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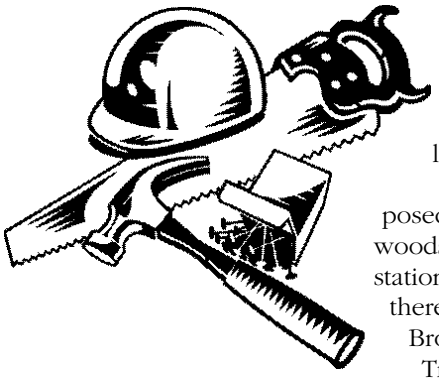
The Truth, the Whole Truth, and Nothing but the Truth: A Look at the Employee Polygraph Protection Act

On Nov. 24, 2008, the U.S. Court of Appeals for the Fourth Circuit performed an in-depth analysis of the often forgotten Employee Polygraph Protection Act (EPPA), which makes it unlawful for an employer to directly or indirectly require an employee or prospective employee to either take a lie detector test or "accept, refer to or inquire" about the results of a lie detector test.[1] In addition, the act forbids employers from discharging, disciplining employees or prospective employees, discriminating against them, or threatening these actions against them based on the results of a lie detector test or because such a person refuses or fails to submit to a lie detector test.[2] Finally, an employer may not take such actions against an employee or prospective employee because this person instituted a cause of action relating to the EPPA, have testified or will testify in any such proceeding, or have exercised a right afforded by the act on behalf of another employee or person.[3]

Recently, in *Worden v. SunTrust Banks Inc.*, the Fourth Circuit issued a decision analyzing the EPPA, which, as the court noted, suffers from a "paucity" of case law.[4] The case involved Daniel Worden, who, on the morning of Aug. 11, 2005, called the SunTrust Bank, where he worked, and informed a co-worker that he had been kidnapped the previous night and his kidnappers wanted to rob the bank. Worden requested that the co-worker open the bank's safe, but the co-worker refused and had another employee contact the local police department. Worden himself also contacted the police department and made similar statements to the police.



Later that day, the robbers supposedly dumped Worden in the woods, and he went to the police station to make a statement. While there, Worden requested that Kevin Brock, an area manager for SunTrust Banks, come to the police station to assist him in his statement. During the process, the police determined that Worden was a suspect in the attempted robbery and requested that he take a polygraph examination. Worden consented to the exam, and no one from SunTrust Banks requested, participated in, or was present during Worden's polygraph exam.

However, Brock remained at the police station during the administration of the polygraph and was later joined by Loretta Rohrer-Norris, a security officer for SunTrust Banks. A police detective came to discuss the situation with both Brock and Rohrer-Norris and informed them that the police suspected that Worden had been involved in the attempted robbery. The polygraph examiner then entered the room and spontaneously announced that Worden had failed the exam and that a second confirmation exam would be appropriate.

The next day, Brock spoke with his supervisor about the investigation and, at some point, mentioned that Worden had failed the polygraph exam. Brock also informed the bank's regional president of the results of the exam.

The Federal Bureau of Investigation also investigated the matter and, with Worden's consent, administered another polygraph exam on Aug. 17, 2005. After the exam, the authorities contacted Brock and asked him to pick up Worden up from the station and drive him home. During the conversation, the detective informed Brock that Worden had "failed [the polygraph exam] miserably." Also, while driving Worden home from the station, Worden himself informed Brock that he had failed the exam. Brock communicated this information to his superiors, along with subsequent updates about the progress of the investigation.

Brock's superiors determined that they could not trust Worden to handle the bank's funds and terminated his employment on Sept. 1, 2005. Allegedly, the superiors did not base their decision on the results of the polygraph test, and they indicated that they would have made the decision to terminate Worden even if he had passed the polygraph exam or they had not been made aware of the negative results. Nevertheless, in March 2006, Worden filed a complaint against SunTrust Banks alleging two violations of the EPPA. First, Worden asserted that SunTrust Banks had violated 29 U.S.C. § 2002(3) by firing him "based on the results of the polygraph." Second, Worden claimed that SunTrust Banks had used, accepted, referred to, and/or inquired into the results of the polygraph, in violation of 29 U.S.C. § 2002(2).

Upon review of Worden's first claim, the U.S. District Court for the District of South Carolina determined that SunTrust Banks had not violated § 2002(3), because the results of the polygraph exam were not the "sole factor" involved in the decision to terminate Worden and

because SunTrust Banks had "overwhelmingly" proven that it would have made the same decision without knowing the polygraph exam results.[5] However, on appeal, the Fourth Circuit rejected the district court's "sole factor" interpretation of the EPPA, instead relying on the plain language of § 2002(3), which states that it is unlawful for an employer "to discharge … any employee … on the basis of the results of any lie detector test."[6] Thus, the Fourth Circuit held that to establish a prima facie case under § 2002(3), a plaintiff only needs to demonstrate that the results of a polygraph exam were a factor in the termination of employment.

