APPEALS COURT

PHILIP SALIBA VS. CITY OF WORCESTER

Docket:	16-P-591
Dates:	February 14, 2017 - October 27, 2017
Present:	Green, Meade, & Agnes, JJ.
County:	Worcester
Keywords:	Practice, Civil, Motion to dismiss. Public Employment, Polygraph test. Statute, Construction.

Civil action commenced in the Superior Court Department on March 27, 2015.

A motion to dismiss was heard by James R. Lemire, J.

Allyson H. Cohen for the plaintiff.

William R. Bagley, Jr., Assistant City Solicitor, for the defendant.

AGNES, J. Massachusetts law prohibits employers, public as well as private, from subjecting applicants for employment, as well as employees, to a "lie detector test," whether the test is administered in this State or elsewhere. G. L. c. 149, § 19B. [1] The statute includes safeguards for employees who assert their rights, provides criminal penalties for those who violate the statute, and permits persons aggrieved by a statutory violation to bring a civil action against the violator for injunctive relief and damages. [2] This appeal requires us to address a question of first impression, namely, whether § 19B(2) prohibits a Massachusetts employer from considering the results of a lie detector test administered lawfully by an out-of-State employer in connection with an individual's earlier application for employment in another State. [3] For the reasons that follow, we conclude that § 19B(2) does not apply in the circumstances of this case, and accordingly, we affirm the judgment dismissing the plaintiff's complaint.

The plaintiff, Philip Saliba, alleges that the defendant, the city of Worcester (city), violated G. L. c. 149, § 19B(2), by obtaining and referring to a copy of the plaintiff's lie detector (polygraph) test results from his application for a job with the Connecticut State police (CSP). The judge below allowed the defendant's motion to dismiss under Mass.R.Civ.P. 12(b)(6), 365 Mass. 747 (1974), and judgment entered accordingly. The plaintiff filed a timely appeal.

Background. 1. 2007 CSP and Worcester police department applications. The plaintiff's claim is based on the following series of events, which are summarized in his complaint. In 2007, the plaintiff, an honorably discharged United States Marine Corps veteran, was working full time as a plumber. He applied for a job with the CSP. As part of the hiring process, the plaintiff voluntarily underwent a polygraph examination. [4] On January 18, 2008, the plaintiff was informed that the reason he was not hired by the CSP was his past use of anabolic steroids. [5] The plaintiff also applied for a job with the Worcester police department (WPD) around the same time. On or about January 23, 2008, the WPD requested from the CSP a copy of the plaintiff's employment application, the CSP findings, and the results of the polygraph examination administered by CSP. The polygraph test results were sent to the WPD the following day. After the WPD completed its own investigation of the plaintiff, which included a personal interview, the chief of police forwarded to the city manager a recommendation that the plaintiff be bypassed [6] for the job based at least in part on the results of the CSP polygraph test. [7]

2. 2011 Worcester fire department application. In October, 2011, the plaintiff applied for a job with the Worcester fire department (WFD). On March 30, 2012, the plaintiff was bypassed for a position based at least in part on the results of the CSP polygraph test. [8] The plaintiff appealed this bypass to the Civil Service Commission, but later withdrew his appeal.

3. 2013 WFD application. The plaintiff again applied for a job with the WFD in July, 2013. The plaintiff was interviewed a second time. In connection with the plaintiff's 2013 application, the WFD obtained summaries of the investigations conducted in connection with the plaintiff's 2008 application to the WPD and his 2011 application to the WFD. Of the applicants for the 2013 position, the plaintiff was the only person who had polygraph test results in his file. The plaintiff was again bypassed, based at least in part on the results of the polygraph test administered by the CSP. [9]

The plaintiff also appealed this bypass to the Civil Service Commission (commission). [10] After three days of hearings, the commission issued its decision. The commission concluded that the city "did not require [the plaintiff] to undergo [a polygraph] exam." The city learned about the test taken by the plaintiff when it became aware that the plaintiff had previously applied for employment with the CSP and requested a copy of the plaintiff's file including any polygraph test results. The commission ruled that this did not violate G. L. c. 149, § 19B. [11]

During the pendency of the plaintiff's appeal to the commission, he filed the present complaint in Superior Court alleging that the city violated G. L. c. 149, § 19B, by using information from his polygraph examination with the CSP to bypass him for employment with the WFD in 2011 and 2013. [12] The judge allowed the city's motion to dismiss the plaintiff's complaint "for essentially the reasons stated in [its] motion."

Discussion. 1. Standard of review. In reviewing a decision allowing a motion to dismiss under Mass.R.Civ.P. 12(b)(6), "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor," are taken as true. Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011), S.C., 466 Mass. 156 (2013), quoting from Marram v. Kobrick

Offshore Fund, Ltd., 442 Mass. 43, 45 (2004). "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief. . . ." Golchin, supra, quoting from Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). "We review the allowance of a motion to dismiss de novo." Goodwin v. Lee Pub. Schs., 475 Mass. 280, 284 (2016).

2. Section 19B. Under G. L. c. 149, § 19B(2), as appearing in St. 1985, c. 587, § 1, it is

"unlawful for any employer . . . , with respect to any of his employees, or any person applying to him for employment, including any person applying for employment as a police officer, to subject such person to, or request such person to take a lie detector test within or without the commonwealth, or to discharge, not hire, demote or otherwise discriminate against such person for the assertion of rights arising hereunder. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations."

Section 19B(2)(a) provides that "[t]he fact that such lie detector test was to be, or was, administered outside the commonwealth for employment within the commonwealth shall not be a valid defense" to an action brought under the statute. Further, § 19B(2)(b) requires that

"[a]ll applications for employment within the commonwealth shall contain the following notice which shall be in clearly legible print:

"'It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability.'"

Initial violations of G. L. c. 149, § 19B, are punishable by a fine. Subsequent violations are further subject to a fine or imprisonment for not more than ninety days, or both. See G. L. c. 149, § 19B(3). Anyone aggrieved by a violation of § 19B(2) may initiate a civil action for injunctive relief and damages, including treble damages for any loss of wages or other benefits, as well costs of litigation and attorney's fees. See G. L. c. 149, § 19B(4).

The plaintiff argues that the Legislature enacted G. L. c. 149, § 19B, to protect applicants for employment both from being required to take a lie detector test and from a potential employer's use of test results in the hiring decision, regardless of when and by whom such a test is administered. In response, the city argues that § 19B only prohibits an employer from "subjecting" an applicant "to, or request[ing] such person to take a lie detector test"; § 19B(2) does not specifically prohibit an employer from using preexisting results from tests not requested or administered by the employer. Because the city did not "subject" the plaintiff to a lie detector test or condition his employment on his agreeing to take such test, the city maintains that its alleged use of the CPS polygraph test results did not violate § 19B.

"[T]he primary source of insight into the intent of the Legislature is the language of the statute." International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 853 (1983). "A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its

plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001). See G. L. c. 4, § 6, Third. Here, the language of G. L. c. 149, § 19B, is unambiguous. The statute states that an employer may not "subject" a person applying for employment to, or "request" that such person take, a lie detector test. The city did not do so in this case. Instead, upon learning of the plaintiff's prior application to the CSP, which he voluntarily disclosed, the city requested the plaintiff's employment application and the CSP's findings, which included a written report concerning the results of his polygraph examination. An appointing authority, here the city, may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See Beverly v. Civil Serv. Commn., 78 Mass. App. Ct. 182, 189 (2010). "In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." Cambridge v. Civil Serv. Commn., 43 Mass. App. Ct. 300, 304-305 (1997). Therefore, because the city did not condition the plaintiff's eligibility for employment on his undergoing a lie detector test, it did not violate the express terms of § 19B. [13]

The plaintiff argues in the alternative that even if G. L. c. 149, § 19B, by its express terms does not prohibit the use of lie detector test results, the statute establishes a public policy against the use of such results. The plaintiff points to the Legislature's most recent amendment of § 19B in 1985, which extended subsection (2) of the statute to prohibit an employer from requiring an applicant for employment to take a lie detector test "within or without the Commonwealth." G. L. c. 149, § 19B(2), as appearing in St. 1985, c. 587, § 1. For two reasons, the plaintiff's argument is unavailing. First, if the Legislature intended to extend the prohibitions of § 19B to all uses of lie detector tests or their results, as opposed to a prohibition against requiring an applicant for employment to take a lie detector test in Massachusetts or in another State, it had the opportunity to do so in the 1985 amendment. The language of that 1985 amendment, however, modifies only the prohibition against subjecting a job applicant to, or requesting that such person take, such a test, and does not address the use of lie detector test results. See Jancey v. School Comm. of Everett, 421 Mass. 482, 495 (1995). Additionally, there is language in the statute that strongly suggests that the Legislature's intent was to limit the statute's reach only to lie detector tests administered in relation to employment in Massachusetts. See G. L. c. 149, § 19B(2)(a) ("The fact that such lie detector test was to be, or was, administered outside the commonwealth for employment within the commonwealth shall not be a valid defense to an action brought under the provisions of subsection [3] or [4]" [emphasis supplied]).

