



In the Matter of:

DAVID L. ROBINSON,
COMPLAINANT,

ARB CASE NO. 10-013

ALJ CASE NO. 2006-ERA-031

v.

DATE: March 28, 2012

TRICONEX CORPORATION,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Anthony P. X. Bothwell, Esq., *Law Offices of A.P.X. Bothwell*, San Francisco, California

For the Respondent:

Michael C. Sullivan, Esq., *Paul, Plevin, Sullivan & Connaughton LLP*, San Diego, California

**Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.
Judge E. Cooper Brown, concurring.**

DECISION AND ORDER OF REMAND

This case arises under the whistleblower protection provisions of the Energy Reorganization Act (ERA), as amended and recodified, 42 U.S.C.A. § 5851 (West 2003 & Supp. 2008), and its implementing regulations 29 C.F.R. Part 24 (2011). David L. Robinson filed a complaint with the Occupational Safety and Health Administration (OSHA) against Respondent

Triconex Corporation¹ on October 26, 2005, alleging that Triconex/Invensys violated the ERA when it terminated his employment because he engaged in ERA-protected activities. Based upon its investigation of Robinson's complaint, OSHA concluded that Triconex/Invensys violated the ERA and on August 7, 2006, ordered Triconex/Invensys to abate the violation.

Triconex/Invensys objected to OSHA's findings and requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). The ALJ, in two separate rulings,² granted the Respondent's motions for summary decision and dismissed Robinson's complaint. Robinson then filed a timely appeal with the Administrative Review Board (ARB or the Board). For the following reasons, we reverse the ALJ's dismissal of Robinson's complaint and remand this case for further proceedings.

FACTUAL BACKGROUND³

Robinson is a nuclear engineer and has worked in the nuclear industry for over thirty years, and on over sixty nuclear power, production, and research projects. He has extensive experience in nuclear safety system design, reactor safety analysis, reactor operations, technical program development, nuclear safety, and project management.⁴ Robinson provided nuclear quality engineering services to clients as President of R&R Consolidated, a company that he operated with this wife.⁵ Respondent Triconex/Invensys supplies products, systems, and services for the Nebraska Public Power District (NPPD) and Florida Power & Light (FP&L) as a subcontractor. The NPPD and FP&L nuclear power plants are licensed by the United States Nuclear Regulatory Commission.⁶ Robinson provided services to Triconex/Invensys at the NPPD nuclear power plant pursuant to an Associate Supplier Master Service Agreement that

¹ Triconex is identified as an operating unit of Invensys, PLC. We refer to the Respondent as Triconex/Invensys throughout this opinion.

² ALJ Order Granting Partial Summary Decision, ALJ No. 2006-ERA-031 (ALJ Apr. 17, 2009), and ALJ Order Granting Summary Decision and Dismissing Complaint, ALJ No. 2006-ERA-031 (ALJ Oct. 14, 2009).

³ For this factual background, we view the facts in the light most favorable to Robinson, the party responding to a motion for summary decision. We do not suggest that any of these facts have been decided on the merits.

⁴ See Resp. Memo in Support of Motion for Summary Dec. (Dec. 19, 2008) (Resp. Memo) at 2; see also OSHA Notice of Determination and Order to Abate (Aug. 7, 2006) (OSHA Letter), Attachment: Resume of David L. Robinson.

⁵ See Resp. Memo at 2-3.

⁶ OSHA Letter at 1.

Robinson, as President of R&R Consolidated Enterprises, entered into with TAC Worldwide (TAC).⁷

Robinson was hired on June 1, 2004, as a nuclear quality assurance engineer to support the Respondent's Quality Assurance programs, and in his most recent assignment, he was responsible for monitoring the Factory Acceptance Test on the NPPD Project. The NPPD project involved the Reactor Vessel Level Control System (RVLCS), which included system interactions deemed important to safety and interactions with equipment providing safe operation of the plant.⁸ In August 2005, Robinson was involved in directing the test engineer to temporarily suspend testing to make procedural corrections.⁹ Testing resumed shortly afterwards.¹⁰

An NPPD representative reported to Triconex/Invensys supervisors that Robinson had authorized suspension of the test. Robinson allegedly discussed his decision to suspend testing with his supervisors.¹¹ Robinson was terminated on September 2, 2005. The next month, TAC Worldwide terminated its contract with Robinson for the provision of Robinson's services to Triconex/Invensys.¹²

Robinson filed a complaint with OSHA alleging a violation of the ERA whistleblower provision on October 26, 2005.

