



## **American Board of Police and Public Safety Psychology**

### **Core Legal Knowledge for the Practice of Police & Public Safety Psychology<sup>1</sup>**

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In March 2012, the 53 board certified specialists of the American Board of Police & Public Safety Psychology were invited to complete a survey of legal knowledge used in the practice of police and public safety psychology. The survey consisted of 117 citations identified by the author as relevant to specialty practice, and respondents were asked to rate the importance that each citation has for preparing a police and public safety psychologist to practice at the specialist level and for ABPPSP board certification. Rating choices were *essential for competent practice*, *helpful for competent practice*, *of little importance for competent practice*, and *not required for competent practice*. In addition, respondents were asked to list other important citations that were not included on the survey.

Sixteen specialists completed and returned surveys. Ratings were assigned a value of 3 for a rating of *essential*, 2 for *helpful*, 1 for *little importance*, and 0 for *not required*. Results were tallied and average ratings were derived. The citations were sorted into three categories based on their average rating. Citations with an average rating at or above 2.6 were categorized as *essential for competent practice* (ECP); citations with an average rating from 2.59 to 2.2 were regarded as *important for competent practice* (ICP); citations with an average rating between 2.19 and 1.5 were placed in the category of *useful for competent practice* (UCP); citations with average scores below 1.5 were removed. Finally, citations recommended for inclusion with clear relevance to the specialty were accepted and identified as an *added citation* (AC).

The following list of federal statutes, regulations, rules, professional guidelines, and case law represent a consensus among the responding board certified police and public safety psychologists as to the core legal knowledge relevant to the specialty. It is by no means exhaustive. Some citations may simply have been overlooked, new citations will necessarily be added over time, and some will be removed when new statutes, rules or court decisions render them outdated.

The citations are organized into five clusters: (1) foundational or crosscutting citations relevant to multiple domains of practice, and those citations relevant to (2) fitness-for-duty evaluations (3) preemployment psychological evaluations, (4) intervention, and (5) operational consulting. Readers may find that many familiar case citations are not included in this list. Citations with broad applicability to clinical psychology generally (e.g., *Tarasoff v. Regents of the University of California* and its progeny) were omitted in order to focus on legal knowledge foundational to the specialty (e.g., Americans with Disabilities Act) and specific to the domains or major areas of practice in police and public safety psychology (e.g., fitness-for-duty evaluations, preemployment psychological evaluations, intervention, operational consulting).

Note: Citations indented immediately below a non-indented citation reflect cases that are related by content or outcome to the non-indented citation. If a related (indented) case belongs to a lower category of importance than the non-indented case above it, it will be designated as **ICP** (important for competent practice), **UCP** (useful for competent practice), or **AC** (added case).

## **Foundational**

*The following crosscutting statutes, rules and case citations are relevant to multiple domains of specialty practice (assessment, intervention, operational, and organizational consulting) and are therefore regarded as foundational to the specialty.*

### **Essential for Competent Practice**

#### **FEDERAL STATUTES/REGULATIONS/RULES**

**Americans with Disabilities Act of 1990**, Pub. L. No. 101-336, §2, 104 Stat. 328 (1991).

**ADA Amendments Act of 2008**, Pub. L. 110-325 (2009).

EEOC. (1991a). ***Equal Employment Opportunity for Individuals with Disabilities: Final Rule***, 55(44) Fed. Reg. (1991).

EEOC. (2000). ***Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act: Compliance Manual*** (Vol. II, Sect. 902, No. 915.002). Washington, DC: Equal Employment Opportunity Commission.

EEOC. (1995). ***ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations: Compliance Manual*** (Vol. II, Sect. 902, No. 915.002). Washington, DC: Equal Employment Opportunity Commission.

EEOC. (1991b). ***Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act***, Title 29, Subtitle B, Chapter XIV, Part 1630.

EEOC. (1997). ***EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities: Compliance Manual*** (Vol. II, Sect. 902, No. 915.002). Washington, DC: Equal Employment Opportunity Commission.

EEOC. (2002, October 29). ***ADA Technical Assistance Manual: January 1992***. (Publication EEOC-M-1A, Addendum).

EEOC. (2008). ***The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities***. Retrieved January 4, 2010, from [www.eeoc.gov/facts/performance-conduct.html](http://www.eeoc.gov/facts/performance-conduct.html)

**Genetic Information Nondiscrimination Act of 2008 (GINA)**. Pub.L. 110-233, 122 Stat. 881, 42 U.S.C. 2000 (2008).

EEOC. (2010). ***Regulations Under the Genetic Information Nondiscrimination Act of 2008 (Final Rule)***. 29 C.F.R. 1635, 75 FR 68912. AC

**Health Insurance Portability and Accountability Act (HIPAA)**. (2000a). Title 45, Subtitle A, Subchapter C, Part 160, General Administrative Requirements.

**Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule**. (2000b). Title 45, Subtitle A, Subchapter C, Part 164, Subpart E, Privacy of Individually Identifiable Health Information.

**Family & Medical Leave Act of 1993**, 29 U.S.C. §2601 (1993).

**Civil Rights Act of 1964, Title VII**, Pub. L. 88-352 (78 Stat. 241) (1964).

**Civil Rights Act of 1991**, Pub. L. 102-166 (1991).

**Rehabilitation Act of 1973, Section 501**, Pub. L. 93-112, 87 Stat. 355, 29 U.S.C.A. §701 (1973). AC

**Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)**, Pub. L. 103-353, 38 U.S.C. §§4301-4335 (1994).

**USERRA Final Rule**, 20 C.F.R. Part 1002 (2006).

## CASE LAW

**Garrity v. New Jersey**, 385 U.S. 493 (1967). (The U.S. Supreme Court held that law enforcement officers and other public employees have the right to be free from compulsory self-incrimination in criminal matters. It gave birth to the *Garrity warning*, which is administered by investigators to suspects in internal and administrative investigations in a similar manner as the Miranda warning is administered to suspects in criminal investigations. A police officer can be ordered to participate in an internal or administrative investigation; he or she can be required to give a statement; and the officer's statements (or silence) can be used against the officer in later disciplinary hearings and civil lawsuits, but not in criminal prosecution.)

**Schloendorff v. Society of New York Hospital**, 211 NY 125, 105 N.E. 92 (N.Y. 1914). (This is the landmark case establishing the legal principle of informed consent or, in the alternative, disclosure, as a basic element in the relationship between a health care provider and a patient or examinee.)

**Brady v. Maryland**, 83 S. Ct. 1194 (1963). (In this landmark case, the U.S. Supreme Court established the proposition that evidence that may be exculpatory in nature must be given to the defense. In a case where an officer will be testifying as a witness to an event, the officer's credibility is a material issue and his lack of credibility is potentially exculpatory evidence. The so-called "Brady rule" holds that a police officer's sustained findings of untruthfulness must be revealed to the trier of fact in any matter in which the officer intends to testify. In turn, the resulting "Brady analysis" frequently leads police employers to refuse to hire, or to remove from police service, any police candidate or incumbent, respectively, who has lied, in order to ensure that the person is not placed in a position to become a percipient witness in an investigation.) **AC**

**LaChance v. Erickson**, 118 S. Ct. 805 (1998). (The Supreme Court applied its *Brady* decision to federal employees charged with lying to investigators when questioned about their misconduct. The Court held that lying to investigators constitutes good grounds to remove an employee. "[A] citizen may decline to answer a Government question, or answer it honestly, but cannot with impunity knowingly and willfully answer it with a falsehood.") **AC**

**Brogan v. United States**, 522 U.S. 398 (1998). (Here, the Supreme Court held that the "exculpatory no" (a false denial of guilt) given in connection with an official investigation constitutes knowing and willful lying, subject to criminal prosecution under 18 U.S.C. §1001 (1988 ed.).) **AC**

### Important for Competent Practice

## FEDERAL STATUTES/REGULATIONS/RULES

**42 USC 21 § 1983**. (Section 1983 of the Civil Rights Act of 1871 makes relief (including monetary damages) available to persons whose constitutional rights have been violated by an actor acting under State authority. It is frequently used by private citizens to redress violations of federally protected rights, often against law enforcement agencies and individuals.)

