Employment Law Briefing

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Is that your final answer?

Polygraph law put to the test in Eleventh Circuit case

In most workplaces, the notion of the employer asking an employee to take a lie detector test would probably elicit a degree of shock and horror. But there are circumstances under which an employer may legally request that a staff member undergo a polygraph examination. These circumstances were put to the test in *Cummings v. Washington Mutual*, a case heard by the U.S. Court of Appeals for the Eleventh Circuit.

Missing money

The plaintiff was the manager of Washington Mutual's Piedmont Commons branch from January 2006 until his transfer to another branch in January 2007. In February 2007, the new Piedmont Commons branch manager discovered that about $58,000 was missing from two cash dispensers to which the plaintiff had had access.

Through surveillance camera images, Washington Mutual's fraud investigators discovered that the plaintiff and the four employees he'd managed at the Piedmont Commons branch had repeatedly violated the bank's "dual control" policy, which required two persons to be present when cash was handled or certain secure areas were accessed.

Employers generally can't "require, request, suggest, or cause any employee … to take or submit to any lie detector test" unless four conditions are met.

Follow-up interviews with current and former Piedmont Commons branch employees established that the plaintiff had often violated the dual control policy. During the investigation, the plaintiff himself was interviewed, at which time investigators asked whether he would take a polygraph test. The plaintiff refused and was fired for violating the dual control policy.

4 EPPA conditions

The plaintiff filed suit, alleging that Washington Mutual had violated the Employee Polygraph Protection Act (EPPA).

Under this law, employers generally can't "require, request, suggest, or cause any employee … to take or submit to any lie detector test" unless four conditions are met:

1. The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business.

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.

4. The employer executes a signed statement, provided to the examinee before the test, that specifically describes the employee's alleged misconduct and the basis for the employer's reasonable suspicion.

The plaintiff challenged the first and third of these conditions.

Ongoing investigation

Under EPPA regulations, an "ongoing investigation must be of a specific incident or activity." Although the existence of an inventory shortage isn't enough on its own to warrant a polygraph, the regulations make clear that, if "additional

evidence is obtained through subsequent investigation of specific items missing through intentional wrongdoing, and a reasonable suspicion [exists] that the employee to be polygraphed was involved in the incident under investigation," such a test may be administered.

Contrary to the plaintiff's assertion that, under EPPA, his former employer needed *conclusive* evidence of a violation, the Eleventh Circuit noted that the regulations require employers to provide only "additional evidence" that the employee was involved before requesting or administering a polygraph test. In this case, the court found that the surveillance footage and employee interviews constituted "additional evidence" and, therefore, an "ongoing investigation" was indeed underway.

Reasonable suspicion

As it relates to EPPA, "reasonable suspicion" is "an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss."

Courts use a "totality of the circumstances" approach when determining whether reasonable suspicion exists. Mere access or opportunity isn't enough on its own to qualify as reasonable suspicion; all of the factors surrounding access or opportunity must be taken into account when the court makes its assessment.

In *Cummings*, the Eleventh Circuit concluded that reasonable suspicion couldn't have been acquired solely because the plaintiff had access to the cash dispensers. But when looking at the totality of the circumstances — including the surveillance footage, the corroborating employee interviews and the fact that only four other employees had access to the dispensers — the court held that Washington Mutual had a reasonable suspicion of the plaintiff.

No fishing

This case highlights the four conditions employers must meet before they may lawfully request that their employees take a polygraph test.

