Westlaw Journal
GOVERNMENT CONTRACT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 28, ISSUE 11 / SEPTEMBER 29, 2014

WHAT'S INSIDE

CRIMINAL LAW

California man gets 3 years for trying to sell military secrets

An ex-Air Force employee has been sentenced to more than three years in federal prison for attempting to pass off sensitive military satellite information to an individual posing as an agent of the Chinese government.

United States v. Orr, No. 2:13-cr-00872, defendant sentenced (C.D. Cal. Sept. 8, 2014).

Judge Beverly Reid O'Connell of the U.S. District Court for the Central District of California also ordered Brian Scott Orr to serve three years of supervised release and to pay a $10,000 fine. Orr, 42, of Marina Del Rey, Calif., pleaded guilty in March to one count of retention of stolen property, the Justice Department said in a statement.

According to a grand jury indictment and his plea agreement, Orr was a civilian employee at the U.S. Air Force Research Laboratory in Rome, N.Y., from 2009 to 2011. His duties included identifying and evaluating vulnerabilities in the Air Force's computer network used to control military satellites.

Orr was granted a top-secret security clearance, which allowed him to access sensitive government information. Prosecutors said he used the security clearance to obtain materials

for 31 training courses on how to operate most aspects of the computer network and related satellites.

The training materials are restricted for use only by certain federal employees and government contractors and clearly state they are the property of the U.S. government and that export is strictly forbidden under the Arms Export Control Act.

CONTINUED ON PAGE 16

COMMENTARY

Temporary impairments under the ADAAA and the impact on government contractors

R. Scott Oswald and Tom Harrington of The Employment Law Group discuss an appellate ruling that government contractors should consider when an employee approaches them about a condition that may constitute a disability.

SEE PAGE 3

41561704

Westlaw Journal Government Contract

Published since August 1989

Publisher: Mary Ellen Fox

Executive Editor: Donna M. Higgins

Managing Editor: Phyllis Lipka Skupien, Esq.

Editor: Catherine A. Tomasko, Esq.
Cath.Tomasko@thomsonreuters.com

Managing Desk Editor: Robert W. McSherry

Senior Desk Editor: Jennifer McCreary

Desk Editor: Sydney Pendleton

Graphic Designers: Nancy A. Dubin
Ramona Hunter

Westlaw Journal Government Contract
(ISSN 2155-0719) is published biweekly by Thomson Reuters.

Thomson Reuters
175 Strafford Avenue, Suite 140
Wayne, PA 19087
877-595-0449
Fax: 800-220-1640
www.westlaw.com
Customer service: 800-328-4880

For more information, or to subscribe, please call 800-328-9352 or visit west.thomson.com.

For the latest news from Westlaw Journals, visit our blog at http://blog.thomsonreuters.com/westlawjournals.

How to Find Documents on Westlaw
The Westlaw number of any opinion or trial filing is listed at the bottom of each article available. The numbers are configured like this: 2014 WL 000000. Sign in to Westlaw and on the "Welcome to Westlaw" page, type the Westlaw number into the box at the top left that says "Find this document by citation" and click on "Go."

Westlaw

TABLE OF CONTENTS

Temporary impairments under the ADAAA and the impact on government contractors

By R. Scott Oswald, Esq., and Tom Harrington, Esq.
The Employment Law Group

In January, in *Summers v. Altarum Institute Corp.*, 740 F.3d 325 (4th Cir. Jan. 23, 2014), a suit involving a government contractor and its employee, the 4th U.S. Circuit Court of Appeals ruled that a sufficiently severe temporary impairment may be a covered disability under the Americans with Disabilities Act. Central to the 4th Circuit's decision was the expanded definition of "disability" under the ADA Amendments Act of 2008, or ADAAA.

The *Summers* decision is significant for several reasons. First, the appellate court applied the ADAAA's definition of "disability" to hold that a temporary impairment can constitute a disability if it is sufficiently severe. Second, the decision highlights an employer's duty to view broadly the definition of "disability." And third, the decision suggests that an employer cannot bypass the interactive process simply because company policies (or, in the *Summers* case, the policies of the employer and the government) do not clearly allow a certain accommodation. The "interactive process" is the way in which a disabled employee and the employer discuss and determine how the employee's disability may be reasonably accommodated. The parties must engage in the process in good faith and explore all reasonable options, although employers are not required to make accommodations that would impose an "undue hardship.

THE *SUMMERS* DECISION

The *Summers* decision is central to a discussion about temporary impairments under the ADA because it is the first case in which a court held that a temporary impairment may be covered under the statute. In *Summers*, the plaintiff, Carl Summers, fell while traveling to work Oct. 17, 2011. Altarum Institute employed Summers as an analyst, and he worked for one of the company's government clients.

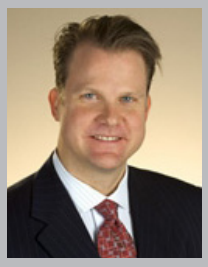
The *Summers* decision is central to a discussion about temporary impairments under the ADA because it is the first case in which a court held that a temporary impairment may be covered under the statute.

As a result of the fall, Summers fractured his left leg and tore the meniscus in his right leg. His injuries required multiple surgeries that included the insertion of metal plates and screws and the drilling of holes to refasten the tendons to his knee. Summers was unable to put weight on his left leg for six months, and doctors said he would not be able to walk normally for at least seven months.

During his hospitalization, Summers emailed an Altarum human resources representative about disability benefits and working from home while he recovered. The representative agreed to discuss "accommodations that would allow Summers to return to work" but suggested that Summers "take short-term disability and focus on getting well again," according to the court's opinion. Summers then emailed both his Altarum and government supervisors, saying that he planned to take short-term disability leave for a few weeks and then work part-time remotely, gradually increasing his hours until he was working full-time.

Altarum never spoke with Summers about his proposed plan to return to work. The company never told Summers that his proposed plan was unacceptable, and it never offered any alternative accommodation or engaged in the interactive process with him. On Nov. 30, 2011, Altarum notified Summers that his employment would terminate effective Dec. 1, 2011, so that another analyst could fill his position.

Summers filed a complaint in the U.S. District Court for the Eastern District of Virginia, alleging that Altarum fired him because of his disability and failed to offer him a reasonable accommodation. The court dismissed the complaint, reasoning that although Summers had suffered a serious injury, the ADA did not cover temporary injuries that were expected to heal within a year.



