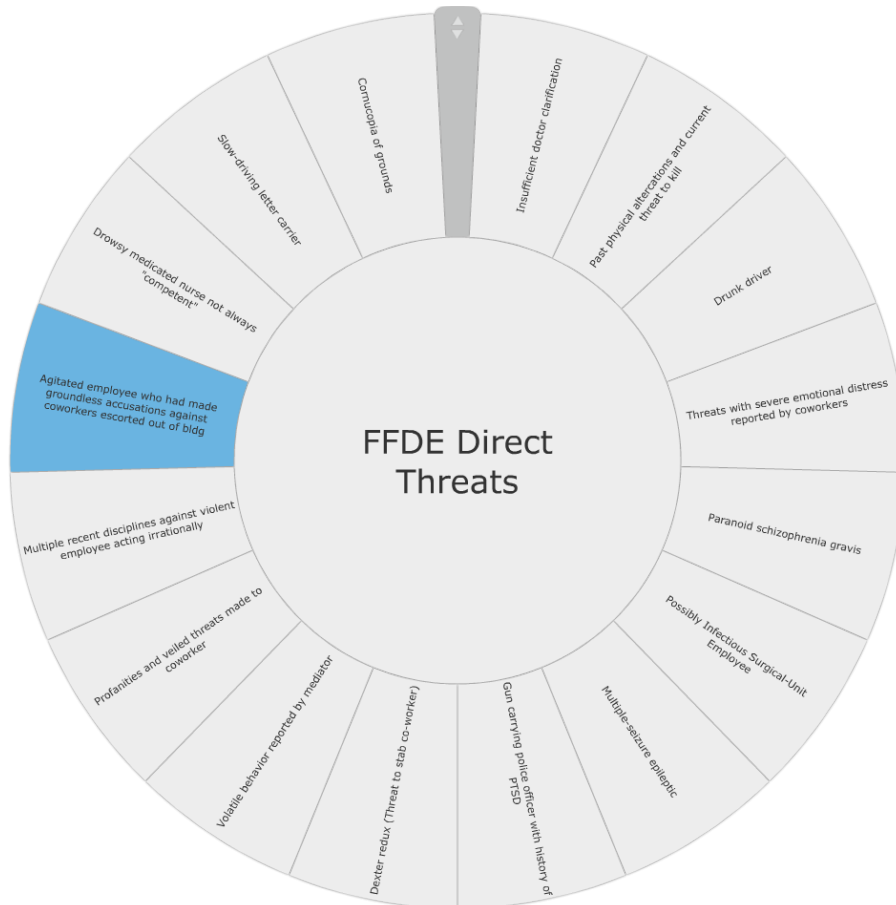


FITNESS-FOR-DUTY EXAMINATIONS UNDER THE REHABILITATION ACT OF 1973

DIRECT THREATS



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FFDE: Direct Threats

Preface

In this installment of *Medical Privacy under the Rehabilitation Act of 1973*, I review those appeals decided by the Equal Employment Opportunity Commission in which the Commission affirmed agency final decisions with findings of no discrimination on formal complaints of discrimination in which complainants claimed that the agency had improperly ordered them to submit to fitness for duty examinations because the agency believed they posed a direct threat to themselves or others.

As discussed in previous installments, the Rehabilitation Act places certain limitations on an employer's ability to make disability-related inquiries or require medical examinations of employees. An employer may make a disability-related inquiry or require a medical examination of an employee only if the inquiry or examination is job-related and consistent with business necessity. See *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act*, No. 915.002, at 5 (July 27, 2000) ("Guidance"). This standard is met when the employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions is impaired by a medical condition; or (2) that an employee poses a direct threat due to a medical condition. See *id.* at 6-9. Objective evidence is reliable information, either directly observed or provided by a credible third party, that an employee may have or has a medical condition that will interfere with her ability to perform essential job functions or will result in a direct threat. *Id.* at 7. Where the employer forms such a belief, its disability-related job inquiries and medical examinations are job-related and consistent with business necessity. *Id.*; see *Janise v. United States Postal Service*, EEOC Appeal No. 01A13359 (September 19, 2002). The burden is on the agency to show that one of the criteria justifying the inquiry or examination was met. *Hampton v. United States Postal Service*, EEOC Appeal No. 01986308 (July 31, 2002).

In deciding the appeals discussed herein, the Commission rarely cited its own decisions as precedent for the rules it applied, but instead relied almost invariably on its Guidance, which it quoted at length. For that reason, the reader should assume that in each decision, the Commission applied rules approximating those set forth in the immediately preceding paragraph. The reader should concentrate on the Commission's statement of facts, which I have condensed as much as I could without losing the drift of the story the Commission intended to tell. Please be forewarned that the factual recapitulations are sometimes lengthy because I did not want to omit facts that may have subtly affected the outcome of the decision.

In the "Comment," after most decisions, I discuss the values that competed for the Commission's attention---safety versus privacy, for example---and the interaction of the facts of the case with those values to produce the outcome that the Commission reached. This analysis is not mind-numbing legal doggerel; rather it is lively and pithy guidance for the busy manager to consider before ordering her employee to submit to an FFDE: fitness-for-duty examination. In some Comments, I don't discuss the Commission's decision at all, especially when its "moral" is easily grasped. Instead, I will think out loud

about an implicit but important issue: e.g., if the FFDE report is likely to be drivel, why order the employee to submit to the exam in the first place? In the Comment to the last case, I admit, among other things, that I am an alien from another planet, practicing law in New Jersey. It's side splitting.

Paranoid schizophrenia gravis

Vivian R. Moss v. John Ashcroft, EEOC Appeal No. 01993351 (December 28, 2001)

In January, 1995, complainant, a Computer Specialist with the FBI, temporarily moved to a hotel because she was hearing voices while in her apartment. On March 22, 1995, she wrote a letter to the supervisory Special Agent (SSA), who served as the agency's Chief, Personnel Administration and Benefits Section, in which she stated that she heard a voice of a person, who identified himself as working for the agency and informed her that a telecommunications device was being used on her. She also notified the SSA that this person had tried to enlist her in a mission to steal secrets, had threatened her, and had sent her tape recordings infected with the AIDS virus. On April 2, 1995, complainant advised her supervisor that she was again hearing voices, as a result of which she was referred to a psychiatrist (doctor 1) in the agency's Employee Assistance Program for an emergency psychiatric assessment.

Doctor 1 diagnosed complainant as suffering from a possible psychotic disorder and recommended that the agency remove her from work immediately and require her to submit to a full psychiatric evaluation as soon as possible. During a meeting that the SSA held to place her on sick leave, complainant complained about an FBI mind-reading machine and an FBI special agent with AIDS who was "trying to get her." Complainant was subsequently evaluated by a private psychiatrist (doctor 2) to whom she was referred by her internist. Doctor 2 prescribed medication and scheduled a return visit, but complainant refused to attend the subsequent appointment. On April 14, 1995, complainant called the SSA and advised him that she was still hearing voices and was hiring a lawyer to find out what the agency was doing to her.

On April 24, 1995, complainant was denied access to the agency headquarters building when she claimed that she could hear the pigeons talking and she was recording her conversation with agency officials with a public transportation fare card. By letter dated April 26, 1995, the agency notified complainant that she was required to provide medical certification of fitness for duty before she could return to work. In response, doctor 2 prepared a letter to the agency dated May 10, 1995, stating that he had prescribed medication for complainant and that he believed she could return to work effective May 15, 1995.

The agency claimed it had not received doctor 2's letter. Accordingly, when complainant again tried to enter the headquarters building on May 15, 1995, she was again denied access. The SSA, complainant's supervisor, and an administrator from the health-care unit were called to meet with complainant. When they explained that she could not return to duty without a doctor's report or an assessment that she was fit for duty, complainant became belligerent and threatening, at one point saying to the health-care unit administrator, "I'll take you down with the rest of them."

