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9th Circ. Says Translation Co. Liable For Staff Polygraphs

By **Daniel Wilson**

Law360 (August 6, 2018, 7:47 PM EDT) -- The Ninth Circuit on Friday refused to overturn a decision holding a federal translation services contractor liable for unlawfully making its linguists take lie detector tests, but it also refused to reapportion the split of damages between the contractor and the U.S. Drug Enforcement Administration, as the linguists had asked.

There were sufficient facts and jurisdiction backing a district court's finding that Metropolitan Interpreters and Translators Inc. violated the Employee Polygraph Protection Act, or EPPA, despite the DEA — the company's contracting agency — carrying out the disputed polygraph tests, a three-judge panel ruled, denying the company's bid to overturn the judgment against it. EPPA bars private employers from requiring, requesting, suggesting, or causing any employee to take a polygraph test.

"EPPA covers damages caused by a wide array of employer conduct surrounding polygraphing, not just the actual examinations," the panel said in an unpublished decision.

While under U.S. Supreme Court precedent federal courts can't review the merits of an executive branch decision to grant or deny a security clearance, the district court had correctly refused to dismiss the claims brought by Francisco Bates and eight other former linguists for the company on subject matter jurisdiction grounds, the panel found.

Metropolitan is not the DEA, and the linguists had challenged the company's conduct surrounding the disputed polygraphs, not whether or not they failed those tests, according to the decision.

And there are "undisputed facts" establishing the company's liability for violating EPPA, including evidence that the plaintiffs were its employees, that company linguists were required to take polygraphs, and that employees who refused or failed the tests were let go, the panel said.

As such, a district court had correctly denied Metropolitan's post-trial bid for judgment as a matter of law or for a new trial, according to the panel, which further noted that the DEA's control of the relevant polygraphs did not preclude liability for the company.

The panel also affirmed the \$3.5 million in noneconomic — emotional distress — damages **awarded to the plaintiffs** by the jury in the case, saying the award was "within the range" of similar awards in cases involving similar circumstances.

But the circuit court refused to overturn the apportionment of those damages in favor of "joint and several" liability, saying apportionment is allowed under EPPA when appropriate,

despite the linguists' **argument to the contrary**.

"Apportionment is appropriate here, because Metropolitan's conduct violated the EPPA, but the DEA independently demanded polygraphing and exclusively controlled the actual examinations," the panel said.

Sixty percent of the noneconomic damages had been apportioned to Metropolitan, and 40 percent to the government, and the linguists, who had settled with the DEA prior to trial in a \$500,000 deal — five of 14 original plaintiffs also settled with Metropolitan before trial — had appealed that apportionment decision.

Counsel for the linguists and a representative for Metropolitan didn't immediately respond to requests for comment Monday.

Circuit Judges Kim McLane Wardlaw, Jacqueline Nguyen and John B. Owens sat on the panel for the Ninth Circuit.

The plaintiffs are represented by Eugene G. Iredale, Julia Yoo and Grace Jun of Iredale & Yoo APC.

Metropolitan is represented by R. Gaylord Smith, John L. Barber and Raul L. Martinez of Lewis Brisbois Bisgaard & Smith LLP.

The case is *Bates et al. v. Metropolitan Enterprises and Translators Inc.*, case numbers 15-56647 and 15-56658, before the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Matthew Bultman. Editing by John Campbell.

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