In the Matter of:

LYDIA DEMSKI,

COMPLAINANT,

v.

INDIANA MICHIGAN POWER COMPANY,

RESPONDENT.

ARB CASE NO. 02-084

ALJ CASE NO. 01-ERA-36

DATE: April 9, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Philip Goldstein, Esq., Christine M. Fecko, Esq., *Ross & Hardies, New York, N.Y.*

For the Respondent:
J. Patrick Hickey, Esq., Jason M. Zuckerman, Esq., *Shaw Pittman, LLP, Washington, D.C.*

FINAL ORDER OF DISMISSAL

Lydia Demski filed a complaint against the American Electric Power Company (AEP) under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003), and its implementing regulations at 29 C.F.R. Part 24 (2003). She alleged that AEP terminated her company's contracts due to her protected activity raising safety concerns about the Donald C. Cook nuclear plant in Brigham, Michigan.

A United States Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed AEP as respondent, added its wholly owned subsidiary, Indiana Michigan Power Company (I & M), as respondent, and granted I & M's motion to dismiss Demski's complaint on the ground that she was not an employee entitled to protection within the meaning of the Act. Demski timely appealed to the Administrative Review

Board (ARB or Board). For the reasons stated herein, we affirm the dismissal of Demski's complaint.

BACKGROUND

The following facts are undisputed. At all times relevant, I & M was a corporation and an employer. RX 3.[1] I & M was licensed by the Nuclear Regulatory Commission (NRC). RX 5. In November 1996, I & M entered into a contract with two corporations, American Nuclear Resources, Inc., and Scope Services, Inc. (ANR/Scope). The contract was to maintain ice condensers at the Cook nuclear plant. RX 3. Subsequently, I & M and ANR/Scope agreed to two other contracts, one for staff augmentation and the other for maintenance of buildings and grounds. RX 3. The express terms of the three contracts provided that ANR/Scope was not an agent or employee of I & M. RX 3.

Complainant Demski was the president and sole shareholder of ANR/Scope, which are engaged in the business of supplying contract labor. RX 1-2; CX 1(f), CX 2, CX 2(b). The two corporations provided technical know-how and skilled and unskilled labor for power-generating plants such as Cook. CX 2.

As owner and president, Demski recruited 80 to 120 employees to work at the plant to fulfill the terms of the contracts. CX 2 at 3-4. Demski drew a paycheck from ANR/Scope, which were Subchapter S corporations, *see* 26 U.S.C.A. § 1361 *et seq*. (West 2001), and received a W-2 tax form. CX 2 at 5. I & M never paid wages or a salary to Demski or provided her with any benefits. RX 3 at 2, CX 2. Nor did I & M pay ANR/Scope for any specific labor or services performed by Demski. *Id*.

Demski was not physically present at the Cook plant every day and did not attend daily meetings between ANR/Scope and I & M supervisors. RX 3 at 2-3, CX 1(c). Two managers from ANR/Scope, Richard Smith and Richard Rigler, oversaw the day-to-day management of the contracts. RX 4; CX 2(b). The hiring and firing of Demski's employees was within her discretion. RX 3 at 3.

Demski was informed of serious safety problems with the ice condenser project at the Cook plant, including the presence of foreign material in the ice and improper procedures. CX 1(e), CX 2 at 5-6. Subsequently, I & M cancelled its ice condenser contract with ANR/Scope "for convenience." RX 3; CX 1(a), (b). By the end of March 2000, I & M had notified Demski that her bid for maintenance work was not accepted, and had also canceled the staffing contract. CX 2(a), (c), (d). I & M revoked Demski's access badge and those of her employees. RX 4.

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[1] The following abbreviations shall be used: Complainant's exhibit, CX; Respondent's exhibit, RX, Recommended Order of Dismissal, R. D. & O.

This case has a simple procedural history. On March 15, 2000, Demski filed a complaint with DOL's Occupational Safety and Health Administration (OSHA), in which she alleged that I & M unlawfully terminated the three contracts with ANR/Scope because she reported safety concerns to I & M management and the NRC. CX 2(b). In her complaint, Demski described herself as "sole proprietor" of the two corporations. Without addressing her status as an employer, OSHA found that Demski's complaint had merit, and AEP exercised its right to a hearing before an ALJ. CX 1(h).