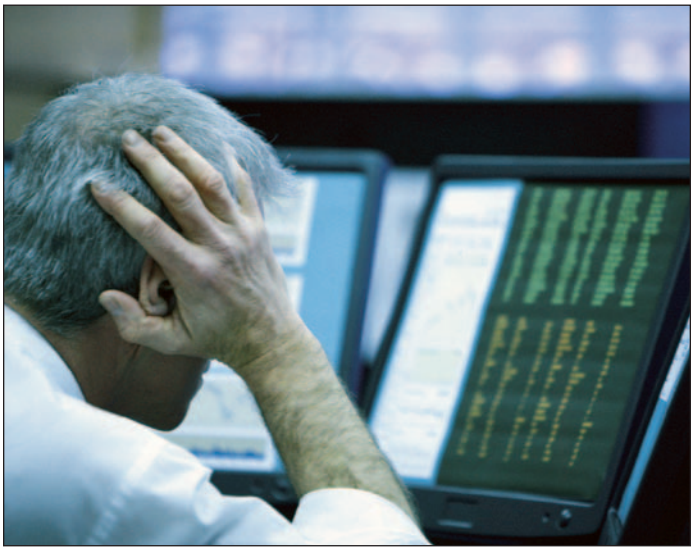
Although the court found in the employer's favor here, it must be noted that EPPA prohibits "fishing expeditions" and, therefore, employers should consult with legal counsel before administering any polygraph exam. ♦

Third Circuit addresses allegedly discriminatory PIP

A performance improvement plan (PIP) is supposed to help an employee keep his or her job. But, in *Reynolds v. Department of Army*, the U.S. Court of Appeals for the Third Circuit had to address whether requiring an employee to participate in a PIP constituted an adverse employment action that could establish the basis for an age discrimination case.

Didn't get along

The plaintiff began an engineering position with the U.S. Army in the On-The-Move Testbed section of the Communications-Electronics Research, Development, and Engineering Center. He and his supervisor didn't get along. He claimed that she treated him dismissively from the start and failed to adequately supervise him, while she asserted that he didn't take his job seriously.



About eight months after the plaintiff began working at the Testbed, his supervisor evaluated his performance and concluded that he had failed to meet two of his seven job objectives. Roughly two months later, the supervisor discussed the evaluation with the plaintiff and presented him with a PIP.

Under it, the plaintiff was given 90 days to improve his performance or face possible reassignment, demotion or termination. The day after receiving the PIP, he applied for two early retirement incentive programs. He was 51 years old.

One month after receiving the PIP, the plaintiff submitted a complaint to the Equal Employment Opportunity Commission (EEOC), alleging age discrimination. After the plaintiff filed his EEOC complaint, he was offered a 90-day extension on his PIP but was denied an extension for deciding whether to accept benefits from the two early retirement incentive programs, for which he'd already been approved.

Several weeks later, the plaintiff exercised his early retirement options through the programs, receiving an incentive payment and a reduced annuity.

Significantly different

Whenever plaintiffs allege age discrimination, they must demonstrate, among other things, that they'd suffered an adverse employment action. According to the U.S. Supreme Court in the 1998 case *Burlington Industries v. Ellerth*, an adverse employment action is:

> … [a] significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

In this case, the Testbed challenged the plaintiff's claim that he'd suffered such an action. Thus, the question became: Did implementation of the PIP qualify as an adverse employment action?

The Third Circuit agreed with Testbed and held that initiating a PIP "differs significantly from the types of employment actions that qualify as adverse." Quite different from actually altering employment status, the court noted, a PIP provides a way for an employer to communicate to its employees how they can better perform their duties.

Is failure to investigate actionable?

The decision in *Reynolds v. Department of Army* (see main article) turned on whether the plaintiff could establish that his employer took an adverse employment action against him. The plaintiff in *Fincher v. Depository Trust & Clearing Corp.*, a case heard by the U.S. Court of Appeals for the Second Circuit, faced the same challenge — though her case fell under the purview of Title VII's antiretaliation provision and what she claimed constituted an adverse employment action was a failure to investigate a discrimination complaint.

The plaintiff in *Fincher* was an African-American woman employed by the Depository Trust from February 2001 until her resignation in June 2006. Following her departure, she brought suit alleging, among other things, that she'd been subjected to unlawful retaliation for having made a complaint of unlawful racial discrimination to the senior director of employee relations.

The Second Circuit held that a failure to investigate typically isn't an adverse employment action and, therefore, the plaintiff couldn't establish a retaliation claim. The court noted that "affirmative efforts to punish a complaining employee are at the heart of any retaliation claim" and, because an employee whose complaint isn't investigated suffers no punishment for bringing that complaint, the plaintiff hadn't been retaliated against for that act.