PRIOR PROCEEDINGS

Around the same time that Robinson filed his ERA complaint, he also filed a lawsuit in California's Orange County Superior Court suing the Respondent for wrongful termination in violation of public policy, retaliatory discharge, breach of contract, interference with contract, intentional interference with prospective economic relations, and intentional and negligent

⁷ See Complainant's Opp. to Respondent's Second Motion for Summary Decision (filed Sept. 28, 2009) at Exh. 1 (Associate Supplier Master Services Agreement, Client Addendum to Associate Supplier Master Services Agreement); see also Complaint at 1 (Oct. 26, 2005), Robinson Statement at 1.

⁸ OSHA Letter at 2.

⁹ See Robinson's Complaint filed with OSHA (dated Oct. 26, 2005), Background Statement at 3 (Complainant's Statement); see also Resp. Memo at 4; OSHA Letter at 2.

¹⁰ Complainant's Statement at 3; Resp. Memo at 4; OSHA Letter at 2.

¹¹ Complainant's Statement at 3; Resp. Memo at 2.

¹² Resp. Memo at 2, 4.

infliction of emotion distress.¹³ After discovery by both parties in the state court action, the Respondent moved for summary judgment.¹⁴ The Superior Court found that Robinson was not an employee of Triconex/Invensys and granted summary judgment in the Respondent's favor.¹⁵ Robinson appealed to the California Court of Appeal, which affirmed the trial court's decision. *Id.*¹⁶ Relying upon the Supreme Court's decision in *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 322-23 (1992), and analogizing Robinson's circumstances to those discussed in *Demski v. Dept. of Labor*, 419 F.3d 488 (6th Cir. 2005), the court concluded that under the *Darden* common law test Robinson was not an employee of Triconex/Invensys, and dismissed his complaint.¹⁷

Following Triconex/Invensys's request for a hearing before an ALJ, it filed a motion for summary decision on December 19, 2008, seeking dismissal of Robinson's complaint for three reasons: (1) Robinson was collaterally estopped by the California Court of Appeal's decision from asserting that he was anything but an independent contractor, and as such he was not a covered employee under the ERA; (2) Robinson was not a Triconex/Invensys employee and therefore lacked standing to bring an ERA claim; and (3) Robinson could not establish that he engaged in protected activity. On January 2, 2009, Robinson filed his opposition to Triconex/Invensys's motion for summary decision.

On April 17, 2009, the ALJ granted partial summary decision (ALJ's First Order) in favor of Triconex/Invensys on the issue of whether there was a common law master-servant relationship between Triconex/Invensys and Robinson. She found that the doctrine of collateral estoppel precluded Robinson from arguing that he was Triconex/Invensys's common law employee.

On September 16, 2009, the Respondent filed a second motion for summary decision, accompanied by a memorandum of points and authorities. (Second Resp. Memo). On October 14, 2009, the ALJ issued a second summary decision (ALJ's Second Order) on behalf of Triconex/Invensys because she found that Robinson could not establish that he was protected by

¹³ See *Robinson v. Invensys, PLC*, No. G039217, 2008 WL 4519042, (Ct. App., 4th Dist., Div. 3, Oct. 9, 2008).

¹⁴ See *Id.*

¹⁵ See *Id.*

¹⁶ The only issue raised and addressed on appeal before the California Court of Appeal was whether the trial court had erred in characterizing Robinson as an independent contractor rather than an employee. *Robinson*, 2008 WL 4519042, at *3. Furthermore, the appellate court deemed six of the claims as waived, leaving only the public policy claim and the retaliatory discharge claim under state law. *Id.*

¹⁷ *Id.* at 4-5.

the ERA as an employee of a contractor of Triconex/Invensys. Because she found that Robinson was not an “employee” protected by the ERA, the ALJ dismissed the complaint. Robinson filed the present appeal with the ARB.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ’s decision. Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110. Under the Administrative Procedure Act, the Board, as the Secretary of Labor’s designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.101(a). The Board reviews questions of law de novo. 5 U.S.C.A. § 557(b).

DISCUSSION

On appeal, Robinson argues that the ALJ erred when she concluded (1) that the DOL was bound by the California state court finding that Robinson worked for Triconex/Invensys as an independent contractor and not as a common law employee; (2) that independent contractors are not protected by the ERA’s whistleblower protection provisions, (3) that the *Darden* multi-factor test determines whether supervisory control exists, and when she (4) dismissed the case based on the Board’s decision in *Demski v. Ind. Mich. Power Co.*, ARB No. 02-084, ALJ No. 2001-ERA-035, slip op. at 6 (ARB Apr. 9, 2004).

For the reasons discussed below, we conclude that collateral estoppel does not apply and that Robinson may be a covered employee in his role as an “on-site” or quality assurance employee to a nuclear project pursuant to *Hill and Ottney v. T.V.A.*, Nos. 1987-ERA-023, -024 (Sec’y May 24, 1989).

