



Issue Date: 14 October 2009

CASE NO. 2006-ERA-00031

In the Matter of:

DAVID ROBINSON,
Complainant,

vs.

TRICONEX CORPORATION,
Respondent.

ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

This matter arises under the Energy Reorganization Act of 1974 (“the Act,” “ERA”), as amended, 42 U.S.C. § 5851. The trial in this matter is scheduled to commence on October 19, 2009, in San Francisco, California.

On April 17, 2009, I issued an order (the April 17, 2009 Order) partially granting Respondent’s motion for summary decision. The order gave preclusive effect to California state court judgments which determined that Respondent and Complainant did not have a common law master-servant relationship. As a result, Complainant was estopped from arguing that he is an employee, temporary contract employee, or independent contractor protected by the ERA. Under the ERA, each of these theories of protection requires a master-servant relationship. These issues are treated as decided in Respondent’s favor. Complainant was not, however, barred from arguing any other theory of protection under the Act that does not require a common law master-servant relationship between Complainant and Respondent, including that the Act protects him as an employee of a contractor of Respondent.

On September 16, 2009, Respondent filed a second motion for summary decision, accompanied by a memorandum of points and authorities (Resp. P&A). Respondent argues that Complainant was not an employee of a contractor of Respondent and thus is not protected by the ERA. Resp. P&A, p. 1. Complainant filed a timely opposition on September 28, 2009 (Comp. Opp.). Complainant argues that he was an employee of a contractor of Respondent. Comp. Opp., p. 1. Respondent filed a reply on October 5, 2009.

SUMMARY OF DECISION

Respondent is entitled to summary decision. Complainant is not an “employee” within the meaning of the ERA. Therefore he is not protected by the statute and his claim must be dismissed. Although “employee” has a broader meaning under the ERA than it does under the

common law, over the course of two motions for summary decision Respondent has established that the term does not apply to Complainant.

The April 17, 2009 order granting Respondent partial summary decision applied the doctrine of collateral estoppel and barred Complainant from arguing that he shared a common law master-servant relationship with Respondent. This precludes Complainant from asserting that he is protected by the ERA as an employee, independent contractor, or temporary contract employee of Respondent, all of which turn on establishing a master-servant relationship. However, under the ERA, a complainant may be protected as an employee of a contractor of a respondent when the respondent has acted in the capacity of an employer with respect to the complainant. Respondent's motion did not address this theory of protection. Therefore, I granted summary decision only on the issues that turned on the master-servant determination. This left the issue of protection as an employee of a contractor of respondent undetermined, as well as any other theory of protection not dependent upon a master-servant relationship between Complainant and Respondent.

I now find that Complainant cannot establish that he is protected by the ERA as an employee of a contractor of Respondent. Complainant is president of the corporation contracting with Respondent and its sole employee performing nuclear quality work. In his words, he is the corporation. Because he is subordinate to no one at the contractor, Complainant is not an employee of the contractor. Since Complainant does not assert, and I cannot find, another viable theory under which Complainant is protected by the ERA, I conclude that Complainant is not protected by the ERA. Therefore, this matter is dismissed for lack of subject matter jurisdiction.

BACKGROUND

The following is adapted from the statement of relevant background set forth in the April 17, 2009 Order. The citations in this section only refer to filings submitted in support of and in response to Respondent's first motion for summary decision.

Complainant David Robinson is a nuclear quality engineer with over 30 years of experience in the nuclear field. Respondent's Memorandum of Points and Authorities in Support of Motion for Summary Decision, December 28, 2008 (Resp. Dec. 28, 2008 P&A), p. 2; Complainant's Opposition, January 2, 2009, (Comp. Jan. 2, 2009 Opp.), p. 1-2. According to Respondent, from June 2004 to June 2005 TAC Worldwide contracted with R&R Consolidated Enterprises to obtain Complainant's services for two six-month periods. Resp. Dec. 28, 2008 P&A, p. 3; Comp. Jan. 2, 2009 Opp., pp. 1-2. Complainant is the president of R&R, which also employs Complainant's wife. Resp. Dec. 28, 2008 P&A, p. 3. TAC Worldwide then leased Complainant's services as an independent contractor to Invensys, the parent company of Triconex.¹ Resp. Dec. 28, 2008 P & A, p. 3; Comp. Jan. 2, 2009 Opp., pp. 1-2. Complainant analyzed Invensys systems and procedures and wrote reports detailing the deficiencies he found. Resp. Dec. 28, 2008 P&A, p. 3; Comp. Jan. 2, 2009 Opp., pp. 1-2.

