

U.S. Department of Labor

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Issue Date: 26 March 2008

CASE NO. 2004-EPP-00004

In the Matter of:

**ADMINISTRATOR, WAGE & HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,**
Plaintiff,

vs.

FLAMINGO LODGE NEVADA PARTNERSHIP
doing business as **HOLIDAY INN EXPRESS,**
Respondent.

Appearances:

Isabella M. Del Santo, *Office of the Solicitor,*
Attorney for the Plaintiff

Catherine M. Corfee, *Corfee, Stone & Associates,*
Attorney for the Respondent

BEFORE: Gerald M. Etchingham
Administrative Law Judge

**DECISION AND ORDER REVERSING AND VACATING SECRETARY'S
DETERMINATION AND ASSESSMENT OF PENALTIES AGAINST RESPONDENT
FOR VIOLATIONS OF EMPLOYEE POLYGRAPH PROTECTION ACT**

This proceeding is before me, pursuant to the Employee Polygraph Protection Act, 29 U.S.C. § 2001 *et seq.* (hereinafter the "Act" or the "EPPA") and in accordance with the regulations promulgated thereunder, 29 Code of Federal Regulations ("C.F.R.") Part 801, *et seq.*, for hearing and final determination on exception to the Assessment of Civil Penalties timely raised by Respondent Mr. Charles McDermid, general operating partner of Flamingo Lodge Nevada Partnership doing business as Holiday Inn Express (collectively "Respondent"). Said penalties, totaling \$14,000, were assessed on September 5, 2002, after the Wage-Hour Division, Employment Standards Division, U.S. Department of Labor ("Plaintiff") investigated and determined that Respondent violated the Act by (1) requiring, requesting, or suggesting that Mr. Robert O'Grady submit to a polygraph examination, (2) discharging Mr. O'Grady for refusing to take a polygraph examination, and (3) failing to maintain records. I reverse and vacate Plaintiff's determination and assessment of penalties for the reasons that follow.

I. PROCEDURAL BACKGROUND

On September 5, 2002, Plaintiff concluded its investigation and issued a Notice of Administrative Determination against Respondent alleging that Respondent had violated provisions of the Act and owed \$14,000.00. Administrative law judge exhibit (“ALJX”) 1 at Ex “A”. On September 16, 2002, Respondent, through its first lawyer, timely requested a hearing before the U.S. Department of Labor’s Office of Administrative Law Judges (“OALJ”) to contest the assessments. ALJX 1 at Ex “B.” This case was referred to the OALJ on July 12, 2004 by Plaintiff’s Order of Reference and was transferred to me on May 26, 2006. *See* ALJX 1.

A hearing on this matter was held on October 18 and 19, 2006, in Reno, Nevada. Plaintiff’s representatives testified at trial and the case went forward. At the hearing, Plaintiff’s exhibits (“PX”) 1, 3-11 and 13, and Respondent’s exhibits (“RX”) 3-8, 12, 15, 16, and 20, were admitted into evidence.¹ TR² at 69, 79, 91, 94, 96-105, 178, 189, 331-34, 431, 571, 641-51, 667. In addition, ALJXs 1-21 were also admitted into evidence. TR at 37-42, 57. I took PX 2 and PX 12 under submission as Respondent had filed two motions in limine to exclude them. *See* ALJXs 17-20.

Respondent also filed a motion to dismiss this case, arguing that the application of the equitable doctrine of laches requires dismissal due to alleged prejudice from Respondent’s loss of evidence over time. ALJX 21.

Plaintiff’s witnesses were Maria Teresa Ruiz and Andy Noguchi from Wage and Hour, U.S. Department of Labor. Respondent’s witnesses were Ms. Ruiz, Patricia Clark, Jesus Gonzales, Erika Hernandez, Robert O’Grady, Andres Marroquin, Jesus Marroquin, Jorge Ruelas, Maria Vasquez, Silvia Vasquez, Maria Teresa Ortiz, and Charles McDermid.

On December 1, 2006, I issued an order denying Respondent’s two motions in limine and I admit PX 2 and PX 12 into evidence as part of this decision.

Plaintiff submitted a closing brief on January 18, 2007, which is hereby admitted into evidence as ALJX 22. Respondent submitted a closing brief on January 19, 2007, which is admitted into evidence as ALJX 23 and closes the record.

II. STIPULATIONS

At the hearing, the parties stipulated to the following:

1. At all times relevant, Respondent was a Nevada general partnership doing business as a hotel in South Lake Tahoe, California.
2. At all times relevant, Respondent was engaged in or affecting commerce as defined by the Act and subject to coverage under the Act.

¹ Respondent withdrew RX 1, 2, 9-11, 13-14, 17-19, and 21-32. TR at 640-47.

² In this Decision and Order, TR = Transcript.

3. At all times relevant, Charles McDermid was the general partner and operating manager of Respondent, the general partnership known as Flamingo Lodge Nevada Partnership.
4. At all relevant times, [Maria] Teresa Ortiz was employed by Respondent as its bookkeeper.
5. From January 16, 2001 to September 8, 2001, Robert O'Grady was employed as Respondent's general manager.
6. Mr. O'Grady was terminated from his employment with Respondent on September 8, 2001.
7. On September 5, 2002, Plaintiff assessed civil money penalties totaling \$14,000 against Respondent for alleged violations of 29 C.F.R. §§ 801.4(a)(1), 801.4(a)(3), and 801.30.
8. On September 16, 2002, Respondent requested a formal hearing pursuant to 29 C.F.R. § 801.53.

Because I find that there is substantial evidence in the record to support the foregoing stipulations, I hereby accept them. *See* TR at 45-53, PX 3; ALJX 22 at 2.

III. ISSUES

1. In July 2001 did Respondent "suggest" that Mr. O'Grady submit to a lie detector test within the meaning of 29 C.F.R. § 801.4(a)(1), and if so, was this conduct nevertheless permissible under the "ongoing investigation" exemption found at 29 U.S.C. § 2006(d) and 29 C.F.R. § 801.12?
2. Did Respondent improperly terminate Mr. O'Grady's employment on September 8, 2001 for failing to take a lie detector test in violation of 29 C.F.R. § 801.4(a)(3)?
3. Did Respondent fail to maintain records in violation of 29 C.F.R. § 801.30?
4. Did Respondent fail to cooperate with Plaintiff's investigation in violation of 29 C.F.R. § 801.30?

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Witness Testimony

1. Robert O'Grady

At trial, Mr. Robert O'Grady ("O'Grady") testified that he currently lives in South Lake Tahoe has lived there for over 25 years. TR at 338.

O'Grady testified that he was employed at Respondent for over four years from the spring of 1997 until September 8, 2001. TR at 338. He also testified that he started with Respondent as a desk clerk and continued in that capacity until the spring of 2001 when he became general manager of the hotel. *Id.*

O'Grady testified that he volunteered to become general manager to the owner, Mr. Charles McDermid ("McDermid"), because he felt that McDermid was ill and sick at the time and the hotel needed a general manager. TR at 361-63. O'Grady talked to McDermid "quite a bit about [O'Grady's] prior experience and why [O'Grady] felt he could handle the general manager position," including the fact that he had managed a business before. *Id.* O'Grady ran his own business, called Dial-a-Line, from 1995 to 1997. TR at 339. Before that job he worked from 1980 until 1995 in various casino positions with Harrah's Hotel and Casino, starting as security guard and moving to card and craps dealer before becoming a pit boss or floor supervisor for the final seven years through 1995. *Id.* In his work as a dealer, O'Grady testified that he handled between three and four thousand dollars a day. TR at 340.

O'Grady also testified that when he began work at Respondent in 1997, Peggy Jenner was the general manager and that she left sometime in 1999. TR at 340-41. In the two years between Ms. Jenner's and O'Grady's tenures as general manager, O'Grady recalled the position being intermittently filled by two other general managers, neither lasting longer than seven months. TR at 338, 341. O'Grady testified that, during the second vacancy period, the general manager position was not officially filled but Mr. John Johnson served as the assistant general manager and McDermid took over general manager responsibilities in addition to his duties as owner. TR at 364.

O'Grady admitted that when he was a desk clerk for Respondent, he made an inappropriate ethnic remark about another employee, Elizabeth Corcoras. TR at 341-43, 365-67. McDermid later mentioned the inappropriate remark to O'Grady without disciplining him. *Id.* O'Grady added that McDermid was Respondent's general manager at the time of the improper remark and that he told O'Grady that the remark was "not a very good thing to do" or "say" especially to a co-employee. TR at 342-43, 370. Erika Hernandez, a maid at the hotel, testified that she thought that O'Grady and McDermid were fairly close friends so she hesitated to complain to anyone about O'Grady. TR at 465.

O'Grady recalled another time when McDermid counseled him for his workplace transgressions, this time while he was acting general manager at Respondent. TR at 343-44. In late June or early July 2001, O'Grady had just returned from Holiday Inn's general manager training from June 9 to June 16, 2001, in Atlanta, Georgia.³ TR at 343-44, 359, 619-20. During one of their regular lunch meetings at the Edgewood Golf Course, McDermid told O'Grady that while O'Grady was gone, McDermid had gotten some complaints. TR at 343. One was that O'Grady had inappropriately touched Mark Moran, another employee at Respondent. TR at 343, 580-81; RX 3. O'Grady testified that he did not know about this incident before being informed by McDermid at lunch. *Id.* O'Grady further stated that McDermid did not discipline him for the incident and that it was just an informative meeting. TR at 343-44, 367-68.

During this conversation, McDermid also informed O'Grady that Ms. Corcoras and Mr. Johnson had also complained to about the derogatory comment O'Grady made to Ms. Corcoras when he was a desk clerk. TR at 271-72, 341-43, 365-67. O'Grady also testified that McDermid later told him at this same meeting that O'Grady should be very careful once he officially became the hotel general manager in his interactions with employees because, as general manager, he was at a "different level" than when he was a desk clerk and McDermid opined that O'Grady should "be more aloof." TR at 360.

Another incident McDermid discussed with O'Grady at that same lunch involved allegations that O'Grady was stealing the hotel maids' tips. TR at 359-61. However, O'Grady testified that McDermid was just informing him about these complaints. *Id.* O'Grady further testified that McDermid pointed out, with "levity," that O'Grady was making \$4,000 per month, that he did not need to take the maids' tips which he believed averaged about \$1 per room, and that if O'Grady needed more than \$4,000 per month, they should instead talk about increasing his salary. *Id.*

O'Grady recalled another employee complaint against him while he was general manager. Ms. Patricia Clark told him that the hotel had a customer tracking system that was to reward her one dollar for each customer she solicited for the hotel's Priority Club program. TR at 357-58, 550. O'Grady testified that he responded that any monies she claimed had to be pre-approved by McDermid as an exception to the hotel's policy that any money that came into the hotel went into the hotel's bank account. TR at 358. Ms. Clark complained to McDermid. TR at 576-77. McDermid later denied telling O'Grady that all money received from the Priority Club had to go to the bank and not to Ms. Clark. TR at 577. Moreover, McDermid testified that he "typically" would match every dollar the franchisor paid to further encourage employees to sign up new members. TR at 577-78.

O'Grady also testified that he handled cash in both his desk clerk and general manager positions at Respondent. TR at 344. O'Grady admitted that while he was general manager, he would empty hotel laundry machine coins at least once a week. TR at 423. In the morning, he would count cash received the day before, verify that it was the same amount as reflected in the records, prepare a deposit slip, attach the slip with any cash and checks received from the

³ At Holiday Inn, one had to attend Holiday Inn's training in Atlanta to officially become a general manager. TR at 493. Thus, technically as to Holiday Inn, O'Grady was acting general manager when he first took the position in February 2001 until his training concluded on June 15, 2001.

previous day and put it all in a bank bag. *Id.* He would then put the bank bag in Respondent's safe and later, unless it was a weekend or holiday, take it over for deposit to the Wells Fargo branch across the street. TR at 344-45.

