

CLIENT NEWS BRIEF

Court of Appeal Upholds Employer's Use of a Fitness for Duty Examination to Evaluate Employee

September 2014
Number 60

A recent court of appeal decision held that employers may require a fitness for duty exam (FFDE) under the California Fair Employment and Housing Act (FEHA) to evaluate a workplace threat when an employee exhibits erratic and confrontational behavior in a manner that causes reasonable fear and confusion to other members of the work environment. (*Kao v. University of San Francisco* (September 3, 2014) __ Cal.App.4th__ 2014 WL 4375929.)

An FFDE under FEHA is an employer-initiated and paid medical examination of an employee. Employers commonly turn to FFDEs when they have concerns regarding the status of an employee's physical or mental health in performing the job or in relation to the work environment. The purpose of an FFDE is to inform the employer whether an employee is physically or psychologically able to perform the essential functions of his or her job. FEHA generally prohibits an FFDE except when the FFDE is job-related and consistent with business necessity. (Gov. Code, § 12940, subd. (f).)

In *Kao v. University of San Francisco*, Professor John Kao was a tenured mathematics professor for the University of San Francisco. In 2006 and 2007, Kao filed a complaint with the University alleging race-based discrimination and harassment. He then had confrontational meetings with the school administration. Shortly thereafter, Kao began exhibiting erratic behavior that caused other faculty members in the math department and the school administration to feel threatened and fearful of their physical well-being. Specifically, Kao engaged in the following conduct: uncontrolled rants; yelling at coworkers; glaring at coworkers with his fists clenched in anger; bumping or charging towards coworkers in the hallways in an intimidating way; and reacting with rage in response to benign questions. He had not exhibited such behavior in his prior fifteen years of employment with the University.

Concerned about the safety of employees and the work environment, and not knowing the cause behind the behavior, the University directed Kao to complete an FFDE. The FFDE would inform the University whether Kao was fit to perform his job, not fit, or fit with an accommodation but would not reveal any confidential information to Kao's employer. Kao refused to submit to the FFDE. After a number of unsuccessful meetings between the University, Kao, and Kao's legal counsel, the University terminated his employment. In response, Kao filed a number of claims against the University including, among others, disability discrimination and violation of his rights under the Confidentiality of Medical Information Act.

Affirming the trial court's decision and upholding the jury's findings, the court of appeal rejected all of Kao's claims. The court focused on the lawfulness of the University's directive that Kao undergo an FFDE. Kao argued that an employer is required to engage in the interactive process before it can refer an employee for an FFDE. The court disagreed, explaining that the interactive process is related to disability accommodations, and an FFDE is not a disability accommodation. Here, the University was not required to engage in an interactive process because Kao never acknowledged having a disability or



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sought accommodation, and no disability was obvious.

Kao also argued that the FFDE was not “job related and consistent with business necessity.” In response, the court explained that there is a business necessity for an FFDE “if it is vital to the business.” Employers have a duty to maintain an environment where people can safely work. There was ample evidence that Kao’s erratic behavior caused fear and confusion in the work environment. On this basis, the court found it was reasonable for the jury to conclude that it was vital to the University’s business to “obtain an independent assessment of (Kao’s) fitness for duty.” As a result, the court also struck down Kao’s argument that his termination was a violation of the Confidentiality of Medical Information Act, which prohibits discrimination or termination for an employee’s refusal to release of medical information. The court concluded that since the FFDE was necessary, the request for information was also appropriate and necessary

As demonstrated by *Kao v. University of San Francisco*, the appropriate use of an FFDE, particularly in regard to an employer’s duty to maintain a safe work environment, can be a useful tool for employers. However, employers should remember that FFDEs are an exception in the law that involve a fact-specific inquiry. As such, employers should treat each case independently and contact counsel when uncertain about an FFDE’s applicability.

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