On August 30, 1995, doctor 3, an agency social worker associated with doctor 1, examined complainant and found that her paranoid ideations had not abated and now included her delusions about a “dream machine” and “radio frequency signaling” operated by the agency.

In October, 1995, doctor 2 wrote a letter to the agency again stating that he believed complainant could return to work. He stated that complainant had advised him that she had not taken her medication for two months and had not experienced any more symptoms, delusions, or hallucinations. Doctor 2 found that complainant’s diagnosis at this juncture was “Schizophreniform Disorder, Resolved.” Doctors 1 and 3 then examined complainant, but both disagreed with doctor 2, and found complainant still not fit for duty. Accordingly, on December 26, 1995, the agency ordered complainant to undergo an FFDE by yet another doctor to resolve the difference of opinions. This examination was conducted on February 6 and 7, 1996, by doctor 4, an Emeritus Professor of Psychiatry at the University of North Carolina at Chapel Hill. By letter dated February 19, 1996, Doctor 4 concluded that complainant was not fit for duty, giving an extensive recounting of his sessions with complainant. In particular, doctor 4 noted that complainant had a “massive distortion of reality” that could lead to violent behavior, as evidenced by her specific statements to doctor 4 regarding possible violence against at least one agency official. Doctor 4 specifically concluded that complainant could be a danger to other agency employees.

On March 7, 1997, the agency sent complainant a letter requesting updated medical information and notifying her that she could not return to work until this documentation was received. The agency sent complainant this letter to determine whether complainant was a “qualified individual with a disability” who could be accommodated under the Rehabilitation Act rather than be terminated. Complainant was subsequently evaluated by doctor 5, a psychiatrist whom she selected. Doctor 5 issued an interim report to the agency stating that complainant had “paranoid delusions” involving the agency, had a cognitive impairment, and was not fit for duty. By letter dated September 30, 1997, the agency advised complainant that doctor 5’s final report had not been received, and that if it was not received by October 10, 1997, a determination regarding whether she could return to work pursuant to the Rehabilitation Act would be made based on the doctor 5’s interim report and doctor 4’s February, 1996 report, both of which concluded that complainant was not fit for duty. The agency did not receive a final report from doctor 5, and by letter dated December 15, 1997, the agency advised complainant of her proposed removal.

In her formal complaint of discrimination, complainant alleged that she was discriminated against based on disability (schizophreniform disorder) when, by letter dated March 3 [?], 1997, she was not allowed to return to work pending the agency’s receipt and consideration of a current medical evaluation requested from her. After receiving the investigative report, complainant requested the agency to issue a final agency decision (FAD).

In its FAD, the agency concluded that the March 7, 1997 letter complainant challenged did not constitute an “adverse action” subject to challenge under the Rehabilitation Act, and further that complainant had not established that she was a “qualified” individual

with a disability under the Act. On appeal, complainant submitted “extensive lists of dictionary definitions of various terms,” copies of some of her performance appraisals, and other documents. The Commission affirmed the agency FAD.

In its appellate decision, the Commission found that the agency’s disability-related inquiries and medical examinations were permitted because the agency had a reasonable belief that complainant’s present ability to perform essential job functions was impaired by a medical condition and that she posed a direct threat due to a medical condition. Specifically, the Commission found that although one doctor had found complainant fit for duty, three doctors had found her unfit when the agency sent complainant its March 7, 1997 letter requesting current medical information. At the time it sent the March 7, 1997 letter, as it had continually since January 1995, the agency had a reasonable belief that complainant’s impairment would affect her ability to perform the essential functions of any job, or pose a direct threat to safety, and it therefore did not violate the Rehabilitation Act for the agency to request a current medical assessment of fitness for duty.

Comment: Ordinarily, the Commission does not permit the agency’s examiners to debate the employee’s so long as the employee’s give a cogent medical or psychological explanation why the employee is fit to return to work. Here, because complainant’s doctor’s opinion was so palpably wrong, the Commission agreed that the FBI had grounds to disregard it and insist upon a soundly-reasoned return-to-work certification, which was not forthcoming.

I believe that the Commission’s extensive recitation of the facts alerts the reader to consider this decision as the rare case in which it would tolerate a disagreement among the medical experts.

Possibly infectious surgical-unit employee

Deborah D. Norton v. R. James Nicholson, EEOC Appeal No. 01A51018 (February 21, 2006)

Complainant was employed as a Patient Service Assistant at the VA Medical Center in Marion, Illinois. She filed a formal complaint alleging that she was subjected to a hostile work environment due to discrimination based on her disability (spina bifida) beginning in May 2003 and continuing to present, as evidenced by among other incidents the following:

- On June 4, 2003, complainant was told that she needed to bring a physician’s statement addressing whether or not she was an infectious risk. On or about May 28, 2003, June 9, 2003 and July 8, 2003, she submitted statements from her physician indicating that she was not an infectious risk.
- In a meeting on June 4, 2003, complainant was given a Report of Contact concerning her hygiene. She was informed that she must bring in a physician’s statement and she was forced to give an oral response in front of people she did not know regarding private and personal information.

Complainant filed an appeal to the Commission from the agency’s final decision which found no discrimination. The Commission affirmed the agency’s decision.

In affirming the agency's decision, the Commission found that when management requested doctor's notes from complainant, they had a reasonable belief, based on objective evidence (a May 11, 2003 doctor's note saying that complainant was off work due to cellulitis, and a May 28, 2003 medical note indicating that complainant may have some level of infection) that complainant posed a direct threat due to a medical condition, particularly because she was working in a Medical/Surgical/ICU area where patients are acutely prone to infection. The May 28, 2003 doctor's note stated "[Complainant] should be able to continue her present position without a greater risk of infection to herself or others. Her wound is healing without complications." The Nurse Manager stated in her affidavit in the ROI, however, that "cellulitis is an infectious process. Cellulitis is a reddening of tissue. It can be and most always is draining. You usually run fever with it. You can have red streaks, which are a sign of infection associated with it. So it's definitely an infectious disease process." The Nurse Manager further stated that she would have required more information from any individual with an infectious illness. Based on the two doctor's notes, the Commission found that it was reasonable for management to request more detailed information. In a doctor's note dated June 9, 2003, complainant's doctor briefly described complainant's medical condition and noted "Since she keeps her wounds covered and does not have a contagious illness, she poses no infectious risk to patients." The Nurse Manager explained that although the June 9, 2003 letter did state that complainant was not infectious, she was not satisfied because a previous statement noted that complainant occasionally had open decubitus ulcers and bowel and bladder incontinence and that was a "red light" for working on a surgical floor. Accordingly, the Commission found that it was reasonable for management to have requested more medical documentation. In the July 8, 2003 doctor's note, complainant's doctor addressed the decubiti and the bladder and bowel problems, and also went so far as to state "This patient poses no increased risk over the average person." Management was satisfied with this letter and did not request more medical documentation. The Commission noted that there were no additional meetings called to discuss complainant's medical condition after the July 8, 2003 letter was received and concluded, "Here, we find that the agency's disability-related job inquiries and medical examinations were job-related and consistent with business necessity."

Comment: *Moss* and *Norton* represent exceptions to the rule that once the employee's physician certifies that the employee is fit to return to duty, with something more than a net opinion, the agency's physicians are not permitted to engage in a never-ending debate with the employee's physician about the accuracy of her opinion that the employee is fit to return to duty. In *Moss*, the employee's psychiatrist's opinion was outnumbered by three contrary opinions, one from an emeritus professor of psychiatry. In *Norton*, because of the grave risk to patient safety of allowing an employee in the surgical unit to return to work with her infection possibly not in check, the Commission permitted the Nurse Manager to insist on getting assurances from complainant's physician on the specific medical concerns she had about complainant spreading her infection to vulnerable surgical patients. The Commission's formula was simple: the greater the magnitude of the risk to patient safety, the greater the intrusion permitted into the medical privacy of the employee creating that risk, especially when the employee's physician failed to answer straightforwardly the Nurse Manager's spot-on questions about employee's risk of infecting the surgical-unit's patients.

