Evaluating Mental & Physical Fitness Under Chapter 143.081 & ADAAA

Presented by
Bradley W. Howard, Esq.
806-345-6310
bhoward@bf-law.com
© 2018 Brown & Fortunato, P.C.
Mental and Physical Fitness

• It is important for fire fighters and police officers to be mentally and physically fit to carry out their duties in their high stress and demanding job every day.

• When it comes to emergency service workers, there are no other jobs quite like them. Therefore, fire fighters and police officers must be mentally and physically strong not only to perform their job to maximum potential but also to ensure they protect themselves on a daily basis.
Civil Service
Civil Service

• The civil service statute in Texas is implemented under the Local Government Code, Chapter 143
• The civil service was created to oversee the laws related specifically to fire and police departments in cities with a population exceeding ten thousand
Civil Service

• The civil service statute allows for the creation of a three-member civil service commission (“the Commission”), which is responsible for the administration of the civil service system

• For the civil service system to be implemented in a municipality, it requires voter approval
Chapter 143.081

• Chapter 143.081 sets forth the process for evaluating the mental and physical fitness of fire fighters and police officers

• Note: Chapter 143.081 is applicable only to municipalities of 1.4 million or less and does not apply to a municipality with a population of 1.5 million or more
Chapter 143.081(b)

• “If a question arises as to whether a fire fighter or police officer is sufficiently physically or mentally fit to continue the persons duties, the fire fighter or police officer shall submit to the commission a report from the person’s personal physician, psychiatrist, or psychologist, as appropriate.”
When a question arises...

- Usually, the Chief (i.e. the department head of a fire or police department) raises the question of fitness of duty for a specific fire fighter or police officer.
- The question is set forth in a memo from the Chief to the firefighter/police officer, the Director, and the Commission.
When a question arises...

• The memo should include
  - the facts and incident(s) from which the question of fitness arose
  - a specific date and time the report should be submitted
  - state why the examination is job related and consistent with business necessity (*for ADAAA purposes discussed in detail later)
  - instructions that the physician, psychiatrist, or psychologist clearly provide an answer to whether the firefighter or police officer is fit for duty—i.e. yes or no
  - whether the firefighter or police officer will be placed on administrative leave, with pay, or remain on duty until final determination is made
Fire Fighter/Police Officer’s Report

• Fire fighter/police officer should return the report from his/her medical provider to the Chief and Director

• The Director, as Secretary to the Commission, must coordinate a meeting with the Commission and the Chief to discuss the results of the report
Pursuant to § 551.074, the meeting shall be a closed meeting for personnel matters when

- “deliberating the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or to hear a complaint or charge against an officer or employee.”
Fire Fighter/Police Officer’s Report

• Note
  o A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. § 143.089
  o Report should be kept confidential between the Commission, Director, and Chief, and any other supervisors/managers who need to be informed regarding necessary restrictions of duty
Fire Fighter/Police Officer’s Report

• Fit or Unfit for Duty?
  o If fire fighter/police officer is determined to be fit by his/her medical provider, they will return to duty
  o If fire fighter/police officer is determined to be unfit for duty for a reason given by his/her medical provider, they will be placed on leave
  o If the report is questioned, go the next step under 143.081
Chapter 143.081 (c)
Chapter 143.081(c)

• “If the commission, the department head [chief], or the fire fighter or police officer questions the report, the commission shall appoint a physician, psychiatrist, or psychologist, as appropriate, to examine the firefighter or police officer and to submit a report to the commission, the department head, and the person.”
Report is Questioned

• If the Department head or Commission questions the report, they will appoint an appropriate medical provider to evaluate the fire fighter or police officer and issue an order.
Report is Questioned

• The order for the fire fighter/police officer to submit to an examination should include
  o Instructions for fire fighter/police officer to allow the appointed medical provider to review the results reached by their own medical provider and the memo from when the question of fitness first arose
  o A specific date and time for the report to be submitted
  o Instructions that the appointed medical provider clearly provide an answer to whether the firefighter or police officer is fit for duty—i.e. yes or no
Report from Appointed Provider Received

- Once the report from the Commission’s appointed medical provider is received, the Commission, Chief, Director, and fire fighter/police officer have a meeting, scheduled by the Director, to review the results of the report.
- The Commission must then decide whether the reports “agree or disagree”
Do Reports Agree or Disagree?