¹ Complainant represents that he worked for "Invensys plc (also known as Triconex Corp)." Comp. Opp. 1-2.

According to Respondent, Complainant was informed on August 31, 2005 that his services would no longer be required after September 2, 2005. Resp. Dec. 28, 2008 P & A, p. 4. Complainant asserts that his services were terminated in retaliation for having lodged safety complaints regarding projects in Nebraska and Florida. Comp. Jan. 2, 2009 Opp., p. 2. Respondent contends that Complainant was terminated, pursuant to the terms of his contract, for reasons of cost and because of concerns with Complainant's handling of a work stoppage on the Nebraska project. Resp. Dec. 28, 2008 P&A, p.4.

ANALYSIS

The whistleblower protection provisions of the ERA prohibit employers from discharging or otherwise discriminating against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee engaged in certain protected whistleblowing activity, including notifying employers of violations of the Atomic Energy Act (42 U.S.C. § 2011 et seq.) and refusing to engage in practices made unlawful by the Atomic Safety Act. 42 U.S.C. § 5851(a). If Complainant is not an "employee" within the meaning of the ERA, the Office of Administrative Law Judges lacks subject matter jurisdiction to adjudicate this matter under the Act, and the complaint must be dismissed. *See Reid v. Methodist Medical Center of Oak Ridge*, ALJ No. 93-CAA-4, Fin. Dec. & Ord., slip op. at 5-13 (Sec'y Apr. 3, 1995). Although the ERA does not define "employee," it has been construed to mean more than simply being the employee in a traditional employer-employee relationship. However, as this order and its predecessor on April 17, 2009 explain, the term "employee" is not construed so broadly as to include Complainant among those protected by the Act.

The April 17, 2009 order gave preclusive effect to California state court decisions which determined that Complainant and Respondent did not share a common-law master servant relationship. The issue before the California courts was whether Complainant was an "employee" and thus, had standing under state law to bring wrongful termination and retaliatory discharge causes of action. April 17, 2009 Order, pp. 14-18; *see Robinson v. Invensys, PLC (Robinson II)*, No. G039217, slip. op at 2 (Ct. App., 4th Dist., Div. 3, Oct. 9, 2008).² The California courts used the common law of master-servant relationships to determine that Complainant was not an employee of Respondent. April 17, 2009 Order, pp. 14-18. A common law master-servant relationship exists when an employer has the right to control the work of another. *See id.*; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). Having determined that Complainant was not an employee, the California courts concluded that Complainant did not have standing to pursue his causes of action. *Robinson II*, slip op. at 2, 10.

Under the ERA, a complainant is protected as an employee, temporary contract employee, or independent contractor of a respondent if he passes the same "master-servant" test the state courts addressed. *See, e.g. Crosier v. Portland Gen. Elec. Co.*, ALJ No. 91-ERA-2, Dec. & Order, slip. op. at 2 n.2 (Sec'y Jan. 5, 1994); *Samodurov v. Gen. Physics Corp.*, ALJ No.

² In *Robinson II*, the California Court of Appeal upheld the Superior Court's decision in *Robinson v. Invensys, PLC (Robinson I)*, No. 06CC04142, slip. op. (Sup. Ct. Orange Cty. July 23, 2007). In this decision and order, I refer to the Court of Appeal's decision as *Robinson II* to maintain consistency with the short-form case name used in the April 17, 2009 Order.

89-ERA-20, Dec & Order, slip op. at 4-5 (Sec’y Nov. 16, 1993). As the California courts determined that Complainant and Respondent do not share a master-servant relationship, Complainant is estopped from arguing that he can proceed under the ERA as an employee, temporary contract employee, or independent contractor. See *Robinson II*, slip op. at 4-8. Complainant can, however, invoke ERA jurisdiction if he is able to establish that he is protected by the Act under a theory which does not depend upon his sharing a common law master-servant relationship with Respondent, including as an employee of contractor R&R. April 17, 2009 Order, p. 23; see *Stephenson v. Nat’l Aeronautics & Space Adm.*, ARB No. 96-080, ALJ No. 1994-TSC-5, Dec. & Ord. of Rem., slip. op. at 3 (ARB Feb. 13, 1997).

