How to Discriminate Against Old Lawyers: The Status of Partners, Shareholders, and Members Under the Age Discrimination in Employment Act with Addendum Discussing *Clackamas Gastroenterology Associates, P.C. v. Wells*

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Introduction

Imagine that a partner[1] in a law firm, organized as a professional corporation, is approaching his sixty-fifth birthday. He has been with the firm for many years and has had, and continues to have, an exemplary record of service. Accordingly, he exercises complete discretion over his daily assignments and work schedule. He takes a regular salary, but also receives additional compensation in the form of bonuses, based on the firm's revenue. He has earned the right to be involved in the management of the firm, which he exercises by voting in all shareholder meetings, but is not a member of the management committee, which handles decision-making for most operations of the firm. This management committee decides that it is in the best interests of the firm to institute a mandatory retirement age of sixty-five. Our partner is in trouble.

The Age Discrimination in Employment Act (ADEA)[2] was enacted to eradicate precisely the type of discrimination described above[3]—where the only

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1. In the context of a law firm, the term "partner" is typically used, rather generically, to identify an attorney who, by virtue of skill and/or experience, has risen to a level in the firm above that of the less experienced associate. Along with this title may or may not come additional power over day-to-day operations and/or additional compensation, often in the form of profit sharing. As this Note continues, it will be important to be able to make the distinction between such a senior attorney in one business form as opposed to another. Accordingly, with the exception of the introductory section, when this Note mentions a "partner" it will be in the context of a partnership; when this Note mentions a "shareholder" it will be in the context of a professional corporation; and when this Note mentions a "member" it will be in the context of a limited liability company.

2. 29 U.S.C. §§ 621-34 (2002).

3. It has been suggested by one learned faculty member that age discrimination is not really discrimination at all because it targets people who usually have both money and power. In other words, these are not the down-trodden masses. It is neither the purpose nor within the scope of this Note to discuss the necessity of the ADEA. Suffice it to say that Congress found such discrimination to exist and to be worthy of legislative action. It is my hope that the courts will never become a safe harbor for discrimination of any kind, and it is in such a spirit that this Note is written.

reason for termination is the age of the employee.[4] Despite the best of intentions, however, Congress managed to produce a piece of legislation which, on its face at least, fails to provide a workable definition for a key term.

Similar to Title VII of the Civil Rights Act of 1964[5] (Title VII), the ADEA only protects "employees" against discrimination by employers.[6] Predictably, the question of whether someone is an employee has been a hotly contested issue in the courts. As it is defined in Title VII[7] and other Acts,[8] "employee" is defined in the ADEA as "an individual employed by any employer."[9] A proper understanding of who qualifies as an employee under Title VII and the ADEA is important for two reasons. The first is that each of the Acts has a minimum threshold number of employees before an employer's actions may be scrutinized under the particular Act.[10] The second is to determine who is an employee and may, therefore, bring an action under the Act.[11]

One might think that Congress would ensure a clear definition of such an important term; however, courts have generally found little guidance in the definition of "employee" provided in the Acts.[12] Accordingly, several

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4. 29 U.S.C. § 621 (2002).

5. 42 U.S.C. § 2000e-2(a) (2002); *see also* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("Although the language we have quoted speaks of "any individual," courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees."); Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996).

6. 29 U.S.C. § 623(a) (2002); *see also* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986) ("A plain reading of the [ADEA] indicates that its protection extends only to those individuals who are in a direct employment relationship with an employer, and that a claim under its provisions lies solely in favor of a person who is an employee at the time of termination.").

7. 42 U.S.C. § 2000e(f) (2002).

8. *See* National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i) (2002); Fair Labor Standards Act of 1938, 29 U.S.C. § 203(e)(1) (2002); Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402(f) (2002); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(6) (2002); Family and Medical Leave Act, 29 U.S.C. § 2611(3) (2002); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2002); *See also* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 708 (7th Cir. 2002) (concurring opinion of Judge Easterbrook, discussing the definition of "employee" in the acts).

9. 29 U.S.C. § 630(f) (2002).

10. Title VII has a minimum threshold of fifteen employees. 42 U.S.C. § 2000e(b) (2002). The ADEA has a minimum threshold of twenty employees. 29 U.S.C. § 630(b) (2002).

11. It should be noted that this is a threshold question. If an individual does not qualify as an "employee" under the ADEA, then he cannot proceed with his claim. For example, in the opening hypothetical, if the partner is not an employee of the firm, his claim for age discrimination under the ADEA will be dismissed because he is not protected by the Act. Likewise, if the partner is deemed to be an employee, he has only been granted the right to proceed; he still must prove his case in order to win the claim.

12. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("ERISA's nominal definition of 'employee' . . . is completely circular and explains nothing.").

jurisdictions have interpreted the definition in ways that are different, and sometimes conflicting.[13] A review of the cases will show that, in the majority of jurisdictions, the courts would refuse protection to the partner in the opening scenario and he would simply be out of a job.

As the Baby Boomer generation ages,[14] yet continues to remain active in the workforce,[15] it will become more important for the courts to develop a unified interpretation of "employee" under the ADEA, as it relates to partnerships, professional corporations, and limited liability companies. The purpose of this Note is to propose a solution to the problem of defining "employee" under the ADEA in that context, which takes into consideration the purpose of the ADEA, while still allowing the courts opportunity to examine employee status based upon individual situations.

Part I of this Note examines the Age Discrimination in Employment Act, looking at the history and purpose of the Act. This section also examines the history and purpose of the Act from which the ADEA derived its definition of "employee."[16] In order to properly understand the problem and the various approaches of the jurisdictions, and to formulate a solution, it will be essential to have a basic understanding of the typical nature of partnerships, professional corporations, and limited liability companies. Accordingly, Part II provides a brief primer on those types of organizations. Part III then examines the various approaches currently used to determine if a claimant is an "employee." Finally, Part IV examines the necessity of a unified approach for determining employee status and proposes a solution which requires an examination of an individual's remuneration and management authority. This solution improves the current regime because it contains standards which honor the remedial purpose of the Act, while still allowing courts to make decisions on a case by case basis.

The Addendum, following the Conclusion, was added after the original writing of this Note to discuss the wide-ranging effects of the United States Supreme Court's opinion reversing the Ninth Circuit's decision in *Wells v. Clackamas Gastroenterology Associates, P.C.*[17] The Addendum also argues that because the Court's adopted test is very similar to the test proposed within this note and because the reasoning for a broad interpretation of the ADEA still applies, the standards for evaluation, proposed in this Note, are still applicable

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13. See Part III of this Note for a thorough explanation of the various approaches.

14. *See generally* Rudy L. Sustaita, *Bracing for the Second Boom: The Courts Prepare the ADEA for the Baby Boomers*, EXPERIENCE, Fall 2002, at 10 (noting that in three years, the ADEA will cover every Baby Boomer).

15. In 2001, there were 18,882,000 men and women over the age of fifty-four in the civilian labor force, making up 13.3% of the total civilian labor force. Of that figure, 97% were actually employed (18,307,000 individuals). The total population of this age group, including those not in the labor force, is 57,052,000. Those in the labor force make up 33% of this age group. U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment Status of the Civilian Non-Institutional Population by Age, Sex, and Race*, *available at* http://www.bls.gov/CPS/cpsaat3.pdf (Feb. 4, 2003).

16. *See* 29 U.S.C. § 203(e)(1) (2002).

17. 271 F.3d 903 (9th Cir. 2001).

and necessary.

Since *Wells* is now settled law, it may be tempting to skip ahead to the Addendum, but I urge you to read the entire Note. The critiques of the various approaches formerly used and the rationale behind this Note's proposed standards are vital to a proper understanding of the issue and how it should be addressed, even after *Wells*.

I. The Age Discrimination in Employment Act

The ADEA was enacted in an environment of social change. Through legislation, Congress sought to correct the ills it perceived in society.[18] With Title VII, Congress undertook the laudable effort of preventing discrimination in the workplace based on race, color, religion, sex, or national origin.[19] Conspicuously absent from the prohibitions of Title VII, however, was any protection from discrimination on the basis of age. In 1967, the ADEA was enacted to fill that gap.

At the time of enactment, the ADEA protected employees[20] between the ages of forty and sixty-five[21] from discrimination on the basis of age. The upper age limit was later increased to seventy[22] and has now been eliminated entirely.[23] The Act specifically prohibits an employer from refusing to hire or discharging any individual on the basis of age, reducing an employee's wages on the basis of age, or acting in any other manner which would have the effect of depriving or adversely affecting an employee on the basis of age.[24]

Because the Act only protects employees, it is important to determine who qualifies as an employee. In this respect, Congress was less than helpful. The ADEA defines "employee" as "an individual employed by any employer."[25] This definition was apparently a popular one to use, as it was also employed in numerous other Acts.[26] Unfortunately, the courts have recognized that the

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18. 29 U.S.C. § 621 (2002).

19. 42 U.S.C. § 2000e-2(a) (2002).

20. It should be noted that the language of the ADEA references "individuals," not "employees." However, courts have recognized that the Act only applies to "employees." *See* 29 U.S.C. § 623 (2002); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986).

21. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (amended 1978).

22. Age Discrimination in Employment Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, as amended by Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342.

23. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342.

24. 29 U.S.C. § 623(a) (2002).

25. *Id.* § 630(f).

26. *See supra* note 8.

definition is completely circular[27] and voluminous litigation regarding the definition of "employee" under the Acts has ensued.[28] Since the Act itself is not helpful in defining "employee," this Note first looks to the history and purpose of the ADEA in order to fashion a workable test for employee status.

