



Issue Date: 27 January 2006

CASE NO.: 2004-EPP-2

In the Matter of:

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

v.

DALLAS SECURITY SYSTEMS, INC.,
Respondent.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This proceeding, pursuant to Section 6(a) of the Employee Polygraph Protection Act, 29 U.S.C. § 2001 *et seq.* (hereinafter “the Act”) and the regulations thereunder at 29 C.F.R. Part 801,¹ is assigned for hearing and final determination of the issues timely raised by Dallas Security Systems, Inc.’s exception to the Notice of Civil Money Penalty assessed against Respondent by the authorized representative of the Secretary of Labor. On June 25, 2003, penalties, totaling \$274,000, were assessed following an investigation and inspection of Respondent’s place of business by the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, which disclosed the use of polygraph examinations allegedly in violation of Sections 3 and 8 of the Act and the regulations issued thereunder.

Procedural History

On July 23, 2003, Dallas Security Systems, Inc. (hereinafter “Respondent”), pursuant to 29 C.F.R. § 801.53, requested a formal hearing before an Administrative Law Judge. On May 10, 2004, the Regional Solicitor, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, referred the matter to the Office of Administrative Law Judges, and on May 26, 2004, both parties were so notified.

On October 19, 2005, Plaintiff filed a motion for partial summary decision. Specifically, Plaintiff requests a summary decision as to whether Respondent violated the requirements in

¹ All cited regulations refer to Title 29, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only.

§ 801.23 in its polygraph testing of 137 employee applicants. Plaintiff's Motion for Partial Summary Decision (hereinafter "Pl. Mot.") at 2. On November 23, 2005, Respondent filed a response. Respondent's Response to Plaintiff's Motion for Partial Summary Decision (hereinafter "Resp. Response"). On November 30, 2005, Plaintiff filed a reply. Plaintiff's Reply to Respondent's Response to Plaintiff's Motion for Partial Summary Decision (hereinafter "Pl. Reply").

Undisputed Material Facts

The undisputed material facts listed below are established by the foregoing pleadings.

1. Respondent is a security company specializing in the design, installation, maintenance, and monitoring of security systems.
2. From approximately 2000 to 2002, Respondent referred employee applicants to Gerald Lee Tolbert for the purposes of polygraph testing.
3. From approximately 2000 to 2002, Tolbert provided polygraph test examinees with forms, provided by the State of Texas Polygraph Examiners Board, advising them of certain rights.
4. From approximately 2000 to 2002, Tolbert did not provide polygraph test examinees with the documentation contained in Appendix A to Part 801.
5. In October 2002, a U.S. Department of Labor investigator, Michael Speer, conducted an investigation of Respondent and Tolbert.
6. On June 25, 2003, the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, assessed a civil money penalty totaling \$274,000 against Respondent for violations of Sections 3 and 8 of the Act and the regulations issued thereunder.
7. On July 23, 2003, Respondent, pursuant to § 801.53, requested a formal hearing before an Administrative Law Judge.

Discussion and Conclusions of Law

Plaintiff is seeking partial summary decision as to whether Respondent violated the requirements set forth in § 801.23 in its polygraph testing of employee applicants. Plaintiff alleges that Respondent violated polygraph testing procedures for 137 employee applicants during the period from October 20, 2000 to October 30, 2002.

Summary decision may be granted to either party if the pleadings, affidavits, or material obtained through discovery, show that there is no genuine issue of material fact that remains to be resolved. §§ 18.40-41. The moving party bears the initial burden of demonstrating that there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Hall v. Newport News Shipbuilding and Dry Dock Co.*, 24 BRBS 1, 4 (1990). Upon such a showing, the

burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322; *Hall*, 24 BRBS at 4. All evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261 (1986); *Hall*, 24 BRBS at 4. Where a genuine issue of material fact does exist, an evidentiary hearing must be held. §18.41(b).

Under the Act, most private employers are prohibited from using any lie detector tests either for pre-employment screening or during the course of employment. § 801.1. The Act provides an exemption from the general prohibition against polygraph tests for certain armored car, security alarm, and security guard employers. § 801.14(a). Under § 801.14(h), polygraph tests administered pursuant to the exemption are subject to limitations set forth in §§ 801.21-26 and § 801.35. “Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial action, as provided for in section 6 of the Act.” § 801.14(h). Under § 801.23(a)(3), before the examinee is examined, written notice of certain rights must be given to the examinee, which he or she must then read and sign. If the examiner chooses to use Appendix A to Part 801, this constitutes compliance with the contents of the notice requirement in § 801.23(a)(3) if the form is properly completed.

Plaintiff alleges that the polygraph examiner, Tolbert, hired by Respondent, violated § 801.23, which defines an examinee’s rights and the examiner’s responsibilities before the administration of the polygraph test. Pl. Mot. at 2. Specifically, Plaintiff alleges that Tolbert failed to provide in writing disclosure of the presence or absence of a two-way mirror, in violation of § 801.23(a)(3)(i); disclosure of whether or not any recording devices would be used, in violation of § 801.23(a)(3)(ii); disclosure of the right of both examinee and employer to make a recording of the entire examination, in violation of § 801.23(a)(3)(iii); disclosure that information acquired from a polygraph test may only be disclosed to certain individuals and entities, in violation of § 801.23(a)(3)(xii); and disclosure that an employee’s rights under the Act may not be waived voluntarily or involuntarily by contract or otherwise, in violation of § 801.23(a)(3)(xv). *Id.* at 4-5.