R. Scott Oswald (L) is managing principal of **The Employment Law Group** in Washington and past president of the Metropolitan Washington Employment Lawyers Association. He has been recognized as one of the Best Lawyers in America and is listed as a Top 100 Trial Lawyer by the National Trial Lawyers. He can be reached at soswald@employmentlawgroup.com. **Tom Harrington** (R) is a principal at The Employment Law Group, where he represents employees who have suffered workplace discrimination and retaliation. He was recently honored by Super Lawyers as a "Rising Star." He can be reached at: tharrington@employmentlawgroup.com.

The 4th Circuit reversed and remanded the court's decision, holding that Summers' allegations were sufficient to plead that he had a disability because "under the ADAAA and its implementing regulations, an impairment is not categorically excluded from being a disability simply because it is temporary."[1]

> The 4th Circuit recognized that Congress broadened the definition of "disability" by enacting the ADAAA.

Under the ADA, a "disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities," "a record of such an impairment," or "being regarded as having such an impairment."[2] Summers alleged that his injury substantially limited his ability to walk for at least seven months. The ADA lists walking as one of the "major life activities."

The 4th Circuit recognized that Congress broadened the definition of "disability" by enacting the ADAAA. Congress enacted the ADAAA to overturn decisions that had limited the ADA's scope. Specifically, Congress sought to overturn the U.S. Supreme Court's cramped definition of "disability" found in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[3] That definition suggested that a temporary impairment could not qualify as a disability.

The appellate court also noted that the ADAAA provides that the term "disability" "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by [its] terms."[4] And the court recognized that regulations of the Equal Employment Opportunity Commission state that the term "substantially limits" "shall be construed broadly in favor of expansive coverage" and that the term is "not meant to be a demanding standard."[5] The court found it particularly relevant that EEOC regulations expressly provide that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" for purposes of proving an actual disability.[6]

The court concluded by stating, "In holding that Summers' temporary injury could not constitute a disability as a matter of law, the district court erred not only in relying on pre-ADAAA cases but also in misapplying the ADA disability analysis."[7] The court pointed out that, "[i]f, as the EEOC has concluded, a person who cannot lift more than twenty pounds for 'several months' is sufficiently impaired to be disabled within the meaning of the amended act ... then surely a person whose broken legs and injured tendons render him completely immobile for more than seven months is also disabled."[8]

IMPLICATIONS OF *SUMMERS*

Now that the 4th Circuit has recognized that a temporary impairment may qualify as a disability, it is important to understand how this rule may affect employers. The *Summers* case is especially important for employers who are government contractors because the defendant in Altarum is such. Summers worked as a senior analyst at Altarum, and his government client was the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury, known as the DCoE. His job responsibilities included conducting statistical research, writing reports and making presentations. Altarum policy allowed employees to work remotely if the government client approved. The DCoE preferred contractors to work on-site during business hours but permitted employees to work remotely from home when putting in extra time on a project.

> The *Summers* case is especially important for employers who are government contractors.

Summers suggested to both his Altarum and government bosses that he work remotely on a part-time and then on a full-time basis until he fully recovered. Altarum did not believe that Summers' severe temporary injury qualified as a disability under the ADA and thus believed it had no duty to engage in the interactive process.

In addition to holding that a temporary impairment may qualify as a disability, Summers highlights the importance of engaging in the interactive process even if the employer is unsure whether an impairment qualifies as a disability. The District Court dismissed Summers' failure-to-accommodate claim, and Summers did not contest the dismissal. But the 4th Circuit noted in a footnote to its decision that "in dismissing Summers's failure-to-accommodate claim, the [lower] court suggested that Summers was not a 'qualified individual' because his requested accommodation — a temporary period of working remotely — was unreasonable."[9]

The 4th Circuit went on to state that "an employee's accommodation request, even an unreasonable one, typically triggers an employer's duty to engage in an 'interactive process' to arrive at a suitable accommodation collaboratively with the employee."[10] This emphasizes that an employer, even one who must answer to a government client, should engage in good faith in the interactive process. This is true even when the government client has a policy, such as that of the DCoE, that may limit an employee's ability to work remotely.

The government contractor employer is in a unique situation when it engages in the interactive process because it must ensure that its accommodation is approved by the United States. To satisfy the requirements of the ADA, the contractor employer is probably required to speak with the government client when engaging in the interactive process and ultimately fashioning a reasonable accommodation for the employee.

To overcome the requirement to find a reasonable accommodation, the employer must prove that an accommodation would cause an undue hardship.[11] It will probably be difficult for a government contractor employer to state that discussing reasonable accommodations with the United States constitutes an undue hardship. The ADA prohibits an employer from discriminating against "an individual with a disability" who with "reasonable accommodation" can perform a job's essential functions,[12] unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."[13] The undue hardship test is a case-by-case, fact-intensive analysis. It may be difficult, if not impossible, for an employer to argue persuasively that speaking with a government client about a reasonable accommodation constitutes an "undue hardship."

CONCLUSION

The *Summers* case touched on many important issues that an employer must consider when an employee reports that he or she has a condition that may constitute a disability. These are issues that were on the periphery of previous ADA discussions, but the 4th Circuit has made it clear that an employer may face legal consequences if it fails to consider them.

> In addition to holding that a temporary impairment may qualify as a disability, *Summers* highlights the importance of engaging in the interactive process even if the employer is unsure whether an impairment qualifies as a disability.

First, the ADAAA unquestionably expanded the scope of the term "disability." Congressional intent and EEOC policies previously made it clear that the ADAAA was meant to expand the scope of what is considered to be a disability, and now the courts have recognized this change. The expanded scope of "disability" is important for many reasons. An employer should not jump to the conclusion that an employee is not disabled simply because his or her condition is temporary. An employer is now on notice that impairments of limited duration may qualify as disabilities under the ADA.

Furthermore, courts may begin to consider certain conditions as being disabilities even though they were not considered as such in the past. As with Summers' injuries, a condition can be a disability even if its duration is less than six months. Given the expansive scope of the term, the central issue of future disability cases may not be whether the employee is disabled, but whether the employer properly engaged in the reasonable accommodation process.

Second, with both temporary and permanent disabilities, a reasonable accommodation may vary from what is traditionally considered to be a reasonable accommodation. It is important for an employer to remember the information tucked away in the *Summers* footnote: that an employee's accommodation request, even an unreasonable one, typically triggers an employer's duty to engage in an interactive process.

For example, working remotely was previously often not considered to be a realistic reasonable accommodation. EEOC guidelines indicate that under certain circumstances, providing employees with the option of working remotely is now required. "An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship."[14]

Finally, employers should approach discussions about disability with an open mind, especially considering the expansive scope of the ADAAA. The *Summers* decision confirms what the EEOC and Congress have already stated: the ADAAA increases the ability of employees with impairments, whether they be permanent or temporary, to qualify for the protections of the ADA.