Very little of Congress' intent can be determined from the legislative history of the ADEA itself. The sectional analysis of the Act, undertaken by the House of Representatives, discusses definitions, but "employee" is not among them.[29] Congressional debate focused on the desire to protect older workers from discrimination,[30] but it did not extend into a discussion of who should qualify as an employee under the Act.[31]

As courts have recognized, the prohibitions of the ADEA were taken "in haec verba" from the language of Title VII,[32] so it is also appropriate to look to Title VII's legislative history and the context within which it was adopted. Title VII's definition of "employee" was borrowed from a number of earlier acts, including the original wordings of the National Labor Relations Act (NLRA)[33] and the Fair Labor Standards Act (FLSA).[34] Such a sparse definition of the term was appropriate at the time because of the way the Supreme Court was interpreting the term "employee."[35]

In a series of cases considering whether individuals were independent contractors or employees under several similarly worded Acts,[36] the Court determined that employee status should be determined broadly "'in the light of

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27. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

28. For an example of the amount of litigation over this issue, run a search on any research service for ("ADEA" /p defin! /s employee).

29. Rebecca R. Luchok, *Coming of Age in the Professional Corporation: Liability of Professional Corporations for Dismissal of Members Under the Age Discrimination in Employment Act*, 48 U. PITT. L. REV. 1185, 1192 (1987).

30. *Id.*

31. *See generally* Congressional Debate on the Age Discrimination in Employment Act of 1967, available in the Congressional Record.

32. Lorillard v. Pons, 434 U.S. 575, 584 (1978).

33. National Labor Relations Act, c. 372, § 2, 49 Stat. 450 (1935) (defining "employee" as "any employee . . .").

34. 29 U.S.C. § 203(e)(1) (2002).

35. Note that the approach discussed, as it relates to determining the difference between employees and independent contractors, was later repudiated by the Supreme Court. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-25 (1992); *see also infra* notes 36-46 and accompanying text.

36. *See* NLRB v. Hearst, 322 U.S. 111 (1944) (establishing a broad test to be used in determining the difference between an independent contractor and employee under the National Labor Relations Act), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); United States v. Silk, 331 U.S. 704 (1947) (applying the *Hearst* test to the Social Security Act); Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (applying the *Hearst* test to the Fair Labor Standards Act).

the mischief to be corrected and the end to be attained.'"[37] The test for employee status must include consideration of the circumstances of those workers who "are subject, as a matter of economic fact, to the evils the statute was designed to eradicate [and who would be afforded relief by the Act]."[38]

In response to the Court's broad interpretation of the definition of employee, Congress either amended the statute to make the definition more restrictive,[39] or left it alone where the Court's interpretation presumably agreed with congressional intent.[40] Title VII's definition of "employee" was lifted from the FLSA;[41] one of the Acts which was not changed in response to the Court's action.[42]

Understanding the context and the origin of the definition itself, we should return to the history of Title VII. Again, the legislative history only provides limited insight into the definition of "employee," but the section-by-section analysis of the Act does indicate that "employee" should be defined "in the manner common for federal statutes."[43] In her article, Professor Nancy E. Dowd[44] theorized that this statement indicated that Congress intended that the same broad standard used in determining employee status under the FLSA was to be used for determining employee status under Title VII.[45] Accordingly, since the definition of "employee" used in the ADEA was taken from Title VII, the same argument could be extended to determining employee status under the ADEA.

Professor Dowd's argument, however, has been rendered moot. Several years after her article was published, the Supreme Court repudiated the broad approach employed at the time Title VII was adopted and held that, unless the statute clearly indicates otherwise, the common law principles of agency should be used to distinguish between independent contractors and employees.[46]

The foregoing discussion about determining the difference between independent contractors and employees has little to do with the status of

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37. *Hearst*, 322 U.S. at 124 (quoting S. Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

38. *Id.* at 127.

39. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 92 (1984). *See also* Labor Management Relations Act, 1947, Title I—Amendment of National Labor Relations Act, § 101, 61 Stat. 137.

40. Dowd, *supra* note 39.

41. The ADEA defines "employee" as "an individual employed by any employer . . . ." 29 U.S.C. § 630(f) (2002). The FLSA defines "employee" as "any individual employed by an employer . . . ." 29 U.S.C. § 203(e)(1) (2002).

42. Dowd, *supra* note 39, at 93.

43. *Id.* at 90 (quoting H.R. 1370, 87th Cong. 2d Sess., *reprinted in* EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 2155).

44. *See id.* Professor Dowd's argument may now be outdated, but her article provides an excellent report of the history of Title VII and the context within which it was enacted.

45. *Id.* at 94.

46. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325 (1992).

shareholders or members as employees, but it does indicate that, at the time of enactment, Congress was desirous of a broad approach for determining employee status in a primary employment question of the day; the difference between independent contractors and employees. If nothing else, it is at least indicative of Congress' desire to protect as many workers as possible under the Acts.

It is difficult, if not impossible, to definitively determine congressional intent with regard to shareholders or members, because at the time of the enactment of the ADEA in 1967, the professional corporation was still in its infancy[47] and the limited liability company did not yet exist.[48] Congress could have had no idea of the hybrid business forms to come.

Before concluding the historical analysis of the ADEA and Title VII, there is one other detail worth mentioning. One particular comment by Senator Javits, which has been much cited in scholarly writings, does shed some light on whom Congress intended the Acts to cover. During debate over an amendment to Title VII, which would have eliminated doctors employed by hospitals from coverage under Title VII, Senator Javits argued in opposition to the amendment that to exclude professionals from the coverage of the Act would be to send a message to the minorities the Act was designed to protect that they just were not good enough to be a doctor or surgeon.[49] His comments provide no insight on the "employee" issue, but they do indicate that Congress did not wish to eliminate professionals from coverage under the Acts simply because they were professionals.[50]

II. Popular Business Forms for Professionals

Since an examination of the history and context of the ADEA is only able to shed partial light on the subject, the courts have created several different approaches to determining employee status under the Act. Before proceeding to an analysis of those approaches, however, it will be necessary to have a basic understanding of the typical nature of partnerships, professional corporations (PC), and limited liability companies (LLC). It is not necessary to go into great detail regarding these business forms, but a basic understanding is necessary to follow several of the approaches taken by the courts.

A. Partnerships

The Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[51] Of particular note for our purposes is that the partners must be co-owners, because "ownership

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47. Luchok, *supra* note 29, at 1194.

48. 5 Zolman Cavitch, Business Organizations with Tax Planning § 33.01 (2002) (noting that the first LLC statute was enacted in 1977).

49. 118 Cong. Rec. 3802 (1972).

50. The proposed amendment was never adopted.

51. 3 Cavitch, *supra* note 48, § 12.01 (quoting U.P.A. § 101(6)).

involves the power of ultimate control."[52]

The existence of a partnership is determined under principles of state law.[53] There are several tests to determine the existence of a partnership, but they usually contain an analysis of the following elements: (1) whether the parties share in profits and losses; (2) whether the parties have common ownership over business property and are able to exercise control over that property; and (3) whether the parties exercise joint control and management of a business.[54] Once it has been determined that a partnership exists, the labels which the parties use to describe themselves and their awareness of the legal consequences of their association are irrelevant.[55]

Of the elements described above, the third element in particular is worthy of additional discussion. Courts have found that while there must be co-ownership of the business for a partnership to exist,[56] the actual management obligations need not be distributed equally.[57] In fact, an agreement to surrender control to a partner has been considered an exercise of the right to control.[58] Delegation of management authority alone, however, does not make a person a partner without the other elements of partnership status being present.[59]

B. *Professional Corporations*

Prior to the establishment of the PC as a business form, professionals were prohibited from organizing themselves as a corporation.[60] The general ground for refusing incorporation to professionals was that they could not work for two employers, the corporation and their clients, at the same time.[61] Following extensive lobbying in the 1960's, however, the last barriers to the incorporation of professional service groups fell and state legislatures enacted professional corporation statutes.[62] All fifty states and the District of Columbia have enacted legislation governing professional associations and/or corporations.[63]

The PC is entirely a creature of statute; there is no common-law antecedent.[64]

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52. *Id.*

53. *Id.*

54. *Id.* § 13.05.

55. *Id.* § 12.01.

56. *Id.* § 13.05.

57. *Id.*

58. *Id.*

59. *Id.*

60. David R. Stras, *An Invitation to Discrimination: How Congress and the Courts Leave Most Partners and Shareholders Unprotected from Discriminatory Employment Practices*, 47 U. KAN. L. REV. 239, 242 (1998).

61. *Id.*

62. *Id.*

63. 6 CAVITCH, *supra* note 48, § 37.01. See note 3 in the source material for a listing of each jurisdiction's PC statute.

64. *Id.*

Unlike a partnership, which may exist even though the parties did not intend for one to exist, the PC must be created with the filing of articles of incorporation, just like any other corporation.[65]

At the time the PC statutes first came into existence, the main motivation for their passage was so that professionals could have the same tax benefits available to a corporation.[66] In addition, if a professional is practicing in a PC, rather than a partnership, he or she also has the ancillary benefit of a corporation's limited liability protection.[67] In a general partnership, the partners are jointly and severally liable for the actions of a fellow partner, whether they are business decisions or malpractice.[68] In a PC, on the other hand, the shareholders are shielded from that liability.[69] However, an individual shareholder is still personally liable for his or her own malpractice; the shareholder will not be shielded by the corporate entity.[70]

Another typical difference between a partnership and a PC is the way in which the participants are compensated.[71] In a PC, each of the shareholders takes a salary and may also receive additional compensation based on share ownership.[72] Meanwhile, any losses suffered by the PC will usually not be sustained by the shareholders individually.[73] Conversely, in a partnership, the partners will be liable for the losses of the partnership.[74]

One of the significant differences between a PC and a typical corporation, making the PC look more like a partnership, is the way the firm is managed.[75] One of the attributes of a corporation is centralized management.[76] Inherent in that attribute is the idea that control and management of the corporation rests in the hands of a group separate from the shareholders.[77] Because of the professional responsibility requirements of some professions,[78] professionals in

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65. *Id.* § 37.02.

