Court of Appeals No. 31451-1

SUPREME COURT OF THE STATE OF WASHINGTON

WALTER L. TAMOSAITIS and SANDRA B. TAMOSAITIS, a marital community,

Plaintiffs/Appellants

v.

BECHTEL NATIONAL, INC., FRANK RUSSO, and GREGORY ASHLEY,

Defendants/Respondents,

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Craig J. Matheson)

Case No. 10-2-02357-4

BRIEF OF APPELLANTS

John P. Sheridan, WSBA #21473
The Sheridan Law Firm, P.S.
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949
Attorneys for Appellants

Court of Appeals No. 31451-1

SUPREME COURT OF THE STATE OF WASHINGTON

WALTER L. TAMOSAITIS and SANDRA B. TAMOSAITIS, a marital community,

Plaintiffs/Appellants

v.

BECHTEL NATIONAL, INC., FRANK RUSSO, and GREGORY ASHLEY,

Defendants/Respondents,

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Craig J. Matheson)

Case No. 10-2-02357-4

BRIEF OF APPELLANTS

John P. Sheridan, WSBA #21473
The Sheridan Law Firm, P.S.
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other State Cases

Federal Cases

Federal Statutes

Washington Rules

Other Authorities

I. INTRODUCTION

This case pits Plaintiff/Appellant Dr. Walter Tamosaitis,[1] a Hanford manager, engineer, and whistleblower employed by Hanford subcontractor URS, against Defendant/Respondent Bechtel National, Inc. ("BNI"),[2] the Hanford prime contractor that retaliated against Dr. Tamosaitis for opposing unsafe design practices at the Hanford Tank Waste Treatment and Immobilization Plant ("WTP").

At summary judgment, BNI argued, and the trial court apparently agreed,[3] that Washington common law cannot hold BNI accountable for tortious interference with a business expectancy for engaging in whistleblower retaliation. BNI's shotgun approach at summary judgment included arguments that tortious interference with a business expectancy claim does not apply to at-will employees;[4] that since BNI is the Department of Energy's ("DOE") prime contractor at Hanford, it cannot be considered a third party for tortious interference purposes against its

---

[1] Plaintiff/Appellant Sandra Tamosaitis is a party in name only to represent the marital community. She did not work for Bechtel National, Inc. and does not assert any individual claims against Defendants/Respondents.

[2] BNI and individual defendants/respondents Frank Russo and Greg Ashley are referred to collectively as "BNI" unless otherwise indicated.

[3] The trial court did not provide any findings to support its initial decision, or its denial of the motion for reconsideration, and therefore Dr. Tamosaitis can only surmise the court's reasoning.

[4] Dr. Tamosaitis is an at-will employee; he was not terminated, but was instead removed from his management position and assigned to a basement office offsite with little meaningfully work. CP 2412-2413.

subcontractor's employee; and that since BNI management simply threatened to withhold funds from URS if URS continued to assign Dr. Tamosaitis to the WTP, as opposed to pressuring URS to terminate him, there is insufficient pecuniary loss to support the claim.

Hanford is located in the third appellate division, where this case was brought. If the Division III Court of Appeals heard the case, Dr. Tamosaitis would not likely prevail because Division III holds that at-will employees do not have a business expectancy in continued employment. *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 258, 274 P.3d 375 (2012), *Woody v. Stapp,* 146 Wn. App. 16, 24, 189 P.3d 807 (2008). However, if the events had occurred in the first appellate division, Dr. Tamosaitis would prevail on that issue because Division I holds that "[a] contract that is terminable at will is until terminated, valid and subsisting, and the defendant may not interfere with it." *Eserhut v. Heister*, 52 Wn. App. 515, 519 n.4, 762 P.2d 6 (1988). This Court must resolve this conflict between the divisions.[5]

This Court has the opportunity and the obligation to protect the people of Washington from arrogant Hanford contractors who put the lives

---

[5] The Division III holdings in *Evergreen* and *Woody* appear to also run afoul of this Court's reasoning in *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 138, 839 P.2d 314 (1992) (union employee's tortious interference claim may be brought without reference to CBA; Washington does not require the existence of an enforceable contract or the breach of one to state claim for tortious interference).

of our citizens at risk and who believe they are beyond accountability for their retaliatory actions against Hanford whistleblowers who oppose their improper actions. Only this Court can protect the people. In a parallel federal court case brought by Dr. Tamosaitis against URS and DOE for violations of the Energy Reorganization Act's ("ERA") whistleblower provisions, 42 U.S.C. § 5851, the federal court judge ruled that Department of Labor ("DOL") precedent, which could have held DOE liable for its part in this retaliatory scheme, "is simply too slender a reed upon which this court is willing to declare the existence of a general rule that it is possible for a government contracting agency to be deemed an 'employer.'" *Tamosaitis v. URS, Inc.*, 2012 U.S. Dist. LEXIS 73305, *9 (E.D. Wash. May 24, 2012) (Appendix 1). That same analysis would no doubt have been applied by the federal court to BNI had Dr. Tamosaitis sought to hold BNI liable for whistleblower retaliation in federal court under the ERA.[6]

Tortious interference with a business expectancy is a powerful tool that can be used to hold Hanford contractors accountable when they

[6] DOL precedent holds that, "[I]n a hierarchical employment context, an employer that acts in the capacity of an employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that the employer does not directly compensate or immediately supervise the employee. A **parent company or contracting agency** acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment." *Stephenson v. National Aeronautics and Space Admin.*, ALJ No. 94-TSC-5, ARB No. 98-025 (ARB July 18, 2000) (emphasis added).

interfere with the employment opportunities of Hanford subcontractor employees in retaliation for whistleblowing, but only if this Court provides clear guidance to the lower courts. This Court must provide that guidance. The summary judgment ruling dismissing Dr. Tamosaitis' tortious interference claim against BNI should be vacated and the case should be remanded for trial because tortious interference is a valid claim in Washington for third party interference by contractors who retaliate against subcontractor employees for blowing the whistle on safety issues, and because there are issues of material fact in this case that can only be resolved by a jury.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error

1. The trial court erred in granting BNI's motion for summary judgment, and in denying Dr. Tamosaitis' motion for reconsideration, on his common law tortious interference with a business expectancy claim. (CP 2503, 2576, RP 1-48)

B. Issues Pertaining to Assignment of Error

1. Whether an "at-will" employee of a subcontractor at the Hanford WTP states a cause of action for tortious interference with a business expectancy when the primary contractor directs the subcontractor to remove the employee from his position in retaliation for whistleblowing?
    a. Whether an "at-will" employee has a business expectancy in his position when the employee would not have been removed from his position absent retaliation by the prime contractor?
    b. Whether Dr. Tamosaitis had a valid business

expectancy in continued employment at the WTP?

c. Whether Dr. Tamosaitis established a genuine issue of material fact with regard to BNI's knowledge of the relationship?
d. Whether Dr. Tamosaitis established a genuine issue of material fact with regard to BNI's intentional interference, which caused a breach of his relationship with URS?
e. Whether Dr. Tamosaitis established a genuine issue of material fact concerning the improper purpose for which BNI interfered?
f. Whether Dr. Tamosaitis established a genuine issue of material fact with regard to the resulting damage?

III. STATEMENT OF THE CASE

A. Procedural History

This case was originally filed by Dr. Tamosaitis in Benton County Superior Court alleging tortious interference against BNI and BNI managers Russo and Ashley, and alleging civil conspiracy against URS and BNI and individual managers. CP 1-2, 33. Defendants removed the case to federal court alleging fraudulent joinder. CP 127. Once in federal court, relying on *Woody v. Stapp,* 146 Wn. App. 16, 189 P.3d 807 (2008), the defendants sought to dismiss the case claiming that "no cause of action will lie for tortious interference with an employment contract where such a contract is terminable at will." CP 130-131, 1281, 1283 (citing *Woody*, BNI argued, "at will employees do not have a business expectancy in

continued employment").[7] The federal judge rejected the defendants' arguments and remanded the case back to state court. CP 127-49.

A parallel action was filed by Dr. Tamosaitis with DOL against URS, BNI, and DOE alleging whistleblower retaliation under the ERA. On March 24, 2011, in its answer to the administrative charge, BNI denied that it was Dr. Tamosaitis' employer:

> BNI did not employ Tamosaitis and did not have a contract with him; BNI **did not and does not have the authority to fire Tamosaitis** - indeed, he continues to be employed by URS to this day; URS (which has a separate HR department at WTP) paid Tamosaitis, and handled his benefits; URS withheld taxes on his behalf; URS has control of Tamosaitis's records, including his personnel file, and payroll and tax information; and BNI did not have the authority to discipline Tamosaitis or evaluate his performance. In short, the evidence shows that BNI was not a joint employer of Tamosaitis, a conclusion that is fatal to his claims against BNI.

CP 1482, 2355 n.39 (emphasis added).

After remand of the state claim, BNI and URS moved to dismiss the civil conspiracy claim, again arguing the claim failed based on his at-will status, the *Korslund* holding, and scope of employment argument

---

[7] As part of their shotgun approach, the defendants also argued that the tortious interference claim was barred by *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005). CP 42-43, CP 133, 273-274, 317, 328, 330-331 (BNI), 362 (BNI), 371-372, 720, 726, 771. Misreading the holding in *Houser v. City of Redmond,* 91 Wn.2d 36, 39, 586 P.2d 482 (1978), the defendants also "fundamentally misrepresent[ed] the doctrine of *respondeat superior* / vicarious liability" in arguing that the individual defendants could not be held liable since they were acting within the scope of their authority. CP 129-130.

made previously. CP 1107, 1115, 1214, 1366, 1382. The trial court denied the defendants' motions to dismiss. CP 1408-1409.

After one year had passed in the DOL forum, Dr. Tamosaitis dropped BNI from the ERA administrative case so he could pursue BNI in state court under Washington law, and pursued URS and DOE in federal court. *See* 42 U.S.C. Section 5851(b)(4).[8] In the state court action, Dr. Tamosaitis moved to amend the complaint to drop the civil conspiracy claim, URS, and the URS individual defendants. CP 1522. The motion was granted, and Dr. Tamosaitis filed an amended complaint reflecting the changes. CP 1560, 1563-1595.