In light of *Summers*, companies should ensure that their ADA policies and training are current. Policies regarding reasonable accommodation should be current and reflect the expansive scope of the ADAAA. Government contractors, in particular, should be prepared to engage in dialogue with their government client; it is likely that the employer and the government will need to work together in order for the contractor to faithfully engage in the interactive process. WJ

NOTES

[1] *Summers v. Altarum Inst. Corp.*, 740 F.3d 325, 333 (4th Cir. Jan. 23, 2014).

[2] 42 U.S.C. § 12102(1).

[3] 534 U.S. 184, 199 (2002).

[4] *Summers,* 740 F.3d at 329 (citing 42 U.S.C. § 12102(4)(A)).

[5] *Id.* (citing 29 C.F.R. § 1630.2(j)(1)(i) (2013)).

[6] *Id.* (citing 29 C.F.R. § 1630.2(j)(1)(ix)).

[7] *Id.* at 330.

[8] *Id.*

[9] *Id.* at 331 n.4.

[10] *Id.* at 331 (citing *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346–47 (4th Cir. 2013)).

[11] 42 U.S.C. §§ 12112(a) and (b); *US Airways v. Barnett,* 535 U.S. 391 (2002).

[12] *US Airways,* 535 U.S. 391 (citing 42 U.S.C. §§ 12112(a) and (b)).

[13] *Id.* (citing 42 U.S.C. § 1211(b)(5)(A)).

[14] U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html.

Whistleblower anti-retaliation provision does not apply outside the U.S.

By Jonathan Richman, Esq., Ralph Ferrara, Esq., Ann Ashton, Esq., and Tanya Dmitronow, Esq.
Proskauer

The 2nd U.S. Circuit Court of Appeals ruled Aug. 14 that the Dodd-Frank Act's prohibition on retaliation against whistleblowers does not apply extraterritorially. In affirming the dismissal of the case on extraterritoriality grounds, the court declined in *Liu v. Siemens AG,* No. 13–4385–cv, 2014 WL 3953672 (2d Cir. Aug. 14, 2014), to address another issue that has attracted attention: whether a person qualifies as a whistleblower for purposes of the anti-retaliation provision if he or she has disclosed the alleged misconduct only within the corporation, rather than to the Securities and Exchange Commission.

FACTUAL BACKGROUND

The plaintiff in the Liu case — a citizen and resident of Taiwan — had worked as a compliance officer for a division of a Chinese company that is a wholly owned subsidiary of a German corporation, Siemens AG, whose shares are listed on the New York Stock Exchange. The plaintiff claimed to have discovered improper payments to officials in North Korea and China. He reported the alleged conduct to his superiors, met with the German company's officials in China, and then was allegedly demoted and ultimately fired.

The plaintiff later reported the alleged conduct to the SEC, charging that the German company had violated the Foreign Corrupt Practices Act. He then sued in the U.S. District Court for the Southern District of New York, alleging that he had been fired because of his whistleblowing, in violation of the Dodd-Frank Act's anti-retaliation provision.

The court dismissed the case, holding that the alleged facts as pled involved only extraterritorial conduct, which was not within the statute's reach, and that the complaint failed to establish that the plaintiff had made a disclosure to the SEC that was "required or protected" by the enumerated statutes.

THE 2ND CIRCUIT'S DECISION

The 2nd Circuit affirmed the dismissal, reaching only the extraterritoriality issue. The court held that, to state a claim, the plaintiff needed to plead that either that the alleged conduct involved a *domestic* application of the anti-retaliation provision or that Congress intended the provision to apply extraterritorially. The plaintiff's claim failed on both grounds.

The court made short shrift of the first alternative:"This case is extraterritorial by any reasonable definition. ... The whistleblower, his employer, and the other entities involved in the alleged wrongdoing are all foreigners based abroad, and the whistle-blowing, the alleged corrupt activity, and the retaliation all occurred abroad."

> "The absence of any direct evidence of a congressional intent to apply the relevant provision extraterritorially" thus defeated the plaintiff's claim, the court wrote.

The fact that the German parent's shares are listed on the NYSE was irrelevant; the federal securities laws do not apply extraterritorially to a foreign company's foreign conduct merely because that company has issued U.S.-listed securities, the court said.

As for the second alternative, the court ruled that nothing in the Dodd-Frank Act's text or legislative history suggests that "Congress intended the anti-retaliation provision to regulate the relationships between foreign employers and their foreign employees working outside the United States."

The "presumption against extraterritoriality" and "the absence of any direct evidence of a congressional intent to apply the relevant provision extraterritorially" thus defeated the plaintiff's claim.



Jonathan Richman (L) is co-head of Proskauer's securities litigation group and represents clients in civil litigation matters, including securities litigation and investigations, shareholder derivative litigation, insurance sales practices suits, antitrust litigation, bankruptcy proceedings, product liability litigation, and employment and ERISA suits. **Ralph Ferrara** (C) has been named one of the leading lawyers in the U.S. in nine categories by *Best Lawyers,* a status shared by only 100 of the 50,000 lawyers globally recognized by the publication. Earlier in his career, he served as general counsel of the Securities and Exchange Commission. **Ann Ashton** (not pictured) is a securities litigation lawyer with a wide range of experience representing clients in complex litigation matters and parallel proceedings, including securities class actions and individual litigation, shareholder derivative litigation, criminal and civil enforcement proceedings before various federal and state entities, corporate internal investigations, ERISA class-action litigation, and market conduct class actions and individual litigation. **Tanya Dmitronow** (R) is a white-collar and securities litigation lawyer who focuses on criminal and civil enforcement proceedings and securities and corporate governance litigation. She has also represented clients in connection with both domestic and international regulatory investigations and in international commercial arbitrations.

Whistleblower program

Background: Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act provides that the commission shall pay awards to eligible whistleblowers who voluntarily provide the SEC with original information that leads to a successful enforcement action yielding monetary sanctions of over $1 million. The award amount is required to be between 10 percent and 30 percent of the total monetary sanctions collected in the commission's action or any related action such as in a criminal case. A whistleblower may be eligible to receive an award for original information provided to the commission on or after July 22, 2010, but before the whistleblower rules become effective, so long as the whistleblower complies with all such rules once effective.

The Dodd-Frank Act also expressly prohibits retaliation by employers against whistleblowers and provides them with a private cause of action in the event that they are discharged or discriminated against by their employers in violation of the Act.

Implementation: Final rules implementing the whistleblower program were approved by the commission May 25, 2011. The final rules took effect Aug. 12, 2011. Compliance with these rules is required to qualify for an award. Please visit the Office of the Whistleblower Web page for additional information about the program, the Dodd-Frank statute, the final rules, how to apply for an award, and how to submit a tip, complaint, or referral.

