



## Environmental Whistleblower Statute

The Louisiana Environmental Whistleblower Statute, La. R.S. 30:2027, provides protection from retribution (via treble damages) for *employees* acting in *good faith* who disclose or threaten to disclose a violation of any environmental law, rule or regulation. Two recent decisions have helped clarify the proper interpretation of this statute.

*Collins v. State*, 16-1195 (La. App. 1 Cir. 4/28/17), 220 So.3d 92.

*Collins* arises out of a dispute between landman Dan Collins and the Louisiana Department of Natural Resources (DNR). Collins provided consulting services for land, title and environmental research for DNR's Atchafalaya Basin Program from 1997 to 2010. Beginning in 2007, Collins noticed and reported what he perceived to be violations of environmental laws, particularly his belief that the underlying purpose for two water-quality projects was actually to benefit the oil-and-gas-exploration opportunities for adjacent landowners. Collins' contract with DNR expired in 2009 and was not renewed in 2010, which precipitated the filing of this

suit under, *inter alia*, La. R.S. 30:2027. The case eventually proceeded to a jury trial in the 19th Judicial District Court, where a jury found against DNR and awarded Collins \$750,000 in damages.

On appeal, DNR argued that the jury erred in finding an employee relationship. Although he alleged that he was in fact an employee under § 2027, allowing the case to reach trial, Collins stated that he and his company were “employed as the *consulting* landman contractor” for DNR and they “provided *consulting* services for land-related research” (emphasis added). Although the whistleblower statute does not define the term *employee* and no cases directly define the term in this context, the 1st Circuit concluded that Collins had “conceded that their claims arise out of a contractual relationship. Thus, they cannot pursue an action under La. R.S. 30:2027, as it is a statute that is intended to protect employees . . . .” *Collins*, 220 So.3d at 96.

Although Collins’ claim to an employee relationship under La. R.S.

30:2027 was probably a longshot, this case is relevant from a jurisprudential standpoint because the 1st Circuit conducted a meticulous analysis of how courts should distinguish between employees and independent contractors for the purposes of the environmental whistleblower statute. To that point, the court explicitly tied the interpretation of § 2027 to its previous decision in *O’Bannon v. Moriah Technologies, Inc.*, 15-1460 (La. App. 1 Cir. 6/3/16), 196 So.3d 127, which outlines a totality of the circumstances test to determine whether a person is an employee or a contractor. The relevant factors include: (1) whether a valid contract existed; (2) whether the work was independent in nature such that the contractor could employ non-exclusive means; (3) whether the contract calls for contractor to use its own methods without being subject to control and direction; (4) whether there was a specific price for the overall project; and (5) whether there was a specific timeline not subject to termination at will. More generally and in conjunction

with these factors, the court reiterated that the principal factor is the degree of control over the work reserved by the employer.

Therefore, at least for cases in the 1st Circuit, the law is now clear on how courts should interpret the term “employee” in the Louisiana Environmental Whistleblower Statute.

*Borcik v. Crosby Tugs, L.L.C.*, 16-1372 (La. 5/3/17), \_\_\_ So.3d \_\_\_, 2017 WL 1716226.

Siding with a terminated employee and the Louisiana Department of Environmental Quality (LDEQ), the Louisiana Supreme Court recently clarified the meaning of the phrase “good faith” in the context of the Louisiana Environmental Whistleblower Statute. The court found that in order for an employee to be entitled to protection under the statute, he or she must only have reported the employer under an honest belief that an environmental violation occurred, and it is irrelevant whether the employee also possessed malice against

the employer.

At trial in the Eastern District of Louisiana, the core dispute was whether the plaintiff, a terminated tugboat crew member, acted in “good faith” when reporting what he believed to be environmental harm. The disagreement over the meaning of good faith played out in the submission of two different versions of proposed jury instructions. The employer proposed that good faith “means that plaintiff had no intent to seek an unfair advantage or harm another party in making his report of an environmental violation.” The employee instead proposed that good faith be defined as “the plaintiff had an honest belief that an environmental violation occurred.” The district court created its own hybrid of the two proposals and instructed the jury that good faith “means that the plaintiff had an honest belief that an environmental violation occurred and that he did not report it either to seek an unfair advantage or to try to harm his employer or another employee.” Because the question turned entirely on Louisiana state law, the U.S. 5th Circuit certified the question to the Louisiana Supreme Court.

The Court noted that the Environmental Quality Act (which contains § 2027) is rooted in the Public Trust Doctrine, La. Const. Art. IX, § 1; thus, the whistleblower protection must be interpreted consistently with that context. As such, the Court adopted a broad definition of good faith — that “an employee is acting with an honest belief that a violation of an environmental law, rule, or regulation occurred.” On June 1, 2017, the U.S. 5th Circuit accepted the Louisiana Supreme Court’s definition and remanded the case for further proceedings. *Borcik v. Crosby Tugs, L.L.C.*, 858 F.3d 936 (5 Cir. 2017).

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