The Fourth Circuit then went on to determine which framework would be used to analyze an EPPA claim, deliberating between the "pretext" or "mixed-motive" frameworks historically used in employment litigation. In the end, the court decided to use the mixed-motive analysis, according to which the plaintiff may first offer evidence of discrimination and then the employer can avoid liability by proving that the same decision would have been made absent discriminatory motivation. In applying the analysis to Worden's case, the Fourth Circuit determined that SunTrust Banks had provided overwhelming evidence that it would have made the same decision even if it had had no knowledge of the results of Worden's polygraph examination. Specifically, Brock's supervisors who made the decision testified that they had terminated Worden because they "lost trust in him due to his probable involvement in the attempted robbery."[7] In addition, the supervisors relied on statements from law enforcement officers, rather than the polygraph results, when formulating their suspicions about Worden's involvement. Thus, the Fourth Circuit held that SunTrust Banks had not violated § 2002(3) of the EPPA.

The Fourth Circuit then reviewed the district court's decision on Worden's second claim, that SunTrust Banks had not "used, accepted, or referred to" lie detector results in violation of § 2002(2). The Fourth Circuit undertook a review of each phrase used in § 2002(2) to determine whether or not SunTrust Banks had violated any section of the statute. First, the district court had held that SunTrust Banks had not "accept[ed]" any results of the lie detector test, and the Fourth Circuit agreed with the decision. Relying on *Black's Law Dictionary*'s definition of "accept," the Fourth Circuit concurred with the district court's opinion in that "to accept" means "something more than to receive," and thus SunTrust Banks' mere receipt of the test results does not impose liability under § 2002(2).

The Fourth Circuit then reviewed Worden's claims that SunTrust Banks "used or referred to" the results of the lie detector test. The district court had summarily dismissed these claims because they were "duplicative of the claim … regarding plaintiff's discharge" brought under § 2002(3).[8] In essence, the district court had determined that an employer could not be found liable for "using or referring to" the results of a lie detector test under § 2002(3) and not liable for an adverse employment action against the employee under § 2002(2). However, the Fourth Circuit decided that, although it creates a "formidable burden," liability under § 2002(3) is not a condition precedent to a § 2002(2) claim.[9] The Fourth Circuit then concluded that the district court had erred in granting summary judgment on Worden's claim, because he was able to bring the two claims separately. Thus, the Fourth Circuit remanded Worden's claim—that SunTrust Banks had used or referred to the results of the lie detector test—back to the district court. However, the Fourth Circuit cautioned that, even if Worden could prove that SunTrust Banks did use or refer to these results, Worden must still prove that he suffered damages from the bank's use.

Overall, *Worden v. SunTrust Banks* is a unique analysis of the Employee Polygraph Protection Act; few other circuits have reviewed the implications of this statute. Of note, the U.S. Court of Appeals for the Eleventh Circuit has held that, when an employee or his or her agent requests to take a lie detector test and doing so will benefit the employee by proving his or her innocence, then the employer has not violated the EPPA.[10] In addition, the U.S. Court of Appeals for the Tenth Circuit has held that, even though an employer, polygraph examiner, and the district attorney's office allegedly conspired in the administration of a polygraph exam, the examiner was not considered an employer under the act nor was he hired to ensure EPPA compliance.[11] However, besides these few decisions, there is an apparent "paucity" of federal case law regarding the EPPA, and the *Worden* case will surely serve as a model analysis for EPPA cases to come. **TFL**

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Endnotes

[1] 29 U.S.C. §§ 2002(1) and (2).

[2] 29 U.S.C. § 2002(3).

[3] 29 U.S.C. § 2002(4).

[4] *Worden v. SunTrust Banks Inc.*, No. 07-1354, 2008 WL 4966543 (4th Cir. Nov. 24, 2008).

[5] *Worden v. SunTrust Banks Inc.*, No. 8:06-cv-1074-GRA, 2007 WL 904524 at *4 (D.S.C. Mar. 22, 2007).

[6] *Worden*, 2008 WL 4966543, at *4.

[7] *Id.* at *6.

[8] *Worden*, 2007 WL 904524, at *15.

[9] *Worden*, 2008 WL 4966543, at *10.

[10] *Watson v. Drummond Co.*, 436 F.3d 1310 (11th Cir. 2006).

[11] *Fernandez v. Mora San Miguel Elec. Coop.*, 462 F.3d 1244 (10th Cir. 2006).