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COMMON LAW REMEDIES OF EMPLOYEES INJURED BY EMPLOYER USE OF POLYGRAPH TESTING

*Deborah Weimer**

I. INTRODUCTION

Defamation and invasion of privacy occur routinely during the administration of polygraph examinations in the workplace. Previously, employers have been shielded from liability for defamation on the grounds that publications in this context are protected by a qualified privilege. Until recently, the general perception was that employees had no substantial expectation of privacy in the workplace.

However, times change. Evidence is available to persuade courts that the value of the polygraph to employers is far outweighed by the damage it may do and has done to innocent employees. Courts are less willing to conclude that employees lose all rights to be free from tortious injury when they accept employment on an "at will" basis.

The unreliability of polygraphs and the potential for their abusive use in the employment setting are increasingly being recognized by legislatures and the courts. Twenty-one states have enacted legislation prohibiting or strictly limiting the use of polygraphs in private employment. Absent a protective statute, employees may find common law protections available. This article explores the remedies available to employees who are injured by employer use of polygraphs, focusing particularly on those jurisdictions which have not enacted protective legislation.

Part I of this article briefly describes the polygraph mechanism itself, and the serious weaknesses of this "lie detection" technique. Section II focuses on the remedies available to employees who have been discharged for failing or refusing to take a polygraph test.

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II. THE POLYGRAPH

A. *The Technique of Polygraphy*

David Nagle, writing in support of the widespread use of polygraphs by employers, suggests that historical precedents of the polygraph give the polygraph more legitimacy.¹ He described the Arabic practice of putting a hot iron on the dry tongue of one accused of deceit. If his tongue burned, this would prove his guilt. The theory was that the accused's fear of being revealed as the guilty party would lead to a reduced production of saliva, and his tongue would burn as a result. India employed a similar, though less painful, test involving the chewing of dry rice. If the suspect could not spit out the rice, this established guilt. Nagle indicated that these tests are "frequently seen as the conceptual forerunners of the polygraph in that they depended upon the subject's faith in the procedure, his fear of detection, and his resulting physiological reactions."²

The techniques on which the modern polygraph are based are straightforward. The polygraph is designed to detect changes in blood pressure, breathing pattern and skin moisture. Measures of skin moisture are also referred to as galvanic skin response, electrodermal response, or skin conductance response. Changes in any of these functions are monitored. A sphygmograph, similar to the device used to take blood pressure, is a part of the machine. Pneumographic tubes are placed around the subject's chest and abdomen to measure changes in her breathing pattern. Electrodes are attached to two fingers on the right hand to measure perspiration. Each of these functions is measured and reflected on a polygraph chart where a pen driven by an attachment records any changes.³

Contrary to the impression that may be given by the term "lie detector," bells do not go off when the subject "tells a lie." Rather, the polygraph operator must interpret the chart and arrive at some conclusion regarding the subject's truthfulness.

The theory underlying the polygraph is that changes in the subject's vital signs indicate deception. The original belief was that

1. Nagle, *The Polygraph in the Workplace*, 18 U. RICH. L. REV. 43 (1983).

2. *Id.* at 44-45.

3. For a thorough explanation of the technique, see J. REID & F. INBAU, *TRUTH AND DECEPTION: THE POLYGRAPH ("LIE DETECTOR") TECHNIQUE* (1977).

the effort required to lie, as opposed to telling the truth, caused a change in the subject's vital functions.⁴ The current theory, however, is that fear of being detected in a lie affects the bodily functions in a way that can be recorded on a graph.⁵

A polygraph examination begins with the pre-test interview in which the examiner goes over the questions to be asked with the subject. The purpose of this interview is to put the "innocent" person at ease while heightening the tension for the "guilty" individual.⁶

The questions used by the examiner in the employment context in seeking information about a specific incident or problem follow a general pattern. The examiner will use a series of "relevant" and "irrelevant" questions. For example, a relevant question in a situation where an employer is concerned about an inventory shortage might be: "Have you ever taken anything from your employer without paying for it?" Irrelevant questions, such as "Did you eat breakfast this morning?" are used as a basis for comparison.

One obvious difficulty with this system is that it is more likely that a person, whether he is innocent or guilty, will react to being asked an accusatory question—"Did you take money from the cash register for your own personal use?" than to an innocuous question—"Do you drink coffee?" As a result, "control" questions have been brought in to respond to this problem. In addition to relevant and irrelevant questions, the subject is asked a general question that is remotely related to the issues at hand. For example, a control question might be, "Have you ever betrayed someone who trusted you?" In theory, the innocent person will be more concerned with the control question than with the relevant question. The guilty subject will show concern about the control question, but will have a more dramatic response to the relevant question.⁷

The test is repeated at least twice. After the test has been com-

4. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

5. Nagle, *supra* note 1, at 46.

6. *Polygraphs and Employment, A BNA Special Report, Gov't Empl. Rel. Rep.* (BNA) 3, 3-4 (Sept. 16, 1985).

7. The usefulness of control questions in the pre-employment screening context has been questioned by the Office of Technology Assessment. "It is not clear, however, how the Reid pre-employment control questions differ from the relevant questions . . . It is also not clear why employers would be less concerned with the control than with the relevant questions." *Id.* at 5 (quoting OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING 18 (1983)) [hereinafter OTA].

pleted, the examiner reviews and scores the charts and arrives at an opinion with regard to the subject's truthfulness. If he believes the subject was deceptive, he will attempt to elicit a confession.⁸

B. *Problems with the Polygraph*

If properly administered, the polygraph is capable of measuring changes in the vital functions. However, at best a polygraph chart can *only* indicate that a subject was more aroused by one question than by another; it is impossible to determine from the chart *why* the subject was more disturbed by one question than another.⁹ This is the primary shortcoming of this technique, and many critics see it as a fatal one.¹⁰

An individual may experience internal turmoil for a variety of reasons other than guilt when asked a particular question on a polygraph test. He may be upset or angry at being falsely accused of a crime. He may be anxious about having to defend himself against an unfounded accusation. He may be worried about being asked about some related or unrelated matter that he would rather keep private.¹¹ In short, there is no particular physiological change that will occur only when a subject is lying.¹²

Proponents of the polygraph acknowledge this serious limitation

8. The coercive power of the polygraph is well recognized. For example, William Colby, in advocating the continued use of polygraph tests for national security purposes to the Senate, stated: "It's a miserable experience, no doubt about it . . . We in CIA some years ago reported to one of the committees of the House that we would have hired 150 people but for the fact of what came out after they were put through the polygraph." *Id.* at 7.

9. Lykken, *Detecting Deception in 1984*, 27 AM. BEHAVIORAL SCIENTIST 481 (1984).

10. Kleinmuntz & Szucko, *On the Fallibility of Lie Detection*, 17 LAW & Soc'y REV. 85, 87 (1982-83).

11. Kleinmuntz and Szucko gave a classic example of a case in which one of them testified as an expert witness for the defendant. The defendant, a police officer, was accused of burglarizing a house on his route. The prosecution suggested that if he would take a lie detector and pass, they would drop the charges. At the urging of his lawyer, who believed that his client was innocent and that the lie detector could be depended upon to reflect this, he took the test. A problem arose, however, because while he was not responsible for the burglary, he had made an agreement with the owners of the house to look after it while they were on vacation, which was against departmental regulations. When he was asked if he had "cased" the house on the night in question his emotional reaction was reflected on the polygraph. As he realized what was being reflected on the polygraph he became even more upset by the two questions that followed: "Did you steal the missing items from Mr. and Mrs. X's house on the night of July 15th? Did you break into the rear door and enter the home of Mr. and Mrs. X on the night of July 15th?" *Id.* at 91.

12. Lykken, *supra* note 9.

of the test.¹³ However, they claim that an experienced examiner can discover these potential problems by skillfully interviewing the subject. They also acknowledge that under certain circumstances a subject may have to be deemed untestable. For example, if an individual is angry at having to take the test in the first place, this undoubtedly will interfere with the results. Most polygraph experts would agree that if the subject's anger cannot be defused, the test should not be administered.¹⁴

In an effort to gather information regarding the usefulness of polygraph testing in the national security context, the Congressional Office of Technology Assessment recently prepared a comprehensive report on the use of polygraphs.¹⁵ After surveying the literature in the field and interviewing polygraph examiners as well as academic critics, the reporters concluded that the evidence of the test's scientific validity and reliability was insufficient to support any firm conclusion.¹⁶ The report noted that the reliability rates achieved in the experiments reviewed varied dramatically.¹⁷

It is of interest to note that in the Barland study, which is widely cited by polygraph proponents as evidence of the polygraph's reliability, the examiner correctly identified 95% of the subjects as guilty, but he also identified 55% of the truthful subjects as deceptive. This tendency of the polygraph to identify truthful subjects as lying is one of the primary concerns raised by critics of polygraph testing.¹⁸

Because the test is never 100% accurate, as even its proponents admit, and because it has a marked tendency to identify truthful

13. J. REID & F. INBAU, *supra* note 3, at 220; Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 UTAH L. REV. 29, 31 (1986).

14. J. REID & F. INBAU, *supra* note 3, at 220.

15. O.T.A., *supra* note 7.

16. *Id.*

17. In this context, reliability refers to the consistency with which different examiners reach similar conclusions based on the same data. Another important measure is the validity of the test. Validity can be defined as the extent to which the polygraph measures what it claims to measure, i.e., the truthfulness of the subject. A test may be reliable in the sense that examiners consistently reach similar conclusions based on the same data. However, if those conclusions cannot be verified by reference to outside data, the test loses its usefulness. In other words, it must be established by outside evidence that the test is in fact measuring *deceit* by its subjects for it to be accepted as valid. See Dworkin & Harris, *Polygraph Tests: What Labor Arbitrators Need to Know*, 41 ARB. J., March 1986, at 23, 25, 27-32.

