Case No.: 2012-ERA-00002

In The Matter Of:

RICHARD NELSON,

Complainant,

v.

ENERGY NORTHWEST,

Respondent.

Appearances: John P. Sheridan, Esq.
Sheridan Law Firm, P.S.
For Claimant

William G. Miossi, Esq.
Winston & Strawn
For Respondent

Angel D. Rains, Esq.
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises under the whistleblower protection provisions of the Energy Reorganization Act of 1974, as amended (“ERA” or “the Act”), 42 U.S.C. § 5851 (1994), and the regulations promulgated thereunder at 29 C.F.R. Part 24. Complainant, Richard Nelson, owns and operates Nelson Nuclear Corporation, a corporation that provided temporary maintenance staffing services to Respondent Energy Northwest. Under the contract between Nelson Nuclear and Energy Northwest, Complainant performed work at the Columbia Generating Station. After Energy Northwest took away Complainant’s Unescorted Access Authorization thus preventing him from entering the power station, he commenced the current action alleging retaliation in violation of the Act. On June 21, 2011, Richard Nelson (“Complainant”) filed a complaint with the Department of Labor, Occupational Safety and Health Administration (“OSHA”) against Energy Northwest, Inc. ("ENW" or "Respondent") alleging retaliation for making safety related complaints about Respondent while he worked at the Columbia Generating Station ("CGS") near Richland, Washington, California. Following an investigation, the Secretary dismissed the complaint; and Complainant thereafter filed his request for hearing before an administrative law judge. On December 12, 2011, Energy Northwest filed a Motion for Summary Decision and a
Memorandum of Law in Support of its Motion for Summary Decision arguing that Complainant is an independent contractor who is not covered under the Act. Complainant submitted a Response to Respondent’s Motion on December 19, 2012, arguing that he performed work at the power plant as a regular employee of Energy Northwest and is therefore entitled to protection as a whistleblower. On December 27, 2011, Respondent filed a Reply in Support of Energy Northwest’s Motion for Summary Decision. Complainant filed a Motion to Strike Respondent’s Reply and to Consider Additional Evidence in Motion for Summary Decision. After considering all of the evidence submitted by the parties, the undersigned found that there was a genuine issue of material fact relating to whether "Respondent exercised a significant degree of control over the manner and means by which he delivers his technical services." Accordingly the undersigned denied Respondent’s motion for summary judgment.

A formal hearing with the Office of Administrative Law Judges (“OALJ”) was held in Kennewick, Washington on May 24 and 25, 2012. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted to record: Administrative Law Judge (“AX”) exhibits 1-4, Complainant’s exhibits (“CX”) 1-16; and Respondent’s (“RX”) 1-14. Hearing Transcript (“Tr.”) at 5, 7-9.

Complainant testified on his own behalf as well as David W. Sanders and Richard A. Hayes, Jr. Jerry W. Ainsworth, Dale K. Atkinson, Pamela Bradley, Kurt Gosney and Bruce K. Pease testified on behalf of Respondent. Both Claimant and Respondent submitted their Post-Hearing Briefs on September 14, 2012. Based upon the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

Findings of Fact

ENW is a municipal corporation and joint operating agency of the State of Washington headquartered in Richland, Washington. ENW owns and operates the Columbia Generating Station, a nuclear power plant licensed by the U.S. Nuclear Regulatory Commission. Tr. at 277. Complainant has worked in the nuclear industry for thirty years, beginning as a Decontamination Technician (nuclear janitor) in 1981. Id. at 101; CX 1. During that time he has always had, and was never denied, Unescorted Access Authorization (“UAA”) status. Tr. at 105. In 2006, Complainant incorporated Nelson Nuclear Corporation (“NNC”), which provides personnel of all experience levels to commercial nuclear facilities and DOE sites in the United States. Id. at 103; CX 1; CX 3; CX 4. Complainant worked with ENW as a permanent employee and provided contract assistance with radiological and mechanical maintenance support on a number of occasions between 1987 and March 17, 2011. Tr. at 102-106; CX 1; CX 16 at 14.

Since 2006, Complainant has owned and operated NNC, a private corporation incorporated in Washington, and based in Richland, Washington. Tr. at 146. NNC principally supplies temporary labor to commercial and government operated nuclear facilities throughout the United States. Id. at 147; http://www.nelsonnuclear.com. As sole owner and manager of NNC, Complainant testified that he recruits and employs skilled and unskilled labor to perform certain work at nuclear power plants and other nuclear facilities to fulfill the terms of NNC’s contracts with the owners and operators of such facilities. Tr. at 147. Complainant exclusively determines the pay, benefits and other terms and conditions of employment for NNC employees; and he administers NNC’s own payroll and employment policies with respect to its workforce.
Id. at 147 - 151. Similarly, Complainant stated he is solely responsible for executing contracts on behalf of NNC, managing the financial affairs of NNC, including managing its risk management program, sales and marketing and he alone determines the profit margin on his contracts with ENW and oversees all NNC invoices issued to Respondent. Id.

Complainant has not been a payroll employee of ENW since 1991; he does not participate in any ENW benefit plans. Id. at 152-153, 191. Complainant exercises his discretion to assign himself to perform work under NNC contracts rather than assign or hire another NNC employee to perform the tasks. Id. at 148-149. Complainant has performed work on the ENW site "off and on since 1987," and throughout this period he has also performed work for other organizations unrelated to Respondent, such as work in 2008, 2009 and 2010, in North Korea, working with radiological safety teams in connection with the International Atomic Energy Association's efforts to denuclearize that country. Id. at 101-102, 192. In addition to providing services to ENW, Complainant's testimony and resume reveals that he has fulfilled assignments both as a payroll employee and as a NNC contractor since 2006 for entities unrelated to Respondent, such as Bartlett Nuclear, EG&G Services, Sonic Systems International, RL Mussman Corp. and both the U.S. Department of Energy and the U.S. Department of State. Id. at 190-194; CX 1; CX 12.

Respondent has contracted with NNC on no fewer than two occasions to supply temporary skilled and unskilled labor to assist with various maintenance projects at the Columbia Generating Station ("CGS"). CX 3; CX 4. The negotiated terms of the contracts between NNC and ENW include terms describing the scope and duration of the labor services being provided, as well as pricing for the labor and related expenses. Id. On each contract, regardless of which specific personnel were assigned to perform work pursuant to any contract between NNC and ENW, ENW paid NNC directly on invoices issued by NNC; ENW did not directly pay Complainant as an individual for any specific labor or services that he performed at ENW. CX 3; CX 4; Tr. at 150-152. Complainant testified that in order for NNC to function and supply staff and services to Respondent, it is not necessary that Complainant personally have unescorted access authorization privileges although he would not personally be able to perform any services. Tr. at 183. In fact, after Complainant's UAA was revoked on March 23, 2011, Complainant agreed that NNC and ENW continued to transact business. Id. at 181-182.

Starting in March 2010, Complainant was employed with ENW as a contractor through NNC, working as a Project Manager with the Maintenance Department at the CGS. Tr. at 102-106; CX 1; CX 16 at 14. While working as a Project Manager in the Maintenance Department, Complainant testified that he was assigned difficult, high profile tasks, such as testing the Main Control Room ventilation (Tracer Gas Testing) and the replacement of CW-V-7 (a 72-inch flow control valve) during operation. Complainant noted he never received any complaints about his performance. Id. Complainant testified that his job duties as a Project Manager were defined and assigned by ENW managers, and ENW managers controlled the numbers of hours he would work in a week, approved vacation requests, determined his start and end times, and determined if he could maintain his UAA. Tr. at 106-107. Mr. Sanders also testified that ENW managers controlled the daily work he was to do and oversaw the quality of that work. Id. at 42-43.
Nelson is a friend and former colleague of Dave Sanders. Id. at 225. From 2009 until approximately April 2011, Sanders was employed by ENW as the Major Maintenance supervisor. Id. at 25. In late 2010, Sanders worked as the Assistant Maintenance Manager, and when the Maintenance Manager was ill and away from work at various times, Sanders stood in for the Maintenance Manager at meetings. Id. at 27-29. During that time, Sanders stated that he attended daily operational focus meetings run by ENW Vice President Dale Atkinson and the plant manager. Id. at 28.

In March 2009, under pressure to hire a security observer for an upcoming outage, Sanders testified that he told Complainant to hire Ricky Hayes, who was his estranged daughter's boyfriend, a person Sanders testified he did not know well and had met only twice. Id. at 50-52, 54-57, 69, 79. At the time Complainant hired Hayes in 2009, Complainant was also working as a contract employee for NNC assigned as a Project Manager for ENW. Id. at 108. At Sanders' request, in April 2009, Complainant hired Hayes under the contract he had with ENW as a NNC employee. Id. at 108, 111-112, CX 4. Complainant testified it was common for ENW supervisors to ask for an employee by name. Tr. at 114-115. Complainant stated that it was a rush hire as he was required to have Hayes working the next day. Id. at 122. Complainant met with Hayes that night and completed the paperwork for the hiring. Id. at 128-129, CX 5. Hayes testified that he listed South Carolina as his permanent address because, even though he had been working at Target in Kennewick (one of the "Tri-Cities" encompassing Richland, Pasco and Kennewick, Washington) for several months, he had not decided whether he would remain in Washington State. Tr. at 205-206; CX 5. At the time, Hayes stated he was registered to vote in South Carolina, his driver's license was from South Carolina, his car had South Carolina license plates, and his furniture was in South Carolina. Tr. at 205-206; CX 5. In filling out the paperwork, Hayes indicated that taxes should be taken out for South Carolina. CX 5.