On November 23, 2011, BNI moved for summary judgment on the tortious interference claim, again arguing that at-will employees do not have a business expectancy in continued employment. CP 1625, 2482. BNI again misread and misapplied the holding of *Houser v. City of Redmond,* 91 Wn.2d 36, 39, 586 P.2d 482 (1978), and claimed, in stark contrast to its representations to the DOL in the administrative forum, that "BNI has the contractual right and duty to make managerial decisions concerning the Project, including personnel decisions." CP 1599.

---

[8] Section 5851(b)(4) states in part, "If the Secretary [of the Department of Labor] has not issued a final decision within 1 year after the filing of a complaint . . . and there is no showing that such delay is due to the bad faith of the person seeking relief under this paragraph, such person may bring an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy."

On January 9, 2012, the trial court granted BNI's Motion for Summary Judgment, dismissing Dr. Tamosaitis' common law tortious interference with a business expectancy claim. CP 2503. The trial court also denied plaintiff's motion for reconsideration. CP 2576. Neither decision contained any findings. *See also* RP 1-48.

Dr. Tamosaitis timely appealed, originally to Division III, and after reconsideration was denied, he redirected his appeal to the Supreme Court. CP 2570, 2580.

B. Background on Hanford and the Waste Treatment Plant

The Hanford nuclear site is owned by DOE. It is our country's most contaminated facility, containing two-thirds of the nation's high-level nuclear waste. CP 2071, 2393-94.

BNI is the prime contractor for DOE at Hanford. CP 2071. URS, Dr. Tamosaitis' employer, is BNI's prime subcontractor, however, URS splits profits and fees paid equally with BNI. CP 2393. It is undisputed that BNI and URS maintain two different Human Resources departments and that Dr. Tamosaitis never worked for BNI. CP 1603.

The WTP is backbone of the Hanford cleanup effort. The basic objective of the WTP is to turn the hazardous, liquid nuclear waste into a stable (vitrified) glass form so uncontrolled or catastrophic releases do not

occur. CP 2394. This chemical process must be done while preventing further spread of nuclear contamination through accidents, fires, leaks, explosions, and other preventable events. *Id.* The WTP will cost taxpayers billions of dollars, and both cost and schedule for the WTP have grown by over 240 percent, with a 2020 completion date. CP 2071, 2394. The WTP is being built with a design life of forty years, and there are parts of the WTP that will be so contaminated from the operations that they must be designed so they can be operated without maintenance. CP 2394.

C. Dr. Tamosaitis is an Experienced Engineer Who Expected to Remain at the WTP Until Retirement

Dr. Tamosaitis is a licensed professional engineer with a Ph.D. in systems engineering. CP 2395. He has over 42 years of industrial experience in the chemical and nuclear industries, working for 20 years with DuPont Corporation and 22 years with URS, or its predecessors, in DOE-associated work. *Id.*

In 2003, while employed by Washington Group International, Dr. Tamosaitis was assigned, and agreed, to work at the WTP as the Research and Technology ("R&T") Manager on a two-year temporary assignment. CP 2395. His family stayed in South Carolina. *Id.* In 2006, after URS acquired the company, Dr. Tamosaitis agreed to stay at the WTP and move his family to Richland after being promised by URS management

that he could remain at the WTP until he "retired or died." CP 2396. In the second half of 2006, Dr. Tamosaitis was assigned the additional duties of Assistant Chief Process Engineer at the WTP. *Id.* As the R&T Manager and Assistant Chief Process Engineer, Dr. Tamosaitis was responsible for the R&T Program supporting the $12+ billion WTP Project. CP 2396-97.

Dr. Tamosaitis' job responsibilities at the WTP also included identifying and solving technology problems and raising concerns to management about engineering and process issues that could potentially affect the safe, efficient, and effective operation of the WTP. CP 2397. Dr. Tamosaitis headed a project that successfully closed the "M12" issue on time and on budget. *Id.* Dr. Tamosaitis documented M12 issues that remained unresolved after closure and raised them to his management in 2009 and 2010. *Id.*

D. DOE Contracts With Hanford Contractors Prohibit Whistleblower Retaliation

Every DOE contractor is bound by the following contract term, which, in each contract, falls under the heading: "WHISTLEBLOWER PROTECTION FOR CONTRACTOR EMPLOYEES."

> The Contractor shall comply with the requirements of DOE Contractor Employee Protection Program at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites, with respect to work performed on-site at a DOE-owned or -leased facility, as provided for at Part 708.

CP 2564-65. The regulation imposes an affirmative duty on the contractor not to retaliate. 10 C.F.R. § 708.43. Under the framework, "retaliation means an action (including intimidation, threats, restraint, coercion or similar action) taken by a contractor against an employee with respect to employment (*e.g.*, discharge, demotion, or other negative action with respect to the employee's compensation, terms, conditions or privileges of employment) . . . ." 10 C.F.R. § 708.2. BNI violated these provisions. The violation of this contract term, and violation of applicable work customs at Hanford, define BNI's improper purpose in removing Dr. Tamosaitis from the WTP for raising safety and technical concerns.

E. BNI's Problems at the WTP Using "Design-Build"

Hearings were held in 2005, which resulted in a 2006 Government Accountability Office ("GAO") report, which found that since the WTP construction contract was awarded in 2000, the WTP's estimated cost increased more than 150 percent to about $11 billion, and the completion date has been extended from 2011 to 2017 or later. CP 2070-2071. The GAO found three main causes for the increases in the project's cost and completion date: "(1) the contractor's performance shortcomings in developing project estimates and implementing nuclear safety requirements, (2) DOE management problems, including inadequate oversight of the contractor's performance, and (3) technical challenges

that have been more difficult than expected to address." CP 2071. The "design-build" approach permits the contractor to begin building the project before the design is complete. The GAO linked the ongoing problems at the WTP to: "(1) the continued use of a fast-track, design-build approach for the remaining work on the construction project; (2) the historical unreliability of cost and schedule estimates; and (3) inadequate incentives and management controls for ensuring effective project." CP 2071.

In response to GAO criticism of the WTP during congressional hearings held in April 2005, Dr. Tamosaitis was appointed in October 2005 as the lead of the first DOE External Flowsheet Review Team ("EFRT"), also known as the "Best and Brightest" review. CP 2397. Over fifty consultants were hired to review the technical viability of the WTP project over a four-month period. *Id.* The EFRT study identified 28 issues, and its report was the subject of media coverage, external review, and inquiries to BNI. *Id.* The review classified 17 of the 28 issues as "major" ("M") issues and 11 as "potential" ("P"), but recommended that all be resolved. CP 2395. In any case, "closure" of an issue does not necessarily mean the issue is completed or finished. *Id.* Much work, and major technical issues, can remain. *Id.*

F. The "M3" Mixing Issue Was the Last Remaining EFRT Issue to Be Resolved and DOE Established a Deadline of June 30, 2010 for Its Closing in Order for BNI to Receive A $6 Million Fee Under the Contract

On May 15, 1989, DOE, the U.S. Environmental Protection Agency, and the State of Washington Department of Ecology signed a comprehensive cleanup and compliance agreement known as the Tri-Party Agreement, which is an agreement for achieving compliance at Hanford with the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") remedial action provisions and with the Resource Conservation and Recovery Act ("RCRA") treatment, storage, and disposal unit regulations and corrective action provisions. Department of Energy Hanford, *Tri-Party Agreement*, *available at* http://www.hanford .gov /page.cfm/TriParty (last visited June 13, 2012). The Tri-Party Agreement: "1) defines and ranks CERCLA and RCRA cleanup commitments at Hanford; 2) establishes responsibilities; 3) provides a basis for budgeting; and 4) reflects a concerted goal of achieving full regulatory compliance and remediation, with enforceable milestones in an aggressive manner." *Id.* One milestone of the Tri-Party agreement was the closure of all technical issues by December 31, 2009. CP 2398. The M3 issue was the last open "M" EFRT issue of the 28 that required closure. *Id.*

The M3 mixing issue required that design problems be resolved concerning the mixing of the high-level nuclear tank waste in 38 tanks in the pretreatment area of the WTP. CP 2398, *see also* CP 1886-97. Of the 38 tanks, 14 tanks presented special design and mixing challenges. CP 1942-46, 2398. The design provides that more than 50 million gallons of high-level nuclear tank waste be transported via pipelines to and between pre-treatment tanks in preparation for vitrification. *Id.* If the high-level nuclear tank waste is not sufficiently mixed in the pre-treatment tanks, plutonium may settle out and may cause a criticality accident. CP 1891-93, 2398. If the high-level nuclear tank waste is not sufficiently mixed in the pre-treatment tanks, hydrogen gas bubbles will accumulate and may be trapped in the waste, which could lead to a sudden gas release and an explosion or fire. CP 2398. Even if neither of those scenarios develops, poorly mixed high-level nuclear tank waste may cause the WTP to operate inefficiently, and under some circumstances to shut down. *Id.* Inefficient and ineffective design can lead to the design life of the plant being exceeded before all the nuclear waste is processed. *Id.*

The M3 mixing issue had not been resolved as scheduled, and in September 2009, DOE Office of River Protection ("DOE-ORP") manager Shirley Olinger directed that Dr. Tamosaitis be appointed to lead the M3 mixing issue resolution effort. CP 2398-99. Dr. Tamosaitis then reported

directly to URS Assistant Project Manager Bill Gay. *Id.* Dr. Tamosaitis' approach was to review all projects and seek a robust system, even if it meant having to redesign support systems. CP 2078-2106.

In a multi-day weekend meeting, between October 2-4, 2009, Dr. Tamosaitis proposed a September 30, 2010 date for closure of the M3 mixing issue. CP 2399. During the meeting, BNI management changed the date to complete testing to April 30, 2010 and to close the M3 mixing issue to June 30, 2010. *Id.* BNI Manager Ted Feigenbaum and Gay told Dr. Tamosaitis to "throw the kitchen sink at it." *Id.* In late 2009, a revision to the Tri-Party Agreement was approved setting June 30, 2010 as the new deadline for closure of M3 mixing issue. CP 2116, 2399. This deadline was tied to a $6 million fee BNI would receive for closing M3 on time. CP 2116, 2395.

