, the employer is prohibited by the FMLA from requiring a medical reevaluation related to the serious health condition for which the employee was granted leave. The Court concluded that “it is not [prohibited from ordering an FFDE], even where such reevaluation involves matters existing prior to the FMLA leave.”

The Court’s rationale in White rested on a 2008 addition in the language of the U.S. Department of Labor’s FMLA regulations: “Requirements under the Americans with Disabilities Act (ADA), as amended, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer’s expense by the employer’s health care provider be job-related and consistent with business necessity” (29 C.F.R. § 825.312[h]).

The Court made note of the Department of Labor’s explanation for this change, including, in part, that the added language “intends to make clear that, once an employee returns to work and is no longer on FMLA leave, an employer may require a medical exam under the guidelines and restrictions imposed by the ADA. At that point, the FMLA’s fitness-for-duty regulation no longer applies” (73 Fed. Reg. 67934-01, 68036). The Court wrote,

Thus, it is clear that the Department [of Labor] intended to clarify that a bright line exists at the employee’s return to work. Before the return to work, the employer must accept the employee’s physician’s certification and return the employee to employment; after the return to employment, the FMLA protections no longer apply, and the employer may require a FFDE consistent with the ADA. (at 704)

A Justified FFDE Does Not Violate an Employee’s Rights

In Dengel v. Waukesha County (2014), after several disturbing workplace incidents, Dengel was referred to the Employee Assistance Program (EAP). Due to a dispute regarding disclosure of information, he refused to return. Dengel’s attorney requested that the County provide reasons for its concern with Dengel’s
mental state. In response, the County stated that it did not believe Dengel had a medical issue—merely a behavioral one. It also clarified that it was no longer seeking a fitness-for-duty evaluation, but that it still needed a return-to-work release. Dengel disagreed, and when his leave expired without him taking any action, Human Resources sent him a letter informing him that it viewed him to have voluntarily terminated his employment.

Dengel subsequently filed suit alleging, among other things, ADA violations. The Court held, “Inquiries into an employee’s psychiatric health are often permissible when they reflect concern for the safety of employees and the ‘public at large,’ especially in jobs affecting public safety…. Moreover, where there is evidence of instability or potential danger, employers are generally justified in seeking mental evaluations” (at 993). Reviewing all of the County’s concerns, the Court said, “Dengel’s behavior and his sensitive position show that the County’s requirement that Mr. Dengel visit EAP and obtain a return to work authorization were clearly job-related and consistent with a business necessity.”

In Franklin v. City of slidell (2013), Franklin, a minority senior corrections officer, brought action against the city alleging that he was required to take a fitness-for-duty evaluation and was relieved of his duties in retaliation for filing a discrimination complaint and civil lawsuit in violation of Title VII of the Civil Rights Act of 1964. Additionally, he alleged that he was required to take a medical and psychological fitness-for-duty evaluation before returning to work from medical leave in violation of the Americans with Disabilities Act (ADA).

The Court found that “[p]laintiff engaged in erratic behavior before and during his period of medical leave, … and it was necessary and appropriate to require Plaintiff to pass a fitness for duty examination before resuming his duties as a senior corrections officer in light of the nature of that position and City policies. In light the City’s proffered nondiscriminatory reasons for its actions, the burden shifts to Plaintiff to produce evidence that these proffered reasons are merely pretext for retaliation.” In Franklin, the plaintiff failed to provide such evidence.

**When Fitness-for-Duty Evaluations Should Be Conducted**

The previous discussion highlights the foundational standard that FFDEs, like all medical evaluations of incumbent employees, must be legally justified. But beyond the right of an employer to require an FFDE is its obligation to do so under circumstances that put the officer, fellow officers, or the public in peril. Many jurisdictions throughout the country impose upon law enforcement management the duty to ensure that law enforcement officers are both physically and psychologically fit for duty. This is due, in part, to the authority exercised by law enforcement officers, as well as statutory law and court decisions.

In Thomas v. Johnson (1968), the federal court held that “[t]he municipal employer will generally be held liable where it has retained an agent whose past history did in fact, or should have, put the municipality on notice of the agent’s propensity for violence or instability” (at 1031; emphasis added). The Johnson court stated further, “[I]f negligence in the selection of unfit persons or retention of known incompetents can be shown on the part of members of the appointing authority, recovery of damages against the municipality will follow subject to the proximate cause limitation” (at 1031; emphasis in original).

In Moon v. Winfield (1973), the federal court stated that where the head of a law enforcement agency “is under some affirmative duty to act and he fails to act accordingly, he may be held negligently responsible for his omission” (at 845). The Court noted that there are several situations which could impose a duty on the agency head to act. For example, knowledge of situations involving a history of misconduct, or complaints regarding “physical abuse or malicious or threatening conduct towards civilians,”
or instances of “questionable mental stability,” raise issues of fact as to the possible negligence on the part of the head of an agency if nothing is done to determine fitness for duty (at 845, emphasis added). Under those circumstances, the Court states, the officer should be assigned “to some other duty where he is under close supervision and has limited contact with the public” (at 845).

Under federal civil rights statute 18 U.S.C. § 1983, a plaintiff may sue public employers and supervisors who negligently hire, supervise, and retain an employee. To establish such negligence, a plaintiff must prove that (1) the employer and/or supervisor had actual or constructive knowledge that his or her subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens; (2) the employer’s or supervisor’s response to that knowledge was so inadequate as to show “deliberate indifference” to, or tacit authorization of, the alleged offensive practices; and (3) there was an affirmative causal link between the employer’s or supervisor’s inaction and the alleged constitutional injury.