**OPM Medical Qualification Determinations**. 5 C.F.R. § 339 (1995). (This federal regulation governs examinations and evaluations of a federal applicant or employee conducted to determine the nature of a medical condition that "may affect safe and efficient performance." Its provisions include stipulations of the requisite procedures and the standards for determining medical (including psychological) disqualification.)

## CASE LAW

### *Accommodation*

**Barnett v. U. S. Air, Inc.**, 228 F.3d 1105 (9<sup>th</sup> Cir. 2000). (Once an employee requests accommodation for a work-impairing condition, the employer has an affirmative duty to engage in the interactive process of accommodation.)

**Hammon v. DHL Airways, Inc.**, 980 F.Supp. 919 (S.D. Ohio 1997), *aff'd*, 165 F.3d 441, 450 (6<sup>th</sup> Cir. 1999). (Except in cases of obvious disability, the employer's obligation to explore accommodation arises only "when the employee tells the employer he is disabled.) **ICP**

**Cannice v. Norwest Bank Iowa N.A.**, 189 F.3d 723 (8<sup>th</sup> Cir. 1999). (The employee need not use the word "disabled" or "disability" to formally initiate the interactive process of accommodation.) **ICP**

**Larson v. Koch Refining Co.**, 920 F.Supp. 1000 (D. Minn. 1996). (Where the employee openly denies having a disability condition, the employer is not required to engage in the interactive process of accommodation.) **ICP**

**Altman v. NY City Health & Hospitals Corp.**, 1993 Westlaw 106166 (SDNY 1993). (Court decided that the plaintiff, who had been Chief of the Department of Internal Medicine before alcoholism led to his removal, could no longer carry out the essential functions of that job despite intervening treatment for his condition. Although the hospital had concluded that Altman could be reinstated, on a trial basis, as a physician in a high-level position, it also concluded that he still needed supervision and that such supervision would be lacking in the chief of the department position, a view with which the court concurred.) **UCP**

**Penn. St. Troopers' Assn. (Kornguth) v. Pa. St. Police**, 537 Pa. 434, 644 A.2d 1161 (Pa. 1994), Lexis 247. (Pennsylvania Supreme Court refuses to reinstate a trooper that would have needed a lengthy and closely supervised unarmed assignment.) **ICP**

**Hogarth v. Thornburgh**, 833 F.Supp. 1077 (SDNY 1993). (FBI did not have to accommodate mentally ill employee who hallucinated, lied and engaged in sex in Bureau offices.) **UCP**

**Siefken v. The Village of Arlington Heights**, 65 F.3d 664 (7<sup>th</sup> Cir. 1996). (Appellant probationary police officer experienced a diabetic reaction, which resulted in disorientation and in driving his squad car erratically until police stopped him. The employer thereafter terminated appellant. The court held that when appellant knew that he was afflicted with a disability, and failed to meet appellee's legitimate job expectations due to his failure to control a disability, he could not state a cause of action under the ADA, or the Rehabilitation Act. When asked what accommodation Siefken would request, his counsel replied to the court, "A second chance." The court stated, "But this is not an accommodation, as envisioned in the ADA. As we recently stated, 'It is plain enough what "accommodation" means. The employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work.'" *Vande Zande*, 44 F.3d at 543. Siefken is not asking for an accommodation; he is not asking the Village to change anything. He is asking for another chance to allow him to change his monitoring technique. But the ADA does not require this." The court concluded, "We only hold that when an employee knows that he is afflicted with a disability, needs no accommodation from his employer, and fails to meet 'the employer's legitimate job expectations,' *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7<sup>th</sup> Cir. 1995), due to his failure to control a controllable disability, he cannot state a cause of action under the ADA.")

**Palmer v. Cir. Ct. of Cook County**, Illinois, 117 F.3d 351 (7<sup>th</sup> Cir 1997). (Federal appeals court declines to reinstate a mentally ill worker who repeatedly threatened to kill her superior. "[I]f an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act. The Act does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge--in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone. The Act protects only 'qualified' employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one. It is true that an employer has a statutory duty to make a 'reasonable accommodation' to an employee's disability, that is, an adjustment in working conditions to enable the employee to overcome his disability, if the employer can do

this without 'undue hardship.' But we cannot believe that this duty runs in favor of employees who commit or threaten to commit violent acts. The retention of such an employee would cause justifiable anxiety to co-workers and supervisors. It would be unreasonable to demand of the employer either that it force its employees to put up with this or that it station guards to prevent the mentally disturbed employee from getting out of hand. So clear is this that we do not think a remand is necessary to explore the possibilities of accommodation.")

### ***Direct Threat***

**Chevron v. Echazabal**, 536 U.S. 73, (S.Ct., 2002). (In this unanimous decision, the U.S. Supreme Court held that people with disabilities cannot demand jobs that would threaten their lives or health. The decision makes it clear that employers can turn away people, or fire them, if the position puts their lives in jeopardy. The Court asserted that this was not the kind of paternalism that Congress intended to outlaw. "Congress was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes.")

**Anderson v. Little League Baseball, Inc.**, 794 F.Supp. 342, 61 USLW 2050 (D. Ariz. 1992). (The court adopted the U.S. Supreme Court's codified standard for determining "direct threat," as applied in the Rehabilitation Act of 1973 (in *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987)) to the ADA. "An individualized inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear.")

### ***Vicarious Liability***

**Monell v. Department of Social Services**, 436 U.S. 658, 98 S.Ct. 2018 (1978). (U.S. Supreme Court ruled that municipalities and administrators can be held liable for the behavior of subordinates if the subordinate employees were negligently supervised, trained, or selected.)

### ***Hostile Work Environment***

**Ellison v. Brady**, 924 F.2d 872 (9th Cir. 1991). (To prevail in a hostile environment claim resulting from a disability, the employee must demonstrate that he or she: (1) is a qualified individual with a disability under the ADA, (2) was subjected to verbal or physical harassment because of his or her disability, (3) did not invite the harassment, and (4) suffered harm "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." The working environment must both subjectively and objectively be perceived as abusive. Whether the workplace is objectively hostile must be determined from the standpoint of a reasonable person with the same fundamental characteristics. An employer is only liable for failing to remedy harassment of which it knew or should have known.)

## ***Fitness-for-Duty Evaluations***

### **Essential for Competent Practice**

#### **PROFESSIONAL GUIDELINES**

International Association of Chiefs of Police, Police Psychological Services Section. (2009). ***Psychological fitness-for-duty evaluation guidelines***. Alexandria, VA: Author.