Prior to the hearing, the ALJ dismissed AEP and added I & M as respondent because it was "the legal holder of the NRC licenses for the Cook plant." R. D. & O. at 5, RX 5. Having determined that Demski's companies, ANR/Scope, had been incorrectly listed as respondents in the complaint, the ALJ also denied Demski's motion to include those companies in the caption as complainants, because the ERA provides a cause of action only for employees, not corporations. R. D. & O. at 4. On appeal, Demski does not dispute either the addition of I & M as respondent or the dismissal of ANR/Scope with prejudice. *See* Complainant's Initial Brief at 6. Therefore, we affirm both rulings.

I & M filed a motion to dismiss Demski's claim for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. I & M argued that Demski had no employer-employee relationship with I & M and therefore failed to allege that she was a covered employee under the ERA. Demski sought leave to amend her complaint, arguing that I & M's allegation of failure to state a claim was "hyper-technical" and that she was an employee of I & M and her own companies, ANR/Scope. The ALJ determined that, even if Demski were permitted to amend her complaint, she would not be able to demonstrate that she was an employee as required by the ERA. R. D. & O. at 8-14. Accordingly, he dismissed her complaint with prejudice.

ISSUE PRESENTED

We address whether I & M is entitled to summary decision because the undisputed facts show that Demski was an employer and was therefore not an employee entitled to whistleblower protection under the ERA.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 (2003) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a).

Because the ALJ considered affidavits that Demski and I & M submitted, I & M's motion to dismiss under Fed. R. Civ. P. 12(b)(6) is more properly treated as a motion for summary decision pursuant to 29 C.F.R. § 18.40, 18.41. *See Flor v. United States Dep't of Energy,* ALJ No. 93-TSC-0001, slip op. at 9 (Sec'y Dec. 9, 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). *See also Erickson v. United States Envtl. Prot. Agency,* ARB No. 99-095, ALJ No. 1999-CAA-2, slip op. at 3 n.3 (ARB July 31,

2001). The standard for granting summary decision in whistleblower cases is the same as summary judgment under the analogous Fed. R. Civ. P. 56(e). The moving party must show that there is no material issue of fact and that it is entitled to prevail as a matter of law. 29 C.F.R. §§ 18.40, 18.41; *Flor,* slip op. at 10.

The ARB reviews an ALJ's recommended grant of summary decision de novo. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003). Accordingly, the Board will affirm an ALJ's recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999).

DISCUSSION

The ERA provides whistleblower protection to individual employees, not corporate employers. It says that "[n]o *employer* may discharge any *employee* or otherwise discriminate against any *employee* with respect to his compensation, terms, conditions, or privileges of *employment* because the *employee*" engages in certain enumerated protected activities, i.e., notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C.A. § 2011 *et seq.* (West 2003)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions of the ERA or AEA, or commences, causes to be commenced, or testifies, assists, or participates in a proceeding under the ERA or AEA. 42 U.S.C.A. § 5851(a)(1) (emphasis added).

To prevail under the ERA, a complainant must prove by a preponderance of the evidence that she was an employee who engaged in protected activity, that the employer knew about this activity and took adverse action against her, and that her protected activity was a contributing factor in the adverse action the employer took. 42 U.S.C.A. § 5851(b)(3)(C); *Kester v. Carolina Power & Light Co.,* ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 (Sept. 30, 2003); *Paynes v. Gulf States Utilities,* ARB No. 98-045, ALJ No. 93-ERA-47, slip op. at 4-5 (ARB Aug. 31, 1999). However, "[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior [i.e., the protected activity]." 42 U.S.C.A. § 5851(b)(3)(D); *Kester,* slip op. at 7.