I recapitulated the Commission's extensive discussion of the facts because I want to emphasize that, for the manager looking for guidance on ordering FFDEs, there is no substitute for matching the facts of her case to a Commission case, ascertaining the result---what the Commission allowed or disallowed--- and then applying the Commission's reasoning to her case. Yes, I understand that is what is taught in law school, but a manager does not have to go there in order to reason by analogy well enough to make sound personnel decisions.

In sum, you cannot discern the moral of the story if you have not mastered the story's facts.

Multiple-seizure epileptic

Judith Rogan v. John E. Potter, EEOC Appeal No. 01A13388 (September 23, 2003)

An epileptic hired under the agency's program for employing the severely disabled, complainant was performing manual mail distribution duties, was working days rather than nights to avoid exacerbation of her seizures, and was sitting on special chair with arms to decrease the likelihood of falling if she had a seizure. In February 1998 and October 1998, complainant had a seizure at work during which she lost consciousness; she had others in which she did not lose consciousness. Sometime in 1999, the Commission does not say when, she was hospitalized because of her seizures. On March 26, 1999, complainant's union representative faxed to the facility's health unit a letter from complainant's neurologist stating that she could return to work on March 25, 1999. The health-unit physician stated that the documents sent by complainant's representative were insufficient to meet the agency's requirements to permit complainant to return to work following a seizure. Complainant then underwent an FFDE, which the supervisor had previously ordered, and the physician performing the examination stated that complainant was a hazard to herself or others and that her seizures were not under "good control." The health-unit physician stated that, after reviewing the FFDE report, he concluded that complainant was unable to return to duty as of May 6, 1999. By letter dated July 9, 1999, complainant's physician addressed the frequency and control of complainant's seizures and the level of her medications and further stated that her consumption of two beers per day was not a cause for concern. After several additional rounds of letters between complainant's physician, the agency's physician, and the physician who performed the FFDE on complainant's fitness to return to work, complainant returned to work on October 1, 1999.

Complainant filed a formal complaint of discrimination alleging that the agency had discriminated against her because of her physical disability when the agency did not allow her to return to work on April 30, 1999---apparently one date on which her own physician had cleared her to return to work. A Commission AJ conducted the hearing that complainant requested and wrote a decision with a finding of no discrimination. The agency adopted that decision in its FAD and complainant appealed to the Commission. The Commission affirmed the FAD.

In its appellate decision, the Commission found that the agency had a reasonable basis to believe that complainant's frequent seizures and loss of consciousness on the job might pose a direct threat to her health and safety. Significantly, the Commission noted that it

“has held that an employer may require a medical examination by a health care professional of its choice whenever the employer has a reasonable belief that an employee will pose a direct threat due to a medical condition. See Enforcement Guidance, at question 12.” The Commission therefore concluded that the agency did not violate the Rehabilitation Act in requiring complainant to undergo the FFDE.

The Commission went on to find that the agency was justified in barring complainant from returning to work during the several months which elapsed while the findings of the physician who performed the FFD examination could be coordinated with the contrary findings of complainant’s personal physician.

Comment: What was included in the Commission’s decision in *Norton, supra*, is missing from its decision in *Rogan*: a description of the surroundings in which the employee worked. Without that description, the reader cannot accurately assess just how dangerous the employee’s medical condition was to herself or others. It goes without saying that a possibly infectious employee working in the midst of surgical patients is hazardous. But was Ms. Rogan a danger to anyone but herself when she was felled by a seizure? And just how serious of an injury to herself did Ms. Rogan risk if she had a seizure? Those risk assessments cannot be made unless the reader knows something about the physical environment in which Ms. Rogan worked. The Commission does state that Ms. Rogan handled mail, but it does not state whether she was working in a post office or a mail-processing facility with conveyors and other equipment used to sort and move the mail. If complainant worked around machinery, then the Commission would have been understandably tolerant of the back-and-forth among the physicians who disagreed about complainant’s fitness to return to work. After all, the Postal Service should not assume the risk that complainant would have become entangled in a conveyor after suffering a seizure.

The Commission, moreover, does not state what was defective about complainant’s return-to-work certification or any of her subsequent medical documentation. By contrast, the Commission stated in detail what Ms. Norton’s physician had written and what the Nurse Manager had written in criticism thereof. The reader therefore knew what was deficient about the return-to-work certification and why it was deficient. And when Ms. Norton’s physician wrote a letter that was accepted by the agency, the reader knew why the agency had accepted it.

For the manager contemplating ordering an FFDE, it is dangerous and maybe even reckless to seek guidance from a case if the “storyteller” omits some of the salient facts from which the “moral” can be gleaned. Thus it goes with stare decisis.

All the same, one can fairly conclude that the Commission found it acceptable for the agency to err on the side of caution and safety before allowing complainant to return to work, especially since the third-party physician had found complainant unfit to return to work. The Commission, also, implicitly acknowledged that it takes time for three physicians to reach a meeting of the minds on complainant’s safe return to work, during which the agency could make complainant stay out of work.

Gun-carrying police officer with history of PTSD

Dennis G. McKenna v. Janet Napolitano, EEOC Appeal No. 0120092051 (October 28, 2010)

Complainant was an Immigration Enforcement Agent (IEA), assigned to Immigration and Customs Enforcement (ICE), Office of Detention and Removal Operations (DRO) in Miami, Florida. Complainant was reassigned from New York City, New York to Pembroke Pines, Florida in June 2002, while working for the Immigration and Naturalization Service (INS), Border Patrol. In March 2003, upon the creation of the Department of Homeland Security (DHS), there was a mass transfer of personnel from INS to DHS, at which time he was reassigned, on paper, to ICE. However, for approximately three more years he worked directly for U.S. Customs and Border Protection (CBP) while employees were being slowly transitioned from legacy agencies into the new agencies created under DHS. On December 6, 2006, Complainant was directed to report to the Miami, Fla. DRO office for duty. On October 17, 2005, while still working for CBP, complainant had a heated confrontation with several of his supervisors, during which time he began to experience chest pains. Since this incident at CBP, complainant had been out of work and receiving FECA benefits for post-traumatic stress disorder (PTSD) and major depression. Thus, complainant had never reported to work in a Miami DRO office. Due to his PTSD, which was first diagnosed in 1993, complainant was out of work for a year.

Complainant first requested an accommodation on June 1, 2006, in a letter from his physician, (P1). In the request, P1 stated that complainant was suffering from PTSD and was “temporarily totally disabled.” P1 stated that complainant needed a “transfer to a new location under new supervisors who will not be associated with the current crisis.” P1 also gave an expected return to work date of July 31, 2006. On August 2, 2006, complainant submitted another letter from P1. In this request P1 stated that complainant was “temporarily totally disabled.” P1 stated that complainant needed to transfer to a new location under different supervisors. P1 also gave an expected return to work date of October 31, 2006. On August 25, 2006, the agency sent a letter to complainant requesting medical information regarding his condition. The letter contained 14 questions for his health-care provider to answer along with the position description for the IEA. The agency requested that complainant provide the information by September 15, 2006. On October 11, 2006, the agency again requested medical information regarding complainant’s condition. In a letter dated October 31, 2006, complainant responded to the agency’s August 25, 2006, communication. The response from P1 included that complainant was suffering from PTSD. P1 also stated that complainant was unable to perform any of the functions of his current position and unable to perform any other duty.

On January 19, 2007, complainant made an unscheduled and uninvited visit to ICE headquarters in Washington, D.C. and attempted to meet with the Assistant Secretary for ICE. Management officials in Washington, D.C., including the Chief of Staff, Acting Deputy Chief of Staff and Staff Officer of Intelligence Operations, spoke with complainant on January 19, 2007. These employees at the Washington, D.C. headquarters described complainant’s behavior as unusual and based on their personal observations suggested to the Miami Field Office Director, that complainant undergo an FFDE

examination. Specifically, the Washington, D.C. employees indicated that the complainant “discussed various topics with no clear direction” such as (1) his dissatisfaction with the ICE Officer badge; (2) his history in New York with INS which included an alleged sighting of Osama Bin Laden in Brooklyn and (3) a conspiracy against him that originated with former Border Patrol Agents. These employees also noted that although they were “not trained to evaluate physiological disorders,” they could not characterize complainant’s “behavior as normal.” This conclusion was based, in part, on the fact that of the 4,500 personnel that comprised the DRO, complainant was the only staff member who bypassed the chain of command to gain access to the AS and what was perceived as complainant’s “unfounded paranoia that ICE Managers were against him.”