American Psychological Association. (in press). ***Specialty guidelines for forensic psychology***. *American Psychologist*, manuscript submitted for publication. Retrieved from [http://ap-ls.org/aboutpsychlaw/SGFP\\_Final\\_Approved\\_2011.pdf](http://ap-ls.org/aboutpsychlaw/SGFP_Final_Approved_2011.pdf)

#### **CASE LAW**

**Pettus v. Cole** (1996, Cal.App.). (California appeals court allows employee's suit for invasion of privacy; psychiatrists provided his superiors with the details of an employer-required stress exam. Although Pettus put his mental condition at issue by requesting paid medical leave from his employer (DuPont), and the employer had a right to know whether in fact Pettus was disabled and whether it was work-related, ". . . the detailed psychiatric information DuPont

requested and obtained from Drs. Cole and Unger and ultimately used to make adverse personnel decisions about Pettus, was far more than the employer needed to accomplish its legitimate objective." The court held that it was reasonable on Pettus's part to expect that Drs. Cole and Unger " . . . would maintain the confidentiality of his discussions with them, excepting so far as DuPont needed their opinions as to whether he was disabled, i.e., whether he had 'functional limitations' that entitled him to leave from work for medical reasons or limit his fitness to perform his present employment. It is difficult to imagine the clearer expression of broadly based and widely accepted community norms." The justices said "there is no reason in law or policy why an employer should be allowed access to detailed family or medical histories of its employees, or to the intricacies of its employees' mental processes, except with an individual employee's freely-given consent to the particular disclosure or other substantial justification." Finally, the court addressed the use of the information by DuPont in requiring Pettus to receive medical treatment for what they believed was his alcohol addiction. "[E]mployers do not have a cognizable interest in dictating a course of medical treatment for employees who suffer non-industrial injuries. That is a matter for the employees to decide in consultation with their own health care providers--medical professionals who have their patients' best interest at heart.")

**Crandall v. Michaud**, 603 So.2d 637, 637 (Fla. 1992). (Persons compelled to submit to independent medical evaluations are "patients" under the law.) See also *Elkins v. Syken*, 672 So.2d 517 (Fla. 1996); *Simmons v. Rehab Xcel, Inc.*, 731 So.2d 529 (La.App. 1999). ICP

**Albert v. Runyon**, 6 F.Supp.2d 57, 1998 U.S. Dist. Lexis 7505 (D.Mass.). (Federal court holds, under the FMLA, an employer cannot require a "fitness for duty" exam of an employee who has been certified by a physician or psychologist that he/she is able to return to work, unless the employee's post-leave behavior justifies it.) See also *Brumbalough v. Camelot Care Centers, Inc.*, No. 04-5543, 427 F.3d 996 (6th Cir. 2005).

**Carrillo v. National Council of Churches of Christ in the USA**, 976 F.Supp. 254 (SDNY 1997). (The holding in *Albert v. Runyon* requires that an employee on FMLA whose health care provider certifies his or her readiness to return to duty may not be required to submit to an independent FFDE. In *Carrillo*, the court held that, when an employer can establish that it would have ordered an FFDE *if the employee had not taken leave*, an examination may be permissible.)

**Brownfield v. City of Yakima**, #09-35628, 612 F.3d 1140, 2010 U.S. App. Lexis 15324 (9th Cir. 2010). (Ninth Circuit upholds a mandatory FFDE of a police officer. The panel wrote that prophylactic "psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work. . . . Undisputed facts show that [the officer] exhibited highly emotional responses on numerous occasions in 2005, four occurring in a single month immediately prior to his referral. . . . Police officers are likely to encounter extremely stressful and dangerous situations during the course of their work.") (Note, too, *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 99 (2d Cir.2003), where the Second Circuit found that "what constitutes a business necessity will undoubtedly vary in different workplaces.")

**Butler v. Thornburgh**, 900 F.2d 871, 876 (5th Cir. 1990), *cert. denied*, 498 U.S. 998 (1990). (Although the EEOC defines "direct threat" to mean "a significant risk of substantial harm" (29 C.F.R. §1630.2(r)), the court held that where the employee's position implicates the safety of others, and the potential harm is severe, even a low probability that the harm will occur may be sufficient to establish a direct threat.) See also *Hogarth v. Thornburgh*, 833 F.Supp. 1077 (SDNY 1993); *Myers v. Hose*, 50 F.3d 278 (4<sup>th</sup> Cir. 1995).

**City of Greenwood v. Dowler**, 492 N.E.2d 1081 (Ind.App. 1986). (Attempted suicide sufficient grounds to terminate a police officer, but not adequate to warrant termination of other public employees. The appeals court panel said, "A policeman frequently works alone, wields authority, carries lethal weapons which he is empowered to use in proper circumstances, and exercises wide discretion continuously while on and off duty. He must, at a moment's notice, be prepared to pursue

dangerous criminals and shoot them if necessary, or be shot. He may expect high-speed chases. He is confronted with extricating hurt, dead, and dying people from vehicular accidents. In short, it is not an occupation for the fainthearted, a person with weak nerves, or a person with questionable emotional maturity. Such unfortunate afflictions go to the very heart of the qualifications of a police officer. Lack of control and bad judgment can result in grave consequences. ... From all the evidence, reasonable people may conclude (though reasonable people could disagree) that [the officer] had become sufficiently emotionally unstable as to be unreliable as a policeman in stress situations.")

**EEOC v. Amego**, 1997 U.S. App. Lexis 6455, 110 F.3d (1st Cir. 1997). (Federal appeals court upholds termination of worker who twice tried to kill herself. Because she worked in a health care facility, caring for others, she could not be trusted to act responsibly. EEOC had claimed the employer was irrationally biased against persons who attempt suicide. "We hold that, in a Title I ADA case, it is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore 'qualified.' Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others." This case also included a lucid observation and analysis concerning the ADA: "At its core, Title I of the ADA is about protecting the disabled from discriminatory employment based on stereotypes and fear.")

**Lassiter v. Reno**, 86 F.3d 1151 (4th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997). (In assessing whether an employee can perform his or her duties without a significant risk to the safety of the individual or others, the examiner "must consider the nature of the position and the consequences should the employee fail to perform his duties properly.")

**Wisbey v. City of Lincoln**, #4:08-CV-3093, 2009 U.S. Dist. Lexis 30819, 21 AD Cases (BNA) 1377 (D. Neb.). (City emergency dispatcher that was terminated after her diagnosis of depression and anxiety was not regarded as disabled, even though she had been required to undergo a fitness-for-duty examination. Impaired alertness and concentration were job-related and consistent with business necessity.)

**Colon v. City of Newark**, #A-3260-03T23260-03T2, 2006 WL 1194230 (N.J.A.D. 2006). (Appellate court sustains a verdict for negligent retention/assignment. Officer with a propensity for violence was retained after he passed a psychological fitness examination, because management failed to submit prior examination results or his disciplinary record to the evaluating psychologist.)

**Thomas v. Corwin**, 483 F.3d 516 (8th Cir. 2007), U.S.App. Lexis 7601, 100 FEP Cases (BNA) 297. (Eighth Circuit affirms the termination of a police employee that failed to cooperate in a fitness-for-duty examination. "By refusing to provide [the psychologist] the opportunity to review her medical records and to discover the root of [her] stress and anxiety, [she] created a stalemate in which KCPD had little choice but to terminate [her] rather than return her to the position from which [her] stress and anxiety originated.")

**Thompson v. City of Arlington**, 838 F.Supp. 1137; 1993 U.S. Dist. Lexis 17093; 2 Am. Disabilities Cases (BNA) 1756. (City could require a police officer, on medical leave for attempted suicide, to release her psychiatric records before reinstating her to full duty. Requirement did not violate the ADA.)