Office of the whistleblower website

Final Rule: Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011)

See also: Proposed Rule Release No. 34-63237

—Source: http://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml

LIU'S IMPLICATIONS

The 2nd Circuit's decision clarifies some issues and leaves others unresolved for future litigation.

First, the court clearly held that the anti-retaliation provision does not apply extraterritorially. However, because the facts of this case so clearly involved only extraterritorial conduct, the court had no need to consider the dividing line between domestic and extraterritorial conduct.

Second, the court saw no reason to reach another basis for the District Court's decision, an issue that has divided the courts: whether purely intracorporate whistle-blowing suffices to trigger the anti-retaliation provision, or whether the whistleblower must actually disclose to the SEC. The 5th Circuit has held that the anti-retaliation provision does not apply unless and until the whistleblower has gone to the SEC,[1] but some district courts have disagreed.[2] The 8th Circuit is currently considering whether to grant an interlocutory appeal on that issue.[3]

Third, the 2nd Circuit, in passing, seems to have raised questions about the SEC's construction of Dodd-Frank's whistleblower bounty provisions as having international reach. But the court did not need to decide that issue, because it held that, even if the bounty regulations can apply to whistleblowers located abroad, "it would not follow that Congress intended the anti-retaliation provision to apply similarly." WJ

NOTES

[1] *Asadi v. G.E. Energy,* 720 F.3d 620 (5th Cir. 2013); *see also, e.g., Englehart v. Career Educ. Corp.,* 2014 WL 2619501 (M.D. Fla. May 12, 2014); *Banko v. Apple Inc.,* 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013); *Wagner v. Bank of Am. Corp.,* 2013 WL 3786643 (D. Colo. July 19, 2013).

[2] *See, e.g., Bussing v. COR Clearing LLC,* 2014 WL 2111207 (D. Neb. May 21, 2014); *Ellington v. Giacoumakis,* 977 F. Supp. 2d 42 (D. Mass. 2013); *Murray v. UBS Sec. LLC,* 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Genberg v. Porter,* 935 F. Supp. 2d 1094 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.,* 2012 WL 4444820 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention Inc.,* 852 F. Supp. 2d 986 (M.D. Tenn. 2012).

[3] *Bussing v. COR Clearing LLC,* No. 14-8015) (8th Cir.); *see Bussing v. COR Clearing LLC,* 2014 WL 3548278 (D. Neb. July 17, 2014) (granting motion to certify for interlocutory review).

Iraq contractor gets 4 years in prison for tax dodge scheme

A former U.S. Army Reserve captain and owner of a California military contracting firm has been sentenced to four years in a federal prison for failing to report on tax forms the millions of dollars his company received for work performed in Iraq.

United States v. Saifan, No. 8:11-cr-00288, defendant sentenced (C.D. Cal. Sept. 5, 2014).

Nadim "Nick" Saifan Jr., 48, of Huntingdon Beach, pleaded guilty in May in the U.S. District Court for the Central District of California to two counts of attempted tax evasion for underreporting income on his company's corporate tax return for 2005 and on a personal tax return in 2006, according to a Justice Department statement.

U.S. District Judge Cormac J. Carney sentenced Saifan on Sept. 5.

Saifan was the owner and operator of Defense Logistical Support & Services Corp., which provided services to the U.S. military and civilian companies in Iraq. Prosecutors said DLSS earned nearly $16 million from the U.S. military between August 2004 and October 2007, but Saifan reported only a small fraction of that money on federal tax filings.

> Nadim "Nick" Saifan Jr. failed to report to the IRS much of the $16 million his company received from the U.S. government for work in Iraq, prosecutors said.

According to a 2011 grand jury indictment, DLSS falsely reported income of only $23,785 for the fiscal year ending Aug. 31, 2005, with $3,568 due as taxes to the Internal Revenue Service. The following year, the company falsely reported a loss of $6,354 and indicated on its returns that no tax was due.

Prosecutors also said DLSS falsely reported income of $809,753 in 2007, for which the firm paid taxes of $275,315.

Saifan also filed a personal income tax return for 2006 indicating he had earned $128,573, for which he paid the IRS $5,688, according to the indictment. He also allegedly listed income of $24,761 on his 2007 return, for which he paid nothing.

In each instance, Saifan and DLSS earned far more money than they reported and illegally withheld that information from the government, prosecutors said. Saifan allegedly used bank accounts in Lebanon to conceal his assets and the company's profits from the IRS, while taking substantial corporate funds for personal use and paying himself.

Prosecutors said he spent $880,000 in down payments on real estate and $292,000 in payments on vehicles, including a Ferrari and a Rolls-Royce.

In addition to prison time, Judge Carney ordered Saifan to serve three years of supervised release and pay a $200 cost assessment. WJ

Related Court Document:
Indictment: 2011 WL 12496603

Document Section C (P. 27) for the indictment.

Failure to restrain mentally ill patient led to fatal accident, suit says

Federal employees at a South Carolina military hospital failed to stop a mentally ill patient from fleeing the premises, which led to his stealing a fire truck and fatally striking a pedestrian, the victim's mother alleges in a federal lawsuit.

Delaney v. U.S. Naval Hospital et al., No. 9:14-cv-03421, complaint filed (D.S.C., Beaufort Div. Aug. 22, 2014).

Rebecca Delaney alleges personnel at the U.S. Naval Hospital in Beaufort, S.C., negligently allowed Kalvin Hunt to run naked from the hospital grounds without trying to stop him or alerting law enforcement.

According to the complaint filed in the U.S. District Court for the District of South Carolina, Hunt's grandmother had contacted a local veteran's affairs office Feb. 24, 2012, to report his erratic behavior.

Hunt, a former corporal in the U.S. Marine Corps, has a history of mental health issues, including post-traumatic stress disorder, delusions and multiple personalities, the complaint says.

A Department of Veteran's Affairs officer escorted Hunt to USNH, where he told employees he had not been taking prescribed antipsychotic medications, and he expressed a desire to harm himself or others, the complaint says.

Hunt was then taken to USNH's emergency room, and the sole medical doctor on duty failed to tell nurses that he should not be allowed to leave, the complaint says.

As a result, a nurse agreed to let the VA officer take Hunt outside for a "breath of fresh air," where he ran naked past security agents and other employees, the suit says.

According to the complaint, the Port Royal Fire Department was responding to an emergency call at a nearby apartment complex around the same time, and Hunt jumped into an unoccupied fire truck. He entered the highway and allegedly struck Delaney's son Justin N. Miller, 28, who was crossing the road on foot.

The plaintiff says the defendants' negligence allowed a mentally ill patient to escape from a facility and steal an unoccupied fire truck, which he was driving when it struck and killed her son.