Courts have frequently referred to the fact that law enforcement agents are entrusted with an “awesome power” (e.g., In re Muhammed C., 2002; People v. Quiroga, 1993). In Duran v. City of Douglas (1990), the Court stated when discussing derogatory language used toward law enforcement officers that, “while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment” (at 1378, emphasis added). Because of the awesome power granted to peace officers, numerous restrictions and obligations are imposed on those officers and/or their employer.

For instance, in California, the Government Code mandates that one must be free from certain emotional or mental conditions in order to possess the powers of a peace officer. Government Code § 1031 states, in part, “Each class of public officers or employees declared by law to be peace officers shall meet all of the following minimum standards: (f) Be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of a peace officer.” Similar laws containing exclusionary criteria exist in Arizona (Arizona Regulation 13-4-107), Georgia (Georgia Administrative Rules and Regulations 464-3-.02), Idaho (Idaho POST Council Administrative Rules 11.11.058), and no fewer than 11 other states (cf. Corey & Borum, 2013).

It is an erroneous assumption, however, that state statutes pertaining to a law enforcement officer’s eligibility for employment pertain only to preemployment requirements. In Sager v. County of Yuba (2007), the California Court of Appeal held that this statute, and the associated regulations of the California Peace Officer Standards and Training (POST) Commission, apply equally to incumbent law enforcement officers. The Court wrote that “the section 1031 standards must also be maintained throughout a peace officer’s career. Section 1031 reflects a minimum set of standards for allowing a new recruit to become a peace officer and it would be illogical to conclude the Legislature believed those standards disappeared once an officer began working” (at 8).

In Brown v. Sandy City Appeal Board (2014), the Utah Court of Appeals reached a similar decision and, like the Sager court, approved the use of the California POST Commission’s psychological screening dimensions in a psychological FFDE. In Brown, the Court permitted the application of these California screening criteria to the FFDE of a Utah police officer to “flesh out” the more general Utah requirement of mental competence, stating:

We view [the psychologist’s] consideration of the California POST standards as analogous to the way that a court might use case law from sister jurisdictions—not as binding authority but as a reference
to consider how other courts have analyzed and resolved a particular issue. Here, California and Utah apparently share a common requirement that peace officers be mentally fit for duty. However, unlike Utah, California has provided additional guidance for evaluating officers’ mental competence. (at 771)

Laws defining the psychological standards for both initial and ongoing eligibility as a law enforcement officer—in combination with state and federal statutes that make it possible to sue public employers and supervisors for negligent hiring, training and retention—establish a professional duty to mandate FFDEs when public safety is in peril. In Conte v. Horcher (1977), the Illinois Appeals Court held that a police chief’s order for a police lieutenant to submit to an FFDE was “not only valid and proper, but also necessary to assure the effective performance of the department” (at 569). In Bonsignore v. City of New York (1982), the federal court held that “[t]he City could reasonably have anticipated that its negligence in failing to identify officers who were unfit to carry guns would result in an unfit officer injuring someone using the gun he was required to carry” (at 638, emphasis added). These landmark decisions have been followed by a long line of similar court decisions granting police employers the authority to mandate FFDEs when justified by safety considerations (cf. Kraft v. Police Commissioner of Boston [1994], holding that a police chief could require a reinstated detective to pass a psychological evaluation before recertifying him to carry a firearm; Krocka v. City of Chicago [2000], finding that it was “entirely reasonable, and even responsible” for the Chicago Police Department to evaluate the officer’s fitness for duty “once it learned that he was experiencing difficulties with his mental health” [at 515]; Watson v. City of Miami Beach [1999], deciding that “[i]n any case where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness-for-duty examination is job-related and consistent with business necessity” [at 935]).

The case of Keslosky v. Borough of Old Forge (2014) illustrates an employer’s authority to mandate an FFDE when ongoing eligibility is reasonably in doubt. Keslosky began working as a police officer on September 1, 1979. On March 13, 1998 he stopped working, claiming to be suffering from a stress-related work injury due to harassment at work. He received treatment from a family physician, a psychologist, and a psychiatrist. The psychiatrist, Dr. David Liskov, opined that he would “be very reluctant to psychiatrically clear this individual to continue in the capacity of a Police Officer if paranoid symptoms are indeed pathological (which they appear [to be] at this time)” (at 5).

The situation continued for several years but eventually Keslosky was ordered to return to work. However, the Municipal Police Officers Education and Training Commission noted that his certification had expired in 1999 and outlined the steps he needed to take to become eligible for certification as a police officer, including medical examinations. Keslosky was notified of the requirements and his attorney responded, stating that Keslosky would not submit to either the physical or psychological examination. As a result, he was suspended without pay.

Keslosky filed suit and the trial court upheld the suspension due to his refusal to submit to the medical evaluations. The trial court concluded that Keslosky’s suspension was proper because he lacked a valid police officer certification. The trial court also concluded Keslosky was ineligible to receive compensation after his certification expired and denied him back pay. The appeals court affirmed.