Following a series of independent examinations during the spring of 2007, three physicians (P2, P3 and P4) provided reports of their findings in July 2007. P2 stated in his report that complainant was “NOT FIT FOR FULL DUTY” (emphasis in original). P3 stated that complainant “should not ever carry a weapon, nor should he be relocated in an effort to acquiesce to his attempts to control his situation. A transfer of this individual would not resolve any of his underlying problems, and he would have the same difficulties no matter where he goes to.” P3 also stated that complainant’s psychological functioning “preclude him from being able to perform his duties and responsibilities . . . The responsibility of carrying a weapon and the associated physical demands of this position are beyond the current psychological capacities of the examinee.”

In his formal complaint of discrimination, complainant alleged that the agency discriminated against him on the bases of disability (PSTD), age (51), and reprisal for prior protected EEO activity under when, among other things, on April 30, 2007, he received a letter from the agency directing him to submit to an FFDE with a psychologist. Following the agency’s investigation into his claims, complainant requested a hearing before an EEOC AJ. The AJ issued a decision by summary judgment, finding in favor of the agency. The agency issued its final order fully implementing the AJ’s decision. Complainant appealed the final order to the Commission which affirmed it.

In its appellate decision, the Commission noted that the AJ concluded that the undisputed record shows that the FFDE was “job-related and consistent with business necessity” because it was based upon objective evidence that complainant could not perform the essential functions of his position due to a mental impairment. The Commission agreed, noting that the “undisputed record shows that in January 2007, Washington, D.C. employees witnessed Complainant engaging in emotionally unstable behavior that resulted in the reasonable belief that Complainant’s ability to perform the essential functions of his job was impaired.” Accordingly, the Commission found that “the undisputed record supports the finding that the ordering of a FFDE was ‘job-related and consistent with business necessity.’”

Comment: The Commission arrives at the right conclusion for the right reason even though it stretched a bit to reach its penultimate reason; namely, complainant could not perform the essential functions of his position. One might be able to mount a plausible argument that complainant’s bizarre behavior during his sojourn to HQ suggested that he could not perform the essential functions of an IAE, but he was on leave after all. Aren’t

you allowed to let your hair down even a little when you are on leave? Seriously, other than sharing his sighting of Bin Laden in Brooklyn (the Bronx would have been more believable), complainant demonstrated only an all-American distrust of his supervisors' intentions. An agency cannot reasonably conclude that an employee is psychologically unbalanced, as the agency did here, simply because he makes baseless accusations. After all, an agency could not order a union official to undergo a psychiatric FFDE every time she filed a patently frivolous grievance. Besides off-putting the union official, the agency would quickly empty its cash drawer on paying doctors. The Commission would have been better off to have forsaken the gobbledygook from its Guidance about "essential functions" and to have relied only on its regulatory precepts about "job-related and consistent with business necessity." The agency had a pressing mission need to determine if complainant lacked the psychological wherewithal to carry a gun. The need was pressing not solely because he claimed seeing Osama Bin Laden in Brooklyn, among other bizarre claims he made during his meeting with HQ personnel, but also because he had a long history of severe psychological instability which the Commission recounted in excruciating detail, but then abandoned in its ratio decidendi. In the end, the examiners found him unfit to carry a gun, which is why I included this case among the direct-threat cases.

This may be a case of consequences justifying their antecedents. One may reasonably suspect that the Commission believed that its hands were tied once some of the evaluators held that complainant was unfit to carry a gun. What was the Commission going to do with that finding? Look backwards and say that the FFDE that produced unimpeachable results of complainant's unfitness was unwarranted to begin with? The lesson is that, if a manager is going to order an FFDE, the results of the exam better confirm that she was right to have ordered it.

Dexter redux (Threat to stab co-worker)

Melody E. Munford v. John E. Potter, EEEOC Appeal No. 0120071416 (March 31, 2009)

Complainant worked as a Mail Processing Clerk at the agency's Phoenix Processing and Distribution Center in Phoenix, Arizona. On May 9, 2005, one of complainant's co-workers (C1) complained that she was threatened by complainant. C1 provided a written statement describing complainant as threatening and "very vocal." According to C1, she and two other employees were working on a machine. After C1 had been unloading the ledges for approximately 45 minutes, she asked complainant if she would mind rotating to console #1 so that C1 could try to keep consoles #2 and #3 running. According to C1, complainant immediately told her in a very loud voice and in a rude manner that C1 was not her supervisor and that C1 could not tell her what to do or force her to move or do anything. To avoid a confrontation, C1 moved on to console #1, yet complainant kept on screaming and yelling at her. C1 stated that she ignored complainant while C1 was loading and running console #1 and #3. After about 15 minutes of hearing complainant yelling and trying to provoke her, C1 stated that she asked complainant to stop talking to her. C1 stated that she told complainant she could do whatever she wanted to do and that C1 would work around her. According to C1, complainant then threatened her by stating, "It's just too bad that I'm not allowed to have any sharp objects or I would use it on you."

C1 found this statement very upsetting and informed her supervisor of complainant's outburst.

While another co-worker was able to calm complainant down, C1 notified management that complainant later gave her a "dead stare" and made threatening hand gestures toward her continuously throughout the day. C1's characterization of the incident was corroborated by a co-worker. When management asked complainant if she threatened C1 in any way, complainant denied it, saying that she stated only that she was not allowed to have sharp objects on the work room floor. The record also shows that complainant admitted to S1 that she had stopped taking her prescribed medications of Zoloft and Paxil.

S1 testified that she sent complainant for an FFDE based on statements from her fellow employees and various supervisors. S1 explained that complainant had exhibited irrational behavior and the inability to get along with her peers on numerous occasions in the past. S1 also explained that the incident on May 9, 2005 triggered the FFDE. According to S1, the FFDE came about due to complainant's hostile and irrational behavior toward her fellow employees and supervisors. S1 sent complainant for an FFDE to determine if she posed a direct threat to safety because of a mental impairment.

Complainant filed a formal complaint of discrimination in which she alleged that the agency had discriminated against her when her supervisor ordered her to undergo the FFDE. At the conclusion of the investigation, the agency sent complainant a copy of the ROI. When complainant did not timely request a hearing, the agency issued a final decision. The decision concluded that complainant failed to prove that she was subjected to discrimination as alleged. Complainant appealed and the Commission affirmed the agency's decision.

In its appellate decision, the Commission found sufficient evidence in the record to conclude that the agency ordered complainant to undergo an FFDE on the basis of objective evidence (i.e., reports by co-workers of hostile, irrational, and potentially threatening behavior on numerous occasions over a two-year period) that she posed a direct threat because of a mental impairment.

Comment: This case is not particularly notable, but it is instructive because it distinguishes between an employee making a threat and an employee being a threat. If you reread this decision carefully, you will conclude that Ms. Munford did not utter an actionable threat against C1. Ms. Munford allegedly told C1, "It's just too bad that I'm not allowed to have any sharp objects or I would use it on you." This remark cannot even be construed as a conditional threat: "If such and such had occurred, then I would have done this and this to you." To its credit, the Postal Service did distinguish between trash-talking and threatening violence and it did not escort Ms. Munford off the premises after C1 ratted her out. To its credit, the Commission also noticed the same distinction and did not solely rely on the one veiled threat, but piled on dubious observations and statements from managers and co-workers alike to affirm the agency's requiring complainant to undergo a psychiatric FFDE because she posed a threat of violence.