O'Grady testified that, as Respondent's general manager, he was responsible for overseeing the accounting and the receipt of room revenues, but not responsible for figuring out why hotel room revenues were declining. TR at 391-92. In addition, O'Grady testified that generally, McDermid would call him daily for a report concerning the hotel's recent room revenues. TR at 393-95. O'Grady admitted being "weak in accounting as the general manager." TR at 383. O'Grady also agreed that he was "kind of weak" in verifying that the money count at the hotel matched the computer system when he would fill out a deposit slip for deposit at the bank. TR at 387. O'Grady also stated that he thought that McDermid wanted him to compare daily room revenues with room revenues from the same time a year earlier. TR at 400.

O'Grady testified that, while he was Respondent's general manager, he supervised a bookkeeper, Maria Teresa Ortiz ("Ortiz"), who also handled Respondent's cash. Stip. Fact No. 4; TR at 345, 390. O'Grady further testified that while he tried to maintain a fairly low level of cash at the hotel, there were holidays and occasional days when neither he nor Ortiz had time to deposit the money and it would accumulate in the hotel's safe. *Id.*

O'Grady recalled one time when he left the hotel safe open when he was distracted by the telephone or something else where other employees could have taken money from the safe. TR at 373, 463. Erika Hernandez, one of the hotel's maids, testified that she pointed out to O'Grady that he had left a bank money bag on top of his truck unattended. TR at 462. She further testified that O'Grady thanked her for pointing that out to him. TR at 462-63. McDermid stated that he never observed the combination safe left open with no one around during O'Grady's tenure as general manager in 2001. TR at 586.

O'Grady testified that in July 2001, McDermid first informed him that approximately \$11,000.00 was missing from Respondent. TR at 345-46. McDermid informed both O'Grady and Ortiz of the missing money. TR at 346. O'Grady understood that the missing money had not been deposited in the bank and that the bank deposit was less than Respondent's computerized receipts. TR at 346. O'Grady further testified that McDermid rarely made deposits of the hotel receipts. TR at 417.

O'Grady further testified that, at that time, McDermid asked Ortiz and him to go through all of Respondent's records. TR at 346. There should have been a deposit slip reflecting each day's receipts. *Id.* The three went through all of the records from the beginning of 2001 through July and either found a deposit slip or noted that a deposit slip was missing. *Id.* O'Grady said that McDermid prepared all of the notations. *Id.*

O'Grady also testified that during the July 2001 review of each day's business, McDermid pointed out that only Ortiz and O'Grady had access to the safe and had the combinations to the safe. TR at 348, 415. O'Grady testified that McDermid also stated that he may, at a later time, ask both Ortiz and O'Grady to take lie detector tests and provide bank statements. TR at 348. In reply, O'Grady told McDermid that this was not entirely true as

McDermid also had access to the hotel safe and O’Grady would want to see McDermid’s bank statements and lie detector test results. TR at 348-49. O’Grady told McDermid that McDermid had a motive for stealing the missing money—insurance fraud. TR at 415-16. However, O’Grady admitted at trial that, even when he made that statement, he did not believe McDermid “was performing an insurance scam.” TR at 417.

O’Grady testified that after all of the accountings were made, McDermid walked with him out to the parking lot and asked O’Grady if he stole the money. TR at 346-47. O’Grady said that he responded to McDermid saying “No, of course not.” TR at 347. O’Grady further testified that he recalled McDermid then saying something like “If you did [steal the money], and it suddenly reappears tomorrow, I [McDermid] won’t do anything further. And if it doesn’t, I’m going to the police and to my insurance company, and make formal arrangements.” TR at 346-49.

O’Grady stated that he eventually went to the police station for an interview concerning the missing money in early September 2001, he believed to be just one day before he was discharged as general manager at Respondent. TR at 349. The South Tahoe police report indicates that O’Grady was interviewed there on September 5, 2001, starting at 8:15 a.m., three days before he was terminated. PX 2 at 7-8. O’Grady testified that he thought he went to the interview to offer information in his role as Respondent’s general manager, not as a suspect in the missing money theft. TR at 351. At the police station, an officer took him to an interview room and asked him questions for “about an hour.” TR at 349. O’Grady denied taking the missing money and stated that he did not know who did. *Id.* O’Grady next informed the police that he thought McDermid could have been conducting an insurance scam—claiming the money was missing so he could be reimbursed the \$11,000.⁴ TR at 401; PX 2 at 9. O’Grady also said that the policeman told him at the end of the interview that O’Grady would have to take a lie detector test. TR at 349-50; PX 2 at 8. O’Grady testified that he responded by refusing to take the lie detector test because he “knew it was against the law” to require him to take the test. TR at 350, 406; PX 2 at 8. O’Grady testified that, just before leaving the police station, the officer tried again to talk him into taking the lie detector test by saying “What have you got to hide?” O’Grady said he responded to this by saying “I have nothing to hide, but I’m not going to do that.” *Id.*

In the police report, Officer C. Carmichael states:

On 9-5-01 at about 0815 hours, I was advised by the records department that O’Grady was here to see me. I went to the front lobby of the police department and introduced myself to O’Grady. I invited him back to the interview room and we began talking. He was advised that he was not under arrest and he was free to leave at any time. O’Grady acknowledged understanding this. We began by going over some simple questions and worked our way into the overall scenario of the incident. I went over the initial report by Officer Camara and mentioned some of the statements which were made to him by McDermid. In particular, I made reference to a statement O’Grady had made regarding his willingness to

⁴ O’Grady later admitted that he did not honestly believe that Mr. McDermid was performing an insurance scam on his insurance company. TR at 417.

take a “lie detector test.” O’Grady told me that at the time he was willing to take a test, but the more he thought about it he decided that he would only take such a test if he could look at the questions first and omit answering the ones that he did not feel like answering. As the conversation went on, O’Grady became more and more defensive. His body language was giving me the opinion that he was not telling me the truth and withholding information. By the end of the interview, O’Grady had made up his mind that he was not going to perform a lie detector test period. He claimed his uncertainty of machinery and his Constitutional Rights as his reason for not wanting to participate in the process.... As O’Grady and I exited the interview room, he told me he would not speak with me again unless I had enough evidence to arrest him.

PX 2 at 7-8. At trial, O’Grady agreed that, by the end of the interview, he had made up his mind that he was not going to submit to a lie detector test. TR at 426-27; PX 2 at p. 8. However, he testified that he did not think the police report was accurate when it attributes to him the statement that he would take the lie detector test only if he could look at the questions first and omit the ones that he did not want to answer. TR at 428; *see also* PX 2 at p. 8. O’Grady also testified that he did not believe that he was a suspect with respect to the missing money, even when he was at the police station and the officer asked him if he stole the money. TR at 420. He further asserted that, even when McDermid indicated that only O’Grady or Ortiz could have stolen the money, he still did not think he was a suspect. *Id.*

O’Grady recalled that, after leaving the police station, he returned to the hotel and told McDermid that he believed that Ortiz was due to go to the police station for her interview. TR at 350-51.

O’Grady testified that the morning after his police interview was a Saturday and that when he returned to work at 9 a.m. McDermid approached him and asked him to come outside to the back of the building. TR at 351. O’Grady next recalled that McDermid then told him that he was “terminated, effective immediately” and asked for the plastic key card and the master key for the entire hotel. *Id.* O’Grady gave McDermid his keys, went inside and gathered up his belongings, and left the hotel. TR at 351-52. O’Grady testified that McDermid did not say why he was terminating him. *Id.*

O’Grady testified that he had never been written up by McDermid for any work problem. TR at 372. O’Grady testified that he believed that he was terminated because he refused to take a lie detector test, and the reason he believed that is because that is what the California Employment Development Department (“EDD”) determined when it investigated O’Grady’s eligibility for unemployment benefits. *Id.*; *see* PX 12 at 4.

O’Grady stated that the Monday after his termination he filed a claim for unemployment benefits and they were awarded to him. TR at 352-53, 551-52. McDermid was notified that benefits would be charged against his business account and he initiated a counterclaim at the EDD. TR at 552. On September 15, 2001, McDermid filled out page 2 of an EDD form and wrote that “O’Grady was fired for cause. Serious amount of [m]issing funds. O’Grady is

currently under police investigation for embezzlement. We may file civil charges against him. We do not think he should be eligible for unemployment benefits.” TR 552-53; RX 7 at 2.

On September 26, 2001, at 7:30 a.m., the EDD recorded the results of its telephone interview with McDermid. PX 12 at 3-4. The EDD report states that:

Employer states that he fired claimant [O’Grady] for the theft/embezzlement. States that claimant is under investigation by the D.A.’s office. Civil charges have been filed by his [McDermid’s] insurance company due to the fact that the police believe that claimant was the one responsible for taking company funds for his own personal use. He [McDermid] states there are only 2 other people who could have taken the monies, one being himself and the bookkeeper, no one else had access to safe and cash deposits. The bookkeeper and himself [McDermid] have been cleared by the police department. Claimant is the only suspect. He has refused to take lie detector test. Employer and police believe that claimant has a gambling problem but Employer states he cannot prove this. Anyway they believe claimant took the funds to casino to gamble with Employer monies and tried to win his losses back but to date he has accused of taking over \$11,270 between 11 day period. Claimant has denied any involvement but there is no other suspect. Claimant knows why he was fired. He was investigated by police at the job and at police department.

PX 12 at 4-5.

Later on September 26, 2001 at 2 p.m., the EDD spoke with McDermid again and he told the EDD that he had the name and numbers of the police investigator and he is willing to provide it to the EDD as proof of allegations. PX 12 at 5. The EDD summarized their facts by stating that claimant [O’Grady] was terminated for taking Employer’s monies for his own personal use. *Id.* The report concludes by stating that Employer has enough proof to file criminal charges against claimant with the District Attorney. *Id.*

McDermid confirmed the conversations, but denied telling the EDD that O’Grady was fired for theft, for refusing to take the lie detector test, that O’Grady took the missing funds, or that he thought O’Grady had a gambling problem. TR at 553-57. Finally, McDermid recalled that he probably indicated that he had filed a claim for missing funds with his insurance company but he did not specifically recall telling the EDD that the police believed that O’Grady was the one responsible for taking the funds for his own personal use. TR at 554.

In response, O’Grady was issued a September 27, 2001 notice of determination from the EDD (the “EDD Determination”) informing him that he was not eligible to receive benefits because the EDD decided that O’Grady was discharged from his last job with Respondent “because you [O’Grady] took money from your employer for your own use.” TR at 353-55; PX 12 at 1-5. The EDD Determination also informed O’Grady what was required for him to appeal the ruling. PX 12 at 1-2. O’Grady testified that in late October 2001, he forwarded the EDD Determination to the Wage and Hour Division of the U.S. Department of Labor. TR at 354; PX 12 at 1-5. McDermid admitted talking with someone from the EDD but he denied telling anyone

at the EDD that O’Grady had been fired for theft and believed that he had been badly misquoted. TR at 553, 555, 565-66. On September 29, 2001, O’Grady filed an appeal of the EDD Determination. RX 20 at 1.

O’Grady testified that, based on language at page 4 of the EDD Determination stating that O’Grady was the only suspect and that O’Grady had refused to take a lie detector test, he did not believe that McDermid terminated him because McDermid thought he had stolen money from the hotel. TR at 377-78; PX 12 at 4; RX 20 at 1. Later, O’Grady contradicted himself when he discussed an October 18, 2001, letter he sent to McDermid quoting the EDD Determination that attributed statements to McDermid, specifically, that he terminated O’Grady “because [he] took money from [his] employer for [his] own use.” TR at 413; RX 5. O’Grady further wrote that he was “stunned and absolutely devastated” after he reviewed this EDD Determination language accusing him of stealing money from Respondent. *Id.*

An appeal hearing took place on October 29, 2001, and O’Grady attended in person with the judge and McDermid participated via telephone. TR at 558; RX 20 at 1. McDermid later had the EDD appeal hearing tapes transcribed by former hotel employee John Johnson, one of the witnesses McDermid claimed to be unavailable for this trial.⁵ TR at 562, 568-69. McDermid once again denied saying that O’Grady had taken the money, yet he later admitted saying that O’Grady was terminated for cause—funds were missing. TR at 566-67. McDermid later testified that he told the EDD judge via telephone that O’Grady was fired for cause, but it was not because he stole the money, it was not because he lied or stole, it was because of “things that were happening on his watch.” TR at 568.