18. See *Polygraphs and Employment*, *supra* note 6, at 49.

subjects as deceptive, truthful persons are routinely identified by the polygraph as deceptive. If the test is given to ten persons, only one of whom is guilty of wrongdoing, it may identify the guilty party as lying. However, if there is a 28% false positive rate as one study found, the test may also identify three innocent persons as lying.¹⁹

The conclusion that polygraph testing is insufficiently reliable to be used where important questions are at stake is supported by the longstanding refusal of the vast majority of federal and state courts to admit polygraph results into evidence. Beginning with *Frye v. United States*,²⁰ courts have consistently found that there is insufficient evidence of the test's scientific validity and reliability to warrant its admission at trial.²¹ Courts which have recently addressed the issue of polygraph admissibility have acknowledged

19. Alpher & Blanton, *The Accuracy of Lie Detection: Why Lie Tests Based on the Polygraph Should Not Be Admitted Into Evidence Today*, 9 LAW & PSYCHOLOGY REV. 67, 70-71 (1985).

20. 293 F. 1013 (D.C. Cir. 1923).

21. The Supreme Court of Oregon recently did a thorough examination of the available literature on the polygraph in deciding that polygraph results should not be admitted in any civil or criminal trial. The court concluded that the value of such evidence was far outweighed by its prejudicial effect. *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984). For other cases excluding polygraph evidence, see *Pulaskis v. State*, 476 P.2d 474 (Alaska 1970); *State v. Melendez*, 121 Ariz. 1, 588 P.2d 294 (1978); *People v. Anderson*, 637 P.2d 354 (Colo. 1981); *People v. Baynes*, 88 Ill. 2d 225, 430 N.E.2d 1070 (1981); *Conley v. Commonwealth*, 382 S.W.2d 865 (Ky. 1964); *State v. Corbin*, 285 So. 2d 234 (La. 1973); *Akonom v. State*, 40 Md. App. 676, 394 A.2d 1213 (1978); *People v. Liddell*, 63 Mich. App. 491, 234 N.W.2d 669 (1975); *Jordan v. State*, 365 So. 2d 1198 (Miss. 1978), *cert. denied*, *Jordan v. Mississippi*, 444 U.S. 885 (1979); *State v. Biddle*, 599 S.W.2d 182 (Mo. 1980) (en banc); *State v. McClean*, 179 Mont. 178, 587 P.2d 20 (1978); *State v. Steinmark*, 195 Neb. 545, 239 N.W.2d 495 (1976); *Fulton v. State*, 541 P.2d 871 (Okla. Crim. App. 1975); *Township of Silver Spring v. Thompson*, 90 Pa. Commw. 456, 496 A.2d 72 (1985); *Commonwealth v. Brockington*, 500 Pa. 216, 455 A.2d 627 (1983); *Lewis v. State*, 500 S.W.2d 167 (Tex. Crim. App. 1973); *Romero v. State*, 493 S.W.2d 206 (Tex. Crim. App. 1973); *State v. Frazier*, 252 S.E.2d 39 (W. Va. 1979); *State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628 (1981). In federal court, the decision as to whether polygraph results should be admitted is generally left to the discretion of the trial judge, and such evidence is almost always excluded. *See, e.g.*, *United States v. Black*, 684 F.2d 481 (7th Cir.), *cert. denied*, 459 U.S. 1043 (1982); *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981), *cert. denied*, *Goldberg v. United States*, 460 U.S. 1011 (1983); *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975); *United States ex rel. Sadowy v. Fay*, 284 F.2d 426 (2d Cir. 1960), *cert. denied*, 365 U.S. 850 (1961).

Nevertheless, some commentators continue to argue that polygraphs have become more sophisticated and should be admitted into evidence. *See, e.g.*, J. REID & F. INBAU, *supra* note 3; Lester, *Polygraph Evidence, Are the Courts Failing to Keep Abreast of Modern Technology?*, 5 CRIM. JUST. J. 33 (1981); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid to Determining Credibility in a Perjury-Plagued System*, 26 HASTINGS L.J. 917 (1975); Comment, *The Polygraph in California: A Heartbeat Away from Admissibility*, 14 PAC. L.J. 1113 (1983).

that the polygraph apparatus itself has become more sophisticated since *Frye*. However, the basic objection remains the same: the polygraph can measure a physiological reaction, but it cannot identify the reason for that reaction.²²

Courts have also noted that polygraph results are significantly different from other "scientific" evidence because an unusually heavy weight rests with the examiner's interpretation of data. The examiner's subjective impressions of the test taker's demeanor will often play a role in the conclusions the examiner reaches. Concern has also been expressed that the person providing background information to the examiner may, even inadvertently, make some improper suggestion regarding the guilt of the subject.²³

22. The only change in the treatment of polygraph evidence that perhaps warrants comment is the fact that some courts in recent years have decided to admit test results when the parties have agreed by stipulation prior to the test that the results will be admissible. *United States v. Oliver*, 492 F.2d 943 (8th Cir. 1974), *cert. denied*, 424 U.S. 973 (1976). On examination, many if not most of these cases involve a situation where a defendant volunteered to take the examination in the hope of clearing himself. In some cases, the defendant, having consented in writing to take the test, and having agreed not to object to admission of the results even if they are unfavorable to him, now seeks to have the unfavorable result excluded. Some courts have concluded that the defendant cannot have it both ways and have therefore enforced the stipulation.

Other courts have questioned the reasonableness of the policy of admitting stipulated polygraph results since the basic concern is the reliability and validity of the results. The North Carolina Supreme Court, for example, reversing an earlier decision, recently concluded that all polygraph evidence should be excluded on the grounds of its questionable validity, regardless of the existence of a stipulation to the contrary. As the court reasoned, the fact that a stipulation was entered into does not make the results any more reliable. *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983), *aff'd*, 314 N.C. 59, 331 S.E.2d 669 (1985); *see also Biddle*, 599 S.W.2d 182; Note, *Stipulation Cannot Make Polygraph Results Admissible*, 47 Mo. L. Rev. 586 (1982).

In reaffirming that polygraph evidence is not admissible, at least in the absence of a stipulation, the court in *United States v. Alexander* stated:

While the polygraphic science and its instruments have advanced significantly since the *Frye* case, we are still unable to conclude that there is sufficient scientific acceptability and reliability to warrant the admission of the results of such tests in evidence. There is an insufficient degree of assurance that polygraph machines and operators are capable of discovering and controlling the many subtle abnormalities and factors which affect test results.

United States v. Alexander, 526 F.2d 161, 166 (8th Cir. 1975).

The general rule against the admissibility of polygraphs appears to be holding its own, despite the urgings of some advocates of polygraphs that it is time for a change. Those opposing the use of polygraphs continue to make persuasive arguments urging their continued exclusion. *See D. LYKKEN, A TREMOR IN THE BLOOD* (1981); Kleinmutz & Szucko, *supra* note 10; Comment, *The Polygraph: Perceiving Us Or Deceiving Us?*, 13 N.C. CENT. L.J. 84 (1981).

23. *Alexander*, 526 F.2d at 167 (citing *United States v. Wilson*, 361 F. Supp. 510, 512 (Md. 1973)).

The importance of these concerns was borne out by a recent informal experiment conducted by *60 Minutes* on C.B.S. A *60 Minutes* researcher, Janet Tobias, posed as a personnel assistant for *Popular Photography* magazine. She informed three different polygraph companies that a camera had been stolen and that she wanted their help in determining who had stolen it. Four employees of *Popular Photography* were informed of the experiment and agreed to take polygraphs. In each case, Tobias told the polygraph examiner of her suspicions regarding which employee had taken the camera. She named a different employee to each polygrapher. After administering the polygraphs to each of the four employees, each examiner confirmed Tobias' suspicions and informed her that the test results indicated deception by the person she suspected. None of these employees had taken the camera. In fact, no camera had been taken!

Concerns regarding the unreliability of polygraph testing as well as employees' desires to be free from the intrusive and demeaning test process have resulted in the passage of protective legislation in twenty-one states. Six states, concluding that the unreliability of the polygraph and its abusive use in the employment setting outweighed any possible benefit to employers, have prohibited the use of polygraphs in private employment entirely.²⁴ Six more states have passed statutes prohibiting employers from requiring an employee to take such a test as a condition of employment.²⁵ And an additional eight states mandate that an employer may not require, request or even suggest such a test, presumably leaving the door open for the employee who might wish to take one on his own initiative in hopes of clearing himself.²⁶ A federal bill limiting the use of polygraphs in private employment, which recently passed the U. S. House of Representatives, and a similar bill with bipartisan support, which was introduced in the Senate, further indicate the widespread concern about the abusive use of polygraphs.²⁷

24. D.C. CODE ANN. § 36-802 (1981); ME. REV. STAT. ANN. tit. 32, § 7166 (Supp. 1985); MASS. ANN. LAWS ch. 149, § 19B (Law. Co-op. Supp. 1986); MINN. STAT. ANN. § 181.75 (West Supp. 1986); OR. REV. STAT. §§ 659.225, .227 (1985); W. VA. CODE § 21-5-56 (1985).

25. CAL. LAB. CODE § 432.2 (Deering Supp. 1986); HAW. REV. STAT. § 378-21 (1976); MD. CODE ANN. art. 100, § 95 (1985); MONT. CODE ANN. § 39-2-304 (1985); 18 PA. CONS. STAT. ANN. § 7321 (Purdon 1985); WASH. REV. CODE ANN. § 49.44.120 (Supp. 1986).

26. ALASKA STAT. §§ 23, 10.037 (1985); CONN. GEN. STAT. § 31-51(g) (Supp. 1986); DEL. CODE ANN. tit. 19, § 704 (1985); MICH. COMP. LAWS ANN. § 37.203 (West 1985); N.J. STAT. ANN. § 2C:40A-1 (West 1985); R.I. GEN. LAWS § 28-6.1 (1979); VT. STAT. ANN. tit. 21, § 494(a), 494(b) (Supp. 1985); WIS. STAT. ANN. § 111.37 (West Supp. 1985).

