NOTES

SOMETHING EVERY LAWYER NEEDS TO KNOW: THE EMPLOYER-EMPLOYEE DISTINCTION IN THE MODERN LAW FIRM

I. INTRODUCTION

The federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964[1] ("Title VII"), the Americans with Disabilities Act[2] ("ADA") and the Age Discrimination in Employment Act[3] ("ADEA") (herein known collectively as "the Acts"), were promulgated by Congress in an attempt to rid the workplace of varying forms of discrimination as well as to ease the burden on employees subject to such discrimination.[4] In most circumstances, the line between those individuals who can protect themselves from discrimination in the workplace and those who are unable to do so and need governmental assistance can eas-

1. 42 U.S.C. § 2000e (West 2003).

2. 42 U.S.C. §§ 12101–12117 (West 2003).

3. 29 U.S.C. §§ 621–34 (West 2003). The ADEA especially has a significant impact on law firms and professional corporations because, while other forms of discrimination may not be widely practiced in firms, "one certainly can expect conflict over the issue of mandatory retirement age." Randall Gingiss, *Partners as Common Law Employees,* 28 IND. L. REV. 21, 30 (1994).

4. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971). In *Griggs,* the Court, interpreting Title VII, noted that, "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Id.* The purpose of the ADEA, as noted in 29 U.S.C. § 621(b), is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." *See also* Leigh Pokora, *Partners as Employees Under Title VII: The Saga Continues-A Comment on the State of the Law,* 22 OHIO N.U. L. REV. 249 (1995) (stating that "Title VII was set in place with the noble purpose of making it unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin"); Dawn S. Sherman, Note, *Partners Suing the Partnership: Are Courts Correctly Deciding Who Is an Employer and Who Is an Employee Under Title VII?,* 6 WM. & MARY J. WOMEN & L. 645, 646 (2000) (noting that "the purpose of Title VII was to stop discrimination in employment").

ily be drawn. However, the modern professional firm presents a unique problem under the Acts because the distinction between those who should be afforded protection (employees) and those who are not protected (employers) is hard to delineate.[5] As firms increasingly expand in size and the number of partners within firms increases accordingly,[6] there is a growing need to reexamine and expand traditional notions of who is a covered employee under the Acts.

While associates are clearly employees under the Acts,[7] including those being considered for partnership,[8] the question plaguing the circuit courts in recent years has been whether or not a partner may be considered an employee under the Acts and, if so, under what circumstances.[9]

5. The structure of the modern law firm makes the question of whether an individual is really a partner or an employee extremely difficult. As noted by one source, "today's larger law firms increasingly use a multi-tiered partnership structure, in which many individuals who are called 'partner' may not truly be partners in the traditional or legal sense." 10 STEVEN M. HARTMAN & RICHARD A. FIORE, LAWYERS AS EMPLOYEES: RIGHTS AND RESPONSIBILITIES, § 10.1, 10.5 (2002 ed.). Further, in the modern law firm, there are many different types of partners, including: non-equity partners; non-proprietary partners; income partners and junior partners, which only confuses the issue more and necessitates a closer examination into whether an individual is truly a partner or an employee. *Id*.

6. Beginning in 1980, as noted by the court in *Wheeler*, there were 190,187 lawyers in the United States who were deemed partners and such figure had grown from 1970 when there were 92,442 partners in the United States. Wheeler v. Hurdman, 825 F.2d 257, 266 n.17 (10th Cir. 1987). The growth of partners in the United States has continued since then. As one source notes, based on the United States Bureau of the Census from 1993, "more than 17 million people in the United States [are] classified as partners." Pokora, *supra* note 4, at 250 (citing U.S. Bureau of the Census, Statistical Abstract of the United States 533, chart no. 851 (113th ed. 1993)). In 2002, as noted by the National Law Journal's 25th annual survey of the largest law firms in the United States, 74 laws firms employ over 500 practicing attorneys, with the largest firm, Baker & McKenzie, maintaining 3,246 attorneys. Kathleen Collins, *The NLJ 250: 2002,* NAT'L L.J., *at* http://www.law.com/special/professionals/nli250/2002/nli250.shtml (last visited Jan. 3, 2003). Sidley & Austin, the firm discussed herein, ranked number six in the survey with 1,511 attorneys. *Id.*

7. Hishon v. King & Spalding, 467 U.S. 69, 76 (1984).

8. *Id.*

9. *See* Simpson v. Ernst & Young, 100 F.3d 436, 444 (6th Cir. 1996) (holding that a partner was considered an employee for purposes of the ADEA). *But cf. Wheeler*, 825 F.2d at 264 (holding that, for purposes of the Acts, a partner was not considered an employee). The question of whether a partner can be considered an employee is analogous to the question of whether or not a shareholder in a professional corporation can be considered an employee and cases addressing both factual scenarios will be analyzed throughout this note. The cases involving shareholders and partners have received similar treatment by the courts because of the similarities between the professional corporation and a professional partnership. *See* Gingiss*, supra* note 3, at 32 (noting that a professional corporation "has characteristics of a partnership").

> From a functional standpoint, professional corporations are extremely similar to partnerships. Specifically, shareholders conduct themselves as partners both in their relations to each other and to their clients. Also, shareholders and partners are compensated similarly to the extent that they both typically receive a salary and a percentage of any profits and losses.

In an attempt to solve this dilemma, the circuit courts, with the exception of the D.C. Circuit,[10] have all instituted tests with particularized criteria to answer this question.[11] However, since there is little agreement be-

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, 243 (1998). The author does note differences between the two business organizations, such as liability. *Id*. However, such differences are inherently weighed in the balancing tests utilized by the courts, allowing the courts to use the tests formulated for one business organization in cases involving the other without causing prejudice to either. *Compare* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 798 (2d Cir. 1986) (wherein the court decided whether a shareholder in a professional corporation was an employee under the ADEA) *with* Rosenblatt v. Bivona & Cohen, P.C., 969 F. Supp. 207, 215 (S.D.N.Y. 1997) (wherein the district court followed the Second Circuit's decision in *Hyland* to determine whether a partner was an employee for Title VII purposes). However, in *Wheeler*, the Tenth Circuit noted that shareholders and partners are not similar. 825 F.2d at 276. "There may be many aspects of a partner's work environment in a partnership which are indistinguishable from that of a corporate employee. But in general the total bundle of partnership characteristics sufficiently differentiates between the two to remove general partners from the statutory term 'employee.'" *Id.*

10. The D.C. Circuit has promulgated a test for whether or not an independent contractor can be considered an employee under the Acts. Spirides v. Reinhardt, 613 F.2d 826, 831–32 (D.C. Cir. 1979). In *Spirides*, the court, when faced with a Title VII claim, held that there were pertinent issues of material fact as to whether the appellant was an employee under Title VII and remanded the proceedings for further findings of fact in regard to specific aspects of her employment. *Id*. at 833–34. In making its determination regarding whether or not the appellant was actually an employee under the Act, the court laid out several factors, including:

> (1) the kind of occupation, with reference to whether the work usually is 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 social security taxes; and (11) the intention of the parties.

Id. at 832. While this test deals specifically with independent contractors as employees under the Acts, the case has been heavily cited by other courts and the independent contractor test expressed in *Spirides* has acted as a springboard for the formation of partner-employee and shareholder-employee tests. *See* EEOC v. Zippo Mfg. Co., 713 F.3d 32, 37–38 (3d Cir. 1983). *See also* Vick v. Foote, Inc., 898 F. Supp. 330, 333–34 (E.D. Va. 1995) (wherein the court looked to its independent contractor test in answering the question of whether a shareholder/owner was an employee under the Acts).

11. The per se rule was adopted by the Seventh Circuit in *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (1984) and *Burke v. Friedman*, 556 F.2d 867 (1977) and by the Tenth Circuit in *Wheeler*, 825 F.2d at 275, 277. The hybrid test was adopted by the First Circuit in *Serapion v. Martinez*, 119 F.3d 982, 990 (1997), by the Second Circuit in *Hyland,* 794 F.2d at 797 and *Drescher v. Shatkin*, 280 F.3d 201, 203 (2d Cir. 2002), by the Third Circuit in *Jones v. Baskin, Flaherty, Elliot and Mannino, P.C.*, 670 F. Supp. 597, 601–02 (W.D. Pa. 1987), *aff'd,* 897 F.2d 522 (3d Cir. 1990), by the Fourth Circuit in *Vick,* 898 F. Supp. at 333, *aff'd,* No. 95-2486, 1996 U.S. App. LEXIS 7580 (4th Cir. Apr. 12, 1996), by the Fifth Circuit in *Goudeau v. Dental Health Serv., Inc*., 901 F. Supp. 1139, 1143 (M.D. La. 1995), by the Sixth Circuit in *Simpson*, 100 F.3d at 4343–44 (1996), by the

tween the circuits about which test should be used to answer this question, as well as what factors are important in doing so,[12] the problem remains unresolved. Consequently, uncertainty amongst partners about their employment status persists. Until the Supreme Court formulates a definitive test or a bright-line rule excluding partners from the protection of the Acts, this controversy will remain unsolved and will be the subject of continuing debate.

II. A BRIEF OVERVIEW

This note will address the question of whether a partner should be considered an employee and, thus, covered under the Acts with reference to the most recent incarnation of the question in *EEOC v. Sidley Austin Brown & Wood*.[13] Section One of the note will discuss the origin of this controversy, focusing on the Supreme Court decision in *Hishon v. King & Spalding*[14] and the implications of that decision that gave rise to the current legal battle in *EEOC v. Sidley Austin Brown & Wood*. Section Two will address the Supreme Court's recent ruling in *Clackamas Gastroenterology Associates, P.C. v. Wells*,[15] and the ramifications of the holding for the *Sidley* case. Section Three will discuss the particular facts and procedural posture of the *Sidley* dispute and discuss, in light of *Clackamas*, the likely outcome of the case on the merits. Section Four will outline the different tests currently employed by the circuits,[16] as well as the EEOC's test.[17] In Section Five, all of the tests will be analyzed, with particular attention paid to the strengths and weaknesses of each approach. In addition, the tests will be compared to each other, pointing out similarities and disparities that have created this problem. In conclusion, Section Six will set forth two possible solutions to the problem. The first possibility will explore the potential level of deference that the courts should pay to the EEOC's test, as the agency that is authorized to administer the Acts.[18] The second possible solution consists of a two-

Eighth Circuit in *Devine v. Stone, Leyton & Gershman, P.C.,* 100 F.3d 78 (1996), by the Ninth Circuit in *Strother v. S. Cal. Permanente Med. Group,* 79 F.3d 859, 867 (1996), and by the Eleventh Circuit in *Fountain v. Metcalf, Zima & Co.,* 925 F.2d 1398, 1400–01 (1991).

12. *See supra* note 11.

13. 315 F.3d 696 (7th Cir. 2002).

14. 467 U.S. 69 (1984).

15. 538 U.S. 440, 123 S. Ct. 1673 (2003).

16. *See supra* note 11.

17. *Partners, Officers, Members of Boards of Directors, and Major Shareholders,* EEOC Compliance Manual ¶ 7110, § 2-III(d) (2000).

18. Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971). In *Griggs*, a Title VII case, the

tiered analysis that explores: 1) whether the individual can correctly be classified as a partner in the firm, and 2) even if the individual is a partner, may he also be classified as an employee?