Miller suffered excruciating pain, mental anguish and terror before dying of his injuries, the complaint says.

Hunt is currently facing criminal charges of murder and hit-and-run in connection with the incident, according to court records.

Delaney alleges that both USNH and the federal government are liable under the Federal Tort Claims Act, 28 U.S.C.A. § 2671, for damages caused by their employees' failure to prevent Hunt from harming others.

Once the defendants knew Hunt was mentally ill and had expressed desire to harm himself or others, they had a duty to ensure he was kept under close watch and to supervise his conduct, the complaint says.

Delaney alleges USNH failed to appreciate the danger that Hunt posed to others and neglected to prevent his elopement, utilize crisis-intervention skills and exercise reasonable care.

The complaint says the emergency room doctor on duty at the time of Hunt's elopement previously had his clinical privileges suspended for a misdiagnosis that caused a patient's death, but USNH negligently allowed him to be responsible for patient care.

The federal government was tasked with providing security at USNH but failed to pursue Hunt or follow proper procedures when he fled the hospital grounds, the suit says.

> Once the hospital knew that Kalvin Hunt was mentally ill and had expressed a desire to harm himself or others, it had a duty to supervise and monitor him, the complaint says.

Delaney says she and Miller's other beneficiaries are entitled to damages for mental shock and suffering, grief, loss of companionship, funeral expenses, and other economic losses.

She seeks total damages of up to $15 million, plus litigation costs. WJ

Attorneys:
Plaintiff: Anne McGinness Kearse, T. David Hoyle and W. Christopher Swett, Motley Rice LLC, Mount Pleasant, S.C.

Related Court Document:
Complaint: 2014 WL 4186305

See Document Section D (P. 29) for the complaint.

Houston federal judge dismisses airman's suit over deadly Black Hawk crash

The pilot of a Black Hawk helicopter that crashed in 2009, killing two military servicemen, did not file suit against the makers of the aircraft and its component parts before the limitations period expired, a Houston federal court judge has ruled.

REUTERS/Nikola Solic

The plaintiff claimed that the UH-60L Black Hawk was built with design flaws that undermined its airworthiness and crashworthiness. Two Black Hawk helicopters are shown here.

Smith v. Sikorsky Aircraft Corp. et al., No. 4:14-cv-00091, 2014 WL 4244041 (S.D. Tex. Aug. 20, 2014).

U.S. District Judge Nancy F. Atlas of the Southern District of Texas dismissed Matthew Smith's product liability suit Aug. 20, ruling that his January 2014 complaint against Sikorsky Aircraft Corp., United Technologies Corp. and Parker Aerospace Group was not filed within the two-year limitations period.

Smith was serving in the Texas Army National Guard from the time of the January 2009 crash until July 26, 2009, when he was reassigned to federal service to ensure he could receive medical care from federal military facilities, the judge's order said. He retired from federal service March 10, 2012, and filed suit Jan. 14, 2014.

Judge Atlas said that when Smith was assigned to federal service between July 2009 and March 2012, the limitations period was tolled under the federal Servicemembers' Civil Relief Act. But his six months with the Texas Army National Guard between the date of the crash and July 2009 were not federal military service and therefore did not qualify for tolling under the SCRA, the judge said.

Smith's suit said the defendants built the UH-60L Black Hawk with dangerous design flaws that undermined both its airworthiness and crashworthiness.

He was piloting the helicopter properly Jan. 12, 2009, when a rudder malfunctioned during a demonstration flight at Texas A&M University, resulting in a crash and the deaths of two of the five servicemen on board, the complaint said. Smith and the two other servicemen were seriously injured, according to the suit.

Smith said his suit was timely because the SCRA and Tex. Gov't Code § 4310.017, tolled the limitations period during his military duty.

He also argued Tex. Civ. Prac. & Rem. Code § 16.001(a)(2) tolled the limitations period during the six months he was legally disabled after the accident because he was mentally incapacitated and unable to make legal decisions.

The defendants moved for summary judgment, saying the complaint was not filed within the two-year limitations period because Smith was serving in the Texas Army National Guard between the accident and July 26, 2009, when he was assigned to federal military service. That branch of the service is not covered under the SCRA tolling provisions, they said; therefore, the complaint was filed four months too late.

In addition, the defendants argued that Smith cannot claim the limitations period was tolled during the six months he was disabled by his injuries because he did not provide evidence supporting his mental incapacity claim.

Judge Atlas agreed.

"When he separated from active military duty March 10, 2012, there were 536 days remaining before the statute of limitations expired. That period expired Aug. 28, 2013," the judge said.

Smith's service in the Texas Army National Guard is not covered by the SCRA tolling provisions, the judge said.

Also, medical records during the six months Smith was recovering from his injures prove he was not "of unsound mind" and therefore was not disabled, Judge Atlas said.

Smith did not offer any specific medical or expert evidence to support his claim that he was mentally incapacitated, and Section 16.001(a)(2) was in effect during the relevant time period, the judge said. WJ

Attorneys:
Plaintiff: James A. Hall, Branton Hall Rodriguez Cruz PC, San Antonio

Defendants (Sikorsky and United Technologies): Greg Waller, Andrews Kurth LLP, Houston

Defendant (Parker Aerospace): Kenneth H. Laborde, Gieger, Laborde & Laperouse, New Orleans

Related Court Documents:
Order: 2014 WL 4244041
Defendants' reply supporting summary judgment: 2014 WL 4184951

See Document Section E (P. 35) for the order and Document Section F (P. 41) for the reply brief.

Asbestos suit against Navy contractors will stay in federal court

A U.S. Navy supplier has established "federal officer" jurisdiction over its asbestos suit by submitting enough evidence to proceed with a government-contractor defense, a Manhattan federal judge has ruled.

Crosby et al. v. A.O. Smith Water Product Co. et al., No. 14-cv-00348, 2014 WL 4059815 (S.D.N.Y. Aug. 8, 2014).

U.S. District Judge Alison J. Nathan of the Southern District of New York declined Aug. 8 to remand Robert and Sahara Crosby's suit to state court, finding that Crane Co.'s defense, which arises from federal law, belongs in federal court.

Under the Federal Officer Removal Act, 28 U.S. Code § 1442, a government contractor can remove a civil suit against it to federal court if the company asserts a "colorable federal defense" and the plaintiff's claims arose from something the contractor did on the orders or instructions of a federal agency.

Judge Nathan also found that Crane timely submitted its removal notice, which the company filed less than 30 days after receiving the Crosbys' asbestos complaint.

