Hofstra Labor and Employment Law Journal

Volume 4 | Issue 1

1986

Honesty Tests - A New Form of Polygraph?

Kurt H. Decker

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation

Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol4/iss1/4

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
HONESTY TESTS—A NEW FORM OF POLYGRAPH?

Kurt H. Decker*

I. INTRODUCTION

Employee dishonesty has become an increasing problem for many private sector employers. To monitor this, employers have incorporated lie detection devices into their employment security programs. Organized labor, however, has consistently opposed the use of lie detection or truth eliciting devices in the employment relationship by seeking restrictions in collective bargaining agreements and statutory prohibitions.

By 1985, twenty four states had enacted legislation which pro-
hibits employers from requiring an employee to take a polygraph examination. In addition, various states have statutes that require the licensing of polygraph operators. Despite these statutory limitations, scientists continue to develop purportedly accurate lie detection and truth eliciting devices.

Employer security programs normally involve the examination of those actually suspected of particular “honesty” infractions, the general testing of job applicants, and the reexamination of current employees. The polygraph’s alleged infallibility has persuaded many employers to accept it as a cure-all for employee dishonesty. Although polygraph examinations and truth serums have undergone technological and scientific development, it is the newer truth eliciting devices that have displayed the greatest ingenuity.

4. J. KAUFF, EMPLOYMENT PROBLEMS IN THE WORKPLACE 17 (1985). The states that prohibit employers from requiring that an employee take a polygraph examination are: Alaska, ALASKA STAT. § 23.10.037 (Michie 1985); California, CAL. LABOR CODE § 432.2 (West Supp. 1986); Connecticut, CONN. GEN. STAT. § 31-51(g) (1982); Delaware, DEL. CODE ANN. tit. 19, § 704 (Michie 1985); District of Columbia, D.C. CODE ANN. §§ 36-601-803 (Michie 1981); Hawaii, HAWAII REV. STAT. § 378-21-22 (Bobs-Merrill 1977); Idaho, IDAHO CODE §§ 44-903-904 (1982); Iowa, IOWA CODE § 321-5-56 (1982); Maine, ME. rev. STAT. ANN. tit. 32, § 7166 (West 1985); Maryland, Md. ANN. CODE art. 100, § 95 (Michie 1985); Michigan, Mich. COMP. LAWS ANN. § 37.201-208 (West 1985); Minnesota, Minn. STAT. ANN. § 181.75-76 (West Supp. 1985); Montana, MONT. CODE ANN. § 39-2-3034 (1982); New Jersey, N.J. STAT. ANN. § 2 C:40A-1 (West 1982); New York, N.Y. LABOR LAW § 773 (McKinney 1983); Oregon, OR. REV. STAT. § 659.225-227 (1981); Pennsylvania, PA. CONS. STAT. ANN. § 7321 (1982); Rhode Island, R.I. GEN. LAWS §§ 28-6.1-1-2 (Michie 1981); Utah, UTAH CODE ANN. §§ 34.37-16 (1982); Vermont, VT. STAT. ANN. tit. 26, § 2901 (Equity Supp. 1986); Washington, WASH. REV. CODE ANN. §§ 49.44.120-130 (West Supp. 1986); West Virginia, W. VA. CODE § 21-5-5a (Michie 1983); Wisconsin, WIS. STAT. ANN. § 111.326 (West Supp. 1985). See also Gov't EML. REL. REP. (BNA) 1085-86 (1985) (the following states have completely forbidden the use of polygraphs in the employment setting: Delaware; Hawaii; Massachusetts; Michigan; Minnesota; Oregon; Rhode Island. (emphasis added)).


7. For descriptions of polygraphs and their uses, see C. LEE, THE INSTRUMENTAL DETECTION OF DECEPTION (1953); J. REID & F. INBAU, TRUTH AND DECEPTION (1966).


these newer methods are paper and pencil honesty tests.

Today, employers are increasingly being solicited by developers and marketers of these paper and pencil honesty tests. These tests are represented as being potential substitutes for the more traditional polygraph examination. Employers have been assured by the marketers of these tests that they do not infringe upon any federal or state anti-discrimination laws. However, no representation is made by these marketers regarding their legality under state anti-polygraph statutes. It is here that a new concern arises for employers over their use. This article will examine the current status of honesty tests under anti-polygraph statutes.