66. Luchok, *supra* note 29, at 1194-95; *see also* 6 CAVITCH, *supra* note 48.

67. Stras, *supra* note 60, at 243.

68. *Id.* at 243-44.

69. *Id.*

70. 6 CAVITCH, *supra* note 48, § 37.03.

71. Stras, *supra* note 60, at 245.

72. *Id.*

73. *Id.*

74. 3 CAVITCH, *supra* note 48, § 13.05.

75. 6 *id.* § 37.03.

76. LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 133 (4th ed. 1998).

77. 6 CAVITCH, *supra* note 48, § 37.03.

78. *Id.* For example, in the case of attorneys, several of the requirements which may be violated by the management of an attorney by a non-attorney are: (1) the work of lawyers may not be directed by non-lawyers; and (2) the services of a lawyer should not be controlled or exploited by any agency intervening between lawyer and client. *See id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 5.4(d) (2002).

a PC cannot surrender control of the PC to one who is not a professional.[79] The result of this difference between the PC and a typical corporation is that the shareholders must be the ones directing operations of the firm and, in terms of management, the PC ends up looking very much like a partnership.

C. Limited Liability Companies

Like a PC, the LLC is also a creature of statute, and a fairly recent one at that.[80] Also like a PC, and unlike a partnership, the LLC cannot come into existence informally; the appropriate filings must be made with the state before the LLC exists.[81] Very basically,[82] the LLC combines the tax benefits of a partnership[83] with the ability to fully participate in management, while still enjoying the limited liability afforded to a PC.[84]

This hybrid business form makes for complicated analysis as to whether it is more like a partnership or more like a PC. Because the business form is relatively new, there is very little litigation involving LLCs; however, as its popularity increases, the courts will almost certainly be faced with making that analysis. Nevertheless, there is one particular feature of many LLC statutes which may provide the turning point for analysis.

The default management form for a LLC is usually similar to that of a partnership; all of the members are equally involved in making management decisions.[85] At the formation of the LLC, however, the members may choose to allow a group of managers to control the operations of the firm, thereby more closely resembling a PC.[86] The type of management chosen and actually employed would likely be the most important factor in determining the status of members under the ADEA.[87]

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79. 6 CAVITCH, *supra* note 48, § 37.03.

80. The first LLC statute was adopted in 1977, but it was not until after 1988, when the IRS decided that LLCs should be taxed as partnerships, that states started widely enacting LLC legislation. The result of this rapid adoption of LLC statutes was that most states had already adopted their own code before there was a uniform LLC code. Accordingly, LLC statutes may vary widely from state to state; however, they all contain the above described attributes. As of 1997, all U.S. jurisdictions have adopted some form of LLC statute. *See* 5 CAVITCH, *supra* note 48, § 33.01.

81. *Id.* § 33.02.

82. This obviously brief discussion of the LLC is limited to the purposes of this Note.

83. 5 CAVITCH, *supra* note 48, § 33.01.

84. *Id.*

85. Alan R. Haguewood, *Gray Power in the Gray Area Between Employer and Employee: The Applicability of the ADEA to Members of Limited Liability Companies*, 51 VAND. L. REV. 429, 434 (1998).

86. *Id.* at 435.

87. *Id.*

III. Approaches in the Courts to Defining "Employee" Under the ADEA

This Note specifically discusses the ADEA. However, in describing the various approaches to determining employee status, several cases examined below have discussed the definition of "employee" under Title VII or another similarly worded act. Courts have allowed that where the purpose of the legislation and the wording of the acts are similar, then decisions regarding one act may be used as persuasive authority for another act.[88]

It should also be mentioned that, unless noted otherwise, the approaches described below are used in the context of determining employee status for partners, shareholders, or members. A jurisdiction may use one approach for that purpose and another approach to determine the difference between employees and independent contractors. Even though the status of independent contractors is discussed in the context of congressional intent for the ADEA, it is not the purpose of this Note to discuss the status of independent contractors.

A. The Per Se Exclusion Rule for Partners

Per se exclusion for partners is not so much a test as a general rule. Most courts which have examined the issue have determined that persons who are properly classified as partners are not protected by the ADEA or Title VII.[89] The rule has been justified on the grounds that a true partner is an owner, not an employee,[90] and Congress only intended the Acts to protect employees, not the owners of businesses.[91]

The primary concern with this rule is that it may be used blindly. Instead of undertaking a detailed analysis to determine if an individual is truly a partner or one in name only, a court may be tempted to summarily deny protection simply

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88. *See* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997); Wheeler v. Hurdman, 825 F.2d 257, 263 (10th Cir. 1987); Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 796 (2d Cir. 1986).

89. *See Serapion*, 119 F.3d 982; Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996); Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859 (9th Cir. 1996); *Wheeler*, 825 F.2d 257; Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977); Simpson v. Ernst & Young, 850 F. Supp. 648 (S.D. Ohio 1994).

90. This approach is generally credited to the aggregate theory of partnership, which holds that a partnership does not exist apart from its partners. In other words, the partners are the partnership; therefore they cannot be employees of themselves. *See* Haguewood, *supra* note 85, at 438; Stras, *supra* note 60, at 258 n.38. It has been noted by at least one commentator, however, that the Revised Uniform Partnership Act (RUPA) has adopted the entity theory of partnership. *See* Stras, *supra* note 60, at 260. The entity theory of partnership holds that the partnership is a separate and distinct entity from the partners, more closely resembling the relationship between a PC and its shareholders. Under the entity theory, partners could be considered employees of the partnership. This may be an important argument to make in those states which have adopted the RUPA. *See id.*

91. *See Hyland*, 794 F.2d at 797.

on the basis of a title or form of business association.[92] As several courts have recognized, there is nothing in the ADEA or Title VII which specifically, or even inherently, denies protection to partners.[93] The analysis needs to focus on whether the individual is an owner or an employee.[94] If a person termed a partner does not exhibit the features of true partnership, then he or she should not be excluded from the protection of the Acts.[95]

B. The Economic Realities Test

The original economic realities test was created by the Supreme Court in the context of determining the difference between an employee and an independent contractor under the NLRA.[96] The test was also later applied to the same issue under the Social Security Act (SSA)[97] and the FLSA.[98] Congress disagreed with the Court's broad interpretation of "employee" under the NLRA and the SSA, and those Acts were subsequently amended to indicate that the common-law test for employee status should be used to determine the difference between employees and independent contractors.[99] The economic realities test, however, has remained because Congress did not amend the FLSA, arguably meaning that Congress approved of the Court's rejection of common law standards for determining employee status under this legislation.[100]

As it was originally created, the economic realities test was a very generous one. The Court recognized that Congress had not used "employee" as a term of art, but rather that the term "takes color from its surroundings . . . [in] the statute where it appears."[101] Further, the term should be "read in the light of the mischief to be corrected and the end to be attained."[102] Accordingly, in fashioning their test, the Court took into consideration the circumstances of those workers who "are subject, as a matter of economic fact, to the evils the statute was designed to eradicate [and who would be afforded relief by the Act]."[103] The test boiled down to "when the [employment situation] combines these characteristics, so that the economic facts of the relation make it more nearly one

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92. *See Devine*, 100 F.3d at 81; *Strother*, 79 F.3d at 867.

93. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 702 (7th Cir. 2002); Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 148 (S.D.N.Y. 1987).

94. *Strother*, 79 F.3d at 867.

95. *See Caruso*, 664 F. Supp. at 148.

96. NLRB v. Hearst, 322 U.S. 111, 127-28 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

97. United States v. Silk, 331 U.S. 704, 713-14 (1947).

98. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

99. Dowd, *supra* note 39.

100. *Id.* at 93.

101. *Hearst*, 322 U.S. at 124 (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 545 (1940)).

102. *Id.* (quoting S. Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

103. *Id.* at 127.

of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification . . . ."[104]

In *NLRB v. Hearst Publications*,[105] the Court found that the purpose of the NLRA was to avoid labor disputes by providing a remedy to the inequality in bargaining power over wages, hours, and working conditions.[106] Those persons who, as a matter of economic reality, suffered from the situation the Act was intended to alleviate and could be provided relief by the Act were considered employees under the Act, regardless of their common-law employee status.[107]

Had this test remained unadulterated over the years, the issue discussed in this Note would not exist. Using the above approach, the shareholder in our opening hypothetical would clearly be a person who suffered from the situation the ADEA intended to alleviate[108] and who could be provided relief by the Act. The economic realities test, however, has undergone some very restrictive changes since the 1940's.[109]

Perhaps the most frequently cited case as standing for the economic realities test used to determine the status of a partner or shareholder is *EEOC v. Dowd & Dowd, Ltd.*[110] In *Dowd*, the EEOC brought suit against a professional corporation, alleging a violation of Title VII for failure to provide pregnancy benefits to its female employees under the Pregnancy Discrimination Act.[111]

The principle question before the court was whether shareholders of the PC should be counted as employees for purposes of the statutory minimum number of employees under Title VII.[112] Resting on its decision in *Burke v. Friedman*,[113] that partners could not be considered employees under the Act, the court determined that "[t]he economic reality of the professional corporation in Illinois is that the management, control, and ownership of the corporation is much like the management, control, and ownership of a partnership."[114] Without any

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104. *Id.* at 128.