According to the judge's order, the Crosbys sued 30 defendants, including Crane, in New York state court, accusing them of failing to warn Robert about the dangers associated with the asbestos-containing products he worked on while serving in the U.S. Navy from 1960 through 1964. He later developed lung cancer.

After receiving the Crosbys' complaint last Dec. 20, Crane filed its removal notice Jan. 17, asserting federal-officer jurisdiction based on its government-contractor defense, according to the order.

Crane only supplied asbestos-containing products to the Navy in accordance with strict government specifications, the company claims.

In response, the Crosbys asked Judge Nathan to remand the case to state court, calling Crane's removal notice untimely and arguing that the company had not offered a colorable federal defense.

Crane's 30-day removal window opened eight days before it received the Crosbys' complaint, on Dec. 12, when the company received "interrogatory responses" from the plaintiffs, they claimed, which made its Jan. 17 filing untimely.

Judge Nathan disagreed, saying she did not understand why the parties had exchanged interrogatories before service of process and only two days after the suit's filing.

Notwithstanding that unusual circumstance, the judge found, the removal statute plainly provides that a defendant has 30 days from service of process to remove a lawsuit. The Crosbys did not cite any authority to the contrary, she noted.

Crane Co. only supplied asbestos-containing products to the Navy in accordance with strict government specifications, the company claims.

Judge Nathan also rejected the Crosbys' argument that Crane had failed to raise a colorable federal defense. Expert affidavits the company submitted showing that the Navy gave Crane specifications and controlled its product warnings were clearly enough to establish federal-officer removal, she said.

"Numerous courts in similar cases have found that Crane's averments and supporting affidavits, or ones like them, present a colorable government-contractor defense against failure-to-warn claims," the judge wrote.

Crane does not have to prove its defense would succeed at trial to establish federal jurisdiction, she added, but only that it is not frivolous.

"The court is satisfied that Crane's federal-contractor defense is neither frivolous nor advanced solely for the purpose of obtaining federal jurisdiction," Judge Nathan wrote. "That is all that is required." WJ

Related Court Document:
Opinion and order: 2014 WL 4059815

Appeals court upholds U.S. bidding rules for medical device suppliers

(Reuters Legal) – A U.S. appeals court has upheld the government's competitive bidding program for medical equipment suppliers, affirming the dismissal of a lawsuit by a Minnesota company that said the rules would keep disabled patients from getting crucial medical devices.

Key Medical Supply Inc. v. Burwell et al., No. 13-2084, 2014 WL 4178343 (8th Cir. Aug. 25, 2014).

Judge Michael Melloy of the 8th U.S. Circuit Court of Appeals on Aug. 25 ruled that the court lacked jurisdiction over the case because Congress had barred courts from reviewing the implementation of the bidding program.

The program, which aims to cut the cost of medical devices for Medicare and Medicaid, was created by a federal law in 2003, and has been phased in gradually since then.

Key Medical Supply Inc., a family-owned Minnesota company that supplies specialty medical equipment to the developmentally disabled, sued the Department of Health and Human Services over the program in March 2012.

It claimed HHS exceeded its authority under the law by creating maximum bid caps for certain products and by lumping expensive custom-fit products in with much less expensive mass-produced products.

Key Medical said that the bidding rules, which took effect in Minneapolis and St. Paul, Minn., last July, make it impossible for the company to supply one of its main products, custom-fitted feeding tubes for disabled patients. This not only deprived Key Medical of revenue, but also prevented Medicare and Medicaid patients from getting those feeding tubes, it said.

In March 2013 Judge Donovan Frank of the District of Minnesota, even though he dismissed the case, disapproved of the outcome.

While finding that the court couldn't review HHS' policy because the law that created the bidding program explicitly blocked judicial review, he said it was "a sad day for those who believe that when a judge adheres, even-handedly, to his or her oath of office, justice will prevail and the public interest will be served." *Key Med. Supply v. Sebelius et al.*, No. 12–752, 2013 WL 1149516 (D. Minn. Mar. 19, 2013).

Courtesy of www.keymedicalsupply.com

Key Medical Supply Inc., a company that supplies specialty medical equipment to the developmentally disabled, sued the Department of Health and Human Services over the government's bidding program for medical equipment in March 2012. A screenshot of the company's website is shown here.

Judge Melloy wrote that, while the bar on judicial review would not apply if HHS were engaged in a "clear and unambiguous statutory violation," that was not the case here.

He also rejected Key Medical's argument that the bidding process deprived patients of their choice of provider. Even if patients' choice was reduced, he said, it was enough that Congress required the government to award contracts to "multiple entities."

Finally, Judge Melloy found that the bidding program was not an unconstitutional taking of Key Medical's business because participation in Medicare and Medicaid is voluntary.

Attorneys for Key Medical and representatives of the Department of Justice and HHS could not immediately be reached for comment.

Judge Melloy was joined by Judges Roger Wollman and Duane Benton. WJ

(Reporting by Brendan Pierson)

Attorneys:
Appellant: Lousene M. Hoppe and Samuel Orbovich, Fredrikson & Byron, Minneapolis

Appellee: Gregory P. Dworkowitz and Dana Kaersvang, Department of Justice, Washington; Assistant U.S. Attorney Friedrich A. Siekert, Minneapolis

Related Court Document:
Opinion: 2014 WL 4178343

Army mismanaged $270 million in energy project contracts, report says

The Army did not properly award contracts for energy projects worth $270 million at Fort Knox in Kentucky, increasing the risk of fraud, waste and abuse, according to a recent Defense Department inspector general report.

Fort Knox officials were not able to show that the 108 task orders issued to contractor Nolin Rural Electric Cooperative Corp. achieved their projected energy savings, as required by federally mandated energy-reduction goals, the Sept. 8 report said.

According to the report, the government is the largest energy consumer in the United States, and recent legislation and presidential executive orders require federal agencies to institute energy-efficiency, water-conservation and renewable-energy projects.

> Millions of dollars may have been spent on projects that will not achieve their required energy savings, the report said.

As part of the government's energy-reductions goals, all federal facilities and buildings must reduce their energy consumption by 3 percent annually through the end of 2015, the report said.

To comply with these requirements, Fort Knox officials directed Nolin to install and update the base's energy systems and equipment.

