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PSEG Whistleblower Row Revived After Improper Toss

By **Bill Wichert**

Law360 (July 30, 2018, 3:19 PM EDT) -- A New Jersey state appeals court on Monday revived a complaint against the state's largest utility from a former project manager over whistleblower and discrimination claims, saying a trial court improperly tossed the suit and compelled arbitration without providing any reasons or hearing oral argument.

A two-judge appellate panel upended the court's Sept. 15 order granting PSEG's motion to compel arbitration of David Guirguess' claims, directing the court on remand to reconsider the motion with oral argument and enter a new order, along with a written or oral statement of its reasons.

"Here, defendants requested oral argument, yet the motion judge decided the motion on the papers without argument," the panel said. "There is nothing in the order granting defendants' motion in this matter that confirms that the judge made an independent decision based upon an analysis of the facts and applicable law."

The appellate opinion did not specify the allegations in the lawsuit.

Guirguess was offered a position in December 2008 as a nuclear shift supervisor in the Salem operations department of PSEG Power Nuclear LLC, a subsidiary of Public Service Enterprise Group Inc., according to the opinion. An offer letter outlined his salary and benefits and said his employment would be at-will, the opinion said.

A mandatory arbitration agreement was enclosed with the letter, stating that Guirguess agreed that certain disputes related to his employment would be decided in arbitration through the American Arbitration Association and that he waived his right to a jury trial, according to the opinion.

In May 2011, Guirguess was offered the job of project manager with PSEG Services Corp., the opinion said.

The offer letter included his salary and said Guirguess "would 'continue to be eligible to participate in PSEG [Services Corp.'s] discretionary Performance Incentive Plan (PIP) under the terms and conditions of that plan,'" the opinion said.

"The letter did not mention arbitration and enclosed no arbitration agreement," according to the opinion.

Guirguess' employment was terminated in September 2016, the opinion said.

The following May, he filed a lawsuit against PSEG Services Corp. and related defendants in Middlesex County Superior Court, alleging violations of New Jersey's Conscientious Employee Protection Act and Law Against Discrimination as well as claims of wrongful termination and aiding and abetting discrimination under the LAD, the opinion said.


PSEG moved to compel arbitration and requested oral argument if Guirguess filed opposition to the motion, which he later did, according to the opinion. Without hearing oral argument or giving any reasons for the ruling, the trial court entered an order dismissing the suit with prejudice and

compelling arbitration before the AAA, the opinion said.

On Guirguess' appeal of that decision, the panel cited state court rules governing requests for oral argument and motion rulings.

"Pursuant to Rule 1:6-2(d), Civil Part motions, other than certain exceptions set forth in Rule 1:6-2(b), must be listed for oral argument if 'a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or . . . unless the courts directs,'" the panel said. "A request for oral argument by a party is required to be granted as of right."

Another provision cited by the panel, Rule 1:7-4(a), states that a court "shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right."

Quoting from the state Appellate Division's 2016 decision in [Avelino-Catabran v. Catabran](#) , the panel said, "When a trial court issues reasons for its decision, it 'must state clearly [its] factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts [are] informed of the rationale underlying th[ose] conclusion[s].'"

"When that is not done, a reviewing court does not know whether the judge's decision is based on the facts and law or is the product of arbitrary action resting on an impermissible basis," the panel added.

PSEG declined to comment Monday.

An attorney for Guirguess, Darren C. Barreiro of Greenbaum Rowe Smith & Davis LLP, told Law360 on Monday, "We were happy with the outcome of the appeal."

Judges Marie P. Simonelli and Garry S. Rothstadt sat on the appellate panel.

Guirguess is represented by Darren C. Barreiro and Irene Hsieh of Greenbaum Rowe Smith & Davis LLP.

The defendants are represented by Fisher & Phillips LLP.

The case is David Guirguess v. Public Service Electric and Gas Co. et al., case number A-0511-17T1, in the Superior Court of New Jersey, Appellate Division.

--Editing by Marygrace Murphy.

Update: This article has been updated with a comment from Guirguess' attorney.