O’Grady further testified that he received the California Unemployment Appeals Board decision of October 30, 2001, which reversed the earlier EDD Determination and held that O’Grady was not disqualified for unemployment benefits because McDermid, as the employer, had not met his burden of proving that O’Grady was responsible for the missing money thefts. TR at 356-57; RX 20 at 1-4. The reversal was further based on O’Grady’s direct testimony that he denied being responsible for the thefts (which outweighed the statement by a police investigator) and conflicting circumstantial evidence showing that O’Grady was absent from June 9 -16, 2001 while attending training in Georgia when some of the alleged thefts supposedly occurred. TR at 619-20; RX 20 at 1-4. McDermid admitted that some of the missing deposit dates in question took place when O’Grady was in Atlanta at training but that no bank deposits were made in the eight or nine days in June that included O’Grady’s five days at training in Atlanta. TR at 601-02. McDermid further testified that O’Grady was only gone for five days, returned by Sunday, June 17th, the funds “were somehow involved that Monday,” and O’Grady officially returned to work the following Tuesday. *Id.* McDermid concluded that although O’Grady had a “good defense,” there is also “evidence to indicate the defense does not cover the entire time period involved.” TR at 601-02.

⁵ While described as unavailable for trial, Mr. McDermid later confirmed that Mr. Johnson remains in the South Lake Tahoe area as Mr. McDermid’s business friend. TR at 562, 604-05.

2. Charles McDermid

McDermid testified that he was the sole owner of the hotel, Holiday Inn, Flamingo Lodge and O'Grady's employer in 2001 and sold his interest on December 30, 2005. TR at 496, 601. He also stated that O'Grady was general manager for Respondent from January 16 through September 8, 2001. TR at 496-97.

McDermid has a master's degree and Ph.D. in management psychology from the University of Wisconsin. TR at 498. McDermid later taught management psychology at Northwestern University while working for seven years as a consulting psychologist. TR at 499. McDermid testified that he retired from the consulting business in 1977 and moved to South Lake Tahoe, California at that time. TR at 499-500.

In 2001, while operating the hotel, McDermid was also chairman of the board for a high-tech company and was "ramping up" a newly built Holiday Inn in Truckee, California. TR at 500. He testified that, although he was physically in many different places either vacationing or conducting other business, he tried to maintain everyday contact with S. Lake Tahoe hotel operations by viewing a computer report that compared daily room revenues to the year before or getting an oral report of the same. TR at 500-01, 513-14.

McDermid had three other general managers before O'Grady—one for just over 20 years and the other two who left for similar positions at the Sacramento Hilton and nearby Hyatt Hotel. TR at 501, 532. When O'Grady was promoted to acting general manager, McDermid terminated John Johnson because O'Grady was going to become his boss, there had been tensions between the two when they were both desk clerks, and also because Mr. Johnson was "emotionally distraught" and not showing up for work. TR at 605-06.

McDermid testified that on July 21, 2001, his CPA, Dan Cavett, pointed out that 12 deposits totaling \$11,267 were missing from the hotel's daily receipts, were not deposited in the bank, and did not appear in the bank statement. TR at 501-04, 511, 533-35. At that time McDermid suspected that Ortiz, O'Grady, or both, could have stolen the money because he knew that both were taking money under other circumstances—the housekeeping staff had complained about O'Grady stealing their tips, Roy Summerskill complained that O'Grady had pocketed laundry coins, and Patricia Clark had informed McDermid that Ortiz was taking advance deposits and other forms of cash. TR at 502-03, 520, 609-10. In addition, McDermid reasoned that Ortiz and O'Grady were the only two persons beside himself with access to the hotel safe and the bank bags. TR at 504, 508.

McDermid also testified that before the \$11,267 was missing in July 2001, his CPA Mr. Cavett had also alerted him to two previous occasions, one in February/March 2001 involving \$7000+, and one in March/April 2001 involving \$5000+, where deposits which should have been made did not show up on a timely basis in the bank statement. TR at 504, 533; PX 2 at 5. Mr. Cavett further alerted him that the missing deposits "miraculously" appeared later in a lump sum deposit at the bank. TR at 504-05. McDermid stated that he did not approach anyone about these two earlier discrepancies because by the time he had seen Mr. Cavett's report, the late-deposited moneys had reappeared in the bank statement. TR at 505. He explained that he didn't

“make an issue of it” because that is his management style, he was busy with his high-tech company, and there was “no harm done.” *Id.*

McDermid further explained the hotel’s process for accounting for revenue and depositing room receipts. TR at 506. He stated that the front desk clerks for each 8-hour shift are responsible for counting and recording the total amount of cash, leaving \$300 in the cash drawer for the next shift, and depositing the remainder in a drop box to the drop box safe. TR at 506-07, 614. They have no access to the safe once a white envelope with the shift’s cash, checks, and the specific cash count are dropped into the safe. *Id.* During the night audit, a computer report is printed which reflected the revenue for a 24-hour period, broken down by receipts from advance deposits, credit cards, traveler’s checks, personal checks, and cash. TR at 507-08. In addition, there are three envelopes, one from each shift, which the bookkeeper or general manager reconciles to the computer printout the following morning. TR at 507-08, 511. Either the bookkeeper or the general manager counts the contents in each envelope and compares the count to the amount written on the envelope and then prepares a deposit slip. TR at 511.

McDermid testified that in 2001, O’Grady and Ortiz were responsible for opening the hotel’s safe and making bank deposits. TR at 509. He further testified that whoever made the bank deposit would bring back a bank-produced deposit slip which was included with the day’s other records. TR at 510. McDermid also testified that, in the relevant period, O’Grady, Ortiz, and he were the only ones with access to the hotel bank safe, involved in preparing the bank deposits, or transporting the bank bags to the bank. TR at 507-08, 603. McDermid testified that it was impossible for any desk clerk to have stolen the \$11,000 because they did not have access to the hotel’s safe. TR at 614-15. According to McDermid, bank deposits from weekend business were made on Mondays, no deposits were made to the bank during the five days O’Grady was in Atlanta at training, and O’Grady was back in town from his training by Monday, June 18, 2001 when deposits were made from the hotel’s receipts to its bank.⁶ TR at 614, 619-20.

McDermid further testified that the hotel generated an internal accounting control report each night that contained details of all hotel receipts for a particular day and also referenced electronic deposits that went directly to the hotel’s Wells Fargo bank account. TR at 620-636; PX 13. This report also contained a daily record of checks and cash received by the hotel which either O’Grady or Ortiz would walk over to Wells Fargo in a bank bag. *Id.*

McDermid testified that by reviewing his daily comparative reports, he knew that the hotel’s net operating income and net profits had gone down by \$141,000 or 25.12% for the six months of February to July 2001 when compared to the same six month period in 2000. TR at 515-17; RX 4. McDermid continued by stating that such a decline was not expected and that the “industry expectation” was at least a 3% increase in net profits from 2000 to 2001. TR at 517. McDermid opined that summer 2001 should have been a record year for net profits at the hotel because they had raised their room rates and occupancy should have been strong—this was before 9/11, when room revenues plummeted everywhere. TR at 529-30. McDermid blamed the lower net profits on O’Grady’s management style, specifically the employee dissension caused by O’Grady’s harassment of the desk clerks and maids. TR at 531.

⁶ O’Grady flew from Reno on Saturday, June 9 and returned from Atlanta to Reno on June 16, 2001. TR at 619-20.

McDermid then testified that he decided to terminate O'Grady in early July 2001 because there was a great deal of unrest amongst the employees—a walkout was threatened—and due to complaints about O'Grady from Pat Clark and Roy Summerskill. TR at 518. McDermid also testified that he told the housekeepers' supervisor Andres Marroquin and Roberto Ruiz that if they could “cool the troops,” he would terminate O'Grady right after Labor Day—the end of the “busy season.” TR at 518, 523, 608.

McDermid further stated that he was too busy with other projects to take over as hotel general manager so he needed to maintain the status quo until the busy season ended. TR at 519. Later, McDermid changed his testimony and stated that, after their June 21, 2001, lunch at the golf course, he concluded that O'Grady “would never be able to change his behavior, and so, he would continue to upset employees, and for that matter he upset guests with flippant remarks that were ill-received.” TR at 519, 524. McDermid testified that he “decided then that as soon as it was possible to get through the busy season, [he] would terminate [O'Grady].” *Id.* McDermid further stated that he warned O'Grady at their June lunch meeting that if he saw O'Grady in any guest room after the guest had checked out and before the room had been called in clean, he would terminate O'Grady. TR at 524. McDermid testified that he also admonished O'Grady that the racist and sexist jokes, which were running rampant in the front office, would also lead to trouble with English-speaking employees. *Id.* McDermid testified that he did not discipline O'Grady for stealing the vending machine money because he did not consider the missing amounts to be material enough to reprimand O'Grady, and did not want to tip him off that he knew about the thefts for fear that O'Grady would quit. TR at 609.

McDermid also testified that Mark Moran and Damien Forest complained that O'Grady was “putting his hands all over” them. TR at 525. At their June 21, 2001 meeting, McDermid said that he told O'Grady to “chill that whole subject” and “don't touch anybody except shake hands,” and “don't say anything about gays, minorities or females.” *Id.*

After discovering that the \$11,267 was missing on July 21, 2001, McDermid testified that he scheduled a meeting with O'Grady and Ortiz on July 26, 2001, at which the three of them went through each bank deposit slip to verify the missing total. TR at 533-34. They went through the records and verified that 12 deposits had not been received by the bank and that they had no deposit slips from the bank as a counter-indication. TR at 534-35. After verifying the missing funds, McDermid testified that he told Ortiz and O'Grady that they would meet again four days later on a Monday and if the missing deposits miraculously appeared on the bank statement, he would say no more, there would be no investigation as long as it did not happen again. TR at 535.

The three of them reconvened on Monday, July 30, 2001, but the money was still missing. TR at 535. McDermid then explained to O'Grady and Ortiz that since the missing funds had not been returned, he would report the theft to initiate an investigation by his insurance company. TR at 536. McDermid also testified that he had pre-written what he would say and he asked “in the course of an investigation, would you be willing to take a lie detector test?” TR at 536, 600. McDermid testified at trial, and told the South Tahoe police, that he asked both O'Grady and Ortiz if they “would take [a] lie detector test and both said they would.” TR at 600;

PX 2 at 5. McDermid then stated that he never actually required them to take a lie detector test. *Id.* McDermid testified that in response to his question, both O’Grady and Ortiz said ‘well, of course we’ll take it [the lie detector test]. No problem.’ *Id.* McDermid admitted that, at that meeting, he did not provide any written statement to O’Grady or Ortiz as to why he wanted them to take a lie detector test. TR at 591-92.

On August 1, 2001, McDermid called his insurance company adjuster and reported the thefts. TR at 537. He testified that he was told to file a police report so the insurance company could process a claim for the missing funds and investigate. *Id.* McDermid called the South Lake Tahoe police department the next day on August 2, 2001, and Officer Camera came to the hotel to investigate. TR at 537-40; PX 2 at 1-5. Officer Camera spoke to McDermid and also separately with O’Grady and Ortiz about the reported missing funds. *Id.* McDermid testified that Officer Carmichael took over the investigation from Officer Camera and, on August 30, 2001, he came out to the hotel to interview McDermid. TR at 540; PX 2 at 7.

McDermid explained the process of depositing bank funds to Officer Camera on August 2, 2001, and to Officer Carmichael on August 30, 2001. McDermid further explained that O’Grady and Ortiz were the only two that had access to the missing funds. TR at 539; PX 2 at 7.

McDermid testified that, on September 5, 2001, Officer Carmichael called on the telephone and gave him an “oral report” of O’Grady’s interview. TR at 542-43. McDermid further recalled that Officer Carmichael opined that, based on his experience, O’Grady’s “body language and other indices” seemed defensive and that, also in his opinion, O’Grady was not telling the truth and was withholding information. TR at 542; PX 2 at 8-9. McDermid testified that Officer Carmichael told him that his supervisor, Sergeant Monk, observed O’Grady “from a one-way mirror,” and that after conferring, they both agreed that O’Grady was “probably the most likely person to have taken the money.” TR at 542; *see* PX 2 at 5.