G. Russo Became the WTP Project Manager and Sought Closure of the M3 Mixing Issue to Increase Profits and to Demonstrate that He Would Meet the Deadline

Defendant/Respondent Frank Russo is not an engineer and is not a scientist. CP 2294-95. Russo's educational background is an undergraduate degree in political science. CP 2295. Yet, in January 2010, Russo was handpicked by DOE Manager Ines Triay to take over the management of the WTP. CP 2296. Russo immediately sought to end all design changes and to meet deadlines that would increase BNI and URS

profits. CP 2107. In response to an email string in which Dr. Tamosaitis raised engineering questions, Russo told Triay, "I will send anyone on my team home if they demonstrate an unwillingness or inability to fulfill my direction." *Id.*

Instead of supporting Dr. Tamosaitis' efforts for a robust solution to the M3 mixing issue, even if it meant the need for design changes, in January 2010, Russo replaced Dr. Tamosaitis as the manager leading the M3 mixing issue resolution effort with retiring BNI manager Mike Robinson, a B.S. civil engineer, because he wanted a BNI manager in that position. CP 2024-25, 2399-2400. Dr. Tamosaitis' duties regarding R&T did not change. CP 2026, 2400.

Russo made it clear that the M3 program must be closed by the deadline, June 30, 2010. CP 2400. This was important to meet the Tri-Party Agreement milestone and to ensure that BNI was paid $6 million in fees for meeting the milestone. CP 2115-16. To achieve closure of the M3 mixing issue, Russo implemented a plan to do the least possible work, at the lowest expense, to meet the deadline, despite valid safety and throughput concerns. CP 2118. Critical to his plan, in Russo's mind, was the "need to freeze design, need to stop change." CP 2109. Gay sought to obtain Dr. Tamosaitis' support for Russo's management approach, reminding him that "80% of the fee is now attached to M3 closure on

time." CP 2113-14. In May 2010, Russo told Triay: "We can get out of M3 if we are willing to take some risk." CP 2118.

Over the following months, Dr. Tamosaitis became increasingly concerned that Russo and Gay were abandoning good engineering practices in favor of meeting deadlines. CP 2132-50, 2153-69, 2400-03. In April 2010, DOE issued a Performance Evaluation to BNI stating that in order to obtain the $6 million award fee set for June 30, 2010, all, not just a portion, of the M3 issue had to be closed, or words to that effect. CP 2116, 2401. In May 2010, an external consultant on the M3 mixing issue, referred to BNI's approach as "criminally negligent." CP 2001. Dr. Tamosaitis did his best to keep his job while seeking to have his concerns brought forward. CP 2132-50, 2153-69, 2402.

Russo and BNI management pressured subcontractor PNNL to support M3 closure. CP 2124-30. Russo commented to DOE Manager Chung (a direct report to Triay in DOE), that "after over $200 million [paid to] PNNL and Battelle they damn well better be on board. Before that card is played, I will talk with Dale [Knutson at DOE]." CP 2130.

On one or more occasions, Gay stated, "If M3 doesn't close I'll be selling Amway in Tijuana." CP 2381.

On June 30 and July 1, 2010, Russo expressed his concern to BNI Vice President David Walker and/or President Scott Ogilvie that failure to

approve M3 closure would "kill momentum within the [WTP] and with Congress re funding," and that "Congress is just looking for a reason to put Hanford money in other states. Our $50 million is still in play. Declare failure [of M3] and our $50 mil goes away." CP 2170, 2177.

On June 29, 2010, URS Manager Bob French, directed that words like "M3 testing" not be used in any future correspondence. CP 2403. On June 30, 2010, BNI announced that the M3 mixing issue was closed, which was the agreed date for closure, despite the existence of many unresolved safety and technical issues. CP 2403-04.

H. Dr. Tamosaitis Opposed the Technical Changes Made to Ensure M3 Closure Because He Felt They Created Health and Safety Problems

By May 2010, Dr. Tamosaitis felt isolated from the WTP Project. CP 1667, 2405. He was not invited to key meetings, not included on distribution of key reports, and often virtually ignored. *Id.*

In June 2010, Dr. Tamosaitis was afraid that he would be fired if he directly criticized the efforts to close M3 without addressing significant design issues. CP 2405. In addition to speaking out against specific decisions, he chose to oppose these improper efforts in two major ways as set forth below.

1. Dr. Tamosaitis Opposed BNI's Improper Actions by Submitting a 50-Item Issue List of Unresolved Items

First, when invited to create and bring a list of unfinished items to a meeting held by BNI, Dr. Tamosaitis brought a 50-item list, which contained unresolved environmental and nuclear safety concerns. CP 2212-52, 2405. Prior to the meeting, he forwarded the list to Gay. CP 2149, 2405. At this June 30, 2010 open issue meeting, Dr. Tamosaitis provided the list of about 50 open issues, most of which were still unresolved. CP 2241-52, 2406. Manager Donna Busche verified that many of the issues raised by Dr. Tamosaitis at the meeting were nuclear safety issues. CP 2220-40. BNI Manager Ashley did not attend the meeting, but delegated the running of the meeting to BNI Chief Engineer Barbara Rusinko. Rusinko, who brought cherries to the meeting, and upon seeing the list, stated to Dr. Tamosaitis: "Maybe you will choke on the cherries," or words to that effect. CP 2406.

a. BNI Manager Ashley Knew About Dr. Tamosaitis' 50 Item Issue List, Which Raised Nuclear Safety Issues

After the June 30, 2010 meeting, Dr. Tamosaitis sent an email to Busche offering his support of the process hazards review she planned to conduct, and copied Ashley. CP 2408. Soon after Dr. Tamosaitis was removed from the WTP, Ashley told Busche that she no longer needed to

review Dr. Tamosaitis' list because "Walt was being reassigned." CP 2233. Busche stated she needed to do the review anyway. CP 2234.

2. Dr. Tamosaitis Opposed BNI's Improper Actions by Submitting an Email to Consultants with the Hope of Stimulating Them to Oppose M3 Closure

Second, after seeing that CRESP, a DOE consultant, was not going to oppose M3 closure, Dr. Tamosaitis sent an email to WTP consultants in the hope that they might publicly raise objections to M3 closure so that if he stood up against the closure, he would not be alone. CP 2173-74, 2405.

a. BNI Managers Russo and Ashley Knew About Dr. Tamosaitis' Email to the Consultants

On July 1, 2010, BNI Managers Russo and Ashley, URS Manager Gay, and DOE WTP Federal Project Director Dale Knutson became aware of Dr. Tamosaitis' consultant email. CP 2173. Ashley received a copy of Dr. Tamosaitis' consultant email and forwarded it on to Russo with the comment "Trouble brewing! I'll call shortly." CP 2382. Russo responded: "Please do." *Id.* After seeing Dr. Tamosaitis' email, Knutson wrote to Russo that Russo should "use this message as you see fit to accelerate staffing changes or to 'color' your conversations with [BNI President] Scott Olgivie [sic]." CP 2173. Russo responded by stating, in part, that he had talked to Kosson and Kosson and he were "livid about the string of

emails [Dr. Tamosaitis] has sent in the last 2 days. He is URS. I directed URS to get [Dr. Tamosaitis] out of here 2 weeks ago after meeting with Mike Kluse. Today I told Gay that [Dr. Tamosaitis] will no longer be paid by WTP." CP 2173. Russo also forwarded Knutson's email on to Gay with the comment: "Walt is killing us. Get him in your corporate office today." CP 2179. Gay responded, stating: "Dennis [Hayes] has called. [Dr. Tamosaitis] will be gone tomorrow." CP 2179.

I. It is Undisputed that Russo Directed URS to Remove Dr. Tamosaitis from the WTP; Ashley Was Closely Involved in This Decision

On July 2, 2010, Dr. Tamosaitis was scheduled to return to work for a 7:00 a.m. meeting to discuss the details of his group's next assignment at the WTP. CP 2408. At the meeting, URS Operations Manager Dennis Hayes told Dr. Tamosaitis that he was fired from the WTP Project as of that moment. *Id.* Hayes directed Dr. Tamosaitis to return his badge, cell phone, and Blackberry, and to leave the site immediately. *Id.* Hayes told Dr. Tamosaitis that the decision to remove him from the project was made the night before, on July 1, 2010, and that, "Bechtel Manager Frank Russo wants you off the project immediately," or words to that effect. *Id.*

Hayes again told Dr. Tamosaitis to return his badge, phone, and Blackberry and to leave the site, and in response, Dr. Tamosaitis returned

both his badge and phone, but he did not have his Blackberry with him at the time. CP 2409. Hayes told Dr. Tamosaitis that he could not go to his office to retrieve any personal belongings and that he must leave the WTP immediately and talk to no one. CP 2409.

At the meeting, Dr. Tamosaitis asked if he could go by the desk of a person on the same floor and pay the dog-sitting fee to a secretary for her daughter's effort to watch his dog over the 4th of July weekend, but Hayes told Dr. Tamosaitis that he could not and had him escorted from the WTP. CP 2409.

J. After the June M3 "Closure," Dr. Tamosaitis Was Scheduled to Move to a New Job at the WTP

As of June 29, 2010, BNI estimated that approximately $14.6 million was available for Dr. Tamosaitis' R&T group over the next eight years, and about $4.8 million was available to support his R&T group in 2011. CP 2404. On June 30, 2010, BNI and URS management approved an announcement, which announced in part, that Dr. Tamosaitis was being reassigned to head a new "Operations and Technical Group" within the WTP. CP 2171-72, 2404. This was the URS and BNI management plan for Dr. Tamosaitis' new position. CP 2325-37.