105. 322 U.S. at 111.

106. *See* United States v. Silk, 331 U.S. 704, 713 (1947) (explaining the Court's decision in *Hearst*).

107. *Id.*

108. Mandatory retirement is illegal per se under the ADEA. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1540 (2d Cir. 1996) ("any policy that requires such employees to retire, solely on account of age, before they reach 65, violates the ADEA.").

109. However, at least one court has used the economic realities test as it was originally intended. *See* Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983) (applying the economic realities test to determine that a parent corporation and subsidiary corporation should be given single employer status for purposes of determining the number of employees in the corporation under Title VII).

110. 736 F.2d 1177 (7th Cir. 1984).

111. *Id.* at 1177.

112. *Id.* at 1178.

113. 556 F.2d 867 (7th Cir. 1977). *See also supra* notes 89-95 and accompanying text.

114. *Dowd*, 736 F.2d at 1178.

analysis of the shareholders' individual situations, the court held that they were analogous to partners and not to be considered employees under Title VII.[115] Even though the economic realities test requires a detailed analysis into each individual's situation, the Seventh Circuit's ruling in *Dowd* has almost become a per se rule that shareholders are not employees.[116]

In cases which are more fully reasoned, several factors to be evaluated under the modern economic realities test begin to emerge.[117] These factors include how the individual is compensated,[118] whether the individual has management authority and to what extent that authority may be exercised,[119] and the amount of control the purported employer exercises over the individual's work.[120]

Applying the modern economic realities test to the shareholder in this Note's opening hypothetical would almost certainly result in the dismissal of his claim. Looking first at compensation, the shareholder takes a regular salary, but also receives bonuses in the form of profit-sharing. The bonus compensation would probably result in his classification as a partner.[121]

The next step in the analysis, an examination of the shareholder's management authority, does not militate in his favor either. As the test has been used, it does not matter that the shareholder is not involved in the day-to-day

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115. *Id.*

116. *See* Schmidt v. Ottawa Med. Ctr., P.C., 155 F. Supp. 2d 919, 922 (N.D. Ill. 2001) ("Under Seventh Circuit law, the economic reality in this case is that, in his capacity as a shareholder, Dr. Schmidt is like a partner in a partnership."); Smith v. Deitsch & Royer MD, Inc., 2000 W.L. 1707964, at *2 (S.D. Ind. 2000) ("The Seventh Circuit's decision in *Dowd & Dowd* is clear and cannot be distinguished on any meaningful basis [therefore Doctors Deitsch and Royer cannot be counted as employees]."). It is also worth noting, however, that the Seventh Circuit may be easing its stance against shareholders. In *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), the court's ruling centered around whether Sidley must comply with the EEOC's subpoena, but in its lengthy opinion the court also stated that "there is authority that employee shareholders of a professional corporation are still employees, not employers, for purposes of federal antidiscrimination law." *Id.* at 703. Much of the opinion is dicta, and the court does specifically state that it is not ruling at this time that Sidley's partners were employees, but it does indicate that the Seventh Circuit is at least open to the idea. *Id.* at 707.

117. My classification, the "modern economic realities test," is not used by any court, but is simply a method in this Note to distinguish the way that courts currently utilize the economic realities test from the way the Supreme Court originally intended it.

118. *Schmidt*, 155 F. Supp. 2d at 922.

119. Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1401 (11th Cir. 1991).

120. *Schmidt*, 155 F. Supp. 2d at 922.

121. In *Schmidt*, the court determined that a doctor, who had declined the opportunity to participate in a profit sharing plan, choosing to receive a straight salary instead, was not an employee because he had the right to share in the profits of the firm. *Id.* It is not clear, but our shareholder may have found the *Fountain* court more forgiving. In *Fountain*, an accountant was found to be excluded from protection under the ADEA, in part, because his compensation was based entirely on the firm's profits and losses. 925 F.2d at 1401. In contrast, our partner only receives bonuses based on the firm's profits.

decisions of the firm; rather it is enough to exclude him from coverage if he simply has some input in the management of the firm, regardless of the actual level of that input.[122]

The last step of analysis would put the final nail in his coffin. Given his position and experience in the firm, the shareholder has complete discretion over his own work. He is still subject to his fellow shareholders for incompetence or failure to complete his work, but there is really no oversight of his daily activities. Using this test, as it has been applied by the courts which employ it, our shareholder would have no claim for age discrimination, even though the only reason for his termination was age.

C. The Common Law Agency Test

The traditional economic realities test was originally created by the Supreme Court to differentiate between employees and independent contractors.[123] This approach was expressly repudiated by the Court in *Nationwide Mutual Insurance Co. v. Darden*, adopting the common law agency test instead.[124] Because the Court's holding in *Darden* was limited to the proper test for distinguishing independent contractors from employees, it has not been used by many courts to determine the employee status of partners, shareholders, or members.[125] Nevertheless, the common law agency test is worth a brief discussion here because of its inclusion in the hybrid test, discussed below.[126]

In *Darden*, an insurance agent sued for retirement benefits allegedly due him under ERISA.[127] Relying on the Court's ruling in *Hearst*, the lower court determined that the insurance agent was an employee under the Act.[128] The Supreme Court reversed, ruling that the common law agency test should be used to determine employee status.[129]

The Court stated that the elements to be considered in the common law agency test are:

> the hiring party's right to control the manner and means by which the

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122. In *Schmidt*, another reason the doctor was excluded from coverage was because of his management authority. Even though he was not a member of the medical center's Board of Directors, which exercised primary control of the firm, he did still have a vote in all shareholder meetings and had sat on the Board at previous times in his career. 155 F. Supp. 2d at 922. "[T]he fact that one or more shareholders or partners might have more influence than others does not support a finding that the others are employees." *Id.*

123. *See supra* notes 96-122 and accompanying text.

124. 503 U.S. 318, 323 (1992).

125. *See* Serapion v. Martinez, 119 F.3d 982, 986 (1st Cir. 1997); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 n.4 (8th Cir. 1996); Wheeler v. Hurdman, 825 F.2d 257, 271-72 (10th Cir. 1987).

126. *See infra* notes 132-36 and accompanying text.

127. *Darden*, 503 U.S. at 320.

128. *Id.* at 324.

129. *Id.* at 323.

> product is accomplished . . . . 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.[130]

Because this test is not appropriate for determining the employee status of a partner, shareholder, or member, it is not necessary to apply it to our hypothetical shareholder. There is no question that the shareholder is an agent of the business; the question is whether he is an employee or really an owner.[131]

D. The Hybrid Test

The hybrid test is essentially a combination of the modern economic realities test and the common law agency test. It has been used primarily by courts where the hybrid test had been used previously to distinguish employees and independent contractors, and then, when faced with an issue of first impression, the court applied it to the partner, shareholder, or member issue.[132]

No one factor of the hybrid test is determinative, but the right to control an employee's work is the most important.[133] The other elements comprising the hybrid test are:

> (1) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the employer or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the employer; (9) whether the worker accumulates retirement benefits; (10) whether the employer pays

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130. *Id.* at 323-24 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)).

131. *See* Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 n.4 (8th Cir. 1996) ("The shareholder-directors are clearly part of [the firm]. The question is whether they manage and own the firm.").

132. *See, e.g.*, Goudeau v. Dental Health Servs., Inc., 901 F. Supp. 1139, 1143 (M.D. La. 1995); Jones v. Baskin, Flaherty, Elliot & Mannino, P.C., 670 F. Supp. 597, 601 (W.D. Pa. 1987).

133. *Goudeau*, 901 F. Supp at 1142.

social security taxes; and (11) the intention of the parties.[134]

As with the common law agency test, the problem with the hybrid test is that it was designed for the independent contractor question. The questions posed by the test are entirely inappropriate to the issue of whether an individual is an employee or an employer.[135] "The line-drawing exercise in [cases distinguishing independent contractors is] between those who [are] really part of a business (employees) and those who [are] running a separate business (independent contractors). Factors employed for that purpose are useless for drawing lines between people who are part of the same enterprise."[136]

E. The Serapion *Test and Other Partnership Law Tests*

In *Serapion v. Martinez*,[137] a female partner in a law partnership was elevated from the position of "junior" partner to that of a "senior" partner.[138] Along with this elevated position, she was allegedly due an equal footing, in terms of compensation and management control, with the other (all male) senior partners.[139] These benefits were not forthcoming and when Serapion demanded the benefits due to her, the other senior partners dissolved the firm and formed a new partnership without her.[140] Serapion subsequently brought suit against the firm under Title VII.[141]

In order to determine if Serapion, a senior partner in a partnership, was an "employee" under Title VII, the court fashioned a test which examined "three broad, overlapping categories: ownership, remuneration, and management."[142] The first category looked for proprietary indicators such as "investment in the firm, ownership of firm assets, and liability for firm debts and obligations."[143] The second category examined primarily whether and to what extent "the individual's compensation is based on the firm's profits."[144] The third category examined the individual's "right to engage in policymaking; participation in, and voting power with regard to, firm governance; the ability to assign work and to direct the activities of employees within the firm; and the ability to act for the firm and its principals."[145] Applying this test, the court found that Serapion was not an employee under Title VII.[146]

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134. *Id.*

135. Wheeler v. Hurdman, 825 F.2d 257, 271-72 (10th Cir. 1987).

136. *Id.*

137. 119 F.3d 982 (1st Cir. 1997).

