

Can an employer request that an employee submit to a polygraph examination when there is no reasonable suspicion that the employee was involved in the incident?

Polkey v. Transtecs Corp., 11th Cir. No.04-14949, March 29, 2005

The United States Department of Defense contracted with a vendor to operate a base mailroom in Pensacola, Florida at the naval air station. The mailroom supervisor, Sabrina Polkey, discovered a number of open and undelivered Christmas cards in a wastebasket. The wastebasket was located at the front desk near where another employee had been assigned to work. Sabrina contacted her supervisor and told him she suspected the employee of tampering with the mail.

The supervisor arranged for all the mailroom employees to take a polygraph examination. The suspected front desk employee submitted to the examination and his test result indicated he was deceptive. The supervisor then asked Polkey and the remaining employees to take the examination as well. They all declined.

Shortly thereafter Polkey was fired. Polkey sued her former employer under the Employee Polygraph Protection Act alleging that she was unlawfully asked to take a polygraph examination. She was granted summary judgment by the court and the claim was settled.

The employer had originally argued that the request for a polygraph examination was permitted under national defense exceptions. However, the court determined that this exception applies only to the government and not contractors or vendors.

The court also determined that the employer had failed in its burden to articulate a reasonable suspicion that Polkey was involved in the theft. The Employee Polygraph Protection Act requires that the employer is conducting an investigation, that the individual to be tested had access to the items stolen, plus there is a reasonable suspicion that the person was involved in the theft. In this case the employer did not suspect Polkey or the other employees, but requested the test to simply clear itself of liability.

The Employee Polygraph Protection Act in most cases prohibits an employer from requesting, requiring or suggesting an employee take a polygraph examination. In general, to ask an employee to take a polygraph examination there must be an ongoing investigation, the employee must have had access to the items stolen and there must be a reasonable suspicion of the individual being involved in the incident. The employer must also provide a written notification regarding the test to the employee.

Specific questions concerning the use of the polygraph in employee investigations can often be answered by contacting the American Polygraph Association at www.polygraph.org.

Can an employee be fired for refusing to submit to a voice print analysis during an investigation?

Theisen v. Covenant Medical Center, Iowa Supreme Court 2001

An investigation into an obscene phone call to a female employee of the Covenant Medical Center led to a Security Manager at the facility. The caller's voice was identified as that of the security manager by the victim and three other employees. During the course of the

investigation the security manager was asked to submit to voice print analysis and he refused. The security manager was discharged as a result of his refusal.

Following his termination the security manager submitted to a voice print analysis with an expert of his choosing. In the expert's opinion it was not the security manager's voice on the obscene call.

The security manager subsequently filed suit alleging wrongful termination and defamation resulting from his dismissal.

The Iowa Supreme Court ruled that the employer's request for the plaintiff to submit to a voice print analysis did not violate public policy or any law therefore the termination was justified.

Discussion

First of all it should be noted that this is an Iowa Supreme Court ruling and is applicable only to the state of Iowa. A governmental investigation of a citizen allows that individual the right to silence and legal representation, however an employee has the duty to cooperate in a company investigation.

Regardless of whether the employee is the target or witness he is generally required to cooperate in the investigation. During an investigation it is expected that the employee will be honest and cooperate in the process. An employee's refusal to cooperate in the investigation is insubordination and could result in some form of discipline. In the preceding case the security manager was terminated by the organization's president for his refusal to comply "with the reasonable requests which could have determined with much more certainty the facts that were present."

This same theory is put forth in the Garrity decision where a police officer is being investigated administratively, rather than criminally by the police department. In Garrity the officer is required to cooperate in the investigation and his refusal to follow legitimate commands could result in his termination for insubordination. However, any statements or information developed during an administrative investigation cannot be used or shared with a parallel criminal investigation of the officer.