1990

The Employee Polygraph Protection Act of 1988: Proper Penalties When Guilty Employees are Improperly Caught

Kathleen F. Reilly

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/vol7/iss2/4
THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988: PROPER PENALTIES WHEN GUILTY EMPLOYEES ARE IMPROPERLY CAUGHT

Kathleen F. Reilly*

I. INTRODUCTION

On June 27, 1988, the Employee Polygraph Protection Act of 1988 (hereinafter “EPPA” or the “Act”) became law.¹ It generally prohibits the use of polygraph examinations² by private sector employers,³ subject to specific exceptions.⁴ The Act provides a variety of

---

* Judicial Clerk for the Honorable Howell Cobb of the United States District Court for the Eastern District of Texas; B.A. St. Louis Univ.; J.D. ITT Chicago Kent School of Law.


2. The Act defines a polygraph as an instrument that “(A) records continuously, visually, permanently changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and (B) is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.” 29 U.S.C.A. § 2001(4) (West Supp. 1989).

3. Except as provided in sections 2006 and 2007 of this title, it shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce —

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;
(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;
(3) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against —
   (A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test, or
   (B) any employee or prospective employee on the basis of the results of any lie detector test; or
(4) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against, any employee or prospective employee because —
   (A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter,
   (B) such employee or prospective employee has testified or is about to testify
penalties for employers who administer polygraph tests in violation of its prohibition. The Act, however, does not specify which of these penalties are applicable to an employer who violates the Act, but in doing so catches an employee who is in fact guilty of some prohibited conduct.

At the time the Act was passed, the vast majority of the polygraph examinations given in the United States were administered in employment settings by private sector employers. Employers in the private sector were requiring polygraph tests both as pre-employment screening devices and as post-employment identification devices for the administration of employee discipline. The use of these polygraph examinations was adversely affecting thousands of innocent workers per year. The EPPA was the Congressional response to the unfairness of subjecting a worker to discipline or discharge based solely upon the results of the inherently unreliable polygraph test.

in any such proceeding, or
(C) of the exercise by such employee or prospective employee, on behalf of such employee or another person, of any right afforded by this chapter.


5. The Act forbids not only polygraph tests but also similar “lie detectors” such as deceptographs, voice stress analyzers, psychological stress evaluators or other devices that are used, or the results of which are used, as a means of ascertaining truthfulness. 29 U.S.C. § 2001(3) (West Supp. 1989).

6. 29 U.S.C.A. § 2005 (West Supp. 1989). Penalties include the imposition of fines and injunction against further polygraph testing, as well as reinstatement, back pay, and attorney’s fees for the adversely affected employee. Id.


8. While the polygraph was originally developed as an adjunct to criminal investigations within the law enforcement community, the vast majority of tests today are used as a screening procedure in private sector employment. Id. at 728.

9. Tests, either preemployment or random post-employment, accounted for much of the recent increase in testing of employees. Id.

10. One witness testified during hearings on the EPPA that a minimum of 400,000 honest workers annually were wrongfully found deceptive by polygraph examinations, and suffered adverse employment consequences. See id. at 729.

11. As the Senate Labor and Human Resources Committee stated, “the Act’s” purpose is to eliminate the denial of employment opportunities by prohibiting the least accurate yet more widely used lie-detector tests, preemployment and random examinations, and providing
The Act prohibits most testing, and establishes guidelines for permitted testing.\(^{12}\) Employers who fail to follow these guidelines are subject to a variety of penalties.\(^{13}\) These penalties fall into two categories: (1) actions that are enforced by the Secretary of Labor, such as injunctions and monetary fines,\(^{14}\) and (2) actions which grant relief to the aggrieved employee or applicant, including reinstatement, backpay, and other remedies.\(^{15}\) A problem arises, however, when an employer administers a polygraph to an employee in violation of these restrictions, but as a result successfully catches an employee guilty of workplace theft or dishonesty. Because it does not specify which penalties should be imposed upon these employers, the courts in attempting to enforce the Act are faced with a myriad of questions. Which penalty does the Act prescribe for administering a polygraph in violation of the statute? Is it consistent with the legislative intent behind the EPPA to use all available penalties if the employer did in fact take action against a guilty employee? Should the penalties be restricted only to those enforced by the Secretary of Labor, with no remedy for the aggrieved employee?

This Article will first discuss the Act generally, focusing on the history and purpose of its ban on lie detector testing.\(^{16}\) This Article will then discuss the problem of the private employer who violates the Act.\(^{17}\) Finally, this Article will suggest an appropriate penalty to be imposed upon the employer who improperly administers a polygraph test, but who identifies and disciplines a guilty employee as a result of the improper test.\(^{18}\)

II. THE HISTORY OF POLYGRAphS AND THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

Since the late 1970's, the number of polygraph examinations given in the United States had risen dramatically.\(^{19}\) Testimony standards for and safeguards from abuse during tests not prohibited." Id. at 726.

12. 29 U.S.C.A. § 2007 (West Supp. 1989). The rights of the examinee are specified for the pre-test phase, during the test itself, and during the post-test phase. Id.; see infra notes 100-03 and accompanying text.

13. 29 U.S.C.A. § 2005 (West Supp. 1989). A civil penalty of not more than $10,000 may be assessed, an injunction against continuing violations may be issued, and the aggrieved employee may seek reinstatement, back pay, costs and attorney's fees. Id.