A. *Employee Coverage under the ERA*

The whistleblower provision of the ERA, at 42 U.S.C.A. § 5851(a) states that:

(1) No 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 (or person acting pursuant to a request of the employee) –

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

Under ERA Section 5851(b)(1), “[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the “Secretary”) alleging such discharge or discrimination.” 42 U.S.C.A. § 5851(b)(1). The ERA defines the term “employer” to include—

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. § 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant;

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. § 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;

(E) a contractor or subcontractor of the Commission;

(F) the Commission; and

(G) the Department of Energy.

42 U.S.C.A. § 5851(a)(2). The term “employee” is not defined in the statute.

In enacting the Energy Reorganization Act of 1974, Congress declared that the legislation's purpose was to "make the Nation self-sufficient in energy, to advance the goal of restoring, protecting, and enhancing environmental quality, and to assure public health and safety." Pub. Law No. 93-438, 88 Stat. 1233 (Oct. 11, 1974); 42 U.S.C.A. § 5801 (a). To achieve those purposes, Congress enacted a whistleblower provision in 1978 to protect employees from retaliation who raise concerns about, inter alia, nuclear safety.¹⁸ In 1992, Congress enacted the Energy Policy Act, which amended the ERA's whistleblower provision to "deepen[] protection of nuclear industry whistleblowers against harassment and other retaliatory treatment." Energy Policy Act of 1992, H. Rep. No. 104-474 (VIII) at 78, Pub. L. 102-486, 102nd Cong., 2nd Sess. (1992 U.S.C.C.A.N. 2296). The 1992 Act "broadened the coverage of existing whistleblower protection provision to include a [NRC] licensee, an application for a Commission license, a contractor or subcontractor of a Commission licensee or of an applicant for a Commission license, the Department of Energy (DOE), a contractor or subcontractor at a Department of Energy nuclear facility, or any other employer engaged in any activity under the Energy Reorganization Act or the Atomic Energy Act of 1954." *Id.* at 78-79 (1992 U.S.C.C.A.N. 2296-2297). With this amendment to the ERA, Congress reiterated that the

ability of nuclear industry employees to come forward to either their employers or to regulators with safety concerns without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power. Recent accounts of whistleblower harassment at both NRC licensee (e.g., Millstone Nuclear Plant in Connecticut) and DOE nuclear facilities (e.g., Hanford, Oak Ridge, Rocky Flats) suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry. These reforms are intended to address those remaining pockets of resistance.

Id. at 79 (1992 U.S.C.C.A.N. 2297).

¹⁸ See S. Rep. No. 95-848 and H. Conf. Rep. No. 95-1796 (1978 U.S.C.C.A.N. 7303, 7309). The ERA whistleblower provision's legislative history underscores the broad interpretation that the term "employee" warrants. On the Senate Floor, Senator Hart urged adoption of the ERA whistleblower provision, stating that "it is important to note that an employee is protected by section 210 whether his assistance or participation relate to the conduct of *his own or some other employer.*" 124 Cong. Rec. Part 22 (Senate) at 29,771 (Sept. 18, 1978) (emphasis added). Additionally, the Senate Report states that the provision would afford whistleblower protection to "[a]ny worker who is called upon to testify or who give[s] information with respect to an alleged violation of the Atomic Energy Act or a related law by his employer or who files or institutes any proceeding to enforce such law against an employer" S. Rep. 95-848, Pub. L. 95-601, 95th Cong., 2nd Sess. 1978 (1978 U.S.C.C.A.N. 7303) (emphasis added). See also *Kassem v. Washington Hosp. Ctr.*, 513 F.3d 251, 254 (D.C. Cir. 2008).

ERA Section 210, which sets out the prohibitions for employers, specifically states that “no employer” . . . may discharge *any* employee or otherwise discriminate against *any* employee.” 42 U.S.C.A. § 5851(a)(1) (emphasis added). “It is not limited in terms to discharges or discrimination against any specific employer’s employees, nor to ‘his’ or ‘its’ employees.” *Hill and Ottney*, Nos. 1987-ERA-023, -024; slip op. at 2.¹⁹ Section 211 of the ERA permits the filing of a complaint by “*any* employee, who believes he has been discriminated against by *any* person” in violation of subsection (a).” 42 U.S.C.A. § 5851(b)(1). Based on this statutory language, federal courts have broadly interpreted the ERA to effectuate its protective and remedial purposes.²⁰

B. The ERA’s Whistleblower Employee Coverage Provision Has Been Interpreted Broadly Consistent with Congressional Intent

Consistent with Congress’ intent to ensure the compelling need for furthering safety at the nation’s nuclear power sites, the ARB has developed distinct approaches for determining when a complainant is an “employee” for purposes of qualifying for whistleblower protection under the ERA. The most pertinent in this case is the approach based on the statutory textual analysis explained in *Hill and Ottney*.²¹

In *Hill and Ottney*, the Secretary of Labor, interpreted the ERA to cover as “employees” twenty-four former employees of a company that had a contract with the Tennessee Valley

¹⁹ In *Hill and Ottney*, the Secretary expressly described the phrase “any employee” as a phrase “not limited in terms” to “any specific employer’s employees.” Nos. 1987-ERA-023, -024; slip op. at 1.