Although the Second Circuit was mindful that its holding "would hardly provide a positive incentive to lodge such a further challenge," it also discussed the "odd consequences" that would result if a contrary rule were adopted. This contrary holding could result in an employer refusing to investigate a clearly meritless complaint, only to face a viable suit for "retaliatory" failure to investigate.

Further, the court expressed a fear that, if PIPs were considered adverse employment actions, it would not only chill employers from using them (and gaining their benefits), but also potentially open the floodgates of discrimination litigation. Accordingly, the Third Circuit dismissed the plaintiff's claim for failure to demonstrate that he had, in fact, suffered an adverse employment action.

Lessons for employers

The good news for employers is that, with the *Reynolds* decision, the Third Circuit joined several other circuit courts in determining that PIPs alone don't constitute adverse employment actions and, therefore, cannot form the basis of a discrimination claim. However, be aware that, if a PIP is accompanied by an adverse employment decision, the affected employee may be able to bring a claim.

In addition, while the plaintiff in *Reynolds* didn't bring a retaliation claim against his employer, employers must keep in mind that a similar situation could give rise to such a claim. Therefore, it's important to tread carefully when taking any action against an employee who has engaged in a protected activity, such as filing a complaint with the EEOC, so that your action will *not* be considered retaliation. Even if an employee's complaint lacks merit, the act of filing a complaint is protected and can trigger a retaliation claim. ♦

No hire, no retaliation

One FLSA case gives rise to another

Every job candidate has a history. But can an employer "retaliate" against a prospective employee based on that history? That was the question before the U.S. Circuit Court of Appeals for the Fourth Circuit in *Dellinger v. Science Applications International Corp.*

Filling out forms

The plaintiff applied for a position with Science Applications International Corporation (SAIC). She was offered the job about one month later, contingent on her passing a drug test, completing specified forms, and verifying and transferring her security clearance. The plaintiff accepted the offer and began the process of satisfying the requirements.

On the form required for her security clearance, she was instructed to list any pending noncriminal court actions to which she was a party. Around the time the plaintiff applied for the SAIC position, she'd also commenced a lawsuit against her former employer, CACI, for alleged violations of the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA).

Pursuant to the instructions, she listed this lawsuit on the SAIC form and submitted it along with the other required documents. Several days later, SAIC withdrew its employment offer.

In response, the plaintiff filed another FLSA action — this time against SAIC, alleging that its motive in denying her employment was retaliation and unlawful discrimination based on her pending FLSA lawsuit. SAIC countered that the plaintiff had no relief under the FLSA because, though the statute does prohibit retaliation, this provision protects only actual employees, not prospective ones.

Defining an employee

The FLSA defines retaliation, in relevant part, as discrimination "against any employee because such employee has

filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter."

Additionally, the statute provides that "any employer who violates the [antiretaliation] provisions of this title shall be liable." The Fourth Circuit interpreted this language to mean that, under the FLSA, only current and former employees may sue their current or former employers, and prospective employees have no cause of action against prospective employers.

The question then became whether the plaintiff, as an applicant with an accepted contingent offer, was an employee or a prospective employee. Continuing to look at the plain language of the FLSA, the court noted that the statute's definition of employee is "any individual employed by an employer."

In addressing this issue, the Fourth Circuit placed significant weight on the fact that the plaintiff's offer was based on contingencies. In addition, the plaintiff never began work for SAIC. According to the FLSA, "employ" means "suffer or permit to work," meaning that an applicant who never began or performed any work couldn't, according to the language of the FLSA, be an "employee."

Grasping at scope

In addition to finding the plaintiff not to be an employee, the court found that her case couldn't proceed because SAIC wasn't her employer. The plaintiff argued that, because the FLSA prohibits all "persons" from engaging in retaliation, she wasn't restricted to bringing suit only against her employer. The Fourth Circuit disagreed, noting that, while the statute does prohibit all persons from retaliating, it doesn't authorize the right to sue all persons.