Respondent argues that it is entitled to summary decision because Complainant cannot show that he was an employee of R&R Consolidated, the company for which Complainant served as president and chief executive officer. Resp. P&A, pp. 2-5. Respondent bases its argument on the Administrative Review Board’s (ARB) decision in *Demski v. Ind. Mich. Power Co. (Demski I)* ARB No. 02-084, ALJ No. 2001-ERA-35, Fin. Ord. of Dismissal, slip op. at 6 (ARB Apr. 9, 2004). Complainant argues that he is an employee of R&R under *Demski I*, and that cases beyond *Demski* provide authority for concluding that Complainant is an “employee” protected by the ERA. Comp. Opp., p. 2.

I. STANDARD FOR SUMMARY DECISION

Summary decision may be granted for any party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d); Fed. R. Civ. P. 56(c). A judge “does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial” by viewing the record “in the light most favorable to the non-moving party.” *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, Dec. & Ord. of Remand, slip. op. at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

A fact is material if proof of that fact would establish or refute one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co. Ltd. v. Zenith*, 475 U.S. 574, 585-88 (1986). The fact must necessarily affect application of appropriate principles of law to the rights and obligations of the parties. *Id.* If reasonable doubt remains as to the facts, the motion must be denied. *Anderson*, 477 U.S. at 247-52.

The moving party bears the initial burden of showing that there is no genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). By moving for summary decision, a party asserts that based on the present record and without the need for further exploration of the facts and conceding all unfavorable inferences in favor of the non-moving party, there is no genuine issue of material fact to be decided and the moving party is entitled to a decision as a matter of law. Fed. R. Civ. P. 56, 29 C.F.R. § 18.40(d). When a motion is properly supported, the nonmoving party must go beyond the pleadings to overcome the motion. He may not merely rest upon allegations, but must set out specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248.

Thus, Respondent, as the moving party, bears the burden of demonstrating (1) that there is no genuine issue of material fact regarding whether Complainant is an “employee” within the meaning of the ERA, and (2) that, as a matter of law, Complainant is not an “employee” under the ERA.

II. DEMSKI V. IND. MICH. POWER CO.

In *Demski v. Ind. Mich. Power Co. Demski v. Ind. Mich. Power Co. (Demski I)*,³ the ARB affirmed the dismissal of Lydia Demski’s complaint under the ERA because she was not an employee protected by the Act. *Demski I*, ARB No. 02-084, slip op. at 1. Demski was the president and sole shareholder of two corporations (ANR/Scope) that contracted with respondent Indiana Michigan Power Company (IMP), to maintain ice condensers at a nuclear plant, to augment staff and to maintain buildings and grounds. *Id.* at 1-2. Demski recruited employees to perform the contract. *Id.* at 2. She drew a paycheck from ANR/Scope and received W-2 tax forms. *Id.* IMP did not pay wages or provide benefits to Demski, nor did it pay ANR/Scope for any specific work performed by Demski. *Id.* Two managers managed ANR/Scope’s day-to-day performance of the contract and Demski retained authority to hire and fire ANR/Scope’s employees. *Id.* Demski’s whistleblower claim alleged that IMP terminated the three contracts in retaliation for her having reported safety concerns to IMP and the Nuclear Regulatory Commission. *Id.*

The ARB concluded that Demski was neither an employee of IMP nor of ANR/Scope. *Id.* at 4. Respondent’s motion for summary decision raises only the ARB’s conclusion that Demski was not an employee of ANR/Scope. Resp. P&A, p. 2. The ARB concluded that Demski’s “status as sole shareholder of . . . ANR/Scope, precludes her from being an employee of those companies,” adding that “Demski cannot be both master and servant simultaneously.” *Demski I*, ARB No. 02-084, slip op. at 5. The ARB further noted that “The employer-employee relationship is essentially hierarchical; the employer, the master, has power over the employee, the servant.” *Id.* (citing RESTATEMENT (SECOND) OF AGENCY, § 220(1) (1958)).

