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The Ninth Circuit Provides Clarity on ERA Whistleblower Protections.

By Daryl M. Shapiro, Timothy J. V. Walsh, Rebecca Carr Rizzo and Keith D. Hudolin

On November 7, 2014, the Ninth Circuit issued its ruling in Tamosaitis v. URS Inc.[1] *and provided clarity on three key aspects of the whistleblower protections afforded under the Energy Reorganization Act (ERA), 42 U.S.C. 5801 et. seq. This decision has important implications for employers facing ERA whistleblower claims.*

I. Acting Solely at a Customer's Direction Is Not a Defense

In *Tamosaitis*, the Department of Energy (DOE) contracted with Bechtel to construct and manage a waste treatment plant in Hanford, Wash. Bechtel subcontracted work to URS Energy & Construction (URS E&C), a wholly owned subsidiary of URS Corporation. URS E&C removed Complainant Tamosaitis from his position working on the waste treatment plant project, and he sued claiming unlawful retaliation. URS E&C asserted as its principle defense that, under its contract with Bechtel, it had no choice but to remove someone from the project if Bechtel demanded that person be removed, regardless of the reason for the request. Under the contract, an employee could be removed if deemed "incompetent, careless, or otherwise objectionable." The Ninth Circuit rejected this defense and reversed the district court's summary judgment for URS E&C, finding that Bechtel, the lead contractor, "encouraged URS E&C to remove Tamosaitis from the WTP site because of his whistleblowing, that URS E&C knew that Tamosaitis's whistleblowing motivated Bechtel, and that URS E&C carried out the removal." The Court explained that:

> there is no meaningful distinction between an employer who takes action based on its own retaliatory animus and one that acts to placate the retaliatory animus of a customer. Either way, the fact that the employee engaged in protected activity is the cause of the action taken against him.

The Court found a reasonable inference that URS E&C had ratified Bechtel's retaliation, or could have refused to carry out Complainant's removal from the project. In this regard, the Court also ruled that removing Complainant from a project and transferring him to another position can be actionable discrimination under the ERA. There was a genuine issue of fact suitable for trial as to whether the

[1] *Tamosaitis v. URS Inc.*, No. 12-35924, 2014 WL 5786708 (9th Cir. Nov. 7, 2014).

Complainant's compensation, terms and conditions of employment, or privileges of employment were affected by his transfer. Relevant here, Complainant previously supervised a $500 million program involving fifteen to fifty employees, whereas he no longer supervised any program and had no one reporting to him. The Court also noted that Complainant had received no annual bonus since January 1, 2012, but asserted he received tens of thousands of dollars in bonus payments prior to his transfer.

II. Right to Jury Trial

The Ninth Circuit confirmed that, notwithstanding the lack of any specific grant under the ERA, both complainants and respondents have a constitutional right to a jury trial in ERA suits moved to federal court. The Court found that a constitutional right to jury trial existed for statutory claims so long as the claims "sound basically in tort" and "seek legal relief" such as compensatory damages, and that Tamosaitis's whistleblower suit met these criteria. The Court found the claim of wrongful transfer "analogous to a wrongful discharge claim at common law." And, "most critically," the ERA expressly provided for compensatory damages to a successful complainant.

III. Federal Court Opt-Out

In 2005, Congress amended the ERA to permit employees to take their whistleblower retaliation claims to federal district court if the Department of Labor (DOL) has not reached a final decision in their claim within one year. Until now, however, it was unclear whether the one-year exhaustion clock restarted if the employee added a new respondent to the administrative complaint. In *Tamosaitis*, the Ninth Circuit resolved this issue, holding that "adding a new respondent to an administrative complaint restarts the one-year exhaustion clock as to that person." Consequently, "before an employee may opt out of the [DOL] process and bring a retaliation suit against a respondent in federal court, that respondent must have had notice of, and an opportunity to participate in, the agency action for one year."

The Court provided four rationales supporting this holding. First, the Court said the structure of the statute itself showed that that the one-year administrative exhaustion period is "linked to a particular respondent, not the substance of the claim alone." Multiple ERA provisions require the agency to know the identity of the respondent (e.g. the agency must notify the person named in the complaint of the filing of the complaint). The court thus found that "[k]nowing the identity of the respondent is a critical component of carrying out the proscribed procedure within the agency."