Under all of the Acts, the definition of an employer[19] and an employee[20] are virtually identical. Because of the similarities used in defining these terms and the general similarities between the statutes themselves, case law interpreting one statute's use of the term is applicable, if not binding, in the interpretation of the other Acts.[21] Even with this guidance, the terms, as defined in the statutes, are of no real assistance in determining employee status. The circular nature of these definitions has only led to confusion.[22] The only guideline for the interpretation of the Acts that has been followed by the circuits is that the terms are interpreted liberally in order to effectively satisfy the intent of the Legislature.[23] However, this statutory canon also offers little guidance in deter-

Court noted that the EEOC's "administrative interpretation of the Act [Title VII] by the enforcing agency is entitled to great deference . . . (if) the Act and its legislative history support the Commission's construction." *Id.*

19. Under Title VII, an employer is defined as a "person engaged in an industry affecting commerce who has 15 or more employees." 42 U.S.C. § 2000e(a). The ADEA defines an employer as a "person engaged in an industry affecting commerce who has 20 or more employees." 29 U.S.C. § 630(b). The ADA similarly defines the term "employer" as a person engaged in a business affecting interstate commerce, but also adds that such person must employ "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A).

20. Under all three Acts, an employee is defined as an individual/person "employed by an employer." 42 U.S.C. § 2000e(f); 29 U.S.C. § 630(f); 42 U.S.C. § 12111(4).

21. Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997). The court in *Serapion*, while addressing a possible Title VII violation, noted that the court regarded "Title VII, ADEA, ERISA, and FLSA as standing *in pari passu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another." *Id.;* s*ee also* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986) (noting that since the definitional provisions of the statutes are nearly identical, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").

22. *See, e.g.*, *Serapion*, 119 F.3d at 985; Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985); s*ee also* Wheeler v. Hurdman, 825 F.2d 257, 263 (10th Cir. 1987) (noting that not only are the definitions of employee and employer circular in nature, "nothing in the legislative history of these Acts explicitly addresses the definition of employee"). David A. Kulle & Maria Jimena Rivera, "*When Partners Become Employees: The Implications of Recent Federal Decisions"* (Nov. 13, 2002), *at* www.lawmemo.com.

23. *Hyland*, 794 F.2d at 796; EEOC v. Rinella & Rinella, 401 F. Supp. 175, 182 (N.D. Ill. 1975). As one source notes, however, even the intent of the legislature is unclear based on the scant amount of legislative history behind the definition of these terms. Pokora, *supra* note 4, at 253. Further, the only legislative history that does exist is one remark during a Senate Debate by Senator Clark that "the term employer was intended to have its common dictionary meaning, except as expressly qualified by the Act." *Id.* (quoting Hishon v. King & Spalding, 678 F.2d 1022, 1027 (11th Cir. 1982)).

mining whether or not a partner should be considered an employee under the Acts.

Under the common law, partners were generally considered employers and not provided protection under the Acts.[24] However, as recent decisions demonstrate, the general categorization of partners as employers has eroded over time and the courts are now willing to consider partners as employees in particular circumstances,[25] thus extending protection under the Acts.

III. THE BEGINNING: *HISHON v. KING & SPALDING*

The roots of the partner as employee controversy were established in the case of *Hishon v. King & Spalding*.[26] Following her graduation from law school, Elizabeth Hishon accepted a position with King & Spalding, a large Atlanta-based law firm.[27] According to Hishon, during the recruitment process, the firm enticed Hishon and others to become associates at the firm through promises of eventual partnership.[28] At that time, the firm also allegedly represented that partnership decisions were made fairly and equally.[29] Based on those representations, Hishon ultimately accepted a position with King & Spalding.[30] As a result of these promises, Hishon argued that a binding employment contract was created and the firm was bound to consider her for partnership on a fair and equal basis.[31]

24. Hartman, *supra* note 5, at § 10.4. "Traditionally, courts have been reluctant to treat partners as employees, reasoning that a partner has the power to prevent discrimination against himself or herself. However, the increasing use of multiple labels and levels of 'partners' within law firms' structures requires a fresher analysis than many of the older cases provide." *Id.*

25. *See* Wells v. Clackamas Gastroenterology Assocs., 271 F.3d 903, 905 (9th Cir. 2001), *cert. granted,* 538 U.S. 440, 123 S. Ct. 1673 (2003); Rosenblatt v. Bivona & Cohen, P.C., 969 F. Supp. 207, 215 (S.D.N.Y. 1997).

26. 467 U.S. 69 (1984). However, as one source notes, courts may still be a little hesitant to "find partners, even those with little or no control in the partnership, to be employees because of the belief that a partner is in a better position, as compared to a non-partner, to stop discrimination due to the partner's co-ownership interest and all that comes with it." Sherman, *supra* note 4, at 660.

27. *Hishon*, 467 U.S. at 71.

28. *Id.* Because the Court was ruling on the issue of whether the district court had properly dismissed a Title VII complaint, there was not a trial to establish the truth of any of the facts. *Id.* at 72–73. Hishon claimed that King & Spalding had represented to her that becoming a partner was a "matter of course," after approximately five years for any associate who had a history of good evaluations. *Id.* at 71–72.

29. *Id.* at 72.

30. *Id*.

31. *Id.*

King & Spalding considered Hishon for partner in May 1978, at which time the firm rejected her application.[32] One year later, the partners again rejected Hishon's admission to the partnership.[33] As per a firm rule, King & Spalding notified Hishon that she would be terminated because she was passed over for partnership on two occasions and informed her to seek other avenues of employment.[34] On December 31, 1979, Hishon was officially terminated.[35]

The case reached the Supreme Court, which reversed the Eleventh Circuit, holding that Hishon may have stated a claim under Title VII.[36] The Court stated that once a contractual relationship of employment is established by an employee, Title VII and its provisions attach and govern particular areas of that relationship, including the 'terms, conditions, or privileges of employment.'[37] The Court further held that in the context of Title VII, employment contracts may arise both formally and informally, as well as through a written or oral agreement.[38] The Court held that if Hishon's allegations that the firm had promised to consider her for partnership fairly and equally were proven, partnership consideration was then a term, condition, or privilege of her employment contract and, therefore, governed by Title VII.[39]

The Court did not stop there. Independent of its first holding, the Court held that Hishon may have had a cognizable claim under Title VII because the benefit of partnership consideration may have been directly linked to an associate's status as an employee, making it a term, privilege, or condition of their employment.[40] Underscoring the holding was the allegation that the firm, by rule, would terminate those associates who were not offered positions as partners, as well as the assertion that King & Spalding specifically enticed lawyers to join the firm by holding out the possibility of partnership consideration.[41] The Court also disposed with King & Spalding's argument that partnership consideration

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 72–73.
37. *Id.* at 74 (quoting 42 U.S.C. § 2000e(2)(a)(I)).
38. *Id.* The Court used the example of a job applicant being handed a shovel by an employer and providing a workplace for the suggested work as a means of creating an oral, informal employment contract. *Id.*
39. *Id.* at 74–75.
40. *Id.* at 76.
41. *Id.*

cannot fall under Title VII governance, holding that the change in status from employee to employer was of no consequence.[42]

While the holding in *Hishon* would seem to have minimal bearing on the issue of partners as employees, a concurring opinion, filed by Justice Powell, was a springboard to the issue. In an attempt to limit future courts' reading of *Hishon*, Powell stated: "[t]he reasoning of the Court's decision does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply."[43] Powell qualified his remarks by stating, "of course, an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'"[44]

Justice Powell's concurrence advocates the position that partners cannot be employees of a partnership. In stating that some lawyers may just be labeled partners, while actually being employees, Powell left open a huge question: how do we determine who is merely labeled a partner and who is actually a partner? Powell did not set forth any criteria for determining which partnerships are real and which might be considered a sham, leaving future courts that chose to follow his opinion without any real guidance.

IV. RECENT DEVELOPMENTS: *CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C. v. WELLS*

In 2003, the Supreme Court granted certiorari in a case involving physician-shareholders in a professional corporation.[45] The district court, adopting the test employed by the Seventh Circuit in *EEOC v. Dowd & Dowd, Ltd.*, concluded that the four doctors were similar to partners in a partnership and that the shareholders could not be counted as employees for purposes of the fifteen-employee statutory minimum.[46] The Ninth Circuit disagreed with the district court and held that based upon the Second Circuit's decision in *Hyland v. New Haven Radiology Associates, P.C.*,[47] that because the doctors had chosen to become a professional corporation precluded any analogy to partnership status and,

42. *Id.* at 77–78.
43. *Id.* at 79.
44. *Id*. at 79 n.2.
45. Clackamas Gastroenterology Assocs., P.C. v. Wells, 123 S. Ct. 1673, 1677 (2003).
46. *Id.* at 1676.
47. 794 F.2d 793 (2d Cir. 1986).

therefore, the doctors could be considered employees of the corporation.[48]

In resolving the dispute, the Court first turned to the statutory definition of the term "employee" as used in the ADA, the statute under which the case was brought.[49] Because the term was defined in nothing more than a nominal fashion, the Court turned to other cases construing the term for guidance.[50] In *Nationwide Mutual Insurance Co. v. Darden*,[51] the Court had interpreted this same term as it was included in the Employee Retirement Income Security Act ("ERISA") and held that when Congress fails to define the term "employee" in any meaningful way, it intended to describe a typical master-servant relationship as understood by common-law principles.[52] Using this as a springboard, the Court rejected the argument that analogizing shareholder-directors to partners was a sufficient basis on which to rest its decision.[53] The Court similarly rejected the approach adopted by the Ninth Circuit, which focused on a broad interpretation of the term so as to remain consistent with the statutory purpose of ridding the workplace of discrimination.[54] Instead of these approaches, the Court relied on its prior holding in *Darden* to conclude that the common law concept of the master-servant relationship was the key to unlocking the meaning of "employee" under the statute.[55] In particular, the Court noted that the common law's focus on the master's control over the servant was the "principal guidepost" to this analysis.[56]

With nothing but past precedent to work from, the Court then turned to the EEOC's guidelines for assistance.[57] The EEOC had recently adopted a new guideline for making just these sorts of determinations.[58] With a renewed focus on the concept of control, the Court held that the EEOC's approach was more in line with its prior reasoning than either of the approaches suggested by the parties.[59] The Court stopped short of holding that the EEOC's approach was decisive on the issue,

48. *Clackamas*, 123 S. Ct. at 1676.
49. *Id.* at 1677.
50. *Id.*
51. 503 U.S. 318, 319 (1992).
52. *Id.* at 322–23 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989)).
53. *Clackamas*, 123 S. Ct. at 1678.
54. *Id.*
55. *Id.* at 1679.
56. *Id.*
57. *Id.* at 1679–80.
58. For more on this issue, see discussion *infra* p. 32.
59. *Id.* at 1680.

stating that this approach was useful for guidance but in no way controlling.[60] Finally, the Court noted that all of the incidents of the relationship need to be considered in determining whether a shareholder-director is an employee, with no one factor being dispositive.[61]

Justice Ginsburg filed a dissenting opinion, joined by Justice Breyer, in which she argued that the Court limited the analysis of employee status to just the element of control.[62] She argued, as an alternative, that the Court should pay more attention to the corporate form as well as the statutory purpose, arguments that the majority had specifically rejected.[63] Ginsburg was also concerned with how the control issue would affect cases similar to *Clackamas*, namely, where someone other than the shareholder-director was searching for coverage under the Acts.[64] In such cases, she argued, the statutory purpose must be kept in "the mind" of the court, or inequities will arise in the application of the test endorsed by the majority.[65]

There is very little clarity following the Court's ruling in *Clackamas*. Importantly though, the Court specifically rejected any sort of per se approach[66] to the issue of employee status under the Acts, which effectively overruled the approaches advocated by the Second, Seventh, and Tenth Circuits. This is all that is clear from the decision since the remaining portions of it are clouded by ambiguities and contradictory language.