14. Id.

15. Id.

16. See infra notes 19-67 and accompanying text.

17. See infra notes 68-109 and accompanying text.

18. See infra notes 110-48 and accompanying text.

19. Polygraphs in the Workplace: Hearings Reviewing the Use and Abuse of Polygraph Testing in the Workplace Before the Senate Committee on Labor and Human Resources,
before the Senate Committee on Labor and Human Resources from various organizations representing workers estimated that private sector employers administered approximately two million polygraph examinations in 1986. The number of tests was increasing in spite of the fact that the American Medical Association (hereinafter "AMA"), among others, had concluded that a polygraph had as much chance of truth detection as flipping a coin.

Polygraphs, by themselves do not, in fact, detect deception. Rather they merely measure physiological responses to various questions. The polygraph machine measures and records cardiovascular and respiratory changes in connection with responses to questions asked by the polygraph examiner. The examiner then evaluates the record of these physical responses and determines whether the responses indicate truthfulness or deception.

The accuracy of the tests varies depending on the questioning technique used. The Relevant/Irrelevant (hereinafter "R/I") technique is a questioning method that was primarily used in the pre-employment screening context. There are many problems associ-
ated with this technique and experts place very little confidence in it.\textsuperscript{28} In response to the inadequacies of the R/I technique a second technique was developed which has proved to be slightly more reliable when used for specific incident testing.\textsuperscript{29} This method is known as the Control Question (hereinafter "CQ") technique.\textsuperscript{30}

Polygraph examinations of either variety are unreliable for two reasons. First, the results are entirely dependent upon the subjective evaluation of the polygraph examiner.\textsuperscript{31} The polygraph machine merely provides a record of the physical responses; the operator must interpret those responses and give an opinion of truthfulness or deception.\textsuperscript{32} Second, changes in blood pressure, heartbeat, and rate of breathing can be the result of influences other than the stress of telling a lie.\textsuperscript{33} An individual who is frightened, nervous, angry, or physically impaired may truthfully respond to a polygraph test in a manner that can often be interpreted as indicating deception.\textsuperscript{34} Similarly, there is no way for the examiner to separate individuals who can remain physically calm while lying, from truthful individuals.\textsuperscript{35} A

\begin{itemize}
\item 28. OTA Study, supra note 25, at 17. The intent of the various questions is usually quite transparent, therefore, the relevant questions are likely to evoke a strong reaction in truthful subjects as well as in deceptive ones. \textit{Id.} Additionally, because the questions usually are not reviewed by the examinee prior to the R/I method exam, the subjects' responses may be skewed by surprise or misunderstanding. \textit{Id.} This method is also more susceptible to errors due to drugs, personality eccentricities or psychological conditions. \textit{Id.; see also Comment, supra note 27.}
\item 29. OTA Study, supra note 25, at 97.
\item 30. The relevant questions under the CQ technique concern specific incidents. \textit{Id.} at 19
\item In contrast to the R/I technique, CQ exams, which are much lengthier in duration, include intentionally ambiguous control questions which involve deviant or nefarious acts almost everyone may have committed at one time or another. \textit{Id.} The assumption is that virtually all subjects will display anxiety and stress when answering these control questions. \textit{Id.} The test examiner then compares the reactions to the relevant questions to the reactions from the control questions. \textit{Id.} If the reactions to the relevant questions are greater than to the control questions the subject is diagnosed as being deceptive. \textit{Id.}
\item 31. As the Senate Committee on Labor and Human Resources noted, "most examiners base their conclusion on the conduct of the examinee, the natural inclinations of the examiner, and on statements made during the examination." S. REP. No. 284, supra note 7, at 729.
\item 33. \textit{Senate Hearings, supra} note 19, at 3 (containing the statement of Robert Abrams, Attorney General, State of New York).
\item 34. As Attorney General Abrams said, "whether a person passes or fails the test also often depends on the state of his or her health. People with breathing or heart problems can show false reactions to questions and then fail the test." \textit{Id.}
\item 35. A person with physical problems may exhibit all of the physical reactions an examiner would interpret as indicating deception, regardless of whether he or she was actually telling the truth. \textit{Id.}
A skilled liar is more likely to indicate truthfulness during a polygraph test than an innocent person tested for the first time.36

Nearly fifty bills had been introduced prior to the second session of the One-hundredth Congress proposing regulation or prohibition of polygraph testing in employment settings.37 The impetus behind those bills was the perception that innocent people were either being denied employment or being discharged from employment because they failed to pass a polygraph test.38 The Senate Committee on Labor and Human Resources heard testimony that hundreds of thousands of American workers had been adversely affected by erroneous polygraphs.39 Testimony indicated that many employers were customarily administering random polygraph tests to employees and taking disciplinary actions based on the results of these random tests.40 Frequently these tests were of very short duration, with random questions intended to elicit general information about an employee or potential employee.41 These random questions included inquiries regarding any previous thefts and any history of drug use, but frequently also included inquiries regarding sexual preferences and personal habits or beliefs.42 The Office of Technology Assess-

36. Ironically, polygraph examinations are generally prohibited from use as evidence in criminal trials. See 1 WIGMORE, EVIDENCE § 7a n.35 (Tillers rev. 1983); MCCORMICK, EVIDENCE § 207 (Cleary 2d ed. 1972). The landmark case refusing the admission of polygraph evidence concerning guilt in a criminal trial is Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923). In Frye, polygraphs were barred because there was no adequate demonstration of their accuracy. See id. But see United States v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989), in which the Eleventh Circuit held that polygraph evidence was not inadmissible per se in a criminal trial. Generally, however, as one representative commented, "[r]ight now, criminals have more protection from these gadgets than working men and women." 134 CONG. REC. H3731 (1988) (statement of Rep. Brennan).