The purpose for preparing all these documents on the evening of April 28, 2009, at Complainant's home was to present it to ENW for the purpose of a) obtaining access authorization for Hayes, and b) fulfilling NNC's contract with ENW so that NNC could get paid and Hayes could receive his wages and travel and per diem. RX 4-5. Complainant asserted that his position whether a person NNC supplies to ENW is due per diem is not dependent on whether that person travels in to the Tri-Cities from a distant location for the assignment, though he conceded that no one from ENW ever approved or endorsed that viewpoint or that "Federal Travel Regulations" applied to ENW. Tr. at 175, 202. Complainant testified that he believed that entitlement to per diem for work on ENW contracts depends on the subjective intent of the person to make their home permanently in the Tri-Cities. Id. at 176. Yet, Mr. Nelson admitted that he understood from the beginning that Mr. Hayes ' intent was to find work and make the Tri-Cities area, Washington, his permanent home. Id. at 176.

Hayes reported to work for training on April 29, 2009. Tr. at 52. Hayes was unskilled and was hired at $22 per hour, which was substantially less than the going rate for a certified safety person, which could draw $80/hour. Id. at 52-53, 113-114. Sanders approved the paperwork that enabled Hayes to receive per diem because Hayes was working away from his permanent residence. Id. at 53. Sanders testified: "The paperwork he provided me was a South Carolina driver's license. [Complainant] had agreed to pay-or asked [Complainant] to take South Carolina state taxes out of his paperwork." Id. at 54. Sanders laid-off Hayes when the job ended.
(2 and 1/2 weeks earlier than originally expected) on June 7, 2010, even though Hayes was contractually approved to remain until June 25, 2009—a total of about five weeks. *Id.* at 80, 121. After he completed his work at ENW, Hayes testified that he was still registered to vote in South Carolina; still had a South Carolina driver's license; his car was still registered in South Carolina; and his furniture was still in South Carolina. *Id.* at 208-209. Hayes further stated that about one month after he ended his assignment at ENW, he returned to South Carolina to sell his automobile and dispose of his furniture as he had made the decision to live in Washington. *Id.* at 209-210.

On May 4, 2009, Hayes completed a Personal History Questionnaire ("PHQ"). *Id.* at 211; RX 6. "The NRC requires that the information collected be used in determining that an individual is trustworthy, reliable, and fit for duty prior to granting and while maintaining UAA/UA. The results of this determination must be available to other NRC licensed facilities." RX 6 at 1. To that end, a new employee fills out the form and an outside vendor (Pinnacle) does a background investigation, which is reviewed by Bruce Pease, the Security Compliance Supervisor at ENW or his designee. Tr. at 68, 379; RX 7.

On March 1, 2011, Pease became the Security Force Supervisor. Tr. at 377. In 2010, Pease testified he was the Security Compliance Supervisor at ENW. *Id.* at 379. Those who review PHQs reported to Pease when he was the Security Compliance Supervisor. *Id.* at 408-409. Jerry Ainsworth testified that he was a Technical Specialist who reported to Pease at the time. *Id.* at 243. When new hires filled out PHQs, Ainsworth or someone else in Pease's department went over the form with the new hire. *Id.* at 264-265. Someone from Pease's organization reviewed the Hayes PHQ on May 4, 2009 with Hayes. *Id.* at 265, RX 6 (review verified by initials). Mr. Ainsworth testified that someone messed up in the Hayes review because Hayes listed South Carolina as his permanent address, but showed employment at the Kennewick Target from October 2008, without listing any local residences. Tr. at 265-266. The PHQ was reviewed four times and approved by Pease's organization. *Id.* at 266-268, RX 6. The PHQs are also audited yearly and the alleged discrepancy was missed again. Tr. at 268-269. Both Mr. Sanders and Mr. Pease stated that by policy, a condition report ("CR") is required to be submitted whenever an error in procedure or mistake is discovered. *Id.* at 32, 392. Mr. Hayes testified that he was not hired again by NNC, but was hired twice more by ENW, once in the summer of 2009 on a temporary basis, and then permanently in February 2010, and each time Hayes filled out a PHQ. *Id.* at 210-212, RX 6; RX 13; RX 14. At the second, and possibly third hiring, it appears that the PHQs were reviewed by Mr. Ainsworth. RX 13 ("JA" initials); see also Tr. at 412 (Mr. Pease identifies initials), and RX 14 (again appears to be "JA" initials). The Hayes PHQs were reviewed by Pease, Ainsworth and ENW attorneys in March 2011, and in May 2009 and February 2010, and no CR was filed even though ENW claims that the first Hayes PHQ was wrongly completed and signed off on by Pease's organization. *Id.* at 247-248, 318, 417. Mr. Hayes was terminated in March 2011 after being interrogated by Messrs. Pease, Gosney, and Ainsworth. Tr. at 213, 224; CX 10.

In October, 2010, Dale Atkinson testified that he assumed the position of ENW Vice President of Employee Development and Corporate Services, which included responsibility for Supply Chain Services; Supply Chain Services oversees all vendor contracting and purchasing, among other things. Tr. at 277-279. Upon assuming these new responsibilities, Mr. Atkinson
stated he endeavored to educate himself on the issues and problems within his new purview. *Id.* at 279-280. In the course of this process, Mr. Atkinson testified he was made aware of concerns that his contracting officers had about "unusual contracting practices in the Maintenance Department." *Id.* at 280. Prominent among the concerns brought to Mr. Atkinson's attention were questions concerning NNC contracts and, in particular, information provided by Bill Penwell concerning inappropriate payment of *per diem* and travel expenses for personnel supplied to Energy Northwest by NNC who had not traveled in to the Tri-Cities area to work on an ENW project. *Id.* at 280-284. Mr. Atkinson testified that Mr. Penwell gave as an example circumstances involving Richey Hayes and his receipt of *per diem* and travel expenses when he was supplied through NNC. *Id.* at 284. Mr. Sponholtz, purchasing supervisor for ENW, testified that as a matter of policy, Energy Northwest does not authorize payment of *per diem* and travel expenses to contract employees unless they are brought in from outside the Tri-Cities area for the express purpose of working at ENW. *Id.* at 423-425. The ENW person who is responsible for administering vendor contracts is known as the "Technical Representative," and that person is responsible for ensuring compliance with ENW contracting policies, and the review and approval of all invoices. *Id.* at 412-425. Dave Sanders, as the Major Maintenance Supervisor, was the Technical Representative responsible for administering the contracts with NNC. *Id.* at 25, 91.

In October 2010, Mr. Sanders testified he had a heated argument with Mr. Pease concerning whether a CR that was given a Bravo designation owing to a badging issue in the Maintenance Department should be "owned" by the Maintenance Department or by the Security Department. *Id.* at 31-34. CRs may be designated Alfa, Bravo, Charlie, or Delta: Alpha being the most serious and requiring the most work to correct. *Id.* at 31-32. Mr. Sanders testified that management supported his point of view over that of Mr. Pease. *Id.* at 35. Mr. Pease admitted that badging is about safety and security, nuclear safety and security. *Id.* at 391; RX 6, RX 13. Mr. Sanders further stated that approximately one week later, the Security Department had a similar incident and Mr. Pease agreed to designate the Security Department incident as a "Charlie." Tr. at 35. Subsequently, in a meeting with Mr. Sanders, Mr. Pease, and upper level management, Mr. Sanders testified that he questioned why his group received a "Bravo" designation for the same issue that Mr. Pease's group received a "Charlie" designation, and after being told by management to "take it outside," Pease and Sanders continued to disagree, but the Charlie designation prevailed. *Id.* at 35-36. Mr. Pease admitted to the incident in general, but denied he wanted to "own" the Maintenance Bravo. *Id.* at 392.

In late February or early March 2011, Mr. Sanders testified he sought to have the ENW UAA badging procedure changed to allow more time for that process in light of the need to hire a number of new, temporary employees. He explained his plan was to not compete with 17 other nuclear plants (which close down for maintenance in the early spring) for qualified personnel who were needed to work an upcoming outage for maintenance. Instead, ENW would bring in the valve contractors in March for training, send them away to work at the other 17 plants, and then bring them back after they completed work at the other plants, which would save about three weeks in time because they would already be trained. *Id.* at 36-38. Mr. Sanders stated he wanted to allow these contractors to return to the site again without having to repeat the badging process because it would save money. *Id.* at 38. Mr. Sanders testified that Mr. Pease had his own written policy that would have required the contractors to repeat the badging process, and he
objected to the change, but Sanders obtained permission for the change through his own chain of command. *Id.* at 39. Mr. Sanders testified that once Pease learned that Sanders had succeeded in having the badging procedure changed, he said to Sanders that that was twice and "he owed him one." *Id.* at 39-40.