The obligation of a police employer to require an otherwise justifiable FFDE is also established by the Occupational Safety and Health Act (1970). In passing this law, Congress acknowledged a broad employer obligation to protect the safety and health of all employees (Morgan & Duvall, 1983).
But even when an FFDE is squarely within the employer’s rights, and even when it is clear that the employer must take action to fulfill its obligations to maintain safety in the workplace and the community, an FFDE is not always the best choice. The IACP FFDE Guidelines (IACP, 2013) acknowledge this:

*When deciding whether or not to conduct an FFDE, both the agency and examiner should take into account its potential usefulness and appropriateness given the specific circumstances, and the agency should consider whether other remedies (e.g., education, training, discipline, physical FFDE) might be more appropriate or useful instead of, or in addition to, a psychological FFDE. (Guideline 4.2)*

In *Conroy v. N.Y. State Dep’t of Corr. Serv.* (2003), the Second Circuit Court of Appeals endorsed the opinion of the Ninth Circuit decision in *Cripe v. City of San Jose* (2001), which held that “[t]he business necessity standard is quite high, and is not [to be] confused with mere expediency” (at 890). The *Conroy* court went on to write,

*An employer cannot simply demonstrate that an inquiry is convenient or beneficial to its business. Instead, the employer must first show that the asserted “business necessity” is vital to the business. For example, business necessities may include ensuring that the workplace is safe and secure or cutting down on egregious absenteeism. The employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary. The employer need not show that the examination or inquiry is the only way of achieving a business necessity, but the examination or inquiry must be a reasonably effective method of achieving the employer’s goal. (at 97-98, emphasis added)*

Certainly there are instances in which an impaired officer, once confronted with the concerns of the employer, agrees that he or she is unfit for duty, in need of mental health care, and voluntarily agrees to obtain that care while on medical leave. However, this situation does not obviate the need for an independent FFDE upon certification by the employee’s treating provider of the employee’s eventual readiness to return to work.

**When Fitness-for-Duty Evaluations Should Not Be Conducted**

The preceding discussion underscores the broad legal authority and responsibility granted to law enforcement employers when a police officer’s fitness for duty is reasonably placed at issue. However, the reasonableness of an employer’s fitness concerns is a critically important factor in determining the legitimacy of any requirement that an incumbent employee submit to a medical examination, even when engaged in safety-sensitive work.

When an employer determines that an employee’s conduct warrants termination based upon his or her behavior, an FFDE would be inappropriate and unnecessarily complicate the record in the event of appeal or adjudication. Should the conduct-based termination be later overturned by an arbitrator or other trier of fact, an FFDE may then be required if otherwise justified, but the timing of that evaluation would be placed where it is most meaningful: namely, in proximity to the employee’s return to duty.

In *Palmer v. Circuit Court of Cook County* (1997), the Seventh Circuit Court of Appeals affirmed an employer’s right to terminate a mentally ill worker who repeatedly threatened to kill her superior and sought reasonable accommodation. The Court held,
Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers

[1]If an employer fires an employee because of the employee’s unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act. The Act does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor’s edge—in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone. The Act protects only “qualified” employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one. It is true that an employer has a statutory duty to make a “reasonable accommodation” to an employee’s disability, that is, an adjustment in working conditions to enable the employee to overcome his disability, if the employer can do this without “undue hardship.” But we cannot believe that this duty runs in favor of employees who commit or threaten to commit violent acts. The retention of such an employee would cause justifiable anxiety to co-workers and supervisors. It would be unreasonable to demand of the employer either that it force its employees to put up with this or that it station guards to prevent the mentally disturbed employee from getting out of hand. (352-353)

Other courts have held that an employee’s simple misconduct, without a reasonable basis for inferring a mental health impairment, does not meet the legal requirement for a medical evaluation (Maplewood and Law Enf. Labor Services, 1996; McGreal v. Ostrov, 2004; Merillat v. Mich. St. Univ., 1994; Watts v. Alfred, 1992). Avoiding unwarranted FFDEs is particularly important given the broad recognition that a mandatory psychological examination may constitute “a stigma, an official branding” of the employee (Stewart v. Pearce, 1973).

Even in instances in which an FFDE should be mandated, it may be preferable to postpone the evaluation until other less privacy-intrusive measures have been carried out. For example, when an employee requests permissible leave (e.g., sick leave, FMLA) to obtain treatment, it may be preferable to allow the employee the opportunity to obtain the needed intervention before requiring an independent evaluation of his or her fitness. Doing otherwise is more likely to require two evaluations—the first to document what the employee already concedes, and the second to assess the employee’s fitness after some period of treatment—when only the latter evaluation may be needed.

It is important to keep in mind that even when an FFDE may be justified under one statute (e.g., the ADA), it may be prohibited under another. A particularly relevant exception involves returning U.S. military reservists. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, 1994; USERRA Final Rule, 2006) entitles veterans to reemployment after military service in either the position they would have held absent their departure for military service “or a position of like seniority, status and pay” (38 U.S.C. § 4313[a][2][A]; see Petty v. Metropolitan Government of Nashville-Davidson County, 2008). However, similar to an employer’s right to require an FFDE of an employee returning to service from FMLA leave (White v. County of Los Angeles, 2014), an employer may require an otherwise justified FFDE after properly reemploying the veteran.

Procedural Issues in Conducting Fitness-for-Duty Evaluations

As we have discussed, police employers are granted wide but not unlimited authority to require FFDEs of law enforcement officers reasonably suspected of a mental health condition that substantially limits their ability to safely and effectively perform the duties of their position. We turn next to a discussion of three important procedural issues in conducting FFDEs that, if inadequately considered, may pose
liability to both the employer and examiner and may diminish the probative value of the examination in determining the ultimate question of the officer’s psychological fitness for duty. These issues are (1) the scope of the FFDE, (2) the content of the FFDE report, and (3) the qualifications of the fitness examiner.

The Scope of the Fitness-for-Duty Evaluation

Once justified, an FFDE must be restricted either to the condition discovered by the employer or to the condition(s) reasonably linked to the behavioral issues giving rise to the employer’s concerns. Under the ADA, “[t]he inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee’s ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat” (EEOC, 1997, p. 10). Although, as discussed previously in this chapter, an employer may require a medical examination when an employee who has been on medical leave seeks to return to work, “[t]he employer may not use the employee’s leave as a justification for making far-ranging disability-related inquiries or requiring an unrelated medical examination” (EEOC, 2000 at Question 17). Instead, medical inquiries and requests for medical documentation must be limited to what is needed to assess the employee’s ability to work and, as noted by the court in Conroy v. N.Y. State Dep’t of Corr. Serv. (2003), must be “no broader or more intrusive than necessary” (at 98).