Past physical altercations and current threat to kill

Giraldo Fernandez-Guerra v. John E. Potter, EEOC Appeal No. 01A45206 (March 3, 2005)

Complainant was a Mail Handler at the agency's Fort Lauderdale, Florida Post Office. In 1996, complainant was issued a notice of proposed removal for exposing himself to an agency employee. In 1999, he was issued a 14-day suspension for physically assaulting a mail handler. In May 2000, he was involved in an altercation with the Manager of Distribution Operations, which resulted in another suspension. On September 4, 2002, a co-worker accused complainant of threatening to kill him. As a result, complainant was ordered to undergo an FFDE and placed in a non-duty/non-pay status. Although complainant was determined to be fit for duty with no restrictions, he was ordered by the agency to provide medical updates every sixty days to his manager.

Complainant filed a discrimination complaint in which he alleged that the agency discriminated against him when it sent him for the FFDE and then required him to provide the medical updates. At the conclusion of the investigation, complainant received a copy of the ROI and requested a hearing before an EEOC AJ. The AJ issued a decision without a hearing, finding no discrimination. The agency adopted the AJ's decision. This appeal to the Commission followed.

The AJ found that the agency ordered complainant to undergo the FFDE because of complainant's past history of violence and the "recent threat to kill." In specific, the AJ cited the statement of A-1, the Plant Manager, that, "the concern was that complainant's continued retention on duty may result in injury to himself or others, a decision I concurred with." A-1 also said that to "[e]nsure the safety of all our employees, I thought it necessary to ensure the complainant was of sound, physical and mental condition." A-2, the Acting Manager of Distribution Operations, was the management official who made the initial decision to send complainant for the examination. She stated that she believed it was in the best interests of all concerned. Finally, A-3, the Manager of Distribution Operations, stated that the medical opinion that they received, as a result of the examination, was that complainant needed to continue with his treatment and his prescribed medications; therefore, management required documentation from complainant indicating that he was continuing with his treatment.

Implicitly adopting the AJ's findings, the Commission found that the agency met its burden of showing that the decision to order complainant to undergo the examination was job-related and consistent with business necessity. Accordingly, the Commission found that the agency did not violate the Rehabilitation Act.

Comment: This straightforward decision illustrates the axiom that there is strength in numbers especially if the group is comprised of disparate factions---here, co-workers and supervisors alike. The plant manager shrewdly enlisted MDOs to share the burden of making the decision. Good move.

Volatile behavior reported by mediator

Jerry K. McMurtrey v. John E. Potter, EEOC Appeal No.0120073957 (December 17, 2009)

On January 27, 2004, complainant, a rural carrier at the agency's facility in Terry, Mississippi, participated in mediation on his EEO complaint. After complainant made his opening statement, an agency labor-relations specialist remarked, "That was asinine." Complainant became angry, yelled, and then walked out of the mediation. According to the mediator, complainant's behavior "did not fit the situation." The mediator stated that complainant got so angry that he visibly frightened the Officer-in-Charge. Complainant so unnerved the mediator that mediator told the Manager of Human Resources (MHR) that he "thought of possible violence on the part of complainant." In turn, on the next day, MHR placed complainant in an immediate non-duty (with pay) status pending the results of a fitness-for-duty examination. On February 19, 2004, complainant submitted to the psychiatric fitness-for-duty examination required by the agency. By letter dated March 3, 2004, management was informed that the psychiatrist concluded that complainant was fit for duty as a rural carrier, but recommended that he receive psychotherapy with anger management on a weekly basis for 3 to 6 months. Therefore, complainant was instructed to return to full duty effective March 4, 2004.

On May 10, 2004, complainant filed a formal complaint of discrimination alleging he was the victim of unlawful employment discrimination when he was placed in emergency non-duty status and required to undergo the psychiatric fitness-for-duty examination. After receiving a copy of the ROI, complainant requested a hearing. The EEOC AJ issued a decision without a hearing with a finding of no discrimination which the agency adopted in its final decision. The complainant appealed the final decision to the Commission. The Commission affirmed the agency's decision.

In its appellate decision, the Commission found that complainant was required to undergo the FFDE because of his disruptive and aggressive behavior during the mediation. Presumably, in his investigative affidavit, the mediator averred that he had participated in approximately 100 mediations with the agency, and complainant had been the only employee he had ever reported to the agency about a being possibly physically violent. MHR also averred that after receiving the report from the mediator expressing his concerns, he had no option other than to send complainant for a fitness-for-duty examination. Solely on basis of the mediator's report, the Commission concluded that the agency had a reasonable belief that complainant posed a threat to himself or others. Accordingly, the Commission determined that the agency acted permissibly in sending complainant for a fitness-for-duty examination.

Comment: I have accurately recapitulated the Commission's statement of facts and analysis, and I am still not sure what Mr. McMurtrey did to deserve being sent home and having his psyche invaded by an agency-paid shrink. I am satisfied that he did something to deserve being as probed as he was; it is just that the Commission has not made the case that the agency made the case. The Commission tells us about some of the generalizations and conclusions the mediator reached but this decision is woefully short on descriptions of Mr. McMurtrey's behavior and his statements. What exactly did he do to spook the OIC, the Commission does not tell us and perhaps the ROI is also silent on this accusation of the mediator. Mr. McMurtrey's bosses and coworkers know him better than the mediator, yet the Commission tells us nothing about what if anything the labor-relations specialist and the OIC said in their investigative affidavits about Mr.

McMurtrey's behavior in the mediation---assuming they were even asked to give affidavits.

I am concerned that the AJ, the agency, and the Commission may have rubber-stamped the indictment of the mediator because he was supposedly an experienced third-party neutral. I certainly would not advise management that it can put the hammer down on employees who don't act with the best manners during REDRESS (Postal Service EEO mediation) in which both sides are expected to vent. Management should not assume that it can hide behind its overly-decorous mediator to punish its employee. As I said earlier, perhaps the mediator described Mr. McMurtrey's allegedly threatening/violent behavior in detail in his investigative affidavit; perhaps some eyewitnesses gave affidavits that corroborated the mediator's accusations against Mr. McMurtrey, but that evidence is not laid out in the Commission's decision which makes it misleading for the unwary. As we have seen, management ordinarily requires more than just the statement from one witness and more than just one incident of maladaptive behavior before it makes the decision to order its employee to submit to an FFDE. *McMurtrey* represents an acute deviation from those facts and, thus, should be regarded with caution.

Threats with severe emotional distress reported by coworkers

Aubrey J. Hightower v. John E. Potter, EEOC Appeal No. 0120070560 (October 3, 2008)

Complainant worked as a part-time flexible clerk at the agency's facility in Danville, Virginia. On March 1, 2002, he filed an EEO complaint alleging that he was discriminated against in reprisal for prior protected EEO activity when: 1. On January 28, 2002, the agency issued him a letter of warning for unsatisfactory attendance; and 2. On February 24, 2004, the agency issued him a notice of proposed removal for improper conduct and subsequently required him to undergo a psychiatric evaluation prior to returning to work to insure that he was not a threat to himself or others.

At the conclusion of the investigation, complainant requested a hearing before an EEOC AJ. After she conducted the hearing, the AJ issued a decision in which she found no discrimination. The agency subsequently issued a final decision fully adopting the AJ's findings, from which complainant appealed to the Commission. The Commission affirmed the agency's decision.

In her decision on the FFDE claim, the AJ noted that management and union officials testified that complainant was required to undergo a psychiatric evaluation because he had ordered his supervisor to "shut up;" stated that he was leaving work because of stress; stated that he was afraid of what he might do; stated that he "could do the ultimate to somebody;" hung up the telephone on his supervisor; stated that he was afraid that he might "hurt someone in here;" and, co-workers expressed concern that he was a "time bomb waiting to go off." Complainant contended that someone forged the word "stress" on his sick-leave request and denied saying he might "do the ultimate to somebody." Complainant further noted that the psychiatric evaluation confirmed that he was mentally sound. However, the AJ found the testimony of management officials to be credible and concluded that agency officials acted out of "genuine concern for the safety and well-being of all its employees," not retaliatory animus.