II. FEDERAL LAW ON EMPLOYMENT TESTING

Lie detection or truth-eliciting devices are subject to various federal and state anti-discrimination laws when used in conjunction with employment decisions. Title VII of the Civil Rights Act of 1964 forbids the use of an employment test that has a disproportionate impact on racial minorities, unless the employer meets the burden of proving that the test is job-related.\(^1\) It is unlawful to "limit, segregate, or classify . . . employees or applicants in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect . . . an employee because of such individual's race. . . ."\(^12\) Job-relation ordinarily must be established by validation studies meeting professional standards. Likewise, Executive Order 11246, applicable to government contractors, is also broad enough to prohibit testing discrimination.\(^13\)

The Uniform Guidelines on Employee Selection Procedures (1978) imposes detailed requirements upon the employer governing the use and validation of tests and other employee selection devices.\(^14\) They contain the following basic prohibition:

The use of any selection procedure which has an adverse im-

---

11. 42 U.S.C. § 2000e-2(a)(2) (1980). See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 402 U.S. 424 (1971). If an aptitude or ability test has a disproportionate impact on a racial minority, the employer has the burden of proving that the test was job-related. Freedom from subjective intent to discriminate is no defense, once discriminatory impact of the test has been shown. Job-relatedness must ordinarily be established by validation procedures of professional quality. In other words, if a test is not job-related and in practice excludes minorities, it may be said that the test, whether or not "designed" or "intended" to discriminate, was indeed "used" to discriminate. Id.


pact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines. . . . 18

The Guidelines define "selection procedure" very broadly to include any "measure, combination of measures, or procedure used as a basis for any employment decision."18 All employment decisions are covered. These include hiring, firing, promotion, and transfer, as well as union membership, job training, apprenticeship, and referrals by employment agencies.

III. HONESTY TESTS AND ANTI-POLYGRAPH STATUTES

Paper and pencil honesty testing has become a "multimillion dollar industry."17 Test market research indicates "that at least 5,000 (employers) are using honesty tests."18 Honesty tests are "commonly used in settings where employees have access to cash or merchandise, such as retail stores, financial institutions, and warehouse operations."19 They are used for "clerks, tellers, cashiers, and security guards" as well as for supervisory personnel, and police officers.20

Paper and pencil honesty testing has been largely developed as an alternative to polygraph screening.21 Many of these paper and pencil tests are "marketed by security firms specializing in polygraph investigations."22 Paper and pencil tests are less costly, and they can be used in states where pre-employment polygraph examinations are illegal. Presently, however, there is no proof that a correlation exists between these test scores and future honesty.23

15. Id. at § 1607.3(a).
16. Id. at § 1607.16(a). The definition goes on to say: "Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms." Id.
17. Sackett, Honest Testing for Personnel Selection, 30 PERSONNEL ADMIN. 67 (1985) [hereinafter Sackett]; see also Sackett & Harris, Honest Testing for Personnel Selection: A Review and Critique, 37 PERSONNEL PSYCHOLOGY 221 (1984) [hereinafter Sackett & Harris] (At least 500 firms were incorporating honesty tests into their employment security programs.).
19. Id.
20. Id.
21. Sackett & Harris, supra note 17, at 222.
22. Id.
23. Id. at 221-24.
Honesty tests are represented as being "psychologically validated, professionally accepted paper and pencil test [batteries], designed to establish a profile on the behavioral and attitudinal tendencies of prospective employees." They examine: 1) employee honesty; 2) violent tendencies; and 3) drug abuse. The developers of honesty tests also claim that honesty test scores have no adverse impact on any of the protected racial/ethnic groups (Hispanic, Black, American Indian, Asian), i.e., these minority groups allegedly have not scored significantly lower than whites. Honesty tests have been developed by psychologists, criminologists, polygraphists, legal experts, and law enforcement specialists. All questions have purportedly met various legal requirements in that they are not prohibited by Title VII, Executive Order 11246, or are in violation of any federal confidentiality or privacy laws. No representation, however, is made regarding whether they violate any anti-polygraph statute or any individual state confidentiality or privacy laws. Further, the marketer does not state that it will defend any employer in a suit that is brought for the alleged use of this test or for an employment decision that is made as a consequence of it.

Research studies conducted have demonstrated that honesty tests can be used to predict employee dishonesty, drug abuse, and violence. These studies have also confirmed the accuracy and validity of the paper and pencil honesty test scores.