On June 30, 2010, an email was drafted by management to announce personnel changes at the WTP. CP 2171-72. This email was

edited by Ashley and Ashley copied Gay and Russo on the email. *Id.* The draft announcement email states, in relevant part:

> With the completion of the overwhelming majority of the baseline R&T work,...the R&T organization within PE&T and their remaining scope will be consolidated into a newly formed Operations Technical Group within the Plant Operations organization and report to Dennis Hayes. **Dr. Walt Tamosaitis will manage this group to be staffed by members of the existing R&T organization in alignment with scope completion.**

CP 2172 (emphasis added).

At summary judgment, BNI claimed that Dr. Tamosaitis was scheduled to leave the WTP for another assignment at Sellafield in England, but this was not the case, nor was a cause of his leaving complaints about Dr. Tamosaitis from PNNL, as BNI has alleged. CP 2292-2324, 2412. Leading up to the M3 deadline, Dr. Tamosaitis sent emails expressing an interest, preference, and expectation to continue working at the WTP and stated that relocating was out of the question because of his family. CP 1789-90, 1857, 1861, 1871. Gay never talked to Dr. Tamosaitis about transferring to Sellafield, but only mentioned a "foreign assignment" in passing to Sandra Tamosaitis at a social engagement. CP 1670. Dr. Tamosaitis' email to Duane Schmoker expressed an interest in working for him in addition to his R&T position. CP 1668-69, 1787.

K. Russo And Ashley Knew URS And Dr. Tamosaitis Planned That Dr. Tamosaitis Would Remain At The WTP But Removed Him Claiming That He Was Disruptive

On July 15, 2010, Russo emailed Ines Triay, the DOE Assistant Secretary for Environmental Management, to give her a "heads up" that Dr. Tamosaitis had become "disruptive" to the M3 mixing issue and that Russo had "asked URS to transfer him and gave them a couple of months to do it. When [Dr. Tamosaitis] sent one email to [sic] many, I told URS that he had to leave because he was undermining M3. He left the project 6/30 but still remains a URS employee. [Dr. Tamosaitis] is very annoyed because **he intended to retire off the project**. That was never an option." CP 2201 (emphasis added).

At a meeting on July 12, 2010, in the presence of Dr. Tamosaitis, Hayes, and URS Human Resources Manager Cami Krumm, Gay stated that Dr. Tamosaitis was removed from the WTP at the direction of Russo and DOE WTP Federal Project Director Dale Knutson. CP 2411. Gay said that he had not been involved in the decision and that Hayes had been the leading URS person to participate in the action. *Id.*

L. URS and BNI Agreed to Dr. Tamosaitis' Return To The WTP, Until BNI Manager Russo and DOE Manager Knutson Heard Dr. Tamosaitis Had Described Himself as a Whistleblower

Several days after Dr. Tamosaitis' removal from the WTP, an agreement was reached between BNI and URS to return Dr. Tamosaitis to his position at the WTP, but this plan was quashed by Knutson and Russo. After hearing from Krumm that Dr. Tamosaitis had used the word, "whistleblower," Knutson and Russo said they would not pay URS for work done by Dr. Tamosaitis at the WTP, which resulted in his not being returned to work there. According to Krumm, Russo said: "We will not pay for Tamosaitis on this project." CP 2274-2275.

M. Two Years Later, Dr. Tamosaitis Remains Employed by URS, but Without a Meaningful Assignment

Dr. Tamosaitis was reassigned to a URS facility off the WTP, in downtown Richland, in a non-supervisory role. CP 2391-92, 2412-13. He was given an office in the basement, with two working copying machines, and has little or no contact with URS management. *Id.* His job duties now as compared to while at the WTP are negligible. CP 2391-92. Dr. Tamosaitis' reputation in the community and his reputation in the industry have been severely damaged by BNI's improper intentional interference with his position with URS. CP 2413. He has lost friends and his family's social involvement in the community has been impacted. *Id.* Dr.

Tamosaitis has suffered loss of enjoyment of life, pain and suffering, mental anguish, emotional distress, injury to reputation, humiliation, lost income, and lost professional opportunities for the remainder of his work life. CP 2413, 2461-74.

Dr. Tamosaitis has also suffered pecuniary losses in the form of books and other property which was never returned to him from his office at the WTP. CP 2508-09.

IV. ARGUMENT

A. The Standard of Review for a Summary Judgment Dismissal is *De Novo*

An appellate court reviews "a summary judgment order de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party." *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008).

Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." CR 56(c) (emphasis added). If there is a dispute as to any material fact, summary judgment is improper. *Id.* "A 'material fact' is a

fact upon which the outcome of the litigation depends, in whole or in part." *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

B. Dr. Tamosaitis Raised an Issue of Fact with Regard to Each Element of His Tortious Interference with a Business Expectancy Claim Against BNI

The trial court's order granting summary judgment and order denying reconsideration did not state the court's reasoning for its decisions. CP 2503, 2576. At oral argument, the trial court did not express whether one or more particular elements of the tortious interference claim had not been met. RP 1-48. In any case, Dr. Tamosaitis is able to satisfy each element of his claim. The trial court erred in granting BNI's motion for summary judgment.

"To prove tortious interference with a business expectancy, a plaintiff must show (1) the existence of a valid contractual relationship or business expectancy, (2) that the defendant had knowledge of that expectancy, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) that the defendant interfered for an improper purpose or used improper means, and (5) resulting damage." *Newton Ins. Agency v. Caledonian Ins. Group*, 114 Wn. App. 151, 157-58, 52 P.3d 30 (2002), *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992).

The analysis for a common law tortious interference with contractual relations claim or tortious interference with a business expectancy claim are the same in Washington. *Pleas v. City of Seattle*, 112 Wn.2d 794, 800, 774 P.2d 1158 (1989), 16A Wash. Prac. Series § 22.21, Interference with prospective advantage or business expectancy--Overview (2009). An employment contract is not necessary in order to bring a claim for tortious interference. *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977), *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 138, 839 P.2d 314 (1992).

"Once these elements are established, the defendant bears the burden of justifying the interference or showing that the actions were privileged." *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992) (citing *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989)). At summary judgment, BNI did not assert a privilege.

BNI admits that Russo intentionally interfered with Dr. Tamosaitis' employment relationship when he directed URS to remove Dr. Tamosaitis from the WTP. RP 16. At summary judgment, BNI did not challenge the "improper purpose or improper means" prong of Dr.

Tamosaitis' tortious interference claim, but denied any wrongdoing. RP 8, *see* CP 1624-32.

Tortious interference with contractual relations is a proper claim when a contracting agency urges an employer to fire an employee in retaliation for whistleblowing activity. *Awana v. Port of Seattle*, 121 Wn. App. 429, 436, 89 P.3d 291 (2004).

1. Element One: Dr. Tamosaitis Established a Genuine Issue of Material Fact with Regard to the Existence of a Valid Business Expectancy in Continued Employment at the WTP

a. At-Will Employees Have the Right to Anticipate that the Terms and Conditions of Their Employment Will Continue Unmolested by the Wrongful and Officious Intermeddling of Third Parties

The first element is, "the existence of a valid contractual relationship or business expectancy." *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992). In *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977), this Court found that "[t]he existence of a valid enforceable contract is not necessary to the maintenance of the action [for tortious interference] and the possibility of a remedy in contract does not preclude it." Numerous Washington authorities in addition to *Cherberg* have found that the "at-will" nature of a contract or business relationship does not

defeat a claim for tortious interference. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 138, 839 P.2d 314 (1992) ("Washington...does not require the existence of an enforceable contract or the breach of one to support an action for tortious interference with a business relationship"), *Calbom v. Knudtzon*, 65 Wn.2d 157, 162, 396 P.2d 148 (1964), *Eserhut v. Heister*, 52 Wn. App. 515, 762 P.2d 6 (1988), *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 323, 692 P.2d 903 (1984), *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 140, 566 P.2d 972 (1977).

Several comments to the Washington Pattern Jury Instructions (WPI) note that at-will employment does not defeat a claim for tortious interference. WPI 352.01, *Cmt.* ("If the alleged interference is with a contract that is terminable at-will, use WPI 352.02, Tortious Interference with Business Expectancy...instead of this instruction"..."there may be a cause of action for interference with contract, even though the contract is terminable at-will." Restatement (Second) of Torts § 766, comment g. Cf. *Calbom v. Knudtzon*, 65 Wn.2d 157, 396 P.2d 148 (1964) (discussing termination of contract that is terminable at-will as interference with business expectancy)), WPI 352.02, *Note on Use* ("If a contract terminable at-will is involved, use 'relationship' rather than 'expectancy'"), CP 868-72.

Calbom v. Knudtzon, 65 Wn.2d 157, 162, 396 P.2d 148 (1964), citing the Restatement of Torts § 766, noted that the cause of action includes those situations "where a business relationship, *terminable at the will of the parties thereto*, exists, and the intermeddler party induces or causes a termination of such relationship." (emphasis added). The *Calbom* court noted that the "fundamental premise" of the tort of tortious interference is "that a person has a right to pursue his valid contractual and business expectancies unmolested by the wrongful and officious intermeddling of a third party." *Id. Calbom* concerned an attorney who was hired by the executrix on an at-will basis to probate an estate. *Id.* at 159. Thereafter, an accounting firm induced the executrix to terminate her relationship with the plaintiff attorney and hire another attorney to complete the probate. *Id.* at 160. The court found that, even though the relationship was terminable at-will, sufficient evidence existed to support the trial court's finding of an "existing attorney-client relationship which plaintiff had every right to anticipate would continue, and which would have continued but for the intervention of defendants." *Id.* at 164.

Yet, a recent Division III case ignored these authorities and held that, "at-will employees do not have a business expectancy in continued employment." *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn.

App. 242, 2012 Wash. App. LEXIS 328 (Div. III, Feb. 16, 2012),[9] *Woody v. Stapp*, 146 Wn. App. 16, 189 P.3d 807 (2008). *Evergreen* considered *Calbom*, but distinguished it on the facts of that particular case. *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 258-59, 2012 Wash. App. LEXIS 328 (Div. III, Feb. 16, 2012). Unlike the instant case, *Evergreen* involved an employer's claim that a third party interfered with its relationship with its employees, causing the employees to go work for the third party intermeddler/competitor. *Id.* at 258. Without much discussion, and relying solely on *Woody*, the *Evergreen* court found that the plaintiff did not produce sufficient evidence of anything other than an at-will relationship. *Id.* at 259.