Corey (2011) has suggested that when it is not yet confirmed that the subject of an FFDE actually has a medical or mental health condition, as when the referral results from a sudden, adverse change in behavior or work performance,

[T]he scope of the examination should be narrowed to those conditions reasonably linked to the problem behavior or other objective evidence giving rise to the referral. On the other hand, when an employee with a previously diagnosed condition is referred for evaluation to determine his or her readiness to return to work, the scope of the evaluation must be limited to that condition. In any case, an examination for either inability to perform essential functions of the job or possible direct threat must be narrowly tailored to seek only that information necessary to address those referral questions. (p. 278, citations omitted)

The IACP FFDE Guidelines (IACP, 2013, Guidelines 7 and 9) also provide guidance on the sources and types of information that would likely be included in the scope of a properly conducted FFDE, noting that “all collected information be clearly related to job performance issues and/or the suspected job-impairing mental condition” (Guideline 7.4). These include:

1. A written description of the objective evidence giving rise to concerns about the employee’s fitness for duty and any particular questions that the employer wishes the examiner to address.
2. Background and collateral information regarding the employee’s past and recent performance, conduct, and functioning, including:
   a. Job class specifications and/or job description.
   b. Performance evaluations.
   c. Previous remediation efforts.
   d. Commendations and testimonials.
   e. Internal affairs investigations.
   g. Use-of-force incidents.
h. Reports related to officer-involved shootings.

i. Civil claims.

j. Disciplinary actions.

k. Incident reports related to any triggering events.

l. Medical records.

m. Prior psychological evaluations.

n. Other supporting or relevant documentation related to the employee’s psychological fitness for duty.

The guidelines also stipulate that, “[i]n some cases, an examiner may ask the examinee to provide relevant medical or mental health treatment records and other data for the examiner to consider” (Guideline 7.4). The EEOC provides the following guidance on this topic:

[1] In most situations, an employer cannot request an employee’s complete medical records because they are likely to contain information unrelated to whether the employee can perform his/her essential functions or work without posing a direct threat. (EEOC, 2000, Question 13)

Thus, when requesting any of the records set forth above, examiners should consider whether the request is, as the ADA requires, “no broader or intrusive than necessary,” and whether they may be disclosed under state law.

Employers occasionally withhold from the examiner important medical and personnel records that they have in their possession, often due to the mistaken belief that the Health Insurance Portability and Accountability Act (HIPAA; 2000a, 2000b) requires the employee’s authorization to release them. Two facts oppose this practice.

First, HIPAA’s Privacy Rule (2000b) does not apply to the employer in its role as custodian of employment-related records, including those held in the employee’s separate medical file. Second, when conducting employer-mandated medical evaluations, the examiner is an agent of the employer (Jimenez v. Dyncorp International, 2009); consequently, information held by the employer may be disclosed to the examiner as long as it is reasonably expected to further the purpose of an otherwise justified evaluation. Instances in which the employer fails to do so can pose significant liability when the withheld records are later determined to be “a moving force” behind harm caused by an employee erroneously found to be fit for duty as a partial consequence of the examiner’s blocked access to the withheld information (cf. Colon v. City of Newark, 2006).

One aspect of the scope of the fitness evaluation that is often overlooked by an examiner is the question of fitness sustainability. Under the terms of the ADA Amendments Act (2009) and the final regulations, an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. According to the EEOC (2015),

This means that chronic impairments with symptoms or effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. The Appendix [Section 1630.2(j)(1)(vii) and corresponding Appendix section] provides examples of impairments that may be episodic, including epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. (Question 11)
Thus, an evaluative focus on the employee’s current functioning without also considering the positive and negative effects from an individual’s use of one or more mitigating measures (that is, measures intended to eliminate or reduce the symptoms or impact of an impairment, including medication and counseling) is incomplete. An individual could erroneously be regarded as having no disability (and therefore not eligible for reasonable accommodation, even if requested) simply because mitigating measures rendered the employee non-symptomatic at the time of the FFDE, even when the impairment is episodic or recurring.

At the same time, an individualized assessment may show that such an employee, as a result of the past pattern of his or her impairment, the normal course of the impairment, the employee’s history of treatment non-compliance, and the limitations and/or negative effects of the mitigating measures, may pose an elevated risk of near-term relapse. In such a case, even if the employee is for all intents and purposes fit for duty at the time of the evaluation, the sustainability of that fitness may be unreliable and, as a consequence, pose a direct threat. For this reason, it is important that the scope of the evaluation consider the episodic or recurring nature of an impairment, in addition to the positive and negative effects of mitigating measures when assessing fitness for duty.

**Content of the FFDE Report**

Within the broad subject of FFDEs, there is probably no topic more controversial, or more fraught with potential liability, than what information the employer is entitled to receive from the examiner after the FFDE is completed. The ADA itself is silent on the topic; it is the EEOC’s enforcement language that is instructive: “An employer is entitled only to the information necessary to determine whether the employee can do the essential functions of the job or work without posing a direct threat” (EEOC, 2000, Question 13).

But what information from an FFDE is needed for the employer to reach this determination? And what impact, if any, do state confidentiality statutes have on the answer? As we illustrate below, the answer to this second question varies greatly along state laws.