**Conte v. Horcher**, 365 N.E.2d 567 (Ill. App. 1977). (This is a landmark case in police-related FFDEs involving an Illinois appellate court that upheld an order from the chief of police for a lieutenant to submit to a psychological examination. The court ruled that the examination was not punishment, was not injurious to his reputation, and the order was non-disciplinary and was not subject to a trial board hearing. The court held that the police chief had not only the authority to order the evaluation, but also an obligation to do so if the facts warranted concern about an officer's psychological suitability. "It is the duty of the police chief to maintain a capable and efficient force. An examination, either physical or mental, enables the chief to

ascertain the qualifications of a person to perform particular duties or to fill a particular position.”)

**Flynn v. Sandahl**, 58 F.3d 283, 10 IER Cases (BNA) 1187, 1995 U.S.App. Lexis 14902 (7th Cir. 1995). (Federal appeals court upheld the warden’s order to an Illinois corrections officer that he submit to a psychiatric examination, after he was accused by several coworkers of making threats of physical harm. In noting that a “privacy right . . . must often give way to consideration of public interest,” the court stated, “We need not decide whether the order requiring a psychiatric examination violated Flynn’s right to privacy because even if it did, we agree with the First Circuit that this right must give way to consideration of the public interest. . . . [C]orrectional officers . . . must be able to depend upon one another to carry out their duties and protect each other in the event there is threat to their safety or the safety of the inmates. It is undisputed that (the employer) had received complaints from Flynn’s peers that he had threatened them with physical harm. On these facts, we think that the state demonstrated a justifiable basis for requiring the psychiatric examination.”)

**Krocka v. City of Chicago**, 203 F.3d 507, 515 (7th Cir. 2000). (“The position of Chicago police officer certainly presents significant safety concerns, not only for other CPD employees but for the public at large. It was entirely reasonable, and even responsible, for CPD to evaluate Krocka’s fitness for duty once it learned that he was experiencing difficulties with his mental health. CPD did not make broad and unfounded assumptions about Krocka’s fitness for duty based on his mental illness or the medication he was taking to mitigate that condition. Instead, it performed an individual evaluation of his particular situation and determined that he was capable of working as a Chicago police officer.”)

**Sullivan v. River Val. Sch. Dist.**, # 98-2143, 197 F.3d 804, 1999 U.S. App. Lexis 30676, 9 AD Cases (BNA) 1711 (6th Cir. 1999). (The Sixth Circuit rejected an ADA attack on an employer-required fitness-for-duty examination. Peculiar behavior is not per se indicative that a person is regarded as mentally ill, and the employer was justified in ordering an FFDE to determine whether the employee posed a direct threat as a result of a medical condition. The court cited the school administrator’s decision to confer with its psychologist expert before referring the teacher for an FFDE as buttressing the district’s belief that a mental health condition may impair the teacher’s ability to perform essential job functions.)

**Watson v. City of Miami Beach**, 177 F.3d 932 (11th Cir. 1999). (“In any case where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness for duty examination is job related and consistent with business necessity. Police departments place armed officers in positions where they can do tremendous harm if they act irrationally. The ADA does not, indeed cannot, require a police department to forgo a fitness-for-duty examination to wait until a perceived threat becomes real, or questionable behavior results in injuries.”)

**Kraft v. Police Commissioner of Boston**, 417 Mass. 235, 629 N.E.2d 995, 1994 Mass. Lexis 93 (1994). (Police chief could require a reinstated detective to pass a psychological screen before recertifying him to carry a firearm.) **ICP**

**Wilson v. City of Baton Rouge**, #08-31018, 2009 U.S. App. Lexis 10555 at fn. 2 (Unpub. 5th Cir. 2009). (Fifth Circuit rejects a disability discrimination that management ordered a psychological evaluation of a public employee related to theft accusations, but did not order the same evaluation for a coworker. The panel noted that the appellant failed to demonstrate “why a mere examination would qualify as less favorable treatment.” Citing *Benningfield v. City of Houston*, 157 F.3d 369 at 376 (5th Cir. 1998), a referral for psychological testing is not an adverse employment action.” Rather, the referral was designed to gather facts to form the basis for an employment decision.”) **ICP**

**Brown Co. Sheriff’s Dept. v. BCSD Employees Assn.**, 533 N.W.2d 766 (Wis. 1995). (A sheriff who was required by an arbitrator to reinstate a deputy was permitted to “require [the deputy] to (a) seek medical and psychological help for the

bias and hostile attitude he harbors toward... citizens and the sheriff's department administration and (b) obtain certification of [his] fitness for duty prior to his return from suspension.") **AC**

**Redmond v. City of Overland Park**, 672 F.Supp. 473 (D. Kan. 1987). (Hostility, unwarranted suspicions of persecution and failure to fully cooperate with psychologist warranted termination of plaintiff police officer.) **AC**

**Sager v. County of Yuba**, 68 Cal.Rptr.3d 1, 156 Cal.App.4th 1049 (Cal.App. 2007). (California Court of Appeals ruled that the California statute (Government Code 1031(f)) specifying the preemployment standards for peace officers applies to incumbent peace officers throughout the term of their careers and, therefore, are applicable in fitness-for-duty evaluations, as well.)

**Coleman v. N.Y.**, #501363, 2007 NY Slip Op 01936, 2007 N.Y. App. Div. Lexis 2653 (3rd Dept.). (A person seeking reinstatement as a New York corrections officer after recovering from an off-duty injury must pass the same psychological screening examination administered to applicants.) **ICP**

**Denhof et al. v. City of Grand Rapids**, 494 F.3d 534 (6th Cir. 2007). (Court reinstates the jury verdicts in favor of the plaintiffs. Both plaintiff officers were referred by the chief of police for fitness-for-duty exams based upon alleged mental health concerns. The police psychologist who performed the examinations opined that both women were not fit for duty, and they were eventually removed from duty. The court found that the psychologist had formed an adverse opinion about the plaintiffs before he examined them, that the police chief knew of this opinion, and, therefore, that the police chief could not assert a "safe harbor" defense based on an honest reliance on the psychologist's opinion.)

**Cleveland Board of Education v. Loudermill**, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). (When a property interest in an employee's position has been established under state law, the question of what process is due is entirely a matter of federal constitutional law. In *Loudermill*, the Supreme Court held that, at a minimum, "the tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." When serious misconduct is alleged, an employer may wish to take action prior to even an informal hearing. *Loudermill* suggested that the appropriate response to an "emergency" situation is to suspend the employee with pay prior to the hearing. [Indeed, it was held in *AFSCME Local 2477 v. Billington*, 740 F.Supp. 1 (D.D.C. 1990) that an emergency regulation permitting a five-day suspension/leave without a hearing for dangerous employees and a limited telephone opportunity to refute during the period was constitutional.] The Court held that the more elaborate the post-termination hearing, the more informal the pre-termination procedures may be. The purpose of the pre-termination procedure is not to definitively settle any rights, but to act as an initial check against a mistaken decision. *Loudermill* does not require a delay between notice and the opportunity to respond. While the notice must be specific, there is no requirement to furnish the actual evidence in its entirety.)

**Bass v. City of Albany**, 968 F.2d 1067 (11th Cir. 1992). (The court extended *Loudermill* due process rights to circumstances in which an officer has been dismissed as a result of an FFDE, noting that the terminated employee has a right to understand the psychological "charges" against him, the evidence underlying the charges, and to be given an opportunity to refute them.) See also *Bauschard v. Martin*, 1993 WL 79259 (N.D. Ill. 1993) (not reported); *Nuss v. Township of Falls, et al.*, 89 Pa. Commw. 97; 491 A.2d 971, 1985 Pa. Commw. Lexis 1029.