The plaintiff also asserted that the scope of the FLSA's definition of employee should be expanded. As support for this argument, she referenced other statutes under which job applicants are protected, one of which was the National Labor Relations Act (NLRA). Under the NLRA, prospective employees are protected.

But the Fourth Circuit rejected this argument as well, finding that the NLRA expressly provides that the term "employee" … "shall not be limited to the employees of a particular employer" unless explicitly stated. The court noted that similar language and regulations can be found in the other statutes cited by the plaintiff and, therefore, those statutes weren't applicable either.

Showing sympathy

Although it dismissed the plaintiff's lawsuit, the Fourth Circuit nonetheless noted its sympathies toward her argument. Specifically, the court wrote, "it could be problematic to permit future employers effectively to discriminate against prospective employees for having exercised their rights under the FLSA in the past."

Yet, because the FLSA's explicit purpose is fixing minimum wages and maximum hours "between employees and employers," broadening the scope of the statute to fit the argument raised by the plaintiff in *Dellinger* would defeat the statute's purpose. ♦

Assessing ADA protection for recovering addicts

The term "in recovery" can be an ambiguous legal concept when one is trying to apply it to those who struggle with addiction. In *Mauerhan v. Wagner Corporation*, the U.S. Court of Appeals for the Tenth Circuit had to consider whether a recovering drug addict qualified for protection under the Americans with Disabilities Act (ADA).

Still a user?

The plaintiff in this case worked for Wagner from 1994 until June 2005. In 2004, he entered an outpatient drug rehabilitation program and, afterward, returned to work. On June 20, 2005, the plaintiff failed a drug test administered at Wagner's request. He was fired that day, though a supervisor told the plaintiff that he could return to work

if he stopped using drugs. The plaintiff entered an inpatient drug rehabilitation program on July 6, 2005, where he tested positive for cocaine and marijuana. About one month later, he completed the program and asked Wagner whether he could return to work. He was told that he could return to work but wouldn't receive the same compensation nor could he service his previous accounts.

Did the one month that the plaintiff had spent in treatment qualify him for protection under the ADA's safe harbor provision?

Refusing these terms, the plaintiff filed a lawsuit alleging that he was subject to unlawful discrimination because of his status as a drug addict. In response, Wagner argued that the plaintiff wasn't protected by the ADA because, it asserted, he was still a drug user when he asked to be rehired. The district court ruled in Wagner's favor, and the plaintiff appealed.

How long is enough?

On appeal, the issue became whether the one month that the plaintiff spent in the treatment program qualified him for protection under the ADA's safe harbor provision, which covers individuals who aren't currently using illegal drugs.

According to this exception, an individual who "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs" is eligible for ADA protection. Therefore, the plaintiff argued, because he had successfully completed a treatment program and wasn't engaged in illegal drug use when he sought reemployment, he was a qualified individual under the ADA.

Analyzing the case law and legislative history of the ADA, the Tenth Circuit held that "an individual is currently engaging in the illegal use of drugs if the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem." In other words, participation in a treatment program isn't enough to qualify someone for the safe harbor; the individual must refrain from using illegal drugs for a significant period as well. Thus, the court rejected the plaintiff's argument.

What factors play a role?

In granting Wagner's motion, the court gave considerable weight to the fact that, when the plaintiff reapplied for employment, his "prognosis [was] set as guarded." Also, Wagner provided testimony by an addiction specialist who stated that it would take approximately three months before the plaintiff reached a "threshold of significant improvement" in his recovery.

In addition to these two points, the court set forth several factors that will be considered when analyzing future safe harbor cases, including:

- Severity of the employee's addiction,
- Employee's level of responsibility and past performance,
- Level of competence ordinarily required to adequately perform the job task(s) in question,
- Employer's applicable job and performance requirements, and
- Relapse rates for drugs involved.

These factors, as well as any documentation or testimony relating to the individual's recovery, will likely play a role in any court's decision.

Are you sure?

Employers should exercise caution when facing an employment decision concerning a former or current worker who's in recovery. Although the plaintiff here didn't qualify for ADA protection, a safe harbor does exist that may cover some employees. ♦