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CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police
From: Martin J. Mayer, Esq.

**RIGHTEOUS FITNESS FOR DUTY EVALUATION
VIOLATES NO EMPLOYEE RIGHTS**

On September 3, 2014, the First District CA Court of Appeal unanimously affirmed the right of an employer to order an employee to cooperate in a fitness for duty evaluation (FFDE) when circumstances call for it. [The court refers to a “FFD” rather than a FFDE.]

In the case of *Kao v. University of San Francisco*, 229 Cal. App. 4th 437, the Court of Appeal held that neither the FFDE order by the University, nor his termination as a professor for refusing to appear for the evaluation, violated the Fair Employment and Housing Act (Gov. Code, § 12900 et seq. (FEHA)), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), or the Confidentiality of Medical Information Act (Civ. Code, § 56 et seq.).

Kao alleged all of the above and, in addition, asserted causes of action against USF for violation of his right to privacy (Cal. Const., art. 1, § 1), and against USF and its Assistant Vice President for Human Resources, Martha Peugh-Wade, for defamation; those claims were also rejected.

Facts

Dr. John Kao earned a Ph.D. in applied mathematics from Princeton, began teaching mathematics at USF in 1991, and became a tenured professor in 1997. Kao was concerned about a lack of diversity of the faculty of the math and computer science departments, and submitted a 485-page complaint to the school in May 2006 alleging race-based discrimination and harassment. He lodged a 41-page addendum to the complaint in August 2007, to which Assistant Vice-President Peugh-Wade responded in September 2007. Kao was not satisfied with Peugh-Wade's two-page response, which he said did not offer any remedies for the problems he perceived with the way the school recruited new faculty.

Subsequently, several professors testified, among other things, to disturbing behavior by Kao at a February 2008 faculty search committee meeting. Professor Paul Zeitz described Kao as having an "uncontrolled rant about things that made no sense . . . coupled with . . . changes in body language, changes in posture and changes in demeanor. It was very upsetting and very scary for me."

Professor Steven Yeung said that Kao was "yelling" and "standing up and leaning towards people" at the meeting, and he was "afraid that it would be not just verbal but get physical." Professor Tristan Needham said that Kao threw papers across the table, and "it was pretty intimidating," and Professor Stephen Devlin said that Kao was "shaking with anger" and "screaming" at the meeting.

Kao's disturbing behavior continued throughout the spring semester and USF began investigating the situation in January, 2009. On January 22, Dean Turpin contacted Paul Good, a clinical and forensic psychologist who testified that USF "was looking for some input on an educational level about markers for violence or things to look for that might suggest an escalation of hostilities . . . and how best for the institution to respond."

Good had a meeting with Turpin and Peugh-Wade on February 12 "about predicting violence, explaining risk factors such as psychopathy and narcissism and other risk prediction schemes that might be related to their issues with Dr. Kao"

On May 20, Peugh-Wade and several colleagues met with forensic psychiatrist James Missett, an expert on threat assessment and fitness-for-duty evaluations. Missett testified that USF was required to provide a campus where people could safely work, and had "an affirmative obligation to take action with respect to Professor Kao." He believed that the action "that appeared to offer both [USF] and Professor Kao the most in a way of . . . a possible good outcome would be [a FFD]."

"Missett explained that a FFD is confidential, and no psychiatric diagnosis can be disclosed to the employer. The evaluator can only tell the employer whether

the employee is fit to perform the job, not fit, or fit with accommodation. Missett recommended three doctors who would be qualified to perform an FFD of Kao. Peugh-Wade contacted the three doctors, and selected Dr. Norman Reynolds, whom Missett had recommended the most highly."

Peugh-Wade met with Kao and his attorney on June 18. Peugh-Wade gave Kao a letter labeled "Draft -- Discussion Item," which contained a description of his behavior. The letter stated the University could proceed in several ways, including requiring a FFDE.

The letter concluded: "Once again, before making a final decision, the University, through me, would welcome explanations, information or anything else you and/or your attorney wish to provide that may assist us in fulfilling our duties as an institution of higher learning. We want to proceed thoughtfully and with respect for you, as well as for all others on the campus."

In a letter dated June 24, Peugh-Wade put Kao on a "leave of absence without duties," prohibiting him from being on campus while on leave, and directing him to participate in a FFD by Reynolds on July 1. Kao's counsel responded at length in a letter dated June 26, and advised that Kao would not attend the FFD.