Evergreen is wrongly decided, and isolated from other decisions because the court did not cite or discuss other authorities that have held an at-will relationship does not defeat a claim for tortious interference, including the Washington Pattern Jury Instructions, the Restatement § 766, *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 839 P.2d 314 (1992), *Eserhut v. Heister*, 52 Wn. App. 515, 762 P.2d 6 (1988), and other Division I case law.

---

[9] *Evergreen* was decided after the trial court had granted BNI's motion for summary judgment, but before the court denied Dr. Tamosaitis' motion for reconsideration. CP 2503, 2576.

In *Eserhut v. Heister*, the Division I Court found that the plaintiff's employment was terminable at-will and stated:

> A contract that is terminable at-will is until terminated, valid and subsisting, and the defendant may not interfere with it. One's interest in such a contract is primarily in future relations between the parties and he has no legal assurance of them. For this reason, an interference with this interest is closely analogous to an interference with prospective contractual relations.

Eserhut v. Heister, 52 Wn. App. 515, 519 n.4, 762 P.2d 6 (1988) (*Eserhut I*) (citing Restatement (Second) of Torts § 766, comment g). *See also Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 323, 692 P.2d 903 (1984) and *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 140, 566 P.2d 972 (1977).

The Division III cases of *Woody* and *Evergreen* lie in contrast with Division I cases *Eserhut*, *Lincor*, and *Island Air*, as well as the WPI and the Restatement. This Court should resolve this conflict consistent with the majority view and find that an at-will employment relationship is not a bar to a claim for tortious interference with a business expectancy.

b. Dr. Tamosaitis Had a Valid Business Expectancy of Continued Assignment To The WTP

Dr. Tamosaitis had a valid expectation of continued employment with URS at the WTP, which was more than just "wishful thinking" on Dr. Tamosaitis' part. *See Sea-Pac Co. v. United Food & Commercial*

Workers Local Union 44, 103 Wn.2d 800, 805, 699 P.2d 217 (1985). First, in 2006, URS management told Dr. Tamosaitis that he could stay at the WTP until he "retired or died." Dr. Tamosaitis had a reasonable expectation that this statement would be true and moved his family from South Carolina to Richland. Second, on June 30, 2010, just two days before he was abruptly removed from his position at the WTP, an announcement was made that Dr. Tamosaitis and his R&T group would move to another project at the WTP. Ashley approved the June 30, 2010 announcement email, and Russo was copied on the email. CP 2171-72. Nowhere in the announcement does it state that Dr. Tamosaitis' new position is a temporary position. Dr. Tamosaitis had a reasonable expectation that this statement would be true and that he would continue working at the WTP. Third, there was funding for Dr. Tamosaitis' continued work at the WTP. As of June 29, 2010, BNI estimated that approximately $14.6 million was available for Dr. Tamosaitis' R&T group over the next eight years, and about $4.8 million was available to support his R&T group in 2011. Dr. Tamosaitis had a reasonable expectation that this statement would be true, and that his next assignment was fully funded.

The plan to move Dr. Tamosaitis and his R&T group to another WTP assignment was planned and being executed, and was only derailed

after Dr. Tamosaitis presented his 50-item issue list at the "choke on the cherries" meeting on June 30, 2010, and then sent his email to the WTP consultants expressing is concern over the M3 closure on July 1, 2010.

2. Element Two: Dr. Tamosaitis Established a Genuine Issue of Material Fact with Regard to the BNI's Knowledge of The Relationship

The second element is, "that the defendants had knowledge of that relationship." *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992). BNI's management knew of Dr. Tamosaitis' assignment to the WTP and of the URS plan to send Dr. Tamosaitis and his R&T group to the next WTP assignment. "[I]t is sufficient if the evidence reveals that the alleged interferor had knowledge of facts giving rise to the existence of the relationship. It is not necessary that the interferor understand the legal significance of such facts." *Calbom v. Knudtzon*, 65 Wn.2d 157, 165, 396 P.2d 148 (1964) (citing Restatement, Torts § 766 Comment e).

Just two days before he was escorted off the property, BNI knew Dr. Tamosaitis and his R&T team were being assigned to another WTP project. BNI Manager Ashley approved of the June 30, 2010 announcement email to that effect. CP 2171-72. Russo was copied on the draft announcement. *Id.* Two weeks later, Russo told DOE that Dr. Tamosaitis "is very annoyed because he intended to retire off the project."

CP 2201-02. On July 1, 2010, Russo stated to DOE that he was "livid about the string of emails [Dr. Tamosaitis] has sent in the last 2 days. He is URS. I directed URS to get [Dr. Tamosaitis] out of here 2 weeks ago after meeting with Mike Kluse. Today I told Gay that [Dr. Tamosaitis] will no longer be paid by WTP." CP 2173. Later, during discussions for Dr. Tamosaitis' return to the WTP, apparently, after hearing from Gay that Dr. Tamosaitis mentioned the word, "whistleblower," Russo stated: "We will not pay for Tamosaitis on this project." CP 2273-2275. BNI knew that Dr. Tamosaitis was assigned to the WTP by URS, and even after his removal, BNI knew of the plan for his return, which was only derailed after Russo heard the term, "whistleblower" used in the context of Dr. Tamosaitis.

3. Element Three: Dr. Tamosaitis Established a Genuine Issue of Material Fact with Regard to the BNI's Intentional Interference Which Caused a Breach of his Relationship with URS

The third element is, "an intentional interference inducing or causing a breach or termination of the relationship or expectancy." *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992). "The third element, intentional interference, is the element most often in dispute." 16A Wash. Prac. Series § 22.21,

Interference with prospective advantage or business expectancy--Overview (2009).

This case is unlike most other tortious interference cases because BNI admits that Russo intentionally directed URS to remove Dr. Tamosaitis from the WTP. RP 16 (BNI's counsel stated, "Dr. Tamosaitis is making the allegation that Frank Russo directed URS to remove him, which in fact he did."), CP 2173, 2179. There is also uncontroverted testimony that during discussions for his return to the WTP, after hearing from Gay that Dr. Tamosaitis mentioned the word, "whistleblower," Russo stated: "We will not pay for Tamosaitis on this project." CP 2273-2275.

There is substantial evidence that Russo's actions caused a breach in Dr. Tamosaitis' employment relationship with URS. Dr. Tamosaitis was a high-level manager at the WTP heading the R&T group, and the plan in place after closure of M3 was to send Dr. Tamosaitis and his team to the Operations Technical Group. CP 2172.

Russo could not remove Dr. Tamosaitis himself because he had no authority to do so. BNI did not employ Dr. Tamosaitis and had no authority to remove him from the WTP. BNI could only threaten URS that it would no longer fund Dr. Tamosaitis' position at the WTP and Russo admits that he did so, stating: "Today I told Gay that [Dr. Tamosaitis] will

no longer be paid by WTP." CP 2173. Russo then told Gay: "Walt is killing us. Get him in your corporate office today." CP 2179. URS Senior Vice President Leo Sain told Dr. Tamosaitis that "URS does whatever BNI says." CP 2410. Gay told Dr. Tamosaitis that "Russo wants you off the project." CP 2408.

Based on Ashley's "Trouble brewing! I'll call shortly" email to Russo, and their subsequent phone conversation, viewing the facts in the light most favorable to Dr. Tamosaitis, an inference is raised that Ashley was involved in Russo's decision to direct the immediate removal of Dr. Tamosaitis from the WTP. CP 1880, 2382. Russo then acted to prevent his return upon hearing that Dr. Tamosaitis used the word, "whistleblower." CP 2273-2275.

The breach that occurred was the end of Dr. Tamosaitis' ability to remain at the WTP for the foreseeable future.

4. Element Four: Dr. Tamosaitis Established a Genuine Issue of Material Fact Concerning the Improper Purpose for Which BNI Interfered

The fourth element is, "that the defendants interfered for an improper purpose or used improper means." *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992). "Interference can be 'wrongful' by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or

profession. Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a 'duty of non-interference; i.e., that he interfered for an improper purpose . . . or . . . used improper means . . .'." *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (*quoting Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371(1979).

BNI did not move for summary judgment on the "improper purpose or improper means" element of Dr. Tamosaitis' tortious interference claim. RP 8 ("the only one of those elements we're not moving on, we're not moving for summary judgment on, is number four that defendants interfered for an improper purpose or used improper means"). All contracts with DOE must have whistleblower protection provisions. CP 2564-65. These provisions create an affirmative duty not to retaliate. 10 C.F.R. § 708.43. In the light most favorable to Dr. Tamosaitis, Russo's actions were taken for an improper purpose in violation of this statute or established standard of the trade or profession. Russo had a duty of non-interference – he could not retaliate against those raising safety and technical concerns. Russo also had no authority to remove Dr. Tamosaitis. As stated in BNI's letter to OSHA, "BNI did not and does not have the authority to fire Tamosaitis." CP 1482 n.39. Thus, they do not have the

authority to take other personnel actions either, and certainly not for an improper motive.

"The Washington Supreme Court has recognized greed or retaliation as improper motives that satisfy the intentional interference element." 16A Wash. Prac. Series § 22.5, Interference with contractual relations – intentional interference (2009) (citing *Schmerer v. Darcy*, 80 Wn. App. 499, 910 P.2d 498 (1996) and *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 564 P.2d 1137 (1977)).

BNI directed the removal of Dr. Tamosaitis from his position at the WTP for an improper purpose, i.e. retaliation for raising safety concerns which threatened BNI's receipt of a $6 million fee. The improper means used was to tell URS management that BNI would not fund Dr. Tamosaitis on the project any longer. This means was not for a legitimate business reason, but in retaliation for his whistleblowing.