Second, the Court noted that unless a respondent is named in the complaint, the individual/entity may not have the benefit of notice of the opportunity to participate in the agency's complaint review process, and the agency may not be able to consider that respondent's position on the complaint.

Third, the Court held that, although the federal district court litigation would be de novo, Congress had characterized the opt-out option as a review of the agency's proceedings. Thus, the federal district court litigation would be "tied to the case and the parties that were before the agency," which must include the respondent(s) that participated for one year before the agency.

Finally, the Court explained that, if the one-year administrative exhaustion requirement did not apply to each respondent, "an employee could file a DOL-OSHA complaint, add an entirely new respondent a year later, and—even if neither the new respondent nor the agency had notice of the new respondent's involvement in the retaliation—proceed to federal court against the new respondent the very next day." This "would effectively make it impossible for the agency to investigate the allegations against the new respondent and create a record concerning that respondent."

Applying its holding to the case at hand, the Ninth Circuit affirmed the district court's summary dismissal of DOE and URS Corporation from the case for failing to exhaust the one-year period. Complainant Tamosaitis had filed his initial complaint with DOL on July 30, 2010, identifying "URS Inc." as his employer. URS Corporation responded to the complaint, explaining that URS E&C was Mr. Tamosaitis's employer and is the party to the subcontract on the project. Complainant amended his complaint on December 15, 2010 to add DOE and Bechtel as defendants, and then again on September 7, 2011 to delete Bechtel because he was pursuing claims against it in state court, and to change his employer-defendant from URS, Inc. to URS Corporation and URS E&C.

Complainant removed his complaint to federal court on November 9, 2011. Because complainant added DOE as a respondent on December 15, 2010, less than one year prior to removing his claim to federal district court, the Ninth Circuit affirmed the district court's summary dismissal of DOE from the case. The Court held the same with respect to URS Corporation because it was not identified as a respondent until September 7, 2011.

The Ninth Circuit, however, reversed the district court's summary dismissal of URS E&C from the complaint. Although URS E&C was not specifically named in the initial complaint filed on July 30, 2010, the Court looked beyond the date when URS E&C was formally added as a respondent and held that "[t]he original complaint adequately notified URS E&C that it was the intended respondent." Indeed, the Court found that URS Corporation and URS E&C had admitted in the response to the initial complaint that Complainant could only be referring to URS E&C as his employer. Further, URS Corporation and URS E&C provided an eighteen-page response to the complaint. Thus, URS E&C's position on the complaint "was fully presented to the agency." The Court also noted that the position statement nowhere "assert[ed] Tamosaitis's mistake in naming URS Inc. instead of URS E&C as a defense to the agency complaint."

In sum, the Court ruled that "[w]here, as here, neither the correct respondent nor DOL-OSHA had any difficulty identifying the proper respondent, a whistleblower's technical mistake in providing the precise name of the proper respondent should not be dispositive." Accordingly, the Court reversed the district court's summary finding of lack of administrative exhaustion towards URS E&C.

IV. Key Implications for Employers from this Decision

- Employers should not take action against employees based on customer requests without conducting their own due diligence. Instead, employers should assess whether the customer's request is based on retaliation.

- If the Complainant does not request a jury trial, employers should carefully weigh the pros and cons of a jury trial. The Complainant may have an unsympathetic character, which will likely have more sway with a jury compared to a trial judge. And a jury trial might be worth the risk if your case has been assigned to a trial judge who has a history of rendering pro-complainant decisions. Conversely, when a defense relies on legal arguments, or when the Complainant will likely be perceived as a sympathetic person, a bench trial will be preferable.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Daryl M. Shapiro (bio)
Washington DC
+1.202.663.8507
daryl.shapiro@pillsburylaw.com

Rebecca Carr Rizzo (bio)
Washington DC
+1.202.663.9143
rebecca.rizzo@pillsburylaw.com

Timothy J.V. Walsh (bio)
Washington DC
+1.202.663.8455
timothy.walsh@pillsburylaw.com

Keith D. Hudolin (bio)
Washington DC
+1.202.663.8208
keith.hudolin@pillsburylaw.com

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