• If reports agree, then the matter will go to the Chief to determine assignment
  • If the reports agree and it finds the fire fighter/police officer unfit for duty, the fire fighter/police officer will go on leave and the commission will comply with ADA/ADAAA rules
Chapter 143.081(d)
Chapter 143.081(d)

• “If the report of the appointed physician, psychiatrist, or psychologist, as appropriate, disagrees with the report of the fire fighter’s or police officer’s personal physician, psychiatrist, or psychologist, the commission shall appoint a three-member board composed of a physician, a psychiatrist, and a psychologist, or any combination, as appropriate, to examine the fire fighter or police officer. The board’s findings as to the person’s fitness shall determine the issue.”
Three-Member Board

• The Commission must appoint a three-member board to decide the issue of fit or unfit through an order
• The Director will research the appropriate medical providers needed and make a recommendation to the Commission
• Note: “the board’s findings shall determine the issue” – this will be the final step because the board’s decision is final
Three-Member Board

• The order of appointing the board should include
  o Instructions that the fire fighter/police officer allow the appointed three-member board to review the results reached by their own medical provider and the commission’s medical provider’s results, along with all memos, any relevant documents, and a description of the fire fighter/police officer’s duties
  o Instructions for the fire fighter/police officer to submit to further examination or any requests from the Board
Three-Member Board

• The order of appointing the board should include (cont’d)
  o A specific time or date the Board should have the issue decided
  o Instructions that the appointed Board clearly provide an answer to whether the firefighter or police officer is fit for duty—i.e. yes or no
  o The Board shall NOT determine any other issue such as diagnosis or disability-only the question of fitness
The Board’s Report

• The Board shall submit to the Commission a written report of its finding regarding whether the fire fighter/police officer is sufficiently physically or mentally fit to continue the person’s duties or assignment.

• At the Commission’s next regularly scheduled meeting after the date it receives the report from the Board, the Commission shall determine whether the fire fighter/police officer is sufficiently physically or mentally fit to continue its duties exclusively from the Board’s report.
The Board’s Report

• The Board’s report and the outcome should be accepted and the Chief determines the assignment
  o If the fire fighter/police officer is determined to be unfit by the Board, the next steps of leave and compliance with federal law will take place
  o If the fire fighter/police officer is determined to be fit by the Board, he will resume his duty
Unfit for Duty Process
Unfit For Duty: Leave for Non-Work Related Injury

• Under § 143.073(d), “if a fire fighter/police officer is temporarily disabled by an injury or illness that is not related to the person’s line of duty, the person may use all sick leave, vacation time, and other accumulated time before the person is placed on temporary leave”

• Therefore, if the incident that caused the injury or illness is not work related, then fire fighter/police officer should first use his/her accrued leave before s/he is placed on unpaid temporary leave
Temporary Leave

• Temporary leave does not have a specific number of days or time specified

• Under § 143.073(e), after recovery from a temporary disability, a fire fighter/ police officer shall be reinstated at the same rank and seniority as before, or
  o “another fire fighter or police officer may voluntarily do the work of an injured fire fighter or police officer until the person returns to duty”
  o This can continue until the person retires, resigns, or recovers from “temporary disability”

• Note: permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee’s disability (discussed more later under ADAAA).
Unfit for Duty: Line of Duty Illness or Injury

- Under § 143.073(a), “a municipality shall provide to a fire fighter or police officer a leave of absence for an illness or injury related to the person’s line of duty”
- The leave is with full pay for a period commensurate with the nature of the line of duty illness or injury. If necessary, the leave shall continue for at least a year.
Unfit for Duty: Line of Duty Illness or Injury

• After the one-year period ends
  o The “municipality’s governing body may extend the line of duty illness or injury leave at full or reduced pay”
  o If leave is not extended or the person’s salary is reduced below 60 percent, then that person may retire on pension until they are able to return to duty if they were a member of a pension fund § 143.073(b)-(c)
  o If pension is not available for that specific fire fighter or police officer, the fire fighter or police officer may use accumulated sick leave, vacation time, or other accrued leave before being placed on temporary unpaid leave
Unfit for Duty: Line of Duty Illness or Injury

• Furthermore, sick leave may come into play under § 143.045 when the fire fighter or police officer has suffered an injury in the line of duty.