Vice President Atkinson admitted to meeting with Sanders and that Sanders wanted the UAA badging procedure changed to allow more than five days for that process because there were going to be many new temporary employees coming in to work an outage. *Id.* at 288. Mr. Atkinson admits to speaking with Mr. Pease after speaking with Mr. Sanders about this issue and that Mr. Pease advocated keeping the five-day time requirement. *Id.* at 289. Mr. Pease testified he never spoke to Mr. Atkinson about the badging issue. *Id.* at 396-397. Although Mr. Atkinson denied knowing that Sanders and Pease were having a professional disagreement, he admitted that Pease had a different position than Sanders on the issue. *Id.* at 289-290.

The focus of Mr. Atkinson's concerns in initiating his investigation was on two contractors, NNC and TLD. Tr. at 281. With regard to NNC, Mr. Atkinson claimed he learned it was "highly unusual to have a contractor working on site who was also contracted to provide candidates, a headhunter's service." *Id.* at 282. However, Gregory Sponholtz testified he has seen situations where people have been contracting through their own businesses where they provide employees to ENW, but also work themselves as a contracting employee. *Id.* at 428. Mr. Sponholtz stated this has been a practice for years and that the arrangement is "common knowledge." *Id.* at 429. Between November 2010 and March 2011, no one from the legal department, or from Atkinson's organization, sought his opinion on the issue. *Id.* at 428-429. Mr. Sponholz testified "That's a practice we've used for years." *Id.* at 429.

Mr. Atkinson stated he went to Acting General Counsel Pam Bradley and explained what had been reported to him about the unusual contracting practices. *Id.* at 283. He said he "directed her to look into the contracting practices within the maintenance departments, specifically these contracts [NNC and TLD], and [to] let [him] know what she found." *Id.* at 283. Mr. Atkinson testified that after the investigation into the "unusual" practices was assigned to Ms. Bradley, he learned that there was evidence that NNC was misusing *per diem*. He testified that in late November or early December 2010, Maintenance Department employee Bill Penwell told him he learned through his wife that "Ricky Hayes wasn't getting paid [per diem] before and was now." *Id.* at 283-284. He testified, "I contacted the Acting General Counsel, Pam Bradley, again, and directed her to add the *per diem* practice in question to the list of contracting items that she was going to look into within maintenance." *Id.* at 284-285. This was a broadening of the initial investigation into contracting issues. *Id.* at 303. Ms. Bradley gave him updates on the progress of the investigation. *Id.* at 285.

On cross-examination, Mr. Atkinson admitted he told Ms. Bradley to begin looking into *per diem* for NNC and Ricky Hayes. *Id.* at 300. He also admitted that he mentioned Sanders in the assignment. *Id.* at 300. He stated he mentioned Sanders' name to Bradley because Penwell mentioned Sanders' name. *Id.* at 301. Mr. Atkinson stated that he gave this assignment to Ms. Bradley in addition to the "general contracting practices" assignment. *Id.* at 300. Ms. Bradley denied that the "unusual" practice was ever discussed with her. She stated: "The fact that Mr. Nelson was an employee of his company, and we had a contract with his company, that wasn't an
issue." Id. at 331. However, Mr. Atkinson testified that Ms. Bradley even briefed him on the Nelson contracting issue, and informed him that it was unusual and "inconsistent with what she believed were past practices within both human resources and the supply chain function." Id. at 298-299. Ms. Bradley denied that Sanders' name had been mentioned. Ms. Bradley testified that in December 2010 or January 2011, Mr. Atkinson came to her and mentioned that "a concern had been raised that there was -- that there had been perhaps improper per diem paid under the NNC contract and asked me to look into that." Id. at 316. She stated that during the conversation, Mr. Atkinson told her that the issue concerned payment of per diem to Ricky Hayes made while he was working for NNC in 2009. Id. at 315-316. Ms. Bradley stated that "he wanted me to investigate that and determine if there was any validity to that concern." Id. at 316. Ms. Bradley denied that Mr. Atkinson mentioned Sanders' name regarding the per diem issue. Id. at 327. However, in her deposition testimony she testified "there was the mention of Richey [sic] Hayes and his relationship with Dave Sanders." Id. at 329.

In early 2011, Mr. Atkinson testified he directed Ms. Bradley, ENW's Acting General Counsel, to investigate the issues concerning the payment of per diem and travel expenses on NNC contracts and report back to him. Id. at 284-285. Ms. Bradley testified that she proceeded to obtain copies of NNC contracts, which were maintained by the Supply Chain Services Department, NNC invoices from Accounts Payable and personal history questionnaire records ("PHQs") that were maintained by Access Authorization, which is part of the Security Department. Id. at 316-318, 320; RX 3; RX 4; RX 5; RX 13; RX 14. With the assistance of Mr. Ainsworth, the Technical Specialist in Access Authorization, Ms. Bradley stated she determined that NNC had invoiced ENW for $7,177.30 in May and June, 2009, for round trip travel and per diem ($90/day for meals and lodging) for Mr. Hayes, whom NNC had supplied to ENW as a contract safety observer in May and June, 2009. Yet, the information Hayes provided on three different PHQs he submitted to obtain access rights to ENW in April and August 2009, and in October 2010, appeared to establish that he had been living and working in Kennewick, Washington since mid-2008, long before he was supplied by NNC to work as a safety observer in the late Spring of 2009. Tr. at 318-320; RX 2; RX 3. It was also known that in 2008-2009, Mr. Hayes was engaged to be married to Mr. Sanders' daughter, Sharese Sanders; and that Mr. Hayes and Sharese Sanders had a child together on December 4, 2008. Tr. at 88.

ENW policy restricts payment of per diem and travel costs only to those contract employees who specifically travel into the Tri-Cities, Washington area to perform work at ENW; persons already living in the area when assigned contract work at ENW are not eligible for travel costs or per diem payments. Id. at 424. The Technical Representative responsible for ensuring compliance with this policy was Mr. Sanders who was responsible for requesting and administering the NNC contract under which Mr. Hayes was supplied in 2009 as a safety observer. Id. at 89, 91, 424; RX 4. Consequently, in March, 2011, Ms. Bradley and Mr. Kurt Gosney determined that additional review was merited; and it was decided that Security would interview all those who appeared to have knowledge or involvement in this matter: Richey Hayes, Dave Sanders, Sharese Sanders and Complainant. Tr. at 319-320, 351. Mr. Gosney (at the time newly appointed Security Compliance Supervisor and the Reviewing Official 1 for ENW), Mr. Ainsworth, (the PHQ Technical Specialist) and Mr. Pease (the Security Force Supervisor as of March 1, 2011) conducted the interviews. Mr. Pease testified that he did not initiate or seek to participate in the investigation of the matter that resulted in Complainant losing his
UAA; but rather, Mr. Pease was specifically asked to support Mr. Gosney, who was new to his position as Reviewing Official, given that Mr. Pease had just previously held that position. *Id.* at 367-368, 380-381. On March 16, 2011, Mr. Ainsworth compiled information about Ricky Hayes and his PHQs. RX 2.

The first person the team interviewed was Mr. Hayes, on March 16, 2011. RX 3. Mr. Hayes revealed during the interview that he did not live in South Carolina in May - June, 2009, when he worked at Energy Northwest as an NNC employee, but had been living continuously in Kennewick, Washington from the summer of 2008 to the time of the interview. Mr. Hayes signed a written statement on March 16, 2009, stating that he was not entitled to *per diem* during this time, but he received it anyway and that Complainant had offered to "help [Hayes] out by paying [him] *per diem*" and that "[Complainant] knew [Hayes] use to live in South Carolina" *Tr.* at 231-234, 353-354; RX 3. Mr. Hayes testified at trial confirming the accuracy and truthfulness of the written statement; that he was not forced or coerced into signing the statement; that he was given ample time to consider it; and that he signed it because he agreed that it represented his statement. *Tr.* at 233-234. However, Mr. Hayes also testified that he didn't know whether his receiving *per diem* was wrong and that he "pretty much" felt pressured to sign the statement which was actually written up by Mr. Pease. *Id.* at 220-221. He also stated that he feared for his job and was in fact terminated as soon as the interview ended. *Id.* at 219, 224. Although Mr. Hayes agreed that he actually lived in Washington from June, 2008 to the time of the hearing, he testified that he did not make the decision to move permanently to Washington from South Carolina until after he had completed the job for NNC and went back to South Carolina to sell his car and personal belongings which was the only three weeks during that entire period that he was not in Washington. *Id.* at 209-210, 226-227. Mr. Hayes agreed that he did not put down his Washington address when he filled out his PHQ in April of 2009, even though the form required a listing of any address lived in for longer than 30 days in the preceding 5 years. *Id.* at 229-231; RX 6.