²⁰ See, e.g., *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) (“a narrow, hypertechnical reading of [the ERA] will do little to effect the statute’s aim of protection”); *Mackowiak v. University Nuclear Syst. Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); see also *Hill and Ottney*, Nos. 1987-ERA-023, -024; slip op. at 3 (“In the nuclear power industry, given the magnitude of the potential hazards to employee and public safety and health, there is an especially compelling need to keep open the channels of communication regarding potential safety and quality violations.”); *DeCresci v. Lukens Steel*, No. 1987-ERA-013, slip op. at 3 (Sec’y Dec. 16, 1993) (“Whistleblowers are protected under the ERA to further the Congressional purpose of the Act of protecting the public from the hazards of nuclear power and radioactive materials.”).

²¹ Another approach is the “control test” described throughout a line of cases discussed by the parties in their appellate briefs. See *Samodurov v. General Physics Corp.*, No. 1989-ERA-020, slip op. at 5 (Sec’y Nov. 16, 1993) (independent contractors may be covered); *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021 (ARB May 28, 2004) (found no relationship between complainant and respondents); *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 03-026, ALJ No. 1996-CAA-008 (ARB Sept. 29, 2004) (control may be demonstrated by the respondent’s ability to influence another employer’s actions over its employees). Essentially, those cases find that “employee” coverage exists where a covered employer exercised some degree of control over or otherwise interfered with the complainant’s terms, conditions, or privileges of employment.

Authority, a NRC licensee, to “develop and implement a program for the identification, investigation and reporting of Respondent’s employees concerns about quality and safety issues at nuclear power plants under construction for TVA.” *Id.* at 1-4. The Secretary observed that “[t]hese on-site employees of a contractor, whose responsibility is identifying, investigating and reporting safety complaints to the licensee, can be an important source of information regarding nuclear plant safety.” *Id.* at 2 (Secretary also citing 10 C.F.R. Part 50, App. B (1988) that under DOE regulations licensees may “delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program”). Indeed, the Secretary held that the ERA “is not limited in terms to discharges or discrimination against any specific employer’s employees, nor to ‘his’ or ‘its’ employees.” *Hill and Ottney*, Nos. 1987-ERA-023, -024; slip op. at 2. In that regard, the Secretary determined that under the ERA “any employee” could file a whistleblower claim against “any person,” presumably any “employer” covered by the ERA whistleblower statute. *Id.*, slip op. at 6. The Secretary made it clear that the ERA did not require an “employee-employer relationship” nor proof of the employer’s “right to control” the complainants. *Id.* at 3 n.2. Notwithstanding amendments to the ERA since *Hill and Ottney*, the same broad language and key words exist in the current version of the statute, making the Secretary’s analysis relevant today.

Turning to this case, the facts suggest that complainant Robinson may qualify as an employee under the ERA for the same reason. The parties appear to agree that Robinson is a nuclear quality assurance engineer who was retained by the Respondent to do quality assurance work for nuclear power plants in Nebraska and Florida. See Resp. Memo at 3-4; Complainant’s Opening Brief at 15. When terminated, Robinson was doing “quality assurance work on a Factory Acceptance Test (FAT) for the Nebraska Public Power District.” Resp. Memo at 4. Respondent’s Memo states that in August 2005, Robinson “discovered that the project engineer on the FAT was recording test information on the test procedure form [different from] the new form developed by Robinson” and later “instructed the engineer to stop the FAT.” *Id.* at 4. These facts suggest that, as in *Hill and Ottney*, when he was terminated, Robinson was working as a quality assurance worker on the NPPD project and would thus qualify as an employee under the ERA. However, we remand this issue to the ALJ to make appropriate findings of fact in the first instance.

C. Neither Collateral Estoppel Nor Demski Precludes a Determination that Robinson Is an “Employee” under the ERA’s Whistleblower Provision

The ALJ issued two separate orders dismissing Robinson’s claims in this matter, on April 17, 2009 (ALJ’s First Order), and on October 14, 2009 (ALJ’s Second Order). In her first order, the ALJ rejected Robinson’s claim that he was a protected employee under the ERA’s whistleblower law because he was collaterally estopped from relitigating his employment status as it pertained to Triconex/Invensys. The ALJ’s second dismissal order focused on whether Robinson was an employee of R&R within the meaning of the ERA because of Robinson’s employment status vis-a-vis his own company, which had contracted to provide Robinson’s services to Triconex/Invensys. In both situations, the analysis for determining whether Robinson is an “employee” for purposes of the ERA’s whistleblower provision differs from the *Darden* common-law master-servant test relied upon by the state court, and thus is not barred by

collateral estoppel.