On March 24, 2011, in its answer to the administrative charge, BNI denied that it was Dr. Tamosaitis' employer that, "BNI did not employ Tamosaitis and did not have a contract with him; BNI did not and does not have the authority to fire Tamosaitis." CP 1482 n.39. Judicial estoppel should apply to bar BNI from now claiming that it had authority to coerce URS into removing Dr. Tamosaitis from the WTP. *Jones v. State*, 170 Wn.2d 338, 370 n.12, 242 P.3d 825 (2010).

BNI and URS maintain separate human resources departments, payroll, personnel, tax, and benefit functions. In 2010, Dr. Tamosaitis was not designated as "key" personnel over which BNI could exert control. CP 2567-68. BNI is the prime contractor at the WTP, but BNI does not have contract authority over all personnel at the WTP. CP 2556-68.

Pressure on a subcontractor by the prime contractor to remove a whistleblowing employee supports a claim of tortious interference. *See Awana v. Port of Seattle*, 121 Wn. App. 429, 431-32, 436, 89 P.3d 291 (2004).

In *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980), this Court considered whether a corporate officer could be liable for tortiously interfering with a contract between his own corporation and the other party to the contract. The Court agreed with the Court of Appeals that the defendant's "status as a corporate officer did not shield him as a matter of law from liability for tortiously interfering with contractual relations between" the two corporations and employed a "good faith" test for the corporate officer's actions. *Id.* at 599.

BNI had no legal right or privilege to interfere with Dr. Tamosaitis' employment relationship with URS.

5. Element Five: Dr. Tamosaitis Established a Genuine Issue of Material Fact with Regard to the Resulting Damage

The fifth element is, "resultant damages." *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992). In *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 145, 566 P.2d 972 (1977), the court found that "mental anguish, discomfort, inconvenience, injury to reputation or humiliation are available in appropriate causes of tortious interference with a business relationship." *See also Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977) ("Damages based upon discomfort and inconvenience are also available" for intentional torts), *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 768, 953 P.2d 796 (1998) (emotional harm damages available in claim for tortious interference), *Calbom v. Knudtzon*, 65 Wn.2d 157, 167, 396 P.2d 148 (1964), 16A Wash. Prac. Series § 22.6, Interference with contractual relations—Resultant damage (2009).

Dr. Tamosaitis submitted compelling evidence supporting his claim for significant emotional harm damages proximately caused by the actions of the defendants. CP 2393, 2412-13, 2461-74.

In relevant part, the Restatement (Second) of Torts §774A (1979) identifies the following damages available:

> (1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for
> (a) the pecuniary loss of the benefits of the contract or the prospective relation;
> (b) consequential losses for which the interference is a legal cause; and
> (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.

At summary judgment, BNI argued that 1) Dr. Tamosaitis has no resulting damages because he is still employed by URS; 2) that Dr. Tamosaitis' emotional harm damages and damage to his reputation are not "pecuniary" damages; and 3) that there is a "threshold economic damage showing" required to prove a claim for tortious interference. RP 20.

Dr. Tamosaitis produced evidence of his pecuniary damages. CP 2505-12, 2521-68. All of this evidence should be considered on appeal.[10]

In *Newton Ins. Agency v. Caledonian Ins. Group*, 114 Wn. App. 151, 157-58, 52 P.3d 30 (2002), citing the Restatement (Second) of Torts §766B cmt. c (1979), the court stated that "[a] valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value." The "pecuniary value" language goes to whether or not the plaintiff had a "valid business expectancy." There is no threshold

---

[10] *Bremmeyer v. Peter Kiewit Sons Co.*, 90 Wn.2d 787, 789-90, 585 P.2d 1174 (1978) (plaintiff's claims were dismissed on summary judgment and plaintiff thereafter submitted additional evidence with his motion to reconsider, which was considered by the appellate court).

economic damage requirement in the resulting damage element of a tortious interference claim. However, even if there were such a requirement, Washington courts have determined that damage to reputation is a "pecuniary" loss.

In *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 321-22, 858 P.2d 1054 (1993) the Washington Supreme Court clarified that pecuniary damages include damage to reputation: "A physician may thus be able to recover pecuniary damages (damages to reputation)." *Fisons* cites to *Oksenholt v. Lederle Laboratories*, 294 Ore. 213, 223, 656 P.2d 293 (1982), where the Oregon Supreme Court stated that "[a]s a general matter, plaintiff may recover damages to his reputation due to another's intentional tort." In another Washington Supreme Court case, *Taskett v. King Broad. Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976), the Court stated that "pecuniary loss recoverable includes losses sustained by 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'" *Id.* at 480 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)). *In re Fleege*, 91 Wn.2d 324, 326, 588 P.2d 1136 (1979), found that a dentist who had practiced for a number of years and established a good reputation had created goodwill, which had "real pecuniary value."

In *Seidell v. Taylor*, 86 Wash. 645, 151 P. 41 (1915), the Washington Supreme Court affirmed a judgment for loss of goodwill without any "tangible damages" in a tortious interference case and stated:

> The nature of the case is such as the wrongdoer has chosen to make it; and, upon every consideration of justice, he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case and the difficulty of accurately estimating the results of his own wrongful act. We think that the case does not call for further discussion.

Seidell was cited in Dr. Tamosaitis' response to summary judgment and discussed in *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 602-03, 564 P.2d 1137 (1977), also cited. Like the physician in *Fisons* and the dentist in *In re Fleege*, Dr. Tamosaitis' reputation had "real pecuniary value."

In his summary judgment declaration, Dr. Tamosaitis declared:

> My reputation in the community and my reputation in the industry have been severely damaged by BNI's improper intentional interference with my position with URS. I have lost friends and my family's social involvement in the community has been impacted. I have suffered loss of enjoyment of life, pain and suffering, mental anguish, emotional distress, injury to reputation, humiliation, lost income, and lost professional opportunities for the remainder of my work life.
>
> Prior to my removal from the WTP, I had program responsibility for approximately $500 million in funding and, at times, had 15-50 direct reports. I currently have no program responsibility and no direct reports. Unlike my previous position with the WTP, I now attend no regular

> meetings, have no interaction with consultants, I do not know who my supervisor is, or who approves my time sheet.

CP 2413. It is obvious that his career is damaged, but the specific pecuniary loss is unknown because so long as the litigation continues, one can reasonably conclude that URS will continue paying his salary. The Restatement addresses this issue. "Sometimes, when the court is convinced that damages have been incurred but the amount cannot be proved with reasonable certainty, it awards nominal damages." Restatement (Second) of Torts §774A cmt. c (1979). It may be that nominal pecuniary damages are awarded on the date of trial, but there can be no doubt, especially at summary judgment, that Dr. Tamosaitis has submitted evidence of pecuniary loss related to his damaged career and reputation—both of which have pecuniary value.

In *Sunland Invest. v. Graham*, 54 Wn. App. 361, 364, 773 P.2d 873 (1989), the court noted that there is no duty to mitigate damages in an intentional tort such as tortious interference and found that the trial court had erred in requiring the plaintiff to mitigate damages. The court also found error in the trial court's award of only nominal damages and stated that the plaintiffs were entitled "to recover all losses proximately caused by the wrongful conduct of the" defendants. *Id.*

In addition to damage to Dr. Tamosaitis' professional reputation in the industry and community, he was escorted off the property without being allowed to retrieve his personal effects from his office at the WTP and thus has been deprived of his personal property, which is a pecuniary loss. CP 2409. Dr. Tamosaitis has since received some, but not all of his personal belongings, including books, notes related to courses he has attended, and textbooks, which he estimates to be valued at approximately $2,000 or more. CP 2545. There is no minimal damage amount requirement in a tortious interference claim and Dr. Tamosaitis' property loss constitutes a recoverable resulting damage.

Thus, assuming that "pecuniary" damages are required when a defendant actively seeks to avoid liability by orchestrating the work environment to limit an employee's income loss, but causes significant emotional harm to that employee, it is clear that Dr. Tamosaitis has proven sufficient pecuniary loss to proceed to trial.

Dr. Tamosaitis has raised a genuine issue of material fact as to whether he suffered "resulting damages" after being removed from the WTP, which caused significant damage to his reputation in the community and in the industry, and after spending the last two years without any meaningful work, which will impact his ability to find meaningful work in the future.

V. ATTORNEY FEES AND COSTS

Recognizing that the case will have to be tried assuming remand, appellant respectfully requests that attorney fees for this appeal be awarded at that time, and that costs of this appeal be awarded in accordance with the Rules of Appeal.

VI. CONCLUSION

Dr. Tamosaitis respectfully requests that this Court resolve the conflict in authorities and find that at-will employees can have a business expectancy in continued employment without improper interference from third parties. Additionally, Dr. Tamosaitis asks the Court to find that the trial court erred in dismissing the case at summary judgment because Dr. Tamosaitis is able to raise a genuine issue of material fact with respect to each element of his claim.

Respectfully submitted this 15th day of June, 2012.

THE SHERIDAN LAW FIRM, P.S.

By: s/John P. Sheridan

John P. Sheridan, WSBA # 21473
Attorneys for Appellants
Sheridan Law Firm, P.S.
705 2nd Avenue, Suite 1200
Seattle, WA 98104
(206) 381-5949
jack@sheridanlawfirm.com

DECLARATION OF SERVICE

Laura Mohler states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On June 15, 2012, I caused to be delivered via email addressed to:

Kevin C. Baumgardner
CORR CRONIN MICHELSON BAUMGARDNER & PREECE LLP
1001 Fourth Avenue #3900
Seattle, WA 98154
kbaumgardner@corrcronin.com

Howard M. Goodfriend
Smith Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101
howard@washingtonappeals.com

a copy of BRIEF OF APPELLANTS.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of June, 2012 at Seattle, King County, Washington.

Laura Mohler
Legal Assistant

Appendix 1

WALTER L. TAMOSAITIS, PHD, an individual, and SANDRA B. TAMOSAITIS, representing the marital community, Plaintiffs, vs. URS, INC., a Delaware Corporation; URS ENERGY & CONSTRUCTION, INC., an Ohio Corporation, and the DEPARTMENT OF ENERGY, Defendants.