24. An example of an "honesty" test is the London House, Personnel Selection Inventory (PSI). This test was developed by London House Management Consultants, Inc. of Chicago, Illinois, and is currently being marketed nationwide [hereinafter cited as PSI], London House, Personnel Selection Inventory (PSI) 1 (1985).
25. Id.
26. Id. at 11-12.
27. Id. (emphasis added).
28. Id. at 11,17-18.
30. Id. at 3-5.
31. Sackett, supra note 17, at 68.
Honesty test scores are correlated either with polygrapher judgments about an applicant's trustworthiness or with admissions of theft or other defalcations made in the course of the polygraph examination. Correlations with polygrapher judgments represent attempts to document the extent to which the paper and pencil test is substitutable for the polygraph examination. Correlations with admissions in the course of the polygraph are more compelling to those who question the validity of polygrapher judgments.

The test's predictive validity was tested. Prospective employees were given the test, but the tests were not scored immediately. The employer made its hiring decisions the way it normally would have — on the basis of resumes, interviews, and background checks. Several months later, the completed tests were bought out, scored and compared.
Standing alone, many of the questions that appear on honesty tests would pose problems in any prospective job interview as unrelated to the job. The questions that may be related to the employment of the individual, however, are phrased in such a way as to make the answer meaningless.

Ethical questions regarding the use of honesty testing have also been raised. Intrusions into an employee's privacy can occur through the use of polygraphs, voice stress indicators, psychological stress tests, and honesty tests. Opponents argue that these lie detection or truth eliciting devices violate an employee's basic right to dignity because they are an unconscionable intrusion into personal privacy.

---

32. London House, Personnel Selection Inventory, PSI 3, 3-8 (1985). For example, "Honesty" tests purport to evaluate a prospective employee's honesty and/or veracity by asking some of the following questions:

1. How honest are you?
2. How often have you thought of hitting someone who really deserved it?
3. How jealous of others are you?
4. How often has it been necessary for you to threaten someone with force?
5. Do you always tell the truth regardless of the circumstances?
6. Have you occasionally had ideas and thoughts that you would not like other people to know about?
7. Do you believe that good guys come out second best?
8. Have you ever felt like swearing?
9. How many people do you like?
10. How many people cheat on their income tax returns?
11. How many judges can be bribed?
12. How often are you wrong about things?
13. How many people dislike watching public fist-fighting or brawling?
14. Do you sometimes enjoy listening to gossip?
15. In your recent jobs, were you able to figure out ways a dishonest person could take merchandise without paying for it?
16. Do you do things you consider to be bad?

33. Id. The answers to these questions are evaluated in varying degrees. Some of these questions are prefaced by introductory remarks along the following lines:

1. How do you think you compare to other people?
2. Nearly everyone at sometimes in their life has taken money, merchandise or other property which did not belong to them. Be certain that your answers are truthful and accurate.
3. Most people have tried drugs sometimes in their lives. An employer is basically interested in knowing if a job applicant falls into one of two categories. Category A is a person who is addicted to drugs. They are not dependable and may need some money to support their habits. Category B is the average person who has tried some commonly used drugs out of curiosity or has used them socially. The great majority of people fall into this category. What kind of person are you? What are your feelings about drugs?

34. Sackett, supra note 17, at 74.

35. See A. Westin, supra note 6, at 237-39; See also Burkey, Privacy, Property and the Polygraph, 18 LAB. U. 79, 89 (1967) (The article expresses a growing societal concern about invasion of privacy due to the wide spread usage of lie detectors.).
thoughts, attitudes, and beliefs.\textsuperscript{36} Questioning of theft attitudes and previous theft behavior has also been viewed as “offensive” and as an invasion of privacy.\textsuperscript{37} Furthermore, the employer, at his own discretion, can choose the passing grade for the honesty test. Because the employer can arbitrarily choose anywhere from a 25 to a 75 cutoff point, many innocent applicants may fail the test and be mislabeled as a dishonest person.\textsuperscript{38} In response, proponents to honesty tests have argued that: “(1) given an employer’s legitimate interest in hiring employees who will not steal, inquiries about honesty are only unethical if the test is invalid; and (2) selection procedures with modest validities are the best psychology has been able to devise; thus selection errors are made with any test.”\textsuperscript{39}

Of particular concern, is the employers use of honesty tests with current employees. After putting much time into a position and developing a good relationship with your employer, the impact of the test scores can be devastating.\textsuperscript{40} A long time trusted employee may score poorly on the examination and be terminated from his position or be viewed with suspicion.\textsuperscript{41} Employers must also be careful in how they use the information the test provides. If a supervisor misuses the information and declares that an employee is dishonest, the employee may have a claim for employer defamation.\textsuperscript{42} “Situations involving current employees that are unsubstantiated by actual admissions of theft lead to concern about the use of honesty test predictions.”\textsuperscript{43} Testing current employees, however, “may be useful in eliciting admissions” or the reporting of “illicit” activities of other

\textsuperscript{36} See A. LEMOND & R. FRY, NO PLACE TO HIDE 130 (1975).
\textsuperscript{37} Sackett, \textit{supra} note 17, at 74.
\textsuperscript{38} Id.
\textsuperscript{39} Id.