1. Collateral estoppel does not apply

In the April 17, 2009 decision the ALJ granted partial summary decision in the Respondent's favor on collateral estoppel grounds. Because a California court state appellate court previously decided that Robinson was not a common law employee of the Respondent under the master-servant test applied in *Darden*, the ALJ concluded that collateral estoppel barred her from addressing whether Robinson was an "employee" under the ERA's whistleblower protection provision.

"Our jurisprudence holds that collateral estoppel applies when: (1) the same issue has been actually litigated and submitted for adjudication; (2) the issue was necessary to the outcome of the first case; and (3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination." *Hasan v. Sargent & Lundy*, ARB No. 05-99, ALJ No. 2002-ERA-032, slip op. at 7 n.28 (ARB Aug. 31, 2007) (citation omitted).

In *Darden* the Supreme Court concluded that "when Congress has used the term 'employee' without defining it . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." 503 U.S. at 322-23 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)).²² We believe that the Secretary demonstrated in *Hill and Ottney* that the statute "otherwise dictates" the broad meaning of "any employee" in the ERA whistleblower statute. As demonstrated by our review of ARB case authority, both the statutory construction of the ERA in *Hill and Ottney* and the "control test" for determining whether a complainant is an employee within the meaning of the ERA whistleblower protection provision are distinct from the *Darden* common-law agency test upon which the California court relied. In ERA cases, the control test is whether the covered employer exercised some control over or otherwise interfered with an employee's terms, conditions, or any privileges of employment, while the *Darden* control test involves a balancing and weighing of many factors.²³

²² In quoting from *Cnty. for Creative Non-Violence v. Reid*, the Court in *Darden* also noted that a well accepted common law may be inferred "unless the statute otherwise dictates." *Darden*, 503 U.S. at 322. *Cf. Sec'y of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 402 (3d Cir. 2007) (*Darden* "was decided under ERISA and has no impact on the question of whether the scope of the OSH Act is broad enough to cover workers who are not employees under the common law definition.").

²³ This distinction was made clear with respect to the "right-to-control" test in a series of decisions the ARB issued in *Stephenson v. NASA* interpreting the Clean Air Act's virtually identical whistleblower protection provisions. See *Stephenson v. NASA*, ARB No. 96-080, ALJ No. 1994-TSC-005 (ARB Feb. 13, 1997); *Stephenson v. NASA*, ARB No. 96-080, 1994-TSC-005 (ARB Apr. 7, 1997); *Stephenson v. NASA*, ARB No. 98-025, 1994-TSC-005 (ARB July 18, 2000). In these decisions, the ARB noted that in determining the employer-employee relationship [under the CAA], *Darden* "[is] of limited usefulness . . . because [it] deals with the distinction between the status of

Thus, the same issue was not litigated nor submitted for adjudication in the California action. The issue of whether Robinson was an “employee” within the meaning of the ERA was not before the California court nor shown to have been necessary to the outcome of the California case. Precluding litigation of the question of whether Robinson qualifies as an “employee” under the ERA would constitute a basic unfairness to Robinson in light of the differing standard applicable under the ERA for determining whether he is a covered, and thus protected, employee. Consequently, collateral estoppel does not apply to preclude litigation in the present case of the issue of whether Robinson is an employee within the meaning of the ERA whistleblower protection provision.

2. Demski does not bar Robinson from pursuing his claim

The ALJ’s Second Order focused exclusively on whether Robinson was an employee under the ERA based on his employment status within his own company. Pursuant to the undisputed facts, Robinson’s company, R&R, had contracted to provide Robinson’s services to Triconex/Invensys from June 2004 through June 2005. The ALJ determined, based on *Demski*,²⁴ that Robinson was not an employee of R&R, and therefore not a covered employee under the ERA’s whistleblower protection provision.²⁵

In *Demski*, the ARB recognized “the right of an employee of a subsidiary or subcontractor to bring a claim against the holding company or contractor if either retaliates

employee and that of independent contractor.” *Stephenson*, ARB No. 96-080, slip op. at 3 (citing *Coupar v. U.S. Dep’t of Labor*, 105 F.3d 1263, 1267 (9th Cir. 1997)). Given this distinction in the control test, the ARB further noted, the determination of whether an individual is a covered employee for whom whistleblower protection is to be afforded can be determined either pursuant to the *Darden* common-law principles applicable to master-servant relationships or under the control test first articulated in *Samodurov*. In assessing whether the requisite “employment relationship” exists, “the underlying question is . . . did [the respondent] act as an employer with regard to the complainant[], whether by exercising control over production of the work product or by establishing, modifying or interfering with the terms, conditions or privileges of employment?” *Stephenson*, ARB No. 98-025, slip op. at 11 (quoting *Stephenson*, ARB No. 96-080, slip op. at 4).