27. See H.R. REP. No. 1524, 99th Cong., 2d Sess. (1986); S. DOC. No. 1815, 99th Cong., 2nd Sess. (1986).

Limitations on the use of polygraphs in employment settings have also developed through case law. At least one court has concluded that given the unreliability of the polygraph test, an employee was within his rights in refusing to take such a test as a condition of continued employment.²⁸

Labor arbitrators are split on whether polygraph results should be admitted in employee discharge hearings because of concern about their validity and reliability.²⁹ An arbitrator's decision is often affected by the terms of the collective bargaining agreement involved. However, a termination based primarily or solely on polygraph results generally will not be upheld.³⁰ Most arbitrators will not uphold a discharge for refusing to take a polygraph examination, at least absent a prior contractual agreement by the employee to submit to the test.

A factor which contributes to the unreliability of the polygraph in the employment setting is that employees are frequently compelled to take the test against their will.³¹ This is a serious problem

28. *Farmer v. City of Fort Lauderdale*, 427 So. 2d 187 (Fla.), cert. denied, 464 U.S. 816 (1983); see Note, *Labor Law—Police Officer May Not Properly Be Dismissed for Refusing to Submit to Polygraph Examination—Farmer v. City of Fort Lauderdale*, 427 So. 2d 187 (Fla. 1983), 11 FLA. ST. U.L. REV. 697 (1983).

Florida does not have a statute regulating polygraphs. Nevertheless, the Florida Supreme Court held that a policeman could not be discharged for his refusal to take a polygraph test. The court reasoned that since a polygraph was not sufficiently reliable to warrant its admission in court, it would be unreasonable to uphold the dismissal of a police officer based on his refusal to take the test. The court dismissed the employer's argument that the test was useful as an investigative tool, concluding that this possible value of the test could not outweigh the police officer's right to be subjected to only reasonable orders.

Other courts have reached the opposite conclusion. In *Smith v. American Cast Iron Pipe*, 370 So. 2d 283 (Ala. 1979), the Alabama Supreme Court held that it was lawful to dismiss an employee who refused to take a polygraph test after being advised to refuse by his lawyer. The court noted that the employer's personnel policies explicitly made refusal to take a polygraph grounds for termination. The court concluded that the employee's refusal to take the polygraph was a refusal to cooperate in the investigation, which was sufficient grounds for termination.

29. Janisch-Ramsey, *Polygraphs: The Search for Truth in Arbitration Proceedings*, 41 ARB. J., March 1986, at 34, 35-38.

30. *Id.* at 39; see also Nagle, *supra* note 1, at 74.

31. Nagle, *supra* note 1, at 75.

Most courts considering the question have held that an employee who is discharged for refusing to take a polygraph examination is not guilty of misconduct and should not be disqualified from receiving unemployment benefits. In *Douthitt v. Kentucky Unemployment Ins. Comm'n*, 676 S.W.2d 472 (Ky. Ct. App. 1984), the court held that "an employer's requirement that employees submit to polygraph examinations is an unreasonable rule. Polygraph examinations are unreliable . . . It is unreasonable that an innocent employee would be forced to risk loss of his reputation and future employment because of his em-

because obtaining the voluntary cooperation of the subject is critical to achieving an accurate result.³² When an individual is forced to take a polygraph examination, the resulting emotional reactions of fear and anger make it impossible to achieve the desired test setting. It may be difficult to say that employees ever truly voluntarily submit to such a test, since they may believe, often with good reason, that refusal to submit will mean the loss of their jobs. The importance of voluntariness is reflected in the examiner licensing statutes of sixteen states, which provide that a polygraph operator may lose his license for failure to inform a subject that the test is voluntary.³³

III. EMPLOYEE REMEDIES

Given the statistics that a substantial number of false positives are likely to occur whenever polygraph tests are administered, it is inevitable that innocent persons will be falsely accused of dishonesty and misconduct. When one considers the coercive atmosphere often surrounding the administration of polygraphs in the employment setting, the likelihood of false positives occurring becomes even greater.

What remedies are available to an employee who is discharged or otherwise injured because of her employer's use or misuse of polygraph testing? In those jurisdictions where polygraph use is prohibited or limited by statute, she may have a statutory remedy or a cause of action for wrongful discharge. In the absence of a statute, however, courts generally have been reluctant to recognize a cause of action for wrongful discharge. Other remedies may be available.

There are several possibilities worth exploring. One of the major

ployer's requirement that he submit to a polygraph examination." *Douthitt*, 676 S.W.2d at 475 (citations omitted).

32. *Township of Silver Spring v. Thompson*, 90 Pa. Commw. 496, 456 A.2d (1985); OTA, *supra* note 15, at 101. For model consent forms used by examiners, see J. REID & F. INBAU, *supra* note 3, at 424.

33. ALA. CODE § 34-25-32 (1985); ARIZ. REV. STAT. ANN. § 32-2713 (Supp. 1985); ARK. STAT. ANN. § 71-2217 (1985); CAL. BUS. & PROF. CODE §§ 9316, 9319 (Deering Supp. 1986); GA. CODE ANN. § 84-5015 (Supp. 1985); LA. REV. STAT. ANN. § 37:2848 (West Supp. 1986); ME. REV. STAT. ANN. tit. 32, §§ 7154, 7161 (Supp. 1985); MICH. COMP. LAWS ANN. § 338.1719 (West Supp. 1984); MISS. CODE ANN. § 73-29-31 (Supp. 1985); MONT. CODE ANN. § 37-62-212 (Supp. 1985); OKLA. STAT. ANN. tit. 59, § 1468 (West Supp. 1985); OR. REV. STAT. § 703-210 (1985); S.C. CODE ANN. § 40-53-180 (Law. Co-op. 1986); TENN. CODE ANN. § 62-27-117 (1985); TEX. REV. CIV. STAT. ANN. art. 4413(29cc) (19) (Vernon 1985); VT. STAT. ANN. tit. 21, § 494(c) (Supp. 1985).

problems faced by employees who are discharged after they "failed" or refused to take a polygraph is that their employer's action in firing them under these circumstances has cast a shadow on their honesty and integrity, making it difficult for them to find other employment. A common law action for defamation may be appropriate. Depending on the circumstances, causes of action for intentional infliction of emotional distress and invasion of privacy should also be considered.

The conduct of the polygraph examiner who administered the test should be carefully reviewed. Was his conduct unduly coercive or threatening? Did the examiner abide by licensing standards in administering the test? A false positive could be the result of the examiner's failure to use due care in administering the test. A suit for negligent misrepresentation or malpractice may be appropriate.

A. *Wrongful Discharge*

Several statutes which prohibit the use of the polygraph in private employment provide a civil remedy for employees injured by their employer's breach of the statute.³⁴ Where the statute provides only a criminal penalty, courts have held that employees who are injured by their employer's violation of such a statute have a cause of action for wrongful discharge in violation of public policy.³⁵

Employees have won impressive verdicts under this theory.³⁶ However, courts have generally refused to recognize such a cause of action for wrongful discharge in violation of public policy in the absence of a statute regulating employer use of polygraphs.³⁷

34. D.C. CODE ANN. § 36-803(d) (1981); MICH. COMP. LAWS ANN. § 37.207 (West 1985); MINN. STAT. ANN. § 181.75 (West Supp. 1986); OR. REV. STAT. § 659.225 (1983); VT. STAT. ANN. tit. 21, § 494(d) (Supp. 1986); WASH. REV. CODE ANN. § 49.44.120 (Cum. Supp. 1987); W. VA. CODE § 21-5-5d (1985).

35. *Perks v. Firestone Tire and Rubber Co.*, 611 F.2d 1363 (3rd Cir. 1979); *Molush v. Orkin Exterminating Co.*, 547 F. Supp. 54 (E.D. Pa. 1982); *Moniodis v. Cook*, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).

36. In *Moniodis*, the Maryland Supreme Court upheld a jury award in excess of one million dollars. *Moniodis*, 64 Md. App. 1, 494 A.2d 212.

37. *Smith v. American Cast Iron Pipe Co.*, 370 So. 2d 283 (Ala. 1979); *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ariz. Ct. App. 1977); *Ising v. Barnes Hosp.*, 674 S.W.2d 623 (Mo. Ct. App. 1984). Each of these cases involved the discharge of employees for refusing to consent to a polygraph test.

But see *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W. Va. 1984), where the court held that employees who were fired for refusing to take a polygraph did have a cause of action for wrongful discharge. The court acknowledged that the West Virginia statute

Courts differ on whether the wrongful discharge remedy is available only to an employee who has refused to submit to a polygraph, or whether it is also available to an employee who failed a polygraph test taken against his will.³⁸ Given the unreliability of the polygraph, and the public policy involved, the better rule is that where an employee is forced to take the test in violation of state law, and is consequently discharged, a cause of action will be recognized.

But what of those employees who are not protected by statute. Do they have any recourse?

B. Suit Against Polygraph Operator for Breaching Duty of Care to Employee

Consider the common situation in which the polygraph examiner asks the employee subject to sign a consent form in compliance with state law prior to taking a polygraph test. The employee objects, saying that he has not voluntarily agreed to take the test, but believes he will be fired if he refuses. The examiner responds that he cannot administer the test unless the employee signs the form indicating that he is taking the test voluntarily. The employee, caught in a no-win situation, signs the consent form. The polygraph examiner is aware that the employee's voluntary cooperation is essential to a fair administration of the test and that the anger and distress that the employee is feeling at this point may well interfere with a proper reading.³⁹ Nevertheless, he proceeds to administer the test. Does this action of the polygraph operator in administering the test under questionable circumstances and in violation of the law, amount to a breach of duty of care to the employee? This particular question has not yet been addressed by

limiting the use of polygraphs in employment was not effective until after these discharges occurred and therefore did not apply to this case. However, the court concluded that this statute was an embodiment of West Virginia's preexisting public policy that individual privacy was worthy of protection by the courts.