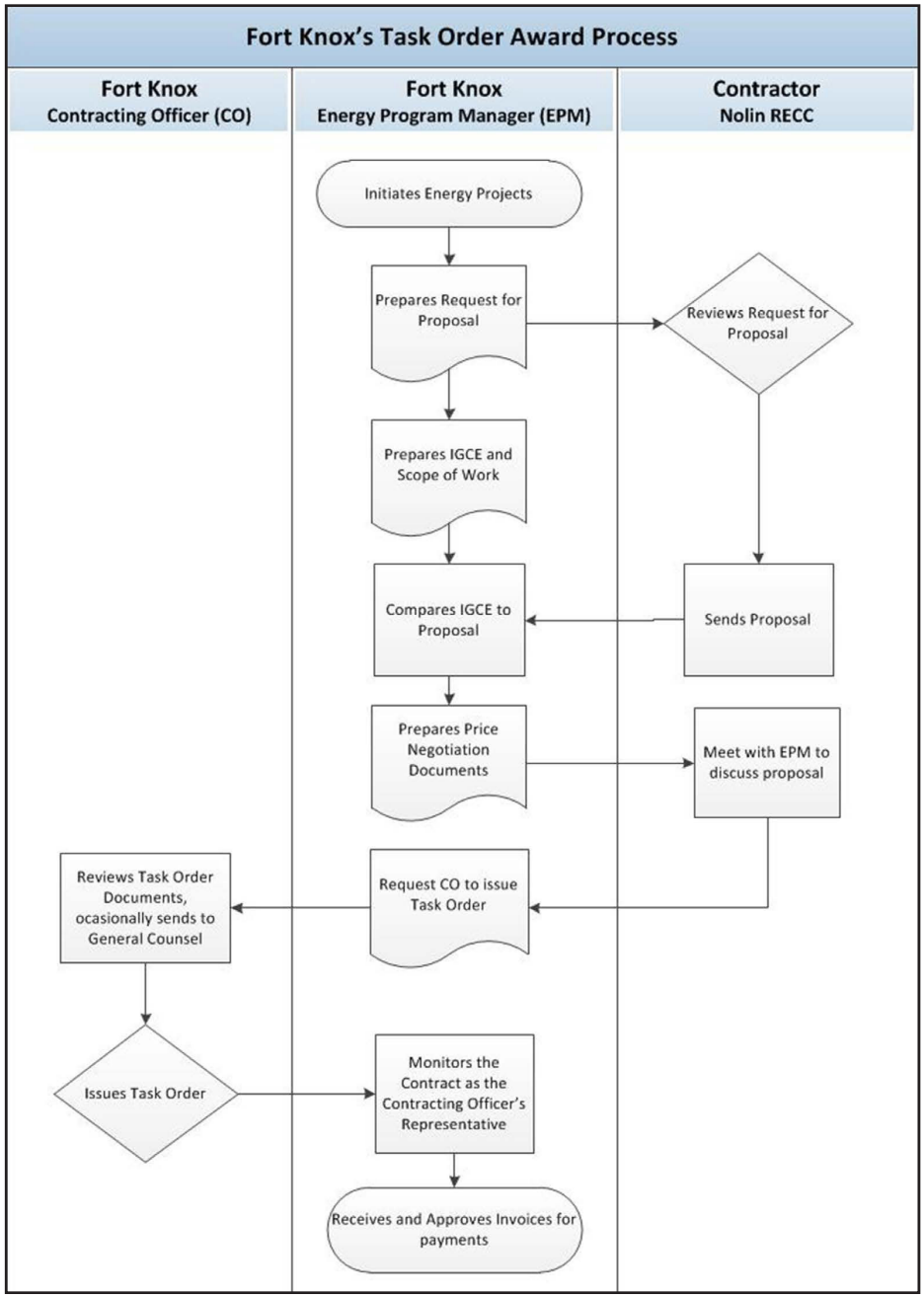
The improvements include lighting replacements and upgrades; replacing and renovating the heating, ventilation and air conditioning, or HVAC, systems; updating the water heaters; automating energy systems; and improving and repairing the base's energy recovery systems.

The inspector general audited the task order awards between August 2013 and July 2014, finding that Fort Knox officials did not have adequate internal controls in place for awarding and administering the orders and did not ensure that the government received fair and reasonable prices.

Officials did not make a determination on price reasonableness prior to ordering the jobs, as required by federal acquisition regulations, the report said. The officials also did not document discussions of price negotiations and instead frequently included only boilerplate language on documents concerning price discussions, according to the report.

As a result, millions of dollars may have been spent on projects that will not achieve their required energy savings, the report said.

The inspector general recommends that Fort Knox officials establish and implement policies and procedures to track the potential



Recommendations

The inspector general recommends the Fort Knox garrison commander:

- Establish policies and procedures to track energy savings for individual projects awarded under utility energy services contracts, or UESC, task orders.
- Coordinate with appropriate contracting officials and establish internal controls over the process for awarding and administering UESC orders under the Nolin contract and for any future energy contracts.

The inspector general recommends the director of Mission and Installation Contracting Command:

- Direct Fort Knox contracting officials to discontinue awarding task orders under the Nolin contract until adequate internal controls are in place.
- Develop standard operating procedures and contracting officer guidance to complete fair and reasonable price determinations for UESC.
- Review the contracting officer's actions in negotiating and determining prices for the Nolin contract task orders and, as appropriate, initiate actions to hold the contracting officer accountable.

energy savings of projects and to coordinate with the appropriate contracting officials to establish internal controls over the awarding of task orders under the current contract and for future contracts.

The report also recommended that Fort Knox officials discontinue awarding task orders under the Nolin contract until proper controls are in place.

The report is available at http://bit.ly/1B6Y1cU. WJ

Ongoing conflict in Iraq spurs new risk factor disclosures

By Cory Hester, Attorney Editor, Westlaw Capital Markets Daily Briefing

With U.S. military troops carrying out new airstrikes in Iraq to combat Islamic State of Iraq and Syria militants, a near-term solution to the conflict seems increasingly unlikely. As a result, several public companies are revising their civil unrest-related risk factor disclosures to directly highlight how the military conflict could affect their businesses.

In August, some public companies highlighted concerns that a prolonged military conflict in Iraq could have an adverse impact on global crude oil prices. Seneca Global Fund LP's recent Form S-1 filing in connection with a secondary offering includes risk factors that echo these concerns.

