

CLIENT ALERT

Court Scuttles Employer Attempts To Avoid Affirmative Action Plan Reporting Requirements

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The Fourth Circuit handed a big win to the Department of Labor (DOL) earlier this month, in a dispute over the scope of the affirmative action plan (AAP) reporting requirements enforced by DOL's Office of Federal Contract Compliance Programs (OFCCP). *Trinity Indus., Inc. v. Herman*, 1999 U.S. App. LEXIS 6919 (4th Cir., April 12, 1999). *Trinity* is the first reported case in which a court has directly held that a facility, ultimately owned by a company that holds some government contracts, is required to comply with AAP requirements, where that facility performs no work on government contracts.

In *Trinity*, the employer refused to comply with a request made by OFCCP for a compliance review at a manufacturing facility in Asheville, North Carolina. The Asheville facility performed no work on any of the government contracts held by Trinity. Trinity argued the Asheville facility was autonomous from its other operations and therefore not subject to the AAP requirements of Executive Order 11246, the Rehabilitation Act, and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA).

When Trinity refused to allow OFCCP to conduct an on-site audit at the Asheville facility, OFCCP filed an administrative complaint against the employer. Following litigation on a stipulated record before an ALJ, both the ALJ and DOL's Administrative Review Board concluded that Trinity had no legal basis for refusing to comply with the AAP requirements. On appeal, the Fourth Circuit reached the same conclusion, holding that Trinity was required to comply with the AAP requirements at the Asheville facility in the absence of obtaining a waiver from DOL. According to the Fourth Circuit: "[T]he waiver provisions make it plain that, in absence of an express waiver or exemption, even facilities of a contractor that are not involved in work related to a government contract are subject to the reporting requirements." *Trinity*, at *7.

The court's opinion turns on its reading of the waiver provisions. The pertinent regulations provide that a contractor's facility is eligible for a waiver if it is "in all respects separate and distinct from the activities of the . . . contractor. . . related to the performance of the contract," and the waiver will "not interfere with or impede the effectuation" of the Executive Order or parallel statute. Waiver authority is discretionary with the Secretary of Labor.

Trinity's failure to properly apply for a waiver from the agency sealed its fate. Judge Motz was clearly troubled by Trinity's unilateral assertion that the Asheville facility was automatically not subject to OFCCP jurisdiction, particularly because this was not Trinity's first battle with the OFCCP on the jurisdiction issue. In a 1994 decision, the Eighth Circuit held that Trinity failed to exhaust its administrative remedies before challenging the agency's preliminary denial of a waiver for its West Memphis, Arkansas facility. *Trinity Indus., Inc. v. Reich*, 33 F.3d 942 (8th Cir. 1994).

In what may be the most significant part of its opinion, the court discussed the merits of Trinity's jurisdictional argument. Trinity had relied heavily on *Armstrong Cork*, a 1972 decision issued by the Comptroller General in connection with a bid protest. That opinion cites the traditional labor law single employer test to determine whether a facility owned by a contractor, which performs no work on any of government contracts, is nonetheless subject to OFCCP's AAP reporting requirements. In practice, the most significant of these factors is whether the contractor (usually the parent corporation of a separately-incorporated and independently-managed subsidiary in an unrelated industry) exercises actual, as opposed to potential, control over the day to

day operations of the facility, including actual control of labor and employee relations. OFCCP enforcement policy for many years has taken account of this articulation of the limits on its jurisdiction. In *Trinity*, the court observed that *Armstrong Cork* may be neither "controlling or persuasive," because the Comptroller General is no longer involved in the waiver process. The court went on to observe that, under the stipulated facts in the case, the Asheville facility would "plainly be covered by the reporting requirements even under the decision of the Comptroller General." *Trinity*, at *11. In this respect, the court concluded Trinity exercised actual, not just potential, control over the Asheville facility, including the exercise of control over the facility's hiring, promotion, and discharge decisions.

Trinity illustrates the difficulties facing an employer that may be interested in contesting what may be viewed as an overly-expansive assertion of jurisdiction by an aggressive OFCCP local office, with respect to an operation that has nothing to do with its government business. Experience with DOL suggests that such employers should take scant comfort in the seldom-utilized waiver procedure cited by the Fourth Circuit. Even if an employer had reason to believe a waiver would be granted, invocation of that procedure normally will not be a basis for OFCCP to suspend a pending on-site audit. The court's opinion also leaves unresolved the threshold issue of how the agency will apply the single employer standard in cases with stronger facts than those presented in *Trinity*.

Trinity is the second major win for DOL in the Fourth Circuit during the month of April. In *NationsBank Corp. v. Herman*, 1999 U.S. App. LEXIS 6093 (4th Cir., April 6, 1999) the court rejected the bank's constitutional law challenge to OFCCP's decision to initiate compliance reviews at additional bank offices in Florida and South Carolina, during the middle of an investigation of one of the bank's Charlotte North Carolina facilities. The bank claimed it had been unreasonably singled out for investigation by OFCCP, in violation of the Fourth Amendment, and that the agency either had no rational policy for the selection of targets for compliance reviews, or that it intentionally disregarded whatever selection policy may have in effect. The bank obtained a preliminary injunction against any additional administrative proceedings, pending resolution of the parties' cross-motion for summary judgment.

OFCCP successfully appealed the district court's order. The Fourth Circuit held that the bank must exhaust its administrative remedies before bringing suit against OFCCP. The court vacated the injunction and granted summary judgment to OFCCP.

A full discussion of the compliance review selection procedures challenged in *NationsBank* is the subject for another day. When read together, *Trinity* and *NationsBank* demonstrate that, at least in the Fourth Circuit, a government contractor interested in avoiding potentially burdensome OFCCP compliance reviews should expect little judicial sympathy.

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