Accordingly, essential elements of a whistleblower claim under the ERA are that the complainant be an employee and that the respondent be an employer. *Varnadore v. Oak Ridge Nat'l Lab.* (*Varnadore III),* ALJ No. 95-ERA-1, slip op. at 59-62 (Sec'y June 14, 1996); *Reid v. Methodist Med. Ctr.,* ALJ No. 93-CAA-4, slip op. at 8 (Sec'y Apr. 3, 1995), *aff'd sub nom., Reid v. Sec'y of Labor,* 106 F.3d 401 (6th Cir. 1996) (table). A complainant has the burden of proof to show that she is a covered employee under the ERA; if she is unable to establish that essential element of her claim, the entire claim

must fail. *Williams v. Lockheed Martin Energy Sys., Inc.*, ALJ No. 95-CAA-10, ARB No. 98-059, slip op. at 9 (ARB Jan. 31, 2001); *see Freels v. Lockeed Martin Energy Sys., Inc.*, 95-CAA-2 and 94-ERA-6, ARB No. 95-110, slip op. at 10 (ARB Dec. 4, 1996) (ARB dismisses complaint because Freels failed to show that she was an employee of the Department of Energy).

On the undisputed facts, Demski was a contractor and an employer, not an employee of I &M or an employee of ANR/Scope, and therefore cannot demonstrate that she is entitled to relief under the ERA.

1. Demski is not an employee of I & M

Demski was an employer and contractor, and therefore not an employee of I & M.

The ERA protects employees from discrimination by employers. *Plumlee v. Dow Chemical Co.*, ALJ No. 98-TSC-8, ARB No. 99-051 slip op. at 3 (ARB June 8, 2001). "Employer" is defined as a "licensee of the [Nuclear Regulatory] Commission," 42 U.S.C.A. § 5851(a)(2)(A) or "a contractor or subcontractor of such a licensee," 42 U.S.C.A. § 5851(a)(2)(C). *See* 29 C.F.R. § 24.3(a). The act does not, and was never intended to, protect employers. 42 U.S.C.A. 5851(b); 29 C.F.R. § 24.3(a); *see* S. Rep. No. 848, 95th Cong., 2nd Sess., at 29-30 (1978), *reprinted in* U.S. Code Cong. & Admin. News 7303.

On the undisputed facts, I & M was an employer. It held a license from the NRC. ANR/Scope were also employers. They were contractors or subcontractors of a licensee, I & M, which entered into three contracts with ANR/Scope. ANR/Scope provided ice condenser services, staff workers, and maintenance of buildings and grounds, and I & M paid the sums specified in the contracts to ANR/Scope. CX 2 at 2; CX 2(a), (c), (d). The sole business relationship between I & M and Demski was through these contracts with her corporations, ANR/Scope. Demski was the president and sole shareholder of ANR/Scope. Through her corporations, she employed 80 to 120 employees to work at I & M's Cook plant, and she was therefore an employer in relation to both her own employees and to I & M and its holding company, AEP.

A corporation has no standing to bring an action for cancellation of a contract under the ERA. Therefore, as a corporate contractor and employer within the meaning of the ERA, Demski was not an employee of I & M entitled to whistleblower protection under the ERA. Nevertheless, we address Demski's arguments that she was an employee of I & M.

Although "employer" is defined in the ERA, "employee" is not. *See Reid*, slip op. at 8-11 (none of the environmental statutes defines the term employee, and the legislative history is "scant"). Before other factors in an employment relationship are considered, an individual must be a "hired party," i.e., receive compensation in exchange for services. *O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997) (only when a person is hired in the

first place should the common-law agency analysis be undertaken). *See also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992), citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

Demski was not a hired party. I & M did not engage in an employment contract with her individually. It contracted with her corporations, paid fees to her companies, and used employees she retained to complete the contract terms. I & M did not pay Demski wages or salary, and provided her no benefits or pension. I & M never paid ANR/Scope for labor or services performed specifically by Demski. Rather, Demski received compensation ("a regular paycheck") from ANR/Scope and a W-2.[2] CX 2 at 5; RX 3. Although Demski likes to characterize herself as a "sole proprietor," she is not, because she did business in a corporate form.[3] Accordingly, Demski was not a "hired party" of I & M.

Since we agree with the ALJ and the respondent that Demski was not an individual who was a "hired party," it is unnecessary – indeed inappropriate – to examine her relationship with I & M under the twelve *Darden* factors, *see Darden*, 503 U.S. at 322-23, which federal courts and the Board employ to determine whether a hired individual is an independent contractor or an employee. *E.g., Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, __ F.3d __, No 02-2187, slip op. at 5 (1st Cir. Mar. 2, 2004); *Boschuk v. ALJ & L Testing, Inc.*, ALJ No. 96-ERA-16, ARB No. 97-020, slip op. at 2 (ARB Sept. 23, 1997).