III. GENUINE ISSUE OF MATERIAL FACT

Respondent argues that Complainant’s own deposition testimony shows that “his relationship to R&R had no elements of being a servant. Like Demski, Robinson was not accountable to, or supervised by, anyone at R&R.” Resp. P&A, p. 3. Respondent points to Complainant’s deposition testimony that:

- He is president and chief executive officer of R&R,
- He signed documents as president of R&R,
- He did not have an employment agreement with R&R,

³ *Demski v. Ind. Mich. Power Co. Demski v. Ind. Mich. Power Co. (Demski I)* was upheld by the Sixth Circuit Court of Appeals on other grounds in *Demski v. U.S. Dept. of Labor (Demski II)*, 419 F.3d 488 (6th Cir. 2005). I refer herein to the first case in the Demski duet as *Demski I* to maintain consistency with the short-form case name used in the April 17, 2009 Order.

- He did not submit records of his work hours to R&R,
- TAC Worldwide did not oversee or supervise the work he performed for Triconex,
- No one at R&R besides himself directed how Complainant provided quality assurance services,
- No one at R&R regulated his work hours,
- No one at R&R had the right to discipline Complainant or terminate his employment,
- Besides Complainant, the only other shareholder, officer and director of R&R was his wife.

Resp. P&A, pp. 3-4; Resp. P&A, Ex. 2, pp. 10, 13-16, 18, 28-29, 30-32

Respondent also notes Complainant's deposition testimony that he "supervised myself, I pay myself, and the corporation is me, period." Resp. P&A, Ex. 2, pp. 14-15.

Complainant argues that he is protected under *Demski I*. Comp. Opp., pp. 1, 5. He also argues that the facts here differ from those in *Demski I*. *Id.* He points to the agreement between R &R and TAC as evidence that Respondent contracted, through TAC, with R&R to obtain services performed by Robinson, that Respondent paid R&R for Complainant's services, and that R&R paid Complainant. Comp. Opp., Exs. A, D, E, F. Complainant also submits W2 forms that R&R provided to Complainant and his wife. *Id.*, Ex. B.

Complainant adds that it was "well known" that Complainant worked for R&R. Comp. Opp., p. 3. He submits a memo signed by Davis Golden, Quality Director for Invensys, which refers to Complainant as a "contract employee." *Id.*, Ex. H. Complainant also provides evidence that R&R maintained medical reimbursement and retirement plans for its employees. *Id.*, Exs. I, J. He adds that when Complainant worked for Triconex, he did not work for other firms. *Id.*, Ex. K, p. 921. Complainant also submits his deposition testimony that Triconex set the hours he had to work. *Id.*, Ex. L, pp. 496-497.

There are no conflicts between the evidence offered by Complainant and Respondent. Indeed, Respondent points almost exclusively to Complainant's own deposition testimony. *See* Resp. P&A, 3-4. I am satisfied that there is no need to further develop the record as to Complainant's employment relationships with Respondent or with R&R. Thus, I conclude that there is no genuine issue of material fact as to whether Complainant is an "employee" protected by the ERA.⁴

⁴ Complainant incorrectly asserts that whether R&R employed Complainant is a genuine issue of fact for the hearing. Comp. Opp., p. 7. Complainant's status as an employee is an issue of law decided based on the facts in the record, which, in this case are not in dispute.

IV. ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW

Respondent has carried its burden of showing that it is entitled to judgment as a matter of law. The evidence indicates that Complainant is not an employee of R&R. Moreover, I find the fact that Complainant is not an employee of R&R precludes Complainant from establishing that he is an employee protected by the ERA.

Respondent's first motion for summary decision did not fully succeed because it failed to address whether Complainant was protected as an employee of R&R because Respondent had acted in the capacity of an employer with regard to Complainant. April 17, 2009 Order, pp. 14-18, 23. A respondent acts in the capacity of an employer with respect to an employee of one of its contractors by "establishing, modifying, or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment." See April 17, 2009 Order, pp. 14-18; see also *Stephenson*, ARB No. 96-080, Dec. & Ord. of Rem., slip. op. at 2-3. Respondent's first motion neither addressed Complainant's relationship with R&R, nor did it address whether Respondent acted in the capacity of an employer regarding Complainant. Respondent's second motion for summary decision does not directly address whether it acted in the capacity of an employer. Rather, it addresses a necessary pre-requisite for status as an "employee" under *Stephenson*. Resp P&A, pp. 2-5. A complainant must be an employee of a contractor of a respondent in order to be protected by the ERA because the respondent acted in the capacity of an employer. *Stephenson*, ARB No. 96-080, Dec. & Ord. of Rem., slip. op. at 2-3.