McDermid also testified that Ortiz was interviewed by the South Lake Tahoe police on September 7, 2001. TR at 542-43; PX 2 at 8-9. He also stated that Officer Carmichael interviewed her and found her to be open, cooperative, and answered questions easily and comfortably. TR at 545; PX 2 at 8-9. McDermid testified that Officer Carmichael telephoned him on September 7, 2001, after his interview with Ortiz and he opined that she was not guilty of taking the funds. *Id.* Officer Carmichael wrote in his report that McDermid asked him to have Ortiz take the Computer Voice Stress Analyzer or polygraph test despite the fact that Officer Carmichael believed that she had been telling him the truth. TR at 602; PX 2 at 9. Officer Carmichael responded by telling McDermid that the people who administer the lie detector tests were too busy to perform tests on persons believed to have been telling the truth like Ortiz. *Id.*

McDermid testified that the South Lake Tahoe Police told him that they had eliminated Ortiz and McDermid as suspects as of September 7, 2001, leaving only O’Grady as a viable suspect. TR at 543. McDermid testified “I do believe they used the phrase 99 percent certain.” TR at 542-44; PX 2 at 8-9; PX 12 at 4-5.

McDermid testified that he terminated O'Grady's employment on September 8, 2001, but the decision to terminate him was made in the first half of July 2001 and McDermid had promised Andres Marroquin and other employees that when the summer season was over, he would terminate O'Grady because of the employee's concerns and the hotel's declining revenues and profits. TR at 547, 549-50. McDermid denied firing O'Grady for stealing money or because money was missing. TR at 547-48.

McDermid admitted that he never wrote O'Grady up or disciplined him for any of the alleged transgressions discussed in the June 21, 2001, lunch meeting at the golf course. TR at 589-90. In addition, McDermid admitted not writing O'Grady up or disciplining him for allegedly taking Ms. Clark's Priority Club money or for the lower hotel revenues while general manager. TR at 591-92.

McDermid testified that, after O'Grady was terminated, Ortiz told McDermid that she took some money from the hotel. TR at 497, 598-99, 615. McDermid testified that Ortiz is "to this day" still paying restitution. *Id.*

McDermid was represented by lawyer Max Hoseit when the Wage and Hour Division and Ms. Ruiz first asked McDermid to turn over documents. TR at 571-74. McDermid sent requested documents to Mr. Hoseit rather than directly to Ms. Ruiz and McDermid did not know whether Mr. Hoseit ever turned over the requested information to Ms. Ruiz at the Wage and Hour Division. TR at 573-74. McDermid recalled that Mr. Hoseit remained his attorney until sometime in 2002 when McDermid represented himself. TR at 573. McDermid recalled that Ms. Ruiz and his lawyer Mr. Hoseit, had a disagreement about the relevancy of the documents requested from Ms. Ruiz as part of her investigation, but McDermid could not recall whether his lawyer withheld documents from her. TR at 574. McDermid opined that producing the enormous amount of data requested by Ms. Ruiz would have cost him thousands of dollars and perhaps hundreds of hours to retrieve. TR at 574-75.

While almost none of the requested information was produced, McDermid testified that "two points" were the main reasons for not turning over any of the requested documents. These included the request for employees' personal bank statements and prior years' federal income tax returns. TR at 575-76.

3. Hotel Housekeepers, Front Desk Employee, and Housekeepers' Supervisor

Respondent's housekeeper supervisor, Andres Marroquin, present and past housekeepers Jesus Marroquin, Maria Vazquez, Jesus Gonzales, Jorge Ruelas, Erika Hernandez, Silvia Vasquez, and former front desk worker Patricia Clark all testified, most through a translator, to similar events. Their testimony was focused on the time before O'Grady attended general manager training in Atlanta in June 2001, and the events that led to his meeting with McDermid in late June 2001. They testified that O'Grady stole housekeeper tips (TR at 434-35, 439-44, 449-60, 462, 468, 474-75, 482-84), stole coins from the hotel laundry machines (TR at 463-64, 468-69, 484-85), and made inappropriate racist and sexist comments and harassed women and gay employees at the hotel (TR at 479-82, 487-88, 526-27).

While none of the employees testified that they actually saw O’Grady steal housekeeper tips, there was testimony that a trap had been set where a \$5 “tip” left in a room was gone after only O’Grady had accessed the room. TR at 435-36, 442-44, 449-60, 462, 466, 477, 483-84. Ms. Hernandez testified that O’Grady would tell her mother, another hotel maid, that there were tips in a particular room and to pick them up. TR at 468. She further testified, however, that she saw O’Grady copy room numbers of customers who checked out early and he would quickly go down to check those rooms out when, in her opinion, there was no reason for him to go to those rooms. *Id.* Silvia Vasquez, another maid of eight years, also testified that it was unusual for O’Grady, the hotel’s general manager, to go into hotel rooms before they were cleaned and that she did not receive her usual cleaning tips on the days that O’Grady worked as general manager and went down to the rooms from his upstairs office. TR at 472-76. McDermid also testified that there was absolutely no reason for O’Grady, as general manager, to go into the hotel rooms before they were cleaned and that he’s never known any other general manager who went into rooms before they were cleaned. TR at 549. Finally, Ms. Hernandez testified that one time she actually saw O’Grady come out of the laundry room with a bucket of coins. TR at 468-69.

Andres Marroquin testified that the housekeepers repeatedly told him O’Grady was stealing their tips and told him of their “sting” to catch O’Grady. TR at 434-36. He recalled being in Room 210 at the hotel when McDermid told O’Grady to stop going into the rooms because the maids thought O’Grady had been stealing their tips. TR at 435. Mr. Marroquin did not testify regarding whether McDermid ever told him that O’Grady would be fired just after Labor Day 2001.

4. Maria Teresa Ortiz

Maria Teresa Ortiz (“Ortiz”) testified that she worked at the hotel from roughly March 2000 until June 2003 as a bookkeeper and later as an assistant general manager. TR at 288, 600⁷; PX 11. Ortiz stated that she worked with O’Grady at the hotel. *Id.* Ortiz’ testimony confirmed much of McDermid’s testimony as to events from July through September 2001 at the hotel when she was present with McDermid. TR at 288-312.

Ortiz confirmed the hotel desk procedure of pulling the manager’s control report from the night audit and entering “that data into a spreadsheet that had formulas that would let you know at the end of the sheet whether you balanced the day or not.” TR at 290. She further stated that once the funds were balanced then they were put in the bank bag for later deposit to the bank twice a week, normally on Monday or Friday. *Id.*

On November 28, 2001, Ortiz signed a declaration. PX 11. She declared that, on or about July 26, 2001, she met for several hours with McDermid and O’Grady to discuss and investigate some missing bank deposit slips and funds for the hotel. *Id.* In that meeting Ortiz recalled that McDermid asked O’Grady and Ortiz if each of them would be willing to take a lie detector test. *Id.* She further declared that at no time did McDermid actually request or demand that she and O’Grady take a lie detector test. *Id.* Finally, Ortiz declared that on several

⁷ According to Mr. McDermid, Ortiz’ employment at the hotel ended in June 2003 when he discovered her stealing money from the hotel. TR at 598-600.

occasions since July 26, 2001, McDermid and Officers Camara and Carmichael of the South Lake Tahoe Police Department asked her if she was willing to take a lie detector test and that she always answered “Yes.” *Id.*

At trial, Ortiz testified that she would regularly prepare the bank deposit of hotel receivables from monies placed in the safe by the desk clerks from the day before. TR at 289. She stated that she would take the money out of the safe and prepare the bank deposit by “balancing out the day to make sure that everything is accounted for” and balanced for that day. TR at 289-90. She would then prepare a deposit slip and put the funds with the deposit slip into an envelope in the bank bag. *Id.* She further testified that when the funds were deposited at the bank, a bank deposit receipt was received for every day of business since there were separate bank deposit slips for every day of business. TR at 292. The deposit slip would be placed into the night audit for each day. *Id.* Ortiz further testified that when the missing funds were discovered in July 2001, McDermid, O’Grady and she spent time going through all the night audits trying to find the deposit slips to reconcile to the night audit report for each day and they did not find all of the bank deposit slips. *Id.*

Ortiz testified that the bank bags would go to the bank about twice a week, usually on Monday and Friday, because McDermid did not want the deposits made more than two days a week. TR at 290. Ortiz further testified that she did not believe that any deposits to the bank were made when O’Grady was in Atlanta in June 2001 because O’Grady had instructed her that McDermid wanted O’Grady to take the deposits to the bank. TR at 290-91. Ortiz concluded by stating that she believed that the bank deposits were left in the hotel safe until O’Grady returned from training in Atlanta, but if bank records showed differently, then she must have been the one who took them to the bank. TR at 291.

5. Maria Teresa Ruiz

Maria Teresa Ruiz (“Ruiz”) testified that at the time of trial she had been an investigator for the U.S. Department of Labor, Wage & Hour Division at their Sacramento, California office for approximately nine years. TR at 64. The Wage & Hour Division is responsible for enforcing the EPPA. TR at 65. Ruiz also testified that she graduated from California State University in Sacramento with a degree in criminal justice and that she has spoken Spanish fluently since she was a child. *Id.* Ruiz testified that in November or December 2001, she conducted the investigation of Respondent’s business. TR at 65-67.

Ruiz explained how she generally conducts her EPPA investigations. TR at 66-90. If there is a complaint, she starts by reviewing the complaint and then interviewing the complainant. TR at 66. Next, she contacts the employer for an initial conference, then she conducts employee interviews, then she looks at records. *Id.* Ruiz testified that she next analyzes findings and reaches legal conclusions. Finally, she presents her findings at a final conference. *Id.* After the findings are presented, she discusses future compliance, provides publications, and answers any questions that the employer has at that time. TR at 67.

Here, Ruiz found that O'Grady's complaint form alleged that it was suggested that O'Grady take a lie detector test, no notice was given as to why he was suspected of taking Respondent's missing funds, and that he was subsequently terminated by Respondent for refusing to take a lie detector test requested by the South Lake Tahoe police investigator. TR at 67. Next, Ruiz made contact with O'Grady and interviewed him. *Id.* Then, she made contact with McDermid and asked him about the allegations, his "business, about coverage, questions we ask in every case." TR at 67-68. She also asked McDermid about "other employees, types of records that would be needed [to] determine the level of compliance." *Id.*

On Wednesday, November 21, 2001, Ruiz telefaxed and sent by certified mail a questionnaire to Respondent, along with a list of requested information. TR at 69. The request included the Business Data Profile Report and the Audit Checklist and a request that Respondent return it to her in a week so she could complete her investigation. TR at 68-70, 72; PX 1. She described her normal methodology as an investigator and the reasons for requesting various documents from Respondent as it relates to O'Grady's complaint. TR at 73-78. Respondent was given a week to answer the three-page questionnaire and produce numerous documents relating mainly to the 2000 and 2001 calendar years but which also included, among other things, requests for copies of the hotel's 1998-2000 federal income tax returns showing gross receipts, employee names, addresses, social security numbers, telephone numbers, rates of pay, department, hire and termination dates, time cards, payroll journals, check registers, cancelled checks, and bank statements for all front desk clerks and Ortiz and O'Grady. PX 1.

Ruiz further explained that the requested information was customary for her investigation and related to Respondent's economic loss allegation, gross dollar volume, employee identification, jurisdiction over the parties under the EPPA, events concerning O'Grady and the allegations in his complaint, and her investigation of other Acts besides the EPPA such as the Fair Labor Standards Act where her department also looks into minimum wage and overtime pay compliance and verifies hours worked, wages paid, and deductions. TR at 73-78, 146-47. Ruiz' November 21, 2001, request also contained correspondence asking that McDermid call her on Monday, November 26, 2001 at 10:00 a.m. PX 1 at 1. Ruiz testified that she did not receive any response to the letter or the two forms enclosed therein. TR at 78.