• It states, “a fire fighter or police officer may accumulate sick leave without limit and may use the leave if unable to work because of a bona fide illness. If an ill fire fighter or police officer exhausts the sick leave and can conclusively prove that the illness was incurred in the performance of duties, an extension of sick leave shall be granted.”

• However, Chapter 143 does not give a definition for an illness or injury in the “line of duty”
ADA/ADAAA Compliance
In addition to complying with Chapter 143 and specific state laws, the civil service commission must also comply with the American Disabilities Act ("ADA") and ADA Amendments of the Act of 2008 ("ADAAA")

The ADA prohibits discrimination on the basis of disability with respect to hiring and also all terms and conditions of employment.
ADA/ADAAA Medical Examinations

• Under the ADA, a medical exam may be required if it is job-related and consistent with business necessity
  o the law usually provides flexibility to employers in requiring medical exams if it is job-related and consistent with business necessity when an employer has a reasonable basis to believe that an employee’s medical condition will impair his ability to perform essential functions of his/her job; or
  o when employer believes an employee may have a condition that is interfering with or impairing the employee’s ability to carry out his/her duties
  o Employer must have an *individualized*, reasonable suspicion of impairment that must be objective
ADA/ADAAA Medical Examinations

• An employer cannot require a medical examination or make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability
ADA/ADAAA Medical Examinations

• Under the ADA, “the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee’s ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.”

• Therefore, medical inquiries and requests for medical documentation must be limited to what is needed to assess the employee’s ability to work
ADA Medical Examinations

• Job descriptions of an employee are important because it will define the “essential functions” of the particular employee’s job and determine whether a medical examination was reasonable under the “job-related” requirement.
ADA Medical Examinations

• Collected information clearly related to “job performance” issues can include
  o Job class specifications or employer job description used for advertisements and/or hiring
  o Performance evaluations
  o Internal affairs investigations
  o Use-of-force incidents (police officer)
  o Commendations and testimonials
  o Prior psychological or physical evaluations
ADA/ADAAA Medical Examinations

• Employer may also require a medical exam when employee is demonstrating erratic or unusual behavior on the job, but an incident has not occurred yet

• However, an inquiry into medical condition without a sufficient factual basis or business necessity reason violates the law

• Note: Courts may give broad authority to employers to mandate medical evaluations of their employees when those particular employees are engaged in safety-sensitive work, or when doing so serves the goal of reducing the risk of injury to the employee or others
What is a Medical Examination?

• A “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health
  o The test should be administered and interpreted by a health care professional
What is a Medical Examination?

- Medical examinations can include
  - Vision tests
  - blood urine and breathe analyses to check for alcohol use
  - blood pressure/cholesterol testing
  - range-of-motion tests, nerve conduction tests
  - pulmonary function tests
  - psychological tests that are designed to identify a mental disorder or impairment
  - Diagnostic procedures, i.e. x-rays, CAT scans, MRIs
What is Not a Medical Examination?

• Tests to determine the current illegal use of drugs
• Physical agility/fitness tests—measuring an employee’s ability to perform actual or simulated job tasks or their performance in tasks (ex. running, lifting)
• Psychological tests that measure personality traits such as honesty, habits, preferences
• Polygraph examinations
Confidentiality

• Personal information of the employee must be kept confidential when conducting a medical examination.

• Information obtained from the inquiry shall be collected and maintained in a separate medical file and should only be shared with:
  o Supervisors and managers who may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations.
  o First aid and safety personnel may be informed when appropriate.
  o Government officials investigating compliance with this part shall be provided relevant information on request.
Brownfield v. City of Yakima

612 F.3d 1140 (9th Cir. 2010)
Brownfield v. City of Yakima

• Facts
  o Brownfield began working as a police officer for the City of Yakima Police Department in 1999.
  o Several years after an off-duty car accident, Brownfield exhibited emotionally volatile behavior during his job as a police officer, including becoming visibly upset and swearing; reports of domestic violence from his wife; and several statements concerning his will to live (i.e. “I'm not sure if it’s worth it” and “it doesn’t matter how it ends”).
  o After hearing these reports, the Captain of the police department placed Brownfield on administrative leave and ordered him to undergo a medical examination.
Brownfield v. City of Yakima

• Facts Cont’d
  o The doctor that conducted the fitness for duty examination (“FFDE”) concluded that Brownfield suffered from “Mood Disorder due to a General Medical Condition with mixed features” and concluded that he was unfit for police duty.
  o After another car accident and Brownfield’s refusal to submit to another FFDE before returning to work, the City conducted a pre-termination hearing and concluded that Brownfield was insubordinate and unfit for duty.
  o Brownfield was subsequently terminated and brought suit alleging ADA and FMLA violations.
  o Brownfield alleges that the City violated the ADA by requiring him to submit to the FFDEs.
Brownfield v. City of Yakima

- **Holding**
  - The federal circuit upheld the validity of the police chief’s order for a fitness for duty medical examination even before there was evidence of impaired work performance.
  - The court said the city had an objective, legitimate basis to doubt Brownfield’s ability to perform the duties of a police officer (i.e. volatile and erratic behavior).
  - The court stated, “police officers are likely to encounter extremely stressful and dangerous situations during the course of their work. When a police department has a good reason to doubt an officer’s ability to respond to these situations in an appropriate manner, a fitness for duty examination is consistent with business necessity.”
Watson v. City of Miami Beach

177 F.3d 932 (11th Cir. 1999)
Watson v. City of Miami Beach

• Facts
  o Watson became a police officer with the City of Miami Beach in 1984.
  o In 1995, the Commander became increasingly concerned with Watson’s “unusually defensive and antagonistic behavior towards his co-workers and supervisors.”
  o Thus, the Commander started an investigation that revealed 10 Internal Affairs’ investigations of complaints against Watson and 11 incidents over a period of three years.
  o Another incident occurred where Watson refused to take a tuberculosis examination because it required him to disclose his HIV/AIDS status.
Watson v. City of Miami Beach

- Facts Cont’d
  - The City then required him to undergo a fitness for duty evaluation, in which the doctor recommended Watson return to work with appropriate stress management counseling to help his symptoms associated with stress.
  - Watson returned to work eight days later and filed a complaint against the City for discrimination under the ADA and relieving him from duty during the pending fitness for duty examination.
Watson v. City of Miami Beach

• Holding
  o The court held that the fitness for duty and tuberculosis examinations were job-related and consistent with business necessity.
  o The court stated “where a police department reasonably perceives an officer to be even mildly paranoid, hostile, or oppositional, a fitness for duty examination is job related and consistent with business necessity.”
  o The police department does not have to wait until the perceived threat becomes real or questionable behavior results in injuries before requiring a fitness for duty examination.
  o Furthermore, the court stated that “the evidence presented showed that the tuberculosis examination required by the City in this case addressed unrefuted health concerns regarding officer safety.”
Direct Threat
Direct Threat Defense

• Employers may be able to use defenses to an allegation of discrimination for requiring an individual to submit to a medical examination or for charges for not making reasonable accommodation

• One of these defenses is the “direct threat” defense
  o Employer could argue that they believe the employee creates a direct threat to workplace safety
Direct Threat

• A “direct threat” is a significant risk of substantial harm to the health or safety of that employee or others which cannot be eliminated or reduced by a reasonable accommodation
  o Determination of direct threat should be based on an individualized assessment of the employee’s present ability to safely perform the essential functions of the job
  o A qualification standard that meets the direct threat criterion will be viewed as job-related and consistent with business necessity

• Note: the employer bears the burden of proving that the employee is a direct threat
  o Employer must identify a specific, immediate risk
Jarvis v. Potter