When Pease, Kurt Gosney (the CGS Training Supervisor), and Ainsworth interrogated Ricky Hayes, they told him he had filled out the 2009 PHQ wrong (by claiming South Carolina residency) and should not have gotten *per diem*. *Tr.* at 216. They claimed to be *per diem* experts. RX 2; RX 19. But they did not ask any questions related to residency. *Tr.* at 218. Mr. Hayes stated they did not tell Hayes he had a right to union representation until the end of the interrogation, although Mr. Pease claims he advised Hayes of his union representation rights at the outset. *Id.* at 220-221, 224-225, 382-383. At the hearing, Pease, Gosney, and Ainsworth testified they were not *per diem* experts, and attorneys working with them agreed they were not, and admitted they were not *per diem* experts either. *Id.* at 333, 340, 364, 386. Although Hayes, Sanders and Nelson testified that during each of their interrogations, Pease and Gosney claimed to be *per diem* experts (*Id.* at 57, 59, 71,121, 131, 219), Gosney and Pease denied telling Sanders, Nelson, and Hayes that they were *per diem* experts. *Id.* at 359, 364, 386, 401.

The investigators also interviewed Dave Sanders and Sharese Sanders in order to obtain their version of the relevant events. On March 16, 2011, less than two weeks after Sanders had his last run-in with Pease, Sanders was interrogated by Pease, Gosney, and Ainsworth. *Id.* at 48. Mr. Sanders was told that they were investigating former NNC employee and ENW contractor Rick Hayes' *per diem* rate from 2009. *Id.* Mr. Sanders admitted that he was aware that Richey
Hayes was living in Kennewick, Washington, with his daughter for at least eight months before Hayes signed on with NNC to work at ENW, and that Hayes did not travel from South Carolina in April, 2009, to accept employment with NNC for work at ENW. Id. at 89-90. Mr. Sanders also conceded that but for a period of three or four weeks, Mr. Hayes has lived in Kennewick, Washington continuously from mid-2008 through the date of his testimony, May 24, 2012, and that he remains in regular contact with Richey Hayes. Id. at 94-95. Mr. Sanders also confirmed that he directed Complainant to hire his future son-in-law, Richey Hayes, and assign him through NNC to be a safety observer at ENW for the period May - June, 2009, and that he instructed Complainant to pay Hayes at a rate of $22 an hour. Id. at 89. Mr. Sanders testified he was the Technical Representative on the NNC contract supplying Hayes and providing for payment of travel and per diem to Hayes and that in the capacity of Technical Representative, he was responsible on behalf of ENW to review and approve all NNC invoices on the NNC contract supplying Mr. Hayes in May and June, 2009. Id. at 91. Mr. Sanders testified that although he knew Mr. Hayes had been in Washington for a while when he hired him through NNC, he didn't know whether Mr. Hayes planned to stay in Washington or return to South Carolina and he noted all the paperwork completed by Mr. Hayes listed South Carolina and his driver's license was also from South Carolina. Id. at 53-57. Mr. Sanders also stated that he knew of others who were living in Washington temporarily but drew per diem. Id. at 58-59.

When they represented themselves to be per diem experts, Sanders began to question himself and offered the names of other employees who received per diem in similar circumstances. Id. at 57-58. Mr. Sanders testified he told Mr. Pease how he had worked in Arizona on a temporary basis and collected per diem. Id. at 58-59. Mr. Sanders testified, "They let me know they were per diem experts and what I done was wrong." Id. at 59. Mr. Sanders explained that the Hayes' per diem approval was one of many tasks he was charged with reviewing, and which he did at night owing to how busy he was. Id. at 59-60. Mr. Sanders reviewed the travel from South Carolina documents and agreed that travel should not have been authorized since Hayes was already in Kennewick. Id. at 60- 61. In his testimony, Mr. Sanders took issue with many of the statements contained in the summary of his testimony that was created by Pease and Gosney and characterized the meeting as an interrogation. Id. at 69-74; CX 11. At the conclusion of the interview, Mr. Sanders told Mr. Pease that Complainant was his ride home, and he was admonished not to talk about the interrogation. Tr. at 74. Mr. Sanders testified he cannot drive because his is legally blind. Id. at 44. Mr. Sanders stated he did not discuss the interrogation with Complainant. Id. at 75-76. Upon leaving the interrogation, Mr. Pease took Mr. Sanders' badge. Id. at 76. Following the interrogation, Mr. Sanders was called to a pre-termination meeting during which he stated he did not know what he did wrong since there were no procedure/policies and no training. Id. at 79-80, 427. At the meeting, he challenged the content of the summary report, and gave the managers and attorneys a copy of his notes from the interrogation. Id. at 83, 99. On April 22, 2011, Sanders was terminated . Id. at 25, 306, 363, 427. Mr. Sanders testified that he was not given much opportunity to talk during the investigative interview but did state that he felt there should be some training available as to who was entitled to per diem and that he thought it was allowed in Hayes' case. Id. at 57, 59, 71.

At the hearing, Complainant confirmed that he drove Sanders home on March 16, 2011, and confirmed that Sanders would not talk about what had just happened or explain why he no longer had a badge. Id. at 116-117. The next day, on March 17, 2011, Complainant was told to
report to the Security department at 7:00 a.m., but was not informed of the reason for this order. *Id.* at 117-118. After waiting about forty minutes, Complainant was then directed to an interview room where Pease, Gosney, and Ainsworth were present. *Id.* at 118. Complainant testified that Mr. Pease was immediately irate after confirming that Complainant drove Sanders home the day before. *Id.* at 118-119. Mr. Pease informed Complainant that Complainant was to answer all questions honestly or ENW would revoke Complainant's UAA. *Id.* at 119. Mr. Pease began questioning Complainant about Sanders and NNC's payment of *per diem* to Hayes during an outage support in 2009, but never showed Nelson one document. *Id.* at 120-121. Complainant testified that they claimed to be experts on *per diem*, and that *per diem* was not allowed for Hayes, but Complainant would not concede that the *per diem* to Hayes was improperly paid, although he agreed that the "travel in" was mistakenly paid and offered to credit that back. *Id.* at 121-124, 131-132. Complainant testified that they used "double-negatives" to confuse Complainant, to which he objected. *Id.* at 125. Complainant became upset and stated, "You guys tell me you're going to pull my access if I'm not honest. You need to ask straightforward questions." *Id.* at 125. After a break and more questioning, Complainant stated that Mr. Pease said, "You're not giving - you're not giving me what I want. Give me your badge." *Id.* at 126. Complainant turned in his badge. Mr. Pease and Mr. Gosney stated that since Complainant was a contractor, they could not place him on administrative leave, as they had done for Sanders. *Id.* Complainant stated he left the site immediately, concerned that he should not be there without a badge. *Id.* Complainant testified that he told Mr. Pease he had the Hayes hiring package and could produce it if they wanted it, but they never requested it. *Id.* at 143-144. Complainant appealed through internal channels, without documents, explaining what he had allegedly done wrong, but the appeal was denied by ENW. *Id.* at 186-187. Complainant testified that the Investigation Summary Report contained many false statements and inaccuracies. *Id.* at 186.

Complainant testified that he hired Richey Hayes as a NNC safety observer in April 2009, assigned him to ENW and paid him in accord with Dave Sanders' instructions. *Id.* at 154. Complainant also acknowledged that he had known Sharese Sanders since she was a young girl; had met Sharese Sanders' fiancé, Richey Hayes, socially many months earlier; and that he knew Hayes had been living in Kennewick, Washington since the summer of 2008. *Id.* at 157-159. Complainant further disclosed that he called Richey Hayes' cell phone on April 28, 2009, and told him to meet at Complainant's home that evening so the two of them could complete a NNC employment application and other paperwork necessary for Hayes to work on site at ENW. *Id.* at 158-159. Complainant admitted that Hayes had no experience as a safety observer, and NNC does not advertise to provide safety observers or supply any staff other than trained professionals and skilled tradesmen. *Id.* at 156-157. In fact, Complainant not only completed certain of the employment forms for Mr. Hayes (*e.g.*, INS I-9 Forms), but he helped draft and personally format a resume for Mr. Hayes that featured a description of Mr. Hayes' work ethic, skills, professional goals and experience, including employment at the Kennewick, Washington Target from "2008 - Present," but omitted any indication that Mr. Hayes had been living in Kennewick, Washington. *Id.* at 159-169; RX 8-11. Complainant testified he prepared Hayes' resume (RX 9) by "cutting and pasting" the information Sharese Sanders emailed to him (RX 8). Tr. at 164-165. RX 8 contained Mr. Hayes' Kennewick, Washington address, yet Complainant omitted that information on RX 9, which he prepared specifically to present to ENW. Tr. at 165-166. Complainant addressed the NNC offer letter to Mr. Hayes to his parents' address in South Carolina, though he was in Mr. Hayes' presence at the time and handed him the document for
Mr. Hayes to sign. *Id.* at 169-172; RX 10. Complainant also had a voided check from HAPO Community Credit Union showing Mr. Hayes and Sharese Sanders as joint account holders at that local bank and stating their Kennewick, Washington street address and a list of Kennewick based reference sources as provided by Mr. Hayes. RX 8; RX 11. Complainant admitted knowing that Mr. Hayes was locally (Kennewick) established for a period of at least nine months at the time he was completing all these documents. Tr. at 172.