37. S. REP. No. 284, supra note 7, at 732.

38. Id. at 726.

39. Senate Hearings, supra note 7, at 8, 9 (statement of Mr. DuBester). According to Mr. DuBester, polygraph tests are frightening and humiliating; employees have been intimidated into informing on fellow employees, and asked questions regarding family problems, levels of job satisfaction, sexual preferences, and personal finances, among other topics. Id. Mr. DuBester estimated hundreds of innocent workers and applicants had lost jobs based on polygraph examinations. Id.

40. Id. at 4 (statement of Attorney General Abrams). According to Mr. Abrams, two New York women lost their jobs at a major department store based on polygraph examinations. Id. One had been at the store twenty-three years, the other twelve-and-one-half years. Id. They were selected at random to take the test as a control measure, although there had been no thefts in their departments. Id. They were both discharged by their employer after failing the random tests. Id.

41. S. REP. No. 284, supra note 7, at 729-30.

42. Such tactics even caused a strike against Coors in 1977. See Comment, supra note 32, at 375. The striking employees claimed that the company was asking questions like: What are your sexual preferences? How often do you change your underwear? Are you immoral?
The Polygraph Act of 1988 (hereinafter “OTA”) found that these types of brief polygraph tests given in the employment setting had no indication of scientific reliability. The control question technique used in the majority of these short tests can show innocent people as guilty as often as 17 percent of the time, with inconclusive results as often as 44 percent of the time.

Although opponents of polygraph legislation conceded that polygraphs were inaccurate, they argued that polygraphs were nevertheless essential because employers were confronted with staggering economic losses from employee theft. In their view, the level of inaccuracy was simply not sufficient to justify depriving business of this tool for controlling employee theft.

Prior to 1988, no bill seeking to ban polygraphs was able to satisfy those who sought to protect employers from huge losses. House Bill 1212 (hereinafter “H.R. 1212”), which eventually became the Act, did not, as introduced, address these conflicting perceptions. The bill originally banned any polygraph testing by private sector employers, with exceptions for particular industries. It did not contain any exception for the employer seeking to control employee theft. Instead, it completely banned the use of polygraphs in the private sector.

The House and Senate received extensive testimony on H.R. 1212 regarding the inherent unreliability of polygraph examinations. A representative of the American Medical Association testified that innocent people seeking to qualify for employment or to avoid discipline during employment, were extremely likely to be victims of a “false-positive” test when under the stress of testing. A “false-positive” test is a polygraph that is interpreted as showing a subject is lying or guilty, when the subject is actually telling the truth. Other

Are you a homosexual? Are you a communist? inter alia. Id.

43. OTA Study, supra note 25. The brief test does not provide an adequate opportunity to develop the control questions necessary to get any level of accuracy whatsoever in the examination. See id.


45. Id.


47. Id.

48. Id. at H9529 (statement of Rep. Taylor).

49. Id.

50. Senate Hearings, supra note 19, at 20 (statement of American Medical Association). According to the U.C. AMA, an unacceptable percentage of innocent persons may be labeled as deceptive in a polygraph screening situation in which most of those screened were truthful. Id.

51. Consequently, a “false-negative” test result occurs when a person is diagnosed as
testimony indicated as many as four-hundred-thousand Americans were victims of adverse employment actions based on “false-positive” polygraph test results.62

The problems associated with polygraph examinations were not ignored by the states however. By the time the Act was passed only seven states were devoid of any kind of legislation or regulation of polygraph examinations.63 Twelve states currently not only prohibit an employer from requiring a polygraph examination, but also bar an employer’s request of an employee to take one.64 Ten states ban only a required exam but not a requested one.65 The other twenty-one states have not banned the polygraph's use, but have imposed various forms of regulation on the polygraph machine and polygraph examiners.66

The extensive use of polygraph testing in private sector employment combined with the enormous impact on employment for innocent individuals because of “false-positive” test results finally galvanized the House into action.

H.R. 1212 was passed in the House and sent to the Senate. In

being truthful when in fact he or she is lying. OTA Study, supra note 25.
52. Senate Hearings, supra note 19, at 3 (statement of Attorney General Abrams).
the Senate, the bill was amended to provide an exception for employers to request polygraph examinations from employees reasonably suspected of involvement in employee theft or other incidents resulting in economic loss to the employer.\(^{67}\) The Senate noted that the Office of Technological Assessment had concluded polygraph tests used in specific investigations had some indication of scientific reliability.\(^{68}\) For example, in criminal cases, where the examiner used a much lengthier test format than that of the typical employer-administered polygraph test, the polygraph had an accuracy rate of 75.1 percent when the subject was guilty, and 63 percent when the subject was innocent.\(^{69}\)

Because of this potentially greater reliability, the Senate added to H.R. 1212 a strictly controlled exemption for employers who wanted to request polygraph examinations of specific employees whom the employer suspected of involvement in an incident resulting in economic loss to the employer.\(^{66}\) One Senator noted, however, that even in such a situation, the evidence indicated that polygraph examinations were "far from infallible."\(^{61}\) The primary purpose of the bill continued to be the protection of employees and applicants from adverse employment actions based solely upon the inherently unreliable polygraph examination.\(^{62}\)