Ruiz testified that she next received from the South Lake Tahoe Police Department a copy of their police report concerning case no. 108-0127 during the course of her investigation of O'Grady's complaint. TR at 79-85; PX 2; and PX 7. Ruiz identified the police report as PX 2 except that the police report she viewed in the course of her investigation did not contain the first two paragraphs on page 7 of the supplemental police report which state the day the investigating police officer was assigned to the case and described what he did later on the first day as well as indicating when the police officer met with McDermid and described documents presented by McDermid to the police officer. TR at 83. Ruiz further testified that these new facts did not affect any of the conclusions that she reached during the course of her investigation as to the three EPPA violation imposed against Respondent. TR at 84. Ruiz also explained that she contacted the detective who prepared the police report and confirmed with him that the facts referenced in his report, the dates and everything referencing discussions, were correct as to his understanding of events reported by McDermid, Ortiz, and O'Grady from August 2, 2001 to October 2, 2001. TR at 84-85, 101; PX 2.

Ruiz also interviewed various employees of Respondent during her investigation including O'Grady, front desk clerks, and Respondent's accountant, Mr. Cavett, and other employees at the hotel who spoke Spanish. TR at 85-87.

Ruiz also described her attempts to communicate and obtain documents from McDermid and his attorney, Mr. Max Hoseit, who on November 26, 2001, telefaxed notice and later in 2001 telephoned Ruiz stating that he was representing Respondent/McDermid in Ruiz' investigation and that any correspondence should go to him. TR at 87-88, 95; PX 4. Ruiz testified that Mr. Hoseit's first November 26, 2001 letter communicated to her that McDermid and Mr. Hoseit were not going to provide records unless she could show them her legal basis for requesting certain records. TR at 95. She claims she tried to do so through her discussions with Mr. Hoseit. *Id.* Ruiz testified that she never received cooperation from Mr. Hoseit or McDermid. *Id.*

In response to Mr. Hoseit's telefaxed notice of representation and questions concerning some of the requested information, Ruiz tried to contact Mr. Hoseit three times also on November 26, 2001—twice by telephone at 3 p.m. and 4:45 p.m. and once by telefaxed letter confirming the two telephone messages that she left and requesting a response from Mr. Hoseit as to the best time to discuss his relevancy questions. TR at 88, 96; PX 5. She testified that she did not receive a response to her November 26, 2001 letter to Mr. Hoseit and did not conduct a final conference in the case because she was not able, even after several attempts, to get Respondent's records necessary to complete her investigation. TR at 88-89; *see also* PX 9 (3/7/02 written request for a final conference) and PX 10 (Second written request dated 3/14/02 to meet for a final conference).

On November 28, 2001, Ruiz finally spoke with Mr. Hoseit about the requested information from Respondent. TR at 96-97, PX 6. Later that day, Ruiz telefaxed Mr. Hoseit a response to their telephone conversation earlier that morning about her continued attempts to obtain the requested documents from Respondent. TR at 96-97; PX 6. Ruiz further explained that her earlier requests for documents had been denied by Respondent and Mr. Hoseit so she explained which section of the EPPA authorizes an investigator to request information. *Id.*

On December 3, 2001, Mr. Hoseit sent Ruiz a letter with a copy of the South Lake Tahoe Police Department supplemental police report and a statement from Maria Ortiz about discussions involving a lie detector test. TR at 97, 102-04; PX 7; PX 11. The letter also states that "the documentation you requested of my client is not relevant to this issue [the alleged demand of O'Grady to take a lie detector test]" and "[i]f you can point out the relevancy of any of those documents I will reconsider my position." PX 7.

On December 14, 2001, Ruiz responded to Mr. Hoseit by indicating that she wanted to schedule something or wanted to discuss with him the relevancy of the requested information to her investigation. TR at 98. Mr. Ruiz gave Mr. Hoseit a date to contact her by and she received no response from Mr. Hoseit despite faxing the letter and also mailing it to him via certified mail. *Id.*

On March 7, 2002, Ruiz sent to Mr. Hoseit, with a copy to McDermid, via telefax and via certified mail, a request for a final conference with directions to her office in Sacramento, California. TR at 98-99; PX 9. Ruiz gave Mr. Hoseit three possible dates to select for the final conference and she explained the process for attending the conference. *Id.* Once again, Ruiz testified that she received no response to this request from Respondent or Mr. Hoseit. TR at 99.

On March 14, 2002, as a follow-up to her March 7, 2002 request to schedule a final conference, Ruiz sent another letter to Mr. Hoseit, with a copy to McDermid, which indicated that she wanted to schedule a final conference to present findings and for Mr. Hoseit to respond by the close of business the next day or she would “assume you [Mr. Hoseit and Respondent] are not cooperating with the investigation and [the Wage and Hour Division] will proceed appropriately.” TR at 99-100; PX 10. Ruiz stated that a response was never received to the request to schedule a final conference. TR at 99. She testified that, other than the supplemental police report and the written statement from Ortiz, she never received any of the documents listed in her initial request. TR at 100.

On September 5, 2002, the Wage and Hour Division’s assessment of civil money penalty for EPPA violations against Respondent was sent separately via certified mail to McDermid and Mr. Hoseit. PX 3. The assessment references alleged violations against Respondent under EPPA section 801.30 of \$3,000 for failure to provide records, subsection 801.4(a)(1) of \$1,000 for requiring, requesting, or suggesting a lie detector test, and subsection 801.4(a)(3) of \$10,000 for discharging O’Grady. TR at 90-95; PX 3.

Ruiz testified that, relying on the police report, which stated that Ortiz and O’Grady were the only ones who had access to the missing money and that Respondent had suggested that they both take a lie detector test, she concluded that Respondent had violated subsection 801.4(a)(1). TR at 101-02. She further explained that Ortiz’ 11/28/01 statement (PX 11) was used as an additional basis for the same alleged violation because the statement indicates that she and O’Grady were both asked if they were willing to take a lie detector test. TR at 103-04; PX 11. Later, Ruiz testified that O’Grady told her that the statement associated with taking a lie detector was “You may be asked to take a lie detector test.” TR at 158.

With respect to the third alleged violation of the EPPA, under subsection 801.4(a)(3), Ruiz stated that again she relied on the police report which discloses that the detective contacted McDermid on September 5, 2001, with the information concerning O’Grady’s refusal to take a lie detector test and on September 8, 2001, O’Grady was terminated. TR at 104-05. Ruiz concluded that the sequence of the dates were “too close.” *Id.* She testified that she also had statements from O’Grady that indicated that he was terminated for refusing to take the lie detector test. *Id.*

Ruiz testified that she also relied on the September 27, 2001, EDD document concerning the alleged violation of 29 C.F.R. subsection 801.4(a)(3). *See* PX 12. The EDD document contains notes from an interview conducted with McDermid as to his reason for terminating O’Grady. TR at 105-08, 175-76, PX 12 at 3-5. Ruiz relied on the statement that O’Grady was terminated for taking money from his employer, possibly for gambling, and that O’Grady was the only suspect, and that O’Grady refused to take a lie detector test. TR at 107-09; PX 12 at 4.

The EDD document further concludes that Claimant was terminated for taking employer's monies for his own personal use. PX 12 at 5. At the time, the EDD opined that Employer has enough proof to file criminal charges against Claimant (O'Grady) with the local District Attorney. See PX 12 at 5.

Ruiz testified that she also relied on O'Grady's appeal and the October 30, 2001, decision to overturn the earlier denial of unemployment benefits. TR at 188. Specifically, Ruiz relied on language contained on page 2 of the October 30, 2001 decision (RX 20) which states:

The Employer terminated the Claimant [O'Grady], because the owner believed that the Claimant was stealing from the Employer.... When the owner was informed of the conclusion of the police investigation, he terminated the Claimant (O'Grady)....The district attorney's office determined that there was not sufficient evidence to prosecute anyone....At the time of the [10/29/01] hearing, the insurance company's investigation was also inconclusive: that is, the insurance company had not demanded restitution or threatened to file any kind of civil action.

TR at 192; RX 20 at 2. Finally, Ruiz also relied on language in the October 30, 2001, decision that the "Claimant was not even there, was gone on an itinerary. The claimant traveled to Atlanta, Georgia for training and was gone from June 9th through June 16th." TR at 192-93; RX 20 at 3.

Ruiz also recalled hearing during her investigation that the hotel's housekeepers had their tips stolen when O'Grady was working but not when he was not working, and that McDermid suspected O'Grady of stealing hotel housekeeper tips prior to his termination. TR at 152-53. During the course of her investigation, Ruiz also learned that not only was there \$11,000 missing in July 2001 from Respondent but that there had been other funds missing a couple of months earlier when O'Grady was general manager where moneys were received but not deposited on time where in this earlier instance the funds later appeared with a deposit to the bank. TR at 153-54. Yet, even with these additional known facts, Ruiz did not think that McDermid had a reasonable suspicion to terminate O'Grady. TR at 154. She testified that the police report says that other people were questioned about the missing hotel monies which Ruiz opined shows that other people were potential suspects and had access to the money. TR at 170-71; PX 2 at 8-9. Ortiz, however, was cleared as a suspect on September 7, 2001, according to Ruiz and the police report. TR at 172-73; PX 2 at 8-9. Finally, Ruiz testified that O'Grady refused to take the lie detector test at the police station on September 5, 2001 and, by September 7, 2001, the police believed that O'Grady was the most viable suspect with respect to the missing hotel monies. TR at 173; PX 2 at 7-8.

6. Andy Noguchi

Mr. Noguchi testified that he is the assistant district director for the Wage & Hour Division's Sacramento Office at the U.S. Department of Labor and at the time of trial had been in that position for nine years. TR at 230. Before then, he worked for 12 years as an investigator for the Department of Labor. *Id.* He also stated that his experience included investigating two

EPPA cases himself and supervising an investigator on two or three additional EPPA cases. TR at 237.

Mr. Noguchi identified the September 5, 2002, civil money penalty assessment against Respondent that he signed and had mailed out to McDermid and his attorney, Mr. Hoseit. TR at 230-31; PX 3. Mr. Noguchi explained that the violations totaled \$14,000 in penalties and were comprised of three violations – \$3000 for failure to provide records under 29 CFR subsection 801.30; \$1000 for requiring, requesting, or suggesting a lie detector test under 29 CFR subsection 801.4(a)(1); and \$10,000 for an adverse employment action discharge for not taking a lie detector test under 29 CFR subsection 801.4(a)(3). TR at 232-33, 248, 277, 282; PX 3 at 1 and 3.

In arriving at the separate violation assessments, Mr. Noguchi testified that he used the Wage & Hour Division's computer system known as the Wage Hour Investigation System and Reporting Database ("WHISARD") to factor in the basic information about the case. TR at 233. Mr. Noguchi continued by stating that, generally, additional discretionary factors are applied to the computer generated assessment for things like an employer's prior history, the number of employees impacted, whether there is an agreement for future compliance, the seriousness of the violation, good-faith efforts, examiner's actions, explanations of the employer, and damage or loss. TR at 234, 271-72. Mr. Noguchi testified that he and Ruiz discussed information about this case and applied these same factors to adjust the initial computer-generated assessment amounts to arrive at his final violation assessments except he did not see a place to factor in examiner's actions. TR at 241, 271-73.

Mr. Noguchi explained further that with respect to the \$3000 assessment for failing to provide requested records, he did not expect any agreement from Respondent for future compliance because McDermid would not recognize that there had been a violation for failing to provide records and, therefore, the \$3000 assessment would not be reduced further for any agreement to comply. TR at 243-45, 248, 255-56. In assessing the penalties in this case, Mr. Noguchi opined that there was not a bona fide dispute of doubtful legal certainty despite McDermid's opinion that he had not violated the EPPA. TR at 274.

B. Credibility

I observed the witnesses' demeanor, facial expressions, and body language at trial and I find that, generally, O'Grady and McDermid had a long history working together at the hotel and a personal relationship that preceded O'Grady's work as a general manager. They would lunch together at the local country club and discuss the hotel's business. Erika Hernandez, a maid at the hotel, testified that she thought that O'Grady and McDermid were fairly close friends. TR at 465. I also find that while O'Grady's conduct at the hotel was tolerated and most likely ignored by McDermid through early July 2001, when it was discovered that the large sum of \$11,267 was missing and never replaced in the hotel's bank account, the relationship between O'Grady and McDermid soured.