38. In *Townsend v. L.W.M. Management, Inc.*, 64 Md. App. 55, 494 A.2d 239, *cert. denied*, 304 Md. 300, 498 A.2d 1186 (1985), the court held that terminating an employee for failing a polygraph examination did not give rise to a cause of action for wrongful discharge, even though administering the test in the first instance was clearly a breach of public policy. *Id.* at —, 494 A.2d at 274; *see also Moniodis*, 64 Md. App. 1, 494 A.2d 212. On the other hand, in *Polsky v. Radio Shack*, 666 F.2d 824 (3rd Cir. 1981), the court found a cause of action for wrongful discharge where the employee claimed she had been discharged because of the *results* of an illegally administered polygraph.

39. J. REID & F. INBAU, *supra* note 3, at 220.

the courts. However, courts have held that a polygraph operator has a duty to the employee to use due care in administering a test.⁴⁰

In *Zampatori v. United Parcel Service*,⁴¹ the plaintiff framed his cause of action against the polygraph operator as one for negligent misrepresentation. There was a question of fact as to whether the plaintiff's discharge had been based on the polygraph operator's report that the plaintiff had shown deception on key questions in his polygraph examination. Nonetheless, the court held that all of the elements of an action for negligent misrepresentation were present and thus, plaintiff could proceed to develop his evidence on this issue. The elements cited by the court were: 1) knowledge that the information is needed for a serious purpose; 2) the party receiving it intends to rely on and act upon it; 3) injury has resulted because of this reliance; and 4) the relationship of the parties is such that assigning a duty of care and permitting reliance is appropriate.⁴²

The court found that Doyle Detective Bureau knew the polygraph test results were needed by U.P.S. for a serious purpose and that U.P.S. could reasonably be expected to rely on the test results. Zampatori, the plaintiff employee, was likely to be injured by U.P.S.'s reliance on the results if they inaccurately indicated that he was responsible for the missing funds.

The court found that since Zampatori's continued employment was likely to be affected by the test results and since such impact was reasonably foreseeable, the Agency owed him a duty to administer the test with due care.

The court in *Lawson v. Howinet Aluminum Corp.*⁴³ also based its finding of a duty on the part of the polygraph operator to the employee on the grounds that it was reasonably foreseeable that the employee would be directly affected by the outcome of the test. Therefore, the polygraph operator had a duty to administer the

40. See, e.g., *Lawson v. Howinet Aluminum Corp.*, 449 N.E.2d 1172 (Ind. Ct. App. 1983); *Zampatori v. United Parcel Service*, 125 Misc. 2d 405, 479 N.Y.S.2d 470 (N.Y. Sup. Ct. 1984).

41. 125 Misc. 2d 405, 479 N.Y.S.2d 470.

42. See *International Prod. Co. v. Erie R.R.*, 244 N.Y. 331, 155 N.E. 662, cert. denied, 275 U.S. 527 (1927).

43. 449 N.E.2d 1172.

test fairly, impartially and with due care. However, at least one state has established such a duty of care by statute.⁴⁴

Most polygraph experts would agree that the voluntary cooperation of the subject is essential to achieve reliable results. This point is acknowledged by the licensing statutes of at least sixteen states. Each includes a provision that failure to inform a subject that his participation in the examination is voluntary may be grounds for suspension or revocation of the operator's license.⁴⁵

Given this situation, it would appear that a polygraph operator has a duty *not* to administer a test where the subject tells him that he does not wish to take the test and will only take it because he is afraid he will be fired if he refuses. If the polygraph operator proceeds to administer the test knowing the employee has not voluntarily consented, he may be held liable to the employee for breaching his duty to use reasonable care in the administration of the test.

Of course, a polygraph operator will generally not administer a test to a subject unless the subject signs a consent form. This may protect the operator from an allegation that he failed to ensure that the subject consented to the test. However, at least two courts have held that a signed consent form is only one piece of evidence a jury may consider in determining whether the subject truly consented to the examination.⁴⁶

Other circumstances which might give rise to a cause of action are situations where the examiner fails to ascertain health problems of the employee which may interfere with the results, or proceeds even with knowledge of such problems. Additionally, in those situations where an examiner inaccurately reports an employee admission, an action for negligent, or even intentional misrepresentation or fraud may be appropriate.

C. *Defamation*

Defamatory statements are made routinely in the context of employer use of polygraph examinations. The question is, are they actionable? Courts have long recognized the special injury that is done to an individual who is slandered in connection with his work

44. GA. CODE ANN. § 43-36-15 (Supp. 1986).

45. See sources cited *supra* note 33.

46. *Polsky v. Radio Shack*, 666 F.2d 824 (3rd Cir. 1981); *Townsend v. L.W.M. Management Inc.*, 64 Md. App. 55, 494 A.2d 239, *cert. denied*, 304 Md. 300, 498 A.2d 1186 (1985).

or profession.⁴⁷ If one can prove the defamatory statement, then the damages to reputation need not be proved; they are presumed so long as the subject is neither a public official nor a public figure.⁴⁸

On the other hand, courts have also recognized the need employers have to make defamatory communications about employees in conducting investigations of employee misconduct and sharing information about potential employees. As a result, courts have held that defamatory communications by employers are protected by a qualified privilege so long as they are made in good faith and for a reasonable purpose.⁴⁹

In order for a defamatory statement to be actionable, the plain-

47. L. ELDRIDGE, *THE LAW OF DEFAMATION* 123, 144-49 (1978); W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 112, at 790-92 (5th ed. 1984); *RESTATEMENT (SECOND) OF TORTS* § 573 (1977).

48. Where a public official or public figure is involved, the common law presumption of damages is no longer applicable. Actual damages must be proven. See *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *aff'd*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

With the recent decision in *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), it is clear that state courts have the freedom to continue to apply traditional common law principles in defamation cases not involving matters of public concern. *Mutafis v. Erie Ins. Exch.*, 775 F.2d 593 (4th Cir. 1985); *Davis v. Ross*, 107 F.R.D. 326 (S.D.N.Y. 1985). However, it is noteworthy that before *Dun and Bradstreet*, the *RESTATEMENT (SECOND) OF TORTS*, *supra* note 47, § 621, took the position that even if the constitutional rule did not apply to private parties, the common-law rule as to presumed damages should be abrogated. See W. PROSSER & W. KEETON, *supra* note 47, § 116A, at 843.

Nevertheless, most courts reached the conclusion that *Gertz* had no application to suits in private employment even before *Dun and Bradstreet*. See *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975); *Stuempges v. Parke Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); Annotation, *Defamation: Application of New York Times and Related Standards to Nonmedia Defendants*, 38 A.L.R.4TH 1114 (1985).

On the other hand, in applying *Gertz* in the employment context prior to *Dun & Bradstreet*, the Maryland Court of Appeals decided that the common law presumption of damages for slander *per se* would no longer apply. *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). In this suit by an employee against his former employer, the court held that the employee would be required to prove actual injury to his reputation. However, the result in this case seems to have been limited by a subsequent decision in *Hearst Corp. v. Hughes*, 297 Md. 112, 466 A.2d 486 (1983), where the issue was whether *Gertz* abolished the presumption of injury to reputation when a plaintiff was injured in his business. The court held that a plaintiff could not presume damages. However, the court went on to hold that the existence of a cause of action could be established by a presumption, and the plaintiff could then proceed to prove separate damages for emotional distress. See *Hearst Corp. v. Hughes—The Presumption of Injury to Reputation in Per Se Defamation Actions Is Not Dead*, 44 Md. L. Rev. 688 (1985) (analysis supporting the court's conclusion); see also *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 377 A.2d 807 (N.J. Super. Ct. Law Div. 1977), *modified*, 164 N.J. Super. 465, 397 A.2d 334 (N.J. Super. Ct. App. Div. 1979).

49. L. ELDRIDGE, *supra* note 47, at 473.

tiff must prove that it was published or communicated to a third party.⁵⁰ The defendant will then have the opportunity to raise the affirmative defenses of truth and privilege.⁵¹ If a privilege is established, the plaintiff may attempt to establish malice or abuse of the privilege.⁵²

1. Publication

At least one court has held that the act of discharging an employee who failed a polygraph test amid allegations of misconduct, where other employees were aware of the circumstances of the discharge, is a defamatory publication.⁵³ However, that court did not

50. *Id.* at 206.

51. *Id.* at 333.

52. *Id.* at 509.

53. *Tyler v. Mack Stores*, 275 S.C. 456, 272 S.E.2d 633 (1980). Though the court's reasoning is not discussed in any detail in this opinion, it appears that the court may have concluded that publication to the plaintiff's co-workers was reasonably foreseeable.

On the other hand, in *Smith v. Greyhound Lines*, 614 F. Supp. 558 (W.D. Pa. 1984), *aff'd*, 800 F.2d 1139 (3d Cir. 1986), the court held that evidence that employees were discussing plaintiff's termination was not sufficient to hold the defendant responsible for republication. The court held that the employee had the burden of proving a particular incident of improper publication by an employer representative to hold the company responsible for the spread of these rumors.

The most useful standard to apply in these situations is probably the one proposed by Professor Prosser. He suggested that so long as those publications made by the employer are done for a reasonable purpose and using a reasonable method, no liability should result if the communication is incidentally read or overheard by a person to whom there is no privilege to publish. W. PROSSER & W. KEETON, *supra* note 47, § 115, at 833. However, Prosser goes on to note that the fact that there may be an incidental publication to an improper person is a factor to consider in determining whether the method chosen for communication is a reasonable one. *Id.*

In *Tumbarella v. Kroger Co.*, 85 Mich. App. 482, 271 N.W.2d 284 (1978), the court said that the defendant could be held responsible because employees in various Kroger stores had heard that the plaintiff was fired for stealing. A Kroger manager had sent a letter informing Kroger store managers of the plaintiff's dismissal for theft. However, the letter was not marked confidential, and given its highly inflammatory content, the court felt that the manager could have foreseen republication under these circumstances. *Id.* at —, 271 N.W.2d at 290.