Ultimately, the House passed a Conference Committee version incorporating the Senate's proposed exception for testing of employees based upon a reasonable suspicion of their involvement in an incident resulting in an economic loss to the employer.\(^{63}\) The House agreed to the compromise based upon the greater possibility for reliability found by the OTA in polygraph examinations in specific criminal investigations.\(^{64}\) Although polygraphs are not very accurate\(^{65}\) even in specific investigations, the need for employers to have some method of detecting employee theft required some compromise Permitting a limited use of the polygraph. The result of this compromise was a prohibition with an exemption for employers with a reasonable suspicion of a particular employee, namely, the Employee

\(^{58}\) \textit{Id.}
\(^{59}\) OTA Study, \textit{supra} note 25.
\(^{61}\) \textit{Id.}
\(^{62}\) \textit{Id.} (statement of Sen. Metzenbaum).
\(^{63}\) S. REP. No. 284, \textit{supra} note 7, at 736.
\(^{65}\) \textit{See supra} notes 31-36 and accompanying text.
Introduction

The Employee Polygraph Protection Act of 1988 prohibits the use of polygraphs by private sector employers in both pre-employment screening settings and post-employment disciplinary proceedings.

III. The Employee Polygraph Protection Act of 1988

The EPPA does not completely ban the use of polygraphs; it contains exemptions for specific industries, permitting employers in those industries to administer polygraph tests to their employees. Additionally, section 7(d) of the Act provides an exemption from the ban on polygraph testing for private sector employers in other industries. A private sector employer may request that an employee take a polygraph test, “in connection with an ongoing investigation involving economic loss or injury to the employer’s business.” Such a test can only be requested of an

69. As laid out in section 7 of the Act:
   Subject to sections 2007 and 2009 of this title, this chapter shall not prohibit an employer from requesting an employee to submit to a polygraph test if —
   (1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer’s business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage;
   (2) the employee had access to the property that is the subject of the investigation;
   (3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and
   (4) the employer executes a statement, provided to the examinee before the test, that —
      (A) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees,
      (B) is signed by a person (other than a polygraph examiner) authorized to legally bind the employer,
      (C) is retained by the employer for at least 3 years, and
      (D) contains at a minimum —
         (i) an identification of the specific economic loss or injury to the business of the employer,
         (ii) a statement indicating that the employee had access to the property that is the subject of the investigation, and
         (iii) a statement describing the basis of the employer’s reasonable suspicion that the employee was involved in the incident or activity under investigation.
70. 29 C.F.R. § 801.12(c)(1) (1989) cites other examples of specific incidents which would meet the economic loss or injury requirements including check-kiting, money launder-
employee who “had access to the property that is the subject of the investigation. . .” and only if “the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation. . .”

An employer who falls under the section 7(d) exemption and wishes to request an employee to take a polygraph must follow certain required steps. That employer must provide the suspected employee with a written notice describing the incident under investigation, setting forth the basis of the employer’s suspicion of the employee, and advising that employee that failing the test or refusing to take it cannot alone be the basis for an adverse employment action or a requirement for continued employment. According to the regulations, the employee must be notified at least forty-eight hours prior to the scheduled examination “to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative.” The Secretary of Labor has provided a suggested form for this notice.

Additionally, an employer who gives a test based upon reasonable suspicion must have “additional supporting evidence” before the employer can take any adverse employment action against the employee who fails or refuses to take the test. This protection is rather illusory, however, since the additional supporting
evidence allowed includes the evidence which was the basis for the employer's reasonable suspicion.\textsuperscript{79} It also includes any incriminating statement or confession made by the employee before, or during, the polygraph examination.\textsuperscript{80} The dichotomous result of these provisions is that an employee who agrees to take a polygraph test, after being assured it cannot be the basis for an adverse employment action, can still be disciplined or discharged if he or she fails that test. For example, a merchant discovers some stock has disappeared between nine o'clock and ten o'clock on a particular morning. An employee who was on duty during that hour and who had access to the stock in question agrees to take a polygraph test. During the test she admits that she stole the missing stock. She can then be legitimately fired by the merchant, based on the incriminating statement she made during the polygraph examination.

Theoretically, an employer can violate the Act in any one of three ways: administering a test without reasonable suspicion;\textsuperscript{81} administering a test based upon reasonable suspicion but failing to follow the required procedure;\textsuperscript{82} or administering the test properly but taking adverse disciplinary action without additional supporting evidence.\textsuperscript{83} For example, a retailer who administers a test to all of his employees when some money is missing from a cash register has no reasonable suspicion that all of them took the money and has therefore violated the Act. Similarly, a hardware store owner who has a reasonable suspicion that two particular clerks were involved in the theft of a case of tools, but fails to give the clerks written notice of the polygraph examination has also violated the Act. Finally, a grocer who suspects three stock boys of stealing liquor, and properly administers a polygraph, but then fires all three with no further evidence theoretically has not obtained additional supporting evidence and has thus also violated the Act.

In practice, however, only two of these violations can ever occur. An employer who has properly administered the test based upon a reasonable suspicion cannot violate the Act by taking an adverse employment action. By definition, the evidence supporting the employer's reasonable suspicion constitutes sufficient additional supporting evidence to justify the ad-
verse employment action. When confronted with an alleged violation, the employer can point to the evidence that gave rise to the reasonable suspicion, since the statute specifies that evidence as adequate additional supporting evidence. The result is that the only possible violations are administering a test without reasonable suspicion, or failing to follow the required procedure during the test. Consequently, this Article will only deal with appropriate penalties for these two violations.

The EPPA specifies the penalties that may imposed upon an employer who improperly administers such a test as well as an employee's recourse when subjected to an improper polygraph. Available remedies include employment, reinstatement, promotion, back pay, costs and attorney's fees for the aggrieved employee. The Secretary of Labor may also seek civil fines and injunctions against continuing violations by the employer. Unfortunately, the Act does not specify any lesser or different penalty to be imposed upon an employer who violates its provisions, but as a result, disciplines or discharges an employee who is actually guilty of the activity leading to the economic loss.