138. *Id.* at 984.

139. *Id.*

140. *Id.* at 985.

141. *Id.* at 986.

142. *Id.* at 990.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 992.

Under the first and second prongs of analysis, ownership and remuneration, the court found undisputed facts that Serapion's compensation was substantially tied to the firm's profits.[147] Further, the court found that Serapion was liable for firm debts on a pro rata share and that she had made substantial capital contributions to the firm.[148]

Under the third prong of analysis, management, the court found that Serapion was allowed a vote on all matters before the Board of Partners (the highest decision-making body in the firm)[149] and was also one of five voting members on the firm's Executive Committee, which handled day-to-day operations for the firm.[150] In effect, Serapion was able to participate at all levels of firm management.

Other courts have established similar tests to evaluate partnership status. One variation is to examine traditional partnership law factors, such as whether the individual made a capital contribution to the firm,[151] whether the individual shared in profits and was liable for losses,[152] whether the individual had a right to examine the firm's books and records,[153] the existence of a fiduciary relationship between the purported partners,[154] and the degree of the individual's management authority.[155] Another variation looked at the method of compensation, responsibility for liabilities of the firm, the firm's management structure, and the individual's role in that management.[156] Yet another test examined whether the individual managed and owned the business.[157]

In his Note, David R. Stras[158] proposed that the *Serapion* test should be adopted by the courts in order to deal with the issue of whether a partner or

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147. *Id.* at 991.

148. *Id.*

149. Junior partners were only allowed votes on matters that affected their own interests. *Id.*

150. *Id.*

151. Simpson v. Ernst & Young, 850 F. Supp. 648, 659 (S.D. Ohio 1994). In *Simpson*, based on the following analysis (see *infra* notes 152-55), the court determined that an accountant employed by a partnership and alleged to be a partner was an employee for purposes of the ADEA. The court found that the accountant's contribution to the partnership's Capital Account was more like a loan than a true capital contribution. *Id.* at 659-60.

152. *Id.* at 660. The court found that the accountant was not liable for firm losses, he received a straight salary, and his bonuses were not tied to firm profits. *Id.*

153. *Id.* at 661-62. Noting that, under New York law, a basic tenet of a bona fide partnership is that all partners have access to the firm's financial records, the court found that the accountant had no unconditional right to examine the firm's records. *Id.*

154. *Id.* at 662. The court found that because the accountant had no right to examine the firm's records, there was no fiduciary relationship between the accountant and the Management Committee. *Id.*

155. *Id.* Finally, the court found that the accountant had no management authority. *Id.*

156. Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867 (9th Cir. 1996).

157. Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996) (examining the status of a shareholder/director in a PC).

158. *See* Stras, *supra* note 60.

shareholder is an employee.[159] The test does, however, have several drawbacks.

The first problem is that because the elements of the *Serapion* test rely so heavily on partnership indicia, when they are applied to a shareholder in a PC, the results may be skewed.[160] The most problematic element is the examination of whether the shareholder was responsible for debts of the firm.[161] In a true corporation, of course, the shareholder would not be liable.

The second and perhaps more damaging problem is that the test has no standards for application.[162] In *Serapion* itself, the partner had such clear ownership indicia that it is doubtful she could have been considered an employee under any test. It is not the straightforward cases which tend to give direction, but the ones in the gray area, requiring extensive analysis, that truly indicate how a test is to be applied. In the absence of a good example on how to use the test, the outcome of a case where the *Serapion* test was applied could easily depend on the generosity of the judges.

The ambiguity of this test is illustrated in its application to the facts of our hypothetical shareholder. Under the first prong of analysis, ownership, his only ownership interest in the firm would be the shares that he holds. Under the second prong of analysis, remuneration, things may look a little worse. Our shareholder takes a regular salary, but his profit sharing is based on actual firm revenue; nevertheless, his remuneration is certainly less tied to the firm's profits than that of the attorney in *Serapion*. Under the final prong of analysis, management, our shareholder is involved in management and does have authority to assign work and direct employees of the firm, but both to a lesser extent than the attorney in *Serapion*. So what happens to our hypothetical shareholder? There is no real way to know. He certainly has fewer partnership indicia than the attorney in *Serapion*, but there are still some identifiable factors militating against him. In all likelihood, the success or failure of our shareholder's claim would depend on the judge's own views on the subject, rather than on any predictable point of law.

Adopting a test without defining standards would leave employers and employees in the dark. On at least one occasion the Supreme Court has discarded a test for just such a reason.[163] Any proposed test to be adopted by the courts must have clear enough standards so that employers will understand the consequences of their conduct and employees will fully understand their status. The trick, of course, is fashioning a test which meets the above criteria, while still allowing the court to examine the facts on a case-by-case basis.

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159. *Id.* at 271.

160. Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 984 (10th Cir. 2002) (declining to adopt the *Serapion* test to determine shareholder status).

161. *Id.*

162. As of the date of the writing of this Note (Feb. 6, 2003), I was unable to find a court which had picked up and applied the *Serapion* test for determining shareholder or partner status.

163. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (rejecting the lower court's approach because the test was unable to furnish predictable results).

F. The Second Circuit's Corporate Form Standard and Partnership Test

The corporate form standard, as it was originally created, certainly met the first criteria for a successful test. However, until the test was expanded later, it failed to allow the courts to examine the facts on a case-by-case basis.

The corporate form standard originated in *Hyland v. New Haven Radiology Associates, P.C.*[164] In *Hyland*, a radiologist, who was also a shareholder/director of the PC, alleged that he had been forced to retire because of his age and consequently filed suit under the ADEA.[165] The lower court dismissed his claim on the grounds that he was essentially a partner and therefore was not entitled to the benefits of the ADEA.[166] On appeal, however, the court reversed, finding that there was no basis to consider the firm a partnership and that the radiologist was a corporate employee.[167]

The court's reasoning was fairly simple; since the radiologists freely chose to form a corporation in order to take advantage of certain tax and employee benefits, they should not then be able to later say that they are really a partnership in order to avoid the anti-discrimination laws.[168] The court further stated that "[w]hile those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive."[169]

Outside the Second Circuit, the corporate form standard has been much maligned. With the exception of the Western District Court of Pennsylvania and the Ninth Circuit,[170] most other courts to consider the standard have declined to

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164. 794 F.2d 793 (2d Cir. 1986).

165. *Id.* at 794.

166. *Id.*

167. *Id.*

168. *Id.* at 798.

169. *Id.*

170. *See* Gorman v. N. Pittsburgh Oral Surgery Assocs., Ltd., 664 F. Supp. 212 (W.D. Pa. 1987) (adopting the *Hyland* corporate form standard to determine the status of a shareholder under the ADEA); *see also* Wells v. Clackamas Gastroenterology Assocs., P.C., 271 F.3d 903 (9th Cir. 2001) (applying the *Hyland* corporate form standard to determine that the firm's shareholders should be counted as employees under the American's with Disabilities Act of 1990), *cert. granted*, 536 U.S. 990 (2002). Since certiorari has been granted in *Wells*, but the Court has not yet issued its opinion, it is difficult to know the future of the corporate form standard. It is worth noting, however, that the Ninth Circuit's decision in *Wells* was based entirely on the corporate form standard; the court did not undertake the additional analysis adopted by the Second Circuit in *Johnson*. *See infra* notes 173-87 and accompanying text. If the Court does reverse the Ninth Circuit and discard the corporate form standard, it should not have a major effect on the way the Second Circuit currently handles these cases. *Author's Note—This prediction proved to be less than accurate. The Court's reversal of the Ninth Circuit had wide ranging effects for the entire issue. See the Addendum for a discussion of the Court's decision in* Clackamas Gastroenterology Associates, P.C. v. Wells, *123 S. Ct. 1673 (2003).*

use it, typically classifying it as an "exaltation of form over substance."[171]

Such disagreement was probably justified.[172] While the Second Circuit certainly deserves credit for honoring the remedial purposes of Title VII and the ADEA, its total failure to consider anything beyond the form of the business entity in question was remiss. The Second Circuit clarified the issue, however, with its decision in *EEOC v. Johnson & Higgins, Inc.*[173]

In *Johnson*, a shareholder/director alleged that the firm's mandatory retirement policy was in violation of the ADEA.[174] Citing *Hyland*, the court easily dispensed with the firm's first argument that the protections of the ADEA should not apply to the shareholder because he is really a partner.[175] This was not, however, the end of the court's analysis. The firm also argued that even if the shareholder/director is not excluded as a partner, he should be excluded because, in his capacity as a director, he was more like an employer than an employee.[176] The court allowed that this was a legitimate argument and went on to discuss its analysis.[177]

The court began by citing a number of cases[178] which had held that "although corporate directors are traditionally viewed as employers, they may also be considered employees depending on their position and responsibilities within the corporation."[179] To analyze whether the director was also an employee, the court fashioned a test relying heavily on the common law agency test.[180] The factors employed by the court were: "(1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy."[181] Applying the test, the court found that the directors were employees under the Act because they performed traditional employee duties on a full-time basis and, even though the directors were members of the board, they still had to report to and were under the authority of the senior members of the

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171. Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400 (11th Cir. 1991); *see also* Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996).

