Ninth Circuit Approves of Preemptive Fitness For Duty Exams, In Some Circumstances

By Brian M. Flock

Under the Americans with Disabilities Act (the "ADA"), it is illegal to require an employee to undergo a medical examination to determine whether the employee is disabled, unless the examination is both job-related and consistent with business necessity. The Ninth Circuit Court of Appeals has repeatedly emphasized that the business necessity standard is "quite high" and should not be confused with "mere expediency." As a result, whether and when an employer can send an employee for a fitness for duty exam ("FFDE") can be a difficult question. This question is even more complicated when an employer is concerned about an employee's ability to perform his/her job, but has not yet gathered objective evidence of declining performance, such as negative performance reviews. In *Brownfield v. City of Yakima*, the Ninth Circuit Court of Appeals, confronted with just such a set of circumstances, held that the Yakima Police Department could send one of its officers for a preemptive FFDE where concerns over his behavior gave the Department serious concerns about his ability to safely perform his job.

Preemptive Fitness for Duty Exams Under *Brownfield*

In *Brownfield* the Ninth Circuit considered a claim by a City of Yakima police officer, Brownfield, that the City's request for him to attend a FFDE violated the ADA. A year after Brownfield was hired he suffered a closed head injury in an off-duty car accident. He was returned to full-duty following his recovery from symptoms including reduced self-awareness. Several years later, during a meeting between Brownfield and his supervisors over an issue Brownfield was having with another officer, Brownfield swore, walked out of the meeting despite an order not to, and subsequently lost his temper when he was confronted by one of his supervisors about his conduct. As a result, Brownfield was suspended.

A few months later, four incidents occurred that, together with Brownfield's prior conduct, caused the City to send Brownfield for a FFDE. First, Brownfield engaged in a disruptive argument with another officer during roll call, wherein Brownfield became visibly upset, was swearing, and was not speaking in complete sentences. Second, Brownfield reported himself "losing control" during a traffic stop, stating that taunting from a young child had made him upset, caused his legs to shake, and made him unsure about "what he was going to do." Third, the police were called to a domestic disturbance call between Brownfield and his ex-wife, as a result of Brownfield allegedly striking her as she was backing out of a doorway. Fourth, a fellow officer reported that Brownfield made disturbing statements including: "It's not important anyway," "I'm not sure if it's worth it," and "It doesn't matter how this ends."

The Ninth Circuit found these incidents, taken together, sufficient for the City to require Brownfield to undergo a FFDE. Brownfield argued that the City had not met the business necessity standard where there was no showing that his work performance had suffered as a result of health problems. The Ninth Circuit rejected this argument and held that preemptive FFDEs (that is, FFDEs coming *before* the employee's work performance suffers) "can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work." In this case, the Ninth Circuit's

decision was "heavily colored" by the fact that Brownfield was a police officer, and the fact that his "repeated volatile responses" were different in character from "isolated instances of lost temper," which the Ninth Circuit suggested would fall short of meeting the standard required by the ADA for a preemptive FFDE.

Advice to Employers

Employers bear "the burden of demonstrating business necessity" for a FFDE. This standard may normally be satisfied by showing declining work performance on the part of the employee. Under *Brownfield*, however, employers who are faced with erratic behavior by one of their employees may be able to avail themselves of a preemptive FFDE before work performance actually declines. Employers will need to have "significant evidence" calling into question whether the employee "is still capable of performing his job." Moreover, the "employee's behavior cannot be merely annoying or inefficient . . . rather, there must be genuine reason to doubt whether that employee can perform job-related functions." The Ninth Circuit suggested that mere isolated incidents or outbursts are likely not enough to invoke a preemptive FFDE. The Ninth Circuit also plainly viewed the nature of the employer's business as very important in determining whether a preemptive FFDE was appropriate. The case will likely be stronger, then, for a police officer than it will be for a file clerk. If you are considering a preemptive FFDE for an employee, it is advisable to take each of these factors into consideration and consult with counsel before sending the employee to the FFDE.