Circumstantial evidence of such republication was held to be sufficient in *Tumbarella*, and in *Agriss v. Roadway Express, Inc.*, 334 Pa. Super. 295, 483 A.2d 456 (1984). In *Agriss*, the evidence showed that plaintiff's co-employees were discussing the fact that he had been chastised for allegedly opening company mail. As plaintiff had told only his union representative about this accusation, and the representative denied repeating it, the court held that there was sufficient circumstantial evidence of the company's responsibility for republication to go to the jury. *Id.* at —, 483 A.2d at 466.

The general rule is that whether an unintentional negligent communication will be treated as an actionable publication will depend on whether the inadvertent publication was foreseeable. L. ELDRIDGE, *supra* note 47, at 217.

address the question of whether this publication was privileged.

Undoubtedly, the original communication from the employer to the polygraph examiner indicating that this employee is suspected of theft is a defamatory publication.⁵⁴ The communication by the polygraph operator to the employer of his conclusions that the subject was deceptive is a defamatory publication.⁵⁵ A communication by the employer to a prospective employer indicating that the employee was fired for failing a polygraph examination can certainly be seen as a defamatory publication.⁵⁶ Firing an employee

54. It is assumed for purposes of this article that the polygraph examiner is an independent contractor, and not an employee of the corporation. Even if the examiner is an employee, the majority rule would still find a publication under these circumstances. A few courts have confused the question of whether a statement has been published with the question of whether a privilege should apply, but the majority rule is that intracorporate communication of a defamatory statement is sufficient publication. W. PROSSER & W. KEETON, *supra* note 47, § 113, at 798-99, RESTATEMENT (SECOND) OF TORTS, *supra* note 47, § 577. For a recent discussion of this issue, see Note, *Libel and Slander, Intracorporate Communications as Publications to Third Persons*—Luttrell v. United Tel. Sys., 33 U. KAN. L. REV. 759 (1985); see also *Elbeshbeshy v. Franklin Inst.*, 618 F. Supp. 170 (E.D. Pa. 1985); *Brantley v. Zantop Int'l Airlines*, 617 F. Supp. 1032 (E.D. Mich. 1985); *Southern Bell Tel. & Tel. Co. v. Barnes*, 443 So. 2d 1085 (Fla. Dist. Ct. App. 1984); *Frankson v. Design Space Int'l*, 380 N.W.2d 560 (Minn. Ct. App.), *aff'd in part and rev'd in part*, 394 N.W.2d 140 (Minn. 1986).

55. Generally, after administering a polygraph test, the examiner will communicate the results to the employer in a form similar to the following: "Subject showed a reaction to questions 5 and 8 which is generally indicative of deception. Questions 5 and 8 in this example would be relevant questions, such as: "Did you take \$20 out of the cash drawer for your own personal use?" J. REID & F. INBAU, *supra* note 3. The substance of the examiner's report in this context accuses the employee of dishonesty as well as possible involvement in theft."

56. In the absence of proof that the employer published the defamatory statement to a prospective employer, the employee might try to establish publication by the compelled publication theory, though to date it has only been adopted in a few jurisdictions. This theory is a response to the dilemma faced by an employee who is fired and attempts to seek other employment. When asked why the employee left the former employer, the employee may have no choice but to repeat the slanderous charge made by the former employer. In *Lewis v. Equitable Life Assurance Soc'y*, 361 N.W.2d 875 (Minn. Ct. App. 1985), *aff'd in part and rev'd in part*, 389 N.W.2d 876 (Minn. 1986) the court held that since the plaintiff employees were under a strong compulsion to republish the defamatory statement made by their former employer to prospective employers, the former employer could be held responsible for this republication. *Equitable Life* had fired four employees, falsely accusing them of gross insubordination. *Id.*

The court in *Lewis* noted that generally, the maker of a defamatory statement would not be liable for republication of the defamatory statement by the person defamed. However, the court decided that where the defendant could reasonably foresee that the employee would be under a strong compulsion to republish the statement, the defendant could be held liable. *Id.* at 880-81. This reasoning was applied under similar circumstances in *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980), where a discharged police officer argued that he was compelled by circumstances to repeat slanderous charges to prospective employers, and *Neighbors v. Kirksville College of Osteopathic Medicine*, 694 S.W.2d 822 (Mo. Ct. App. 1985) where the defendants gave their discharged employee a letter of reference containing defamatory statements. See also *Colonial Stores*,

for refusing to take a polygraph examination may also be seen as publication of a defamatory statement.⁵⁷

However, the central question is whether any or all of these publications are protected by a qualified privilege. If so, they are not actionable.

2. Qualified Privilege

A qualified privilege is said to attach to a communication

made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest⁵⁸

In determining whether a qualified privilege should attach to the communication of a defamatory statement, the courts generally balance the interests of the parties involved. The determination of whether an interest is of sufficient importance to give rise to a qualified privilege "depends upon a comparison of the advantages to the publisher's interest if the defamatory matter should be true, with the harm to the other's reputation if the defamatory matter should prove to be false."⁵⁹

Where defamatory statements by employers regarding their employees are involved, the courts have generally concluded, implic-

Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946).

This approach may appear to increase unduly employer exposure in this area. However, it has the merit of taking into consideration the serious problem faced by an employee who is unjustly accused and discharged. The employee faces the prospect of divulging his employer's reason for discharging the employee, and most likely being denied new employment. The employer can risk lying about the reason for his discharge, and live with the fear of possible discovery later on.

57. There appear to be no cases in the employment context on this point. However, at least one court has held that a statement that an individual has refused to take a polygraph in the context of an investigation of arson is actionable defamation as a matter of law. *Molnar v. Star-Ledger*, 193 N.J. Super. 12, 471 A.2d 1209 (N.J. Super Ct. App. Div.), *cert. denied*, 99 N.J. 162, 491 A.2d 674 (1984). The court explained that it was "satisfied that the statement that Molnar refused to take a lie detector test, when examined in the context of the reference to probable arson, is likely to excite adverse, derogatory or unpleasant feelings or opinions and as such, clearly 'sounds to the disreputation' of Molnar." *Id.* at 1212 (citations omitted).

58. Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employees' Work Record or Qualification*, 24 A.L.R.4TH 144, 149 (1983).

59. RESTATEMENT (SECOND) OF TORTS, *supra* note 47, § 594(a).

itly if not explicitly, that the employer's interest in employing only trustworthy employees outweighs the employee's interest in her reputation.⁶⁰

Undoubtedly, an employer's communications with employees and supervisors must be protected to the degree necessary to enable the employer to carry out a reasonable investigation.⁶¹ How-

60. In an unusual exception to the general rule, the court in *Tumbarella v. Kroger Co.*, 85 Mich. App. 482, 271 N.W.2d 284 (1978) refused to find the employer's defamatory communication privileged, reasoning that the employee's interest in his reputation and ability to make a living outweighed the employer's interest in making the communication. The court in *Harrison v. Arrow Metal Prod. Corp.*, 20 Mich. App. 590, —, 174 N.W.2d 875, 887 (1970), concluded that the likely injury to the defamed employee outweighed any possible damage to the employer involved, and refused to recognize a privilege. As the court said:

Contemplate the effect of an accusation, as here made, upon the future life of the employee. Any prospective employer generally requires an applicant to furnish the names of all prior employers. In one way or another the prospective employer usually contacts prior employers. This one unproved accusation could then become the basis for permanently depriving a man of his dignity, good name, self-respect and right to earn for the support of himself and his family.

Id.

The fact that what is occurring in this context is a balancing of interests is seldom acknowledged. In a rare analysis of the role played by a qualified privilege, the court in *Riggs v. Cain*, 406 So. 2d 1202 (Fla. Dist. Ct. App. 1981) noted:

The concept of qualified privilege as applied in this case represents a delicate balance between society's concerns for the rights of individuals to be protected from false and defamatory statements which may seriously affect an individual's reputation and ability to secure employment, and the rights of employers to freely comment upon and receive relevant information as to an employee's past work performance.

Id. at 1204.

The court went on to reach the unusual conclusion that the question of whether the employer's statement should be protected by a qualified privilege was best resolved by the jury.

61. Annotation, *Libel and Slander: Privileged Nature of Communication to Other Employees or Employees' Union of Reasons for Plaintiff's Discharge*, 60 A.L.R.3d 1080 (1974).

Courts which have found a privilege to communicate to employees at large have generally based it upon the ground that disclosure was necessary to improve employee morale or discourage similar misconduct. However, upon close examination this reasoning is subject to question. For example, in *Happy 40, Inc. v. Miller*, 63 Md. App. 24, 491 A.2d 1210, *cert. denied*, 304 Md. 299, 498 A.2d 1185, *cert. denied*, *Miller v. Happy 40, Inc.*, 304 Md. 299, 498 A.2d 1185 (1985), the court held that the employer had a qualified privilege to communicate to plaintiff's former co-workers that she had been discharged for theft. The employee had an unblemished record of honesty and good work performance. The employer did not confront the employee with his suspicions before terminating her. It was later established that plaintiff was not the guilty party. Nevertheless, the court found that the employer had a qualified privilege to inform the plaintiff's co-workers that he had fired her because he suspected her of stealing. *Id.* at —, 491 A.2d at 1216. The court explained that if the employer "were not permitted to tell them his reasons, he would run the risk of appearing arbitrary and capricious. This would affect the remaining employees' morale and sense of security and such a situation would not be in the best interests of the appellants." *Id.*

Given that the defendant fired this employee without confronting her and that she was a reliable employee who was never charged with any crime, it might be argued that the employer's action here was arbitrary and the other employees had good reason to feel insecure.

ever, does it necessarily follow that communications to a polygraph operator should also be privileged?

