



Issue Date: 18 February 2005

CASE NO: 2004-EPPA-2

In the Matter of:

ADMINISTRATOR OF THE WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

DALLAS SECURITY SYSTEMS, INC.,
Respondent.

ORDER DENYING RESPONDENT'S MOTION TO IMPEAD THIRD PARTY

On May 4, 2004, Plaintiff, the Administrator of the Wage and Hour Division of the United States Department of Labor, filed an Order of Reference seeking final determination of certain alleged violations of the Employee Polygraph Protection Act of 1988 [EPPA], 29 U.S.C. § 2005. Respondent filed its Answer to the Order of Reference on July 27, 2004. On October 22, 2004, Respondent filed a third party complaint against polygraph examiners, Gerald Lee Tolbert and Tolbert & Associates, Inc [polygraph examiners]. The Third Party Complaint sought to implead the polygraph examiners as parties in interest in this proceeding. Respondent contends that impleader is proper because the polygraph examiners may be liable to Respondent for indemnification. The factual circumstances relevant to this case arose in Texas. This proceeding is therefore governed by the law of the United States Court of Appeals for the Fifth Circuit.

The polygraph examiners cannot properly be joined as a third party in this proceeding. First, as the record is currently developed, this tribunal lacks jurisdiction over the polygraph examiners. Second, Respondent does not have the authority to institute an EPPA action against the polygraph examiners. Finally, because the polygraph examiners are available as witnesses, the failure to implead them will not prejudice or limit Respondent's defense.

Jurisdiction Under the EPPA

Coverage of the EPPA extends to "any *employer* engaged in or affecting commerce or in the product of goods for commerce." 29 C.F.R. § 801.3(a) (quoting Section 3 of the EPPA, 29 U.S.C. 2002) (emphasis added). Thus, this tribunal's authority under EPPA extends exclusively to parties considered "employers" under the Act. Section 801.2(c) defines an "employer" as:

[A]ny person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. *A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an employer with respect to the examinees.*

29 C.F.R. § 801.2(c) (emphasis added). Thus, the regulations make clear that a polygraph examiner can be treated as an employer under EPPA only in limited circumstances. The regulations do not discuss when such treatment is appropriate.

The Fifth Circuit explored this question in *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721 (5th Cir. 2002). The court first noted that, while no other court of appeals had considered the question, each district court to consider the issue applied an “economic reality” test.¹ Under this test, a polygraph examiner can be considered an employer only where, “the examiner went beyond the role of an independent entity and exerted control over the employers’ compliance with the EPPA.” *Calbillo*, 288 F.3d at 727. The Fifth Circuit found that this approach was consistent with EPPA’s definition and the Secretary’s “carefully phrased regulation” that “ordinarily protects a polygraph examiner from liability.” *Id.*

The Fifth Circuit established four factors that a court should consider when determining whether a polygraph examiner exerted a sufficient degree of control over the polygraph testing to defeat the examiner’s status as an independent entity. *Calbillo*, 288 F.3d at 728. That court found that courts should consider whether the examiner (1) decided that a polygraph examination should be administered, (2) decided which employee would be examined, (3) provided expertise or advice to the employer regarding compliance with EPPA’s requirements, or the employer relied on the examiner to ensure compliance, or (4) decided whether the examined employee would be subjected to disciplinary action, or merely reported the results of the polygraph examination to the employer. *Id.*

In the present case, there is no allegation or evidence that the polygraph examiners decided that a polygraph examination should be administered, decided which employees would be examined, or decided whether the examined employee would be subject to disciplinary action. Only the third factor could be potentially applicable because, in its Third Party Complaint, Respondent alleged that the polygraph examiners represented to Respondent that the examinations were completed in compliance with EPPA. Respondent further alleged that it relied on the polygraph examiners to take all necessary steps to make sure the examinations were conducted properly.

These bare allegations, however, are insufficient to defeat the polygraph examiners’ status as an independent entity. Three of the four factors delineated in the economic reality test are entirely absent. The third factor is only addressed facially. A polygraph examiner will not “ordinarily” be liable under the Act. Clearly, to depart from this norm, an examiner must do

¹ See *Cabillo v. Cavender Oldsmobile, Inc.*, 2000 WL 33348243, at *12; *James v. Professionals’ Detective Agency, Inc.*, 876 F. Supp. 1013, 1016 (N.D. Ill. 1995); *Kluge v. O’Reily Auto., Inc.*, 1994 WL 409575, at *9-10 (D.Kan. 1994); *Fallin v. Mindis Mtals, Inc.*, 865 F. Supp. 834, 840 (N.D. Ga. 1994); *Rubin v. Tourneau, Inc.*, 797 F. Supp. 247, 249-53 (S.D.N.Y. 1992).

