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EMPLOYMENT LAW

Polygraph Protection Act Claim Denied in Recent Case

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Special to the Legal

Although we often plead or defend various state law claims ancillary to our more usual employment discrimination actions, they rarely drive cases and we rarely have the opportunity to discuss such claims in this column. But the recent post-trial decision in *Accurso v. Infra-Red Services*, No. 13-7509 (E.D. Pa. Feb. 16, 2018) involves a wide variety of seldom-litigated claims.

ROOFING BUSINESS

The rather convoluted facts involve the employment of Peter Accurso by Infra-Red Services (IRS) and Roofing Dynamics Group (RDG), both roofing services companies connected to Brian Land. Accurso was responsible for soliciting business for both companies. In 2008, he was suspected of diverting business from RDG to friends and was directed to take a polygraph test as part of the investigation. Accurso took another polygraph in 2010. There was a dispute over whether the 2010 polygraph was mutually agreed upon or if Accurso was forced to take the test. Accurso claimed that he was fired because of the polygraph results. He also



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claimed that he was fired because Land wanted to divert Accurso's business to his significant other.

Accurso brought numerous claims against the defendants, including violation of the Employee Polygraph Protection Act; breach of contract; intentional interference with contractual relations and violation of the Pennsylvania Wage Payment and Collection Law. His EPPA claim related to the 2008 polygraph was dismissed as time-barred, but the 2010 polygraph claim remained in dispute. The defendants filed counterclaims against Accurso for breach of contract, breach of fiduciary duty, fraudulent

misrepresentation, intentional interference with contractual relations, and misappropriation of trade secrets.

JURY RETURNS MIXED VERDICT

After a six-day trial, the jury returned a verdict in favor of Accurso on his breach of contract claim, but found that because Accurso had also breached the contract, the defendants were relieved of their obligation to perform. The jury then awarded damages to the defendants for Accurso's breach of contract, as well as finding that Accurso had breached his fiduciary duty to the defendants and had misappropriated the defendants' trade secrets. The jury found that the defendants had not violate the EPPA. The jury awarded nominal damages to the defendants on the counterclaims for intentional interference with contractual relations and fraudulent misrepresentation. Finally, the jury found that the defendants had violated the Wage Payment and Collection Law by failing to pay Accurso commissions earned before his termination. Both parties filed post-trial motions on all adverse findings.

POLYGRAPH PROTECTION ACT

Initially, the EPPA states that "it shall be unlawful for any employer ... directly

or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test; to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee" or to otherwise take an adverse employment action against an employee on the basis of the results of any lie detector test. The limited exception to the prohibition against using a polygraph is where it is used "in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage." In order to invoke this exception, the employee must have had access to the property being investigated and the employer must have "a reasonable suspicion that the employee was involved in the incident or activity under investigation." The employer must then execute a signed statement, provided to the examinee before the test, that "sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees."

The issue at trial was whether Land relied upon the results of either polygraph in terminating Accurso. With respect to the 2008 test, there was evidence that Accurso confessed to diverting business shortly after the test, such that the company did not rely on the test's results per se. Further, there was a dispute as to whether Accurso had even taken the 2010 test, which supported the company's contention that it made no conclusions about the test's results.

BOTH PARTIES BREACH CONTRACT

The company's breach of contract action was based largely on Accurso

having breached his contractual duty to maintain the confidentiality of the company's pricing information. Accurso was found to have given such information about a specific project to a friend (who, it appears, underbid RDG for the business). One of the arguments put forward by the company in the breach of contract action was that Accurso had affirmatively deleted all of his emails related to the project in question, thus raising the issue of spoliation. There was specific evidence that Accurso's email "send" box contained threads that could not be found in his "in" box—thus leading to

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the question of whether Accurso had (rather sloppily) deleted the emails in question. The court allowed counsel to argue spoliation to the jury.

The court also found sufficient evidence to support the jury's verdict that, by forwarding company information to his friends in the business (who, again, underbid RDG on specific, identified projects), Accurso had breached his common law fiduciary duty and that his actions rose to the level of fraudulent misrepresentation. Additionally, there was sufficient evidence that Accurso had interfered with

numerous contractual relationships of the company, including with a business associate responsible for marketing (when he undermined the relationship by disclosing what the company paid to someone else for the same work) and with an ongoing customer relationship.

WAGE PAYMENT CLAIM UPHELD

Despite all of the findings regarding Accurso's business misdeeds, the jury found that the company had violated the Wage Payment and Collection Law by failing to pay commissions on seven projects on which Accurso had worked before his termination. The court denied the defendants' post-trial motions on this claim, finding that "the mere fact that certain compensation is not payable until a future date is not necessarily fatal to a WPCL claim so long as the employee is deemed to have 'earned' it during his employment." That is, "the date compensation is payable is not necessarily the same as the date compensation is earned. Naturally, an employer and employee can designate some other point in the transaction at which time a commission is "earned," but the contract between Accurso and the defendants contains no such clear designation."

While Accurso appears to have repeatedly sought to undermine the defendants' business—in what one hopes is a rare circumstance—the case illustrates the potency of the various state law claims under the appropriate circumstances as well as the need to follow through on commission payments that may be owed even after an employee leaves the company. •