The answer is, not necessarily. If one applies the balancing of harms notion, the damage that may be done to an innocent employee's reputation could easily outweigh the value of the polygraph to the employer.

Of course, this conclusion would depend upon one's view of the validity and reliability of the polygraph. If one sees the polygraph as inherently unreliable, it is of little value to the employer. At the same time, the danger posed to the employee by the possibility of a false reading is great.⁶² Certainly an employer's right to investi-

In any case, the court made no effort to attempt to balance the plaintiff's interest in her reputation against the employer's interest in having his business run smoothly. For other cases reaching a similar conclusion, see *Hall v. Rice*, 117 Neb. 813, 223 N.W. 4 (1929), *overruled on other grounds*, *Whitcomb v. Nebraska State Educ. Ass'n*, 184 Neb. 31, 165 N.W.2d 99 (1969); *Kroger Co. v. Young*, 210 Va. 564, 172 S.E.2d 720 (1970).

Other courts have expressed a more limited view of how broadly the employer's privilege to communicate should reach. It has been held that communications to employees at large are not protected because they serve only the employer's interest in attempting to quell rumors and restore morale. *Sias v. General Motors Co.*, 372 Mich. 542, 127 N.W.2d 357 (1964). *Sias* was superseded by statute as stated in *Wojciechowski v. General Motors Corp.*, 151 Mich. App. 399, 390 N.W.2d 727 (1986). The employees have no corresponding interest or duty in receiving the communication. *Id.* As the court in *Sias* stated:

[W]e hold that in calling in fellow employees of plaintiff and 'explaining' the circumstances of his separation, defendant-corporation was serving its own particular interest. That interest . . . was to restore morale in the plant protection force and to quiet rumors that were circulating among its members, adversely affecting the company. These men were not supervisors, personnel department representatives, nor company officials. They were simply fellow employees in the identical work. No privilege extended to the communication to them and the trial court properly so held.

Id. at ____, 127 N.W.2d at 360. This position appears to be gaining support. See, e.g., *Haddad v. Sears, Roebuck & Co.*, 526 F.2d 83 (6th Cir. 1975) (relying on *Sias* to deny qualified privilege to communicate reason for resignation to fellow employees); *Dillard Dep't Stores, Inc. v. Felton*, 276 Ark. 304, 634 S.W.2d 135 (1982) (employer's statement exceeded what was necessary to the situation); *Drennen v. Westinghouse Elec. Corp.*, 328 So. 2d 52 (Fla. Dist. Ct. App. 1976) (meeting script read to 300 employees not privileged because it served employer's own interest); *Arison Shipping Co. v. Smith*, 311 So. 2d 739 (Fla. Dist. Ct. App. 1975) (statements, even if only to employees, are not protected), *cert. denied*, 327 So. 2d 31 (Fla. 1976); *Flughum v. United Parcel Serv., Inc.*, 424 Mich. 89, 378 N.W.2d 472 (1985) (employer is not privileged to communicate needlessly to fellow employees); *Romano v. United Buckingham Freight Lines*, 4 Wash. App. 929, 484 P.2d 450 (1971) (whether employer had authority to reveal reason for employer's discharge).

62. The question of the existence of a privilege could also be affected by state law regulating the use of polygraphs. If the particular jurisdiction prohibits the use of polygraphs in employment, it is apparent that no privilege to communicate should attach. On the other hand, if state law provides that polygraphs may be administered so long as they are not used as a condition of continued employment, existence of a privilege might turn on whether the employee took the test with the impression that refusal to take the test would result in dismissal. A similar question would arguably arise in those jurisdictions whose polygraph licensing statutes provide that tests may only be administered to voluntary subjects.

gate misconduct by his employees is worthy of protection, but the question is, aren't there other, more reliable, less potentially dangerous ways to conduct an investigation?

Three reported cases address the question of whether a qualified privilege should attach to communications from an employer to a polygraph operator.⁶³ Two of these cases apparently rely on a finding that by consenting to take the polygraph examination, the employee consented to the publication of the defamatory statement to the polygraph operator.⁶⁴ It is well established that when the victim of a defamatory statement consents to its publication, it is not actionable.⁶⁵

In *Borden, Inc. v. Wallace*,⁶⁶ the plaintiff was suspected of theft. He objected to his employer's communications to the polygraph operator, but the court found that by consenting to the test, the plaintiff had consented to these communications.

In consenting to this test, he must have known that the test could not be conducted without the operator being told what the charges or circumstances were. Thus, he consented to [the polygraph operator's] being told by [his employer] that he, [the employee], was suspected of committing dishonest acts at the Wuest Store.⁶⁷

The court found that there was no evidence of malice in these communications and reversed the jury verdict for plaintiff.

In *Montgomery v. Big B, Inc.*,⁶⁸ the court held that since the corporate officers had a duty to investigate missing store receipts, and since their communication of relevant facts to the polygraph operator was necessary to the competent administration of the test, this was a privileged occasion as a matter of law. The court did not directly address the propriety of Big B's use of a polygraph operator in its investigation. However, the court noted that plaintiff had voluntarily agreed to take the polygraph examination.⁶⁹

63. *Montgomery v. Big B, Inc.*, 460 So. 2d 1286 (Ala. 1984); *Clements v. Ryan*, 382 So. 2d 279 (La. Ct. App. 1980); *Borden, Inc. v. Wallace*, 570 S.W.2d 445 (Tex. Ct. App. 1978).

64. *Montgomery*, 460 So. 2d 1286; *Borden*, 570 S.W.2d 445.

65. RESTATEMENT (SECOND) OF TORTS, *supra* note 47, § 583; L. ELDREDGE, *supra* note 47, § 61, at 317.

66. 570 S.W.2d at 445.

67. *Id.* at 448.

68. 460 So. 2d 1286.

69. *Id.*

In *Clements v. Ryan*,⁷⁰ the court held that the employer was protected by a qualified privilege while making communications necessary in investigating the suspected wrongdoings of his employees, and this covered his communication with the polygraph operator. In an unusual twist in that case, the polygraph operator found the plaintiff to be innocent of any wrongdoing, but the employer remained unconvinced of the employee's innocence and fired her.⁷¹

Experts agree that since a polygraph test can only be properly administered to a voluntary subject, there should be no privilege to communicate to the examiner in the absence of the subject's consent. If a polygraph test is given without the subject's voluntary cooperation, the results are likely to be inaccurate.⁷² Thus, a privilege to communicate to the polygraph operator should not be recognized under these circumstances. Certainly the harm done to the employee's reputation is likely to outweigh the value of an inaccurate test to the employer.

As noted above, it has been held that firing an employee who fails a polygraph test amid allegations of employee misconduct is publication of a defamatory statement. However, it must be determined whether this publication is privileged. This determination will depend on whether the employer's actions were reasonable under the circumstances. In the absence of the polygraph examination, if an employer fired an employee whom he reasonably suspected of misconduct after making some attempt to verify this suspicion, this action would probably be protected by a qualified privilege.

However, a slightly different circumstance presents itself where the employer has not carried out a reasonable investigation, but instead resorts to subjecting all of the employees in a particular store to polygraph testing in order to find out why there is a shortage in the inventory. Three employees "fail" the polygraph examination, and they are fired as a result. Their fellow employees are thus given the impression that they were guilty of theft. Given the inherent unreliability of polygraph examinations, and the employer's failure to carry out any other investigation, it may be argued that the potential harm to the employees' reputations

70. 382 So. 2d 279.

71. See J. REID & F. INBAU, *supra* note 3, at 20.

72. See L. ELDRIDGE, *supra* note 47, §§ 93-94, at 508-35.

through this publication outweighs the employer's interest in using the polygraph examination to attempt to protect his business from theft. The employer has no substantial reason to believe that the polygraph examination has indeed identified the culprits. He may very well fire the employees who failed the test, and find that shortages continue. The employees' reputations, on the other hand, will be severely damaged by a termination under these circumstances. Their reputations in the eyes of their fellow employees will be diminished. Their ability to find other work may be severely hampered.

Another issue worthy of consideration is whether an employer's communication to a prospective employer that he discharged an employee for failing or refusing to take a polygraph examination is protected by a qualified privilege. Applying the balancing of harms notion, the case against recognizing a privilege is at least as strong as in the situations discussed up to this point. The injury to the employee likely to result from such a communication is clear: he will lose an employment opportunity. On the other hand, the value of this communication to the prospective employer is highly questionable. Again, one's conclusion will depend on one's view of the reliability of the polygraph examination.

3. Abuse of Privilege or Malice

Once a privilege has been recognized, it may of course be lost if the privileged occasion has been abused. Courts have traditionally defined abuse of privilege in terms of a finding of malice.⁷³

There is a great deal of disagreement and confusion in the case law as to what constitutes malice.⁷⁴ Some courts take the position that common law malice refers primarily to ill will or personal animosity.⁷⁵ Other courts have historically recognized that malice may exist where there is a lack of good faith, where a charge is made without any reasonable evidence of its truth, or where the em-

73. In order to avoid the confusion resulting from the many definitions of malice, the RESTATEMENT (SECOND) speaks in terms of abuse of the privilege. RESTATEMENT (SECOND) OF TORTS, *supra* note 47, § 593.