Second, cases decided since the original enactment of G. L. c. 149, § 19B, see St. 1959, c. 255, make clear that the use of lie detector tests is not contrary to the public policy of the Commonwealth. For example, in Baker v. Lawrence, 379 Mass. 322, 326-327 (1979), the Supreme Judicial Court recognized that notwithstanding the fact that § 19B prohibits all employers, public or private, from requiring or even requesting that an applicant for employment (including an applicant for a position as a police officer) submit to a lie detector test, by its express terms the statute exempts "lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations." [14] In Baker, the court recognized that the employer police department could require its officers to submit to a lie detector test as part of the department's investigation into a crime alleged to have been committed by one or more of its

police officers. Id. at 327. "Such requests, followed by administration of tests where the subjects agree, are common incidents of criminal investigations, and are permitted." Ibid. (quotation omitted). See Patch v. Mayor of Revere, 397 Mass. 454, 456-457 (1986) (compelling police officers suspected of crime to submit to lie detector test or face discharge does not violate due process); Local 346, Intl. Bhd. of Police Officers v. Labor Relations Commn., 391 Mass. 429, 440 (1984) (use of lie detector tests in criminal investigations in which police officer is suspect is not contingent on collective bargaining process). [15] [16]

3. Federal law. The plaintiff also relies on Federal law, in particular, the Employee Polygraph Protection Act (EPPA), 29 U.S.C. §§ 2001 et seq. (2012), as support for his argument. The EPPA, which was adopted in 1988, bars an employer from requiring or requesting that a prospective employees submit to a lie detector test. However, unlike G. L. c. 149, § 19B, the EPPA also makes it "unlawful" for an employer to "use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee." 29 U.S.C. § 2002(2) (2012). The plaintiff argues that "[b]ecause the [EPPA's] meaning . . . is clear and unambiguous, its pla[i]n language controls our analysis." We disagree.

General Laws c. 149, § 19B, was initially enacted by the Legislature in 1959, and last amended in 1985. The EPPA, on the other hand, was adopted in 1988. See Pub. L. No. 100-347, §§ 2 et seq., 102 Stat. 646 (1988). The EPPA expressly limits its reach to nongovernmental employers: "This chapter shall not apply with respect to the United States Government, any State or local government, or any political subdivision of a State or local government." 29 U.S.C. § 2006(a) (2012). Federal law, therefore, provides no support for the plaintiff in this case.

Conclusion. For the above reasons, the judgment dismissing the complaint is affirmed.

So ordered.

footnotes

[1] The statute defines the phrase "lie detector test" as

"any test utilizing a polygraph or any other device, mechanism, instrument or written examination, which is operated, or the results of which are used or interpreted by an examiner for the purpose of purporting to assist in or enable the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding the honesty of an individual."

G. L. c. 149, § 19B(1), as appearing in St. 1985, c. 587, § 1.

[2] General Laws c. 149, § 19B(2), as appearing in St. 1985, c. 587, § 1, reads as follows:

"It shall be unlawful for any employer or his agent, with respect to any of his employees, or any person applying to him for employment, including any person applying for employment as a police officer, to subject such person to, or request such person to take a lie detector test within or without the commonwealth, or to discharge, not hire, demote or otherwise discriminate against

such person for the assertion of rights arising hereunder. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations.

"(a) The fact that such lie detector test was to be, or was, administered outside the commonwealth for employment within the commonwealth shall not be a valid defense to an action brought under the provisions of subsection (3) or (4)."

[3] We are not called upon and do not express any opinion about the scientific validity of various instruments and technologies that may be used to detect whether a subject is telling the truth. In Commonwealth v. Mendes, 406 Mass. 201, 212 (1989), the Supreme Judicial Court ruled "that polygraphic evidence . . . is inadmissible in criminal trials in this Commonwealth either for substantive purposes or for corroboration or impeachment of testimony."

[4] The report on the results of that polygraph examination are included in the record before us as an attachment to the plaintiff's opposition to the city's motion to dismiss. The CSP report is also referred to in the decision by the Civil Service Commission discussed infra.