²⁴ We appreciate that the ALJ had no authority to ignore *Demski* if it was controlling. We also recognize that the Sixth Circuit affirmed *Demski*; however, that decision is not controlling here because (1) this case is not in the Sixth Circuit, and (2) the Sixth Circuit expressly relied on our determinations in that case. See *Demski*, 419 U.S. at 491 (“In the absence of a congressional definition or an explicit delegation of congressional authority to the agency, we determine how the agency responsible for implementing the statute (in this case, the Department of Labor) understands the term . . .”).

²⁵ We note that the ALJ’s determination that Robinson was not an employee of R&R conflicts with the California court’s determination that “[b]oth [Robinson] and his wife are employees of R&R.” *Robinson*, 2008 WL 4519042 at *1.

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.”²⁶ Nevertheless, in *Demski* the ARB concluded that because the complainant was an owner of the subcontracting company, not an employee, she was not a protected employee within the meaning of the ERA.

It is unclear from the facts whether *Demski* will ultimately apply in this case. If the ALJ finds that Robinson is an employee under *Hill and Ottney*, then *Demski* will be irrelevant. Therefore, we reserve for another day whether the holding in *Demski* bars Robinson from protection under the ERA whistleblower statute. Nevertheless, we question the viability of *Demski*'s overly narrow interpretation of the term “employee” in the ERA whistleblower provision. Arguably, our precedent in *Demski* creates a “narrow, hyper-technical reading of the [ERA]” that runs afoul of the plain language of the statute and *Kansas Gas & Electric*.²⁷ It also creates coverage issues that suggests an individual can be a covered employee one day at the work-site as an “independent contractor” or quality assurance worker but lose his or her coverage by coming back the next day to do the same exact work as the president or officer of a subcontracting company. Under the broad interpretation explained in *Hill and Ottney*, any on-site worker or any nuclear quality assurance worker is covered.²⁸

CONCLUSION

The statutory basis for determining whether an individual is a covered “employee” under the ERA and thus protected from whistleblower retaliation is distinct from the *Darden* common law master-servant relationship test. Consequently, Robinson is not barred by collateral estoppel from claiming in this case that he is a protected employee within the meaning of the ERA pursuant to *Hill and Ottney*'s interpretation of “employee” to include on-site employees and quality assurance workers, or the control test. Accordingly, the ALJ's First and Second Orders

²⁶ *Demski*, ARB No. 02-084, slip op. at 8 (citing, inter alia, *Hill and Ottney*, Nos. 1987-ERA-023, -024).

²⁷ 780 F.2d at 1512, *supra* n.20.

²⁸ Unlike the facts in *Demski*, Robinson personally provided quality assurance services for Triconex/Invensys in connection with its nuclear plants, before and after R&R joined the TAC contract. Even without this distinction, we find that it would be contrary to the clear intent of the whistleblower statute to find that a common law employee working side-by-side at the nuclear plant is a covered “employee” under the ERA while Robinson was not because he was technically an officer or owner of a subcontractor hired to work at the site. If Robinson proves that he was an employee under the “control” test, whether he is also covered as an employee of R&R becomes moot.

granting summary decision in favor of Respondent are **VACATED**, and this case is **REMANDED** to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring:

I concur with the majority that collateral estoppel does not preclude a determination in the instant case of whether Robinson is a protected employee under the whistleblower provisions of the ERA. I write separately because I am of the opinion that Robinson may be a covered employee entitled to whistleblower protection under *Hill & Ottney v. T.V.A.*, 1987-ERA-23/24 (Sec’y Apr. 21, 1994), upon which the majority primarily relies, even if it is determined that he is neither an “on site” employee or quality assurance worker at a nuclear facility. Given the majority’s alternative reliance upon the “right-to-control” test that has been developed through ARB case law for determining when an individual will be considered a protected employee under the ERA, I am also of the opinion that further explication of that test is warranted.