The Complainant contends that summary decision is improper, because the facts concerning some of the *Darden* factors are disputed, e.g., the amount of control I & M exercised over her employees and how much time Demski spent at the Cook plant. However, she does not create a genuine issue of *material* fact. The *Darden* test is inapplicable where, as here, the business relation is between one corporate employer and another. And even if we were to apply the *Darden* factors, reviewing the facts in the light most favorable to Demski as the non-moving party, we agree with the ALJ and the Respondent that Demski would be deemed to be an outside contractor, not a protected employee under the ERA. R. D. & O. at 12; Respondent's Brief at 27.

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[2] The incorporation of ANR/Scope under Subchapter S, 26 U.S.C.A. § 1361 *et seq.*, which allows for direct pass-through of tax consequences to the shareholder(s), does not affect our determination that Demski was not an employee of I & M.

[3] Demski uses the term "sole proprietor" incorrectly throughout, disregarding her corporate structure as a "hyper-technicality." A sole proprietor is an individual owner of a business who does not operate in a corporate form. A sole proprietorship has no stockholders, officers, or directors, can sue or be sued, or contract in his/her own name or using a trade name (i.e., d/b/a), and is personally obligated for the business' debts. *See* 18A Am. Jur. 2d *Corporations* (1985), especially § 154. Although Demski was a sole stockholder of her corporations, she was not a sole proprietor.

In sum, we hold that Demski was not an employee of I & M entitled to whistleblower protection under the ERA.

2. Demski is not an employee of ANR/Scope

We now address Demski's other argument that I & M, as employer, discriminated against her as an employee of her own corporations, ANR/Scope. Demski argues that as a common-law employee of ANR/Scope, which was a contractor to NRC licensee I & M, she has standing to file a whistleblower discrimination claim under the ERA. Complainant's Initial Brief at 14-12. For the reasons that follow, we disagree.

The ERA protects employees against the discriminatory acts of employers. 42 U.S.C.A. § 5851(a)(1). Nothing in the Act or its interpretive history, though, suggests that someone who is defined as an employer under the Act can also claim employee protection under it. The employer-employee relationship is essentially hierarchical; the employer, the master, has power over the employee, the servant. Restatement (Second) of Agency § 220(1) (1958). By definition, an employer has authority or power over those individuals he or she employs, that is, the "right to control the manner and means by which the work is accomplished." *Darden*, 503 U.S. at 323. As the ALJ stated, for an individual to be an employee, there must be some higher supervisory authority to which that individual may be held accountable. R. D. & O. at 13.

We find that Demski's uncontested status as sole shareholder of her two companies, ANR/Scope, precludes her from being an employee of those companies for ERA purposes. Demski cannot be both master and servant simultaneously. She is not a hired party subject to the *Darden* factors because her companies never hired her. As president and owner of ANR/Scope, only Demski could set the terms of her own employment, discipline herself for poor performance, or exercise the attributes of a traditional employer-employee relationship. She was beholden to no one in her companies except herself. She could not rationally take discriminatory action against herself. The fact that she issued herself a paycheck, standing by itself, would not, under the ERA, make her an employee of the corporations she directed.

Under the circumstances of this case, therefore, Demski could not have an employer-employee relationship, direct or not, with herself. Accordingly, we agree with the ALJ and the Respondent that Demski's status as a corporate employer and contractor was fundamentally at odds with her claim of protected employee status. R. D. & O. at 13; Respondent's Brief at 11.

In an effort to establish herself as an employee of her own companies, Demski cites us to cases giving ERA protection to employees of subsidiaries whose employment has been affected by the holding company; extending the ERA to individuals who are outside contractors under control of the respondent; finding that corporate principals can be employees of the corporation for the purpose of participating in retirement programs; and considering minority shareholders employees of professional corporations. These cases do not alter the outcome here, and we distinguish them.