In *Sangirardi v. Village of Stickney* (2003), the Illinois Court of Appeals held that the state’s “Confidentiality Act” (740 ILCS 110/1 et seq.) did not preclude a police employer from receiving the results of a mandated FFDE:

> The authority to order fitness exams is justified by the unique, almost paramilitary nature of police departments and the critical importance of police officers to public health and safety. By necessary implication, the police department must have access to the **ultimate fitness determination** of such exams in order to determine whether officers are capable of performing their duties. (at 798, emphasis added)

Further, the Court found that Sangirardi had no reasonable expectation that the results of the FFDE would be kept confidential from the police chief because “fitness exams are part and parcel of the process officers must undergo in order to be hired and retained” (at 799). However, a year later, in *McGreal v. Ostrov* (2004), the Seventh Circuit Court of Appeals held that the *Sangirardi* decision did not entitle the police employer to “anything other than the fitness for duty determination. They were not entitled under any Illinois law to force the disclosure of the intimate and irrelevant details of [the employee’s] home life” (at 690).
California confidentiality law, on the other hand, differs in important ways from Illinois law, and evaluating psychologists should be cautioned to learn what their respective jurisdictions require for a legally enforceable consent form and what information can be disclosed to a police employer in the absence of such consent. In the case of *Pettus v. Cole* (1996), the California Court of Appeal ruled, among other questions, on whether and to what extent medical information obtained during the psychiatric examination of an employee may be disclosed to the employer by a psychiatrist without the employee’s authorization or consent, where the employee has requested leave from work because of a stress-related disability, the examination is required under the employer’s short-term disability policy, and the examination is arranged and paid for by the employer.

Noting that the psychiatrists failed to obtain a specific written authorization to disclose their findings to the employer, the Court held that the psychiatrists violated Pettus’s privacy rights under the state’s “Confidentiality of Medical Information Act” (CMIA). As with Illinois’s Confidentiality Act, the CMIA strictly prohibits the disclosure of medical information except when specifically authorized by the individual using a compliant form. The *Pettus* court concluded:

*The Legislature recognized ... that the ability of employers to obtain some medical information without employee authorization may serve a legitimate purpose under some circumstances. At the same time it sought to preserve the employee’s interest in maintaining the confidentiality of sensitive medical information in the employment context. To balance these interests, the Legislature restricted the information that may be disclosed without authorization to only that which is necessary to achieve the legitimate purpose.* (at 66)

Absent a written authorization from the employee, the CMIA stipulates that an employer is entitled only to a description of the functional limitations of the employee that may entitle him or her to leave from work for medical reasons or limit the employee’s fitness to perform his or her employment, provided that no statement of medical cause is included in the information disclosed. Notably, the CMIA includes an exception when the examination is conducted at the specific prior written request and expense of the employer and the disclosure is limited to that part of the information that is relevant to a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and the employee are parties and in which the employee has placed in issue his or her medical history, mental or physical condition, or treatment, provided that the information is used or disclosed only in connection with that proceeding (Civil Code § 56.10[c][8]). Indeed, it is this latter exception that permits an evaluating psychologist in California to release to the employer a comprehensive written report once the employee challenges the psychologist’s fitness determination.

It is important to note that both the *Pettus* and *McGreal* courts found that the examiners failed to obtain consent and authorization from their examinees using the forms required by the respective confidentiality statutes. In *McGreal*, the Court wrote that use of the form in that case would have “served the competing public policy interests in maintaining mental health confidentiality and ensuring a mentally fit police force” (footnote 4). The Court went on to write,

*For example, if the officer disobeyed a reasonable order to submit to a mental health exam and refused to sign a valid consent to the disclosure necessary to determine fitness for duty, then the police department would be justified in discharging the officer. An officer could choose not to consent to disclosure but could not, in that instance, retain his position as a police officer.* (footnote 4)
In *Pettus*, the Court limited its holding to instances in which CMIA-compliant consent and authorization is *not* obtained. In *Anthony v. Village of South Holland* (2013), the federal district court enjoined Anthony’s police employer from requiring him to irrevocably release his mental health records and ordered that the employer use a consent form that conforms to the Illinois Confidentiality Act, which includes “the right to revoke the consent at any time,” among other provisions. However, when the employee does not give the necessary authorization, the examining psychologist is limited by statute to disclosing to the employer only that information permitted in the absence of consent (e.g., a description of the functional limitations of the employee that may entitle him or her to leave from work for medical reasons or limit the employee’s fitness to perform his or her employment, provided that no statement of medical cause is included in the information disclosed).

In tension with any solution that deprives the employer of information pertaining to medical causation is the employer’s need for sufficient medical information to determine whether the employee’s functional limitations derive from a disability (EEOC, 2000) and, ultimately, whether the employee is psychologically fit for duty. In *Sager v. County of Yuba* (2007), a California appeal court held that the determination of a law enforcement officer’s fitness for duty is a matter for the employer to decide, with consideration of, but not blind deference to, the opinion of its medical expert. In *Slater v. Department of Homeland Security* (2008), the Merit System Personnel Board concluded that FFDE reports that were “entirely conclusory, devoid of any medical documentation or explanation in support of their conclusions” carried less “credibility and reliability” than one that was “a thorough, detailed, and relevant medical opinion addressing the medical issues of the agency’s removal action” (at 16).

The utility of a non-cursory report is also seen in the case of *Michael v. City of Troy Police Department* (2014). Michael was hired as a police officer by Troy in 1987. In March, 2000, he was diagnosed with a brain tumor and underwent a craniotomy that same month to remove the tumor. He subsequently underwent two more such operations in 2002 and 2009. “Because of certain incidents of what defendants regarded as odd behavior in the several months before plaintiff’s third craniotomy, defendants required Michael to undergo a neuropsychological evaluation to determine his fitness to return to work after the surgery” (at 2-3).