172. It should be noted that while the Second Circuit's decision in *Hyland* did not necessarily stand for the proposition that all shareholders are employees, the court was not clear in its holding on that matter until years later. *See infra* notes 173-87 and accompanying text.

173. 91 F.3d 1529 (2d Cir. 1996).

174. *Id.* at 1531.

175. *Id.* at 1537-38.

176. *Id.* at 1538.

177. *Id.*

178. *Id.* at 1538-39 (citing Chavero v. Local 241, 787 F.2d 1154, 1157 (7th Cir. 1986); Zimmerman v. N. Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983); EEOC v. First Cath. Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982)).

179. *Id.* at 1539.

180. *Id.*

181. *Id.*

board.[182]

As the test has been applied to later cases, certain standards of evaluation have begun to emerge. In *Kern v. City of Rochester*,[183] the deciding factor in finding that the board members were not employees was the fact that they did not perform traditional employee duties.[184] In *Drescher v. Shatkin*,[185] the primary point of analysis was the level of management authority held by the director.[186] Determining that the *Johnson* court had intended for this to be a very high level since the directors were actually board members, but still employees under the Act, the court established that unless the director had the power or ability to change what he or she complained of, then that individual must be an employee.[187]

Applying these standards to our shareholder in the opening hypothetical, he will clearly be allowed to proceed with his claim. As an active attorney, the shareholder is performing traditional employee duties, as would almost any other professional active in a PC. Under the analysis of his management responsibilities, the facts fit neatly into the rule explained by the *Drescher* court. Our shareholder is involved in some management of the firm, but is not a member of the management committee, which made the decision to institute the mandatory retirement policy. He does not have the power or ability to change what he complains of.

Even though I am in favor of a broad interpretation of "employee" under the Acts, the Second Circuit has probably gone too far in honoring the remedial purposes of the Acts. The first concern is with the corporate form standard itself. It has been widely accepted by the courts that the protections of Title VII and the ADEA, among others, apply only to employees, not owners of businesses.[188] Adopting the premise that partners are owners, the per se exclusion for partners was an attempt by the courts to enforce the idea that owners should not receive protection under the Acts.[189] The corporate form standard was probably adopted in the interests of equity and in response to the per se exclusion for partners. While it is logically appealing to say that a business cannot claim the benefits of incorporation and then call itself a partnership to avoid anti-discrimination laws, such an analysis does not fully honor the purpose of the Acts.[190] The

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182. *Id.* at 1539-40.

183. 93 F.3d 38 (2d Cir. 1996).

184. *Id.* at 47.

185. 280 F.3d 201 (2d Cir. 2002).

186. *Id.* at 204.

187. *Id.* (finding that the sole shareholder in a PC could not be considered an employee under Title VII, for purposes of reaching the statutory minimum number of employees, because he held all of the management authority).

188. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 797 (2d Cir. 1986); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977).

189. *See Burke*, 556 F.2d at 869.

190. The analysis also fails to give any direction whatsoever on how the courts should handle

determination of employee or owner must include a detailed analysis of the specific facts, and should not rely on any per se rule.[191]

The second problem with the Second Circuit's approach is in the factors adopted under *Johnson*. The first two elements (examining the director's activities and whether he or she was employed by a separate entity)[192] are essentially common law agency elements.[193] As has been previously discussed, the elements of the common-law agency test do not differentiate between employees and owners, but instead between employees and independent contractors.[194] It is almost a given that a professional in a PC will be performing traditional employee duties, and it is highly unlikely that an inquiry into whether a professional is employed by any other entity would indicate whether he or she was an owner or employee.

The third element, examining management responsibility,[195] is an appropriate element of analysis and should be included in any test adopted, but the Second Circuit has been too liberal in applying it. Under the Second Circuit's rule, the only shareholder who would be excluded from protection under the Acts would be a firm's sole decision-maker, because he or she would be the only person who could unilaterally control a situation.[196] Even if the power of control were equally spread between four shareholders, they would each be considered employees because any one of them could not control the situation alone.[197] Such an analysis provides no guidance whatsoever regarding whether a shareholder is an owner or an employee.

The Second Circuit applies a better test when evaluating the status of partners.[198] In *Caruso v. Peat, Marwick, Mitchell & Co.*,[199] the court considered the question of whether an accountant partner was an employee under the ADEA.[200] To analyze the facts, the court developed a test containing three factors: "(1) The extent of the individual's ability to control and operate his business; (2) The extent to which an individual's compensation is calculated as

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an LLC.

191. *See* Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867 (9th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400 (11th Cir. 1991).

192. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539 (2d. Cir. 1996); *see also supra* note 181 and accompanying text.

193. *See supra* notes 123-31 and accompanying text.

194. *See* Serapion v. Martinez, 119 F.3d 982, 986 (1st Cir. 1997); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 n.4 (8th Cir. 1996); Wheeler v. Hurdman, 825 F.2d 257, 271-72 (10th Cir. 1987).

195. *Johnson*, 91 F.3d at 1539; *see also supra* note 181 and accompanying text.

196. Drescher v. Shatkin, 280 F.3d 201, 204 (2d. Cir. 2002).

197. *See generally id.*

198. This discussion may have been more appropriate in the section discussing tests for partnership status (*see supra* notes 137-63 and accompanying text), but because it does not necessarily contain the same drawbacks as other partnership tests, I have included it here.

199. 664 F. Supp. 144 (S.D.N.Y. 1987).

200. *Id.* at 145.

a percentage of business profits; and (3) The extent of the individual's employment security."[201]

Reasons for the first two elements of the test should be obvious, but a brief note is in order regarding the third. The court developed the third element with the traditional understanding that, under New York law, a partner "works as a permanent employee of his firm."[202] "The typical firm may not fire a partner or otherwise terminate his employment merely because of disappointment with the quantity or quality of his work, but may only remove the partner in extraordinary circumstances."[203] Therefore, if a partner is employed at-will,[204] then he is probably not a true partner.

In *Caruso*, the accountant was allowed to proceed with his claim under the ADEA.[205] The court determined that because the accountant had virtually no control over his own work, his salary was only nominally tied to firm profits, and he was employed at-will, he was not a true partner.[206]

The standard of analysis regarding the ability to control and operate the business was further clarified in *Ehrlich v. Howe*.[207] In *Ehrlich*, the court examined a purported partner's ability to control the firm and found that he had substantially more power than the accountant in *Caruso*.[208] Evidence showed that he was involved in all of the firm's decision-making meetings and that 80% of the partnership vote was required in order to adopt all firm decisions.[209] Given the 80% voting requirement, the court found that the partner could have vetoed any firm decision with the support of only one other partner.[210] While the court here does not explicitly say so, it seems to be applying a standard of meaningful participation in management. The standard appears to be less than the *Drescher* standard of total control over one's situation,[211] but considerably more generous than the *Schmidt* standard of *any* control.[212]

IV. A Proposed Solution for Defining "Employee" Under the ADEA

At this point, it may be appropriate to discuss the importance of having a unified approach to defining "employee" under the ADEA and the other anti-discrimination statutes. For lawyers, at least, mega-firms with offices in several

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201. *Id.* at 149-50.

202. *Id.* at 149.

203. *Id.*

204. In other words, the employment relationship is terminable at the will of either party for any reason.

205. *Caruso*, 664 F. Supp. at 150.

206. *Id.*

207. 848 F. Supp. 482 (S.D.N.Y. 1994).

208. *Id.* at 487-88.

209. *Id.* at 487.

210. *Id.*

211. *See supra* notes 185-87 and accompanying text.

212. *See supra* note 122 and accompanying text.

locations are becoming more and more common. If a firm had offices in Chicago (Seventh Circuit), New York (Second Circuit), and Boston (First Circuit), it could potentially face varying degrees of liability in each jurisdiction for the exact same conduct. Depending, of course, on the type of business organization and the activities in question, the firm would probably not face liability for its activities in the Chicago office; probably would face liability for its activities in the New York office; and may or may not face liability for its activities in the Boston office (depending on the mood of the judge).[213]

In an increasingly connected business environment, where it is commonplace for organizations to have several locations across the country, it is vital that a firm be able to determine its liabilities with some degree of certainty. Having consistently identifiable standards for who qualifies as an employee under the anti-discrimination statutes would allow firms to make appropriate choices and avoid expensive litigation. Further, employees would also have a clear understanding of their rights under the Acts, thereby presumably avoiding litigation which has no basis in the law.

A. The Appropriate Inquiry and Rejection of Inappropriate Tests

In fashioning an appropriate test, the first consideration must be to honor congressional intent.[214] As previously discussed, Congress arguably wanted the protections of the Acts to be applied broadly.[215] Such an intention should color every step of the test. While coverage under the Acts should not be expanded beyond that which Congress intended,[216] neither should the Acts be read in a restrictive manner so as to exclude those who should be covered (i.e. older workers under the ADEA).[217]

It is clear that Congress did not intend the Acts to protect owners of businesses.[218] Accordingly, the proper test will be one which differentiates

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213. *See supra* notes 162-63 and accompanying text (discussing the lack of identifiable standards under the First Circuit's *Serapion* test).

214. Negonsott v. Samuels, 507 U.S. 99, 104 (1993) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)) ("Our task is to give effect to the will of Congress . . . ."); Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118 (1983) (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.").

215. *See supra* notes 39-50 and accompanying text.

216. *See* Wheeler v. Hurdman, 825 F.2d 257, 275 (10th Cir. 1987) ("There are statutory limitations to the argument that the remedial ends of the Acts justify as means any definition of employee which results in coverage.").