1. O'Grady

Generally, I find O'Grady's testimony to be credible as to the overall chronology of events, but his attitude at trial bordered on being flippant, especially when discussing and attempting to downplay his ethnic slurs, harassment of fellow employees, and his role in the missing hotel maid tips. Numerous housekeepers and hotel staff consistently testified that housekeeper tips were missing when O'Grady worked and a trap intentionally set against O'Grady showed that monies planted in a room that he later accessed in the morning were no longer there after he departed. TR at 435-36, 442-44, 449-60, 462, 466, 477, and 483-84.

O'Grady was credible regarding McDermid's nonchalant attitude towards O'Grady's petty thefts and inappropriate behavior towards fellow employees, specifically as exhibited in their June 21, 2001, discussion over lunch. McDermid never issued any written admonishment to O'Grady about any problems with O'Grady's work performance which is consistent with McDermid believing that those problems were immaterial to running the hotel. See TR at 609.

O'Grady was not credible as to his recollection of the date he was interviewed at the South Lake Tahoe police department. He testified that the interview took place on September 7, 2001, a day before his employment was terminated by McDermid. TR at 349. McDermid testified that he received a telephone call from South Lake Tahoe Police Officer Carmichael after he finished interviewing O'Grady on September 5, 2001. TR at 542-43. The September 5, 2001, date is also confirmed by the police report. PX 2 at 7-8.

O'Grady was not credible when he suggested, in a conclusory manner, that the missing funds might have been taken by McDermid himself as part of an insurance scam or by McDermid's wife as part of a shopping spree without any other confirming testimony or additional evidence to support these accusations. TR at 415-16, 536-37, 550. No one testified that McDermid's wife accessed the hotel safe at any time when the funds at issue were missing. McDermid testified that the desk clerks did not have access to the hotel's safe. TR at 506-07, 614-15. Finally, the police focused their investigation solely on O'Grady, Ortiz, and McDermid before concluding on September 7, 2001 that only O'Grady remained as a viable suspect. PX 2 at 7-8.

The police report only listed Ortiz and O'Grady as suspects. PX 2 at 2. In addition, McDermid's testimony that funds had been discovered missing by the hotel's CPA Mr. Cavett on two occasions before the missing funds from June 2001 but later appeared to balance the books leads me to believe that McDermid was not a proper suspect. Also, I find that McDermid initiated the investigation in good faith, as it is believable that he was not troubled by O'Grady's petty thefts from the maids or the laundry machines, but truly cared when the missing amounts reached thousands of dollars and were not replaced at a later date. As a result, I disregard as both unproven and improbable O'Grady's testimony that McDermid and/or his wife were plausibly suspected of stealing the missing \$11, 267.

O'Grady was also not credible when he said he did not consider himself a suspect when interviewing with the police, even when the officer asked him if he stole the money, or afterwards when McDermid indicated that only O'Grady or Ortiz could have stolen the money,

See TR at 420. It is possible that, before, or in the earliest minutes of, the interview, O'Grady could have thought he was there to only offer information "in his role as Respondent's general manager." TR at 351. However, I do not find it credible that he did not consider himself a suspect after Officer Carmichael asked if he stole the money, told him he would have to take a lie detector test, and asked "What have you got to hide?" See TR at 349-50, 406; PX 2 at 7-9.

Finally, O'Grady was not credible when he testified that the hotel bank bags were taken to the bank for deposit "every bank day." TR at 344-45. Later, O'Grady contradicted this and testified that there were holidays and occasional other days when neither he nor Ortiz had the time to deposit the money and it would accumulate in the hotel safe. TR at 345, 390. Ortiz testified that deposits were made twice a week on Monday and Friday. TR at 290. McDermid credibly testified that in 2001, Ortiz and O'Grady were responsible for opening the hotel's safe and making bank deposits specifically on Monday's from the weekend business. TR at 614, 619-20

2. McDermid

I found McDermid's discussion of chronological events generally credible as to dates and I found him to be very knowledgeable regarding his hotel business.

McDermid was not credible when he denied terminating O'Grady's employment on September 8, 2001, for stealing money or because the \$11,267 was missing. See TR at 547-48. McDermid's initial explanation for terminating O'Grady's employment was that he fired him because he believed that O'Grady stole the missing funds. PX 12 at 3-5. McDermid's testimony that he did not tell the EDD that he terminated O'Grady for theft, for refusing to take a lie detector test, that O'Grady took the missing monies for his own personal use, or that O'Grady had a gambling problem is not credible as it consisted of self-serving recollections, more than five years old. See TR at 553-57, 566-67. In contrast, on September 15, 2001, McDermid filled out page 2 of an EDD form and wrote that "O'Grady was fired for cause. Serious amount of [m]issing funds. O'Grady is currently under police investigation for embezzlement. We may file civil charges against him. We do not think he should be eligible for unemployment benefits." TR 552-53; RX 7 at 2. In addition, the EDD representative documented the conversation where McDermid said he terminated O'Grady because he thought O'Grady stole the missing funds either contemporaneously or soon after it took place and had no significant stake in his or her reporting of the conversation. PX 12 at 3-5. Moreover, by October 2001, McDermid's justification for O'Grady's termination had evolved again to include a new statement that "things that were happening on O'Grady's watch" while he was responsible as general manager. TR at 568.

McDermid's most recent version of the basis for O'Grady's termination is that O'Grady was fired according to a May/June 2001 plan to terminate O'Grady right after Labor Day and that it was merely a coincidence that he was fired the day after Ortiz was cleared as a suspect and the police announced that they were "99 percent certain" that O'Grady stole the money. TR at 503, 518, 543-44, 549-50. Further eroding the credibility of this explanation is that it was made in response to a leading question. See TR at 549-50. Moreover, Andres Marroquin testified, but did not confirm McDermid's testimony that McDermid told him that O'Grady would be fired

just after Labor Day 2001 and to “cool the troops” in the meantime. *See* TR at 518, 523, 547, 549-50, and 608. Finally, I find that McDermid operated the hotel efficiently and it is very unlikely that McDermid would have expended funds to send O’Grady to Atlanta in June 2001 for general manager training knowing that he would fire him less than three months later.

I find McDermid’s statement that it would have cost him thousand’s of dollars to retrieve and produce the requested information by Ruiz in her investigation speculative because there was no good-faith attempt to comply with the investigation. *See* TR at 574-75.

McDermid was credible with his explanation of PX 13 and it being part of an internal control report which records daily receipts at the hotel along with electronic direct deposits to the hotel’s Wells Fargo bank account. *See* TR at 620-636; PX 13. He credibly explained the difference between credit card receipts that get electronically deposited at the bank and check or cash receipts which must later be walked to the bank in the hotel’s bank bag usually on Monday or Fridays. *Id.*

3. Ms. Ortiz

Ortiz did not have a good memory of events at the hotel in 2001 and many times Respondent’s counsel asked her leading questions. Even the questions about whether she deposited money in the bank when O’Grady was in Atlanta were answered against him until she was told about the deposits made when he was out of town. She also didn’t confirm McDermid’s testimony that she was later fired for stealing funds and currently making restitution.

4. Various Hotel Staff Workers

The hotel staff who testified were very credible as to the missing housekeeper tips and the trap left to infer that O’Grady actually stole hotel housekeeper tips. I give the hearsay testimony less weight but do not reject it outright unless noted in the record. There was also a lot of testimony that was unclear as to specific dates, names, and places. A number of hotel staff members testified in response to leading questions which makes their testimony somewhat less credible. I give less weight to the testimony from Respondent’s staff employed at the hotel or a hotel nearby at the time of trial because they appeared intimidated by the legal process and may have feared retribution.

5. The Remaining Witnesses

The remaining witnesses were credible with their testimony particularly as it related to the Wage & Hour’s representatives common custom and practice in investigating alleged EPPA violations and calculating penalties.

C. Discussion

On September 5, 2002, Plaintiff assessed civil monetary penalties totaling \$14,000 against Respondent for alleged violations of the EPPA. ALJX 1 at Ex “A” attached thereto; *see* 29 U.S.C. §2001, *et. seq.*

The parties agree that Respondent was subject to the Act’s provisions. Stip. No. 2; TR at 47. The parties have also stipulated to the fact that Respondent was the employer of O’Grady and Ortiz and that Respondent was engaged in or affecting commerce, as defined by the EPPA. Stipulation (“Stips.”) Nos. 1-4; TR at 46-52. Neither O’Grady, as complainant, nor any other employee seeks money damages or job-related restitution. Consequently, the Secretary seeks only to impose and collect civil penalties of up to \$14,000.00 against Respondent under the EPPA. *See Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877, 881 (9th Cir. 1992) (Even without seeking alleged money damages or job-related restitution, the Secretary is empowered to impose and collect civil penalties of up to \$10,000 per violation).

1. Laches

Respondent raise a laches defense, arguing that the case should be dismissed because it has been prejudiced by the unavailability of witnesses and documents since the relevant events took place in 2000 and 2001.

Laches is an equitable time limitation on a party’s right to bring suit. The doctrine bars an action where a party’s unexcused or unreasonable delay has prejudiced his adversary. . . . “The bare fact of delay creates a rebuttable presumption of prejudice.” It protects against difficulties caused by the unreasonable delay in bringing an action, *not against problems created by the pendency of a lawsuit after it is filed.*

Boone v. Mechanical Specialties, 609 F.2d 956, 958 (9th Cir. 1979) (emphasis added, internal citations omitted).

Here, O’Grady was terminated on September 8, 2001, and Plaintiff Wage & Hour conducted its investigation from November 2001 through March 2002 and assessed penalties against McDermid/Respondent on September 5, 2002. PX 3. McDermid requested a hearing and this case came to this Office on July 19, 2004. The case proceeded with discovery and was ultimately assigned to me on May 26, 2006 and trial went forward on October 18 and 19, 2006 in Reno, Nevada.

I find that there was no inaction on Plaintiff’s part in performing its investigation and accessing penalties against McDermid as Respondent. Plaintiff’s prosecution of this action from November 2001 through the penalty assessment in September 2002 was not unreasonably lengthy and only took that long because Respondent refused to cooperate. Any prejudice from lost evidence occurred during the pendency of this action when discovery was readily available to preserve it.

Boone is easily distinguished because the plaintiff there took seven years to *file* his action against the defendant. As a result, laches was deemed a valid defense because of the prejudicial delay of seven years in bringing the action and not because of any problems that developed during the pendency of the action after the lawsuit began. Here, Plaintiff initiated its investigation within three months of O’Grady’s termination and issued the penalty assessment less than a year from the termination. Respondent was not prejudiced a result of any inaction by Plaintiff. Therefore, laches is no defense to Plaintiff’s claims.

2. Respondent Did Not Violate the EPPA by Asking O’Grady If He Would Be “Willing to Take a Lie Detector Test”

Plaintiff argues that Respondent’s July 2001 query whether O’Grady would be willing to take a lie detector test violated the EPPA and 29 C.F.R. Sec 801.4(a)(1) and thus Respondent is liable for \$1000 in penalties. I find that Respondent did “suggest” that O’Grady take a lie detector test within the meaning of the EPPA, but that suggestion falls within the “ongoing investigations” exemption.

a. Asking If O’Grady Would Be “Willing To Take a Lie Detector Test” Was a Regulated “Suggestion” Under the EPPA

The EPPA provides that covered employers are prohibited from “requiring, requesting, suggesting, or causing, directly or indirectly, any employee or prospective employee to take or submit to a lie detector test.” 29 C.F.R. § 801.4(a)(1).

Respondent admits that McDermid asked O’Grady (and Ortiz) “in the course of an investigation, would you be willing to take a lie detector test?” ALJX 23 at 10; *see* TR at 536; PX 11. Plaintiff argues that statement constituted a prohibited “request” or “suggestion” under the EPPA. ALJX 22 at 4-5. Respondent does not argue otherwise.

Whether an employer’s statement constitutes a “request” or “suggestion” to take a lie detector test under the EPPA is necessarily dependent upon the totality of the circumstances. In *Lyle v. Mercy Hospital Anderson*, the district court rejected the employer’s motion for summary judgment, finding that a juror could reasonably conclude that an employer asking employee whether he would be willing to take a lie detector test is a “suggestion” to the employee under the EPPA to take a lie detector test. 876 F. Supp. 157, 159-160 (S.D. OH 1995).