At no point during the investigation, did Complainant express any safety concerns of any kind with respect to himself or in support of anyone else, and he had no personal involvement with any disputes concerning safety issues or Condition Reports between Mr. Pease and Mr. Sanders. *Id.* at 97, 178, 358-360, 387. Mr. Sanders testified that Complainant was not involved in any Condition Reports or safety concerns, real or alleged, expressed by him at any time. *Id.* at 96-97. In fact, Complainant did not testify or submit any evidence whatsoever that he ever expressed any nuclear or other safety concerns concerning ENW in any manner or at any time. *Id.* at 100-102.

Mr. Gosney was the Reviewing Official for ENW at the time of the investigation in March, 2011. As Reviewing Official, he is charged with responsibility for administering the NRC access authorization regulations, codified at 10 CFR, Part, 26, supplemented by NEI Guidance Memo 03-01. *Id.* at 346-347. At the conclusion of the investigation, Mr. Gosney testified he alone made the decision to revoke Complainant's UAA because he determined that Complainant was not truthful during the course of his security interview and had provided false information to support *per diem* for Mr. Hayes in 2009. *Id.* at 350, 358, 363-364. Consequently, in his capacity as Reviewing Official for ENW, Mr. Gosney testified he determined that Mr. Nelson was not trustworthy and reliable and therefore not qualified under NRC regulations to retain his UAA at Energy Northwest. *Id.* at 321-322, 346-350, 358, 360; RX 1. Mr. Gosney also prepared a Security Investigation Summary Report, dated March 22, 2011, wherein he detailed the steps of the investigation, the documents reviewed, the information obtained through witness interviews and the conclusions reached that "all personnel interviewed had knowledge that the travel/*per diem* was not warranted and knowingly and willfully submitted falsified documentation with the intent to support payment of travel/*per diem* to Richard Hayes." RX 3; Tr. at 352. The investigators testified that they were not provided an agenda or any direction or instructions as to the manner or outcome or conclusion that the travel/*per diem* investigation should reach. *Id.* at 242-243, 285,320, 358, 388.

On February 24, 2009, the parties executed a Contract Release for Complainant through NNC. The Contract Release notes that the release provides for the services of Complainant as a Field Engineer to support the By-Pass Valve Inspection Project and various other projects as directed by the Turbine Functional Area Manager in support of R19 refuel/maintenance outage. CX 3. The agreement was scheduled to last from March 9, 2009, through June 30, 2009. The contract specifies that the listed rate for all hours worked is $79.35. This agreement was later extended from August 17, 2009 through September 17, 2009. On the same date, the parties also executed a basic order agreement for $180,000 titled Richard Nelson, Fluid Leak Coordinator. CX 4. Under this agreement, Complainant was scheduled to provide services as a Fluid Leak Coordinator from March 3, 2010 through June 30, 2010 at a bill rate of $63.50 for all hours worked. The agreement was later extended to last from July 01, 2010 through June 30, 2011.
CONCLUSIONS OF LAW

Arguments Concerning "Employee" status

Complainant argues that although his company, NNC, did business with Respondent, Complainant’s main job was to work as an employee for Respondent. According to Complainant he performed full time work at Respondent’s facilities under the direct control and supervision of Respondent’s managers and was not just an off-site manager who monitored the performance under a contract. When Respondent revoked his UAA, Complainant could not work at the power plant as the Project Manager in the Maintenance Department and could not conduct the business of NNC. Respondent counter argues that as a corporate employer, Complainant can’t also qualify as an employee who is entitled to protection as a whistleblower under the ERA. In the alternative, Respondent asserts that the Darden factors weigh in favor of finding that Complainant was an independent contractor. The undersigned finds that under the facts of this case, Complainant can serve as a sole shareholder of his own corporation and still retain the status of employee with respect to Respondent. The undersigned likewise concludes that Respondent maintained sufficient degree of supervision and control over Complainant’s work at the plant such that he should be considered an employee for purposes of the Whistleblower Protection provisions of the ERA.

Analysis of "employee" status issue

The ERA protects whistleblowers employed in the nuclear power industry. Under Section 5851 of the ERA, “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)” has engaged in protected activity. 42 U.S.C. § 5851(a)(1). To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he was an employee who engaged in protected activity, that the employer knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took. 42 U.S.C.A. § 5851(b)(3)(C); Dysert v. Secretary of Labor, 105 F.3d 607 (11th Cir. 1997); Simon v. Simmons Foods, Inc., 49 F.3d 386 (8th Cir. 1995); Kester v. Carolina Power & Light Co., ARB No. 02-007, slip. op. at 5-8 (ARB Sept. 30, 2003). Complainant is not entitled to relief 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.” 42 U.S.C.A. § 5851(b)(3)(D).

The statute and the regulations interpreting the ERA do not define the term “employee;” however, the following entities are considered employers:

(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;
and

(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.

When the definition of a term in the statute is uninstructive, courts turn to cases construing similar language to fill “the gap in statutory text.” Clackmas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003). Most courts consider the definition of “employee” to be uniform under federal statutes where it is not specifically defined. See, e.g., Fichman v. Media Center, 512 F.3d 1157, 1161 (9th Cir. 2008); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1537-40 (2d Cir. 1996). The U.S. Supreme Court has previously held that when a statute contains the term “employee” but fails to define it adequately, there is a presumption that traditional agency-law criteria for identifying master-servant relationships apply. See e.g., National Mut. Ins. Co. v. Darden, 503 U.S. 318, 324-24 (1992) (holding that “employee,” as used in ERISA, incorporates traditional agency law criteria for identifying master-servant relationships). In Darden the Supreme Court outlined a multi-factor test which should be applied to determine if a common law employment relationship exists between the alleged “employer” and the hired party:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to the inquiry are the skills required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; the tax treatment of the hiring party.

Id. at 323-24 (internal quotation marks omitted). The court went on to stress that the common law test requires that “all incidents of the relationship must be assessed and weighed with no one factor being decisive.” Id. at 324 (citing NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968).

The Ninth Circuit has applied the Darden factors to cases arising under OSHA, Title VII and the ADEA and has held that “whether an employment relationship exists depends upon the economic realities of the situation”. Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980); Barnhart v. New York Life Ins. Co., 141 F.3d 1310 (9th Cir. 1998) (applying Darden analysis to definition of “employee” in the ADEA); Loomis Cabinet Co. v. Occupational Safety & Health Review Comm’n, 20 F.3d 938 (9th Cir. 1994) (applying Darden analysis to
definition of “employee” in the Occupational Health and Safety Act). In determining whether an employment relationship exists, labels are meaningless and the emphasis is on the “substance over form of the relationship.” *Loomis*, 20 F.3d at 938; *see Simpson v. Ernst & Young*, 100 F.3d 436, 439 (6th Cir. 1996) (holding that a partner at an accounting firm could qualify as an “employee” for the purposes of the ADEA, ERISA, and Ohio Rev. Code § 4101.17, under the traditional principles of the common-law agency doctrine or the “economic realities” test where the partner had no significant management control, no meaningful voting rights, and no job security); *Clackamas*, 538 U.S. at 442 (remanding the case to the lower court to consider whether physician-shareholders who owned a professional corporation and served on the corporation’s board of directors were to be counted as “employees” under the ADA); *Baker v. McNeil Island Corrs. Ctr.*, 859 F.2d 124, 127-28 (9th Cir. 1988) (holding that Title VII of the Civil Rights Act of 1964 covers prisoners). In a recent case, *Murray v. Principal Financial Group*, the Ninth Circuit clarified that it only utilized one multi-factor test which stems from the *Darden* factors. 613 F.3d 943 (9th Cir. 2010). In this case, it held that an insurance agent was an independent contractor not entitled to protections of Title VII where she was free to operate her business as she saw fit without day to day intrusions, decided when and where to work, maintained her own office space, scheduled her own time off, was not entitled to vacation or sick days, received commission payments, and reported herself as self-employed to the IRS. *Id.* at 947.

According to Respondent, since the contract for services was between NNC and Respondent, Complainant does not qualify for protection as an employee of Respondent or of NNC. There is nothing in the Act which suggests that an individual who is an employer with respect to the workers of his own corporation can’t also serve as an employee of a third party which does business with the corporation.