The most glaring problem with the Court's reasoning is that it seems to advocate control as definitive on the issue of employee status, but then in the same breath rejects such an approach. The Court clearly believed the issue of control to be central to determining employee status. However, the Court then goes on to say that no one single element of the relationship between the corporation and shareholder-director is decisive.[67] If control is not the overriding issue, then why did the Court spend the overwhelming majority of its opinion discussing it? This makes little sense. Even the EEOC's test, which the Court appears to be advocating, is not completely focused on control. In fact, the EEOC's test takes into account the corporate form, which was specifi-

60. *Id.* at 1680 n.9.
61. *Id.* at 1681.
62. *Id.* at 1681 (Ginsburg, J. dissenting).
63. *Id.* at 1682. (Ginsburg, J. dissenting).
64. *Id*. at 1683. (Ginsburg, J. dissenting).
65. *Id.* at 1682–83. (Ginsburg, J. dissenting).
66. Which can also be described as a form over substance argument.
67. *Clackamas*, 123 S. Ct. at 1681.

cally rejected earlier in the opinion as informative on the issue.[68] The only conclusion that one can draw from this is that the Court is informing us that control is of the utmost concern, but it is not the only concern. The problem with this is that the Court fails to specify just what those other concerns are and how much they should be taken into account. This language also leaves one to wonder the extent to which they can rely on control as a determinative issue.

Another major problem with the Court's ruling in *Clackamas* is its decision to seemingly adopt the EEOC's test of employee status. While stating that it was "persuaded by the EEOC's focus on the common-law touchstone of control,"[69] the Court also noted that "the EEOC's Compliance Manual is **not** controlling."[70] As is clear from the Court's stated reasoning for accepting the case, there is conflict among the circuit courts as to how to deal with this issue.[71] Yet, the Court appears to adopt the EEOC's test without binding any of the circuit courts to that same test. In affording absolutely no deference to the EEOC's Compliance Manual, which is the source of this test, the Court essentially allowed any future court to adopt its own approach, provided it comported with the Court's reasoning on the control issue. This is the exact lack of uniformity that plagues this area of the law and it is shocking to see the Court perpetuate the lack of uniformity in spite of its recognition of a circuit split. The possibility that the Court would adopt a different version of the EEOC's test in later cases is left wide open by the holding, further clouding the issue of whether partners or shareholder-directors can be considered employees. The reason the Court would leave this possibility so wide open is a question with no answers.

A further problem with the reasoning of the Court is its failure to properly address to whom this decision applies. The Compliance Manual discusses the employee status question with reference to a partner, officer, member of a board of directors, or a major shareholder.[72] The

68. *Id.* at 1680. The fifth factor in the EEOC's test looks to the intentions of the parties, as expressed through any written agreement or contract. *Id.* This takes into account the corporate form based on the reliance upon the choice of the parties to the contract to place an individual within a certain corporate structure. While this is not a direct inclusion of corporate form, the test at least accounts for the choices made by firms to establish a corporate form by allowing one's intended placement within that corporate structure to have some bearing on the determination of employee status.

69. *Id.*

70. *Id.* at 1680 n.9 (emphasis added).

71. "We granted certiorari to resolve the conflict in the Circuits, which extends beyond the Seventh and the Second Circuits." *Id.* at 1677.

72. EEOC Compliance Manual ¶ 7110, § 2-III(d).

Clackamas case involved a shareholder-director in a medical corporation.[73] In addressing the argument of whether shareholder-directors were analogous to partners in a partnership, the Court stated that asking such a question was insufficient to determine employee status because it focused merely on corporate form over substance.[74] What the decision seems to ignore is the fact that all of the circuit courts in cases involving shareholder-directors have both analogized shareholder-directors to partners and have applied precedent from partnership cases to these cases. This practice could not have been a secret. Major holes are left in the law because the Court limited its reasoning to the shareholder-director issue. Knowing that the circuit courts would use *Clackamas* as precedential in future partnership cases, it was incumbent on the Court to determine whether the decision was limited to the shareholder-director scenario. Its failure to do so leaves this as an open question and one that is very troublesome. The differences between a corporation and partnership, for purposes of determining employee status, is not so vast as to warrant varying interpretations. But, this is exactly what the Court has allowed to happen given its vague language.

V. THE CASE AT BAR*: EEOC v. SIDLEY AUSTIN BROWN & WOOD*

In 1999, Sidley & Austin[75] ("Sidley") implemented a new retirement policy that changed the mandatory retirement age for partners from 65 to a discretionary age for any partner who was between the ages of 60 and 65.[76] At the same time, the firm demoted 32 partners to "of counsel" or senior counsel status.[77] All but two of the demoted partners were over the age of 40.[78] As a result, the EEOC commenced an investigation of Sidley in order to determine if the demotions were in violation of the ADEA.[79] In order for the EEOC to charge Sidley under the ADEA, it would have to determine that the 32 demoted partners were employees

73. *Clackamas*, 123 S. Ct. at 1676.

74. *Id.* at 1678.

75. Sidley & Austin is now known as Sidley Austin Brown & Wood following a merger in May 2001 with Brown & Wood. EEOC v. Sidley & Austin, No. 01-C-9635, 2002 WL 206485, at *1 n.1 (N.D. Ill. Feb. 11, 2002).

76. *Id.* at *1.

77. *Id.*

78. *Id.*

79. EEOC v. Sidley Austin Brown & Wood, 315 F.3d at 696, 698 (7th Cir. 2002). The EEOC proceeded with the investigation without a charge being filed by any of the demoted partners, Martha Neil, *Firm Pressed to Hand Over Data in Bias Case*, 35 A.B.A. J. E-Report 1 (West Sept. 13, 2002), because it's investigatory authority is not limited to instances where charges have been filed. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d at 701.

under the statute prior to their demotion.[80] To make this determination, the EEOC issued a subpoena to Sidley,[81] requiring them to turn over information relating to the employment status of the demoted individuals.[82] The EEOC also sought information that related to the alleged discrimination, including how the new retirement plan was developed and the exact reasons for the demotions.[83] In response, Sidley neglected to turn over any information relating to the alleged discrimination, nor did they turn over all of the information requested on the coverage issue.[84] The information that Sidley failed to turn over was critical to the EEOC's analysis of the coverage issue.[85] As a result, the EEOC brought suit before the Northern District of Illinois in February 2002, asking the court to order Sidley to comply with the subpoena in full.[86]

In the district court, Sidley asserted that the documentation provided to the EEOC was sufficient to demonstrate that the firm was a partnership and that the individuals at issue were partners, an assertion

80. *Id.* at 698.

81. The EEOC was permitted to issue the subpoena under authority granted by 15 U.S.C. § 49 and 29 U.S.C. § 209. EEOC v. Sidley & Austin, 2002 WL 206485, at *1. Subpoenas issued by administrative agencies are generally enforced as long as the information that the agency seeks to ascertain is reasonable. EEOC v. Kloister Cruise, Ltd., 939 F.2d 920, 922 (11th Cir. 1991). In *Kloister*, two of the defendant's employees filed a charge with the EEOC alleging that they were discriminated against on the basis of their national origin and gender. *Id.* at 921. The Eleventh Circuit, in enforcing the subpoena issued by the EEOC, stated that "[i]t is well settled that the role of a district court in a proceeding to enforce an administrative subpoena is sharply limited; inquiry is appropriate only into whether the information sought is material and relevant to a lawful purpose of the agency." *Id*. at 922. Only when the agency's subpoena is found to be unreasonable and the agency obviously lacks jurisdiction over the issue will the subpoena request be denied. *Id.*

82. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d at 698. In regard to an inquiry by an agency to determine whether or not the statute covers a particular employee or not, the coverage determination is left in the hands of the administrative agency seeking to enforce its subpoena. *Kloister*, 939 F.2d at 922. The Seventh Circuit in *Sidley* noted that the law states that "like any agency with subpoena powers the EEOC is entitled to obtain the facts necessary to determine whether it can proceed to the enforcement stage." 315 F.3d at 699.

83. *EEOC v. Sidley & Austin*, 2002 WL 206485, at *1. The EEOC had previously sought and collected, via subpoena, information from Peat, Marwick, Mitchell & Co., in regard to the firm's retirement practices and policies. EEOC v. Peat, Marwick, Mitchell & Co., 775 F.2d 928, 929 (8th Cir. 1985). The court allowed the EEOC to have the information it requested so that it could determine whether or not the partners were covered under the ADEA and noted that, "[t]he initial determination of the coverage question is left to the administrative agency seeking enforcement of the subpoena." *Id*. at 930. Further, all the EEOC had to show in order to have its subpoena enforced was that its "investigation [was] for a legitimate purpose authorized by Congress and that the documents subpoenaed [were] relevant to its inquiry." *Id.*

84. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d at 698–99. Sidley challenged the assertion that there was discrimination involved in the demotion decisions, instead arguing that the partners were demoted due to unsatisfactory performance levels. *Id.* at 698.

85. *EEOC v. Sidley & Austin*, 2002 WL 206485, at *1.

86. *Id*.

that the firm claimed prohibited the EEOC from pursuing the matter further.[87] Sidley further argued that if the demoted individuals were members of the partnership, the EEOC could not subject decisions to demote them to the scrutiny of the ADEA or any of the other Acts.[88] In response, the EEOC argued that the information sought related to coverage under the ADEA.[89] The EEOC further argued that Sidley is an employer under the ADEA whom it has jurisdiction over.[90] Therefore, the only question was whether the demoted individuals were employees or employers at the time of their demotion, an issue within the province of the EEOC's investigatory powers.[91] Finally, the EEOC argued that since the information requested was pertinent to determining coverage, the court should require Sidley to disclose any information related to this issue.[92]

The district court declined to decide whether the demoted individuals were employees or employers since such a determination was not warranted at that stage of the litigation, unless the EEOC was pursuing an improper investigation in regard to individuals who were clearly not covered under the ADEA.[93] However, the court noted that while the EEOC has different guidelines for determining an individual's status as an employee, the case law did not support the EEOC's view of coverage.[94] Despite that fact, the court concluded that it "cannot find with utter confidence that there are no facts that could be contained within the subpoenaed information that would make a difference such that, in effect, Sidley is now entitled to judgment as a matter of law."[95] Based upon this, the district court ordered Sidley to fully comply with the subpoena.[96]

Sidley appealed the ruling of the district court to the Seventh Circuit, again arguing that the issue was jurisdictional in nature.[97] The court disposed with such a characterization, stating that "the Commission is entitled to the information that it thinks it needs in order to be able to formulate its theory of coverage before the court is asked to choose be-

87. *Id.* at *2.
88. *Id.* at *2–3.
89. *Id.* at *2.
90. *Id.*
91. *Id*. at *2–3.
92. *Id.* at *2.
93. *Id.* at *3.
94. *Id.*
95. *Id.*
96. *Id*. at *4.
97. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 699 (7th Cir. 2002).

tween the Commission's theory and that of the subpoenaed firm."[98] The court instead focused on whether the EEOC had overstepped its bounds in conducting the investigation.[99] The court concluded that the EEOC did have a lawful purpose in requesting the information,[100] and, therefore, information regarding coverage should have been disclosed.[101]

The court, however, limited the information that Sidley was required to turn over to the coverage issue only.[102] The limitation was imposed because the court held that if the information relating to coverage bore out the fact that the demoted individuals were employers, then the information requested with regards to the alleged discrimination would be for an unlawful purpose.[103] The EEOC would then not be entitled to discovery of information related to discrimination because it does not have regulatory authority over decisions made among employers about other employers.[104] In a concurring opinion, Judge Easterbrook wondered if there should be some uniform standard concerning whether partners can be considered employees.[105] Among his many concerns was the fact that the majority had deferred to the district court in making an initial determination about this issue.[106]

The limited ruling in *EEOC v. Sidley Austin Brown & Wood* will again force the courts to evaluate the question of coverage of partners under the Acts. The Seventh Circuit had previously developed its own rule concerning inclusion of partners as employees. In *Burke v. Friedman*, the court held that equity partners in an accounting firm were not employees under Title VII.[107] The court upheld the district court ruling that partners are considered employers and cannot be employees because

98. *Id.* at 700.

99. *Id.* at 700–01.

100. *Id.* at 707.