IV. EMPLOYER VIOLATIONS OF THE REASONABLE SUSPICION EXCEPTION

As was previously mentioned, there are two possible violations of the EPPA that an employer can commit in connection with the investigation of a workplace theft. The first is to administer polygraphs to employees in the absence of reasonable suspicion. The second is to administer polygraphs to reasonably suspected employees, but without following the required procedure. The first violation occurs when the employer can articulate no rational basis for suspecting the employee he or she wants tested. The employer is required by the regulations to have "an observable, articulable basis in

84. See supra notes 79-80 and accompanying text.
89. An employer who violates any provision of this chapter may be assessed a civil penalty of not more than $10,000. 29 U.S.C.A. § 2005(a) (West Supp. 1989); see also 29 U.S.C.A. § 2005(b) (West Supp. 1989).
90. See supra note 87 and accompanying text.
91. See supra note 81 and accompanying text.
93. Id.
fact" which indicates that the employee to be tested was involved in the theft. Access to the property that was stolen cannot alone constitute a basis for reasonable suspicion. The evidence that the employer gathers in support of the reasonable suspicion requirement is the evidence that can be used later as the additional supporting evidence for disciplinary action. When an employer, who has experienced a workplace theft, requests or requires an employee to take a polygraph test, but can articulate no reasonable basis for suspecting that the employee is involved in the theft, the employer will be in violation of the Act. The second violation occurs when the employer does have reasonable suspicion that a particular employee was involved in a workplace theft, but that employer fails to follow the Act's procedures for administering the polygraph examination. For example, the employer may fail to provide written notice to the employee, or fail to give the employee a list of questions to be

---

...continue reading the text...

94. The regulations further define this standard:
For example access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for "reasonable suspicion." Information from a co-worker, or an employee's behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion. While access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding the access or opportunity (such as its unauthorized or unusual nature) may constitute a factor in determining whether there is a reasonable suspicion.


95. The word access as used in section 7(d)(2) of the Act (codified at 29 U.S.C.A. § 2006(d)(ii) (West Supp. 1989)) is defined at 29 C.F.R. § 801.12(e)(1) (1989) and refers to:
the opportunity which an employee had to cause, or to aid or abet in causing, the specific economic loss or injury under investigation. The term "access," thus, includes more than direct or physical contact during the course of employment. For example, all employees working in or with authority to enter a warehouse storage area have "access" to the property in the warehouse. All employees with the combination to a safe have "access" to the property in a locked safe. Employees also have "access" who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of investigation. For example, a bookkeeper in a jewelry store with access to inventory records may aid or abet a clerk who steals an expensive watch by removing the watch from the employer's inventory records. In such a situation, it is clear that the bookkeeper effectively has "access" to the property that is the subject of the investigation.


99. See supra note 82 and accompanying text.
100. See supra note 75 and accompanying text.
The Polygraph Act of 1988 asked, or ask questions that are forbidden, or otherwise fail to meet the requirements of the Act. Any of the above transgressions amounts to a violation of the EPPA.

An employer’s chances of catching a guilty employee are usually increased by the administration of the polygraph test, because the polygraph test is an inherently coercive device. The polygraph has been shown to have a coercive effect on some employees, instilling fear and therefore inducing confessions. It has been estimated that as much as 90 percent of the information a polygraph examiner obtains during an exam regarding a particular incident is obtained through pre-examination questioning, before the examinee is even hooked up to the machine. The regulations affirm the coercive potential of the polygraph by providing that statements or confessions made during the polygraph examination may constitute the additional supporting evidence necessary to support an adverse employment action.

An employer may be tempted to violate the Act in order to take advantage of the coercive power of the polygraph examination. An employer who knows that a polygraph exam is likely to induce a confession may improperly administer one, and, through the exam, gather the evidence he or she can later claim gave rise to the reasonable suspicion. It is essential, therefore, that some penalty

101. Section 6 of the Act requires that the employee is to be provided an opportunity to review all questions to be asked during the test and be informed of the right to terminate the test at any time. 29 U.S.C.A. § 2007(b)(2)(E) (West Supp. 1989).

102. The Act provides that:
   (B) the examinee is not asked questions in a manner designed to degrade, or needlessly intrude on such examinee;
   (C) the examinee is not asked any question concerning -
      (i) religious beliefs or affiliations,
      (ii) beliefs or opinions regarding racial matters,
      (iii) political beliefs or affiliations,
      (iv) any matter relating to sexual behavior, and
      (v) beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations . . . .

103. See 29 U.S.C.A. § 2007 (West Supp. 1989). Other procedural requirements include disclosing to the employee in writing; all of his or her rights under the Act, whether the testing area is being observed by a two-way mirror or camera, whether the test is being recorded or otherwise monitored, that either employer or employee may (with mutual knowledge) record the test and, inter alia, that no test shall last for less than 90 minutes. Id.

104. See PLI, supra note 98.

105. Senate Hearings, supra note 19, at 88 (statement of the International Brotherhood of Electrical Workers, AFL-CIO).

106. Id. at 11 (statement of Mr. DuBester).


108. See supra note 85.
be imposed upon that employer in order to fulfill the Act’s purpose of protecting innocent employees from polygraph testing. However, it seems contrary to the legislative purpose of the exception, the deterrence of employee theft, to allow a guilty employee to successfully sue for reinstatement, back pay, and attorney’s fees.\textsuperscript{109} If the employer is forced to take back a thief, the purpose and effect of the EPPA seems to be undermined. The question, therefore, is what penalty will deter the employer, while not rewarding the guilty employee.