Here, considering all the circumstances, I find that McDermid’s July 30, 2001 inquiry was a “suggestion” to O’Grady and Ortiz, implying the possibility that that they would be required to take a lie detector test at some unknown future date. The inquiry came in the context of a discussion in which McDermid was threatening to “initiate an investigation” into the very large sum of money that was missing. TR at 536. Also, McDermid had made that meeting contingent upon the missing money failing to “miraculously” reappear, therefore, O’Grady and Ortiz could only assume that McDermid’s statements were calculated to coerce them to comply with the subsequent investigation, not merely idle speculation as to their views on polygraph examinations. TR at 535. Thus, a “suggestion” was made within the scope of the EPPA.

b. Respondent's "Suggestion" Falls Within the "Ongoing Investigations" Exemption

Section 7(d) of the EPPA, provides a limited exemption to the general prohibition on lie detector use for employers conducting ongoing investigations of economic loss or injury to the employer's business. *See also* 29 C.F.R. § 801.12. An employer may request or suggest 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; (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; and (4) the employer provides the examinee with a statement fully explaining the incident being investigated and the basis for testing certain employees, which the employer retains for at least 3 years and makes available for inspection by the Wage and Hour Division on request. 29 C.F.R. § 801.12.

Plaintiff concedes that Respondent satisfies the first two elements—ongoing investigation and access—but contests the remaining requirements—reasonable suspicion, a written statement and retention of the statement. ALJX 22 at 5-6, fn 2.

I agree that Respondent satisfies the first two elements of the ongoing investigations exception. I find that there is ample uncontroverted evidence that Respondent was conducting an ongoing investigation involving economic loss to its business. Thus, Respondent satisfies the first element.

O'Grady was in Atlanta during some of the time that the soon-to-be-missing funds were received by the hotel, but there was no credible evidence that deposits were made during his absence. *See* TR at 290-91, 345, 390, 601-02, 614, 619-20, 632-34, 636-37. I find that the deposits were made after O'Grady returned from his training. Therefore, I find that O'Grady had access to the missing funds and Respondent satisfies the second element.

i. Reasonable Suspicion

The third element of the ongoing investigations exception is "a reasonable suspicion that the employee was involved in the incident." 29 C.F.R. § 801.12(a)(3).

Plaintiff argues that there is no evidence that Respondent had knowledge of any suspicious behavior, demeanor or conduct by O'Grady or Ortiz by July 30, 2001 that could form the basis of a reasonable suspicion. Plaintiff contends that the only information that might provide reasonable suspicion was provided by the police, a month *after* Respondent had suggested that O'Grady and Ortiz take a lie detector test. ALJX 22 at 5-7.

Respondent argues that it had reasonable suspicion that O'Grady had taken the missing money because he was "perceived of taking money under other circumstances."⁸ ALJX 23 at 16-19. Respondent maintains that it logically had reasonable suspicion of the only two employees (O'Grady and Ortiz) who had access to the hotel's money at the time that it was

⁸ No adverse actions were taken against O'Grady such as write-ups or written warnings before the sudden job termination on September 8, 2001.

stolen and cites *Taylor v. Epoc Clinic*, 437 F. Supp.2d 1323, 1326 (D.Ct. M.D. Fla 2006) in support.

As used in the Act:

[R]easonable suspicion refers to an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss. 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 or the fact that access was limited to a single individual) may constitute a factor in determining whether there is a reasonable suspicion.

29 C.F.R. § 801.12 (f)(1). The statute expressly contemplates finding reasonable suspicion based upon the fact that only one employee had access. *Id.* In *Taylor*, the court found that the employer had reasonable suspicion of all five of its employees, based solely upon the fact that only the five employees had access to the stolen property. 437 F. Supp.2d at 1326.

Here, only O’Grady and Ortiz commonly handled money for Respondent. Since I have found that neither McDermid nor his wife was plausibly suspected of stealing the missing funds, O’Grady and Ortiz were the only two remaining suspects. Consequently, following *Taylor*, I could find reasonable suspicion here based solely upon the small number of employees with access. Here, however, McDermid had reliable evidence that O’Grady was stealing change from the laundry machines as well as the housekeepers’ tips. Moreover, O’Grady had access to the mysteriously late-deposited hotel receipts from February to April 2001.

Considering the totality of the circumstances, I find that on July 30, 2001, O’Grady and Ortiz were the only two reasonable suspects in the missing \$11,267. O’Grady’s access to the missing \$11,267 and the funds that earlier went missing and then reappeared, plus his reputation for numerous and recent petty thefts gave Respondent “reasonable suspicion” of O’Grady’s involvement in Respondent’s economic loss and satisfies the third element of the ongoing investigations exception.

- ii. Provide “Examinee” with a Written Statement and Make Necessary Documents Available to the Wage and Hour Division

The fourth element of element of the ongoing investigations exception is the requirement that, within 48 hours of administering the test, an employer must provide the “examinee” with a statement fully explaining the incident being investigated and the basis for testing certain employees. 29 C.F.R. § 801.12; *see* 29 U.S.C. § 2006(d)(4). At a minimum, the statement must

include: employer's identification of the economic loss to employer, a description of the employee's access to the property, the basis of the employer's reasonable suspicion, and the signature of a person authorized to legally bind the employer. 29 C.F.R. § 801.12. The employer must retain the statement for at least 3 years and make it available for inspection by the Wage and Hour Division on request. *Id.*

Plaintiff alleges Respondent does not satisfy the fourth element of the ongoing investigations exception because it failed to provide O'Grady with a written statement fully explaining the incident being investigated and the basis for conducting a lie detector test. Respondent argues that O'Grady was never an "examinee" because he never took a polygraph test and therefore, the fourth element of the ongoing investigation exception does not apply.

The EPPA only requires that a signed written statement be provided to an "examinee." *See Polkey v. Transtec Corp.*, 404 F.3d 1264, 1269-70 (11th Cir. 2005). In *Polkey*, the Eleventh Circuit explained that the EPPA "differentiates between 'employees' and 'examinees': while the other elements of the ongoing investigation exemption apply to 'employees' more broadly, only 'examinees' must be provided with a signed written notice." *Id.*; *see* 29 U.S.C. § 2006(d)(4); *Watson v. Drummond Co.*, 436 F.3d 1310, 1315 (11th Cir. 2006). An employee who never takes the requested polygraph does not become an "examinee" and a written statement is not required for such employees. *Id.*

This rule is consonant with the underlying rationale of the written statement requirement. The written statement must be provided 48 hours before the examination and must include notice of the date and location of the examination "and that the examinee has the right to consult with counsel or an employee representative before each phase of the test." 29 C.F.R. § 801.23(a)(1). The purpose of the written statement "is to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative." *Id.* However, consultation with counsel serves little purpose if the examination is never conducted.

Moreover, the regulations' requirement that the written notice include the date and location of the examination only make sense if an examination was scheduled, not just suggested. *See* 29 C.F.R. § 801.23(a)(1). Finally, if the written statement was required for employees who never went on to take a polygraph, it would have to be received 48 hours before an event that never happened—an absurdity. *See* 29 C.F.R. §§ 801.12(g)(2), 801.23(a)(1).

Here, neither O'Grady nor Ortiz was ever examined, nor was an examination ever scheduled. Therefore, Respondent was not required to provide a written statement and the fourth element of the ongoing investigations exception does not apply. For the same reason, I find that Respondent was not required to maintain the nonexistent written statement for three years. *See* 29 C.F.R. § 801.12; 29 U.S.C. § 2006(d)(4).⁹

⁹ As explained further below, Respondent also should not have been penalized \$3000 under 29 C.F.R. §801.30 for failure to maintain a written statement it was not required to provide in the first place.

For the reasons stated above, I conclude that Respondent satisfied the applicable requirements of the ongoing investigation exemption of the EPPA and, therefore, Respondent was exempt from the EPPA's general prohibition against suggesting that O'Grady and Ortiz submit to a lie detector test.

3. Respondent Did Not Violate Section 3 of the EPPA and 29 C.F.R. Subsection 801.4(a)(3) by Terminating O'Grady's Employment

Section 3 of the EPPA prohibits covered employers from discharging against an employee for refusal or failure to take or submit to a lie detector test. 29 C.F.R. 801.4(a)(3). The ongoing investigation exemption will not apply if an employer takes an adverse employment action against a current employee based on the refusal to take the test *without additional supporting evidence*. 29 C.F.R. § 801.20(a) (emphasis added).

Plaintiff argues that O'Grady engaged in protected activity when he refused to take a lie detector test at the police station on September 5, 2001, and that refusal was the sole basis for his termination and therefore Respondent violated section 3 of the EPPA. ALJX 22 at 10-16. Plaintiff proposes a civil money penalty of \$10,000 be imposed for the violation. Plaintiff argues the close proximity between the refusal and the adverse action is sufficient to infer causation. Plaintiff further argues that Respondent's proffered reasons for the termination are unsubstantiated because all but one of the alleged events are undocumented. ALJX 22 at 12. Plaintiff also argues that Respondent had other opportunities to terminate O'Grady's employment before his refusal to submit to a polygraph. Thus, the absence of adverse action until after the refusal is evidence further supports a finding that Respondent has violated section 3 of the EPPA.

Respondent contends that O'Grady was fired for poor performance. ALJX 23 at 23-24. Specifically, Respondent claims O'Grady was terminated for the following: failing to increase room revenues; upsetting the housekeepers by allegedly stealing their tips; stealing laundry money; making sexist and racist remarks; and O'Grady's unwelcome touching of fellow employees. *Id.* McDermid testified that he had planned for months to terminate O'Grady right after Labor Day, 2001. TR at 518, 523, 608. However, Respondent's explanation for terminating O'Grady evolved as the case progressed to trial—so much so that its credibility was significantly reduced.

McDermid testified that O'Grady was terminated for “unrest amongst the employees.” TR at 518. McDermid also claimed that O'Grady was terminated for failing to increase room revenues as a result of O'Grady's inability to deal with personnel problems. Yet, Respondent presents no evidence that O'Grady was disciplined after earlier reported incidents of inappropriate management and complaints of theft. In fact, Respondent failed to present any documentation of the supposed complaints or employee performance reports indicating O'Grady's alleged improprieties. TR at 588-91. McDermid discussed O'Grady's misconduct at the golf course lunch in June 2001, but I find that none of the flaws that McDermid perceived in O'Grady's work as general manager caused McDermid to seriously consider terminating him until the missing funds were not returned and the police were summoned in July/August 2001.

The assertion that Respondent had planned on terminating O'Grady after Labor Day, is not supported by the evidence. McDermid testified that he had informed employees that the situation would be remedied after Labor Day. TR at 518, 523. While plausible in the abstract, considering the nature of Respondent's business, the facts do not support Respondent's claim. Respondent had the opportunity to terminate O'Grady's employment after Labor Day (September 3, 2001) and before his refusal to submit to a polygraph test (September 5, 2001), but did not. Respondent did not terminate O'Grady's employment until after learning of his refusal to take the lie detector test on September 5, 2001, and the police's conclusion that O'Grady was the only remaining viable suspect on September 7, 2001. More importantly, McDermid's claim that he had told employees that the situation would be taken care of after Labor Day was not corroborated by witness testimony. Finally, Respondent's investment in O'Grady's professional development by sending him to Atlanta for official Holiday Inn training to become a general manager recognized by Holiday Inn despite all of his alleged deficiencies is inconsistent with the alleged plan to terminate him after Labor Day.

Further weighing against Respondent's proffered reasons for terminating O'Grady is the close temporal proximity between discovering that O'Grady was the sole remaining suspect and terminating him the next day. On September 5, 2001, the police investigator contacted McDermid and informed him of the results of the interview with O'Grady, including the police belief that O'Grady likely stole the missing hotel funds due to his observed body language and demeanor along with O'Grady's refusal to take a lie detector test. On September 7, 2001, after interviewing Ortiz and concluding that she was not guilty of taking Respondent's missing funds, the police told McDermid that they believed that O'Grady had more information about the missing funds but he refused to cooperate further. TR at 545; PX 2 at 8-9. O'Grady was subsequently terminated on September 8, 2001. Thus, the short time between O'Grady's September 8, 2001 discharge and Respondent learning new facts on September 5 and 7, 2001, especially that the police had dismissed Ortiz as a viable suspect leaving only O'Grady, is evidence that all these facts were factors in O'Grady's termination. Furthermore, the California EDD Notice of Unemployment Insurance Claim shows that by September 26, 2001, McDermid stated that the reason for O'Grady's termination was the missing funds and the police investigation. PX 12 at 4-5; RX 7. In fact, McDermid stated in an interview with an EDD representative that both he and Ortiz, the bookkeeper, had been cleared of wrongdoing by the police, O'Grady was the only remaining suspect, and O'Grady had "refused to take [the] lie detector test." PX 12 at 4. This directly contradicts the reasons Respondent presented through witness testimony at the hearing. TR at 547, 549-50.