500 F.3d 1113 (10th Cir. 2007)
Jarvis v. Potter

• Facts
  o Jarvis was terminated from his position at the U.S. Postal Service because of concerns about the danger he posed to his co-workers.
  o Jarvis was a Vietnam War veteran that had Post Traumatic Stress Disorder (“PTSD”).
  o During the course of his work, he had several incidents in which he struck co-workers on duty for startling him and one occasion where Jarvis explained his state of mind at the time in which “[he] was ready to kill the guy.”
  o The Postal Service held a due-process meeting in which they concluded that “due to the chronic nature of PTSD it is not likely Mr. Jarvis’s symptoms will dissipate in the near future… unfortunately, the unpredictable nature of PTSD symptoms may pose some threat in the workplace.”
Jarvis v. Potter

• Facts Cont’d
  o The Postal Service sent Jarvis a letter that he would be removed from the Postal Service as he was unfit for duty.
  o Jarvis met with the EEO Office and filed several complaints and also requested that he be allowed to access his accrued vacation and sick leave while he applied for a disability retirement.
  o The Postal Service offered Jarvis the opportunity to resign, rather than be terminated if he agreed to do so before a specific time.
  o Jarvis interpreted this as retaliation and rejected the offer. Although he ultimately received disability retirement benefits, Jarvis filed a complaint against the Postal Service alleging that they failed to accommodate his disability and retaliated against him for filing EEO complaints.
Jarvis v. Potter

• Holding
  o The Postal Service argued that Jarvis was not a qualified individual with a
disability because he posed a direct threat to the safety of others. The court
agreed and stated that the Postal Services’ determination that Jarvis was a direct
threat was an objectively reasonable one.
  o Based on interviews, incidents, Jarvis’s statements, and an individualized
assessment of Jarvis that relied on the best available objective evidence, the court
concluded that the duration, imminence, and likelihood of a direct threat was clearly met.
Jarvis v. Potter

• Holding
  o Based on the fact that Jarvis’s “symptoms would last indefinitely [and] he could erupt at any moment if startled,” was enough to determine that Jarvis could not safely return to the workplace, even with an accommodation.
  o The court further stated, “the law does not require the Postal Service to wait for a serious injury before eliminating the threat.”
Medical Examinations and Disability

• Once an employee submits to a lawful medical examination that is job-related and linked to business necessity, and is found to be unfit for duty, the employee’s disability, if s/he has one or is a “qualified” individual must also be taken into account
Disability, Qualified Individual, and Leave under the ADA/ADAAA
What is Considered a Disability?

• “Disability” is defined as
  o A physical or mental impairment that substantially limits one or more of the major life activities of the individual;
  o A record of such impairment; or
  o Being regarded as having such impairment
What is Considered a Disability?

- **ADAAA distinction**
  - Congress mandated the ADA’s definition of the term “disability” should be construed broadly and make it easier for an individual to seek protection under the ADA to establish that s/he has a disability within the meaning of the statute.
  - The ADAAA also made it easier for individuals to establish coverage under the “regarded as” prong of disability.
    - The focus for establishing coverage is on how a person has been treated because of a physical or mental impairment, rather than on what an employer may have believed about the nature of the person’s impairment.
Who is Considered a Qualified Individual?

• A qualified individual with a disability is an employee who meets legitimate skill, education, experience or other requirements of an employment position that he or she holds.

• The employee must also be able to perform the “essential” functions of the position either with or without reasonable accommodation.
What is Considered a Disability?

• “Physical or mental impairment” includes a physiological disorder or condition, cosmetic disfigurement, or loss affecting one or more body systems, such as neurological, respiratory, cardiovascular, etc. It also includes any mental or psychological disorder.

• “Substantially limits” is not meant to be a demanding standard and should be broadly construed in favor of expansive coverage, which can include limiting one’s ability to perform a major life activity as compared to most people.
Reasonable Accommodations

• For any employee or new hire who is a “qualified individual with a disability,” the ADA prohibits discrimination against that individual which includes
  o Limiting, segregating or classifying a job applicant in any way that adversely affects the employee’s opportunities
  o Utilizing standards that have the effect of discrimination on the basis of a disability
  o Denying employment
  o Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual
  o Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability
Reasonable Accommodations

• The ADA requires covered employers (with 15 or more employees) to provide reasonable accommodations for these qualified individuals
Reasonable Accommodations

• A “reasonable accommodation” is “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities” 29 C.F.R pt. § 1630 app. 1630.2(o).
Reasonable Accommodations

• Reasonable accommodations can include
  o Leave for treatment, recuperation, or training related to their disability
  o Modified equipment or devices
  o Accessible recruitment, tests/physical modifications
  o Lighter duty of work
Leave as Reasonable Accommodation

• According to the EEOC, if an employer receives a request for leave for reasons related to a disability and the leave falls within the employer’s existing paid policy, employer should treat it the same as an employee requesting leave unrelated to a disability
Leave as Reasonable Accommodation

• However, where an employee’s paid leave has run out, the employer must consider providing unpaid leave as a reasonable accommodation for an employee with a disability if:
  o The employee requires it; and
  o It does not create undue hardship on the employer
Leave as Reasonable Accommodation

• Thus, a qualified individual with a disability is entitled to additional leave time beyond the twelve weeks permitted under the FMLA, so long as additional leave time would not constitute undue hardship
Leave as Reasonable Accommodation

• What is considered undue hardship for an employer?
• An employer must demonstrate that a reasonable accommodation would impose undue hardship on the operation of its business which can include the employer taking into account
  o The amount and length of leave required
  o The impact of the employee’s absence on co-workers and on whether specific job duties are being performed in a timely manner
  o The impact on the employer’s operations and its ability to serve customers appropriately and in a timely manner
  o The overall financial resources of the employer’s facility or facilities involved in the provision of the reasonable accommodation
Leave as Reasonable Accommodation

• Undue hardship can also have consequences such as lost sales, increased burdens on management and staff, and increased stress on co-workers
Leave as Reasonable Accommodation

• Employers need to have a flexible maximum leave policy, as inflexibility can violate the ADA
  o Because employers have the obligation to assess each requested accommodation on a case-by-case basis, it may not apply a maximum leave policy or automatic termination policy after a certain period of time
  o Modifying work place policies for disability leave is part of reasonable accommodation
Leave as Reasonable Accommodation

- Employers need to have a flexible maximum leave policy, as inflexibility can violate the ADA (cont’d)
  - The ADA does not identify any amount of leave time that would automatically be deemed an undue hardship on the employer; however, varying durations of leave have been considered reasonable accommodations
    - Furthermore, a leave request is not indefinite simply because the nature of the employee’s condition cannot provide an approximate date upon return
Leave as Reasonable Accommodation

• Notes
  o It is essential for the employer to engage the employee in the ADA’s interactive process
    • This is important for providing a detailed report when employer is considering whether to deny leave or terminate employee after s/he has requested a second or third extension of leave
  o Employers can obtain medical information from the employee’s medical provider to help make decisions on leave requests
  o Automatic termination provisions should be revised as soon as possible to ensure compliance with the law
Leave as Reasonable Accommodation

• Notes (cont’d)
  o Employees on leave for disability may request reasonable accommodation in order to return to work
    • In some situations, the request for reasonable accommodation will be reassignment to a new position and the employer must place the employee in a vacant position for which he is qualified, without requiring the employee to compete with other applicants for open positions
Other Laws to Consider
Other Laws to Consider

• The Uniformed Services Employment and Reemployment Rights Act (USERAA): rights for past or present members of the uniformed services
  o Leave entitlement and reinstatement times depending on length of deployment

• Family and Medical Leave Act (FMLA)
  o Leave entitlement up to 12 weeks after employee has been working for 12 months
Summary

• Make sure to go through the entire process of 143.081 and comply with all of Chapter 143
• Ensure that the medical examination is for a job-related and business necessity reasons
• Comply with ADA/ADAAA regulations and other federal law
Questions??
The End

Bradley W. Howard, Esq.
Brown & Fortunato, P.C.
905 S. Fillmore, Suite 400
Amarillo, TX 79101
806-345-6310
bhoward@bf-law.com
www.bf-law.com