On appeal, the Commission agreed with its AJ, finding that the testimony established that the agency's directive for complainant to undergo a psychiatric evaluation was "job-related and consistent with business necessity" because it was based on objective evidence that complainant could not perform the essential functions of his position or posed a direct threat because of an impairment, i.e., complainant's insubordinate behavior toward his supervisor, complainant's reports to management that he was experiencing significant job-related stress, comments by complainant that could be reasonably construed as threats, and reports from co-workers that complainant had exhibited signs of severe emotional distress. The Commission further determined that the agency properly sought to ascertain that complainant was fit to return for duty before returning him to work after complainant abruptly left work while declaring that he was under stress. Accordingly, the Commission determined that the examination was not a violation of the Rehabilitation Act.

Comment: The agency stampeded this apparently hapless employee with witnesses from all sides to justify ordering him to submit to an FFDE. And yet one mental-health examiner found Mr. Hightower to be psychologically fit to return to duty; and maybe he was. I have no evidence to the contrary except for the evidence that the Commission recited in its decision. If there is an 800-pound gorilla in all FFDE direct-threat cases, it is the accuracy of the opinions of the fitness-for-duty examiners. Do even some of the examiners actually have enough knowledge of the psychology of violence to make an accurate threat assessment? Even more fundamentally: is an accurate assessment of the threat of violence even possible? And if an accurate threat assessment can be made and if this threat assessor can make an accurate assessment, will she devote the time necessary to make an accurate one?

I recognize that in the never-ending game of "gotcha," management sometimes scores one for itself if it can pull off an FFDE without getting its wrist slapped by the Commission; but should not the by-product of that exam---the examiner's report---provide management with some useable information about whether its employee is a threat to himself or others? If the report is likely to be drivel, why bother ordering the exam in the first place? Why not just discipline the employee, relying on the agency's zero-tolerance policy against violence? If the employee's violent predilection is psychologically-based and treatable, why not let him raise that as a mitigating circumstance in replying to a proposed discipline?

I hear that gorilla pounding her chest and so should management before it spends big bucks on worthless "expert" twaddle. The literature of industrial psychology on the efficacy of FFDEs is there to read, and must be mastered well before managers delve into the law of permissible FFDEs.

Profanities and veiled threats made to coworker

Steve E. Bartusek v. John E. Potter, EEOC Appeal No. 01A53955 (September 26, 2006)

Complainant worked as a Laborer-Custodian at the Main Post Office in Canton, Ohio. On February 2, 2004, he was placed in an off-duty status without pay; on February 14, 2004, he was placed on administrative leave; and on February 20, 2004, he was scheduled to report for a Psychiatric FFDE. In his formal complaint, he accused the agency of

discriminating against him when the agency took those actions against him. After he received the ROI, he first requested then withdrew his request for a hearing whereupon the agency issued a final decision with a finding of no discrimination on all of his claims. He appealed that decision to the Commission and the Commission affirmed it.

Presumably in the ROI, an agency official averred that complainant was placed in an off-duty status as a result of his confrontation with a customer (C1, a former plant manager), in the box lobby after normal business hours. In a letter to the Postal Inspector, C1 alleged that while complainant was collecting the trash from the trash container in front of the Main Post Office and he was on his way to collect his mail from his Post Office box, complainant said, "There's my pal." Complainant then called him a "mother fucking, cock sucking, lying son of a bitch." C1 stated that complainant followed him into the building and waited for him to exit the main lobby. C1 stated that as he was leaving, complainant again called him a liar and said, "There is a big hearing scheduled in the near future." C1 stated that complainant's eyes were huge, and his body language and actions were threatening. The agency final decision found that on the basis of C1's allegations concerning this incident, management decided to place complainant off-duty until an investigation could be completed. This action was taken because it had yet to be determined if complainant was a threat to the safety of the employees. The Canton Plant Manager noted that since he had been Plant Manager, there had been three incidents involving the perceived threat of physical violence involving complainant. The final decision noted that the agency has a zero-tolerance policy for violence.

The Plant Manager averred that, as a veteran's preference eligible, complainant was entitled to administrative leave after 14 days. Thus, after 14 days, complainant was in a paid-leave status. The Plant Manager averred that he was involved in requiring the Psychiatric FFDE. The Plant Manager stated that this action was taken because there were reasons to believe that complainant might be a threat to himself or others due to C1's allegations and past allegations involving complainant's conduct.

In its appellate decision, the Commission found that based on C1's allegations that complainant spoke in profanities and in a threatening manner to him, the agency had a reasonable belief, based on objective evidence, that complainant might pose a direct threat due to his medical condition. The Commission discerned "no improper disability-related inquiry in this case."

Comment: Complainant denied that he had made these threats against C1, but the Commission sided with the agency because of evidence that complainant had engaged in prior similar behavior. In specific, the Plant Manager stated that on September 26, 2002, complainant had a confrontation with his supervisor, wherein the supervisor felt physically threatened and was visibly shaken. Complainant was put on Emergency Placement off-duty. Complainant was also given a letter of termination, however, it was later agreed that the letter of termination would be dropped if complainant could pass an FFDE that showed that he was not a threat to himself or others. Complainant was not found to pose a threat. So unlike *McMurtrey, supra*, the complainant here had several strikes against him; and unlike *McMurtrey*, the complainant here had several witnesses give statements against him.

As always, the greater the likelihood the threat of violence, the greater the latitude the Commission will give to an agency in assessing the psychological stability of the source of that threat. Not to be crude and insensitive, I speculate that in this case the Commission did not want to be a party to the possibility of a Postal Service employee “going postal.” If the Postal Service wanted to believe its former plant manager over complainant about complainant’s vulgar language and malevolent bearing, the Commission was not going to second-guess them, especially when complainant had made previous threats. Let’s not forget that complainant could have gone forward with a hearing in which he could have challenged the truthfulness of the accusation made against him by his former and present nemeses. Instead he relied on the ROI and lost.

Multiple-recent disciplines against violent employee acting irrationally

Sandor Gubi v. John E. Potter, EEOC Appeal No. 01A54097 (November 23, 2005)

Complainant was employed as an Electronics Technician at the agency’s West Jersey P&DC facility in Whippany, New Jersey. Complainant filed a formal complaint on September 11, 2003, alleging that he was discriminated against when, among other things, in March 2003 he was ordered to undergo an FFDE. After receiving the ROI, complainant requested a hearing but the AJ remanded the complaint to the agency for a FAD because---OMG---complainant failed to obey one of the AJ’s orders. The agency then issued a FAD with a finding of no discrimination on the claims it did not dismiss. Complainant appealed, but in a perfunctory decision the Commission affirmed.

In its appellate decision, the Commission noted that the responsible management official (RMO) averred that he requested a FFD for complainant “based on his irrational behavior.... [Complainant] had recently received two letters of suspension within four months. [He] has acted in a violent manner ... [and] was removed from the facility. A coworker ... [reported] fearing [complainant]. And last, [complainant] has difficulty seeing. For his safety and those around him I did not want him working on moving machinery.” Complainant did not dispute these assertions and the Commission thus found the FFDE to have been job-related and consistent with business necessity.

Comments: This decision goes hand in glove with *Bartusek, supra*.

Agitated employee who had made groundless accusations against coworkers escorted out of bldg

Linda C. Jutras v. John E. Potter, EEOC Appeal No. 01992623 (December 20, 2001)

Complainant was a Flat Sorter Clerk at the agency’s Providence Processing and Distribution Center, Providence, Rhode Island. Complainant had a history of verbal confrontation with coworkers, and had, on numerous occasions, made serious accusations against them which had been investigated by the agency and found to be groundless. As the incidents escalated and disrupted the workplace and other employees, management moved complainant to another location on the same tour of duty but where she would not interact with her co-workers as much. Despite these and other accommodations, complainant continued to have outbursts and make accusations against other employees. On April 9, 1997, management met with complainant to discuss an earlier settlement agreement and a list of alleged incidents that complainant had sent to the union. During

the meeting, complainant became so upset and agitated that management escorted her from the premises and place her in off-duty status, pending a fitness-for-duty examination.