Dr. Firoza Van Horn, a neuropsychologist, evaluated Michael on December 7, 2009 and reported that Michael’s test results revealed several significant cognitive deficits. Dr. Van Horn concluded that “there is convincing evidence that Officer Michael is not competent to handle his duties as a police officer” (at 4).

Subsequently, five different doctors rendered opinions regarding Michael’s fitness for duty with some finding that he was fit for duty and others finding that he was not. In March of 2012, Michael requested a “civilian desk position” and permission to work outside the department in security or asset protection. Both requests were denied. Michael filed his complaint in this matter on July 30, 2012, bringing two counts in his complaint: disability discrimination and retaliation, both in violation of the ADA.

Michael alleged he is not disabled but is perceived as disabled by the defendants. The defendants argued that Michael could not establish the second element of his prima facie case of discrimination—namely, that he is “otherwise qualified” to work as a police officer—and they moved for summary judgment which, ultimately, was granted.

The federal district court ruled that “[a]n employer may, in certain circumstances, rely on the results of a medical examination to determine that a person cannot perform the essential functions of a position for purposes of the ADA. Specifically, the ADA ‘mandates an individualized inquiry in determining whether an employee’s disability or other condition disqualifies him from a particular position’” (at
Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers

The Court held that Dr. Van Horn’s evaluation was a “thorough medical assessment” and “qualifies as an individualized inquiry for purposes of the ADA” (at 24), ruling that Michael “has not presented sufficient evidence that he is ‘otherwise qualified’ under the ADA to work as a Troy police officer” (at 33). Importantly, Michael disagreed with the conclusions from Dr. Van Horn’s evaluation thereby putting it “at issue” and justifying disclosure of the full report.

Citing Wurzel v. Whirlpool Corp. (2012) and Jennings v. Dow Corning Corp. (2013), the Court noted that an individualized inquiry focuses on the individual’s actual medical condition, and its impact, if any, on that individual’s ability to perform the job in question. In addition, the inquiry must be conducted by an examining doctor who (1) is familiar with the relevant job duties; (2) obtains “much individualized information” about the employee’s medical condition; (3) has current knowledge of the employee’s medication condition; (4) examines the employee in person; and (5) reviews the records of the employee’s other treating physicians. As such, employers may only rely on evaluations that meet this standard.

Both the law and professional standards of practice are in harmony on the question of whether the FFDE report should address reasonable accommodation unless specifically requested by the referring source. Said succinctly, the answer is no. The EEOC admonishes the following:

A doctor who conducts medical examinations for an employer should not be responsible for making employment decisions or deciding whether or not it is possible to make a reasonable accommodation for a person with a disability. That responsibility lies with the employer. The doctor’s role should be limited to advising the employer about an individual’s functional abilities and limitations in relation to job functions, and about whether the individual meets the employer’s health and safety requirements. (EEOC, 2002, at 6.4)

Beyond the question of responsibility for making employment decisions, professional standards of practice make clear that psychologists who conduct evaluations for third parties should be guided in their decisions about report content by the employer’s referral questions; applicable policies, procedures and provisions of any collective bargaining agreement; relevant law; and informed consent (APA, 2015, Guideline 11; IACP, 2013, Guideline 10.1.1). Examiners who opine on topics not solicited by the referral source, whether or not it is within the examiner’s clinical expertise (e.g., reasonable accommodation, treatment recommendations, prognosis for recovery) are acting outside of their contractual role and do a disservice to the referring party (Corey, 2011). As Gold and Shuman (2009) assert, “When specific questions are asked, evaluators should limit themselves to providing opinions and supporting data responsive only to these questions unless otherwise specified” (p. 153).

Qualifications of the Fitness Examiner

When mandating an FFDE that is job-related and consistent with business necessity, the ADA entitles an employer to require that the employee be evaluated by a doctor of its own choosing, so long as the employer foots the bill. In its enforcement guidance, the EEOC states,

The determination that an employee poses a direct threat must be based on an individualized assessment of the employee’s present ability to safely perform the essential functions of the job. This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or
best objective evidence. To meet this burden, an employer may want to have the employee examined by a health care professional of its choice who has expertise in the employee’s specific condition and can provide medical information that allows the employer to determine the effects of the condition on the employee’s ability to perform his/her job. (EEOC, 2000, Question 12)

But the fact that the employer is entitled to select a particular doctor does not mean that the chosen doctor is necessarily well-suited for the task. It is an established ethical standard that psychologists decline to conduct evaluations that fall outside of their competence (APA, 2010). This is especially critical when conducting occupationally-mandated psychological evaluations where the stakes are as high as they are in FFDEs of police officers and other safety-sensitive positions (APA, 2015, Introduction).

The IACP FFDE Guidelines (IACP, 2013) list the following minimum qualifications for examiners conducting these evaluations:

1. Be licensed psychologists or psychiatrists with education, training, and experience in the diagnostic evaluation of mental and emotional disorders;
2. Be competent in the evaluation of law enforcement personnel;
3. Be familiar with the essential job functions of the employee being evaluated and the literature pertinent to FFDEs, especially that which is related to police psychology;
4. Be familiar with, and act in accordance with, relevant state and federal statutes and case law, as well as other legal requirements related to employment and personnel practices (e.g., disability, privacy, third-party liability);
5. Be familiar with, and be guided by, other applicable professional guidelines, including, but not limited to, the Specialty Guidelines for Forensic Psychology;
6. Satisfy any other minimum requirements imposed by local jurisdiction or law;
7. Recognize and make ongoing efforts to maintain and develop their areas of competence based on their education, training, supervised experience, consultation, study, and professional experience; and
8. Seek appropriate consultation, supervision, and/or specialized knowledge to address pertinent issues outside their areas of competence that may arise during the course of an FFDE. (Guidelines 5.1.1 through 5.1.8)

In addition, the guidelines stipulate that “[w]hen an FFDE is known to be in the context of litigation, arbitration, or another adjudicative process, the examiner should be prepared by training and experience to qualify as an expert in any related adjudicative proceeding” (IACP, 2013, Guideline 5.2).