217. *See* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986) ("The statute is considered remedial in nature and must be given a liberal interpretation in order to effectuate its purposes.").

218. *See* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997); Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996); *Hyland*, 794 F.2d at 796.

between owners and employees.[219] Of course, some of the tests used by the Circuits are better than others in identifying the differences between owners and employees.

There are a few tests which may be eliminated immediately. The first are the per se tests—both the per se exclusion for partners,[220] and the corporate form standard.[221] Most courts are in agreement that whether an individual is covered by the Acts must be determined by a factual inquiry.[222] Reliance on a rigid per se rule may be easy to apply, but it ignores the congressional intent behind the legislation.[223]

Next to be eliminated are the hybrid tests[224] and other tests which derive their factors from the common law agency test. As previously discussed, the common law agency factors do not really illuminate the issue of whether an individual is an owner or an employee.[225] Rather, the factors determine whether the individual is an agent of the enterprise.[226] This is not the inquiry we are interested in. Accordingly, the hybrid test, which derives most of its factors from the common law agency test, should be discarded.

The other test to be discarded here is the test developed by the Second Circuit in *Johnson*.[227] There are several problems with the *Johnson* test, but the concern here is with the first two elements of the test:[228] "(1) whether the director has undertaken traditional employee duties; [and] (2) whether the director was regularly employed by a separate entity . . . ."[229] Both of these elements are essentially inquiries into the agency status of an individual. The first factor will almost always be met in the context of a partnership, PC, or LLC, and the second factor is better suited to determining if someone is an independent contractor, not an owner of a business.

After abandoning these tests, we are left with the modern economic realities test (as applied by the Seventh Circuit),[230] the partnership tests (including the

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219. *See Serapion*, 119 F.3d at 987; *Hyland*, 794 F.2d at 797.

220. *See supra* notes 89-95 and accompanying text.

221. *See supra* notes 164-71 and accompanying text.

222. *Serapion*, 119 F.3d at 987; Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400-01 (11th Cir. 1991).

223. *Devine*, 100 F.3d at 80-81.

224. *See supra* notes 132-36 and accompanying text.

225. *See Devine*, 100 F.3d at 81 n.4; Wheeler v. Hurdman, 825 F.2d 257, 271 (10th Cir. 1987); *see also supra* notes 123-31 and accompanying text.

226. *Devine*, 100 F.3d at 81 n.4.

227. *See supra* notes 174-94 and accompanying text.

228. The third element will be discussed below. An analysis of management authority is proper, but the Second Circuit is far too generous in its application. *See infra* notes 235-37 and accompanying text.

229. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539 (2d Cir. 1996).

230. *See supra* notes 110-22 and accompanying text.

First Circuit's *Serapion* test),[231] the remaining element of the *Johnson* test, and the Second Circuit's partnership test.[232] While these tests are better reasoned than those discussed above, they are not without flaws.

With regard to the modern economic realities test, the third factor is particularly troublesome (examining the amount of control the purported employer exercises over the individual's work).[233] Operating under the general assumption that workers are able to exercise more control over their work as they get older and gain more experience, application of this factor to those who would make a claim under the ADEA would work to exclude the very people the ADEA was meant to protect.

Beyond the common-sense argument, however, this factor looks like it has been lifted directly from the common law agency test. Keep in mind that the proper analysis is whether someone is an owner or an employee. High ranking employees of large corporations are frequently able to exercise great control over their own work, but no one would argue that such an employee was the owner of the business. It could be argued that this element is simply an inquiry into management authority, but because the second element of the modern economic realities test does expressly examine management authority, this third element would be redundant.

Analyzing the *Serapion* test and other partnership tests outside the Second Circuit, the factors which examine ownership status are not necessarily appropriate for broad application outside of partnerships. For example, while an individual must be liable for the firm debts in order to be a partner (and presumably an owner),[234] a shareholder or member may not be liable for firm debts, but could still be an owner of the business. This factor should not be discarded entirely, but, given its limited applicability, it should not be a decisive factor.

The third element of the Second Circuit's *Johnson* test should also be dropped, thereby totally eliminating the test. The third element of the test examines management authority,[235] but the standard which has developed is too generous. As applied by the Second Circuit, any individual who did not have complete control over his or her situation would be considered an employee.[236] Most courts are in agreement that an individual need not exercise complete control in order to be considered an owner.[237] Applying the Second Circuit's standard could create ridiculous results. For example, in a three partner firm, with all decisions requiring only a simple majority (two votes), the partners would be considered employees instead of owners because the odd partner out

231. *See supra* notes 137-63 and accompanying text.

232. *See supra* notes 198-212 and accompanying text.

233. Schmidt v. Ottawa Med. Ctr., P.C., 155 F. Supp. 2d 919, 922 (N.D. Ill. 2001).

234. *See* 3 CAVITCH, *supra* note 48, § 13.05.

235. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539 (2d Cir. 1996).

236. Drescher v. Shatkin, 280 F.3d 201, 204 (2d. Cir. 2002).

237. Serapion v. Martinez, 119 F.3d 982, 992 (1st Cir. 1997); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1401 (11th Cir. 1991).

in any vote would be unable to control his or her own situation with a single vote.

Finally, turning to the Second Circuit's partnership test, the third element, which examines job security and was based on principles of New York state law,[238] should be eliminated. Any test adopted should be applicable to all jurisdictions. Further, whether an individual qualifies as an "employee" under the Acts should be determined according to principles of federal law.[239]

B. The Appropriate Test and Standards for Evaluation

After abandoning the tests and elements discussed above, we are basically left with various test elements which examine remuneration and management authority. The following analysis will identify how these ownership indicia should be examined and what standards should be applied.

Again, in fashioning the test and its standards, the primary consideration should be to honor the intention of Congress in passing the ADEA.[240] In this respect, there appear to be two limiting factors. The first is that this is remedial legislation, which should be interpreted broadly to protect older workers.[241] The second is that Congress did not intend the Act to protect owners.[242] The standards of the test, therefore, must fall between these two extremes.

Turning first to the Seventh Circuit's examination of remuneration, it appears to be in violation of the goal that the Act be interpreted broadly. In *Schmidt*, the court found that a doctor in a PC, who received a straight salary, choosing not to participate in the firm's profit sharing plan, was not an employee under the ADEA because he had the right to participate in a profit sharing plan.[243] In numerous forms, profit sharing has become a common way of rewarding workers of all levels of responsibility.[244] To exclude all individuals who may be entitled to the benefits of profit sharing, regardless of the level of their actual participation in such a plan, could effectively render the Act moot.

A better test is the one employed by the Second Circuit in partnership cases, which examines the "extent to which an individual's compensation is calculated as a percentage of business profits. . . ."[245] Such a test actually examines the

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238. *See supra* notes 201-04 and accompanying text.

239. *See Serapion*, 119 F.3d at 988.

240. *See* Negonsott v. Samuels, 507 U.S. 99, 105 (1993) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)); Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118 (1983) (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)).

241. *See* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986).

242. *See Serapion*, 119 F.3d at 985; Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996); *Hyland*, 794 F.2d at 796.

243. Schmidt v. Ottawa Med. Ctr., P.C., 155 F. Supp. 2d 919, 922 (N.D. Ill. 2001).

244. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 703 (7th Cir. 2002) ("[M]any corporations base their employees' compensation in part anyway, but sometimes in very large part, on the corporation's profits, without anyone supposing them employers.").

245. Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 149 (S.D.N.Y. 1987). For ease of writing, from this point on, this concept will be referred to as "profit sharing."

level of ownership an individual enjoys rather than relying on a bright-line test which excludes all who may be entitled to profit sharing.

The percentage of total remuneration made up by profit sharing allowed to an individual who may still be considered an employee is more difficult to determine. Such a standard would need to develop in the courts over time; however, common sense is a good guide. Certainly, any individual whose remuneration is 100% profit sharing would have to be considered an owner rather than an employee. Perhaps even those with 50% of their remuneration made up by profit sharing should be excluded. On the other side, those with minimal profit sharing, perhaps less than 20% or 30% of their total remuneration, would be protected as employees under the Act. More than that amount (and less than 50%), however, becomes less clear. A court faced with such a decision would probably need to make the management analysis more determinative.

An inquiry into whether the individual is liable for losses of the firm should also be included in the analysis of remuneration.[246] Because this factor may not be present in every business form, it should not be determinative; however, where liability for the firm's losses is present, it would strongly indicate ownership status.

Turning now to the management prong of the test, the Seventh Circuit's analysis again appears to be in violation of the proper approach when dealing with remedial legislation. In *Schmidt*, the court also cited the doctor's management authority as a reason for his exclusion from the Act's protection.[247] The doctor's participation in shareholder meetings was enough to exclude him, even though he had no participation on the firm's Board of Directors, which exercised primary control of the firm.[248] While it would be ridiculous to require that an individual be able to exercise complete control over his or her situation before finding ownership status, it is equally ridiculous to find that anyone who exercises *any* control is an owner. While the Seventh Circuit's standard here is not as restrictive as its standard for remuneration, it still fails to broadly interpret the Act in order to give effect to the remedial goals of the legislation.

A far better standard would be one which looks for meaningful participation in management, similar to that employed by the Second Circuit in partnership cases.[249] An examination for meaningful participation in management would be broad enough to protect those who have only minimal management participation,[250] but would exclude those who are able to exercise some legitimate control over their situation.[251] At the very least, this standard would require that the individual in question be a voting member of the body making the detrimental decision. If the court wished to be more generous, then a standard

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246. *Serapion*, 119 F.3d at 990.

