

Professor's Refusal to Undergo Fitness-for-Duty Exam Warranted Termination, California Court Rules

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A university properly terminated a professor for failing to undergo a fitness-for-duty examination after he had engaged in instances of threatening behavior, the California Court of Appeal has ruled, affirming a judgment in favor of the University of San Francisco on a professor's alleged disability discrimination claims under the Fair Employment and Housing Act ("FEHA"). *Kao v. University of San Francisco*, No. A135750 (Cal. Ct. App. Sept. 2, 2014). Significantly, the Court ruled the University was not required to engage in an "interactive process" before requesting the examination because the professor never sought any accommodation for any disability.

Background

John S. Kao was a mathematics professor at the University of San Francisco from 1991 to 2009. Beginning in 2008, Kao engaged in a series of confrontations with co-workers during which he often appeared enraged and threatening. Consequently, his co-workers became concerned for their physical safety. The University investigated, consulting with experts in threat assessment and workplace violence.

Based on the experts' recommendations, the University informed Kao that he needed to undergo a fitness-for-duty assessment ("FFD") or he would be placed on a leave of absence. Kao refused to undergo the FFD, and the University placed him on leave. After several failed attempts to resolve the situation, the University terminated Kao's employment.

Kao subsequently sued the University for disability discrimination under the FEHA, among other things. Following a trial, the jury returned a verdict in favor of the University, and Kao appealed.

Applicable Law

The FEHA permits an employer to require a medical or psychological examination of an employee if it can show the examination is "job related and consistent with business necessity." Cal. Gov't. Code § 12940(f)(2). The FEHA also requires employers to reasonably accommodate an employee's disability, unless doing so would produce undue hardship to its operation, and "to engage in a timely, good faith, interactive process with the employee" to determine effective reasonable accommodations. Cal. Gov't. Code §§ 12940(m) & (n).

Appeal Rejected

Kao argued the FFD was not "job related and consistent with business necessity" because the University failed to engage in the "interactive process" before requiring him to undergo the FFD. The Court rejected Kao's argument. The Court explained that the FFD was not a reasonable accommodation and thus, the interactive process did not apply. Further, the Court noted that, unless a disability is obvious, it is the employee's obligation to initiate the interactive process. Here, Kao never told the University that he had any disability. Thus, the Court concluded, "No interactive process was necessary, and there is no substance to Kao's argument that [the University] improperly failed to participate in that process."

Kao next argued that the University failed to establish that the FFD was job related and consistent with business necessity. The Court rejected this argument as meritless. "Ample evidence" existed from which the jury could conclude that the FFD was necessary to determine whether Kao posed a danger to others in the workplace, the Court said. The Court noted the University had received multiple reports from Kao's colleagues about his threatening, erratic and angry behavior, and it sought expert advice

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confirming the appropriateness of an FFD in the situation. Further, the University had a duty to maintain a safe workplace for its employees, and Kao's conduct, the Court said, "cast a pall of 'fear and confusion' over the math department." Accordingly, the Court concluded a jury could reasonably find that the FFD was job related and consistent with business necessity and affirmed the judgment in favor of the University.

This case provides helpful guidance on the interplay between a fitness-for-duty examination and the interactive process required by a request for a reasonable accommodation. At the same time, the importance of providing a workplace safe from violence played an important role in this case. Where safety is not an issue, employees should be cautious and consider seeking legal advice before discharging employees simply for refusing a FFD.

For additional information regarding this case or disability discrimination issues, please contact the Jackson Lewis attorney with whom you regularly work.

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