101. *Id.* While noting that Sidley had a legitimate argument about precluding the EEOC from obtaining the information, Judge Wood noted at the circuit court proceeding that the law was not on the side of Sidley with respect to the issue of subpoena compliance. Neil, *supra* note 79, at 1. Judge Posner was concerned with the fact that Sidley was not forthcoming with the information requested, commenting ''What are these other facts you are so eager to hide from us, and might they actually bear on the coverage issue?'' *Id.*

102. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d at 707.

103. *Id.*

104. *Id.*

105. *Id.* at 708 (Easterbrook J., concurring).

106. *Id.* (Easterbrook J., concurring).

107. 556 F.2d 867, 868, 870 (7th Cir. 1977).

they own and manage the operation of the partnership,[108] thereby adopting a per se rule as it relates to partners.[109]

Seven years later, in *EEOC v. Dowd & Dowd, Ltd.*, the Seventh Circuit expanded its view in *Burke* to include shareholders in a professional corporation.[110] Because the general make-up of a partnership was closely analogous to a professional corporation, the court held that the principles of *Burke* should govern the issue before the court.[111] Taken together, *Burke* and *Dowd* demonstrated that in the Seventh Circuit there was a per se rule regarding partners as employees: a partner would not be considered an employee if the partner shared in the profits and losses of the partnership and helped manage and control the business, regardless of the extent to which the partner shared in the profits and management of the partnership.[112] However, in light of the Court's decision in *Clackamas*, it is obvious that *Dowd* has been overruled as too reliant on the corporate form rather than the substance of the working relationship.[113] Long before this though, the reasoning of *Dowd* had been called into question by judges sitting in the Seventh Circuit.[114]

108. *Id.* at 869–70.

109. *Id.* at 869–70. *See* Gingiss, *supra* note 3, at 31 (noting that the Seventh Circuit appears to follow a per se rule); Hartman, *supra* note 5, at § 10.4 (wherein the author noted that in *Burke*, the court held that "individuals who own, manage, and share in the profits and losses of the business cannot be considered employees"); Sherman, *supra* note 4, at 649 (stating that in *Burke,* "the court held that everyone with the title of partner must be an employer").

110. 736 F.2d 1177, 1178 (7th Cir. 1984). *See* Pokora, *supra* note 4, at 255 (stating that the court in *Dowd*, "relied on its *Burke* decision in holding shareholders in a professional corporation are not employees for Title VII purposes").

111. *Dowd*, 736 F.2d at 1178–79.

112. *Burke*, 556 F.2d at 869–70. Illinois has adopted the Uniform Partnership Act, under which the key feature in defining an individual as a true partner is his or her participation in profit sharing. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 709 (Easterbrook J., concurring).

113. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 123 S. Ct. 1678, 1681 (2003).

114. Easterbrook, in his concurrence in *EEOC v. Sidley Austin Brown & Wood*, criticizes *Dowd* for its apparent dismissal of state law as dispositive in determinations of whether partners are employees. 315 F.3d at 711 (Easterbrook J., concurring). Easterbrook also questioned whether the rule of *Dowd* is consistent with *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d at 711. The Court in *Darden* held that the common law agency principle of the master-servant relationship should be applied in defining the term "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"). 503 U.S. at 319. However, the Court indicated that the reason for this was the vague definition of "employee" contained within ERISA, coupled with the absence of a provision that expansively defines the term "employ," which is contained in the Fair Labor Standards Act (FLSA). *Id.* at 326. This distinction is critical to the analysis because courts have previously decided that the ADEA, ADA, and Title VII are lumped together under the heading of anti-discrimination in employment laws, therefore making a decision about one authority in the interpretation of one of the remaining statutes. *See* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997).

Even though *Dowd* has been explicitly overruled, it is not so clear from the Court's decision that *Burke* has similarly been overruled. As noted earlier, the Court has left open the question of whether its holding in *Clackamas* would apply to a case involving partners in a partnership.[115] Because *Dowd* was merely an extension of *Burke* into the realm of professional corporations, it is highly unlikely that *Burke's* form over substance reasoning could withstand a legal challenge premised on the Court's decision in *Clackamas*. Under the old per se rule, the EEOC was unlikely to have success on the issue of coverage against Sidley. The Seventh Circuit indicated as much when it partially ordered Sidley to comply with the subpoena.[116] The Seventh Circuit appears to have been persuaded by the fact that the EEOC's analysis of the question does not follow a bright line standard, but instead pursues a case-by-case approach, a standard that the court finds unmanageable and unfair.[117] However, the concept of a bright line standard has been rendered ineffective in these types of cases by the Court's express rejection of form over substance arguments in *Clackamas*.[118] Thus, the Seventh Circuit has no legitimate test in place to deal with issues that the *Sidley* case will present.[119]

VI. THE OTHER TESTS

The Seventh Circuit is not the only circuit that has dealt with the employer-employee distinction in the context of professional firms. In

115. For a more detailed analysis of this issue, see discussion *infra* p. 49.

116. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d at 707. Easterbrook, in his concurrence, also notes the fact that the majority has already conceded that the 32 lawyers were partners: "Were the 32 lawyers *bona fide* partners? The majority all but concedes that they were." *Id.* at 709 (Easterbrook J., concurring).

117. *Id.* at 707; s*ee also* Neil, *supra* note 79, at 1 (noting that Judge Easterbrook in particular pushed the EEOC to establish a bright-line rule that would make it easy for both the courts and law firms to determine if their partners were actually employees).

118. 538 U.S. 440, 123 S. Ct. 1678, 1681 (2003).

119. The only test that could possibly provide guidance is *Burke*. However, as noted earlier, *Burke* has been overruled by implication. The Northern District of Illinois, which is the court that will hear *EEOC v. Sidley, Austin, Brown & Wood* in the first instance on the issue of coverage, recently attempted to limit the holding of *Clackamas* by stating that *Clackamas* was an ADA case and, therefore, had no application to cases involving Title VII discrimination. Colangelo v. Motion Picture Projectionists, Operators & Video Technicians, No. 01-C-9417, 2004 WL 406770, at *3 (N.D. Ill. Feb. 26, 2004). Such an assertion is utterly illogical in light of overwhelming precedent to the contrary. This case serves as an illustration of the lengths to which the courts in Illinois will go to limit the holding in *Clackamas* so as to allow them to avoid applying it. While *Colangelo* did not involve the partners as employees question, it is not unreasonable to think that the Seventh Circuit might similarly limit *Clackamas* in an attempt to hold true to its per se approach to this issue.

fact, except for the D.C. Circuit, every circuit has adopted a rule to guide it in making these distinctions.[120] The tests are designed to allow the courts to make a distinction between partners who are employees and those who are employers. All of the tests are highly controversial, however, because all of the them require subjective determinations by the court.

VII. PER SE RULE

The Seventh Circuit had (as already discussed) adopted a per se rule to determine these types of cases.[121] The Tenth Circuit, in *Wheeler v. Hurdman*, has also adopted the per se rule.[122] In doing so, the court held that a true partner is distinguishable from a corporate employee, based upon his "participation in profits and losses, exposure to liability, investment in the firm, partial ownership of firm assets, and . . . voting rights."[123] Because such a distinction is discernible from the facts of any case, the court adopted the view that once an individual's status as a general partner has been established, the inquiry into coverage ends.[124] The court was also explicit in rejecting several approaches proposed by both Wheeler and the EEOC.[125] Specifically, the court rejected the "economic realities" test on the grounds that it did not have any reasonable limit.[126] Similarly, the court rejected the "right of control" test on the grounds that, in its view, true partners "personally control management of the business and their own affairs within the business."[127] Finally, the court rejected the idea that defining the term "employee" must be done

120. In *Auld v. Law Offices of Cooper, Beckman & Tuerk*, the Fourth Circuit looked at all three tests previously adopted by other circuit courts, including the per se rule, the economic realities test, and the hybrid test, and determined that under all of them, the partners of the firm were not employees and that they, therefore, could not be counted toward the jurisdictional amount of employees required under Title VII. 981 F.2d 1250, No. 92-1356, 1992 WL 372949, at *1–2 (4th Cir. Dec. 18, 1992).

121. EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977). The court has noted, however, that not all partners are employers and that there is the possibility for sham partnership labels being applied in an effort to avoid application of the anti-discrimination statutes. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d at 706–07. In such situations, it appears the court is willing to apply an economic realities test to determine if the partner label is a sham or real. *Id.* at 706.

122. 825 F.2d 257, 277 (10th Cir 1987).

123. *Id.* at 276.

124. *Id.* at 277.

125. *Id.* at 276.

126. *Id.* at 271–72.

127. *Id*. at 273.

with reference to susceptibility to discrimination.[128] While not explicitly overruled, the foundation for the decision in *Wheeler* was, in essence, rejected in *Clackamas*.

VIII. THE HYBRID TEST

The test most commonly adopted by the circuits in order to answer the question of whether a partner is an employee is the "hybrid test," which is a combination of the "right of control" (also known as the common law agency test) and an analysis of the economic realities of the employment relationship.[129] The First,[130] Second,[131] Third,[132] Fourth,[133] Fifth,[134] Sixth,[135] Eighth,[136] Ninth,[137] and Eleventh Circuits[138] have all adopted this test in varying forms. Even within this subsection of tests, there is little agreement between the circuits about which factors are the most important in deciding when a partner is an employee.

In *Serapion v. Martinez*, the First Circuit showed a willingness to peer beneath the label of "partner"[139] given to an attorney within a law firm while specifically rejecting the per se rule.[140] The court held that

128. *Id.* at 275.

129. Pokora, *supra* note 4, at 260:

> While most hybrid tests rely heavily on common law concepts and interpretations, they are broader in the sense that they work to consider the entire economic situation. In order to best meet the remedial nature of the anti-discrimination laws, hybrids widen the scope of evaluation so that each individual case gets detailed review.

130. Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997).

131. Drescher v. Shatkin, 280 F.3d 201, 203 (2d Cir. 2002); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 797 (2d Cir. 1986).

132. Jones v. Baskin, Flaherty, Elliot and Mannino, P.C., 670 F. Supp. 597, 602 (W.D. Pa. 1987), *aff'd*, 897 F.2d at 522 (3d Cir. 1989) (without opinion).

133. Vick v. Foote, Inc., 898 F. Supp. 330, 333 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 7580 at *1 (4th Cir. Apr. 12, 1996). The Fourth Circuit upheld the decision of the district court as well as the reasoning behind the decision. *Id.* at *1.

134. Goudeau v. Dental Health Servs., Inc., 901 F. Supp. 1139, 1143 (M.D. La. 1995); *see also* Hickey v. Arkla Indus., Inc., 699 F.2d 748, 751–52 (5th Cir. 1983).

135. Simpson v. Ernst & Young, 100 F.3d 436, 443–44 (6th Cir. 1996).

136. Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996).

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

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

139. Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997). In *Serapion*, a female senior partner brought suit against her employers under Title VII after the firm was dissolved and she was not asked to join the new firm established by three of the original firm's senior partners, who were all male. *Id.* at 984–85. The court, in stating that the plaintiff was an employer and was not entitled to protection under Title VII, noted that Serapion had an overwhelming ownership interest in the firm, her salary depended on the firm's economic status, and she had the ability to vote in the firm's two principal governing bodies. *Id.* at 992.

140. *Id*. at 988.

"form should not be permitted to triumph over substance when important civil rights are at stake."[141] The court further held that the proper analysis of such issues should be on a case-by-case basis.[142] Under the First Circuit's form of the hybrid test, the most important characteristics of the partner's employment status could be broken down into three broad categories: 1) the partner's ownership in the firm,[143] 2) the partner's management role within the firm,[144] and 3) the partner's compensation from the firm.[145]

Although not specifically labeling its test, the Second Circuit utilizes factors in its analysis that are indicative of a hybrid test by contrasting factors of the common law agency test with the economic reality of the partner's status within the firm.[146] *Hyland v. New Haven Radiology Associates, P.C.*[147] was a case of first impression for the Second Circuit, but later district court opinions have clarified and elaborated upon it.[148]

141. *Id.*

142. *Id*. at 987.