On the other hand, I find that Plaintiff has not demonstrated that O'Grady's refusal to submit to a lie detector test on September 5, 2001, was the *sole* reason for O'Grady's termination. Moreover, Plaintiff has relied on facts known to the parties on October 30, 2001 rather than facts known to McDermid on the day of O'Grady's September 8, 2001, termination. *See* TR at 188, 192-93; RX 20 at 2. Furthermore, Ruiz mistakenly believed that O'Grady was out of town when the missing money failed to appear at Respondent's bank which I find is unsupported by the evidence as O'Grady could have deposited funds the Monday after he returned from Atlanta. *See* TR at 290, 345, 390, 601-02; 614, 619-36, PX 13.

Plaintiff also cites *Mennen v. Easter Stores*, seemingly to influence the factual findings of the termination here. See 951 F.Supp. 838 (N.D. IA 1997). I find the court's factual findings in *Mennen* irrelevant to this case. Furthermore, *Mennen* is easily distinguished. There, the plaintiff was suspected of stealing cash from a register and subjected to a polygraph exam, but the court specifically found that he was demoted and ultimately constructively discharged *solely because of the negative results of the exam*. *Id.* at 855-56. The critical factual difference is that, here, McDermid learned that O'Grady refused the polygraph on the 5th, did nothing, then on the 7th learned that the police had concluded that O'Grady was the only viable suspect. Only then did McDermid fire O'Grady.

Therefore, I reject both Plaintiff's and Respondent's proffered explanations for O'Grady's termination on September 8, 2001 and, based on the above and additional supporting evidence cited below, I find that McDermid terminated O'Grady because:

- (1) O'Grady had already exhibited a tendency to be dishonest as with the housekeeper tips, the laundry coin money, and having access to hotel receipts that did not get deposited in a timely manner from February through April 2001;
- (2) O'Grady refused to submit to a lie detector test on September 5, 2001;
- (3) O'Grady failed to otherwise fully cooperate with the police on September 5, 2001;
- (4) O'Grady's reported body language at the police station on September 5, 2001, indicating dishonesty and the withholding of information;
- (5) The police's September 7, 2001, oral report to McDermid that they were "99% certain" that O'Grady was the guilty party based on his behavior during the September 5, 2001, interview, O'Grady becoming red in the face, stammering, and other body language;
- (6) The fact that by September 7, 2001 McDermid was informed that:
 - (i) The police had interviewed Ortiz and did not believe McDermid or Ortiz stole the missing funds thereby leaving only O'Grady as the sole viable suspect;
 - (ii) The resulting continued risk of O'Grady remaining at Respondent's hotel and having continued access to hotel receipts; and
 - (iii) The police concluded that O'Grady had more information to disclose regarding the missing funds yet he refused to cooperate further.

TR at 542-44; PX 2 at 8-9; PX 12 at 4-5.

Without citing any supporting authority, Plaintiff argues that even if Respondent based its decision to discharge O'Grady in part on the police's suspicion that O'Grady took the missing funds, any decision that is partially motivated on an illegal basis—in this case, O'Grady's refusal to take a lie detector test—is a violation of the EPPA. ALJX 22 at 13.

Similar to the analysis in the previous section, Respondent satisfied the elements of the ongoing investigation exemption on September 8, 2001, as well. There was an ongoing investigation involving economic loss to Respondent's business, O'Grady had access to the missing funds, Respondent had even more reasonable suspicion, and the written statement requirement was inapplicable because O'Grady never actually took, or was scheduled to take, a polygraph.

I have found no Ninth Circuit authority considering whether the ongoing investigation exception is available when an employer's adverse action is partially, but not wholly, based upon a refusal to submit to a polygraph test. However, the text of the regulation is not ambiguous:

(a) Section 8(a) (1) of the Act provides that the limited exemption in section 7(d) of the Act and Sec. 801.12 of this part for ongoing investigations shall not apply if an employer discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, *without additional supporting evidence*.

(b) "Additional supporting evidence," includes, but is not limited to, the following:

(1) (i) Evidence indicating that the employee had access to the missing property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; or

(2) Admissions or statements made by an employee before, during, or following a polygraph examination.

29 C.F.R. § 801.20(b) (emphasis added). The regulation expressly limits the adverse action exception to the ongoing investigation exception to situations where the employer takes the adverse action "without *additional supporting evidence*."¹⁰ The regulation then provides three non-exclusive examples of the evidence that will suffice to overcome the adverse action exception. The Secretary's intent is quite clear. The ongoing investigation exception remains available to an employer who takes an adverse action against an employee who fails or refuses a polygraph so long as the employer has additional supporting evidence that the employee was involved in the incident under investigation.¹¹ *See Worden v. Suntrust Banks, Inc.*, 2007 WL 904524 (Dist. Ct. SC 2007) (EPPA does not prohibit the discharge of an employee if polygraph results are not the "sole factor" in the decision).

Because Respondent satisfies the elements of the ongoing investigation exemption, the only remaining question is whether it had "additional supporting evidence" to support its termination of O'Grady. *See* 29 C.F.R. § 801.20(b). It did. First, I previously found that McDermid had reasonable suspicion when he made the July 2001 suggestion that O'Grady take a polygraph. By the time he terminated O'Grady on September 8, 2001, he had even more reasons

¹⁰ An exception to an exception to an exception.

¹¹ In *Mennen*, the court's discussion of causation standards was limited to situations in which the ongoing investigation exception is unavailable. *See* 951 F.Supp at 854-56. Thus, that discussion is not relevant here.

to be suspicious that O'Grady was responsible for the theft, as explained above. Reasonable suspicion is one of the enumerated examples of "additional supporting evidence." Second, O'Grady had access, which is another example in the regulation, as well as an element of the ongoing investigation exemption, itself. Finally, McDermid had the "additional supporting evidence" that I labeled as reasons 3 through 6(iii), above. Respondent's termination of O'Grady falls under the ongoing investigation exemption to the EPPA's general prohibition against terminating an employee based upon the results of, or the refusal to take, a polygraph examination.

I further find that McDermid would have terminated O'Grady on September 8, 2001, even without the knowledge that O'Grady refused to submit to a polygraph test. For all these reasons, I find that Respondent's termination of O'Grady did not violate section 3 of the EPPA.

4. Respondent Did Not Fail to Maintain Records in Violation of 29 C.F.R. § 801.30.

Plaintiff claims that Respondent and Respondent's former attorney violated 29 C.F.R. § 801.30 by failing to provide "certain records" requested by the Wage and Hour investigator during the Administrator's investigation and therefore request a \$3,000 penalty. ALJX 22 at 7. Respondent insists that since they were not required to provide a written statement to O'Grady, they were also not required to maintain a nonexistent document and, likewise, were not in violation for failing to maintain records of such a statement under section 801.30.

Pursuant to 29 C.F.R. § 801.30, records are to be preserved for 3 years.

(a) The following records shall be kept for a minimum period of three years from the date the polygraph examination is conducted (or from the date the examination is **requested** if no examination is conducted):

(1) Each employer who **requests** an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific incident or activity under investigation and the basis for testing that particular employee, **as required by section 7(d)(4) of the Act and described in § 801.12 (a)(4) of this part . . .**

(b) Each employer shall keep the records required by this part safe and accessible at the place or places of employment or at one or more established central recordkeeping offices where employment records are customarily maintained. If the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative...

(c) All records shall be available for inspection and copying by the Secretary or an authorized representative. Information for which disclosure is restricted under section 9 of the Act and § 801.35 of this part shall be made available to the

Secretary or the Secretary's representative where the examinee has designated the Secretary, in writing, to receive such information, or by order of a court of competent jurisdiction.

29 C.F.R. § 801.30(a)(1), (b), and (d) (Emphasis added).

Under section 801.30, an employer who “requests” an employee to take a polygraph must retain the written statement “required by section 7(d)(4) of the Act and described in § 801.12 (a)(4).” However, as discussed in section IV(C)(2)(b)(ii) above, the EPPA does not require a written statement where a polygraph was never scheduled or conducted. *See Polkey*, 404 F. 3d at 1269-70. Therefore, section 801.30 does not require the employer to retain or make available such a statement.

Here, O’Grady was never subject to, or scheduled for, a polygraph. Thus, he never became an “examinee” and Respondent was not required to provide any written statement to him. Moreover, Respondent did not *request*, but only *suggested* that O’Grady take a polygraph. Consequently, Respondent’s failure to keep or make available to the Secretary the non-existent written statement did not violate section 801.30.

5. Respondent Failed to Cooperate with the Plaintiff’s Investigation But Was Not Properly Charged.

I observed at trial and read through the trial exhibits that this was a case that was filled with occasional animosity and personality conflicts between O’Grady and McDermid, McDermid and Ruiz, McDermid and Plaintiff’s counsel and, finally, Plaintiff’s counsel and Respondent’s counsel. *See* TR at 117-26, 201-02, 205-07, 210-12, and 223-24. While, in some respects, the case was not complex, Respondent’s credibility lapses and clear failure to cooperate to meet and produce customarily undisputed documentation requests during the initial investigation phase by Wage and Hour forced an unnecessarily lengthy litigation and the corresponding incurrence of sizeable attorneys’ fees and costs. *See* TR at 68-70, 87-88, 95-104, 115-16, 131-32, 138-56, 204-05, 215-18, and 571-75; PX 1; PX 4; PX 5; PX 6; PX 9; and PX 10.

I find that the large majority of attorneys’ fees and costs would have been avoided had McDermid and/or his counsel simply produced all of the *undisputed* records and information rather than withholding everything except eventually turning over the police report and Ortiz’ November 2001 declaration. If Ruiz had received the requested documents and been able to meet with either McDermid and/or his attorney, she would have had the full picture and not have had to assume the worst and issue the \$14,000 in alleged violations in September 2002. In addition, I further find that if McDermid had candidly disclosed his true motivations for terminating O’Grady’s employment, this case would either have not gotten to trial or it would have been streamlined so much that attorney fees and costs would have been greatly reduced.

Plaintiff charged Respondent under 29 C.F.R. § 801.30 and argues that Respondent’s failure “to cooperate in any way with [Ruiz’] investigation” and “Respondent’s blatant failure to produce the requested records” is a violation subsection 801.30. However, section 801.30 is limited to recordkeeping and disclosure requirements related to the records generated in

connection with requesting and administering polygraph tests to examinees under the EPPA. As discussed above, Respondent did not violate subsection 801.30 because O’Grady never became an “examinee” under the EPPA.¹²

ORDER

For the reasons stated above, the Secretary’s determinations of violations and penalties assessed against Respondent are hereby **REVERSED** and **VACATED** in full and this case is **DISMISSED** *with prejudice*.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF REVIEW: Within twenty (20) days after the date of this Decision and Order, Respondent, the Administrator, or any other party desiring review, may file with the Administrative Review Board a petition for issuance of a Notice of Intent to modify or vacate this Decision and Order. Any such petition must conform to the procedural requirements stated in 29 C.F.R. subsection 801.69. The Administrative Review Board is located at:

ARB
U.S. Department of Labor
Suite S-5220
200 Constitution Avenue, NW
Washington DC 20210

¹² Plaintiff did not raise its strongest argument and charge Respondent for civil money penalties under 29 C.F.R. § 801.42(a)(6) for “[r]esisting, opposing, impeding, intimidating, or interfering with an official of the Department of Labor during the performance of an investigation, inspection, or other law enforcement function under the [EPPA] or this part.” There was ample evidence in the record to find a violation and assess penalties had Respondent been charged under this subsection.