more than assert that the polygraphs will be administered lawfully, which could reasonably be expected in the ordinary course, and Respondent must do more than passively expect that the polygraph examiner would comply with the law. Respondent does not allege what specific advice or expertise the polygraph examiners may have provided that affected this cause of action. Nor has Respondent indicated how its reliance on the polygraph examiners to ensure EPPA compliance was exceptional. There is no allegation or substantial suggestion that Respondent engaged the polygraph examiners for any purpose other than to administer polygraphs. *See Rubin v. Tourneau*, 797 F. Supp. 247, 249-53 (S.D.N.Y. 1992). Respondent has not provided any factual basis whatsoever that would allow this tribunal to divert from the “ordinary” treatment of polygraph examiners under EPPA.

Significantly, Respondent does not argue that the polygraph examiners should be liable under the economic reality test. Instead, Respondent attempts to distinguish *Calbillo*, reasoning that *Calbillo* held that an employee in a *civil suit* could not recover money damages from a polygraph tester. Despite the different venue and procedural posture, the question addressed in *Calbillo* is precisely the same as the issue in the present case: whether a polygraph examiner is an “employer” under EPPA. The court established a clear framework to analyze this question. As discussed above, the polygraph examiners do not qualify as “employers” under this framework.

Refusal to allow Respondent to sue the polygraph examiners under EPPA is consistent with the policy goals underlying EPPA and the implementing regulations. The House and Senate Reports accompanying EPPA make clear that Congress intended to protect employees by generally restricting the use of polygraph examinations in connection with employment. *See* S. Rep. 100-284; H.R. Conf. Rep. 100-659. As the House Conference Report stated, the purpose of EPPA was to “prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers.” H.R. Conf. Rep. 100-659, * 11. The Act was not intended to give protection to employers who administered polygraphs. If anything, such protections would dilute the efficacy of the Act because they could shield employers from liability and thereby encourage employers to engage in polygraph testing. Thus, EPPA’s failure to create a cause of action for employers against polygraph examiners is consistent with the Act’s underlying policy goals. Recognition of such an action by this tribunal would not only exceed the authority expressly created by EPPA, but would also undermine clear congressional intent. Any actionable harm that may have stemmed from the relationship between Respondent and the polygraph examiners can be adequately redressed separately in contract or tort.

Enforcement of the EPPA

Regardless of this tribunal’s lack of jurisdiction, it would be improper to implead the polygraph examiners because Respondent lacks authority under EPPA to institute a cause of action against the polygraph examiners. EPPA vests enforcement authority with the Secretary of Labor and with employees who institute private actions against their employers. EPPA does not create a cause of action for an employer against a polygraph examiner that administered an examination on the employer’s behalf. *See Rubin*, 797 F. Supp. at 249-53.

Section 801.7(a)(3) gives the Secretary authority to “make investigations and inspections as necessary or appropriate . . . to determine compliance with the Act.” 29 C.F.R. § 801.7(a)(3). Section 801.40 deals specifically with enforcement of the Act and speaks exclusively in terms of the Secretary: “Whenever *the Secretary* believes that the provisions of the Act or these regulations have been violated, such action shall be taken and such proceedings instituted as deemed appropriate . . .” 29 C.F.R. § 801.40(a) (emphasis added). Section 801.40(a)(1) gives the Secretary equitable remedies in federal district court. The only right the regulations contemplate for private parties is a right to report EPPA violations.² Section 801.7(d) states that “[a]ny person may report a violation of the Act or these regulations to the Secretary by advising any local office of the Wage and Hour Division” 29 C.F.R. § 801.7(d).

Private actions under EPPA are contemplated only in section (c) of the Act. 29 U.S.C. § 2005(c). This section limits such actions to actions brought by employees against their employers. “An employer who violates this chapter shall be liable to the employee or prospective employee affected by such violation.” *Id.* The Act does not create a similar right for other private parties. It follows that the Act did not intend to create such a right. This tribunal has not found, and the parties have not identified, any authority that permits an employer to bring a cause of action against a polygraph examiner under EPPA.

Because this tribunal does not have jurisdiction over the polygraph examiners and because Respondent lacks authority to institute an enforcement action against the polygraph examiners, Respondent’s motion to implead Tolbert and Tolbert & Associates must be denied. It is so ORDERED.

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Edward Terhune Miller
Administrative Law Judge

² As discussed *infra*, the Act itself contemplates a right of enforcement for private employees against their employer.