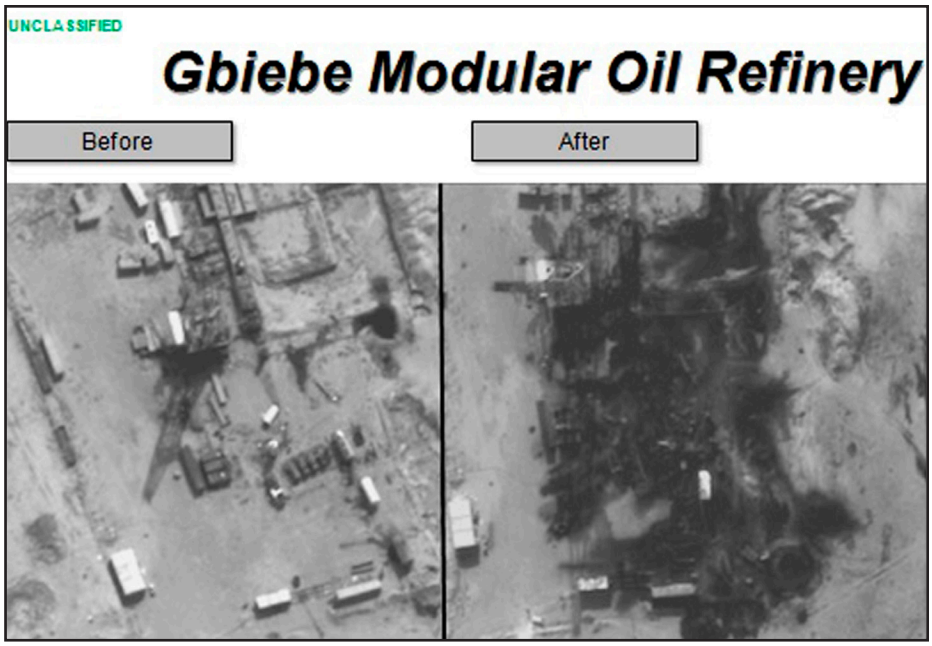
> As tensions continue to rise in the Middle East, public companies around the world are on edge.

Seneca's Aug. 28 filing disclosed that the company has already seen an increase in oil prices, stating:

> Violence escalated in the Middle East, as the militant ISIS group seized key regions in Iraq, pushing up oil prices on fears of a supply disruption.

In addition to these concerns, the company also noted that its "short positions in gold and silver" recently lost value, as demand climbed for these safe haven assets on "fears of a full-blown civil war in Iraq."

Janus Investment Fund also noted oil price concerns in a recent Form N-CSR filing Aug. 29. The fund disclosed that sectarian conflict in Iraq caused oil prices to spike late in the second quarter of this year.



REUTERS/U.S. Department of Defense/Handout via Reuters

Pictures released Sept. 25 by the U.S. Defense Department show damage to one of the modular oil refineries operated in Syria by the militant group known as the Islamic State following airstrikes by U.S. and coalition forces. Some public companies have recently highlighted concerns that a prolonged military conflict in Iraq could have an adverse impact on global crude oil prices.

EFFECTS ON SURROUNDING COUNTRIES

Aside from increased oil and gas prices, issuers have also recently noted the potential for the recent conflict to affect countries that neighbor Iraq. In August, for example, Transatlantic Petroleum Ltd. noted that the conflict could have an adverse impact on its significant operations in Turkey, which borders Northern Iraq.

The National Bank of Greece SA also recently warned investors about the potential that the conflict could have a significant impact on Turkey. In discussing macroeconomic factors that could affect Turkey's economy, it noted that "an eventual escalation of the crisis in Iraq, Turkey's second largest export market, would weigh heavily on Turkey's growth and external deficit."

As tensions continue to rise in the Middle East, public companies around the world are on edge. As issuers continue to watch and analyze how the conflict could impact their businesses, it is clear that the conflict has ripple effects in the global markets, specifically commodity markets. WJ

Military secrets

CONTINUED FROM PAGE 1

Orr illegally retained these items after he stopped working for the Air Force in January 2011, the charges said.

Prosecutors said that in September 2013 Orr began communicating with a person posing as a representative of the Chinese government but was actually an undercover FBI agent.

Orr met with this operative twice in October and November 2013 and received $7,000 in exchange for providing stolen training materials on password-protected USB devices, the Justice Department said.

Retention of stolen government property

Public money, property or records:

Whoever embezzles, steals, purloins or knowingly converts to his use or the use of another or without authority sells, conveys or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof, or

Whoever receives, conceals or retains the same with a intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted ...

Shall be fined under this title or imprisoned not more than 10 years, or both, but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

—18 U.S.C. § 641

Former Air Force employee Brian Scott Orr told an undercover FBI agent that he was the "foremost expert" on attacking the agency's computer network, prosecutors say.

Orr allegedly used a number of sophisticated techniques in his dealings with the undercover agent to conceal his plans to sell the military information. Prosecutors say he hacked the undercover agent's phone to gain access to the telephone account and other identifying information and used a "drop" prepaid phone to set up meetings.

The Justice Department said Orr told the agent he was the "foremost expert on attacking the computer network" and that he could destroy or disrupt U.S. military satellites on China's behalf.

Orr also allegedly offered to reveal how to destroy the network for a "big reward," but told the agent he would need to be taken out of the country in order to "actually do something to this network." WJ

Related Court Document:
Indictment: 2013 WL 9678193
Plea agreement: 2014 WL 4635315

Document Section A (P. 19) for the indictment and Document Section B (P. 20) for the plea agreement.

NEWS IN BRIEF

FLORIDA FIRM TO SUPPLY MISSILES TO 5 FOREIGN NATIONS

The Army is paying Orlando, Fla.-based Hellfire Systems LLC more than $68 million to purchase missiles on behalf of the Middle East governments of Iraq, Jordan, Indonesia, Saudi Arabia and Qatar. The Defense Department said in a Sept. 15 statement that Hellfire's contract is part of the Foreign Military Sales Program, under which the United States buys goods and services from domestic contractors and sells them to friendly foreign nations. Hellfire, which will supply six varieties of missiles, is expected to finish the job by Nov. 30, 2016, the statement said.

NAVY ENVIRONMENTAL STUDY JOB GOES TO HAWAII FIRM

The U.S. Navy has chosen Element Environmental LLC for an environmental study contract worth up to $20 million, the Defense Department said in a Sept. 12 statement. The contract requires the Hawaii-based company to conduct investigations, prepare reports and technical evaluations, create management plans, and handle permit applications concerning environmental work at Navy and Marine Corps facilities. Element will perform the majority of the job in Hawaii and will work in Diego Garcia, Guam, Japan, Korea and Singapore, the statement said. The company beat four other bidders for the contract.

6 COMPANIES WIN ARMY DEMOLITION CONTRACTS

The Defense Department said in a Sept. 10 statement that six companies will be performing demolition work under newly awarded contracts as part of the Army's Facility Reduction Program. The program is designed to save on energy and maintenance costs through the elimination of excess buildings. All Phase Services Inc., North Wind Solutions LLC, Bhate Environmental Associates Inc., Charter Environmental Inc., NCM Demolition & Remediation LP and Perma-Fix Environmental Services Inc. will perform the work in the northeastern United States until Sept. 9, 2019. The Army has allotted $9.6 million for all the work, the statement said.

CASE AND DOCUMENT INDEX