### **Important for Competent Practice**

**McGreal v. Ostrov**, #98-CV-3958, Docket entry No. 177 (N.D. Ill. Oct. 1, 2004); interim ruling on a Motion at 2004 U.S. Dist. Lexis 18420, on remand from 368 F.3d 657, #02-3405, 2004 U.S. App. Lexis 9059 (7th Cir. 2004). (Case settled for \$900,000. A police officer had sued a police psychologist, the village and others, because he was ordered to submit to an intrusive fitness-for-duty exam after he narrowly lost an election to the incumbent mayor. The court found that, even if the evaluation had been conducted under a valid order, it went

too far in republishing private information. The circuit court ruled that the defendants "were not entitled to disclosure of anything other than the fitness for duty determination. They were not entitled ... to force the disclosure of the intimate and irrelevant details of McGreal's home life.")

**Stewart v. Pearce**, 484 F.2d 1031, (9th Cir. 1973). (Federal appeals court upholds a lower court injunction against a public employer's order that an employee submit to a psychiatric evaluation. "The order by the college to report for a psychiatric examination implied that there existed both reasonable grounds for the order and mental unfitness for the job. Moreover, the order created a stigma, an official branding of [the plaintiff].")

**Merillat v. Mich. St. Univ.**, 207 Mich.App. 241, 523 N.W.2d 802, 4 AD Cases (BNA) 764 (1994). (Michigan appeals court reinstated a dispatcher who was fired for refusing to cooperate at a mandatory psychological exam. Employer did not have a valid basis for ordering her to take the test, as required by state law. White female public safety dispatcher was having an affair with an African American married male supervisor. Employer ordered female dispatcher to undergo an FFDE even though the employer had "no evidence that [she] was unable to perform her duties as a dispatcher.")

**Watts v. Alfred**, 794 F.Supp. 431 (D.D.C. 1992). (Federal court enjoined the disciplinary transfer of a fire captain, and an order to submit to psychiatric evaluation. Captain had filed a grievance protesting chief's order banning a cartoon in the fire station.)

**Rice v. City of Oakland** (U.S. Dist., N. California, 1999). (Rice, an African-American male who worked for the Oakland City Jail as a correctional officer from 1989 until his termination in 1997, claimed discrimination under both Title VII and ADA. He was fired after he refused to comply with an order to submit to a psychological FFDE. He contended that the City subjected him to numerous FFDEs to establish disabilities that would assist the City in its effort to demote or terminate him. The City responded that Rice was ordered to undergo a complete physical and psychological FFDE because Rice had missed a significant amount of work due to a combination of stress and stress-related illness, and Rice's recent stress-related absences suggested that his condition was possibly worsening. "An employer violated the ADA when it requires an employee to submit to a medical exam for the purpose of determining whether, and to what extent, the employee has a disability, and the medical exam is unrelated to the requirements of the job. However, consistent with the ADA's business necessity exception, 'when health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability' [Yin v. California]. The Court concludes that the City's request that Rice undergo a FFE exam was sufficiently job-related and therefore did not violate the ADA." The Court held that an employer required only a "reasonable basis" to conclude that an employee's health conditions could undermine the employee's ability to perform his duties.)

**Yin v. State of California**, No. 94-17057 (9th Cir. 1996). ("When health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability.")

**Risner v. U.S. Department of Transportation**, 677 F.2d 36 (8<sup>th</sup> Cir. 1982) ("The fitness-for-duty examination is a useful procedure to determine an employee's competency to perform his duties ... [and] failure to submit to such an examination, when there are good reasons for directing an employee to submit to it, is insubordination and can justify discharge.") **AC**

**Hill v. City of Winona**, 454 N.W.2d 659 (Minn. App. 1990). (A divided appellate court held that a chief's order to a subordinate to take a psychological exam is grievable, and subject to arbitration, as to whether the employee's supervisors had a reasonable basis to require the exam. Note: This ruling pertained to a specific provision of

Minnesota's Public Employee Labor Relations Act and highlights the importance of a jurisdiction-specific analysis for the consequences of refusing to participate in an FFDE.) **UCP**

**Haynes v. Police Board of Chicago**, 293 Ill.App.3d 508, 228 Ill.Dec. 96, 688 N.E. 2d 794 (7<sup>th</sup> Cir. 1997). (A Chicago police officer was accused of sexual misconduct and was ordered to be evaluated. He refused, believing the order to be unlawful. The Appellate Court stated that an "officer does not have the prerogative of actively disobeying an order from a superior while the officer subjectively determines whether the order is lawful ... such a practice would thwart the authority and respect which is the foundation of the effective and efficient operation of a police force and destroy the discipline necessary in a paramilitary organization." The court also wrote, "The authority to order fitness exams is justified by the unique, almost paramilitary nature of police departments and the critical importance of police officers to public health and safety. By necessary implication, the police department must have access to the ultimate fitness determination of such exams in order to determine whether officers are capable of performing their duties.") **AC**

**New Jersey Transit P.B.A. Local 304 v. New Jersey Transit Corp.**, 384 N.J. Super. 512 (App.Div. 2006) ("... no officer has the right to hide his or her lack of fitness by asserting a privacy interest [and] no officer who is unfit for the position has the right to remain in the position.") **AC**

**City of Elizabeth v. Superior Officers Association**, 27 NJPER P 32017 (2000). (An Elizabeth police officer was ordered to undergo a psychological fitness-for-duty evaluation. The union sought arbitration on whether the employer had good grounds to order the evaluation. The court held that the union could not challenge the application of the department's fitness-for-duty policy, as that would block the employer from determining whether an officer is fit. The court further held that the ordering of a psychological examination does not constitute a disciplinary action for purposes of arbitration.) **AC**

**McKnight v. Monroe Co. Sheriff's Dept.**, # IP 00-1880-C-B, 2002 U.S. Dist. Lexis 18148, 90 FEP Cases (BNA) 35 (S.D.Ind. 2002). (Federal court finds that an order to take a FFDE is not an "adverse action" that violates an officer's civil rights. The fact that the officer filed seven allegedly unfounded harassment complaints justified the requirement.)

**Coffman v. Indianapolis Fire Dept.**, #08-1642, 106 FEP Cases (BNA) 1793, 22 AD Cases (BNA) 360, 2009 U.S. App. Lexis 18717 (7<sup>th</sup> Cir. 2009). (Requiring a woman firefighter, who had complained of sexual harassment, to submit to a psychological evaluation did not violate the ADA because the examination was shown to be job-related and consistent with business necessity.)

**Jenkins v. City of Sandusky**, #E-07-067, 2008 Ohio App. Lexis 3966 (6<sup>th</sup> App. Dist.). (Ohio appellate court sustained the suspension and demotion of a fire lieutenant for failing to submit to a psychological exam following a 5-month absence from work after undergoing back surgery. A separate action against the union for failing to seek arbitration also was dismissed. A psychological evaluation request was reasonable and is not an unlawful search of his mind.) **UCP**

**NLRB v. Weingarten, Inc.**, 420 US 251 (1975). (This U.S. Supreme Court ruling established the *Weingarten rights* of an employee represented in a collective bargaining group. The court held that such an employee who reasonably believes that an interview or examination may result in disciplinary action against the employee has a right to the presence of a union representative, if requested, although the representative may not interfere with the proceedings.)