247. *Schmidt*, 155 F. Supp. 2d at 922.

248. *Id.*

249. Ehrlich v. Howe, 848 F. Supp. 482, 487 (S.D.N.Y. 1994).

250. *See Caruso*, 664 F. Supp. at 150.

251. *See Ehrlich*, 848 F. Supp. at 487.

similar to that employed by the *Ehrlich* court could be used.[252] Such a standard would require that the individual have a realistic opportunity to protect him or herself from the discriminatory practice before being excluded from the protection of the Act.

Such a standard, however, is not without controversy. The first argument against it is that the delegation of management authority alone is enough to indicate ownership status. The problem with this approach is that it fails to examine why the management authority was delegated. For example, if delegation of authority was a requirement for joining the firm, then it would not be indicative of ownership status. After all, "ownership involves the power of ultimate control."[253] Such a situation is not indicative of ultimate control.

The next argument comes from courts which hold that an individual need not exercise complete control in order to be considered an owner.[254] This, however, is not what is being proposed. The proposed standard is requiring, at most, that the individual have a realistic opportunity to protect him or herself from the discriminatory practice (thereby not needing the protections of the Act) and, at the very least, be able to vote on the detrimental decision in question. This standard is in keeping with the remedial purpose of the Act (to protect against discrimination), yet is also restrictive enough to exclude those with the power of ultimate control.[255]

In sum, the proposed test will require evaluation of an individual's remuneration and management authority. The analysis of remuneration will include an inquiry into the percentage of profit sharing in total remuneration, and an inquiry into whether the individual is liable for losses of the firm. Liability for losses, however, should not be determinative if not present. The analysis of management authority will look for meaningful participation in management. At the very least, the individual in question must have a vote on the decision which may be detrimental to him or her before a finding that the individual is an owner and not entitled to protection under the Act. In the absence of clearly determinative findings under the remuneration prong of the test, the analysis of management authority should receive the most weight in the court's analysis.

Turning again to the partner in the opening hypothetical, it is more than likely that he would be able to proceed with his claim if the proposed test were applied to his situation. The extent of his profit sharing as a percentage of total remuneration is not indicated, but the fact that he did not have a vote in the

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252. *See id.*

253. 3 CAVITCH, *supra* note 48.

254. *See* Serapion v. Martinez, 119 F.3d 982, 993 (1st Cir. 1997); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1401 (11th Cir. 1991).

255. When I reference "the power of ultimate control," I am not suggesting that each business may only have one owner (i.e. the person who can exercise ultimate control). Rather, ultimate control may be spread among a number of owners. The key is to include in that group only those who actually have ultimate control. It stands to reason that if an individual does not have the opportunity to exercise a vote on the decision that may be detrimental to him or her, then that person does not have the power of ultimate control.

decision which led to discrimination against him would probably be determinative.

C. Application of the Test to Partnerships, Professional Corporations, and Limited Liability Companies

Because the proposed test does not rely on labels or business forms, it may be easily applied to any of the currently popular business forms for professionals, and should have significant shelf life for use on whatever business forms the future may hold. Regardless of how a business is organized, there will always be some form of remuneration for workers and some arrangement for management authority. These, of course, are the elements which the proposed test examines.

For example, if a LLC was organized so that management authority was vested in a central decision-making body, those members who did not participate in the decision-making would probably not be considered owners under the test (absent a clearly determinative finding under the remuneration prong of the test). However, if the LLC was organized so that all members had an equal vote, then they would probably be considered owners, and not subject to the protections of the Act. Using the more liberal standard available under the management prong of the test, the members would have to have a legitimate chance to protect themselves from discrimination. To do so, the LLC would probably need to have either a supermajority provision (so that a minority of voters could veto the proposal) or a limited number of members (so that the member affected by the discriminatory decision could have a legitimate chance of persuading the few votes required to defeat the proposal).

D. Application of the Test to Anti-Discrimination Statutes Outside the ADEA

It has been my general operating premise that a test under the ADEA should have broad standards for management authority not only because of the remedial nature of the Act, but also because of the people the Act was intended to protect. As a worker ages, it is more likely that he or she will gain additional management authority. Given the unique situation of older workers in that respect, a test with a narrow standard for management authority would effectively exclude many of the people the Act was intended to protect.

When fashioning a test under the other anti-discrimination statutes, like Title VII or the ADA, such a premise would not be appropriate. These Acts, however, are still remedial in nature and deserving of a broad interpretation to affect the desires of Congress. The test examines meaningful participation in management. The proposed standard for that element is not so extreme as to include everyone in the Acts, which Congress did not intend, but is not so narrow as to be overly exclusive. It is not out of order to include as owners only those who have the power to exercise ultimate control over the business.

CONCLUSION

As businesses grow and expand, it is vital that they have some understanding of what their legal obligations are. As the law currently stands, growing businesses, spread across several jurisdictions, could be subject to different rules for the exact same activities. Even within a single jurisdiction, there may be multiple tests for various business forms.

The proposed test would unify the Circuits into a single approach, which could be used on a wide variety of business forms. Further, even though the test was designed with the ADEA in mind, it is fluid enough to be applied to the other similarly worded anti-discrimination statutes. Finally, and most importantly, the test honors the remedial purpose of the ADEA, while still allowing the courts to examine cases on a situational basis, thereby excluding those not properly covered by the Act.

ADDENDUM

In April 2003, the United States Supreme Court issued its opinion[256] reversing the Ninth Circuit's decision in *Wells v. Clackamas Gastroenterology Assocs, P.C.*[257] In *Wells*, the Ninth Circuit had chosen to follow part of the Second Circuit's approach, adopting the corporate form standard, and decided that a shareholder physician could not be a partner and was therefore an employee under the ADA. In reversing that decision, the Court answered many of the questions plaguing this issue.

Both the corporate form standard and the per se exclusion for partners have now been discarded.[258] In their place, the Court essentially adopted the EEOC's proffered test examining management control and, to a lesser degree, remuneration.[259] There are six specific questions to ask when making the determination,[260] but the Court's own definition of what an "employer" is (as opposed to an "employee") is more instructive. "[A]n employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire

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256. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 123 S. Ct. 1673 (2003).

257. The Ninth Circuit's opinion is briefly discussed at *supra* note 170.

258. *Wells*, 123 S. Ct. at 1678 ("asking whether shareholder-directors are partners—rather than asking whether they are employees—simply begs the question").

259. *Id.* at 1680.

260. Those six factors are:

> (1) Ability of the organization to hire or fire the individual or set work rules and regulations; (2) Whether and, if so to what extent the organization supervises the individual's work; (3) Whether the individual reports to someone higher in the organization;(4) Whether and, if so to what extent the individual is able to influence the organization; (5) The existence of written agreements or contracts indicating the individual's employment status; and (6) Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. It is important to note, however, that the Court essentially discounted the fifth element as it recognized that the title given to a party should not be determinative. *Id.*

and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed."[261] This, of course, is an accurate description of what an employer is, but within the context of determining employee or ownership status, modern business forms will present many challenges to evaluators using the Court's test.

As the Court recognized, because of the intricacies and complexities of modern business organization, making a determination purely based on title or position is useless.[262] Also because of those intricacies and complexities, a person labeled as partner, shareholder, or member, may very well meet some of the Court's indicia of ownership, but not all. In such a case the issue then becomes where to draw the line.

It is not necessary to rehash the lengthy discussion regarding a broad interpretation of the ADEA and the other anti-discrimination statutes, but the reasoning still applies. The Court has hopefully set out a workable test for distinguishing between employees and owners.[263] The real issue now is what standards should be applied in using the Court's test. It would be relatively simple for the Seventh Circuit to take the Court's test and apply a very narrow standard and for the Second Circuit to take the Court's test and continue using a broad standard, and we would basically be back where we were before the Court issued its ruling. Every jurisdiction would be applying the same test, but they would all be interpreting it differently.

The standards proposed in Part IV of this Note were to be used in a test that examined remuneration and management authority. The Court's test is slightly more expansive than the test proposed herein,[264] but the standards suggested are still applicable.

Essentially, the standard proposed in this Note would only exclude from coverage those who are able to exercise the power of ultimate control, either individually or in a group. Such power is determined by examining whether the individual is able to have meaningful participation in management. At the very least, a person with meaningful participation in management will have the ability to have some control over whether a discriminatory practice will be adopted by the firm. Even if the individual reports to no other person in the firm;[265] even if the individual has complete discretion over his or her work;[266] even if the

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261. *Id.*

262. *Id.* at 1678.

263. The Court references the difference between employers and employees, but in the context of a partnership, PC, or LLC, the employers are necessarily also the owners. This may not be true in a typical corporation, particularly one which is publicly held, but here it is appropriate to use employer and owner interchangeably.

264. The Court's test also examines supervision over the individual and the organization's ability to terminate the individual. *Wells*, 123 S. Ct. at 1680. However, it could be argued that if a person can be discharged at will, then they probably do not exercise the power of "ultimate control."

265. This is the Court's third factor. *Id.*

266. This is the Court's second factor. *Id.*

individual shares in some profits of the organization;[267] if that individual has no say in his or her fate or in the decisions of the organization, then that individual cannot exercise the power of ultimate control. Ownership, in this context, must involve the power of ultimate control.[268]

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267. This is the Court's sixth factor. *Id.* However, an individual who shares completely in profits and losses of the firm may be an owner, even without management participation, if it was freely surrendered. 3 CAVITCH, *supra* note 48.

268. 3 CAVITCH, *supra* note 48.