V. AN APPROPRIATE PENALTY FOR IMPROPER TESTING RESULTING IN THE DISCHARGE OF GUILTY EMPLOYEES

This Article proposes that the appropriate penalty for an employer who discharges a guilty employee based upon an improperly administered polygraph test, is the imposition of a civil fine and an injunction to prevent further improper testing. This would adequately deter the employer by financially punishing the employer for the violation of the Act, while at the same time furthering the legislative purpose of protecting innocent employees.\textsuperscript{110} Additionally, the discharged employee should not be allowed to pursue reinstatement or other remedies against the employer. Barring reinstatement will protect the legislative goal of allowing employers to fight employee theft by punishing guilty employees.

Tailoring the penalties in this way would satisfy both the Act’s goal of prohibiting the use of the inherently unreliable polygraph, and the realistic goal of permitting employers to discharge employees who steal from them. The amount of the civil fine will serve as the deterrent to the employer’s incentive to exploit the coercive potential of the polygraph. An employer who suffers financial loss because of his/her indiscriminate use of the polygraph will become more prudent in its use. In the future such employers will utilize the test only when there is reasonable suspicion of employee theft and will seek to follow proper procedure when doing so. At the same time, this penalty will not reward guilty employees with reinstatement and back pay based only upon their employers’ violations of the Act. Employees who steal from their employers, but have the luck to be caught through an EPPA violation by that employer, should not then be reinstated to steal again. That would be tantamount to slapping the

\textsuperscript{109} The primary legislative concern was deterrence of employee theft, thus rewarding a guilty employee seems to undermine that purpose. \textit{See supra} note 46.

\textsuperscript{110} \textit{See supra} note 46 and accompanying text.
hand of the boy who caught the fox and tossing the fox back into the henhouse.

The EPPA is so new that no court has yet ruled on the appropriate penalty in such a situation. State court decisions, as well as court decisions interpreting Weingarten rights\(^\text{111}\) provide guidance in this area. Cases in which state courts have upheld or reversed discharges, or granted or denied unemployment compensation, can be helpful in defining the public policy surrounding the enforcement of laws regarding polygraph examinations.\(^\text{112}\) Examination of these results against the backdrop of the legislative intent behind the Act indicates that a punitive, rather than a compensatory, remedy is proper to truly implement the purposes of the Act. Courts are willing to punish employers for improper uses of polygraph examinations, but are not willing to permit guilty employees to obtain compensation for those examinations.

Additionally, decisions from the forty-three states which had laws regulating the use of polygraphs or the work of polygraph examiners prior to the EPPA's passage can provide assistance in interpreting the proper penalty for an employer who discovers a guilty employee through an improper polygraph. When the EPPA was passed, only seven states had no law whatsoever regarding polygraph examinations.\(^\text{113}\) The Act now prohibits polygraphs in the employment setting in those states in which it was previously permitted or merely regulated. The EPPA does not, however, preempt any state polygraph prohibition which is more stringent than itself.\(^\text{114}\)

One group of cases denies recovery under the wrongful discharge cause of action or collection of employment cause of action to employees discharged because they failed or refused to take a polygraph test. These courts base their decisions on the public policy against requiring an employer to retain a guilty employee. For example, a federal district court in the state of New Jersey, which statutorily prohibits the use of polygraphs in employment settings, upheld

\(^{111}\) See NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). Weingarten rights are the rights of employees, under section 7 of the National Labor Relations Act, to have union representatives present when the employees are questioned regarding facts that may result in disciplinary actions. \(\text{Id.}\)

\(^{112}\) Since the EPPA is so new, courts' application of state polygraph policies can be instructive.

\(^{113}\) See supra note 53 and accompanying text.

\(^{114}\) 29 U.S.C.A. § 2009 (West Supp. 1989) provides that "this chapter shall not preempt any provision of any state or local law or of any collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to lie detector tests than any provision of this chapter."
an arbitrator's award sustaining the discharge of an employee based upon the statements the employee made during a polygraph examination.\textsuperscript{116} The court said that the public policy discouraging polygraph tests, embodied in the statute, was outweighed by the public policy considerations in favor of permitting an employer to discharge an employee who steals.\textsuperscript{118}

Similar conclusions have been reached by state courts in Ohio,\textsuperscript{117} Illinois,\textsuperscript{118} and Florida.\textsuperscript{119} The Ohio Appellate Court for Hamilton County held that an employee who was discharged for refusing to take a polygraph, failed to state a cause of action for wrongful discharge.\textsuperscript{120} Likewise, the Illinois Appellate Court for the First District found no cause of action for wrongful discharge when an employee refused to take a polygraph examination.\textsuperscript{121} In Florida, an employee who agreed to take a polygraph as a condition of employment, and then later refused, was prohibited from collecting unemployment compensation, based on the public policy against requiring an employer to pay unemployment benefits to a possibly guilty employee.\textsuperscript{122}