**AFGE Local 596 v. DOJ and Federal Bureau of Prisons** (FCC Coleman, FL), Grievance 06-540891 (Sherman, 2007). (Arbitrator held that bargaining unit members are entitled to be accompanied by a Weingarten representative, if requested, at a fitness for duty evaluation required by a superior. Although the union did not claim

medical expertise, "union representation during a fitness for work examination is necessary to ensure that the employee's rights are not being violated during the course of the examination.") **UCP**

**Slater v. Dept. of Homeland Security**, 108 MSPR 419, 2008 MSPB 73. (In *Slater v. Dept. of Homeland Security* (2008), the Merit System Personnel Board concluded that the FFDE reports that were "entirely conclusory, devoid of any medical documentation or explanation in support of their conclusions" carried less "credibility and reliability" than one that was "a thorough, detailed, and relevant medical opinion addressing the medical issues of the agency's removal action.")

**Aldrup v. Caldera**, #01-50369, 2001 U.S. App. Lexis 26347 (5<sup>th</sup> Cir. 2001). (Firefighter was fired for insubordination. In his suit, he alleged that he was fired because of his disability from depression. The district court granted summary judgment in favor of the employer. On appeal, the Circuit Court concluded, "Aldrup alleges that he suffers from the disability of depression caused by "the stress and anxiety of having to work with certain employees at the [Houston Station]." This claim, if supported by the record, would merely tend to show that he was unable to perform any job at one specific location, and is not evidence of Aldrup's general inability to perform a broad class of jobs. The central evidence offered by Aldrup in support of his disability claim is a letter from a physician concluding that he "has a medical condition that substantially limits one or more of his major life activities." The district court properly determined that such unsupported conclusional statements are not entitled to evidentiary weight.") **AC**

**Petty v. Metropolitan Government of Nashville-Davidson County**, 538 F.3d 431 (6<sup>th</sup> Cir., 2008). (Court of Appeals reversed the decision of the district court and found that the employer violated USERRA when it required a returning Army reservist to go through a return-to-work process that delayed reemployment.)

#### **Useful for Competent Practice**

**Richardson v. Perales**, 402 U.S. 389 (1971). (The U.S. Supreme Court held that the standard of "substantial evidence" (as required of an employer under the ADA when showing that an employee poses a significant risk of substantial harm) is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.")

**Nichols v. So. Ill. Univ.**, #06-2688, 102 FEP Cases (BNA) 519, 2007 U.S. App. Lexis 29865 (7<sup>th</sup> Cir. 2007), affirming 432 F.Supp.2d 798. (Placement of an officer on paid administrative leave pending the result of a psychological fitness-for-duty evaluation following a use of force incident does not constitute a materially adverse action that would support a retaliation claim.)

**McCabe v. Hoberman**, 33 A.D.2d 547 (1st Dept. 1969). (This New York case involved conflicting opinions between the agency's psychiatrists and the petitioner's about his qualification. The court noted that "there is nothing in the record before us to indicate or even intimate that the respondent's Medical Board acted illegally or capriciously or adopted a professional position not founded on a rational basis. It is not for the courts to choose between the diverse professional opinions. That is the function of the proper department heads and as long as they act reasonably and responsibly, the courts will not interfere. And when a department relies on its own medical staff for advice such reliance per se is not to be considered arbitrary or capricious.")

**Broberg v. Illinois State Police**, #06cv3901, 2008 U.S. Dist. Lexis 7916, 20 AD Cases (BNA) 321 (N.D.Ill.). (Former state police officer who was removed from duty due to allegedly irrational behavior may proceed with a claim that she was regarded as disabled, where the psychologist that conducted fitness-for-duty evaluation diagnosed her as depressed, paranoid personality and unfit for duty.)

**National Treasury Employees Union v. Von Raab**, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). (The U.S. Supreme Court decision upheld the constitutionality of the U.S. Customs Service's drug testing program, reasoning that the employees of customs service had "diminished expectation of privacy." The Court added, "the public should not bear the risk

that employees who may suffer from impaired perception and judgment will be [in] positions where they may need to employ deadly force.”)

**Policemen’s Benevolent Association of New Jersey v. Township of Washington**, 850 F.2d 133 (3<sup>rd</sup> Cir. 1988). (In deciding in favor of the Township’s random and annual drug testing program for its police officers, the New Jersey Supreme Court wrote, “The success of a police department in the performance of its duties is largely measured by the degree of support and cooperation it receives from the people of the community which it serves. It is of paramount importance that we secure the confidence, respect, and approbation of the public. The cultivation of such desirable attitudes is dependent upon proper performance of duty by all the members of the department. ... [P]olice officers are members of quasi-military organizations, called upon for duty at all times, armed at almost all times, and exercising the most awesome and dangerous power that a democratic state possesses with respect to its residents--the power to use lawful force to arrest and detain them.”)

**Briggs v. North Muskegon Police Dept.**, 563 F.Supp. 585 (W.D. Mich. 1983). (The court held an employer liable for damages for terminating the employment of a police officer for cohabiting with a woman who was married to another man. The court opined that “the privacy and associational interests implicated here are sufficiently fundamental to warrant scrutiny of the defendants’ acts on more than a minimal rationality basis.” The critical issue in Briggs was framed in terms of “whether the likely adverse effect of plaintiff’s off-duty conduct on his job performance justified his suspension and dismissal.” The court decided that “there are many areas of a police officer’s private life and sexual behavior which are simply beyond the scope of any reasonable investigation by the Department because of the tenuous relationship between such activity and the officer’s performance on the job. In the absence of a showing that policeman’s private, off-duty personal activities have an impact upon his on-the- job performance, we believe that inquiry into those activities violates the constitutionally protected right of privacy.”)

**Shuman v. City of Philadelphia**, 470 F.Supp. 449 (E.D. Pa. 1979). (Conduct within the scope of privacy is protected unless it adversely affects performance. The Court reversed the termination of a police officer who refused to answer an internal investigator’s questions about his adulterous relationship.)

**Law v. Garden State Tanning**, 159 F.Supp. 2d 787 (E.D. Pa. 2001). (In determining whether an employer’s order for a fitness-for-duty evaluation is justified, courts will apply a reasonable person standard. Thus, there must be sufficient evidence for a reasonable person to doubt whether an employee is capable of performing the job. A reasonable person in this context is a reasonable employer, not a reasonable physician. *Jackson v. Lake County*, 2003 U.S. Dist. Lexis 16244.)

**Garner v. Stone**, No. 97A-320250-1 (Ga., DeKalb County Super. Ct. Dec. 16, 1999). (In this non-appealed trial verdict, a six-member jury sided with a police officer plaintiff who sued for breach of psychotherapist-patient privilege. The defendant psychologist reported a serious threat of physical harm, made by the officer in the course of a fitness-for-duty evaluation, to the subject of the threat. Georgia has a duty to protect but no duty to warn statute. Importantly, the psychologist noted in his affidavit that he “did not believe the threats to be imminent but considered them to be very serious.”) **AC**

### ***Preemployment Psychological Evaluations***

#### **Essential for Competent Practice**

#### **PROFESSIONAL GUIDELINES & STANDARDS**

International Association of Chiefs of Police, Police Psychological Services Section. (2009). ***Preemployment psychological evaluation guidelines***. Alexandria, VA: Author.

American Educational Research Association, American Psychological Association, & National Council on Measurement in Education. (1999). ***Standards for Educational and Psychological Testing***. Washington, DC: American Educational Research Association.