There were many efforts undertaken by the University to secure Kao's cooperation, but they all failed. As a result, Dean Turpin terminated Kao's employment in a February 3 letter for his failure "to carry out the work-related instructions of the University to cooperate with an independent medical evaluation."

Kao filed suit and the court granted a nonsuit against Kao on the defamation cause of action, and a jury ruled against him on his other claims. Kao appealed the judgment on

multiple grounds, but his principal contention was that USF could not lawfully require the examination.

Discussion

The Court of Appeal noted that “Kao's central contention in this appeal is that USF had to engage in an interactive process before it could refer him for a FFD. But in the circumstances presented here, no such interactive process was required. FEHA permits an employer to require a medical or psychological examination of an employee if it can show that the examination is ‘job related and consistent with business necessity.’ When a disability is not obvious, the employee must submit ‘reasonable medical documentation confirm[ing] [its] existence.’ Kao did nothing of the sort. No interactive process was necessary, and there is no substance to Kao's argument that USF improperly failed to participate in that process.”

“Kao also contends that USF did not present substantial evidence that the FFD was ‘job related and consistent with business necessity’ as required by Government Code section 12940, subdivision (f). A FFD 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.’ Multiple people reported multiple instances of threatening behavior on his part. USF's decision to require him to have a FFD was based on expert advice, and USF presented unrefuted expert testimony that a FFD was appropriate under the circumstances.”

“There is a ‘business necessity’ for a FFD if ‘the need for the disability inquiry or medical examination is vital to the business.’ USF unquestionably has a duty, as its consultant Missett testified, to

maintain a campus where people can safely work. The jury heard testimony that Kao frightened school administrators and that his behavior cast a pall of ‘fear and confusion’ over the math department. The jury could reasonably find that it was vital to the university's business to obtain an independent assessment of his fitness for duty.”

“Kao argues that, by banning him from campus, USF violated the Unruh Civil Right's act prohibition against disability discrimination (Civ. Code, § 51, subd. (b)). This contention hinges on Kao's claims that ‘the ban arose from a perception that [he] suffered from some mental disability that made him unusually dangerous and unpredictable,’ and that there was ‘no evidence of any actual danger -- just USF's subjective perceptions.’ These claims are untenable. The evidence did not as a matter of law establish that USF had a discriminatory motive in keeping Kao away from campus.”

“Kao also argued that USF violated the Confidentiality of Medical Information Act (CMIA) by firing him for ‘exercise of rights under the CMIA to refuse to release medical information’ to Reynolds for the FFD. The jury was instructed that if Kao proved his refusal to authorize release of confidential medical information for the FFD was ‘the motivating reason for [his] discharge,’ USF ‘nevertheless avoids liability by showing that . . . its decision to discharge Kao was necessary because John Kao refused to take the FFD examination.’ The evidence described above that supported findings that the FFD was job related and consistent with business necessity also supported a finding that his discharge was ‘necessary’ within the meaning of Civil Code section 56.20, subdivision (b) because of his refusal to release the medical information required for the FFD.”

HOW THIS AFFECTS YOUR AGENCY

USF did everything an employer should do when confronted with concerns about the fitness of an employee to safely carry out his or her job duties. When informed by a number of USF employees of numerous concerns regarding Kao's behavior, and about his disturbing and threatening actions towards them, the University initiated an internal personnel investigation.

Following the investigation, the University consulted with a psychologist to secure guidance on how to proceed with the matter. Based on all of that, USF placed Kao on administrative leave and ordered him to submit to a FFDE. They met with Kao and his attorney, explained the reason for the FFDE and, when he refused to participate, informed him that he would be terminated under those circumstances.

The University was not obligated to engage in an "interactive process," because it is required under FEHA only when there is an issue of disability involved. The Court noted that "Kao never acknowledged having a disability or sought any accommodation for one."

The Court concluded that the FFDE was appropriate because it was job related, there was a business necessity, and it was tailored to assess the professor's ability to carry out the essential functions of his job and to determine if he posed a danger to other employees based on his actions. The University had a duty, as does any employer, to provide a safe workplace and investigate whether an employee posed a danger or threat to others.

If any employer is confronted with a situation similar in nature to the one presented in this case, following the process utilized by USF will protect it from allegations of discrimination if it orders the employee to submit to a FFDE. As in all matters involving the law, it is important to seek out legal advice from your agency's designated attorney. That applies in this situation as well.

As always, if you wish to discuss this case in greater detail, please feel free to contact me at (714) 446 – 1400 or via email at mjm@jones-mayer.com.

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