While the Secretary expressly limited her ruling in *Hill & Ottney* to the specific facts and circumstances of that case, the Secretary’s decision stands for a much broader legal proposition than that the ERA affords whistleblower protection to only “on site” or quality assurance nuclear power plant employees. In construing the language of the ERA’s whistleblower protection provision, the Secretary pointed out that the provision is not limited by its terms to retaliation against any specific employer’s employees, and that it provides for the filing of complaints by “any employee” against “any person.” This, the Secretary concluded, evinced an intent to extend whistleblower protection beyond an immediate employer-employee relationship consistent with the ERA’s remedial purposes, its legislative history, and case authority ascribing a broad definition to “employee” under the employee protection provisions of both the National Labor Relations Act, after which the ERA was patterned, and Title VII of the Civil Rights Act of 1964. The Secretary accordingly concluded that cases “purportedly distinguishing an employee from an independent contractor are not controlling,” and that “section 5851(a) of the ERA prohibits discrimination against ‘any employee’ without words of limitation, and section 5851(b) permits the filing of a complaint by ‘any employee’ against ‘any person’ whom he believes has discriminated against him.” *Hill & Ottney*, slip op. at 2-6.

As the majority notes, *Hill & Ottney* is not the only basis that has been recognized for determining whether an individual is a protected employee under the ERA; and that a long line

of cases have embraced a “right-to-control” test distinguishable from the *Darden* common law test for determining employee coverage. Indeed, this alternative test was recognized by the Secretary in *Hill & Ottney*. In reversing the ALJ in that case, the Secretary noted that the ALJ had relied on court decisions articulating a “right-to-control” test under the National Labor Relations Act requiring the existence of an employer-employee relationship between the parties.²⁹ The Secretary acknowledged that “[i]f Complainants were found to be constructive employees of Respondent under . . . the right-to-control test . . ., there would be no question of their right to complain of the alleged discrimination against them.” Having concluded, however, that the complainants were protected employees based on a statutory construction of ERA’s whistleblower provision, the Secretary found it unnecessary to consider the applicability of the test. Slip op. at n.2

The NLRA “right-to-control” test acknowledged by the Secretary in *Hill & Ottney* as an alternative basis for determining whether an individual is a covered employee under the ERA was subsequently relied upon in *Samodurov v. Niagara Mohawk Power Corp. et al.*, 89-ERA-20 (Sec’y Nov. 16, 1993). This “right-to-control” test, the Supreme Court has noted, “reject[ed] the agency common law conception of employee for purposes of the National Labor Relations Act where structure and context of [the] statute indicated [a] broader definition.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989). “Employee” within the meaning of the NLRA was read “to imply something broader than the common-law definition.” *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 324 (1992). *Accord N.L.R.B. v. Town & Country Electric*, 516 U.S. 85, 89-90 (1995).³⁰ *Samodurov* applied this test in holding that an applicant for employment as an independent contractor was a protected employee entitled to pursue a claim of discriminatory refusal to hire.³¹ The broad interpretation of “employee” applied in *Samodurov* was, in the Secretary’s opinion, necessary in order to give full effect to the purpose underlying the ERA employee protection provision of encouraging the reporting of safety deficiencies in the nuclear industry. Slip op. at 4. Accordingly, the Secretary considered “the degree of control or supervision by the respondent” determinative. *Id.* at 5.

²⁹ The ALJ cited *N.L.R.B. v. United Ins. Co. of Am.*, 390 U.S. 254 (1968), and *N.L.R.B. v. Tri-State Transport Corp.*, 649 F.2d 993 (4th Cir. 1981).

³⁰ In *NLRB v. Town & Country Electric*, the Supreme Court deferred to the NLRB’s continued broad interpretation of “employee” under the NLRA “right-to-control” test notwithstanding the Court’s articulation of the common law agency test for defining “employee” in *Darden*.

³¹ The Secretary expressly held: “In determining whether a contractor is an employee within the ERA’s protection, the decisions examine the degree of control or supervision by the respondent.” *Samodurov*, slip op. at 5. In making this determination, the Secretary cited and relied in part on *Faulkner v. Olin Corp.*, 85-SWD-03, *recommended decision* (Aug. 16, 1985), *adopted by the Secretary of Labor* (Nov. 18, 1985), which applied the NLRA “right-to-control” test to distinguish an employee from an independent contractor for purposes of the Solid Waste Disposal Act.

Subsequently, in *Seetharaman v. General Electric Co., et al.*, ARB No. 03-029, ALJ No. 2002-CAA-021 (ARB May 28, 2004), the ARB refined the “right-to-control” test for determining whether an individual claiming ERA’s whistleblower protection is a covered “employee” within the context of an employer-employee relationship between the complainant and the respondent. Necessary within this context, the ARB held, “is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant’s employment. Such control . . . includes the ability [of the respondent] to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant” *Seetharaman*, slip op. at 5.