143. *Id*. at 990. The ownership category takes into consideration the partner's investments in the firm, the partner's ownership of firm assets and any liability that the partner may have for the firm's debts and obligations. *Id*.

144. *Id*. Under this category, the court includes in its determination of whether the partner is an employee, the partner's ability or inability to engage in the firm's policymaking, the partner's voting rights and strength of that voting power in regard to how the firm is governed, the ability to supervise other employees in the firm and to divide work amongst those employees and the ability to function as an agent for the firm and its principals. *Id*. All of these factors taken together indicate the partner's "proprietary role" within the firm. *Id*. However, as manifested by the court's decision in *Serapion*, just because a partner has "less power and influence than the other partners did not mean that she [is] an employee." Sherman, *supra* note 4, at 656; *see also* Hartman, *supra* note 5, at § 10.5.

145. *Serapion*, 119 F.3d at 990. In regard to the compensation category, the court takes into account the extent to which the partner's salary is based on the firm's profits and is then subject to any fluctuations in the firm's economic status. *Id.* A partner is more likely to be considered an employee if his income is the same regardless of whether the firm is experiencing economic difficulty. *Id.* Lastly, the extent to which the partner receives fringe benefits is also relevant under this category. *Id.*

146. Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 797–98 (2d Cir. 1986). The court in *Hyland* held that the defendant organization was not a partnership but rather was a corporation and that the plaintiff, a physician-member, was an employee of the corporation. *Id.* at 798; s*ee also* Rosenblatt v. Bivona & Cohen, P.C., 969 F. Supp. 207, 209, 215 (S.D.N.Y. 1997) (holding, in a Title VII case, that a white partner who brought suit for racial discrimination based on his interracial marriage, although labeled a partner was actually an employee and could not be discriminated against on impermissible grounds); Caruso v. Peat, Marwick, Mitchell & Co., 717 F. Supp. 218, 222 (S.D.N.Y. 1989) (holding that a principal of an accounting firm was an employee and not a partner because he lacked control in the firm, he had little or no control over the firm's decision making, he did not have the right to seek promotion to the positions of Chairman or Deputy Chairman of the firm, and several levels of hierarchy separated him from the managing body of the firm).

147. 794 F.2d at 793.

148. *Caruso*, 717 F. Supp at 222. *See also Rosenblatt*, 969 F. Supp. at 215.

In *Caruso v. Peat, Marwick, Mitchell & Co.*, the court, citing *Hyland,* laid out a three-factor test to be used in determining whether a partner is an employee, including the partner's ability to control and operate the enterprise,[149] the method by which the partner is compensated,[150] and the partner's employment security.[151] Although these factors are considered the most pertinent to the analysis, they do not represent an exhaustive list.[152] For example, other aspects of the partner's employment relationship should also be taken into account, such as the partner's responsibilities and role in general.[153]

While not explicitly overruling *Hyland,* the Second Circuit, in recent years, had backed away from the position that it took in that case, adopting a more lenient test in *Drescher v. Shatkin.*[154] The court elucidated a three-part hybrid test in determining whether a shareholder-director of a professional corporation was an employee and noted that the relevant factors to the analysis include: "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."[155] In holding that the share-

149. *Caruso*, 717 F. Supp at 222. Included within the determination of the partner's ability to control and operate the firm, the court takes into account the right of the partner to vote upon issues within the firm and if the partner does get a vote, how that vote is weighted in relation to other partners within the firm. *Id.* Further, the partner's responsibilities within the firm are examined to determine whether any aspect of his employment includes management responsibilities. *Id.*

150. *Id*. In terms of compensation, the court evaluated whether the partner's compensation was based on job performance, like that of a traditional employee, or whether the partner's compensation was based on profits from the firm. *Id.*

151. *Id*. The court noted that employment security is important in this analysis because "a partner is generally considered a permanent employee, who cannot be fired or released except in extraordinary circumstances." *Id.* The plaintiff in *Caruso* was subject to routine evaluations of his performance for the purpose of requesting resignations if the partner's performance was not up to par. *Id.* Further, other partners could have forced a partner to involuntarily resign by a two-thirds vote. *Id.*

152. *Id.* at 222–23.

153. *Id*.

154. 280 F.3d 201, 203 (2d Cir. 2002). In *Drescher*, the plaintiff brought suit under Title VII against her employer, a professional corporation, for sexual harassment. *Id*. at 202. The plaintiff argued that Samuel Shatkin, Sr., the corporation's sole director and sole shareholder, was an employee since he worked for the corporation and performed duties that a traditional employee would perform. *Id.* at 203–04. Since the court found that Shatkin was not considered an employee, the corporation did not have the requisite fifteen employees needed in order to sustain the plaintiff's alleged violation of Title VII. *Id.* at 206.

155. *Id.* at 203. The court, in promulgating this test, followed its earlier decision in *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1539 (2d Cir. 1996). The argument could be made that the distinction between *Hyland* and *Drescher* was the position that the individual at issue held within the corporation; namely, the individual in *Hyland* was a shareholder and the individual at issue in *Drescher* was a director. Thus, technically, *Hyland* was not overruled by *Drescher* since the test

holder-director at issue was not an employee, the court noted that if an individual who would normally be considered an employee has enough power to control the policymaking decisions of the corporation, that individual could be rightfully classified as an employer.[156] Whether the Second Circuit would continue to follow the holding in *Hyland* or would, instead, follow the more lenient test as stated in *Drescher* remained an open question until *Clackamas*, wherein the Court explicitly overruled *Hyland*.[157]

The Third Circuit, in upholding a decision from the Western District of Pennsylvania, determined that the hybrid test was the proper test to use in determining who is an employee under the Acts.[158] In *Jones v. Baskin, Flaherty*, *Elliot & Mannino, P.C.*,[159] the court, in finding that the plaintiff was an employee under the ADEA, held that the hybrid test was

stated in *Drescher* was a test specifically tailored towards directors of a corporation. However, this distinction lacks merit since the individual at issue in *Drescher* was a shareholder, as well as a director. Further, having two different tests for shareholders and directors of a corporation is not rational since both have similar positions within the corporation. Further, if the Second Circuit did mean to have two different tests, one for directors and one for shareholders, it does not make sense that the shareholders should be subjected to a more stringent test since, presumably, the directors of the corporation have more say over the decision making and control within the company than a mere shareholder.

156. *Drescher*, 280 F.3d at 205. The court concluded that "Shatkin is one of the tiny class of persons who so dominate the affairs of the employer that they must be seen as in control of the very policies and actions of which they would be complaining, and who, therefore, are not considered eligible to sue their employers under Title VII." *Id*. at 204. The court noted that although Shatkin, as the corporation's president, was the servant of the corporation, did work that normal employees did, and was subject to the rules of the business, he was the sole shareholder of the corporation and, as such, he not only had the ability to fire people but he also had the power to change the rules and policies of the business. *Id*.

157. The plaintiff in *Drescher* tried to convince the court to abandon its test and adopt a common law agency test to determine whether an individual is an employee. *Id.* at 204–05. The court, in refusing to adopt the common law agency test, noted that the term "employee" should have a uniform meaning and the court found "it preferable, and more likely to reflect the intention of Congress, to construe the statute to mean one thing by the term 'employee' – not two different things depending on the context of the inquiry." *Id*. at 205.

158. Jones v. Baskin, Flaherty, Elliot and Mannino, P.C., 670 F. Supp. 597, 602 (W.D. Pa. 1987), *aff'd* 897 F.2d 522 (3d Cir. 1989) (without opinion). The Third Circuit, prior to the *Jones* decision, had adopted a hybrid test to determine whether a district manager was an employee under the ADEA. EEOC v. Zippo Mfg. Co., 713 F.2d 32, 33 (3d Cir. 1983). In *Zippo*, the court determined that the plaintiffs were independent contractors and not employees due to the fact that the district managers could control the manner in which they sold the defendant's products, they could fire their own employees and they could establish their own business organizations. *Id.* at 38. The court in *Zippo* followed verbatim the test formulated by the D.C. Circuit in *Spirides*. *Id.* at 37–38.

159. 670 F. Supp. 597. In *Jones*, a discharged attorney of the defendant's law firm, who was also a shareholder in the firm, brought suit under the ADEA. *Id*. at 598, 600. The plaintiff argued that although he was a shareholder, he should be considered an employee of the firm. *Id*. at 600–01. The defendants, in response, argued that the plaintiff's position was analogous to that of a partner in a law firm and he should not be considered an employee of the firm. *Id.* at 601.

the proper test to use in determining whether an individual is an employee under the ADEA.[160] The analysis of the individual's employment should include such things as the individual's degree of control over the management of the company, the individual's degree of control over the work that he or she does, whether the individual receives profits from the company, and whether the individual runs the day-to-day operations of the company.[161] The decision in *Jones* has been followed by other district courts even though the Third Circuit has not specifically adopted the test as its own.[162]

The Fourth Circuit, while not specifically addressing the issue, upheld a district court's use of a hybrid test to determine whether an owner and majority shareholder was an employee under Title VII and the Equal Pay Act.[163] In *Vick v. Foote, Inc.*,[164] the court found that the Fourth Circuit's test for distinguishing between employees and independent contractors[165] was "helpful in distinguishing between an owner and an employee."[166] Besides the common features of how much control the

160. *Id.* at 602.

161. *Id*. The court noted that simply because Jones was a shareholder in the firm did not necessarily mean that he was an employer. *Id*. In reality, since Jones owned less than 1% of the shares in the company, received no profits from the firm but rather a salary, and had no control of the decision making of the firm, which was instead run by a board of directors, the plaintiff was not an employer. *Id*. The "economic reality" was that of an employment situation between the professional corporation and the plaintiff and not an employer relationship. *Id*.

162. *See* Ziegler v. Anesthesia Assocs. of Lancaster, Ltd., No. 00-4803, 2002 WL 387174, at *4 (E.D. Pa. Mar. 12, 2002). In *Ziegler*, the court, in determining whether or not a professional corporation had the requisite fifteen employees under Title VII, noted that "the key consideration is the extent to which a shareholder manages, controls and owns the business." *Id*. at *2*; see* Siko v. Kassab, Archbold & O'Brien, LLP, No. 98-402, 1998 WL 464900, at *15 (E.D. Pa. Aug. 5, 1998). In *Siko*, the court held that a female attorney who filed suit against her employers for violations of the Family Medical Leave Act and Title VII, when she was discharged after taking pregnancy leave, had demonstrated an issue of material fact as to whether she was an employee and could, thus, bring suit under the acts. *Id*. at *1, *5. Although the court did not analyze the plaintiff's employment status under any test, the court did lay out the multifactor hybrid test that courts have used to analyze whether an individual is an employee under the Acts. *Id.*

163. Vick v. Foote, Inc., 898 F. Supp. 330, 333 (E.D. Va. 1995), *aff'g* 1996 US App LEXIS 7580 (4th Cir. Apr. 12, 1996). In *Vick*, an employee of a corporation sued the corporation under Title VII for various acts of discrimination. *Id.* at 331. The plaintiff tried, unsuccessfully, to argue that William Foote was an employee, although he was the Vice President of the company and 60% shareholder in the corporation. *Id.* at 333. The determination of whether or not he was an employee was pertinent to deciding whether the corporation had the requisite fifteen employees to be covered under Title VII. *Id.* Prior to *Vick*, the Fourth Circuit, in *Auld,* chose not to adopt any of the prevailing tests, but rather analyzed the case under all of the tests and concluded that the partners were not employees. Auld v. Law Offices of Cooper, Beckman & Tuerk, 981 F.2d 1250, No. 92-1356, 1992 WL 372949, at *2 (4th Cir. Dec. 18, 1992).