An illustration of how local law may impose other minimum requirements is seen in White v. County of Los Angeles (2014). Here the California Appeal Court held that a police employer’s freedom to require an employee returning from FMLA leave to submit to a fitness evaluation after being returned to paid status is in part justified by the fact that California law permits only licensed psychologists meeting certain requirements of experience, training and competence to assess a police applicant’s or officer’s psychological fitness and the doctor who cleared her to return, following the FMLA leave, did not have that background.

Psychological FFDEs are often contentious examinations in which the employee being evaluated has much to lose, public and officer safety is at risk, and the likelihood of an administrative grievance,
arbitration or litigation is high, particularly when the officer is deemed to be unfit for duty and the results are contested. The Montana Supreme Court case of City of Livingston, Montana v. Montana Pub. Empl. Assoc. (2014) illustrates what can go wrong.

Matthew Tubaugh was hired as a police officer with the City of Livingston in 2004. Tubaugh initially met or exceeded expectations as an officer. Prior to 2011, he had received only a few minor reprimands. A series of incidents that occurred in 2011 and 2012, however, led Police Chief Darren Raney to issue a letter of reprimand to Tubaugh on June 28, 2012 as a result of several troubling incidents. The first of these occurred during a City Court trial in December 2011 when he told the judge that he disagreed with a ruling of the court and later became aggressive and argumentative toward the defendant. The second took place in January 2012 when Tubaugh disagreed with his supervising officer and attempted to confront the County Attorney. After being told that the County Attorney was unavailable, he made a profane outburst. Then, in April 2012, Tubaugh lost his composure following an arrest, called the arrestee a “small child” and a “baby,” and slammed down his clipboard. He then inserted himself into the booking process and charged the arrestee with obstruction of justice after the arrestee was reluctant to provide an address.

Finally, on June 8, 2012, Tubaugh criticized a co-worker, Jessica Kynett, for using the internet at work and for missing work for physical therapy. The interaction became confrontational and Tubaugh ignored an order from a supervisor to “knock it off.” On June 23, 2012, Tubaugh and another officer made another arrest, this time for disorderly conduct. At the detention center, Tubaugh’s conduct escalated the situation and ultimately provoked a physical altercation, after which Tubaugh charged the arrestee with assault for the altercation in addition to the initial charges.

Chief Raney’s letter of reprimand was primarily for the confrontation with Kynett, but the letter also referenced other incidents of inappropriate conduct, including a letter of complaint that was filed concerning Tubaugh’s behavior during one of the arrests. On July 25, 2012, Tubaugh was placed on paid administrative leave. Subsequent investigations conducted by Chief Raney found that Tubaugh had engaged in unprofessional conduct and that his use of force against one of the prisoners was not objectively reasonable. Chief Raney also became concerned that Tubaugh had displayed “an increasing tendency to respond to disrespectful or insufficiently deferential behavior with charges such as disorderly conduct, resisting arrest, obstruction, or assaulting an officer” (at para. 7).

Chief Raney determined that a fitness-for-duty examination was needed, and he ordered Tubaugh to complete an examination with a psychologist “with a focus on law enforcement fitness for duty” (at para. 7). The psychologist concluded that,

Tubaugh suffered from a personality disorder, and that he exhibited symptoms of paranoia, narcissism, and histrionic personality disorder. [The psychologist] concluded that he was unable to recommend that Tubaugh continue as an officer. After reviewing [the psychologist’s] report and providing Tubaugh the opportunity to respond, Raney recommended Tubaugh’s discharge. The recommendation was accepted and Tubaugh was discharged on October 29, 2012. (at para. 7)

Tubaugh protested his discharge pursuant to his rights under the collective bargaining agreement (CBA) in effect at the time between the City of Livingston and the Montana Public Employees Association (MPEA). Pursuant to the CBA’s binding arbitration provision, an arbitration hearing was held. On May 20, 2013, Arbitrator Anne MacIntyre determined that while there was just cause to discipline Tubaugh,
the proper disciplinary action was a three-month suspension without pay. She ordered that the City of Livingston reinstate Tubaugh to his previous position or to one of comparable pay, and pay Tubaugh back pay and benefits until his reinstatement. She also ordered that the City of Livingston expunge the fitness for duty examination from Tubaugh’s personnel file.

Arbitrator MacIntyre’s principal concerns about the examining psychologist’s “troubling” examination were that his sole interview with Tubaugh took place in a public venue, that he relied on statements from people who were not identified in the report, and that Tubaugh never had the opportunity to rebut or challenge the bases for the psychologist’s conclusions. “The Arbitrator did not hold that the City could not require its officers to complete a fitness for duty examination; instead, she held that the fitness for duty examination here was not credible or reliable because of the manner in which it was conducted” (at para. 30).