In *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 03-026, ALJ No. 1996-CAA-008 (ARB Sept. 29, 2004), the ARB further explained that in determining whether an individual is a covered employee under the control test and thus protected by the ERA’s whistleblower statute, establishing the existence of an employee-employer relationship between the complainant and the respondent is “[a]n essential element of a whistleblower claim under the ERA. If the respondent is not the complainant’s direct employer, the complainant must prove that the respondent exercised control over the terms, conditions, or privileges of his employment. The ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is evidence of the requisite degree of control.” *High*, slip op. at 9 (citations omitted). *Accord Lewis v. Synagro Tech.*, ARB No. 02-72, 02-CAA-012 (ARB Feb. 27, 2004), slip op. at 8, n.14 (“Although the existence of an employment relationship in a particular case arising under the environmental whistleblower statutes may be determined based on a variety of factors, it is essential in finding coverage that the respondent putative employer exercised control over the terms, conditions, or privileges of the complainant’s employment.”).

In interpreting virtually identical provisions of other whistleblower protection provisions where the term “employee” is statutorily undefined and where the entity charged with retaliation is not the complainant’s direct or immediate employer, the ARB has applied the right-to-control test in determining whether the necessary employee-employer relationship exists for finding liability on the part of the respondent. For example, in *Stephenson v. NASA* the ARB stated, in interpreting the virtually identical whistleblower protection provisions of the Clean Air Act found at 42 U.S.C. § 7622(a):

Without deciding the exact breadth appropriately accorded [the statutory terms “employer” and “employee”] we do conclude that, in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with

an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment.

Stephenson v. NASA, ARB No. 96-080, 1994-TSC-005 (ARB Feb. 13, 1997), slip op at 3.

In a series of decisions rendered by the ARB in *Stephenson v. NASA*,³² the ARB drew a distinction between the “right-to-control” test developed for determining the employer-employee relationship under the Clean Air Act and the *Darden* common law test. While not ruling out entirely the applicability of *Darden*, the ARB explained that the *Darden* common-law principles applicable to master-servant relationships were “of limited usefulness” in determining whether an individual is a covered “employee” under the CAA, *Stephenson*, ARB No. 96-080 (ARB Feb. 13, 1997), slip op. at 3. Whereas under *Darden* the focus is on the respondent’s exercise of control over production of the work product,³³ in assessing whether the requisite “employment relationship” exists for purposes of determining whether an individual is a protected employee within the meaning of the CAA, “the underlying question is . . . did [the respondent] *act* as an employer with regard to the complainant . . . by establishing, modifying or interfering with the terms, conditions or privileges of [the complainant’s] employment?” *Stephenson*, ARB No. 98-025 (ARB July 18, 2000), slip op. at 11, quoting *Stephenson*, ARB No. 96-080 (ARB Apr. 7, 1997), slip op. at 4.

As the foregoing thus demonstrates, both the statutory construction of the ERA as the Secretary undertook in *Hill & Ottney* and the “right-to-control test” for determining whether a complainant is an employee within the meaning of the ERA whistleblower protection provision are distinct from the *Darden* common-law agency test upon which the California court relied. The California state court’s determination that Robinson is not an employee of Triconex/Invensys under the common law master-servant relationship test of *Darden* does not preclude determination in the present litigation of whether Robinson is a covered employee subject to ERA whistleblower protection pursuant either to *Hill & Ottney* or under the “right-to-control” test articulated in *Samodurov*, *Seetharaman*, *High* and subsequent ARB decisions.

In conclusion, I further join with the majority in questioning the precedential viability of *Demski v. Indiana Michigan Power Company*, ARB No. 02-084, 2001-ERA-036 (ARB Apr. 9, 2004), particularly in light of the ARB’s invocation of the “right-to-control” test as a means of determining whether an individual is a protected employee for ERA purposes. In *Demski*, the ARB focused upon the complainant’s employment relationship with the subcontracting company, concluding that because the complainant was not an employee of the subcontracting company, but its owner, she was not a protected employee within the meaning of the ERA.

³² *Stephenson v. NASA*, ARB No. 96-080, ALJ No. 1994-TSC-005 (ARB Feb. 13, 1997); *Stephenson v. NASA*, ARB No. 96-080, 94-TSC-005 (ARB Apr. 7, 1997); *Stephenson v. NASA*, ARB No. 98-025, 1994-TSC-005 (ARB July 18, 2000).

³³ “In determining whether a hired party is an employee under the general common law of agency,” the focus is on “the hiring party’s right to control *the manner and means by which the product is accomplished.*” *Darden*, 503 U.S. at 323 (emphasis added).

Under the “right-to-control” test, however, it is the complainant’s employment relationship with the respondent who is alleged to have taken the adverse action, and the respondent’s ability to control the terms, conditions, or privileges of the individual’s employment within that relationship that is dispositive, rather than the complainant’s employment relationship with a company that has subcontracted with the respondent.

For the foregoing reasons, I thus join with the majority in concluding that Robinson is not barred by collateral estoppel because of the California state court decision from claiming in the instant action that he is a protected employee within the meaning of the ERA.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge