employment brief

Legal Developments Affecting Employers
Murchison & Cumming, LLP Management Advisors

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CONTRIBUTORS

Ellen M. Tipping [Editor & Contributor] is a Partner in Murchison & Cumming's Orange County office. Ms. Tipping specializes in employment law, providing advice and counsel, and representation of employers in litigation through trial and appeal.

Heidi C. Quan [Contributor] is a Partner in Murchison & Cumming's San Francisco office. Ms. Quan focuses her practice on employment law, general liability, trucking, health law and vertical transportation.

Outbursts of Rage and Refusal of Fitness for Duty Examination May Lead to Termination

Heidi C. Quan
hquan@murchisonlaw.com

What can you do when an employee is terrifying coworkers with repeated and unpredictable outbursts of rage? If the results of your investigation into the reported incidents warrants some action, you may request that the employee submit to a psychiatric evaluation for fitness of duty. As well, a refusal to submit to an evaluation may lead to proper termination of that employee.

A recent California Appellate case found that an employer's request for a fitness for duty examination was justified to evaluate work place safety and the subsequent termination based on a refusal to submit to the exam was proper where the employer did not know what was causing the employee's erratic behavior. In John S. Kao vs. University of San Francisco (CA1/3 A135750, filed 8/4/14, pub. ord 9/3/14), coworkers and administrators of University of San Francisco (USF) math professor John Kao started noticing changes in his personality, including sudden and uncontrollable rage during workplace meetings and confrontations with other academics. Witnesses noted alleged behavior such as screaming and clenching fists, shaking with anger, throwing things, and purposely colliding with colleagues when passing them in the hall.

USF began investigating the repeated reports of coworkers being terrified by Kao's outbursts, including consulting with forensic psychologists and psychiatrists. The University then met with Kao and requested that he submit to a "fitness for duty" (FFD) evaluation with a psychiatrist. The University explained to Kao

that he had to submit to the FFD or be placed on a leave of absence and banned from campus. The University explained to Kao the strict limitations on the evaluator's dissemination of information, which was limited to whether or not Kao was fit for duty, along with any functional limitations. Actual diagnostic analyses would not be part of the report.

However, Kao refused to submit to the examination. Thereafter, Kao was put on a leave of absence and the University prohibited him from campus. After nearly a year of failed attempts to persuade Kao to submit to the examination, the University terminated Kao from his employment. The termination letter cited Kao's failure "to carry out the work-related instructions of the University to cooperate with an independent medical examination."

Kao sued for disability discrimination and defamation, among other things. Kao argued at trial that the FFD was a medical examination. Under the Fair Employment and Housing Act (FEHA), a medical examination of an employee is permissible if "job-related and consistent with business necessity." Kao also argued that the FFD could not be job-related or necessary without the University's first engaging in the "interactive process" that is part of the "reasonable accommodation" process.

A jury rejected Kao's claims and he appealed. The court of appeal affirmed, holding that substantial evidence supported the verdict in favor of USF.

On appeal, Kao argued that the university should not have ordered a fitness exam before it had gone through the required interactive process. First, the court noted that the FFD is not an "accommodation," and the interactive process relates to the accommodation process. Second, the court noted that Kao was required to initiate the interactive process, not the University as any disability was not obvious. Kao failed to provide any evidence of a disability or seek any accommodations. Thus, no interactive process was necessary.

The Court reiterated that under FEHA an employer may require a medical or psychological examination of an employee if it can show that the examination is "job related and consistent with business necessity." A fitness for duty examination is "job-related" if it is "tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability," as set forth at Cal. Code Regs., tit. 2, §11065(k). In Kao's case, the court found that the jury had sufficient evidence to find that an FFD was essential to determine whether Kao posed a danger to his coworkers or others in the workplace given the reported incidents and the expert advice that the University received.

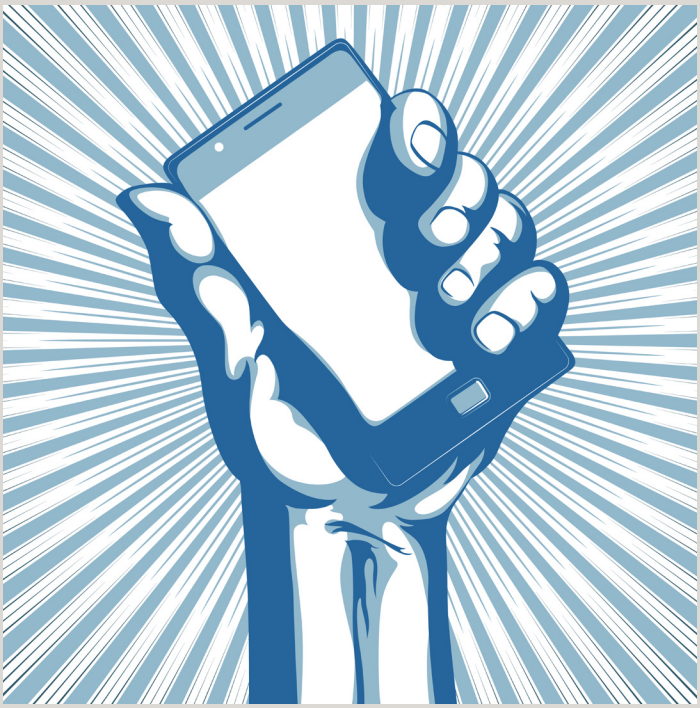
Ultimately, this case supports the position that it would be proper for an employer to require a fitness examination and to subsequently terminate an employee for the failure to comply when the employer does not know the cause for the questionable or erratic behavior. The key to this issue is not knowing what was causing the behavior, not that it was determined that the behavior was the result of a disability.