74. See *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257-58 (Minn. 1980).

75. *De Ronde v. GayTime Shops, Inc.*, 239 F.2d 735, 738 (2d Cir. 1956); *Andrews v. Mohawk Rubber Co.*, 474 F. Supp. 1276, 1282 (E.D. Ark. 1979); *Bratt v. IBM*, 392 Mass. 508, —, 467 N.E.2d 126, 133 (1984); *Bacon v. Michigan Cent. R. Co.*, 66 Mich. 166, 33 N.W. 181, 184-85 (1887); *Kroger Grocery & Baking Co. v. Harpole*, 175 Miss. 227, —, 166 So. 335, 338-39 (1936).

ployer acts in reckless disregard of the rights of his employees.⁷⁶ Several courts have concluded that an employer's failure to verify or properly investigate charges before terminating employees may be evidence of malice. With the advent of the United States Supreme Court's decisions in *New York Times Co. v. Sullivan*⁷⁷ and *Gertz v. Robert Welch, Inc.*,⁷⁸ yet another definition of malice has been introduced into the equation.⁷⁹

76. After *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), a few courts and the RESTATEMENT took the position that all defamation actions should be governed by constitutional considerations, and the common law standards should be abandoned. See, e.g., *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). In *Marchesi v. Franchino*, 283 Md. 131, 387 A.2d 1129 (1978), the Maryland Court of Appeals held that common law malice and malice, as defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964), are incompatible legal standards. The court determined that the *New York Times* standard alone should be applied in all future defamation cases. See *Marchesi*, 283 Md. at ___, 387 A.2d at 1133.

The position taken by the Maryland courts is a minority one. Most courts faced with the question of the impact of *Gertz* on cases involving non-media defendants and matters of no public concern have declined to apply *Gertz*. See, e.g., *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 935-36, 119 Cal. Rptr. 82, 87-88 (1975); *Rowe v. Metz*, 195 Colo. 424, ___, 579 P.2d 83, 84 (1978); *Wheeler v. Green*, 286 Or. 99, ___, 593 P.2d 777, 784 (1979); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, ___, 568 P.2d 1359, 1365 (1977); *Houston Belt & Terminal Ry. v. Wherry*, 548 S.W.2d 743 (Tex. Civ. App. 1976), appeal dismissed, 434 U.S. 962 (1977); *Stuempges*, 297 N.W.2d at 258; *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, ___, 228 N.W.2d 737, 745 (1975).

With the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), it appears likely that common law standards will continue to apply to employee suits for defamation in most jurisdictions.

The *New York Times* definition of malice, "reckless disregard of truth," is of marginal utility in such suits. The concern is not what the employer's subjective attitude toward the truth is, but rather, whether he has abused a privileged occasion by his unnecessarily harmful acts. When the *New York Times* standard is applied, the court might consider what an employer's attitude towards the reliability of the polygraph is, rather than objectively considering the reasonableness of the employer's reliance on the machine. However, a version of the reckless disregard of truth standard existed in defamation actions long before *New York Times*, and it appears to be a useful standard to continue to apply in the employment setting. See *Bacon*, 66 Mich. at ___, 33 N.W. at 184-85. In *Bacon*, the court described two definitions of malice, one being the ordinary meaning of ill will against a person, and the other being a wrongful act done intentionally without just cause or excuse. It labeled these two malice in fact and malice in law. The court concluded that malice could be found where a charge was made without any reasonable evidence of its truth, as where an accusation was made without an investigation being made into its truth. *Id.* This is an objective standard, distinguishable from the subjective *New York Times* standard. The *New York Times* standard asks whether the publisher in fact entertained serious doubts as to the truth of the published statement, and not necessarily whether the defendant conducted a reasonable investigation prior to publishing. *Grebner v. Runyon*, 132 Mich. App. 327, ___, 347 N.W.2d 741, 744 (1984).

77. 376 U.S. 254.

78. 418 U.S. 323.

79. Malice has been defined simply as reckless disregard for an employee's rights under the circumstances. See, e.g., *Stephens v. Columbia Pictures Corp.*, 240 F.2d 764, 767 (2d Cir.) (defining malice as reckless disregard or ill will), cert. denied, *Columbia Pictures Corp.*

The common law "ill will" standard appears to have a relatively limited application in today's large and often impersonal workplaces. It developed under very different conditions than exist today, at a time when workplaces tended to be smaller and employer and employees worked side by side. Today, though it is certainly true that personal animosity can develop between managers and employees, and may be a factor in a defamation law suit, the more widespread and critical problem is the disregard of employees' interests by large and impersonal employers. In this context, the personal relationship between employer and employee becomes less important. The important factor is the employer's regard for the rights of his employees to be treated in a reasonable and lawful manner. In this context, the definition of malice as the "reckless disregard of the rights of his employees" appears most appropriate.⁸⁰ The goal is to ensure that employers are deterred from needlessly and recklessly injuring employees through thoughtless and unnecessary acts. It does not put an undue burden on employers to expect that they will carry out reasonable investigations in lieu of, or at least prior to, resorting to a polygraph examination.

In a recent Practicing Law Institute seminar, the panelists, who included corporate counsel to C.B.S. and Rockwell International, advised against the use of polygraphs in employment. They urged employers to use other more reliable and effective and less potentially dangerous methods of ferreting out dishonesty in the workplace.⁸¹

If an employer subjects his employee to a polygraph examination without some reasonable basis for suspecting him of wrongdoing, this may amount to an abuse of privilege.⁸²

v. *Stephens*, 353 U.S. 949 (1957); *De Ronde*, 239 F.2d at 738 (defining malice as reckless disregard or ill will); *Andrews*, 474 F. Supp. at 1282 (defining malice as reckless disregard, ill will or conscious indifference); *Bratt*, 392 Mass. at ___, 467 N.E.2d at 131-32 (defining malice as reckless disregard or as knowledge of falsity).

80. Failure to carry out a good faith investigation of employee misconduct may be evidence of malice. See, e.g., *Stephens*, 240 F.2d at 767; *Sumner Stores of Miss. v. Little*, 187 Miss. 310, 192 So. 857 (1940); *De Ronde*, 239 F.2d at 738-45; *Calero*, 68 Wis. 2d at ___, 228 N.W.2d at 749. Other courts have held that a failure to investigate is not sufficient to establish malice. See, e.g., *Gaines v. CUNA Mut. Ins. Soc'y*, 681 F.2d 982, 988 (5th Cir. 1982); *Boston Mut. Life Ins. v. Varone*, 303 F.2d 155, 160 (1st Cir. 1962); *Butler v. Central Bank & Trust Co.*, 458 S.W.2d 510, 512 (Tex. Ct. App. 1970).

81. PRACTICING LAW INST., *EMPLOYMENT PROBLEMS IN THE WORKPLACE* (1986).

82. POLYGRAPHS AND EMPLOYMENT: THE MYTH OF LIE DETECTION, NEW YORK CIVIL LIBERTIES UNION PRIVACY PROJECT (1981).

D. *Invasion of Privacy*

One of the major objections employees have to polygraph use is that it involves an unwarranted intrusion into their private affairs. This is especially true of pre-employment screening, where questions may cover a whole range of personal areas including political beliefs, sexuality, financial security, family life, etc.⁸³ However, as courts are beginning to recognize, the use of polygraphs to investigate particular misconduct at work also involves an invasion of an employee's right to privacy.⁸⁴

The parameters of an employee's right to privacy on the job are only beginning to be developed. The central question is under what circumstances an employee can be said to have a "reasonable expectation of privacy."⁸⁵ Certainly, there is no privacy right that would protect an employee from being interrogated about on-the-job conduct. However, polygraph examinations routinely go beyond this narrow focus.

Before administering a polygraph examination, the operator typically asks the employee a series of questions about her physical and mental health as well as about her use of drugs.⁸⁶ Such information is considered vital in determining the accuracy of the test results. Asking an employee about her health and drug use, when it does not relate to her performance on the job, certainly can be seen as an unwarranted invasion of privacy.

83. *Long Beach City Employees Ass'n v. City of Long Beach*, 41 Cal. 3d 937, ___, 719 P.2d 660, 666, 227 Cal. Rptr. 90, 96 (1986); *Texas Dep't of Mental Health v. Texas State Employees Union*, 708 S.W.2d 498 (Tx. Ct. App. 1986).

84. *Texas State Employees Union*, 708 S.W.2d at 509. Invasion of privacy may take different forms, each of which may give rise to an actionable tort:

1. Intrusion into plaintiff's private affairs.
2. Public disclosure of embarrassing private facts about plaintiff.
3. Publicity which casts plaintiff in a 'false light.'
4. Appropriation of plaintiff's name or identity for defendant's advantage.

See W. PROSSER & W. KEETON, *supra* note 47, § 117, at 849-69.

85. *Id.*

86. J. REID & F. INBAU, *supra* note 3, at 232-33; see *Long Beach City Employees Ass'n*, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (where the City of Long Beach required employees to submit to polygraph testing as a part of its investigation of suspected theft by employees). In that case, the pre-test interview of each employee included the following questions:

Ever been arrested for any reason? . . . Any history of heart trouble or epilepsy? . . . Under the care of a doctor now for any reason? . . . Ever been treated by or consulted a psychiatrist for any reason? Have you experimented with any type of drugs—reds, whites, LSD, heroin or cocaine? . . . Have you ever smoked marijuana in your life? . . . When was the last time?

Long Beach City Employees Ass'n, 41 Cal. 3d at ___, 719 P.2d at 664, 227 Cal. Rptr. at 94.

In addition, the "control" questions used in the administration of the test often delve into private areas having nothing to do with the employee's job performance. The employee may be asked whether she has ever committed a dishonest act in her life. She may be questioned about thefts or attempted thefts during childhood.⁸⁷

According to polygraph examiners, use of control questions is critical to the accurate interpretation of test results.⁸⁸ As was described in detail in the first section of this article, responses to control questions are compared to responses to relevant questions as an aid in identifying the "guilty" subjects.⁸⁹

In addition, an employee may not avoid a particularly intrusive question by simply remaining silent.⁹⁰ The polygraph will record his emotional and physiological responses to an unsettling question.