Although the undersigned knows of no Ninth Circuit cases addressing the issue under the ERA, the Ninth Circuit precedent under Title VII jurisprudence is instructive. In *Gomez v. Alexian Brothers Hospital of San Jose*, the plaintiff was a physician of Hispanic ancestry who practiced medicine under the professional corporation name. 698 F.2d 1019, 1021 (9th Cir. 1983). He submitted a contract proposal to defendant hospital on behalf of the corporation, for the operation of the hospital emergency room. *Id.* Under the proposal, plaintiff was to serve as the full-time director of the emergency room. *Id.* Five of the twelve participating physicians were Hispanic. *Id.* When his proposal was rejected, plaintiff brought an action under Title VII of the Civil Rights Act of 1964 alleging that the rejection was made on racial grounds. *Id.* The district court granted summary judgment on behalf of defendant on the grounds that plaintiff lacked standing because Title VII applies only to employment relationships. *Id.* The district court held that under the proposed contract the corporation would have been an independent contractor and plaintiff would have been an employee of his corporation and not of the hospital. *Id.* The Ninth Circuit overturned and held that the plaintiff is entitled to have his Title VII claim tried on the merits. *Id.* at 1022. First, it held that the same discriminatory conduct can result in both corporate and individual injuries. *Id.* Second, it rejected defendant’s argument that an independent contractor relationship was contemplated between the defendant and the corporation not the physician. *Id.* The court noted that although it is true that “there must be some connection with an employment relationship for Title VII protections to apply” but “[t]he connection with

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1 Defendant did not dispute that the hospital was an employer under Title VII, nor that plaintiff was an employee of his corporation. *Gomez*, 698 F.2d at 1022.
employment need not necessarily be direct.” *Id.* (citing *Luchner*, 633 F.2d at 883). The court indicated that “it would contravene Congress’s intent in Title VII “[t]o permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual’s employment opportunities with another employer, while it could not do so with respect to employment in its own service…” *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973); *Cf. Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762 (9th Cir. 1988) (refusing to find a status of employee and holding that unlike the plaintiff in *Gomez*, who employed a number of doctors who rendered medical services as part of the corporation’s medical practice, plaintiff was a sole shareholder and sole employee of his professional corporation).

The Second Circuit was faced with a similar issue in *Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993). In that case, plaintiff was a shoe sales representative who formed a California corporation of which he was the sole shareholder and permanent employee. Plaintiff’s corporation provided services to a shoe company. *Id.* at 88. The shoe company and plaintiff’s corporation subsequently signed a contract designating all sales representatives as “independent contractors.” *Id.* The company also hired other sales representatives who had chosen to incorporate. *Id.* at 88-89. After plaintiff was terminated by the shoe company, he sued alleging that his termination was improperly based on age. The shoe company moved for summary judgment on the ground that plaintiff was an “independent contractor” and thus did not qualify for the protection of the ADEA or state law. *Id.* at 89. The district court granted defendant’s motion as a matter of law after concluding that plaintiff did not stand in a direct employment relationship with defendant since defendant contracted with the corporation and the corporation paid plaintiff’s salary and health benefits. *Id.* The Second Circuit remanded the case back to the district court to consider all of the factors outlined in *Darden*. The court emphasized that the common law agency test contains “no shorthand formula or magic phrase that can be applied to find the answer … all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Id.* at 91 (citing *Darden*, 112 S.Ct. at 1349). It went on to note that instead of taking the multi-factored approach, the district court incorrectly established a *per se* rule that under the ADEA an individual who does business as a corporate entity cannot be recognized as an employee of the company for whom he performed services. *Id.* at 92. The Court went on to note that although plaintiff’s establishment of the corporation, and the corporations payment of salary and benefits to plaintiff are important factors to be weighed in an analysis under common law agency; “however, the corporate form under which plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA. Indeed, no *per se* rule applies in such circumstances.” *Id.*

The facts of the present case are very similar to *Gomez* and *Frankel*. When Respondent terminated Complainant’s UAA pass, it deprived him of the opportunity to work an extra number of hours at the power plant and earn a salary for his work. The contracts between NNC and ENW specifically provided for Complainant’s services, first as a Field Engineer and subsequently as a Fluid Leak Coordinator. Presumably, Complainant could not hire assistants or assign his responsibilities at the plant to another individual. Although the wage which Complainant earned was presumably negotiated between ENW and NNC, the contract goes on to define “direct hourly rate” as the rate actually paid to the NNC employee.
The undersigned does not need to reach the issue of whether a shareholder like Complainant can serve as an employee of his own corporation for the purposes of a whistleblower lawsuit.\(^2\) However, even in these types of cases, some circuits have been willing to extend coverage under ERISA. For example, in *Sipma v. Massachusetts Casualty Insurance*, plaintiff owned 49% of the stock in a corporation which had only two shareholders but employed four other individuals.\(^3\) 256 F.3d 1006, 1009 (10th Cir. 2001). The Court noted that the corporation is a legal entity separate from its shareholders or members. “Because a corporation enters into contracts in a capacity separate and distinct from its shareholders, the corporation, not the shareholder, is the employing party in an employment relationship. As in the liability and taxation contexts, to equate the shareholders with the corporation requires the piercing of the corporate veil, something courts do only in extraordinary circumstances.”\(^4\) *Id.* at 1011. *Cf. In re Watson v. Proctor*, 161 F.3d 593, 598 (9th Cir. 1998) (relying on the Department of Labor regulations and holding that a self-employed owner of a corporation who is also the sole participant in the corporations health plan is not an “employee” of his own corporation for purposes of qualifying his plan under ERISA. The court reasoned that “traditional agency criteria can be applied logically only in situations involving relationships between two different persons, i.e., those who employee persons and those who are so employed.”).

**Application of the Darden Factors**

The undersigned proceeds to analyze the facts of this case under the *Darden* factors. Respondent urges the undersigned to reach the same decision as the Six Circuit in *Demski v. United States Department of Labor*, 419 F.3d 488 (6th Cir. Aug. 17, 2005). Demski was the president and sole shareholder of two corporations that supplied contract labor and technical

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\(^2\) Under certain circumstances, courts have found staffing agencies and/or their clients liable under the joint employer theory. *See Amarnare v. Merrill, Lynch Pierce, Fenner & Smith*, 611 F. Supp. 344, 349 (D.C. N.Y 1984) (temporary employee assigned by “Mature Temps” to work for Merrill Lynch could challenge discrimination by Merrill Lynch either on basis that Merrill Lynch was her joint employer or that Merrill Lynch interfered with her employment opportunities with Mature Temps.); *Poff v. Prudential Ins. Co. of America*, 882 F. Supp. 1534 (E.D. Pa. 1995)(where plaintiff was hired by computer services contractor and assigned to work on-site at insurance company, issue of fact existed as to whether insurance company exercised sufficient control over the manner and means by which plaintiff’s work was accomplished to qualify as employer); *Magnus*, 808 F. Supp. at 508-10 (where car company contracted with staffing firm for plaintiff’s services and assigned her to work at its car dealership, genuine issue of material fact was raised as to whether car company, dealership, and staffing firm all qualified as her joint employers); *Guarra v. Tishman E. Realty*, 52 Fair Emp. Pract. Cas. 286 (S.D. N. Y. 1989).

\(^3\) In *Sipma*, the insurer issued individual disability insurance policies to two shareholders, and the corporation paid premiums on both of these policies. 256 F.3d at 1010. When plaintiff got injured and claimed disability benefits, the insurer refused to pay, and plaintiff filed a lawsuit alleging state law claims of breach of contract. *Id.* The parties disputed whether ERISA applies to the disability insurance policy and preempts the contract claim. Plaintiff argued that ERISA does not apply because no “employees” were covered under the disability policy since he could not be both an employer an employee of the corporation. *Id.* The court rejected this argument and noted that the argument has no merit where the business organization is a corporation because the corporation is the employer and not the shareholder. *Id.* at 1011.

\(^4\) The court further held that because plaintiff was not the sole shareholder of the corporation, he was not excluded from the definition of “employee” for purposes of the ERISA regulations.
knowledge to power generating plants. Id. at 491. Indiana Michigan Power Company (“I&M”) entered into three contracts with plaintiff’s corporations under which the corporations agreed to maintain ice condensers at the Donald C. Cook Nuclear Power Plant in Michigan, augment plant staff, and maintain plant buildings and grounds. Id. The terms of the agreements expressly provided that the corporations were not agents or employees of I&M. Id. I&M did not pay plaintiff a salary or offer her benefits. Plaintiff also did not have a supervisor at I&M. Id. Plaintiff had two offices at the Cook plant, a security badge and clearance, and the right to use the office supplies. Id. She participated in meetings with I&M management (although not daily meetings) and responded to I&M management inquiries. Id. Two other managers of plaintiff’s corporations were responsible for overseeing the day-to-day management of the contract. Id.

After plaintiff learned of serious safety problems with an ice condenser, she reported the problems and informed I&M. Id. I&M then terminated its ice condenser contract with the corporations, refused to continue the other two contracts, and revoked the employee access badges for plaintiff and her employees. Id. Plaintiff filed a complaint with OSHA both individually and as a representative of the corporations, alleging that the parent company of I&M wrongfully terminated the contracts because Demski reported safety concerns. The ALJ held that: 1) plaintiff’s corporations were not covered under the ERA as “employees;” 2) the Darden factor test was not triggered because plaintiff was not a hired party because she did not receive financial compensation from I&M; 3) even if the Darden factors were triggered most of them indicate that plaintiff was not an employee; and 4) plaintiff was not an employee of her corporations because she was the sole shareholder of both companies. Id. The ARB affirmed, and plaintiff appealed.