## CASE LAW

**Leonel v. American Airlines, Inc.**, 400 F.3d 702 (9th Cir. 2005). (9<sup>th</sup> Circuit held that the ADA is not only an antidiscrimination statute, but also a procedural statute that establishes a "bright line" between the pre-offer non-medical phase of a preemployment selection process, and the post-offer medical phase. Importantly, the continuation of non-medical inquiries past the point of a conditional offer may render the offer "not real" and invalid, thereby causing a post-offer medical evaluation or inquiry to be unlawful.)

**Barnes v. Cochran** (Sheriff of Broward County) (1996, D.C. for the Southern Dist. of Florida). (Applicant was refused employment as a corrections officer following a preemployment psychological evaluation (pre-offer). The examination included five psychological tests, an interview by a psychologist, and inquiries into specific psychological disorders which "provided evidence that would lead to identifying a mental disorder or impairment." The court ruled that, "While the ADA does permit preemployment inquiries into an applicant's ability to perform essential job functions, it does not permit the type of extensive psychological evaluation that took place here.") **ICP**

**Bonsignore v. City of New York**, 521 F.Supp. 394, aff'd 683 F.2d 635 (2nd Cir. 1982). (Failure to adopt meaningful psychological testing results in \$300,000 compensatory and \$125,000 in punitive damages. Off-duty officer wounded wife, then killed self; officers required to carry weapons while off-duty.)

**Hild v. Bruner**, 496 F.Supp. 93 (D.N.J. 1980). (Civil rights action brought against a town for injuries suffered by the victim of an assault by the town's police officers; Court held that jury could reasonably have inferred that the town's failure to conduct some kind of psychological testing of its officers constituted gross negligence.) **AC**

**Lewis v. Goodie**, 798 F.Supp. 382 (W.D.La. 1992) (Individuals arrested and assaulted by two officers; police chief held personally liable for general and punitive damages; chief found to have failed in his duty to properly supervise and train officers, one aspect of this was the fact that he had not required the two officers to undergo psychological screening.) **AC**

**Woods v. Town of Danville**, WV, #2:09-cv-0036, 2010 U.S. Dist. Lexis 47666 (S.D.W.Va.). (In an unlawful detention lawsuit, "a reasonable jury could find that [the town] did not adequately investigate [the officer's] military service, conduct a psychological [preemployment] evaluation, or adequately follow up on [his] references. Given the information about [his] propensity toward anger, his spotty employment history, and the facts surrounding his other-than-honorable discharge from the Navy, the plaintiffs have sufficiently alleged genuine issues of material fact on their claims of negligent hiring and retention.")

### Important for Competent Practice

**Karraker v. Rent-A-Center**, #04-2881, 411 F.3d 831, 2005 U.S. App. Lexis 11142 (7th Cir. 2005); 316 F.Supp.2d 675 (C.D. Ill., 2004) reversed. (Federal appeals court reversed a trial court decision that found that an employer's use of the MMPI for promotional screening did not violate the ADA because it was not interpreted by a psychologist and not used for diagnostic purposes. The Seventh Circuit found these factors not to be determinative in light of the MMPI's purpose as a measure of psychopathology or "medical test.")

**McKenna v. Fargo**, 1978 U.S. Dist. Lexis 17539, 451 F.Supp. 1355 (D.N.J. 1978), aff'd. w/o opin. 601 F.2d 575 (3rd Cir. 1979). (Federal court upheld psychological testing of firefighter applicants in Jersey City; ACLU privacy suit fails. The court concluded that the psychological evaluations do intrude upon an applicant's constitutional rights, but that intrusion is justified by the State's compelling interest in the benefits derived from the evaluations.)

**Miller v. City of Springfield**, 146 F.3d 612, 1998 U.S. App. Lexis 13385, 8 AD Cases (BNA) 321. (8th Cir.). (Federal appeals court found that a rejected applicant was not disabled, nor was she perceived as disabled, simply because she scored 66T on the Depression scale of the MMPI-2. The court concluded, "Miller is not disabled under the

Act. She therefore cannot base a claim of discrimination on this regulation because she was not screened out on the basis of any disability. In any event, we easily conclude that appropriate psychological screening is job-related and consistent with business necessity where the selection of individuals to train for the position of police officer is concerned.")

**Nilsson v. City of Mesa**, #05-15627, 503 F.3d 947, 2007 U.S. App. Lexis 21912, 101 FEP Cases (BNA) 901, 19 AD Cases 1418 (9th Cir., 2007). (Ninth Circuit affirmed dismissal of a suit filed by a rejected police applicant that failed a psychological evaluation that cited her stubborn nature and impulsivity. The appellate panel enforced a preemployment waiver of legal rights "for any acts, or omissions in the course of the investigation into background, employment history, health, family, personal habits and suitability for employment ...." The waiver was not effective against another claim that she was rejected because she had filed an EEOC complaint against a neighboring city.)

**Matter of Murray v. Co. of Nassau Civ. Serv. Cmsn.**, #000132/07, 2007 N.Y. Misc. Lexis 2579 (Nassau Co. Sup.). (New York court rejected a judicial challenge brought by a police applicant. Although his personal doctor found no disabling conditions, two psychologists and a psychiatrist found that he lacked the skills necessary to carry out the functions of a police officer. The opinion of the applicant's privately retained expert was not controlling.)

**Roulette v. Department of Central Management Services**, 490 N.E.2d 60 (Ill.App. 1 Dist. 1986). (Court held that the preemployment psychological evaluations of a police applicant should not be made public under FOIA.)

**Cremer v. Macomb Bd. of Fire & Police Cmsnrs.**, 260 Ill.App.3rd 765, 632 N.E.2d 1080 (1994). (Court held that the civil service commission must release the results of the preemployment psychological evaluation to the firefighter applicant-plaintiff because Illinois's Administrative Review Act provides that the commission must file an answer to the plaintiff's complaint which consists of the "entire record of proceedings" before the Board, including the evidence heard by it. "Since the results of the plaintiff's examination were part of the evidence before the Board, we hold that those results must be provided to the plaintiff as part of the Board's answer.")

**Ring v. Fox**, 56 Ohio App.2d 235, 382 N.E.2d 1159 (1977). (Appellate court ruled that results of a psychological test required by the Civil Serv. Cmsn. are not confidential. The purpose of the exam was not for diagnosis or treatment. The patient/health care provider privilege does not apply to the testing process.)

**Schroeder v. Detroit**, 221 Mich.App. 364, 561 N.W.2d 497 (1997). (Consistent with the findings of the *Roulette* court, the Michigan appeals court held that public interest in disclosure of the evaluation under FOIA was outweighed by public interest in nondisclosure. Importantly, the court reached this conclusion after noting that the city had already provided the plaintiff "with a detailed explanation of the results of the psychological evaluation" and concluding that "this explanation was sufficient to apprise plaintiff of defendant's reasons for denying him employment and to determine the reasonableness of defendant's administration of the evaluation.") **UCP**

**Stamford v. FOIC**, WL 1212439 (Conn.Super., 1999). (Connecticut court dismissed the City of Stamford's administrative appeal from a FOIA Commission's order that a rejected police applicant be provided with her psychological evaluation.) **UCP**

**Patton v. FBI**, 626 F.Supp. 445 (M.D.Pa. 1985), aff'd 782 F.2d 1030 (C.A.3, 1986). (Federal court upheld FBI's refusal to release portions of a rejected applicant's application file to him under an exemption to the federal FOIA.) **AC**

**Cleghorn v. Hess**, 853 P.2d 1260 (Nev. 1993). (The Nevada Supreme Court held that individuals examined by a psychologist to determine their suitability for employment were "patients" within the meaning of a statute requiring health care providers to make a patients records available upon request. No exception has been carved out by the legislature for police or other public safety applicants.) **AC**

**Valentin v. Bootes**, 325 N.J. Super.590, 740 A.2d 172 (Law Div.1998). (New Jersey court ordered that the preemployment and fitness-for-duty evaluation reports of a police officer are not protected by privilege and are discoverable to a citizen plaintiff who brought suit against the officer and the police department. The court limited disclosure only to the records provided by the psychologist to the employer, reasoning that the employee had to reasonable expectation of confidentiality of these records. The court expressly refused to grant access of the plaintiff to the entire file.)