No. CV-11-5157-LRS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

2012 U.S. Dist. LEXIS 73305

May 24, 2012, Decided
May 24, 2012, Filed

SUBSEQUENT HISTORY: Summary judgment granted by *Tamosaitis v. URS Corp., 2012 U.S. Dist. LEXIS 76432 (E.D. Wash., June 1, 2012)*

PRIOR HISTORY: *Tamosaitis v. Bechtel Nat'l, Inc., 2011 U.S. Dist. LEXIS 12294 (E.D. Wash., Jan. 31, 2011)*

COUNSEL: [*1] For Walter L Tamosaitis, Ph.D, an individual and the marital community, Sandra B Tamosaitis, representing the marital community, Plaintiffs: John P Sheridan, LEAD ATTORNEY, Sheridan & Baker PS, Seattle, WA.

For URS Inc, a Delaware Corporation, URS Energy and Construction Inc, an Ohio Corporation, Defendants: Matthew W Daley, Timothy Michael Lawlor, LEAD ATTORNEYS, Witherspoon Kelley Davenport & Toole - SPO, Spokane, WA; Matthew A Mensik, LEAD ATTORNEY, Witherspoon Kelley PS, Spokane, WA.

For Department of Energy, Defendant: Rolf H Tangvald, LEAD ATTORNEY, Pamela Jean DeRusha, U S Attorney's Office - SPO, Spokane, WA.

For URS Corporation, Defendant: Matthew A Mensik, LEAD ATTORNEY, Witherspoon Kelley PS, Spokane, WA; Matthew W Daley, Timothy Michael Lawlor, Witherspoon Kelley Davenport & Toole - SPO, Spokane, WA.

JUDGES: LONNY R. SUKO, United States District Judge.

OPINION BY: LONNY R. SUKO

OPINION

ORDER RE DOE'S MOTION TO DISMISS

BEFORE THE COURT is the Motion To Dismiss For Lack Of Subject Matter Jurisdiction And Failure To State A Claim (ECF No. 45) filed by Defendant United States Department of Energy (DOE). This motion was heard with oral argument on May 3, 2012. Rolf H. Tangvald, Esq., Assistant U.S. Attorney, [*2] argued for DOE. John P. Sheridan, Esq., argued for Plaintiffs.

Plaintiffs, Walter L. Tamosaitis, Ph.D., and his wife, Sandra, bring this action against the Defendants, URS Corporation, URS Energy & Construction, Inc., and DOE, asserting they violated the whistleblower protection provision of the Energy Reorganization Act (ERA), codified at *42 U.S.C. §5851*. Pursuant to *Fed. R.*

Civ. P. 12(b)(1), DOE asserts four grounds to dismiss it as a Defendant for lack of subject matter jurisdiction: 1) DOE is entitled to sovereign immunity and the Plaintiffs' First Amended Complaint (ECF No. 7) sets forth no basis on which DOE has consented to suit or waived immunity; 2) DOE is not Plaintiffs' employer under the ERA; 3) the court lacks jurisdiction to award the injunctive relief Plaintiffs have requested against DOE; and 4) Plaintiffs have failed to exhaust administrative remedies. DOE asserts that *Fed. R. Civ. P. 12(b)(6)* dismissal for failure to state a claim is also warranted because DOE is not Plaintiffs' employer under the ERA and the court is not statutorily authorized to award the injunctive relief requested by Plaintiffs.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

42 U.S.C. Section 5851(b)(4) [*3] provides:

> If the Secretary [of the Department of Labor (DOL)] has not issued a final decision within 1 year after the filing of a complaint . . . and there is no showing that such delay is due to the bad faith of the person seeking relief under this paragraph, such person may bring an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. [1]

1 When DOL issues a final decision, it is reviewable by the circuit court of appeal in which the violation allegedly occurred. *42 U.S.C. Section 5851(c).*

Plaintiffs did not wait the required one-year period after filing their administrative complaint against DOE to initiate the captioned action against DOE. Dr. Tamosaitis filed his administrative complaint with DOL on July 30, 2010, but on December 15, 2010, he file an amended administrative complaint adding DOE as a respondent. On October 14, 2011, at his request, Dr. Tamosaitis' administrative complaint was dismissed by DOL. [2] On November 9, 2011, Plaintiffs commenced the action before this court. [3] As against DOE, the administrative complaint had not been pending [*4] a full year before it was dismissed and Plaintiffs proceeded with suit in this court. Plaintiffs did not allow DOL a full year to act on the administrative complaint as against DOE.

2 Plaintiffs object that this information is derived from material which is extraneous to the pleadings. *Rule 12(d)* states that if, on a motion under *Rule 12(b)(6)* or *12(c)*, matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment and all parties must be given a reasonable opportunity to present all of the material pertinent to the motion. DOE's motion to dismiss for failure to exhaust administrative remedies is brought under *12(b)(1)* for lack of subject matter jurisdiction. On a *12(b)(1)* motion, the court can consider extraneous material, particularly when its authenticity is not questioned. *Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1141 n. 5 (9th Cir. 2003).* Plaintiffs do not dispute that the administrative complaint was dismissed on October 14, 2011.

3 The original complaint was filed November 9, 2011 and the First Amended Complaint was filed December 20, 2011.

Plaintiffs contend that since the original administrative complaint [*5] was filed on July 30, 2010, against parties other than DOE, they waited over one year to commence their action in this court on November 9, 2011. Therefore, Plaintiffs assert the action in this court was properly commenced pursuant to the plain language of *42 U.S.C. Section 5851(b)(4)*. Plaintiffs have not cited any authority for the proposition that a new party to an administrative complaint can be added at any time and then the jurisdiction of the district court can be sought without giving DOL the opportunity to investigate and review the complaint, in particular the allegations against the newly added party. At oral argument, Plaintiffs represented that they did not have a basis for including DOE as a respondent in the original administrative complaint filed July 30, 2010, until after discovery had been conducted in the state court litigation commenced by Plaintiffs against Bechtel National, Inc. (BNI), and other individual defendants. *Tamosaitis v. Bechtel National, Inc., et al.*, Benton County Superior Court Cause No. 10-2-02357-4. DOL was entitled to an adequate opportunity to investigate the particular and unique allegations against DOE to determine if it had any liability under [*6] the ERA. By statute, DOL had at

least a year from the date DOE was added as respondent to look into those allegations against DOE. *42 U.S.C. § 5851(b)(4)* says "1 year after the filing of the complaint," not "1 year after filing of the *original* complaint." (Emphasis added).

The court agrees with DOE that holding DOL to a one year period to conduct an investigation and make a final determination, notwithstanding subsequent addition of new parties to the administrative complaint would conflict with congressional intent to allow DOL to use its specialized knowledge and expertise to investigate and make determinations; would destroy the goal of Congress to have uniformity in the decision-making process; and would encourage forum shopping by allowing plaintiffs to selectively avoid the administrative scheme established by Congress.

Dismissal of DOE from the captioned action for lack of subject matter jurisdiction is warranted for failure to exhaust administrative remedies against DOE. It is unclear whether Dr. Tamosaitis could now re-file an administrative complaint against DOE or whether he would be procedurally barred from doing so. In particular, the court notes that an administrative complaint [*7] must be filed within 180 days after an alleged violation occurs. *42 U.S.C. Section 5851(b)(1)*.

EMPLOYER-EMPLOYEE RELATIONSHIP

The ERA protects an "employee" from being discriminated against by his or her "employer" for engaging in whistleblowing activities. The terms "employer" and "employee" are not defined by the ERA. The ERA provides a list of specific entities, including DOE, who potentially qualify as "employers" under the ERA, *42 U.S.C. § 5851(a)(2)*, but it does not offer a general definition of "employer."

Plaintiffs' First Amended Complaint alleges "Dr. Tamosaitis is an employee of URS, and for the purposes of this claim, he is also an employee of the DOE under *Stephenson v. National Aeronautics and Space Admin.*, ALJ No. 94-TSC-5, ARB No. 98-025 (ARB July 18, 2000)." (See Paragraph 1.7 of First Amended Complaint). *Stephenson* is a decision by DOL's Administrative Review Board (ARB). *Stephenson* involved the whistle blowing provisions of the federal Clean Air Act (CAA). In its July 18, 2000 decision, the ARB noted that twice already it had "ruled that an employer who is **not an employee's common law employer** may nevertheless be held liable for retaliation under the CAA employee protection [*8] provision" and therefore, that the law of the case doctrine prohibited the ALJ from ruling to the contrary. (Emphasis added). In its February 13, 1997 decision remanding the matter to the ALJ, the ARB held it was clear Stephenson was not an employee in the common law sense of the term, but that the relevant question was "whether [Stephenson] is protected under the CAA against retaliation by an entity which, albeit not her direct or immediate employer, is nonetheless a covered employer." 1997 WL 65773 at *2, ALJ No. 94-TSC-5, ARB No. 96-080. According to the ARB in its 2000 decision:

> Here, the ALJ neither acknowledged the principles of the Board articulated on the employer/employee issue in this case, nor did he conform his proceedings to them. In this case, it has been undisputed from the outset that Stephenson was a common law employee of Martin Marietta, which was, in turn, a contractor for NASA. However, we held that the reach of the CAA employee protection provision may, depending on the specific facts of the case, encompass an employee who is not a common law employee of the respondent employer. The ALJ's failure to look beyond the common law definition of employee in evaluating [*9] the evidence in this case was contrary to our specific holding.
>
> As we discuss in the following section of this decision, Stephenson failed to prove that she engaged in activity which was protected by the CAA whistleblower provision. Therefore, we need not determine whether NASA's substantial involvement in Stephenson's work environment (e.g., its bar on her working in, or even entering the Space Center complex, and NASA's action prohibiting Stephenson from talking with her NASA counterparts) rose to a sufficiently intense level of involvement and interference in Stephenson's employment that NASA might be held to come within the ambit of the CAA's whistleblower protection provision.

ARB No. 98-025, slip op. at *13.