Complainant is not an employee of R&R within the meaning of the ERA. As the ARB explained in *Demski I*, "the employer-employee relationship is essentially hierarchical . . . for an individual to be an employee, there must be some higher supervisory authority to which that individual may be held accountable." *Demski I*, ARB No. 02-084, slip op. at 1. Complainant did not provide evidence that he is in anyway accountable for his performance to his wife, R&R's only other shareholder. When Complainant was asked whether anyone at R&R besides himself supervised the work he performed for Respondent, Complainant replied, "That's kind of an inane question, given the fact that I'm the only person that works for Triconex – for R&R, therefore, I supervised myself, I pay myself, and the corporation is me, period." Resp. P&A, Ex. B, pp. 14-15. While Complainant's relationship with R&R may reflect some of the formalities frequently found in employer-employee relationships, these formalities do not determine Complainant's status as an employee protected by the Act. The fact that Complainant received a pay check, or a W2 form, for instance, does not overcome Complainant's own testimony that he is the corporation. *Id.* Since Respondent has established that Complainant is not an employee of R&R within the meaning of the ERA, Complainant is not protected by the ERA as an employee of R&R against alleged retaliation by Respondent.

Complainant argues unsuccessfully that he is an employee protected by the ERA under *Crosier v. Portland Gen. Elec. Co.*, ALJ No. 91-ERA-2, Dec. & Order, slip. op. at 2 n.2 (Sec'y Jan. 5, 1994) and *Samodurov v. Gen. Physics Corp.*, ALJ No. 89-ERA-20, Dec & Order, slip op. at 4-5 (Sec'y Nov. 16, 1993). While these cases do provide that independent contractors and temporary contract workers may be protected under the ERA, they also provide that they are protected only when the respondent has the right to control their work, in other words, when

there is a common law master-servant relationship. *Crosier*, ALJ No. 91-ERA-2, Dec. & Order, slip. op. at 2 n.2 ; *Samodurov.*, ALJ No. 89-ERA-20, Dec & Order, slip op. at 4-5; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). This issue was already decided by the California state courts; they determined there was no master-servant relationship. *Robinson II*, slip op. at 4-8. As I explained in my April 17, 2009 Order, Complainant is estopped from arguing any theory of protection under the Act which requires a common law master-servant relationship between Complainant and Respondent. April 17, 2009 Order, pp. 13-20.

Complainant also cites additional cases in support of his argument that he is a protected employee under the Act. Comp. Opp., pp. 4-5. However, none of these cases address the issue of status as an employee under the ERA. While *Blackburn v. Reich*, 79 F.3d 1375, 1378 (4th Cir. 1996) involves the ERA, it addresses when attorney fees may be awarded. *Spicer Accounting v. U.S.*, 918 F.2d 90, 92 (9th Cir. 1990) and *Fort Dodge By-Products v. U.S.*, 133 F.Supp. 254, 260 (N.D. Ia. 1955) do state that the same person may be classified as both an officer and an employee of the same corporation; however, they address the issue of classifying income for the purpose of tax liability. As *Spicer* explains, the Internal Revenue Code defines “employee” for purposes of classifying income. *Spicer*, 918 F.2d at 93. This determination turns on the nature of the services the officer/employee performed, not on the nature of his relationship with the defendant. *Id.* 18 F.2d at 93. As discussed above, since the ERA does not define “employee,” determining whether the term applies to a complainant does turn on the nature of his relationship with the respondent. None of the cases Complainant cites are relevant to whether he is an employee protected under the Act.

CONCLUSION

Respondent has established that there is no issue of material fact as to the Complainant’s status as an “employee” under the ERA. It has also established, as a matter of law, that Complainant is not protected by the Act as an employee of Respondent, independent contractor or temporary contract employee of Respondent, or as an employee of a contractor of Respondent. Complainant has not suggested, and I cannot find, any other viable theory under which Complainant is an employee within the meaning of the ERA. Thus, I conclude that Respondent has succeeded in establishing that, as a matter of law, Complainant is not an employee protected by the ERA. Accordingly, Respondent’s motion for summary decision is **GRANTED** and this matter is hereby **DISMISSED** for lack of subject matter jurisdiction.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board (“the Board”) within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).