In essence, “honesty” testing involves “playing the odds.” For example, imagine that 20 percent of all job applicants would steal from an employer if they were hired. Assume that only 10 percent of applicants passing a particular test would steal if hired. Hiring only applicants passing the test should reduce the overall proportion of employees who steal; thus despite the fact that some of those who pass the test will steal and some of those who fail the test will not steal, the test can be useful to the employer. However, at the individual level, many errors may be made. Most of the individuals who fail the test will not steal. A high degree of confidence should not be placed in individual scores.

\textit{Id.} at 74, 121.
\textsuperscript{40} Id. at 121.
\textsuperscript{41} Id.


\textsuperscript{43} Sackett, \textit{supra} note 17, at 121.
employees.\textsuperscript{44}

Pennsylvania is one of the states that prohibits the use of a polygraph test or any form of a mechanical or electrical lie detector test as a condition for employment or for continuation of employment.\textsuperscript{45} Violation of this statute is punishable as a second degree misdemeanor. This prohibition, however, has one exception; it does not apply to employees or other individuals who are in the field of public law enforcement or who dispense or have access to narcotics or dangerous drugs.\textsuperscript{46}

Pennsylvania case law has reviewed this statute and its application.\textsuperscript{47} Courts have determined that a wrongful discharge action can be brought as a violation of public policy for requiring an employee as a condition of employment to take a lie detector test or to maintain employment.\textsuperscript{48} If this condition of employment is present, an employee cannot waive liability for violation of this statute by signing a release.\textsuperscript{49} However, the police, under certain circumstances, can administer these tests in the employment setting.\textsuperscript{50}

A review of the advertising literature marketing honesty tests and the applicable case law indicates that as of this writing these tests have not been challenged as a violation of Title VII or Executive Order 11246. Honesty tests are, however, regulated by three states.\textsuperscript{51} Furthermore, polygraph examinations have served as a model from which honesty tests have drawn their objectives. This is verified by their comparisons to polygraph tests and their validation against polygraph examinations.\textsuperscript{52} Because of this, a question over

\begin{footnotesize}
\begin{enumerate}
\item 44. \textit{Id.}
\item 45. \textit{PA. STAT. ANN.} tit. 18, § 7321 (Purdon 1983). Specifically, section 7321 provides:
\begin{enumerate}
\item (a) Offense defined. A person is guilty of a misdemeanor of the second degree if he requires as a condition for employment or continuation of employment that an employee or other individual shall take a polygraph test or any form of a mechanical or electrical lie detector test.
\item (b) Exception. The provisions of subsection (a) of this section shall not apply to employees or other individuals in the field of public law enforcement or who dispense or have access to narcotics or dangerous drugs.
\end{enumerate}
\item 46. \textit{Id.}
\item 50. Wright v. Unemployment Compensation Bd. of Review, 77 Pa. Commw. 278, 547 A.2d 1075, 1077 (1983) (It is not an employer violation when a polygraph examination is administered by the police during an investigation of an accusation made against an employee.)
\item 51. 23 \textit{GOV'T EMPL. REL. REP. (BNA)} 1085 (1985).
\item 52. \textit{See supra} note 31 and accompanying text.
\end{enumerate}
\end{footnotesize}
confidentiality and employee privacy rights arises. Honesty tests could be interpreted as a substitute polygraph examination.

Although Pennsylvania has a statute which only prohibits polygraph examinations as a condition of employment or to continue employment,\(^5\) it may be broad enough to apply to and to prohibit the use of honesty tests.\(^4\) “Mechanical polygraph tests” are also covered by this statute, and include paper and pencil tests. These tests are normally mechanically scored through the use of a computer or a microcomputer that is brought to the testing site. Consequently, a paper and pencil honesty test could be viewed as a “mechanical lie detector test” under Pennsylvania’s anti-polygraph statute.

Honesty tests are at least within the “spirit” and “intent” of this statute. They purport to evaluate the same subjects as a polygraph examination. This alone should be sufficient to prohibit their use. Even though they may not be in violation of Title VII or Executive Order 11246, an employer could still be challenged for illegal use of a mechanical lie detector test. Criminal as well as civil liability could arise from this.\(^5\) An employer must be aware of this possibility in evaluating the decision to use honesty tests on either a broad or limited basis.