**Roulette v. State Human Rights Commission.**, 628 N.E.2d 967 (Ill.App. 1993). (State police properly rejected an applicant who had "egotistical character traits" because it was probable he would have difficulty in getting along with other officers.)

**Jachyra v. City of Southfield**, #95-1009, 1996 U.S. App. Lexis 2528 (6th Cir. 1996). (Federal appeals court affirmed the rejection of a woman firefighter applicant who suffers from PTSD as a result of a rape 12 years earlier. The city's psychologist found her unsuited for a firefighter position because of continuing posttraumatic stress disorder and concluded that she would not adjust to group living situations.)

**Greenberg v. N.Y. Dept. Corr. Serv.**, 919 F.Supp. 637 (E.D.N.Y. 1996). (Federal court dismissed suit by rejected corrections applicant who was unable to exercise good judgment and perform under stress.) **UCP**

**Daley v. Koch**, 892 F.2d 212 (2nd Cir 1989). (Federal appeals court rejected a handicap discrimination complaint under the Rehabilitation Act of 1973 by a police applicant who was rejected by a psychologist for "poor judgment, irresponsible behavior and poor impulse control." The court wrote, "Appellant was screened for the job of police officer and found to hold personality traits that made him unsuitable for the position. Appellant does not qualify as a handicapped person under the Act simply because he was rejected for employment by the police department.") **UCP**

**Fragante v. City and County of Honolulu**, 888 F.2d 591 (9<sup>th</sup> Cir. 1989). (Filipino brought civil rights action against city and county after Filipino was not chosen for clerk job. The district court dismissed. Plaintiff appealed and the Ninth Circuit court held that Fragante was passed over for employment because of the deleterious *effect* of his Filipino accent on his ability to communicate orally, not merely because he had such an accent.)

#### **Useful for Competent Practice**

**Bopp v. Institute for Forensic Psychology**, 6432 N.Y.S.2d 89 (A.D. 1996). (Appellate court in New York rejected a defamation suit brought by a police applicant against a psychological testing firm. Statements were protected by a qualified privilege.)

**Jimenez v. Dyncorp Intl.**, #3:08-CV-174, 106 FEP Cases (BNA) 1780, 2009 U.S. Dist. Lexis 64187. (Federal court refused to dismiss a gender bias claim against a military contractor that rejected a police advisor applicant because she failed psychological screening. The court reasoned, "Given [the psychologist's] alleged emphasis on [the] Plaintiff's appearance, his repeated focus on her ability to handle the sexual advances of the opposite sex, his comments that her appearance would cause further problems at her duty station, and his purportedly contemptuous attitude towards [the] Plaintiff having her first child at such a young age and 'out of wedlock,' the Court finds [that the] Plaintiff has produced substantial evidence that [the employer's] reasons for not hiring her are [a] pretext for unlawful discriminatory behavior based on [the] Plaintiff's gender."

**Jordan v. City of New London**, 1999 U.S. Dist. Lexis 14289, 15 IER Cases (BNA) 919 (D. Conn. 1999). (Federal court dismissed a lawsuit by a police applicant who was "too smart" for the job. Although it may be unwise to reject persons who score high on an IQ exam, is not a denial of any federally-protected rights.)

## ***Intervention***

### **Essential for Competent Practice**

#### **PROFESSIONAL GUIDELINES**

International Association of Chiefs of Police, Police Psychological Services Section. (2009). ***Officer-involved shooting guidelines***. Alexandria, VA: Author.

International Association of Chiefs of Police, Police Psychological Services Section. (2011). ***Peer support guidelines***. Alexandria, VA: Author.

#### **CASE LAW**

**Jaffee v. Redmond**, 518 U.S. 1, 1996 U.S. Lexis 3879, 116 S.Ct. 1923. (U.S. Supreme Court recognized a psychotherapist-patient communications privilege in a police shooting case where the officer refused to let the jury learn the contents of her counseling sessions. The holding is not limited to situations in which employees and others voluntarily consult a mental health professional. Confidential communications between a licensed psychotherapist and his/her patients in the course of diagnosis or treatment are protected from compelled disclosure. Whether an employee sees a psychologist voluntarily, or is ordered to go, is not dispositive of the issue.)

### **Important for Competent Practice**

**Sehie v. City of Aurora**, 432 F.3d 749 (7<sup>th</sup> Cir. 2005). (Employer responsible for the cost of treatment and compensation to the employee for on-duty time used to engage in treatment).

**Transco Energy Co. v. Tyson**, 497 So.2d 184 (Ala. Civ. App. 1986). (Employer not required to pay for employee's psychological counseling when visits were not authorized and employee did not notify employer of planned treatments.)

**Todd v. Lexington Fayette Urban County Government**, 2009 U.S. Dist. LEXIS 115183 (C.D. KY 2009). (Employer not required to pay for employee's psychological counseling when it is for the benefit of the employee and not the employer. Treatment for alcoholism, while off-duty, was non-compensable. "The Court cannot find that while in treatment, [he] learned any skills that enabled him to become a more effective or valuable police officer." Attendance at AA meetings and psychiatric evaluations, although mandated by his employer, "does not constitute compensable 'work' under the FLSA.")

## ***Operational Consulting***

### **Essential for Competent Practice**

#### **PROFESSIONAL GUIDELINES**

International Association of Chiefs of Police, Police Psychological Services Section. (2011). ***Guidelines for consulting psychologists***. Alexandria, VA: Author.

#### **CASE LAW**

**Crowe, et al. v. County of San Diego, et al.**, #05-55467, 608 F.3d 406, 2010 U.S. App. Lexis 894 (9th Circuit, 2010). (A civil rights lawsuit was filed by individual family members as a result of an investigation and prosecution of innocent teenagers for a crime they did not commit. The trial court ruled in favor of summary judgment for the defendants, which included Dr. Lawrence Blum, the psychologist who aided the Escondido police detectives in their interrogation of the victim's innocent brother, one of the teenage suspects. The Court concluded, "The record shows that the quality of Blum's involvement in the interrogations is not categorically inconsistent with a tacit 'meeting of the minds.'" The Court pointed out that the "plaintiffs' theory of liability as to Blum is that he conspired with the Escondido police and is thus liable for unconstitutional acts committed by other defendants. A private individual may be liable under section 1983 if [he] conspired or entered into joint action with a state actor.")

**Christiansen v. City of Tulsa**, 332 F.3d 1270 (10th Cir. Okla. 2003) (If the state restrains an individual's freedom to act to protect himself or herself through a restraint on that individual's personal liberty, the state may thereby enter into a "special relationship" during

such restraint to protect that individual from violent acts inflicted by others. Absent involuntary restraint, however, no duty to protect arises under the special-relationship theory. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament, but from the limitation which it has imposed on his freedom to act on his own behalf.) **AC**