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The FMLA Gets a "Second Opinion"

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Under the Family and Medical Leave Act ("FMLA"), when an employee's physician certifies that the employee can return to work from an FMLA leave, the employer must return the employee to work. But does the FMLA preclude the employer from then securing its own medical evaluation of the employee's fitness for duty, if the evaluation is related to the condition that prompted the employee's FMLA leave? In welcome news for employers, the California Court of Appeal has answered that question with a resounding "No": an employer may require a fitness-for-duty medical examination so long as the employer can satisfy the requirements of the Americans with Disabilities Act ("ADA").

The Facts

The plaintiff, Susan White, worked as an investigator for the Los Angeles County District Attorney ("DA"). As an investigator, she carried a weapon and made arrests. White began to experience emotional difficulties, associated with depression that occasionally spilled into the workplace and endangered her coworkers. In May 2011, White took an FMLA leave for treatment of her depression.

In August 2011, White's doctor released her to return to work and to perform her essential job functions. The DA, although restoring White from administrative leave in September 2011, harbored doubts about her fitness for duty and requested that she undergo another medical evaluation in light of her condition prior to her FMLA leave.

White sued for an injunction to prevent her reevaluation, arguing that it constituted an unlawful interference with her FMLA leave rights. The trial court found in her favor and issued an injunction preventing the medical reevaluation. The DA appealed.

The Appellate Court Decision

The Court of Appeal reversed the trial court, ruling that the DA did not violate the FMLA. The Court of Appeal discerned a "bright-line" demarcation between the requirements of the FMLA and those of ADA, as articulated by the 2008 FMLA regulations.

The 2008 regulations made clear that if an employee on FMLA leave submits her physician's certification that she can return to work, the employer may not then subject the certification to a further medical evaluation. However, once the employer restores the employee to active status, the employer may seek a medical evaluation of the employee as long as the evaluation is "job-related and consistent with business necessity." (According to the EEOC, a medical examination may be "job-related and consistent with business necessity" when there is a reasonable belief, based on objective evidence—rather than general

assumptions—that the employee's ability to perform essential job functions will be impaired by a medical condition, or that the employee will pose a "direct threat" due to a medical condition.) The Court of Appeal further reasoned that there was nothing that impeded an employer from basing its decision to seek another medical evaluation on conduct that occurred before the employee took FMLA leave.

White had returned to work and the DA had accepted her doctor's certification for that purpose. At that point, the employer had complied with the FMLA's reinstatement provision. After her return to work, the employer could seek a fitness-for-duty evaluation given her erratic conduct prior to her FMLA leave and that she carried a firearm on the job. The Court of Appeal determined that the employer's request for a fitness-for-duty evaluation qualified under the ADA as job-related and a business necessity under the specific circumstances.

What *White* Means For Employers

This decision demonstrates that employers need not ignore pre-FMLA leave conditions when assessing the fitness for duty of an employee who has returned from an FMLA leave. While the employer must reinstate an employee who submits medical certification releasing her to return to work, the employer may, in accordance with the ADA, request a fitness-for-duty evaluation once the employee is back at work. Although the *White* decision appears to allow employers more latitude to ensure that employees are fit to work following FMLA leaves, note that the facts of this case were somewhat extreme, in that the employee in question carried a firearm and, if unfit for duty, could pose a significant risk of harm to others. Any employer considering a fitness-for-duty examination (for an employee recently reinstated from FMLA leave or for any other reason) must ensure that there is a legitimate business necessity for it, and that any evaluation is tailored to specifically assess only the employee's ability to perform essential job functions, or to determine whether the employee's disability poses a danger to herself or others.

Finally, although the *White* decision addressed only federal statutes—the FMLA and the ADA—the court's reasoning would seem apply also to leave obligations under the California Family Rights Act to fitness-for-duty examinations under the disability-discrimination provisions of the California Fair Employment and Housing Act.

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