

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>CONSTANCE O'NEIL,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 98-192-P-C</b>
	)	
<b>UNUM LIFE INSURANCE</b>	)	
<b>COMPANY OF AMERICA,</b>	)	
	)	
<b>Defendant</b>	)	

***RECOMMENDED DECISION***

Before the Court is Plaintiff's Motion to Remand filed pursuant to 28 U.S.C. § 1447(c). Plaintiff maintains that this case was improperly removed from Cumberland County Superior Court because her sole count alleges a breach of contract claim governed by state law. Defendant removed the matter to federal court asserting that the breach of contract claim is pre-empted by the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 -1462. For the reasons delineated below I recommend that the Court DENY Plaintiff's Motion to Remand.

***I. Background***

Conley & Haley (Law Firm) hired Plaintiff as an associate in 1980. In December 1981 the Law Firm obtained a Group Long Term Disability Insurance Policy. Plaintiff became a partner and shareholder of the Law Firm in 1988 and in 1998 the firm was renamed Conley, Haley & O'Neil. In June 1995, the Law Firm submitted a Long Term Disability Claim on behalf of Plaintiff. Plaintiff received disability benefits from July 1995 to December 1996 when Defendant notified her by letter that she was no longer eligible to receive disability benefits. Plaintiff appealed the decision. On December 10, 1997, Defendant notified Plaintiff that it

completed its review of Plaintiff's claim and denied her appeal. Plaintiff then initiated suit and asserted a breach of contract claim against Defendant in state court.

## *II. Analysis*

We begin with the basic principle that the party removing the action to this Court has the burden of demonstrating this Court's jurisdiction over the matter. *Sullivan v. First Affiliated*, 813 F.2d 1368 (9<sup>th</sup> Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). This burden effectuates the principle that a court will permit the plaintiff to control the forum which hears the matter. Generally, removal is proper if a federal question appears on the face of a well-pleaded complaint. *Engelhardt v. Paul Revere Life Ins.*, 139 F.3d 1346, 1353 (11<sup>th</sup> Cir. 1998). However, even if one does not clearly identify a federal claim in the complaint, "Congress may preempt an area of law so completely that any complaint raising claims in that area is necessarily federal in character and therefore necessarily presents a basis for federal court jurisdiction." *Kemp v. International Bus. Mach.*, 109 F.3d 708, 712 (11<sup>th</sup> Cir. 1997). When Congress enacted ERISA it intended to create a "comprehensive system of federal law to regulate the operations of employee benefit plans." *Kwatcher v. Massachusetts Serv. Emp. Pens. Fund*, 879 F.2d 957, 959 (1<sup>st</sup> Cir. 1989). Therefore if this Court determines that the claim is one under ERISA it is required to recharacterize the breach of contract claim as one arising under ERISA. *Id.*

ERISA preempts Plaintiff's breach of contract claim if the disability plan is an "employee benefit plan" as defined under ERISA, 29 U.S.C. § 1002(1), and if Plaintiff has standing under ERISA as a "participant" or "beneficiary" of the plan. 29 U.S.C. § 1002(7)-(8). Both parties appear to agree that the disability plan in question is an "employee benefit plan" as defined under

ERISA. 29 U.S.C. § 1002(1).<sup>1</sup> Once it is determined that an "employment benefit plan" exists, the court must examine whether the party has standing under ERISA. Plaintiff has standing to assert an ERISA claim if she was a "participant" or "beneficiary" under the plan. A "participant" is:

any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7).

Under the definition above, Plaintiff can only maintain standing as a "participant" if she was an employee. Plaintiff argues that as an "employer" she cannot maintain standing under ERISA. Defendant maintains that Plaintiff was an employee of the firm and therefore a "participant" of the plan. The First Circuit has noted that an "employer" and "employee" are two distinct concepts. *Kwatcher*, 879 F.2d at 959. ("'Employer' and 'employee' are plainly meant to be separate animals; under Part I [of ERISA], the twain shall never meet.") Therefore if Plaintiff is determined to be an "employer" she cannot have standing as a "participant" under ERISA.

Whether a person should be considered an "employee" or "employer" under ERISA has been the subject of much litigation. ERISA defines an "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). Recognizing that the definition in ERISA "is completely circular and explains nothing," the Supreme Court attempted to clarify the definition.

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<sup>1</sup> To be a plan under ERISA, the plan must be: (1) a plan, fund or program; (2) established or maintained; (3) by an employer or an employee organization or by both; (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment, or vacation benefits; (5) to participants or their beneficiaries. *Kelly v. Blue Cross & Blue Shield of R.I.*, 814 F. Supp. 220, 224 (D.R.I. 1993) (quoting *Wickman v. Northwestern Nat'l Ins.*, 908 F.2d 1077, 1082 (1<sup>st</sup> Cir. 1990)).

*Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 323, 112 S. Ct. 1344, 1348 (1992). The Court set forth a test under traditional agency principles as the guide to determine if one is an “employee” or “employer” under ERISA. The Court wrote that:

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 other factors relevant to this inquiry are the skill 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; and the tax treatment of the hired party.”