On appeal, the court only considered whether plaintiff was an employee of I&M for the purposes of ERA. Id. at 492. First, it indicated that the Darden factors require the plaintiff to be a hired party. See O’Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997); Shah v. Deaconess Hosp., 355 F.3d 496, 499 (6th Cir. 2004). It concluded that plaintiff was not a hired party because I&M “never hired her” since the contractual relationship was between plaintiff’s corporations and I&M. Id at 493. According to the court, the fact that plaintiff was the sole shareholder did not mean that I&M had any sort of a contractual or employment relationship with her individually. Id. Second, the court held that the Darden factors do not show a master-servant relationship because plaintiff had complete control over how to fulfill the contractual obligations. She chose whether to seek or renew the agreement. Id. I&M could not assign more or different work to plaintiff or the corporations than the contract allowed. Plaintiff had control over how the corporations fulfilled its contractual obligations to I&M and who should perform the work. Id. Plaintiff also had exclusive control over the hiring and compensation of the employees who worked on the three contracts. Id. Plaintiff’s compensation came from any profits the corporations made on the contract with I&M not from a salary or an hourly wage provided by I&M. Id. I&M also did not provide plaintiff with any benefits and did not withhold social security or income taxes from any payments to the corporations on her behalf. Based on these facts, the court found that the Darden factors indicate that plaintiff was not an employee, but that her solely owned corporations were independent contractors.

Respondent relies on Demski and argues that the undersigned should not engage in the analysis of the Darden factors because just like Demski, Complainant was not a “hired party.”
Respondent points to the cases in the Second Circuit which follow a two-step analysis in determining whether an individual is an “employee” or an “independent contractor.” In O’Connor v. Davis, the Second Circuit indicated that before determining the nature of the economic relationship between the parties under the Darden factors, the court must ascertain if the putative employee was a “hired party.” O’Connor v. Davis, 126 F.3d 112 (2d Cir. 1997). It noted that although “compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition … it is an essential condition to the existence of an employer-employee relationship.”

In the circuits that follow the two-step analysis, the plaintiff can show that he received direct or indirect economic remuneration. See Haavistola v. Cmty. Fire Co., 6 F.3d 211, 219 (4th Cir. 1993) (a volunteer member of a fire company who did not receive direct compensation was nevertheless an employee because he received a state-funded disability pension, survivors’ benefits for dependents, scholarships for dependents, and group life insurance); United States v. City of New York, 359 F.3d 83 (2d Cir. 2004) (holding that participants in city’s work experience program, a mandatory welfare work program, sufficiently alleged they were “employees,” within meaning of Title VII, when they asserted that they were required to perform meaningful work for city, and in exchange received substantial benefits including cash, food stamps, transportation and child care expenses).

First, the undersigned takes note of the fact that Sixth Circuit’s decisions constitute persuasive authority not binding authority. The allegedly discriminatory conduct in this case took place in Richland, Washington. NNC is a Washington corporation, and Complainant was presumably a resident of Washington at all times relevant to this complaint. The hearing was conducted in Washington. Accordingly, the undersigned looks to the Ninth Circuit for a final say on the issues raised in this case. Second, although the Sixth Circuit seemingly followed the two-step analysis in Demski, it subsequently clarified that the receipt of significant remuneration is not an independent antecedent inquiry prior to applying common-law agency test. See Bryson v. Middlefield Volunteer Fire Dep’t, Inc., 656 F.3d 348, 354 (6th Cir. 2011). The Court opined that the Supreme Court included the term “hired party” in Darden only “in a direct quote from its decision in Reid, and the Reid Court’s use of ‘hired party’ was in the context of the ‘work for hire’ provision from the Copyright Act.” Bryson, 656 F.3d at 355 (citing Comty. for Creative Non-Violence Mut. Ins. Co. v. Reid, 490 U.S. 730, 751-52 (1989)). The Court noted that its decision “to consider remuneration as a factor when determining whether an employee relationship exists comports with Darden’s instruction that, when evaluating a particular relationship ‘all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’” Bryson, 656 F.3d at 355 (citing Darden, 503 U.S. at 324) (remanding the case back to the district court for evaluation of all other aspects of the relationship between the parties). As discussed above, the Ninth Circuit looks at the “economic realities of the situation” and considers all factors relevant to the inquiry. Murray, 613 F.3d at 945-46; Lutcher, 633 F.2d at 883; Adock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir. 1999).
Accordingly, the undersigned considers the form and quantity of the economic remuneration that Complainant received as a factor relevant to the inquiry. Unlike Demski, whose compensation came solely only from profits her corporations made on the contract with defendant, not from a salary or an hourly wage provided by defendant, Complainant received an hourly wage from Respondent for his services. CX 4. Complainant was required to log his time like the other NNC workers. ENW required all workers to submit electronic timesheets through its Portal Energy System. Respondent argues that ENW paid NNC directly on invoices issued by NNC and did not directly pay Complainant as an individual for any labor or services on those invoices. NNC had exclusive control over the compensation decisions concerning personnel NNC supplied to ENW. It determined the pay, benefits and other forms of compensation. Complainant testified that Energy Northwest requested individuals by name, including himself and Mr. Hayes, and reviewed and approved all pay rates. Tr. at 114-115.

The fact that Respondent reimbursed NNC and NNC paid Complainant the same amount is not dispositive, and the undersigned must look to the economic reality of the situation. See Stephenson v. Nat'l Aeronautics and Space Admin., ALJ No. 94-TSC-5, ARB No 98-025 (ARB Jul 18, 2000) (noting that “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.”); see also Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, 611 F. Supp. 344 (S.D. New York 1984) (holding that the brokerage firm was plaintiff’s “employer” along with temporary employment agency, notwithstanding the fact that plaintiff was paid directly by employment agency, because plaintiff was subject to direction of brokerage firm in her work assignments, hours of service and other usual aspects of employee-employer relationship); EEOC v. Sage Realty, 507 F. Supp. 599 (S.D.N.Y. 1981) (holding that the management company that contracted with the cleaning company for services was a joint “employer” of the female lobby attendant within the meaning of Title VII where the lobby attendant was paid by the cleaning company, but the corporation had hired, trained and supervised the attendant, ultimately ordered her discharge, and controlled the uniform policy challenged by attendant). The economic reality in this case appears to be that Complainant received compensation for a specific number of hours which he personally worked at the plant while under the direct supervision of Respondent. The fact that Complainant was never on ENW's payroll, did not receive W-2 wages from ENW or participated in any pension or welfare plan sponsored by ENW are factors which weigh against the finding of employee status; however, they are not dispositive.

Complainant testified that he was under control of Respondent while he was working at the power plant alongside his employees on a daily basis. TR at 102-106. He had an on-site supervisor, Dave Sanders. Id. Although Complainant coveted to make himself available during the specific dates listed in the contract, Energy Northwest’s managers assigned the tasks that Complainant worked on, controlled the number of hours he worked during the week, approved his vacation requests, determined his start and end times, oversaw the quality of his work, and determined if he could maintain his UAA. Id. at 42-43, 106-107. The facts of this case appear

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7 It appears that when Respondent took away Complainant’s UAA, he was working as a Fluid Leak Coordinator under Contract No. 328274 and at the same time NNC was providing staffing services another contract.
fundamentally different from Demski. Even though Demski had an office at the plant, a security badge, and the right to use defendant’s supplies, she was not under the direct supervision and control of Respondent while at the plant in the same manner as Complainant. She had flexibility in her schedule, did not have an on-site supervisor, and did not oversee the day-to-day management of the contracts. For example, she was not required to be physically present at the plant every day and did not attend daily meetings. The Sixth Circuit in Demski noted that even if Demski was on-site daily, this factor would only marginally enhance her case under the Darden factors. Demski, 419 F.3d at 493. The undersigned takes this statement to mean that the relevant factor is the degree of control defendant exercises over plaintiff who works on-site, not just the amount of time that plaintiff spends there.

Under the NNC contracts, Complainant was scheduled to work as a Field Engineer from March 9, 2009 through June 30, 2009. CX 3. The contract was subsequently extended from August 17, 2009 through September 17, 2009. From March 3, 2010 through June 30, 2010, he worked as a Fluid Leak Coordinator. CX 4. This contract was extended to last from July 1, 2010 through June 30, 2011. Complainant testified that he worked from March 3, 2010 until March 17, 2011 when Respondent took away his UAA. Thus, although each of the contracts individually is only several months in duration, when examined in aggregate, they show that Complainant worked for Respondent for an extensive period of time and was assigned a wide range of responsibilities. The work which he performed was part of ENW’s regular business. Tr. at 42-43. All of the equipment which Complainant used was apparently provided by ENW. Furthermore, unlike Demski who had the power to hire and fire her workers, Complainant did not supervise NNC’s workers once they reported to Energy Northwest on a given start date. All workers reported directly to Energy Northwest’s management and received their day to day assignments from Energy Northwest. Id. at 42. Complainant worked to fulfill NNC’s obligations under the contract by supplying Respondent with resumes of qualified workers; however, he also personally performed work for Respondent at the power plant and indirectly received compensation for each hour of work. Construing the term “employee” broadly for the purposes of ERA effectuates the main goal of Section 211, which is to encourage the voicing of safety concerns without fear of reprisal. Accordingly, the undersigned finds that Complainant should be considered the "employee" of Respondent in this case.