164. 898 F. Supp. 330.

165. *See* Garrett v. Phillip Mills Inc., 721 F.2d 979, 982 (4th Cir. 1983).

166. *Vick*, 898 F. Supp. at 334.

employer had over the individual and how dependant the individual was upon the company for his livelihood, the court found that how the individual was compensated was of particular importance in determining whether the individual was an employee.[167] The court, in holding that Foote was not an employee, also noted that no one in the company told him when to work, what to do at work, nor did anyone within the company supervise the work that he did, which clearly showed that he was not an employee.[168]

In several different contexts, the Fifth Circuit has adopted a form of the hybrid test to determine whether an individual is an employee or an employer.[169] Although the Fifth Circuit has not directly addressed the issue of partners as employees, the trend in the district courts has been to use a hybrid test to analyze whether an individual is an employee or an employer.[170] In *Goudeau v. Dental Health Services, Inc.*, the district court noted that there was no precedent within the Fifth Circuit with regard to whether a shareholder in a professional corporation can be considered an employee under the Acts.[171] The court focused on the Fifth

167. *Id*. at 333–34. The court noted that Foote, the individual at issue, was not paid for the services that he rendered to the company and was compensated based on his 60% interest in the company. *Id.* Further, there was no indication that the money that he did receive from the company was in the form of a salary. *Id.*

168. *Id.*

169. *See* Hickey v. Arkla Indus., Inc., 699 F.2d 748, 751–52 (5th Cir. 1983). In *Hickey*, with regard to whether an individual was an independent contractor or an employee, the court noted five important factors that should be taken into account in making this decision, including: "the degree of control; opportunities for profit or loss; investment in facilities; permanency of relationship; and the skill required." *Id.* The *Hickey* court described its test as one of "economic realities" and not a hybrid, despite the fact that the test itself resembles the classic form of a hybrid. *Id.* at 751. The court later reaffirmed this assertion in *Brock v. Mr. W Fireworks, Inc.,* 814 F.2d 1042, 1044 (5th Cir. 1987). However, in *Mares v. Marsh*, 777 F.2d 1066 (5th Cir. 1985), the court explicitly recognized that it was following the hybrid rule adopted by the Eleventh Circuit. *Id.* at 1067–68. Despite what the courts may say on the issue, the form adopted first in *Hickey* clearly follows the hybrid model, based on its reliance on both the economic dependence of the individual and his or her degree of control in the employment relationship. In *Barrow v. New Orleans Steamship Ass'n*, the court specifically stated that the Fifth Circuit uses a hybrid test. 10 F.3d 292, 296 (5th Cir. 1995). In determining whether a union was the plaintiff's employer or an agent of the plaintiff's employer in regard to a suit under the ADEA, the court stated that it was focused on the extent of control that the union had over the employee, including "whether the alleged employer has the right to hire or fire the employee, the right to supervise the employee, and the right to set the employee's work schedule." *Id.* Further, the test focuses on whether the alleged employer pays the employee a salary, with or without taxes included, whether the alleged employer provided the employee benefits and whether the alleged employer set the terms and conditions of the employment relationship. *Id*.

170. Goudeau v. Dental Health Servs. Inc., 901 F. Supp. 1139, 1143 (M.D. La. 1995).

171. *Id.* In *Goudeau*, the defendant, a professional corporation composed of four dentists who were also shareholders, claimed that the plaintiff had failed to demonstrate that the defendant was an employer as defined under a Title VII provision requiring that the employer employ at least fif-

Circuit's use of a hybrid test to determine independent contractor status and found that it was "appropriate to utilize the factors of the hybrid economics realities/common law agency test that are relevant here and look for guidance to the cases in other circuits that have specifically addressed this issue."[172] In determining that the shareholders were not employees of the corporation, the court noted that important factors to consider in this analysis were the extent to which the alleged employees managed, controlled, and owned the corporation, including how the individuals were compensated and whether they shared in the profits of the corporation.[173]

Another multi-factor hybrid test was adopted by the Sixth Circuit in *Simpson v. Ernst & Young*.[174] In determining which factors were important in the analysis of whether a partner is an employee, the court evaluated the facts of the case in light of the common-law principles as promulgated within the Uniform Partnership Act ("UPA").[175] Among the factors that the court took into account were the partner's role in management, his exposure to liability for the firm's losses, his share of firm profits, his voting rights in the firm, and the manner in which the partner was compensated, as well as other factors.[176]

teen employees to be covered. *Id*. at 1141 n.2. However, the plaintiff argued that while the four dentists were shareholders in the corporation, they were also employees of the corporation. *Id*. at 1142.

172. *Id*. at 1143.

173. *Id*. at 1146. The court stated that in "[c]onsideration of all the circumstances surrounding the organization and ownership of the defendant corporation, its relationship with the dentists shareholders, and their relationship to the defendant's employees supports the finding that the dentists are not employees for purposes of Title VII." *Id*. at 1147. The court was willing to look beyond the corporate form and analyze the substance of the individual's employment, and noted that such inquiry was especially pertinent in regards to Title VII litigation. *Id*.

174. 100 F.3d 436, 444 (6th Cir. 1996) (holding that a partner in an accounting firm was an employee under the ADEA). In an earlier case, *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983), the court seemed to adopt an economic realities test to determine whether an independent contractor was an employee for purposes of Title VII, but the court never explained what it meant by "economic realities." *Simpson*, 100 F.3d at 442. However, the *Simpson* court specifically adopted a multi-factor test reminiscent of the hybrid test. *Id.* at 443–44.

175. *Id.* at 443.

176. *Id*. at 443–44. Additional factors listed by the court include the right of the partner to act as an agent for the firm; the relationship between him and other partners, the partnership label as indicating the partner's "power of ultimate control" in the firm, the extent of the investment that the partner contributed to the firm, the partner's ownership of firm's assets, the partner's employment security and "other similar indicia of ownership." *Id.* The court further noted that when analyzing the facts of a particular case, the focus must be on "the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership." *Id.* (quoting Fountain v. Metcalf, Zima & Co., 925 F.3d 1398, 1400-01(11th Cir. 1991)).

In *Devine v. Stone, Leyton & Gershman, P.C.*,[177] the Eighth Circuit adopted the hybrid approach to distinguishing between employers and employees.[178] The court specifically rejected any type of a per se approach,[179] preferring instead to adopt an approach that is more focused on the substance of the employment relationship.[180] According to the court, important factors to consider in this approach include: contributions to firm capital, liability for debt, compensation, and, most importantly, participation rights.[181] The court determined that the plaintiff in *Devine* had failed to meet her burden of demonstrating that federal jurisdiction existed under Title VII.[182] Particularly damaging for Devine was her concession that all of the shareholder-directors (former partners) had participated in all of the management decisions, set firm policy, bore responsibility for firm debts, and contributed to the firm's capital.[183]

After a prolonged discussion of various circuit court opinions on the issue, the Ninth Circuit, in *Strother v. Southern California Permanente Medical Group,* concluded that a hybrid approach was appropriate in determining if a partner in a medical group was actually an employee of that group.[184]

> Courts must analyze the true relationship among partners, including the method of compensation, the "partner's" responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.[185]

In adopting the hybrid test, the court held that any label given to an individual, even a partnership label, should be disregarded since it is not indicative of the actual role played by a person in the business.[186] Using

177. 100 F.3d 78 (8th Cir. 1996).

178. *Id.* at 81. Devine had asserted that she had been sexually harassed by the lawyers at the firm, who, prior to her termination, had reorganized the firm into a professional corporation. *Id.* at 79. Devine alleged that the shareholder-directors (former partners) were employees of the corporation and should be counted towards the threshold required to bring suit under Title VII. *Id.* at 79–80.

179. *Id.* at 81. The court noted "a rigid per se rule that stresses organizational form over substance might be easier to apply, but it also might undermine the statutory purposes." *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 81–82.

183. *Id.* at 82.

184. 79 F.3d 859, 866–67 (9th Cir. 1996).

185. *Id.* at 867.

186. *Id.* In so ruling, the court rejected the approach taken by the district court, which relied heavily on the facts in the complaint and the "partner" label that Strother possessed at the time that

this test, the court determined that the plaintiff in *Strother* had presented sufficient information before the court to defeat a summary judgment motion.[187] Because *Clackamas* was a Ninth Circuit case, the Court's holding will bear directly on the Ninth Circuit's future decision-making in this area, including its upcoming decision of the *Clackamas* case upon remand.

"We focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership"[188]; such was the pronouncement of the Eleventh Circuit in *Fountain v. Metcalf, Zima & Co.*, where the court adopted a form of the hybrid test.[189] The court indicated its preference for a case-by-case analysis of the employee-employer distinction[190] and criticized any approach that gave deferential treatment to labels.[191] Because Fountain had actively participated in the governance of the business, the court held that there was no issue of genuine fact regarding Fountain's status as an employer.[192]

IX. THE EEOC'S TEST

Independent of the tests formulated by the circuit courts, the EEOC has developed its own test to deal with the distinction between employers and employees. The purpose of the EEOC's test is to determine whether the individual is subject to the control of the business that he or she is working for.[193] While assuming that, generally, partners, officers, members of boards of directors, or majority shareholders are not em-

the cause of action arose. *Id.* at 867–68.

187. *Id.* at 868. The court held that it was likely, based on the size of the firm, that Strother could make a showing that her rights were limited in such a way that characterizing her as an employee would be appropriate. *Id.* at 867–68.

188. Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1400–01 (11th Cir. 1991).

189. *Id*. Fountain sued his former partners in an accounting firm for wrongful termination. *Id.* at 1399. Fountain owned 31% of the association's capital stock, shared in the profits and losses of the business, had voting rights based on ownership of stock, was compensated based on a share of the business profits, and generally had final authority, along with his partners, in all aspects of the operation of the business. *Id.*

190. *Id.* at 1400.

191. *Id*. The court noted: "We reject the exaltation of form over substance that resides in reliance on a label ("corporation") applied to the entity as in *Hyland*, or on a label applied to a claimant." *Id*.

192. *Id.* at 1401.

193. EEOC Compliance Manual Directives ¶ 7110, § 2-III(d).

ployees, the EEOC does not look to titles as dispositive of the actual role played by any individual within a company.[194]

Instead, the EEOC focuses on six factors that it considers, taken together, as telling of an individual's actual role in an organization.[195] Those factors are:

> (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (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) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; [and] (6) Whether the individual shares in the profits, losses, and liabilities of the organization.[196]

X. ANALYSIS

An exhaustive analysis of each of the tests adopted by the circuit courts reveals that fatal flaws exist within each test, rendering the continued usage of such tests contrary to the Acts' purpose of protecting those who are not in a position to protect themselves against discrimination. The analysis will begin with a look at the approach adopted by the Seventh Circuit,[197] where the partner as employee question will play a central role in deciding *EEOC v. Sidley Austin Brown & Wood*.

Under the per se approach adopted in the Seventh and Tenth Circuits, the primary question to be asked is whether the partner is a true, bona fide partner or whether the partnership is a sham.[198] In this regard, both approaches follow Justice Powell's assertion that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.'"[199] The court is concerned with whether the individual is actually a partner or just someone labeled as a partner. Once the court

194. *Id.*

195. *Id.*

196. *Id.*

197. And the Tenth Circuit, by virtue of the fact that it has adopted the same type of approach.

198. The Seventh Circuit does not actually categorize its approach to the question as a per se rule. Instead, it frames its inquiry as one that is focused on the "economic realities" of the relationship. EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984). This label, as discussed shortly, does not fit the actual approach adopted.

199. Hishon v. King & Spalding, 467 U.S. 69, 79 n.2 (1984) (Powell J., concurring).

has determined that partnership status exists, its content to say that the individual is an employer by definition.

For example, in *Burke*, the Seventh Circuit relied on the legal definition of a partnership to determine whether partners are employees.[200] Relying on the UPA's classification of a partnership as "an association of two or more persons to carry on as co-owners a business for profit,"[201] the court held that a partner, by definition, manages and controls the business and shares in the profits and losses.[202] The court failed to extend their inquiry beyond this basic definition, not even to the "economic realities" of the partnership. Later, in *Dowd*, the court failed to look beyond the basic definition of a partner in resolving a dispute concerning employee status.[203] While stating that the "economic realities" should be examined to determine who is an employee for Title VII purposes,[204] the court failed to do so, instead relying on the idea that shareholders in a professional corporation and partners in a partnership are in analogous positions.[205] Based on these similarities, the court decided to extend the holding of *Burke* to shareholders in professional corporations.[206] Thus, any inquiry into "economic realities" was effectively ended through the invocation of *Burke*, which relies on a legal definition rather than the reality of the employment relationship.

The Tenth Circuit's decision in *Wheeler* shares many of the same fundamental flaws of the Seventh Circuit's per se approach. The court flatly rejected the "economic realities" and "right of control" approaches advanced by Wheeler,[207] holding that such tests reduce the importance of the general attributes of a partnership.[208] Based on its rejection of the approaches suggested by Wheeler and the EEOC, the Tenth Circuit, like the Seventh Circuit, is clearly more concerned with promoting a standard that is easy to apply rather than taking a case-by-case approach.

The *Wheeler* court focused much of its opinion around the differences between Wheeler's status while an associate at Main Hurdman and

200. 556 F.2d 867, 869 (7th Cir. 1977).

201. UNIF. PARTNERSHIP ACT § 6 (2003).

202. *Burke*, 556 F.2d at 869.

203. EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984).

204. *Id.* at 1178 n.2.

205. *Id.* at 1178.

206. *Id.*

207. The EEOC joined Wheeler in bringing the case before the court, advancing a theory that focused on the "economic realities" and the level of control that Wheeler had as a general partner. Wheeler v. Hurdman, 825 F.2d 257, 261, 269 (10th Cir. 1987).

208. *Id.* at 273–74. The court also held that a standard based on one's susceptibility to discrimination was too broad and unsupported by any of the statutes. *Id.* at 275.

her status while a partner at that same firm.[209] The court indicated early in its decision that Wheeler had presented evidence that her duties had gone largely unchanged since her promotion to partner.[210] In fact, she continued to be supervised by the same department head.[211] Additionally, Wheeler's partnership points, which determined her income, were allocated by the managing partner of her office and that same managing partner could expel her from the partnership with little difficulty.[212] However, these facts were not given great weight by the court, which focused instead on the fact that Wheeler's compensation was based on a point system, she contributed to the firm capital, she incurred personal liability for firm debts, and that she had some limited voting rights.[213] Focusing on these factors, though, indicates that the court was more concerned with whether it could distinguish Wheeler from associates at the firm rather than from other partners. This analysis is superficial at best, and is designed to promote a standard of examining employee status that fails to protect hundreds of individuals who are somewhere between an employer and a traditional employee.

In adopting a per se approach, the courts have failed to provide meaningful protection under the Acts. This shortcoming has been caused primarily by the desire on the part of the judges to maintain a bright line, easy-to-apply test.[214] By focusing their analysis on identifying the existence of indicia of partnership, which is an easier determination to make, the Seventh and Tenth Circuits have created a workable standard, but they have also created a test that largely ignores the problems that the Acts were designed to alleviate. This desire to have a bright line standard is so antithetical to the purpose of the Acts that the Court has flatly rejected any such approach.[215] Continued adherence to the per se rule is now clearly in violation of the *Clackamas* ruling, which is a welcomed rejection of an overly narrow rule.

The main strength of the per se approach, namely the ease with which it can be applied, is missing from the remainder of the circuit tests, which are all grouped under the hybrid test umbrella. The other

209. *Id.* at 261.

210. *Id.*

211. *Id.*

212. *Id.* Wheeler pointed out that decisions of the general partner of the office were routinely adopted as policy by the whole partnership and that appeals of such decisions were generally ineffective. *Id.*

213. *Id.* at 276.

214. *See* Neil, *supra* note 79, at 1 (describing Judge Easterbrook's response to the EEOC's standards for determining whether a partner is an employee).

215. *Clackamas*, 123 S. Ct. 1678.

circuits have chosen to focus on a more detailed analysis of the partner's status, but in doing so, they have sacrificed the ease with which they can uniformly apply their tests, as well as creating standards that are so subjective that they rarely lead to the same outcome twice.

Under the approach of *Hyland v. New Haven Radiology Associates*, the Second Circuit specifically rejected the assertion in *Dowd* that a shareholder-director was the equivalent of a partner.[216] The court held that the election by the shareholders to incorporate trumped any judicial decision that the corporation was the same as a partnership.[217] While the court was guilty of allowing form to trump substance, it was evidently influenced by the fact that, while owning shares in the corporation, Hyland was forced to comply with all of the corporate policies and regulations, his income was based on a salary system, and some of his outside behavior was also regulated by the corporation.[218] The reliance on substance sets the case apart from the decisions in *Dowd*, *Burke*, and *Wheeler*, which rely exclusively on the existence of indicia of partnership.[219] However, all of the cases ultimately rest on the idea that, by definition, a partner or shareholder are or are not an employee.

In *Drescher v. Shatkin*, the Second Circuit took a step back from the hard-line stance of *Hyland* and effectively overruled it.[220] *Drescher* presented a slightly different scenario than its predecessor, but not one that was wholly distinguishable so as to make the two cases compatible. The shareholder-director involved in *Drescher* was a sole shareholder and director of the corporation.[221] Instead of relying on the corporate form, as it did in *Hyland*, the court held instead that Shatkin was not an employee based upon his role within the corporation.[222] The court held

216. 794 F.2d 793, 797–98 (2d Cir. 1986).

217. *Id.* at 798.

218. *Id.* at 795. Hyland was required by the employment contract he signed to maintain membership in certain outside medical groups as determined by the board of directors of the corporation. *Id.*

219. EEOC v. Dowd & Dowd, Ltd., 736 F.3d 1177 (7th Cir. 1984); Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977); Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987).

220. 280 F.3d 201 (2d Cir. 2002). The court has yet to actually state that *Hyland* has been overruled, but the effect of *Drescher* is that the corporate form does not preclude a finding of employee status, which is the proposition that *Hyland* stood for. *See id.* at 203–05.

221. *Id.* at 202. The procedural posture of *Drescher* was different than that in *Hyland*. In *Hyland,* the court was asked to decide if discrimination had actually taken place and whether Hyland was protected under the Acts. 794 F.2d at 794. In *Drescher*, the court had to determine if Shatkin was an employee of the corporation for purposes of determining whether the corporation had the requisite fifteen employee minimum to qualify for coverage under Title VII. 280 F.3d at 202–03.

222. *Id.* at 204, 206.

that it would be possible for a shareholder-director to be so high in the policymaking hierarchy of the corporation that he should not be afforded protection under the Acts.[223]

The retreat on the part of the court from its earlier decision was predicated upon a desire to examine the substance of the relationship between the shareholder-director and the corporation itself.[224] To accomplish this task, the court adopted a common law agency approach, focusing on the duties of the shareholder-director and the structural hierarchy of the corporation to determine employee status.[225] This approach addressed some of the same concerns brought forth in *Hyland*, namely a concern, however limited it may have been, with the substance of the employment relationship. However, missing from the examination is any focus on indicia of ownership, which indicates that the Second Circuit approach to answering the partner as employee question is more akin to how the courts would answer an employee or independent contractor question. While the two questions do present some similar issues, the two factual scenarios should not be answered in the same way because ultimately the partner as employee question must encompass more than just a control-oriented approach.

The Fourth Circuit, in *Vick v. Foote, Inc.*, adopted a hybrid approach to the employer-employee question.[226] The court's focus was centered on the control exercised by the shareholder-director and whether he was dependent upon the company for whom he rendered services.[227] The court concluded that Foote was rendering few, if any, services for the defendant company while exercising power to write company checks at-will.[228] Ultimately, the court was of the opinion that there was no nexus between the benefits received by Foote, including his income, and the services that he rendered for the defendant company.[229]

While identifying the factors that a detailed analysis of the employer-employee question might include, the court failed to adequately expand upon the basic categories of control and economic reality. The court was concerned with the basic exchange relationship that typically

223. *Id.* at 204.

224. *Id.* at 203. The practical effect of *Drescher* was made official with *Clackamas*, in which the Court explicitly rejected the form-oriented approach that the Second Circuit had adopted. 123 S. Ct. 1673, 1680 (2003).

225. *Drescher*, 280 F.3d at 205.

226. 898 F. Supp. 330 (E.D. Va. 1995), *aff'd,* 1996 U.S. App. LEXIS 7580, at *1 (4th Cir. 1995).

227. *Id.* at 334.

228. *Id.*

229. *Id.*

exists between an employee and employer, evidenced by its analysis of the benefits received by each party. The extent to which Foote could create obligations for the company was also essential to the court's analysis. However, the court failed to set forth a detailed list of relevant factors that could guide future courts in answering similar questions.[230] In advancing only two extremely broad categories, control and economic reality, the court did little to clarify the debate over partners as employees. All that was accomplished in *Vick* was that the court adopted a hybrid approach that is overly broad and ultimately unhelpful to courts in the future.

In *Strother v. Southern California Permanente Medical Group*, the Ninth Circuit was confronted with the issue of whether the plaintiff was an employee of a medical partnership under the Fair Employment and Housing Act ("FEHA").[231] The court, as a result of the limited question before it, did not outline a specific test. Instead, it listed several factors that would be indicative of the reality of the relationship, including method of compensation, responsibility for firm liability, the individual's role in the management structure of the firm, and the management structure itself.[232] The failure of the court to describe in detail any of the four factors that it included makes application of the test difficult. In addition, the court was not specific about the importance of any one factor with regard to the other factors. In doing so, the court created a test that combines control and economic factors but fails to indicate how those factors should be weighed. The result is a test that is a slave to the whims of judges who value economic factors over control factors or vice versa.

The Eleventh Circuit in *Fountain v. Metcalf, Zima & Co.* took a questionable approach to settling the partner as employee question.[233] The court specifically rejected the idea that the label affixed to an individual can be probative of his actual position within a firm.[234] The court then indicated that the role of the individual as it relates to traditional

230. The court was most swayed by the fact that Foote owned approximately 60% of the company, and regardless of which approach the court adopted, Foote would still have been deemed an employer, which made analysis futile. *Id.*

231. Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 865 (9th Cir. 1996). The Court noted that although there was little guidance at the time relating to the interpretation of the term "employee" under the FEHA, the California courts had interpreted the statute as a whole, in accordance with both the ADEA and Title VII and, therefore, the existing body of knowledge relating to employee status under both laws would be persuasive. *Id.* at 866.

232. *Id.* at 867.

233. 925 F.2d 1398 (11th Cir. 1991).

234. *Id.* at 1400–01.

concepts of management, control, and ownership was determinative on the issue of employee status.[235] Curiously though, there was no pronouncement as to what those three concepts entailed. Fountain did not dispute the findings of fact from the district court, which had concluded that he had shared in the firm's profits and liabilities, that his salary was based on a percentage of the profits, and that he was free to vote his thirty-one percent ownership shares in any way he chose.[236] The court decided that these factors were indicative of Fountain's position as a partner[237] and held, therefore, that he could not have been an employee.[238]

The approach taken in *Fountain* seems to indicate a grounding in the principles of *Dowd* and *Burke* that, by definition, partners are not employees.[239] However, there is a key difference between the *Fountain* approach and the *Dowd* or *Burke* approaches. Namely, the court was willing to attach great significance to the substance of the voting rights that Fountain enjoyed at the firm.[240] The court was swayed by the fact that Fountain possessed a thirty-one percent voting interest.[241] Neither the *Burke* or *Dowd* court focused on the substance of the voting rights. While the *Wheeler* court did focus on the substance of the voting rights, it disregarded anything more than a nominal analysis of the rights because it noted that a certain level of domination was necessary in large partnerships.[242]

235. *Id.* at 1401.