Respondent contends that the issue of alleged violations of the Act cannot be properly resolved in a motion for summary decision because numerous questions of material fact exist. Resp. Response at 2. Specifically, Respondent contends that Tolbert did not testify as to how many of Respondent’s applicants were tested and what procedures were followed for each applicant. *Id.* at 3. Respondent argues that because Speer refused to answer questions regarding the identities of the applicants he interviewed and the substance of those interviews, there is no evidence to support 137 violations of the Act. *Id.* Respondent also states that Speer does not know the substance of Tolbert’s discussions with the applicants. *Id.* at 4.

Respondent also contends that all of the applicants subjected to polygraph testing are exempt under the Act from the general prohibition against polygraph testing of prospective employees under § 801.14(d) and § 801.14(e). Respondent further argues that the Wage and Hour Division’s assessment of a civil money penalty totaling \$274,000 was unreasonable under § 801.42(b). However, because Plaintiff has not moved for summary judgment as to these two legal issues, they need not be addressed.

Respondent correctly argues that a question of material fact exists as to Plaintiff's assertion that Respondent committed 137 violations of the Act, because Plaintiff has not provided sufficient evidence that 137 employee applicants were polygraph tested by Tolbert. There is no dispute, however, that a substantial number of applicants were polygraph tested. Tolbert's deposition testimony and the documentation he provided is sufficient evidence to establish that his pretest procedures in administering polygraph tests to Respondent's employee applicants violated § 801.23 such that there is no disputed issue of material fact in this regard.

In his deposition, Tolbert acknowledged that he did pre-employment polygraph testing for Respondent until 2002. Deposition of Gerald Lee Tolbert (hereinafter "Tolbert Depo.") at 16. Tolbert stated that he used forms, attached at Exhibit 1 to his deposition, provided by the State of Texas Polygraph Examiners Board that did not adhere to the requirements of Part 801:

Q: All right. Are you familiar with the regulations that were propagated under the Employer Polygraph Protection Act?

A: Yes, sir.

Q: Are you aware that they require certain advi[c]e to be given during the pretest phase?

A: Yes, sir.

Q: And in fact, some of that advice is contained in Exhibit One, correct?

A: Yes, sir.

Q: Are you aware of any advice that is required to be given under the CFR that was not given through those forms?

A: I am now.

Tolbert Depo. at 29-30.

Tolbert later acknowledged that the forms he used did not follow the procedures required in § 801.23:

Q: Are you aware that as part of the pretest advi[c]e required under the section 802.23 (sic)² of the CFR an employee/examinee must be advised that if any of these examinee's rights or protections under the law are violated the examinee has a right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor?

² Attorney Charles R. Hairston, in asking this question, apparently misstated the applicable C.F.R. as Part 802, not Part 801, which is the section regulating the application of the Employee Polygraph Protection Act, or the transcript may reflect a typographical error. In any event, there does not appear to have been any misunderstanding of substance.

A: No, sir.

Q: Did you give that kind of advisement in those forms?

A: Not in these forms, no.

Q: Have you ever given that?

A: I do now but I didn't do it before that.

Q: Did you provide that written notification to the DSS employees that you examined in 2002?

A: No.

Q: Did you provide any of the advice that I just mentioned with respect to the presence or absence of a two-way mirror, or the presence or use of a recording device, the right with the other's knowledge to have a recording of an entire examination. Any of those notifications, were provided to the employee/examinees that you examined in 2002 for DSS?

A: Not that I know of. Not that I remember.

Tolbert Depo. at 29-30.

Respondent argues that Speer admitted that he does not know what Tolbert discussed with each employee and that Tolbert could have provided more information than Speer is aware of. Resp. Response at 4. However, Respondent's answers to Plaintiff's interrogatories also establish that the State of Texas Polygraph Examiners Board forms were the only documentation provided to employment applicants. In response to Plaintiff's Interrogatory No. 6, requesting all documents given to examinees before, during and after polygraph testing, Respondent provided four documents, all of which are State of Texas Polygraph Examiners Board forms. Respondent's Answer to Plaintiff's Interrogatory No. 6. These documents are identical to the documents provided by Tolbert at his deposition. Exhibits 1 and 2 to Tolbert Depo. Thus, there is no dispute as to what documents were provided. These documents do not fulfill the requirements of § 801.23.

Respondent has provided no further evidence that the requirements of § 801.23 were met in polygraph testing employee applicants. Therefore, there is no disputed material fact as to whether Respondent violated the Act by not meeting the requirements of § 801.23, regardless of the number of applicants tested or the number of violations under the Act committed by Respondent.

ORDER

Plaintiff's Motion for Partial Summary Judgment as to whether Respondent violated the requirements set forth in § 801.23 is granted. Respondent is held to have violated the requirements of § 801.23 in administering a substantial but undetermined number of polygraph tests to employer applicants.

A

Edward Terhune Miller
Administrative Law Judge