Analysis of Whistleblower Claim

As noted previously, the ERA protects whistleblowers employed in the nuclear power industry. Under Section 5851 of the ERA, “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)” has engaged in protected activity. 42 U.S.C. § 5851(a)(1). To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he was an employee who engaged in protected activity, that the employer knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took. 42 U.S.C.A. § 5851(b)(3)(C); Dysert v. Secretary of Labor, 105 F.3d 607 (11th Cir. 1997); Simon v. Simmons Foods, Inc., 49 F.3d 386 (8th Cir. 1995); Kester v. Carolina Power & Light Co., ARB No. 02-007, slip. op. at 5-8 (ARB Sept. 30, 2003). Complainant is not entitled to relief 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.” 42 U.S.C.A. § 5851(b)(3)(D).

The analysis in resolving whistleblower protection cases follows the “burden-shifting” approach that was established in McDonnell Douglas v. Green, 411 U.S. 492 (1973). Passaic Valley Sewerage Comm’r v. Dep’t of Labor, 992 F.2d 474 (3rd Cir. 1993); see also Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995). The court may find that a violation has occurred only if the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the adverse employment action. Therefore, to succeed at this step of the litigation, the complainant must establish the following elements of his case by a preponderance of the evidence standard:

1. The complainant engaged in protected activity, as defined by relevant statute and regulations;

2. The respondent had knowledge of the complainant engaging in the protected activity;

3. The respondent subjected the complainant to an adverse employment action; and

4. The complainant’s engagement in the protected activity “was a contributing factor in the unfavorable personnel action.”


A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” Speegle, ARB No 06-041, slip op. at 9. Complainant can prove this element by offering either direct or indirect proof of contribution. Id. Direct evidence is evidence that acts as a “smoking gun” – “evidence that conclusively links the protected activity and the adverse action and does not rely upon inference.” Id. (quoting Williams, ARB 09-092, slip op. at 5); Id. If direct evidence is unavailable, complainant may proceed by indirect evidence that demonstrates by a preponderance of the evidence that the respondents’ proffered reasons are merely pretext for retaliation. Id. (quoting Jenkins v. U.S. E.P.A., ARB No 98-149, ALJ no. 1988-SWD-002, slip op. at 16-17 (ARB Feb. 28, 2003). However, if the complainant proceeds by offering indirect evidence to prove pretext, the court may infer that the protected activity contributed to the termination, but would not be compelled to do so. Id.

The complainant may still be defeated at the second stage of the litigation, however, if respondent can demonstrate by clear and convincing evidence that it would have taken the same adverse action, even in the absence of any protected activity or retaliatory motive. Id. Clear and
convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” Id. (quoting Williams, ARB 09-092, slip op. at 5); Speegle, ARB No 06-041, slip op. at 16.

In this case, there is no question that Complainant had his UAA revoked, clearly an adverse personnel action. There is a dispute as to whether Complainant took part in any protected activity. Further, Respondents contest that even if there were any protected activity by Complainant it did not contribute to having his UAA revoked as Respondents contend that Complainant lost his UAA solely due to his perceived lack of truthfulness in connection with the Hayes per diem matter and subsequent investigation. After examining the evidence as a whole, the undersigned concludes that Complainant has failed to demonstrate by a preponderance of the evidence that he engaged in any protected activity or that Respondents terminated him because of any protected activity.

Protected Activity

Intra-corporate complaints and disclosures relating to safety and quality constitute protected activity under the environmental protection statutes, including the ERA. See Passaic Valley Sewerage Comm’r v. Dep’t of Labor, 992 F.2d 474, 478-80 (3rd Cir. 1993); Kan. Gas & Elec. Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985); and Mackowiak v. Univ. Nuclear Sys., Inc., 735 F.2d 1159, 1163 (9th Cir. 1984). The ERA protects individuals from discrimination arising from engaging in activity protected by the ERA. Protected activities under ERA are identified at 42 U.S.C. § 585l(a)(1)(A)-(F). Each of these activities refers to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).

The concerns raised by Complainant in this matter relate primarily to possible protected activity by Mr. Sanders presumably on the theory that Complainant's loss of UAA status was "collateral damage" from Respondent's discriminatory attack upon Mr. Sanders in retaliation for Mr. Sanders' alleged protected activity. Thus, Complainant presented Mr. Sanders testimony regarding his disputes with Mr. Pease over badging issues which Mr. Sanders apparently believes led to the per diem investigation. Tr. at 31-40. However, whatever the merits of Mr. Sanders' claim for retaliation, no legal precedent for extending the whistleblower protection to "friends of a whistleblower" has been presented by Complainant. Complainant and Mr. Sanders testified that Complainant was not personally involved in any way in Mr. Sanders' alleged protected activities. Id. at 97, 178. Thus, Complainant in his Post-Hearing Brief argues that his protected activity leading to withdrawal of his UAA status was his participation in the investigation interview relating to the Hayes per diem matter. See Complainant's Post-Hearing Brief ("CPHB") at 11, 20-21. Since Complainant was found not "trustworthy" based on the interrogation and investigation, Complainant argues that his participation in such was the protected activity for which he was stripped of UAA status. In support, Complainant cites Stone & Webster Eng’g Corp. v. Herman, 115 F.3d 1568 (11th Cir. 1997). However, Complainant in this case is quite different that that involved in Webster. Complainant in Webster was found to be engaging in protected activity when he encouraged co-workers to carry out fire watch duties themselves rather than allowing the iron workers to do so. Complainant in this case was not engaged in reporting any security or safety concerns to his superiors or others. Rather, he was being investigated for his personal participation in a per diem matter that was found by his
superiors to be against the practices of the company and had his UAA card taken because his superiors believed that he participated in the matter and did not admit to the wrongfulness of the scheme. Tr. at 350, 358, 363-364. He wasn't the complainer in this situation rather he was the person complained of.

Complainant has argued at length that various perceived inconsistencies in the testimonies of the Respondent's witnesses prove that some sort of conspiracy existed to revoke Complainant's UAA privilege. See CPHB at 8-10, 12-16. First, I find the inconsistencies to be minor and most likely attributable to the passage of time between the events and their testimony. More importantly, I find no convincing evidence that any "conspiracy" at ENW existed. Rather, I find that Complainant was caught in a web which he helped to create. While he may have thought there was some justification for Mr. Hayes to receive per diem, his actions in preparing the various documents to make it appear that Hayes was coming in from South Carolina for the job are not consistent with the actual facts. Complainant should have, at the least, made some inquiry from someone at ENW as to whether Hayes might be entitled to the per diem. Furthermore, Complainant has argued at length regarding whether the per diem policy at ENW was clear and made known to all. However, Complainant's claim in this case rests not with whether he actually violated the per diem policy, but whether his superiors believed that he had violated the policy. In other words, was the withdrawal of Complainant's UAA privileges due to his participation in the per diem matter or was it truly in retaliation for some protected activity? As discussed above, I find no evidence that Complainant engaged in any protected activity as he made no complaint relating to nuclear safety. Further, even if he did, the evidence in this matter is overwhelming that Respondent withdrew his UAA privileges based solely on Respondent's belief that Complainant had shown a lack of honesty and trustworthiness in regard to the payment of per diem to Mr. Hayes. Tr. at 350, 358, 363-364.

A Complainant may prove that the respondent’s true reasons for imposing an adverse employment action are retaliation by either direct or circumstantial evidence. Clarke, ARB No. 09-114, ALJ No. 2009-STA-018. Circumstantial factors that the court considers in finding contribution includes temporal proximity or “closeness in time” between the employer forming his retaliatory motive and the employer imposing the adverse action, and additional proof when needed to establish the existence of employer’s retaliatory motive. Id. Here, the undersigned finds Complainant has failed to establish his whistle-blowing activities as a contributing factor to the adverse employment action that he suffered.

In weighing all of the evidence, the Court concludes that Complainant’s termination likely was not the result of any retaliatory motive on the part of his employer.
ORDER

Having found that Respondent did not violate the employee protection provision of the Energy Reorganization Act of 1974, Complainant’s complaint against Respondent is hereby DISMISSED with prejudice.

Russell D. Pulver
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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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. Dept. 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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages. With your supporting legal brief you may also submit an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.
Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party’s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages. In addition, an appendix (one copy only) may be submitted with the opposing legal brief consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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.