The Mississippi Supreme Court, with reasoning similar to the rationale in the Act for exempting certain employers, held that a police officer can be required to take a polygraph examination or be dismissed.\textsuperscript{123} The court reasoned that the nature of a police officer's job, involving public safety and protection, made it essential that a police department be able to use all available tools, including the polygraph examination.\textsuperscript{124} Similarly, in drafting the EPPA, Congress

\begin{itemize}
  \item \textsuperscript{116} Id. at 2758.
  \item \textsuperscript{117} Walden v. General Mills Restaurant Group, Inc., 31 Ohio App. 3d 11, 508 N.E.2d 168 (Ct. App. 1986)(holding that an at-will employee who was discharged for refusing to take a polygraph examination did not have a cause of action for wrongful discharge).
  \item \textsuperscript{118} Cipov v. International Harvester Co., 134 Ill. App. 3d 522, 481 N.E.2d 22 (App. Ct. 1 Dist. 1985) (upholding that an at-will employee can be terminated for any or no reason).
  \item \textsuperscript{119} Vaughan v. Shop & Go, Inc., 526 So. 2d 91 (Fla. App. 1987)(construing that an employee who refused to take a polygraph examination after agreeing to submit to such an examination as a condition of employment was guilty of misconduct under unemployment compensation law and was therefore disqualified from receiving unemployment compensation benefits).
  \item \textsuperscript{120} Walden, 31 Ohio App. 3d at 11, 508 N.E. 2d at 168.
  \item \textsuperscript{121} Cipov, 134 Ill. App. 3d at 522, 481 N.E. 2d at 22.
  \item \textsuperscript{122} Vaughan, 526 So. 2d at 91.
  \item \textsuperscript{123} Knebel v. City of Biloxi, 453 So. 2d 1037 (Miss. 1984)(holding that a municipal police officer could reasonably be required to submit to a polygraph examination, the scope of which was restricted to her involvement in an illegal drug investigation, and that she had no constitutional right to refuse).
  \item \textsuperscript{124} Id.
\end{itemize}
The Polygraph Act of 1988 created a specific exception for government intelligence agencies and security service employers, both of whose employees are involved in public safety and protection activities.

In a decision that was a remarkably accurate prediction of the parameters of the Act's reasonable suspicion exception, a Georgia appellate court held that an employee could be required to take a polygraph if the examination questions were specifically related, and narrowly tailored, to a specific incident. If the employee was assured the answers could not be used in a subsequent criminal prosecution, refusal to take the test was an adequate basis for discharge of the employee.

125. Section 5 of the Act states that:

(2) Security Nothing in this chapter shall be construed to prohibit the administration, by the Federal Government, in the performance of any intelligence or counterintelligence function, of any lie detector test to-

(A) (i) any individual employed by, assigned to, or detailed to, the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency,

(ii) any expert or consultant under contract to any such agency,

(iii) any employee of a contractor to any such agency, or

(iv) any individual applying for a position in any such agency, or

(v) any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency; or

(B) any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve access to information that has been classified at the level of top secret . . .

(c) . . . an employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under contract with such Bureau. 29 U.S.C.A. § 2006(b), (c) (West Supp. 1989).

126. The Act defines security services as:

Private employers whose primary business purpose consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel and whose function includes protection of-

(A) facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States . . . [including]

(i) facilities engaged in the production, transmission, or distribution of electric or nuclear power,

(ii) public water facilities,

(iii) shipments or storage of radioactive or other toxic waste materials, and

(iv) public transportation, or

(B) currency, negotiable securities, precious commodities or instruments, or proprietary information.


128. Id. The Act does not indicate whether statements made by an employee during a polygraph examination can be used in a later criminal prosecution, but there is no prohibition of such a use. See 29 U.S.C. §§ 2001-2009. The actual polygraph itself is probably inadmissible. See supra note 36.

All of these decisions indicate that the public policy in favor of permitting the employer to discharge a guilty employee and prevent employee theft is strong and persuasive. In applying the Act, denial to the employee of the remedies of reinstatement, back pay, and attorney's fees follows that public policy. Such a denial supports the employer's right to seek to eradicate employee theft and control the workplace.

In fashioning a public policy compromise under similar circumstances, the National Labor Relations Board and the federal courts have adopted the view that guilty employees who are discharged in violation of their Weingarten rights are not entitled to reinstatement. Courts have recognized the public policy in favor of union representation, but balance it against the public policy against forcing an employer to take back a dishonest worker. In a Weingarten situation, an employee is deprived of union representation during an interview which is later the basis for discipline or discharge. The violation is similar to a situation where an employee is improperly given a polygraph examination which is later the basis for discipline or discharge. In a Weingarten situation, in spite of the fact that the employer discovered the employee's guilt through improper means, the employer will not be forced to take back the employee.

At the same time, a strong public policy exists against conditioning employment upon a polygraph examination. For example, the Pennsylvania Commonwealth Court upheld the award of unemployment benefits to an employee who quit rather than take a polygraph examination. The court reasoned that the public policy against polygraphs in employment settings rendered an employee's refusal to take the polygraph an involuntary quit under the Pennsylvania unemployment statute. Similarly, the Nebraska Supreme Court ruled that an employee who was fired for refusing to take a polygraph examination had stated a cause of action for wrongful discharge. The public policy against polygraphs in employment was