The resulting fitness-for-duty evaluation report included statements made by complainant in which she threatened to kill certain co-workers, predicted future bomb threats, and made numerous “paranoid misinterpretations of events around [her].” Additionally, the report stated that with proper psychiatric care complainant would be fit for duty, however, her condition could lead to a “future situation of some potential danger.”

Complainant filed a formal complaint alleging that the agency had discriminated against her when, among other things, the agency ordered her to submit to the FFDE. After complainant received the ROI, she requested a hearing, but the EEOC AJ dismissed her complaint without a hearing. The agency then issued a FAD with a finding of no discrimination, which complainant appealed. The Commission affirmed the FAD.

In its appellate decision, the Commission found that requiring complainant to submit to a fitness-for-duty evaluation was appropriate given her past behavior and her demeanor during the meeting of April 9, 1997.

Comment: Perhaps I am reading too much into the decision, but I cannot help but wonder if the Commission cut the agency some slack here because of the accommodations it had previously granted to complainant to mollify her idiosyncrasies when, in fear of its employees’ safety, it ordered her to undergo the FFDE. There is just no hint of management malevolence or bad faith in the facts of this decision; on the contrary, patience and forbearance pervaded the agency’s dealings with complainant. The moral of this story is that before going forward with an FFDE, the observant manager will add a few ducks to those already standing in a row.

Drunk driver

Donald E. Frazier, Sr. v. John E. Potter, EEOC Appeal No. 01A33280 (September 29, 2004)

In its sparse appellate decision, the Commission does not state what position Mr. Frazier held and at what duty station he worked, but it does state that, on an unspecified date, he filed a formal complaint of discrimination in which he alleged that the agency had discriminated against him on the bases of race ((Black), age (June 8, 1945), disability (emotional distress), and/or reprisal (prior EEO activity) when, among other things, on April 20, 2000, he was sent for an FFDE. . Following the investigation, complainant requested a hearing before an EEOC AJ, who issued a decision dismissing the complaint without a hearing. Apparently the agency issued a final decision adopting the AJ’s decision and complainant appealed to the Commission which affirmed the agency’s decision.

As to FFDE claim, the AJ found that complainant performed a limited-duty assignment for a few days, from which he returned with further limitations. The AJ further found that his supervisor had twice smelled alcohol emanating from him. That sent up a red flag

since complainant's duties included shuttling postal vehicles. Thereafter, the agency sent complainant for the FFDE.

In its appellate decision, the Commission found that the agency had shown that the FFDE was job-related and consistent with business necessity. In particular, the Commission noted that the agency had found that complainant reported to work on two occasions smelling of alcohol and his position duties included shuttling agency vehicles. Accordingly, the Commission concluded that the FFDE was not a violation of the Rehabilitation Act.

Comment: Once again, the Commission makes sure that the agency had just cause to order complainant to undergo an FFDE, but then does not check to see if the scope of the examination was limited to the complainant's ability to perform only those duties about the agency has a legitimate question. The Commission should have reviewed the correspondence between the agency and the examiner to insure that the examiner's testing and inquiry were limited to Mr. Frazier's ability to safely shuttle agency vehicles.

Drowsy medicated nurse not always "competent"

Jody Hill v. R. James Nicholson, EEOC Appeal No. 0120054529 (March 16, 2007)

Complainant was a VA clinical support nurse in St Louis, who sustained several back injuries for which she took pain medication. Her supervisor allegedly saw her several times under the influence of this medication while she was administering medication to patients, as a result of which she ordered complainant to undergo an FFDE. Complainant denied that she took pain medication while on the job and otherwise denied that she was under the influence of pain medication while performing her general nursing duties (administering medications, completing medical and physical assessments, ordering supplies). Complainant filed a discrimination complaint in which she alleged that the agency had violated her medical privacy when the agency ordered her to undergo the FFDE.

After receiving the ROI, complainant requested a hearing before an EEOC AJ. The AJ held the hearing and issued a decision with a finding of no discrimination. The agency adopted the AJ's decision into its decision and complainant filed an appeal to the Commission which affirmed the agency's decision.

In his decision, the AJ found that complainant told her supervisor that she felt competent 95% of the time and that her medication sometimes "snowed" her, such that she could not wake up or drive or think too clearly. Notwithstanding complainant's denial or explanation of these admissions, the AJ found that complainant's written statement, in conjunction with her supervisor's recollection of conversations with her, proved that she continued to come work on days when her medication made her feel less than competent to perform her job. The AJ found that complainant's behavior indicated that she may have been impaired by the medication she was taking. The AJ noted that the agency presented evidence of several incidents of impaired thinking, documented by complainant, such as feeling "snowed" and forgetting to call in sick to work. As such, the AJ found the agency demonstrated that the FFDE was business related and consistent with business necessity. Although complainant had not injured a patient while performing

her nursing duties, the AJ found that mistake by an impaired nurse could have seriously injured a patient. The AJ also found that the agency had not removed complainant from her position and had not relieved her of most of her duties. Significantly, the AJ highlighted that she was required to undergo the fitness-for-duty examination to determine only whether she was capable of administering medication to patients while she herself was taking pain medication.

After setting out in detail the AJ's decision, the Commission adopted his findings, his reasoning, and concluded that the fitness-for-duty examination was appropriate.

Comment: I believe that the AJ and the Commission took pains to detail just how measured and reasonable the agency was in ordering the FFDE, because the complainant adduced the testimony of other nurses to the effect that they had never seen her at work under the influence of her pain medication. The bonus from this painstaking factual recitation for the manager looking for guidance about the limits of the FFDE that can be conducted is the statement that, "She was required to undergo the fitness-for-duty examination to determine only whether she was capable of administering medication to patients while she herself was taking pain medication." That was the sole issue for the examiner to resolve. Accordingly, the prudent manager must scrutinize the requirements letter to the examiner to insure that the examiner is not conducting a global examination of the employee's ability to perform all the essential functions of her position but rather an examination limited to her ability to perform certain specific duties about which management has a legitimate concern.

The prudent manager should assume that the complainants in these EEOC cases were not represented by counsel. If they had been, counsel most assuredly would have scrutinized the requirements letter to the examiner to insure that the scope of the examination requested was not overbroad. If counsel found the agency guilty of overreaching, she would have included that as a separate claim in the formal complaint of discrimination.

Slow-driving letter carrier

William J. Webb v. William J. Henderson, EEOC Appeal No. 01994914 (May 6, 2000)

Complainant, a Letter Carrier at the agency's facility in Coram, New York, filed a formal EEO complaint on March 10, 1997, alleging that the agency had discriminated against him on the basis of physical disability (right eye condition) when on February 5, 1997, he was sent for an FFDE. At the conclusion of the investigation, complainant received a copy of the investigative report and requested a hearing before an EEOC AJ. The AJ issued a decision without a hearing, finding no discrimination. Complainant appealed to the Commission the agency decision that adopted the AJ's decision. The Commission affirmed the agency decision.

In its appellate decision, the Commission found that, during a route examination, a route examiner told complainant that he should be driving faster. Complainant replied that he was driving as fast as he felt safe driving "without the chance of hitting a mailbox or parked car." Complainant also told the examiner that he was a disabled veteran with a right eye condition. The Commission found that on the basis of these responses, management reasonably concluded that complainant might have problems seeing where

he was driving. Accordingly, despite complainant's protestations to the contrary, the Commission found that material facts were not in dispute and summary judgment was proper.

Comment: For those stalwarts who insist on reading the whole case, I recommend that they don't read this one. This is an early medical-privacy case and the Commission was still getting its feet wet and its argument is only half-baked. The result however is correct and shrewd managers will take from it the rule that the Commission will grant it broad discretion to inquire about an employee's ability to safely drive an agency vehicle when the employee himself puts his ability to drive safely into play.