*Darden*, 503 U.S. at 323-24, 112 S. Ct. at 1348, (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 190 S. Ct. 2166, 2173 (1989)). Additionally, the Court noted that the common-law test contains “no shorthand formula or magic phrase . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324, 112 S. Ct. at 1349, (quoting *NLRB v. United Ins. Co. of Amer.*, 390 U.S. 254, 258, 88 S. Ct. 988, 991 (1968)).<sup>2</sup>

Plaintiff asserts the following facts in support of her contention that she is an employer

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<sup>2</sup> Plaintiff argues that the Court should also apply the “economic reality test” to determine if Plaintiff is an “employer” or an “employee.” Under this test the court “looks at the role an individual assumes in the company as well as the investment that he or she makes.” *Welsh v. Quabbin Timber*, 943 F. Supp. 98 (D. Mass. 1996). In *Welsh*, the court applied the “economic reality test” and the test set forth in *Darden* and found that Plaintiff was an “employer” under either test. The court applied the “economic reality test” because of its long application in the First Circuit. *Welsh*, 943 F.2d at 1006; *See Mass. Laborers’ Health & Welfare Fund v. Starett Paving*, 845 F.2d 23, 24 (1<sup>st</sup> Cir. 1988). However, the case cited as support for applying the “economic reality test” is a pre-*Darden* case. *Starett Paving*, 845 F.2d at 24. Because the Supreme Court set forth the common-law agency test as the one to apply when determining whether one is an “employee” under ERISA this Court will apply only the test enunciated by *Darden*. *Darden*, 503 U.S. at 323-324, 112 S. Ct. at 1344.

and not an employee of the incorporated law firm. Plaintiff is a proprietary partner (as an owner of twenty percent of the firm's stock) in the firm and, along with the other partners, manages the business activities of the firm. The partnership is not managed by proportion of the shares. Rather the firm is managed as a whole by the partners. As partner, Plaintiff has control or significant participation in the hiring of staff and the assignment of work to associates.

Defendant argues that because Plaintiff would be considered an employee of the corporation under corporate law, she cannot be considered an "employer" under ERISA. In *Kwatcher*, the First Circuit explicitly held that a sole shareholder may be considered an "employer" under ERISA. *Kwatcher*, 879 F.2d at 959. Although *Kwatcher* was decided before the rule enunciated in *Darden*, many courts that have addressed whether a sole stockholder may be an "employer" or an "employee" under ERISA since *Darden* have correctly decided that a sole shareholder is an "employer" under ERISA. *Kelly*, 814 F. Supp. at 224 (sole business owner of corporation is an "employer"); *Meredith v. Time Ins. Co.*, 980 F.2d 352 (5<sup>th</sup> Cir. 1993) (owner of business is an "employer" under ERISA); *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6<sup>th</sup> Cir. 1992) (sole proprietor is an "employer" under ERISA). *But see Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4<sup>th</sup> Cir. 1993) (sole shareholder is an employee of corporation and therefore an "employee" under ERISA).

Having determined that a sole shareholder may be considered an "employer" under ERISA the Court now turns to whether a minority shareholder may be considered an "employer" under ERISA. Neither Plaintiff nor Defendant cite any cases that address whether a minority shareholder can be considered an "employer" under ERISA and the Court has found only one. *Taylor v. Carter*, 948 F. Supp. 1290 (W.D. Tex. 1996). In *Taylor*, the Court determined that the

plaintiff was an “employer” even though he only owned between fourteen and twenty-five percent of the stock. *Taylor*, 948 F. Supp. at 1298. However, the Court came to this determination because the plaintiff was the driving force behind investigating, negotiating, obtaining, and maintaining a group benefit plan. *Id.* The court properly warned that, “in the case of a less than 100% shareholder/officer who claims that he or she is an ‘employer’ under ERISA, this court believes it is crucial to make a factual determination into that person’s role in relation to the employee benefit plan.”<sup>3</sup> *Id.*

After reviewing the cases delineated above and applying the test set forth in *Darden*, I recommend that Plaintiff be considered an “employee” under ERISA. Although Plaintiff may take part in decisions regarding the salaries of the employees, assigns work to other employees, and determines the amount of bonuses a partner may receive, she does not, as a minority shareholder, exercise the degree of control needed to be considered an “employer” under ERISA. Additionally, unlike the plaintiff in *Taylor*, Plaintiff does not assert that she exercised significant or any control over the firm's disability. Further, Plaintiff’s payment on a monthly basis from the Law Firm also leads the Court to the conclusion that she was an “employee.” For the reasons stated above I recommend that Plaintiff was in fact an “employee” of the law firm and therefore

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<sup>3</sup> Plaintiff’s reliance on *Welsh* to support her proposition that Plaintiff is an employer is misplaced. Plaintiff’s Reply at 3. In *Welsh*, the court determined that the plaintiff, an absentee 50% owner, was an “employer” under ERISA. *Welsh*, 943 F. Supp. at 107-108. The Court distinguishes *Welsh* in many respects. First, the plaintiff was not a minority shareholder and therefore maintained at least equal control over the corporation. Second, despite being an absentee part-owner the court found: that weekly paychecks received by the plaintiff were intended as a year-end bonus; the plaintiff was an original incorporator of the business and signed the Articles of Incorporation; and that the plaintiff worked as long as he pleased. *Id.* None of the facts delineated above have been asserted by Plaintiff as support that she was an employer of the Law Firm.

has standing as a “participant” to assert her claim under ERISA.<sup>4</sup>

### ***III. Conclusion***

Accordingly, I recommend that the Court DENY Plaintiff’s Motion to Remand and retain jurisdiction over this case.

### **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on August 18, 1998.

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<sup>4</sup> Because the Court determined that Plaintiff was a “participant” of the “employee benefit plan” under ERISA, the Court need not address Defendant’s argument that even if Plaintiff was not a “participant” she may be considered to be a “beneficiary” under the plan.