The ARB has recognized the right of an employee of a subsidiary or subcontractor to bring a claim against the holding company or contractor if either retaliates against the employee because of protected activity by encouraging his or her immediate employer to take adverse action, such as discharge or discrimination with respect to compensation, terms, conditions, or privileges of employment. For example, relying on *Stephenson v. National Aeronautics and Space Admin.*, ALJ No. 94-TSC-5, ARB No. 98-025 (ARB July 18, 2000), Demski argues that that she is an employee of I & M, and thus protected under the ERA, because I & M acted "in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company [i.e., with her as an ANR/Scope employee] regarding the employee's compensation, terms, conditions or privileges of employment." Slip op. at 11.

In *Stephenson*, NASA induced a contractor to take action against one of the contractor's employees. The employee was permitted to advance a whistleblower complaint against NASA, even though NASA was not the direct employer. Slip op. at 13. Likewise, *Hill v. Tennessee Valley Auth.*, ALJ 87-ERA-23 (Sec'y May 24, 1989), held that an NRC licensee who took adverse action against an employee of its contractor while acting in the capacity of an employer toward that employee was subject to a claim under the ERA. Slip op. at 2.

The present situation is not analogous to either *Stephenson* or *Hill* because Demski was not an employee of contractors, ANR/Scope, and because I & M did not direct those companies as her putative employer to take action against her that terminated her employment with ANR/Scope, or otherwise affected the compensation, terms, conditions or privileges of her relations with those companies. She remained a sole shareholder; her overall status with those companies was unchanged.

In *Samodurov v. General Physics Corp.*, ALJ No. 89-ERA-20 (Sec'y Nov. 16, 1993), the Secretary dismissed a complaint alleging discriminatory refusal to hire an individual who was an independent contractor, but noted that an individual who was an independent contractor might qualify for ERA protection if the respondent employer exercised a requisite degree of control and supervision over the individual. Slip op. at 7. For *Samodurov* to apply, Demski would have to establish that she individually had a business relationship with I & M. However, it is undisputed that the relationship was solely with Demski's corporations.

Under *Richter v. Baldwin Assoc.*, ALJ No. 84-ERA-9-12 (Sec'y Mar. 12, 1986), the ERA affords whistleblower protection to a respondent's supervisory or managerial employees. Slip op. at 12, n.5, 14. Although Demski may have had a supervisory or managerial role in her companies, that does not establish her as a supervisory or managerial employee with standing under the ERA. Until Demski demonstrates that she was an employee of ANR/Scope, *Richter* does not apply. Demski was not an employee of those companies for the reasons we have explained.

Citing *Madonia v. Blue Cross & Blue Shield*, 11 F.3d 444 (4th Cir. 1993), *Sipma v. Massachusetts Cas. Ins. Co.*, 256 F.3d 1006 (10th Cir. 2001), and *Vega v. National Life Ins. Serv., Inc.*, 188 F.3d 287 (5th Cir. 1999), Demski argues that a sole shareholder can be an employee of the owned corporation under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A § 1002(6) (West 1999). However, as I & M points out, there is strong support for the conclusion that the sole owner or shareholder of a corporation cannot be considered an employee under ERISA. *See Watson v. Proctor*, 161 F.3d 593, 597 n.6 (9th Cir. 1998) and cases cited therein. Regardless, we decline to enter the debate. Whether or not Demski could be considered an employee of her corporations under the special statutory and regulatory provisions of ERISA is not determinative of her employment status under the ERA.

Finally, citing *Hyland v. New Haven Radiology Assoc.*, 794 F.2d 793 (2d Cir. 1986) and *Wells v. Clackamas Gastroenterology Assoc.*, 271 F.3d 903 (9th Cir. 2001), Demski also contends that shareholder/managers of small professional corporations may be employees. *Hyland* and *Wells* are not controlling. Demski was not a minority shareholder of a professional corporation whose relationship was terminated by other shareholders. She was a sole shareholder whose companies took no action against her.

Thus, on the uncontested facts, Demski was not an employee of ANR/Scope.

CONCLUSION

The undisputed facts are that I & M contracted with Demski's companies and that she was herself an employer. Corporate employers do not have whistleblower protection under the ERA. Based on this record, we find that Demski, as the non-moving party, has failed to establish an element essential to her claim – that under the ERA she is a covered employee of I & M or ANR/Scope. Because there is no genuine issue of material fact, I & M is entitled to summary decision as a matter of law. Therefore, we dismiss Demski's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge