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Federal Employee Fact Sheet: Discriminatory Polygraph Examinations

Many federal government applicants and employees are required to take a polygraph examination as a prerequisite to being hired by, or to continue employment with, a federal government agency. This guide discusses the ability of the Equal Employment Opportunity Commission (EEOC) to review an allegation that an applicant or employee was subjected to unlawful discrimination during a polygraph examination.

Overview

In certain jobs, such as law enforcement positions, or with certain agencies, such as the Department of Homeland Security, it is common for an agency to require that applicants to a position take and pass a polygraph examination. Employees in these positions may also be required to take an updated polygraph examination from time to time. That examination can occur as part of a security clearance determination, or for positions that do not require security clearances. If the polygraph examination is part a security clearance determination, it generally is not reviewable by the EEOC. However, if the polygraph examination is unrelated to a decision on a security clearance, the EEOC has the authority to review whether the examination was discriminatory.

Security Clearance Determinations Generally Are Not Reviewable

The EEOC lacks the authority to review the substance of an agency's decision to grant, revoke, or deny a security clearance for an applicant or employee. *Henry S. v. Dep't of Def.*, EEOC App. No. 07201700202 (Mar. 28, 2018) (citations omitted). However, it can still review whether the grant, denial, or revocation of a security clearance was carried out in a discriminatory manner. *Id.* (citing *Fonda-Wall v. Dep't of Justice*, EEOC App. No. 0720060035 (July 28, 2009); *Schroeder v. Dep't of Def.*, EEOC Req. No. 05930248 (Apr. 14, 1994)). As the Commission explained this distinction in a decision finding that it lacked the authority to review the complainant's allegations of discrimination: "for example, if complainant had alleged that the agency required female applicants to take a polygraph examination, but did not require such an examination for male applicants, the Commission could review that aspect of the agency's process. However, complainant's claims concern the merits of the agency's determination that she could not be granted a security clearance, a matter of over which the Commission has no jurisdiction." *Kingan v. Nat'l Sec. Agency*, EEOC App. No. 01996328 (Feb. 15, 2002).

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The EEOC Can Review Whether Discrimination Occurred During An Agency's Polygraph Examination

The EEOC reviews and decides complaints where an applicant or employee alleges he or she was discriminated against during a polygraph examination unrelated to a security clearance determination. *See Brown v. Dep't of Justice*, EEOC App. No. 0120110788 (Mar. 13, 2012) (reviewing and deciding complainant's claim that he was discriminated against where "he failed a pre-employment polygraph because of the FBI examiner's discriminatory animus against him and as a result, his conditional offer of employment with the FBI was withdrawn"); *Scott-Hardeman v. Dep't of Justice*, EEOC App. No. 0120101567 (Nov. 30, 2010); *Natividad v. Dep't of Justice*, EEOC App. No. 0120064879 (Apr. 21, 2008). For example, in *Scott-Hardeman*, the complainant alleged that she was subjected to discrimination in part when "she felt like she was being interrogated during her polygraph examination" and "the Agency informed her that she did not pass her first polygraph examination." EEOC App. No. 0120101567. The EEOC adjudicated these claims. *Id.* Similarly, in *Natividad*, the complainant alleged that he was subjected to "discrimination based on sex when: (a) on July 22, 2005, the agency rescinded the conditional offer of employment after he failed his second polygraph test; and (b) the first polygraph test was administered in a discriminatory manner." EEOC App. No. 0120064879. Both an EEOC administrative judge and the Commission reviewed and decided the complainant's claims. *Id.* Therefore, it is clear that if an applicant or employee believes he or she was discriminated against during a polygraph examination that is unrelated to a security clearance determination, the EEOC has the authority to decide whether the discrimination occurred as alleged.

Were You Discriminated Against During A Polygraph Examination?

Each situation is different. As such, this is not a question that can be answered without evaluating each case individually. Employment attorneys experienced in representing federal employees, such as those as The Wick Law Office, can provide advice to assist you with this determination.

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