If a Pennsylvania employer suspected a theft, he would be prohibited from administering a polygraph test under Pennsylvania's statute. Similarly, an honesty test should be accorded the same prohibition in this type of situation. Honesty tests would be used for the same purpose as the polygraph, i.e., to determine the theft suspect. If the objective of an honesty test is similar to a polygraph, then it should be subject to similar statutory restrictions in its use.

However, in *State v. Century Camera, Inc.*,\(^5\) paper and pencil honesty tests were found not to be prohibited under Minnesota's anti-polygraph statute. The court in *Century Camera*, stated that:

> the polygraph and the voice stress analysis, both purport to measure physiological changes. . . . Thus, we exclude from the current prohibitions of section 181.75 written psychological questionnaires, personal judgments made by an employer or his or her agent, even if based in part on observations of physical behavior or demeanor,

---

53. *See* PA. STAT. ANN. tit. 18, § 7321 (Purdon 1983); *Perks*, 611 F.2d at 1365 (Illustrative of the growing trend against the traditional right to discharge without reason is the judicial finding that a civil cause of action for wrongful discharge may in some circumstances exist and by the fact that there also may be criminal prosecution for such an action under this statute.).

54. *See supra* notes 48-50 and accompanying text.

55. *See* PA. STAT. ANN. tit. 18, § 7321 (Purdon 1983); *Perks*, 611 F.2d at 1363.

and all other gauges of honesty which do not purport to measure physiological changes.\textsuperscript{57}

How other states with anti-polygraph statutes will view honesty tests is not clear. What is certain is that this question can be expected to be litigated because of its important employee privacy connotations. In reviewing this, physiological changes should be considered irrelevant by courts. This is an artificial distinction. If polygraph examinations have been considered unreliable to cause their regulation then honesty tests are likewise unreliable because no additional proof exists to justify their use. The standard that should be used by the courts is the test’s objective and its result. These should be the determinative considerations in evaluating whether honesty tests are substitute polygraph examinations.

Meanwhile, any employer who uses honesty tests should not use them on a blanket basis. A strong job-relatedness should be available for any position for which they are used. This should be conclusively demonstrated. The employer should obtain a representation from the marketer prior to their use. This representation should state that the testing service will defend the employer in any and all actions brought against the employer that may violate Title VII, Executive Order 11246, state discrimination laws, federal and state confidentiality and privacy laws, and state polygraph statutes. The testing service should also make available its personnel to assist in any employer defense of these tests along with any expert witnesses. Otherwise, the employer bears a considerable risk denoted by a feeling of “buyer beware.”\textsuperscript{58}

\textsuperscript{57} Id. at 745 (emphasis added).

\textsuperscript{58} Sackett, supra note 17, at 76. The following guidelines should be considered:

1. Do not over-rely on tests. Use other screening measures such as the interview, background, and reference checks in conjunction with tests.

2. Use test results as an added piece of information, not as a way to make or break someone’s career. If someone gets a poor score but has good recommendations, call up the vendor to recheck the test, and recheck past employers.

3. Periodically retest employees at all levels because people change.

4. Use tests at the end of the pre-employment screening process, once the number of candidates has been reduced to the best few choices.

5. Develop a strong anti-theft policy: Use training films and packages currently in the market to drive home a strong line against theft. Stress the adverse effect of employee theft on employees, their peers, the company. Put your policy on paper. Enforce it.

6. Integrate theft detection into the inventory control process. Investigate computerized inventory control.

7. Understand why employees steal. When possible use this understanding to alter conditions favorable to theft. The reasons people steal are:

(a) Need: Not just financial—may be desire for challenge, thrill-seeking,
IV. CONCLUSION

Increasingly, legislatures and courts are finding that polygraph examinations are a distasteful employment practice as an unwarranted intrusion into an employee's privacy. Paper and pencil honesty tests may be a new or disguised form of polygraph. Employers should be aware of the possible challenges that may arise from their use. Eventually more courts will be asked to review honesty tests under state anti-polygraph laws. Employers must prepare now for this. They must realistically review their internal testing practices and the necessity for the use of these tests. Failure to do this may result in costly litigation and increased exposure to damages if an employer is selected as the unlucky target for challenge.

---

(a) Motivation: a wish for revenge.
(b) Opportunity: Availability of stealable goods plus belief that the thief won't get caught.
(c) Attitude: View that theft is acceptable; is often rationalized as "The company can afford it."

Id. (emphasis in original).