[5] Other than the polygraph report, none of the materials from CSP hiring process are included in the record appendix.

[6] We do not use the term "bypass" in reference to passing over the candidate whose name appears highest on a certification for a civil service position. See G. L. c. 31, § 27; Bielawski v. Personnel Administrator of the Div. of Personnel Admin., 422 Mass. 459, 459-460 (1996). We simply use the term, as the parties have in their briefs and record appendix, to mean that the city determined not to make an offer of employment to the plaintiff.

[7] The WPD's employment investigation report noted that during his interview, the plaintiff several times gave answers contradictory to answers he gave during his employment process with the CSP. The report also noted that when confronted with the conflicting information, the plaintiff would change his responses. Based on this, the report concluded that "[n]ot only can [the plaintiff's] honesty and integrity be questioned at times, the consistency to his answers leave doubt."

[8] Contrary to the plaintiff's claims, nothing in the record shows that he was considered by the WFD to be "number 2" on the list of potential candidates. Early on in his interview for a position with the WFD, the plaintiff disclosed his application for a job with the CSP, including that he had undergone a polygraph examination. He stated that he had been bypassed for that job due to his disclosure that he had taken anabolic steroids in the past. At the end of the interview, the plaintiff mentioned his application for employment with the WPD. As a result, the interviewer contacted the WPD and obtained information about the WPD's investigation of the plaintiff. The record indicates that the WFD's investigation concluded that the plaintiff should be bypassed for a job due to his "issues with anger and alcohol coupled with his selective memory about which issues in his past to bring forward." Subsequently, a letter from the city's director of human resources to the city manager listed the plaintiff under the heading "Bypassed Candidates," and stated that the plaintiff was bypassed due to his negative history, including

criminal and domestic violence incidents and issues with alcohol, as well as his prior unsuccessful attempts to obtain employment with the CSP and the WPD.

[9] The record contains a 2014 letter from the city's director of human resources to the city manager stating the reasons for the bypass. The director stated that the plaintiff "had a poor interview," and that he "admitted he would have lied to the investigators about his history of drug use and almost anything if they did not have the information already on file." The director concluded that the plaintiff's "admission to purposely omitting information relative to his background demonstrates his intent to mislead the investigators, a total disregard for the law, a pattern of irresponsibility and dishonesty."

[10] See Beverly v. Civil Serv. Commn., 78 Mass. App. Ct. 182, 187-188 (2010) (describing commission appeal procedure).

[11] In addition, the commission addressed some of the matters contained in the CSP's polygraph examination report that the WFD had referred to in its decision to bypass the plaintiff.

[12] The plaintiff did not include the WPD's bypass of his 2007 application in his complaint, as it was barred by the statute of limitations. His appeal here only concerns his 2011 and 2013 applications to the WFD.

[13] Similarly, the plaintiff's argument that G. L. c. 149, § 19B, prohibits the use of the results of a lie detector test and prohibits such tests even if they are conducted outside the Commonwealth, see G. L. c. 149, § 19B(1), (2)(a), falls short. As with § 19B(2), those actions are only prohibited when done as a requirement of or prerequisite to employment. That is not the case here.

[14] "The Legislature, although generally averse to tests forced by employers upon their employees, here recognized an evident interest of the employer in applying some pressure to assist an investigation leading to exoneration of the employee or the opposite." Baker v. Lawrence, 379 Mass. at 327.

[15] Of course, whether a police officer who refuses a lawful order to submit to a lie detector test can be disciplined or discharged is a separate question. "A public employer has authority to compel an employee, under threat of discharge for noncooperation, to answer questions reasonably related to the employee's ability and fitness to perform his official duties." Patch v. Mayor of Revere, 397 Mass. at 455. In Carney v. Springfield, 403 Mass. 604, 611 (1988), the Supreme Judicial Court explained that a grant of transactional immunity is necessary to overcome a public employee's privilege against self-incrimination under art. 12 of the Massachusetts Declaration of Rights so as to compel the public employee to answer questions relating to a criminal investigation. See Furtado v. Plymouth, 451 Mass. 529, 530-532 (2008).

[16] A private employer also may require an employee who is suspected of a crime during an ongoing criminal investigation to submit to a police-administered lie detector test or face discharge from employment. See Bellin v. Kelley, 435 Mass. 261, 271-272 & n.14 (2001).