Insufficient doctor clarification

Stanley O. Calicott v. John E. Potter, EEOC Appeal No. 01A01169 (July 2, 2003)

The chronology of this case is nearly impossible to decipher from the Commission's rag-tag decision. I will recite only those facts of which I am reasonably sure:

1. On some unspecified date, complainant, a laborer, was given a job assignment that involved operating a forklift and a cardboard bailer;
2. Complainant informed his supervisor that he had taken medication that morning that could cause drowsiness or blurred vision when taken;
3. On April 16, 1997, complainant's physician wrote a letter indicating that at therapeutic doses, he would not expect to find any central nervous system effects. The physician indicated that he had "not placed any limitations on complainant's activity including, such activities as driving, bending, climbing ladders and so forth." The letter continued that if complainant began having any of these mentioned problems "I would think it would be unlikely to be related to taking Lomotil at therapeutic dosages";
4. Unconvinced, the agency thereafter ordered complainant to undergo an FFDE on April 30, 1997; and
5. The results of the April 30, 1997, exam found that complainant was medically qualified to perform the essential functions of his position without accommodation and with no limitations.

Complainant filed a formal complaint in which he alleged that the agency had discriminated against him when it ordered him to undergo the FFDE. The agency issued a FAD with a finding of no discrimination. On appeal, the Commission affirmed the FAD.

In its appellate decision, the Commission found that on the basis of the physician's letter, the agency had just cause to seek clarification regarding complainant's medical status. In specific the Commission stated, "We find the information provided by the physician was lacking in relevant facts and did not provide information regarding complainant's current medical condition, i.e., whether or not he had experienced blurred vision or drowsiness while taking the medication. As such, the April 30, 1997, fitness-for-duty examination was lawful."

Comment: I ask: "Why order the exam; why not write back to doctor?" The Postal Service answers: "We gave the doctor an opportunity to tell us whether complainant's vision had trouble seeing when taking this medication and when he did not, we sent his

complainant for an FFDE because we were not going to risk him driving one of our forklifts into one of our employees because his vision was blurred.”

The Commission’s first impulse might have been to upbraid the agency for failing to have written back to Mr. Calicott’s physician, seeking a straight answer to the question about the possible debilitating side-effects of the medication. But the Commission may have resisted that impulse and permitted the agency to go forward with the FFDE without first giving the physician another chance to prove his patient’s fitness to drive that multi-ton forklift truck.

Cornucopia of grounds

Larry P. Edmonds v. Glenn L. McCullough, EEOC Appeal No. 01A53467 (November 17, 2005)

In January 2003, complainant, a Combustion Turbine Technician, began to complain of headaches, sometimes with nausea, and often left work, too ill to continue. Although complainant had not used any sick leave since his appointment over 18 months earlier, through July 23, 2003, he had used 70.5 hours of sick leave. Questioning complainant’s ability to work safely, the agency directed him to take an FFDE. Complainant attended the FFDE, but he refused to sign the release to allow communications between agency medical personnel and his private health-care providers. Specifically, complainant objected to releasing the agency “for anything that may occur at any time because of [the FFDE];” that he was responsible for any fees in connection with provision of his personal records; and that it was his responsibility to ensure that all reports were sent to the agency. Because he continued to refuse to execute a release to complete his FFDE, the agency removed him on the ground that he was not available for work because the agency would not allow him to work until cleared to do so by the FFDE.

On March 9, 2004, complainant filed a formal complaint claiming discrimination based on race (white), national origin (American), disability (headaches), and in reprisal for prior EEO activity when he was terminated effective October 24, 2003. Following an investigation, complainant requested a hearing, and an EEOC AJ issued a decision without a hearing on February 11, 2005, finding that the agency did not discriminate against complainant on any bases. Complainant appealed to the Commission an agency final decision which implemented the AJ’s decision. The Commission affirmed the agency decision.

In its appellate decision, the Commission found that the agency’s reasons for requiring complainant to undergo an FFDE were job-related and consistent with business necessity. The Commission found that the agency was understandably concerned about the safety of its operations and offered the reasons for directing complainant to take the FFDE: complainant’s increased use of sick leave from January through July 23, 2003; his failure to follow directions to cease his aggressive and confrontational behavior towards others; his increasingly unstable behavior; and his frequent headaches accompanied by nausea since January 2003. Based on all these factors, the agency directed him to take the FFDE and not return to work until cleared by the agency’s medical staff.

Turning to the juicy issue of the release which complainant stubbornly refused to sign, the Commission stated its “advisements” require an employer to obtain a release from the employee before it can contact the employee’s personal healthcare providers. In this case, the complainant’s refusal to sign the release prevented the agency from learning the results of the fitness for duty exam, results they were entitled to obtain since the exam was job-related and consistent with business necessity. The Commission dismissed complainant’s specific objections to signing the 11-point release in that they “do not raise issues addressed by the Rehabilitation Act.” The Commission therefore pointedly found that “the agency did not violate the Rehabilitation Act by requiring complainant to sign a medical release so that it could obtain the results of the fitness for duty exam.”

Comment: I have a confession: I am a Martian (who is dying to return home ASAP). On Mars, we don’t guard our medical history at all, let alone as ferociously as you earthlings do yours. On the contrary, we Martians flaunt our illnesses and injuries (both real and imagined) and carp openly about our medications, treatments, and surgeries (all of which are for the most part unavailing). This is how we draw attention to ourselves, in the very same way as putative earthlings Woody Allen, Larry David, Sarah Silverman, Phillip Roth and Rodney Dangerfield made spectacles of themselves. Alas, within the Milky Way, Martians are not regarded as comedians, but as hypochondriacs. The Venusians in particular are very insulting.

As a Martian practicing law in New Jersey, which may or may not be on Earth, I am constantly confounded by employees, who, apparently like complainant Edmonds, are willing to risk losing their livelihood rather than to allow their employers to pry into their medical histories as they see fit. Unlike judges, Martians do not “weigh and balance competing interests”; for without a paycheck, we cannot afford a scale on which to weigh anything. For us, it’s moolah all the way and let our medical privacy be damned.

My homesickness aside, I actually do not understand why Mr. Edmonds refused to sign the releases. First, any ridiculous waiver the agency insisted upon him signing would be instantly tossed out of court as being contrary to public policy. Second and far more fundamentally, to what use did Mr. Edmonds think his agency would put the information it extracted from him and his physicians? The Commission’s prohibition against the disclosure of confidential medical information hermetically sealed the results of the FFDE and any information that passed from his own physicians to the agency’s physicians. I cannot imagine that Mr. Edmonds consulted an attorney to guide him through the FFDE. Instead, I smell the presence of an amateur, perhaps with his own ax to grind against the same agency, who cost Mr. Edmonds a really fine job. I could be wrong of course, but I doubt it since we Martians have highly-advanced olfactory organs.

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions

for more than 14-days); reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

With the Civil Service Commission, Mr. Kastner served as an EEO Hearings Officer, performing duties similar to those now performed by EEOC Administrative Judges.

Since returning to private practice in 1985, Mr. Kastner has represented employees before MSPB on virtually all of types of appeals over which the Board has jurisdiction, including several types which were added after he left, most notably, representing whistleblowers in Independent Right of Act appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining-unit members of every major federal employee and postal service worker union in arbitrations.

He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication's compact disc *MSPB Litigation Techniques*. He is a widely sought-after speaker and trainer.

If you are seriously interested in retaining Mr. Kastner, please call him or email him: (732) 873-9555; mknjlaw@comcast.net. If you wish to read more articles that Mr. Kastner has written on federal personnel law, please visit his blog: <http://fedemplaw.blogcollective.com/blog>.

Mr. Kastner charges \$350.00 for a two-hour in-person or telephone consultation. Please do not call Mr. Kastner with "short questions," which you expect him to answer for free. For although he very much enjoys practicing law, he does it as a profession and not as a hobby.