130. See supra note 109 and accompanying text.
131. Taracorp Indus., 273 N.L.R.B. 340 (1981). Taracorp was an abrupt about-face for the National Labor Relations Board, which had been ordering reinstatement unless the discharge was not based even in part upon information obtained during their proper interview. Id.
132. Communications Workers of Am., Local 5008 v. NLRB, 781 F.2d 817 (7th Cir. 1986); Pacific Tel. & Tel. v. NLRB, 711 F.2d 134 (9th Cir. 1983); Montgomery Ward & Co. v. NLRB, 664 F.2d 1095 (8th Cir. 1981).
133. See supra note 111.
135. Id. at 1880.
such a clear mandate that the employer’s requirement of a polygraph constituted abusive discharge.\textsuperscript{137} In Alabama, an appellate court ruled that insubordination based upon a refusal to take a polygraph examination cannot be an adequate basis for discharge.\textsuperscript{138} Similarly, in Maryland, a wrongful discharge cause of action may be available to an employee who is required to take a polygraph examination.\textsuperscript{139} The Maryland public policy is clearly against conditioning employment on the taking of a polygraph examination.\textsuperscript{140} The same public policy prohibits requiring a polygraph for employment in West Virginia.\textsuperscript{141}

Maryland has expanded the remedies available to the employee wrongfully discharged on the basis of a polygraph examination, to include future lost wages.\textsuperscript{142} Although the Act provides only for back pay, the Maryland decision awarding future lost wages suggests that in weighing the public policy considerations against polygraph examinations, financial awards are an appropriate means of enforcement. In punishing an employer who has violated the Act, the punitive financial damages sought by the Secretary of Labor provide an appropriate means of enforcement, and a deterrent to the employer who violates the public policy against polygraphs.

In situations involving statutes other than the EPPA, a reviewing court or administrative agency must make a choice between compensating the innocent victims, and consequently compensating the guilty as well, or not penalizing the guilty employer who coerces employees. Since only one weapon is typically available, the enforcement or denial of disciplinary action against the employee, the choice between compensation and punishment is a Procrustean bed.\textsuperscript{143} The court or agency must either cut off the feet of the inno-

\textsuperscript{137} Id. at 1187.
\textsuperscript{138} Hood v. Alabama State Personnel Bd., 516 So.2d 680 (Ala. App. 1987)(holding that an employee could not be discharged for insubordination based on a refusal to take a polygraph examination where the employer had no written policy regarding the use of polygraph exams).
\textsuperscript{140} Id.
\textsuperscript{141} Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984). The West Virginia Supreme Court of Appeals stated that it is contrary to the public policy of West Virginia for an employer to require or request that an employee submit to a polygraph test or similar test as a condition of employment. \textit{Id}.
\textsuperscript{143} In Greek mythology, Procrustes, the owner of this bed and a highway robber, would fit every traveller into the bed by either cutting off the feet of travellers who were too
cent employee to consistently punish the guilty employee, or stretch the employer to take back the guilty employee to protect the innocent employee.

The Act provides the reviewing court with a choice of remedies, and the additional weapon made available by the Secretary of Labor's action against an employer, independent of remedies available to the employee, solves the Procrustean difficulty presented by other statutes. The imposition by the Secretary of Labor of a civil fine and injunction against continuing violations are divisible from the enforcement or denial of disciplinary action against the employee. An employer who administers a polygraph examination without reasonable suspicion that the employee was involved in an incident resulting in economic loss and, based on that examination discharges an innocent employee, is properly subject to the full panoply of penalties available under the Act. Not only can the employer be penalized through fines and injunctions, but the innocent employee can be compensated with reinstatement, back pay, and costs and attorney's fees. If, however, an employer improperly administers a polygraph examination and discharges a guilty employee, the employer should only be subject to the penalizing provisions of the Act, and not its compensatory provisions. The penalizing provisions support the public policy against requiring employees to take polygraph examinations, while a denial of the compensatory provisions supports the public policy against requiring employers to retain guilty employees.

Neither the EPPA nor the regulations specifically permit this division of remedies. Under the EPPA, a literal interpretation provides the compensatory remedies to the employee who is discovered as guilty after an improper polygraph examination. However, the EPPA specifically vests discretion in the administration of remedies in the state or federal court hearing the complaint. This discretion should be used to divide the remedies provided in a manner that upholds the dichotomous public policies behind polygraph legislation. The objective of the Act was to protect innocent employees from the inherently unreliable polygraph. At the same time, the reasonable suspicion exemption recognizes the need to permit employers to at-

---

146. Id.
147. See supra note 22 and accompanying text.
The Polygraph Act of 1988 was enacted to protect innocent employees in the private sector from adverse employment actions based solely on the inherently unreliable polygraph examination. The EPPA recognizes and permits, however, the use of polygraphs in their coercive function and, therefore, the exemption for reasonable suspicion might induce an employer to improperly administer a polygraph test. The Act's remedial provisions should be split when applied to employers who act upon this inducement and, as a result, take adverse employment action against guilty employees. Those employers should be penalized with a civil fine and enjoined from continuing violations of the Act, but should not be required to compensate the employee with reinstatement, back pay and benefits, costs and attorney's fees.

This division of remedies, within the discretion of the court hearing the case, addresses the two public policies embodied in the Act and its reasonable suspicion exemption. The policy behind the Act, that of protecting innocent employees from the unreliable polygraph examination, is enforced through the punitive measures imposed upon the guilty employer. The policy behind the reasonable suspicion exemption, that of permitting employers to discover and control workplace theft, is enforced through the denial of its compensatory provisions (i.e. denying a reward to a guilty employee). The proper penalty under EPPA when a guilty employee is improperly caught is the enforcement of punitive measures against the employer and the denial of compensatory remedies to the guilty employee.

VI. CONCLUSION

The Employee Polygraph Protection Act was enacted to protect innocent employees in the purpose of both the polygraph ban and the reasonable suspicion exception, a court could decide that division of the remedies most closely reflects these parallel legislative goals.

148. See supra note 57 and accompanying text.
149. See supra note 105 and accompanying text.
150. See supra note 144 and accompanying text.