The City of Livingston petitioned to vacate the arbitrator’s award and, following briefing and oral argument on the petition, the district court issued an order vacating it, noting in part that Chief Raney had given Tubaugh an opportunity to provide additional information after the examination. The MPEA appealed the ruling before the Montana Supreme Court. The Court reversed the district court’s ruling, stating,

*The Arbitrator did not order that the examination be destroyed. She merely ordered it removed from Tubaugh’s personnel file to prevent it from being used for disciplinary purposes in the future. … Removal from the personnel file of an examination report that the Arbitrator determined should not have been the basis for discharge was a form of relief within the Arbitrator’s broad powers under the CBA. The District Court erred when it held that the Arbitrator exceeded her authority by directing removal of the examination from Tubaugh’s personnel file. (at para. 37)*

The arbitrator raised concerns about a “troubling” FFDE evaluation that was conducted in a public venue, that relied on statements from people who were not identified in the report, and that denied the examinee the opportunity to rebut or challenge the bases for the psychologist’s conclusions. It is instructive that the *McGreal* (2004) court expressed similar doubts about an FFDE evaluation that, “[f]or reasons not explained in the report … apparently credited only the versions of those stories presented by the defendants and their lawyer” (at 13).

Corey (2011) pointed out that “third-party information, primarily consisting of documents and interviews with collateral informants, is especially important given the elevated potential in FFD evaluations for either party to provide an incomplete picture of the relevant facts” (p. 278). To help balance the potential for bias, Corey advised that an examinee “be provided with a full opportunity to tell his or her side of the story as it pertains to the issues underlying the referral, including alternative explanations and perspectives” (p. 279).

Professional practice guidelines also acknowledge that occupationally-mandated psychological evaluations “frequently occur in contexts in which the referral source, the examinee, and collateral information sources (e.g., supervisors, coworkers, human resource personnel) have preexisting and complex relationships, often with competing interests and motives” (APA, 2015, pp. 18-19). Consequently, it is important that evaluating psychologists strive to be “dispassionate advocates for their evidence-based findings and the job-relevant inferences to be drawn from them rather than for particular outcomes” (p. 19).
Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers

Summary

A substantial body of law affirms a public safety employer’s authority to order a psychological fitness-for-duty evaluation of an employee when it is job-related and consistent with business necessity. As we have shown, this standard is met when facts give rise to reasonable questions about the employee’s ability to perform in a safety-sensitive position.

Nevertheless, the law also places constraints on when fitness evaluations can be required, the scope of the evaluation, the acquisition and communication of private information, the role of a mental health expert in making employment decisions, and, in some jurisdictions, who is qualified to perform these evaluations. These restrictions are clarified further by professional practice guidelines and ethical standards. Together, these laws and professional standards have significant implications for the police employer and the evaluating psychologist.

When the employer has met the legal threshold for mandating an FFDE, the evaluation itself must nevertheless be carried out in a manner that is no broader or more intrusive than necessary. This includes the requirement to receive and review employment and health care records which, when relevant and properly limited, cannot be unreasonably withheld by either party.

Furthermore, when evaluating psychological fitness for duty in a safety-sensitive position, examiners are cautioned to attend both to current fitness and the sustainability of fitness. The latter is especially important when a condition’s symptoms or treatment effects are episodic rather than persistent.

A particularly controversial and high liability topic involves the information to which an employer is entitled to receive from the examiner after the FFDE is completed. The statutory and case law we reviewed in this chapter highlights the importance of knowing and conforming to state laws pertaining to the disclosure of confidential medical information, as well as the importance of obtaining consent or authorization from the employee using state-compliant authorization forms before disclosing any information to the employer other than a description of any functional limitations of the employee and the ultimate fitness determination.

However, this is not to say that an evaluator should not prepare a thorough written report. Indeed, a comprehensive report should always be written, citing all relevant findings and describing their relationship to the evaluator’s opinions about the employee’s fitness for duty. But in the absence of written authorization that conforms to statutory requirements, the comprehensive report should be prepared and retained by the psychologist pending the employee’s challenge to the psychologist’s determination.

Whether or not the employee authorizes the evaluating psychologist to disclose the personal health information supporting the fitness determination, both the law and professional standards of practice agree that the psychologist should not address reasonable accommodation, including treatment recommendations, unless specifically requested by the referring party. Instead, psychologists who conduct these evaluations should constrain their opinions to those that respond to the referral questions.

Although employers are entitled to select a professional of their own choosing to conduct an FFDE, psychologists are required by state law and ethical standards to decline to conduct evaluations that fall outside of their competence. This is especially critical when an FFDE is known to take place in the context of litigation, arbitration, or another adjudicative process. Local laws may impose additional minimum requirements on the qualifications of psychologists who conduct these evaluations.
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Watson v. City of Miami Beach, 177 F.3d 932 (11th Cir. 1999)


Wurzel v. Whirlpool Corp., 482 F. App’x 1 (6th Cir. 2012)

ENDNOTES

1 The California CMIA (Civil Code § 56.11) requires the following elements: (1) the name or functions of the provider disclosing the medical information; (2) the name or functions of the persons or entities to receive it; (3) the specific uses and limitations on the use of the information; (4) a specific date after which the provider is no longer authorized to disclose the information; and (5) notice that the person signing the authorization may receive a copy of the authorization. Similarly, the Illinois Confidentiality Act expressly requires that a consent form must include “the right to revoke the consent at any time” (740 Ill. Comp. Stat. 110/5[b]). It also must specify (1) the person or agency to whom disclosure is to be made; (2) the purpose for which disclosure is to be made; (3) the nature of the information to be disclosed; (4) the right to inspect and copy the information to be disclosed; (5) the consequences of a refusal to consent, if any; and (6) the calendar date on which the consent expires.

2 The factual summary of this case derives from the narrative of the Court’s decision and, while not quoted verbatim in its entirety, it borrows heavily from the language of the Court.