Employers with BYOD Policies Must Kick In for Employee's Cell Phone Tab

Ellen M. Tipping
etipping@murchisonlaw.com

Everyone carries a cell phone. It doesn't cost an employee any more to put it to business use. That is the premise behind a "BYOD" ("bring your own device") policies, which are commonplace.

Employers have been grappling with various issues concerning cell phones and the tablets in recent years. Chief concerns have been (1) the constant connectedness created by these devices which present



the opportunity for off-the-clock work by nonexempt employees, and (2) the security of information which resides on the employee's personal device, and which is accessible from "the cloud" at all times through the employee's personal device. Now here's another: if the employer requires its employees to use their own cell phone in the course of the job, the employer must reimburse some portion of the phone bill.

Does it make any difference that the employee came into the job with the device and an unlimited minutes and data plan, and use of their phone or device in the course of the job doesn't cost them any more than if they did not make such use? No, it does not. A recent decision by a court of appeal holds that any "mandatory" use of the personal device creates the obligation for reimbursement. (Cochran v. Schwan's Home Service, Inc., 228 Cal.App.4th 1137 (August 2014)).

This case affects any employer in California who requires employees to use their own devices as a condition of employment, generally referred to as BYOD. These programs now officially trigger California Labor Code § 2801, which requires employers to indemnify employees for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer."

This decision was issued in reversing a trial court's denial for certification of a class of 1,500 service managers seeking reimbursement of work-related cell phone expenses. Certification was denied based on evidence that some putative class members had unlimited plans and that others did not personally pay for their own cell phone bills. The appellate court held that this did not matter, stating, "An employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed."

The opinion explains that the purpose of section § 2801 is to prevent employers from passing their operating expenses on to their employees.

But what is "some reasonable percentage of the employee's cell phone bill"? The decision offers no help in answering that question. Indeed, each service manager's percentage of business and personal use could vary significantly. The opinion rather unhelpfully explains that "[b]ecause of the differences in cell phone plans and work-related scenarios, the calculation of reimbursement must be left to the trial court and parties in each particular case."

The takeaway is that employers who do not provide the cell-phone/data plan for their employees need to assess a reimbursement strategy that will protect them in their particular situation. A starting point could be asking the employee to provide their own assessment of their frequency of use of their phone for business, and obtaining their agreement to the reasonableness of a certain contribution to the bill each month.

LOS ANGELES
801 S. Grand Avenue, 9th Floor
Los Angeles, CA 90017
(213) 623-7400
Managing Partner: Dan L. Longo
Parter In Charge: Edmond G. Farrell, III

ORANGE COUNTY
18201 Von Karman Avenue, Suite 1100
Irvine, CA 92612
(714) 972-9977
Partner In Charge: Dan L. Longo

SAN FRANCISCO
Embarcadero Center West
275 Battery Street, Suite 550
San Francisco, CA 94111
(415) 524-4300
Partner In Charge: Kasey C. Townsend

SAN DIEGO
750 B Street, Suite. 2550
San Diego, CA 92101
(619) 544-6838
Partner In Charge: Kenneth H. Moreno

LAS VEGAS
6900 Westcliff Drive, Suite 605
Las Vegas, NV 89145
(702) 360-3956
Partner In Charge: Michael J. Nuñez

Legislative Update

Mandatory Sick Leave for All Employees

As of July 1, 2015, California employers will be required to provide paid sick leave to any employee who works at least 30 days in California in a year. Part-time and temporary employees are not exempt from coverage of this law, nor are employees who work on a commission-only basis. The Healthy Workplaces, Healthy Families Act of 2014, will require accrual of sick leave at the rate of 1 hour for every 30 hours worked, to a minimum of 24 hours of sick leave.

Sexual Harassment Training Must Add "Abusive Conduct" Prevention

As of January 1, 2015, employers who are required to provide sexual harassment training for their supervisors will also be required to train them on the "prevention of abusive conduct." This is defined as "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance."

For more information on the new sick leave and abusive conduct prevention laws, go to www.Murchisonlaw.com/news_center/4

MURCHISON & CUMMING LLP
801 S. Grand Avenue
Ninth Floor
Los Angeles, CA 90017