

EPPA Permits Employer to Request Polygraph Test After Receiving Credible Evidence that Employee Stole from Employer

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A bank discovered that \$58,000 was missing from one of its locations. Surveillance videos showed that the manager at the location had instructed his employees to ignore certain anti-theft policies, and employees confirmed that the manager had repeatedly violated the policies. The employer fired the manager for violating the policies. Before informing the manager of his termination, however, the employer requested that the manager submit to a polygraph test regarding the missing money. The manager refused and, after being fired, sued the employer for violating the Employee Polygraph Protection Act (EPPA). The EPPA prohibits employers from requesting that an employee take a polygraph test, except where the request is made as part of “an ongoing investigation” into a “specific incident of economic loss” and based upon a “reasonable suspicion” that the employee was involved. The U.S. Court of Appeals for the Fifth Circuit found that the employer’s request was made as part of an investigation into a “specific incident of economic loss” because while the EPPA does not allow employers to use polygraph tests as “fishing expeditions” whenever money is lost, the employer here requested the test only after receiving other evidence suggesting that the manager had taken the money. The court also found that the employer’s suspicion of the manager was reasonable because the “totality of the circumstances” established not only that the manager had the opportunity to take the money, but also gave “reason to believe that [he] was actually capitalizing on that opportunity.” Employers should be aware that requesting or even suggesting that an employee take a polygraph test violates the EPPA, unless the employer has evidence prior to making the request that credibly suggests that the employee stole the employer’s money or property.

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