

# LEGAL NEWS AND HIGHLIGHTS

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## FITNESS FOR DUTY CASE

In *Department of Fair Employment and Housing v. Avis Budget Group* (October 19, 2010), an employee won a large award (\$89,000) against Avis Budget Group. Avis used a fitness for duty examination as an excuse to fire the employee. This case may assist you in representing employees with fitness for duty or reasonable accommodation issues.

DFEH brought an action against Avis for failing to reasonably accommodate a mentally disabled employee. The employee suffered from post traumatic stress disorder. She had been subject to domestic abuse for years.

The employee was a customer service representative for Avis at the San Francisco Airport. She requested a six-hour shift to accommodate for her mental disability. She was previously granted the accommodation without any problems, and she succeeded in her job. Then Avis decided to place her on unpaid leave and requested medical documentation. The employee provided:

- medical documentation, including her diagnosis,
- the reasons for the accommodation, and
- the reasons why this shift would allow her to perform the essential functions of the job.

However, **the employee refused to agree**

- to open all of her medical records to the employer, and
- refused to allow the employer open access to her treating psychiatrist.

Avis decided that the documentation was inadequate. Avis did not give the employee an opportunity to add to the doctor's information. Five months after she was placed on unpaid leave, Avis obtained an independent medical opinion that agreed with the employee's doctor that she could perform the job. Avis agreed to grant the accommodation, however it placed the employee on a greatly reduced work schedule that removed her from eligibility to bump, and then laid her off the following month.

The Fair Employment and Housing Commission found that Avis:

- made unlawful inquiries about the employee's disabilities,
- failed to engage in the interactive process,
- denied a reasonable accommodation and
- failed to take all reasonable steps necessary to prevent discrimination.

(Gov. Code §12940(f), (k), (m) and (n))

## **Fitness for Duty Examinations in Schools**

School districts may use improper fitness for duty examinations and may ask for unreasonable access to an employee's medical records to get rid of employees.

### **In a disability case, Attorney Sonja Woodward and LRR Henry Soria recently worked together to save a classified employee's job.**

The employee did not show up for work, and then brought in a doctor's note that initially restricted him from driving. The district insisted that he come to a meeting while on sick leave. At the meeting, the employee told the district some of his symptoms. The district pressured the employee to resign or be fired. The doctor's note gave medical information that raised a question that the employee might not be able to perform the essential functions of the job.

### **The LRR Gets Involved**

The employee then obtained a doctor's note with a full release to return to work without restrictions. The employee also contacted his LRR. The district insisted on a fitness for duty exam. The LRR contacted the Legal Department. The district refused to clearly identify why it believed the employee might be unable to work. District demanded a full medical examination, not limited to the employee's particular physical issue.

The LRR told the district: that the exam must be limited to the district's area of concern related to the job, and that the employee will not go to an unlimited fitness for duty exam unless the district orders him to do so under threat of discipline.

That district stated in writing that it is concerned about the employee's ability to perform the essential functions of his position because of his demeanor during the meeting. The district claimed to be "gravely concerned" about his physical condition. The letter stated that the employee appeared to be "physically impaired" and his "slurred speech made it difficult to understand" him, and that his "change in affect was marked from" his "usual demeanor." The district also stated "based on your condition, it appeared that you were unable to perform your job functions." The district ordered him to appear at a fitness for duty examination on threat of discipline.

The employee went to the appointment with the district's doctor. The doctor insisted on a general release and full access to medical records. The employee told the doctor that he was participating in the examination under protest and he does not believe he is required to provide the doctor access to his medical records. The employee repeated that he would take any tests or exams required so that the doctor could make his own conclusions. The employee explained his understanding that the doctor would limit the exam and opinion to the employee's ability to perform the essential functions of his position.

The doctor asked the employee the cause for his absence. The employee said that a diagnosis had not been established by his treating physician. The employee offered to participate in any tests

requested by the doctor to examine his condition and arrive at a conclusion using his own tests and exams paid for at district expense. He also offered to provide on request written verification from his own doctor that the cause of his absence was undetermined. The employee offered to provide the district's doctor with a signed copy of a release prepared by CSEA, if requested. The district's doctor refused CSEA's release and said that he required complete access to his medical records. The doctor declined to actually perform an examination of the employee.

The district asked the employee to "please promptly provide" his "treating doctor with the necessary authorization to allow" the district's doctor to review his medical records and to speak with his treating physician so that the district's doctor could "conclude his examination and provide" the district with his opinion. The employee declined to provide a blanket release.

**Note in *Department of Fair Employment and Housing v. Avis Budget Group*, discussed above, requiring a blanket release is one of the elements found to be a violation of the law.**

The LRR wrote an excellent letter back to the district laying out the history of these events and educating the district about the employee's rights. The letter explained:

- That it was inappropriate to use observations of the employee at the time he was on sick leave and under the care of his treating physician to justify a fitness for duty examination *after* his doctor had released him to return to work.
- That, since the district's doctor did not actually perform an exam but instead insisted on full access to the employee's medical records, it appeared that the district was on a fishing expedition to determine whether the employee had a disability and what the disability was. This is prohibited by the Americans with Disabilities Act and the Fair Employment and Housing Act.
- That the California Family Rights Act allows a district to require a fitness for duty examination of an employee returning to work after a medical absence only if it has a uniform policy of doing so. (2 CCR Section 7297.4(b)(2)(E).)

The LRR stated that CSEA and the employee take the district's directive to provide a blanket release as optional and that the member was declining to provide it.

Once an employee has been hired, the employer may only require examinations that are job-related and consistent with business necessity (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, *cert den.*, 522 U.S. 807.)

***While the district continued to say that its position was legally supportable, it backed down and said it would accept a return to work notice from our member's own doctor.***

**Practice Pointer:** Contact the Legal Department as early as possible for assistance with fitness for duty issues.

**Practice Pointer:** Have the employee provide a note from his or her treating physician stating that the employee is fit for duty as soon as possible in the process.

**Practice Pointer:** Educate your members about their rights before the fitness for duty examination. Do not have a member sign a blanket release of their medical records.