The question of the limits of an employee's right to privacy in the context of employer use of polygraph testing is just beginning to be litigated. It has come up primarily in the context of public employees fighting discharges for refusing to submit to polygraph examinations.⁹¹ Courts have found that employees do have privacy rights, which may be founded in the state or federal constitution, a state privacy statute or the common law.⁹² They have concluded that polygraph examinations do infringe upon this right to privacy. However, they go on to hold that the employee's right to privacy must be balanced against the employer's need to conduct a reason-

87. J. REID & F. INBAU, *supra* note 3, at 28-30; see *Long Beach City Employees Ass'n*, 41 Cal. 3d at ___, 719 P.2d at 665, 227 Cal. Rptr. at 95; see also *Kamrath v. Suburban Nat'l Bank*, 363 N.W.2d 108, 110 (Minn. Ct. App. 1985) (polygraph testing can cause emotional problems).

88. See J. REID & F. INBAU, *supra* note 3, at 28-30.

89. See *supra* text accompanying notes 1-8.

90. *Long Beach City Employees Ass'n*, 41 Cal. 3d at ___, 719 P.2d at 665, 227 Cal. Rptr. at 95.

91. PRACTICING LAW INST., *supra* note 81 at ___.

Objections to polygraph testing have been raised by public employees in the past, primarily on fifth amendment grounds, often without success. See, e.g., *Roux v. New Orleans Police Dep't*, 223 So. 2d 905, 910 (La. Ct. App.), *cert. denied*, 254 La. 815, 227 So. 2d 148 (1969), *cert. denied*, 397 U.S. 1008 (1970); *Seattle Police Officers' Guild v. City of Seattle*, 80 Wash. 2d 307, ___, 494 P.2d 485, 493 (1972). But see *Molino v. Board of Pub. Safety*, 154 Conn. 368, ___, 225 A.2d 805, 809 (1966).

92. PRACTICING LAW INST., *supra* note 81, at ___. See also *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111, 117 (W. Va. 1984).

able investigation. Courts have reached different conclusions in applying this balancing test.

The Supreme Court of California recently recognized an employee right to privacy in the context of employer use of polygraphs in *Long Beach City Employees' Ass'n v. City of Long Beach*.⁹³ The court addressed the difficulties posed by the use of control questions, and the court came close to concluding that the employee's right to privacy outweighed the value of the test to the employer. However, as California has a statute prohibiting the use of polygraphs in private employment, the court instead based its decision on equal protection analysis. The court decided that allowing public employees to be compelled to take such tests, when private employees could not be so coerced, amounted to a denial of equal protection.⁹⁴

In another recent case involving public employees, the Texas Court of Appeals also recognized that polygraph testing involved an invasion of an employee's right to privacy.⁹⁵ The court specifically acknowledged the invasive nature of "control" questions. However, the court was reluctant to conclude that polygraph testing should never be permitted. The court found that the regulations already in effect to protect employee's privacy were not sufficiently stringent, and that additional safeguards were required. The court concluded, therefore, that polygraph use should only be permitted where *serious* misconduct was involved and where other reasonable methods of investigation had been exhausted.

It remains to be seen whether a cause of action for invasion of privacy will be recognized for employees injured by employer use of polygraph testing. In related contexts, courts have been generally reluctant to recognize such a cause of action.⁹⁶ However, with the recent controversy over drug testing in the workplace, it appears that courts will increasingly be called upon to set limits to protect employee privacy.⁹⁷

93. 41 Cal. 3d at ___, 719 P.2d at 663, 227 Cal. Rptr. at 93.

94. *Id.* at ___, 719 P.2d at 671-72, 227 Cal. Rptr. at 101-02.

95. *Texas State Employees Union*, 708 S.W.2d at 510.

96. *See, e.g.*, *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982) (employees could be fired for refusing to complete a questionnaire which included personal questions with no apparent relevance to job performance).

97. *See, e.g.*, *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (given the intrusive nature of the urinalysis test, it should only be administered where there exists a "reasonable suspicion" of drug use by a specific employee).

Where polygraph testing is involved, a strong argument can be made that the invasion of an employee's privacy which is inherent in the test, cannot be justified. The value of the test to the employer is limited by its unreliability and the number of false positives which are bound to occur. Alternative methods of investigation are available and are routinely used effectively in jurisdictions where polygraph testing is prohibited.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To establish a cause of action for intentional infliction of emotional distress, the employee must prove that his employer acted in an outrageous manner, intentionally or recklessly inflicting severe emotional distress on the employee.⁹⁸

To date, in the absence of a statute prohibiting employer use of polygraph testing, courts have refused to recognize a cause of action for intentional infliction of emotional distress for employee victims of polygraph testing.⁹⁹ They have held that firing an employee for refusing to take or failing a polygraph test is not outrageous conduct.

However, if the employee can establish that he was particularly susceptible to emotional distress and his employer was aware of this fact, he may have a cause of action.¹⁰⁰ Furthermore, if the em-

98. W. PROSSER & W. KEETON, *supra* note 47, § 12.

99. American Road Serv. Co. v. Inmon, 394 So. 2d 361 (Ala. 1981); Food Fair Inc. v. Anderson, 382 So. 2d 150, 153 (Fla. Dist. Ct. App. 1980); Bridges v. Winn-Dixie Atlanta, Inc., 176 Ga. App. 227, —, 335 S.E.2d 445, 448 (1985); Gibson v. Hummel, 688 S.W.2d 4, 8 (Mo. Ct. App. 1985); Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, —, 321 S.E.2d 602, 612-13 (S.C. Ct. App. 1984), *writ granted in part*, 285 S.C. 84, 328 S.E.2d 479 (S.C.), *decision quashed by*, 287 S.C. 190, 336 S.E.2d 472 (S.C. 1985). *But see* Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985) (damages of over one million dollars awarded against employer who fired employees for refusing to take polygraph examinations; employer's action violated state statute which provided only for a fine not to exceed \$100); Kamrath v. Suburban Nat'l Bank, 363 N.W.2d 108, 111 (Minn. Ct. App. 1985) (damages awarded for emotional distress stemming from employer's violation of state statute forbidding employers from requesting employees to submit to polygraph testing).

100. Tandy Corp. v. Bone, 283 Ark. 399, 678 S.W.2d 312 (1984). In *Tandy Corp.*, the plaintiff was under investigation for involvement in theft. He was questioned for a full day at thirty minute intervals, and was subjected to threats and harsh words by his interrogators. Near the end of the same day, when he was thoroughly upset and agitated by periodic questioning, he was asked to take a polygraph test. He agreed, but requested permission to take his valium. His request was refused on the grounds that the valium might interfere with the test results. The employee hyperventilated and was unable to proceed with the test. He had been under a psychiatrist's care in the past, and this incident precipi-

ployee can establish that the polygraph was administered primarily to cause the employee emotional distress and force a confession, he may also have a cause of action.¹⁰¹ This will be especially true in circumstances where the employer or polygraph examiner threatens the employee with arrest if he fails to cooperate where it is clear that the evidence is insufficient to support such a step.

In general, it is difficult for employees to establish that their employer's actions have risen to the level of outrageous conduct. Yet some courts have concluded that conduct which would not be considered outrageous between strangers could be considered outrageous in the context of an employer-employee relationship.¹⁰²

Also, employees will face a stiff burden in establishing that they are suffering from severe emotional distress caused by their employer's actions. Employees would be well advised to be prepared with expert medical opinions on both of these points.¹⁰³

V. CONCLUSION

The traditional shields which have protected employers from liability for tortious conduct have no place where polygraph testing is involved. Employers have no substantial or legitimate interest in employing such an investigative tool of doubtful reliability, especially given the injury to employees which unavoidably accompanies its use.

A bill prohibiting the use of polygraph examinations in private employment passed the House of Representatives this Session. A

tated his return to the hospital. Under these circumstances, the court held there was sufficient evidence to go to the jury on the question of intentional infliction of emotional distress.

But see Bridges, 176 Ga. App. 227, 335 S.E.2d 445 (firing an employee who failed a polygraph examination did not amount to intentional infliction of emotional distress, even though the employee was suffering from multiple sclerosis at the time she took the test).

101. *See Hall v. May Dep't Stores, Co.*, 292 Or. 131, 637 P.2d 126 (1981). In *Hall*, the Oregon Supreme Court upheld plaintiff's jury verdict, finding that there was evidence to support a cause of action for intentional infliction of emotional distress. The plaintiff had alleged that the defendants intentionally caused her severe emotional distress by threatening her with prosecution, in an effort to force a confession. *But see Food Fair*, 382 So. 2d 150 (employee who had been pressed into a false admission of theft by a polygraph operator did not have a cause of action for intentional infliction of emotional distress but did have a cause of action against the polygraph operator for fraud and deceit).

102. *See generally* Annotation, *Liability of Employer, Supervisor, or Manager for Intentionally or Recklessly Causing Employee Emotional Distress*, 86 A.L.R.3d 454 (1978).

103. *See, e.g., Jones v. Harris*, 35 Md. App. 556, 371 A.2d 1104, *aff'd*, *Harris v. Jones*, 281 Md. 560, 380 A.2d 611 (1977).

similar bill was considered by the Senate Committee on Labor and Industry, but its consideration by the full Senate was prevented by a filibuster by supporters of the polygraph. National legislation prohibiting polygraph use and providing meaningful compensation to those injured by violation of such legislation would be a welcome response to the concerns raised in this article. Unfortunately, the likelihood of the passage of such legislation is uncertain due to the existence of a strong polygraph lobby.

Employees who are being injured *now* by polygraph testing need not wait for the passage of national legislation to seek protection by the courts. Common law remedies exist which can and should be utilized. Individuals do not give up all rights to be protected from tortious injury by accepting employment. If employers choose to continue to use polygraph testing, they must be prepared to compensate innocent employees who are injured as a result.