What the ARB found in *Stephenson* was that it was possible, at least under the CAA whistleblower provision, that even if an individual did not qualify as a common law employee of an entity under the U.S. Supreme Court's criteria set forth in *Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 112 S.Ct. 1344, 117 L. Ed. 2d 581 (1992)*, he or she might still qualify as an employee of that entity if its involvement and interference in the employment rose to a sufficiently intense level. In its February1997 [*10] decision, the DOL ARB held: "[I]n a hierarchical employment context, an employer that acts in the capacity of an employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that the employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment." 1997 WL 65773 at *2.

Stephenson, a twelve year old DOL ARB decision, is simply too slender a reed upon which this court is willing to declare the existence of a general rule that it is possible for a government contracting agency to be deemed an "employer ," even though it does not directly compensate or immediately supervise the employee and would not qualify as an "employer" under the common law factors set forth in *Darden*. No court has so declared under the ERA, let alone the CAA which was at issue in *Stephenson*. A rule that a "sufficiently intense level of involvement and interference" [*11] could qualify a government contracting agency as an "employer" under the ERA would effectively read out any limitation on the meaning of "employer," contrary to the Supreme Court's ruling in *Darden*. In any event, as discussed below, DOE's alleged involvement in Dr. Tamosaitis' employment was not remotely as intense as that alleged in *Stephenson*.

There is no question under the *Darden* common law factors that Dr. Tamosaitis is an employee of URS Energy & Construction, Inc. (URS E & C), in that a master-servant relationship exists between them. URS E & C is a subcontractor of Bechtel National, Inc. (BNI) which is a general contractor of DOE with regard to construction of the Waste Treatment Project (WTP) at the Hanford Nuclear Reservation. DOE has not contracted with URS E & C. DOE is not a "contracting agency" with URS E & C like NASA was with Martin Marietta in *Stephenson*.

Plaintiffs allege that DOE Federal Project Director for the WTP, Dale Knutson, conspired with BNI manager Frank Russo to remove Dr. Tamosaitis from the WTP, citing to an e-mail which Knutson sent to Russo telling Russo to "[p]lease use this message to accelerate staffing changes or to 'color' your conversations with [*12] Scott Ogilvie [BNI's president]." Plaintiffs also cite to notes taken by URS Human Resources Manager Cari Krumm stating that:

> [Russo] said that Dale [Knutson] said that Walt could go blow the whistle. We will not pay for him on this project. If he works, it will be unallowable costs. The Federal Director [Knutson] was not going to respond to threats of whistle blowing.

Based on these two sources of information, the First Amended Complaint alleges "Knutson was directly involved in the decision to terminate Dr. Tamosaitis from the WTP" and "also participated in the decision that Dr. Tamosaitis not be returned to the WTP after hearing that Dr. Tamosaitis was a whistleblower." (Paragraphs 2.60 and 2.156 of First Amended Complaint).

Knutson's single cryptic comment to BNI is contrasted with the circumstances in *Stephenson* where the NASA division chief directly and unequivocally informed Martin Marietta officials she did not want Stephenson handling any flight hardware and decided that Stephenson should not be allowed to work on, or even be near, NASA space hardware. Subsequently, the NASA division chief took things a step further and advised Martin Marietta officials that she did not want [*13] Stephenson "in the clean room, in any part of the Space Center, or talking about work to NASA Life Sciences personnel."

Dr. Tamosaitis does not qualify as an "employee" under *Darden's* common law test. DOE did not hire Dr. Tamosaitis and there was and is no contractual relationship between Dr. Tamosaitis and DOE. According to *Darden*:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant the inquiry are the skills required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; the tax treatment of the hired party.

503 U.S. at 323-24. Plaintiffs do not single [*14] out any of these specific factors in arguing that Dr. Tamosaitis is an employee of DOE, instead contending it is necessary to look at the "economic realities" of the situation. There is, however, "no functional difference" between the "economic realities" test and the *Darden* common law analysis. *Murray v. Principal Fin. Group, Inc., 613 F.3d 943, 945 (9th Cir. 2010)*. The common law test is also known as an "economic realities" test, *Simpson v. Ernst & Young, 100 F.3d 436, 439 (6th Cir. 1996)*, and *Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980)*.

According to Plaintiffs:

> This court must look at the "economic realities" of the situation. DOE is the contracting agency that owns and operates the WTP. DOE Federal Director Knutson's directive to Bechtel to "accelerate staffing changes" to remove Dr. Tamosaitis from the WTP and his statement "[w]e will not pay for [Dr. Tamosaitis] on this project" are evidence of DOE's control over the project and the economic realities that DOE could refuse to fund certain individuals like Dr. Tamosaitis.

It is necessary to read quite a bit into Knutson's e-mail to describe it as a "directive" to specifically remove Dr. Tamosaitis from [*15] the WTP. Furthermore, Knutson's purported statement that "we will not pay for [Dr. Tamosaitis] on this project" is derived from hearsay upon hearsay (notes by the URS Resources manager about what Russo of BNI stated about what Knutson stated). While Knutson's e-mail and Russo's purported statement may be factually sufficient to state a common law interference with contract claim, they are insufficient to state a claim under the ERA in that they do not establish that DOE controlled the manner and means of Dr. Tamosaitis's work for URS E & C such that DOE could also be deemed an "employer" of Dr. Tamosaitis under the *Darden* test. [4] As DOE notes, an interference with contract claim is not legally cognizable against it under the Federal Tort Claims Act (FTCA), *28 U.S.C. Section 2680(h)*.

> 4 Two or more entities may function as a joint employer for purposes of liability for violations of the federal employment laws. Each entity must qualify as an employer under the *Darden* test (i.e., power to hire and fire the employees; supervise and control employee work schedules or conditions of employment; determine the rate and method of payment; and maintain employment records). *Allen v. CH2M-WG, Idaho, LLC, 2009 U.S. Dist. LEXIS 49201, 2009 WL 1658018 (D. Idaho 2009)*(citing [*16] various court and administrative decisions).

Plaintiffs' reliance on *Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011)*, is unavailing because it analyzed whether a plaintiff who "was not a municipal court employee," should be treated "as a public employee for purposes of determining whether he has alleged a viable *First Amendment* retaliation claim." This is not the same analysis as whether an individual is in fact an "employee" of a particular entity under a federal statute. In *Clairmont*, the court did not apply the *Darden* common law test for ascertaining whether an individual was in fact an "employee" of a particular entity. That was not the relevant inquiry. All the court needed to determine was whether the individual plaintiff's relationship to the municipal court "was **analogous** to that of an employer and employee." (Emphasis added). It answered this inquiry affirmatively and concluded the plaintiff should be treated as if he were a public employee.

REQUESTED RELIEF

The relief available for violation of *42 U.S.C. Section 5851* includes ordering reinstatement of the complainant to his former position together with compensation (including back pay), terms, conditions, and [*17] privileges of his employment, ordering payment of compensatory damages, and taking affirmative action to abate the violation. *42 U.S.C. Section 5851(b)(2)(B)*.

Plaintiffs claim the relief they seek from DOE is intended to "abate" the violation. The authority cited by Plaintiffs, however, clearly recognizes this relief is limited to the particular individual involved and the particular misconduct involved. The injunctive relief requested by Plaintiffs in their First Amended Complaint (Paragraphs 4.8 through 4.11) goes far beyond remedying the alleged retaliation against Dr. Tamosaitis. The court does not have jurisdiction to grant this type of relief. Plaintiffs do not request that DOE reinstate Dr. Tamosaitis to a "leadership position at the WTP," nor do they request compensatory damages be paid by DOE. (Paragraphs 4.1 through 4.7 of First Amended Complaint). Compensatory damages are sought specifically as against Defendant "URS," further proof that DOE was not and is not the "employer" of Dr. Tamosaitis under the *Darden* test.

CONCLUSION

DOE's Motion To Dismiss For Lack Of Subject Matter Jurisdiction And Failure To State A Claim (ECF No. 45) is **GRANTED**. Plaintiffs have failed to exhaust [*18] their administrative remedies and therefore, the court is without subject matter jurisdiction to consider their claim against DOE under the ERA. Because DOE was not and is not Plaintiffs' "employer," and Plaintiffs have failed to allege such in their First Amended Complaint, the court does not have subject matter jurisdiction to consider their claim against DOE under the ERA and the First Amended Complaint fails to state a claim against DOE under the ERA which can be granted. Finally, the court does not have subject matter jurisdiction or statutory authority under the ERA to grant the relief requested in the First Amended Complaint against DOE. For all of these reasons, DOE is **DISMISSED** as a Defendant from the captioned action pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)*. The dismissal is **with prejudice** because it is not apparent Plaintiffs could now exhaust administrative remedies as to DOE and, moreover, Plaintiffs could not amend their First Amended Complaint to allege additional facts stating a claim against DOE as the "employer" of Dr. Tamosaitis and seeking relief consistent therewith. [5]

5 The court need not consider whether *12(b)(6)* dismissal is warranted on the asserted [*19] basis that Plaintiffs fail to allege they engaged in conduct protected by the ERA.

IT IS SO ORDERED. The District Executive shall forward copies this order to counsel of record.

DATED this 24th of May, 2012.

/s/ Lonny R. Suko

LONNY R. SUKO

United States District Judge

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, June 15, 2012 2:39 PM
To: 'Beth Touschner'
Cc: 'Jack Sheridan'; 'May Ashalee'; 'Mohler Laura'
Subject: RE: Tamosaitis v. Bechtel National, Inc., et al, Case No. 87269-4

Received 6/15/12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Beth Touschner [mailto:beth@sheridanlawfirm.com]
Sent: Friday, June 15, 2012 2:37 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Jack Sheridan'; 'May Ashalee'; 'Mohler Laura'
Subject: Tamosaitis v. Bechtel National, Inc., et al, Case No. 87269-4

Please find attached the Brief of Appellants in Case No. 87269-4, Tamosaitis v. Bechtel National, Inc., et al. This brief is filed by:

John P. Sheridan
WSBA # 21473
jack@sheridanlawfirm.com
206-381-5949

Beth Touschner
Associate Attorney
Sheridan Law Firm, P.S.
705 Second Ave., Suite 1200
Seattle, Washington 98104
Tel.: (206) 381-5949
Fax: (206) 447-9206