236. *Id.* at 1399, 1401. Fountain had the right to vote on issues relating to amendments of the partnership agreement, admission of new members to the partnership, termination of membership, withdrawals from firm capital, and distribution of assets and income. *Id.*

237. *Id.* at 1401.

238. *Id.*

239. While the Fifth Circuit has not yet definitively adopted a test for dealing with the partner as employee question, the U.S. District Court for the Middle District of Louisiana, in *Goudeau v. Dental Health Serv., Inc.*, 901 F. Supp. 1139, 1143 (1995), adopted the approach taken by the Seventh Circuit in *Dowd*. *Id.* at 1146. However, the approach that the Fifth Circuit would adopt if presented with the question is unclear. As recently as 1994, the court reaffirmed its commitment to a hybrid approach to the question of determining employer status under the ADEA. Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 296 (5th Cir. 1994). *See also* Mares v. Marsh, 777 F.2d 1066, 1068 (5th Cir. 1985) (holding that a test focusing on the extent of control exercised by an employer, juxtaposed upon the backdrop of the economic realities of the employment relationship was called for under the ADEA); Hickey v. Arkla Indus., Inc., 699 F.2d 748, 752 (5th Cir. 1983) (holding that the proper analysis includes an examination of the degree of control, opportunities for profit or loss, investment in facilities, the permanency of the employment relationship, and the skill required to perform the work).

240. *Fountain*, 925 F.2d at 1401.

241. *Id.*

242. Wheeler v. Hurdman, 825 F.2d 257, 273 (10th Cir. 1987).

The *Wheeler* court was also fearful of what such a substantive voting rights analysis would mean for the status of countless partners across the nation, whose voting rights would fall far below the level sufficient to constitute "actual control."[243] The court in *Fountain* did not seem concerned with such fears,[244] instead relying heavily on the substance of Fountain's voting rights in deciding that he was a partner and, therefore, an employer under Title VII. The approach utilized in *Fountain* is more correctly placed under the hybrid approach because of its focus on the substance rather than the form of the employment relationship. However, in failing to explain what the test entails, the court left too much room for interpretation in determining what the test actually includes.

A similar focus on the substance of the participation rights of the individual is present in the majority opinion in *Devine v. Stone, Leyton & Gershman, P.C.*[245] The Eighth Circuit determined that the substance of the employment relationship was determinative on the question of whether the shareholder-directors were employees of the firm.[246] Particularly important to the court was the extent to which the directors participated in and controlled the setting of firm policy.[247] The court indicated that the critical aspect of the participation rights was that these rights provided the directors with a "meaningful voice in decision-making."[248] This analysis contradicts the approach of *Wheeler* in that the court did not seem phased by the potential result of such a holding for other partnerships.[249]The court also made a point of indicating its disdain for "a rigid per se rule," which it felt would undermine the purpose of the Acts.[250]

Despite this pronouncement, the court set forth a vague standard that is too broad to be effective. The court stated that "all relevant factors must be examined; any one may not be decisive in deciding whether an individual is an employee."[251] The court qualified the remark by specifically discussing participation rights and indicia of partnership.[252] However, while proclaiming the evils of a rigid per se approach, the court did

243. *Id.*

244. This could have been based on the fact that Fountain controlled so much of the voting interest that it would be easy to distinguish the facts of *Fountain* from later cases.

245. 100 F.3d 78, 81 (8th Cir. 1996).

246. *Id.* at 80–81.

247. *Id.*

248. *Id.* at 81.

249. *Id.;* s*ee* Wheeler v. Hurdman, 825 F.2d 257, 273, 276 (10th Cir. 1987).

250. *Devine*, 100 F.3d at 81.

251. *Id.*

252. *Id.*

something equally damaging to the purpose of the Acts by adopting a hybrid test that is overbroad and vague.[253]

The Sixth Circuit, in *Simpson v. Ernst & Young*, created an equally overbroad and vague test for determining employee status.[254] The court, taking its cue from the standard promulgated in *Fountain*, set forth twelve individual factors that it would consider along with a catch-all category entitled "other similar indicia of ownership."[255] The *Simpson* court shared the concern of the *Fountain* court that the critical factor in the analysis be a focus on the "actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control and ownership."[256] Significantly, though, the court refused to be limited by such concepts, or by the thirteen factors it set forth in the majority opinion.[257]

In applying the test, the court was severely limited by the circumstances of the case, leaving observers to guess at the importance of the relevant factors, as well as their scope. The only indicia of partnership that existed was Simpson's liability for firm debts, making the judicial determination that Simpson was an employee inevitable.[258] The only clue that the court provided about the relevance of the factors in its test was the language it used in describing the non-existence of certain indicia. Specifically, the court described an absence of "significant management control," "meaningful voting rights," and a "meaningful vote in firm decisions" as indicating employee status.[259] In describing these factors, the court revealed its focus on more than just nominal control, which sets it apart from *Wheeler* and *Dowd*.[260] However, the court was

253. Less than six months later, the Eastern District of Missouri heard *Rhoads v. Jones Fin. Cos.*, 957 F. Supp. 1102 (1997). The analysis of the relevant factors, as set forth by *Devine*, spanned four pages of the eight-page decision and covered everything from Rhoads' signing of her partnership agreement to her functions on a day-to-day basis. *Id.* at 1106–10. The court, taking a step back from the Eighth Circuit's approach in *Devine*, affirmed the *Wheeler* court's holding that domination was a necessary element of the modern partnership and that, therefore, there could not be a major emphasis on the control factors. *Id.* at 1109.

254. 100 F.3d 436 (6th Cir. 1996).

255. *Id.* at 443–44.

256. *Id.* at 443 (quoting Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1400–01 (11th Cir. 1991)).

257. *Id.*

258. *Id*. at 443 n.2.

259. *Id.* at 443–44. Apparent in the decision was the court's concern with reconciling its holding with *Darden*. The Court in *Darden* held that in determining employee status under ERISA, courts must focus on the common law agency doctrine in the absence of a clear Congressional definition of the term "employee." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992).

260. The court approved of the general approach in *Wheeler* that examined the "'total bundle of partnership characteristics'" in making a determination of employee status. *Simpson*, 100 F.3d at

so concerned with the substance of the employment relationship that it failed to adequately limit or prioritize the factors that it considered truly important to answering this question. While the level of significance that participation rights are afforded can be roughly surmised from the language of the opinion, courts interpreting this decision have to resort to mere speculation about the actual weight of such factors. Therefore, the *Simpson* analysis suffers from the same fatal flaw that the *Strother* and *Devine* approach also suffers from: over-inclusion.

Although the Third Circuit has not officially adopted a hybrid approach, the *de facto* result of *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, was the affirmation of the hybrid standard for determining if a partner can qualify as an employee under the ADEA.[261] The Western District of Pennsylvania initially heard the case and determined that the proper inquiry is into the economic reality of the employment relationship, with a focus on the employer's control over the employee as the single most important factor.[262] Jones had little control over the corporation, owned less than one percent of the shares, and the corporation exercised considerable control over the work he performed.[263] The court also made note of the fact that Jones was paid a salary, received no share of the profits or losses of the corporation, that a Board of Directors made all of the decisions for the corporation, and that Jones was never a part of that Board.[264] This test is similar to the test employed by the EEOC, more so than any of the aforementioned approaches.

The court was more focused on the control element than anything else, evident by the lack of discussion of economic factors in the decision.[265] The court accepted the assertion of *Dowd* that shareholders of a

443 (quoting Wheeler v. Hurdman, 825 F.2d 257, 276 (10th Cir. 1987)). However, the court rejected any application of the holding in *Dowd* because that decision failed to address a similar question of the actual participation of the plaintiff in the partnership. *Id.* at 444 n.3.

261. 897 F.2d 522 (3d Cir. 1989).

262. Jones v. Baskin, Flaherty, Elliot and Mannino, P.C., 670 F. Supp. 597, 602 (W.D. Pa. 1987). *See also* Ziegler v. Anesthesia Ass'n of Lancaster, Ltd., No. 00-4803, 2002 WL 387174, at *2 (E.D. Pa. Mar. 12, 2002) (holding that the extent of control, management and ownership are the central issues to resolving the question of whether shareholders of a professional corporation may be considered employees). *But see* Gorman v. N. Pittsburgh Oral Surgery Assocs., Ltd., 664 F. Supp. 212, 215–16 (W.D. Pa. 1987) (holding that enough evidence existed as to whether shareholders of a professional corporation are employees for purposes of determining ADEA protection to defeat a summary judgment motion). The decision in *Gorman* came in July 1987 while the decision in *Jones* was handed down in September 1987.

263. *Jones*, 670 F. Supp. at 602.

264. *Id.* at 601.

265. *Id.*

professional corporation are akin to partners.[266] However, it rejected the superficial approach taken by the *Dowd* court when it peered beneath the shareholder label and explored the substance of the participation rights enjoyed by Jones. The emphasis placed on the lack of control that Jones had over his work and corporation policy indicates dissatisfaction with the mere existence of participation rights and a total rejection of the *Wheeler* court's assertion that a certain amount of domination is necessary for the function of a large partnership or corporation. However, because the case was heard in the district court and the Third Circuit declined to render an opinion on appeal, one is left to speculate about whether or not this standard would be adopted by the Third Circuit.[267]

The First Circuit in *Serapion v. Martinez* was presented with exactly the same issue that the Seventh Circuit is likely to face if the EEOC presses charges against Sidley.[268] The court in *Serapion* specifically rejected any type of per se approach to the question in favor of a substantive analysis of the facts to determine if the partner was an employee.[269] The court adopted an analysis aimed at three broad categories: ownership, remuneration, and management, listing several factors under each category that would assist in the analysis.[270] It also indicated that emphasis on any one particular category over another would vary based on the facts of the case.[271] The court noted that the economic factors under the first two categories strongly hinted at Serapion's partner/owner status, but still proceeded to a detailed analysis of the management factors before rendering judgment.[272] After determining that Serapion had served on the Board of Directors of the firm and had a meaningful say in the policy and decision making of the firm, the court concluded that Serapion more closely resembled an employer rather than an employee.[273]

The strength of this test, which was endorsed by the EEOC as the test that most closely resembles their own,[274] lies in the fact that it places

266. *Id.* at 600.

267. With the *Ziegler* decision in the Eastern District, there is a split within the circuit itself, albeit not a major one. The approaches are only slightly dissimilar, but do represent a different way of prioritizing the relevant factors in the analysis that could yield different results if the same case was presented in the two district courts. This problem will fuel speculation until the Third Circuit definitively chooses which test it will follow.

268. 119 F.3d 982 (1st Cir. 1997).

269. *Id.* at 987.

270. *Id.* at 990.

271. *Id.*

272. *Id.* at 991.

273. *Id.* at 992.

274. Brief of Amici Curiae of the United States and the Equal Employment Opportunity Com-

equal emphasis on each of the factors and does not presuppose that the existence of indicia of partnership necessarily correlates with employer status. Instead, the focus is properly on the substance of the relationship between the individual and the partnership. The test's only shortcoming is the fact that there was no attempt by the court to limit the list of possible relevant factors, much like *Devine, Strother,* and *Simpson*, all cases that the EEOC has cited as representative of the type of analysis that is likely to afford the most adequate protection under the Acts.[275]

With the distinction between employer and employee continues to be the cause of debate, the EEOC developed its own test that is a hybrid of the various circuit court tests. It attempts to take into account the factors that each court has pointed to as critical.[276] According to the EEOC, "the relevant inquiry with respect to both shareholder-directors and partners is whether they operate independently and manage the business or instead are subject to the business' control."[277] To that end, the EEOC has developed an approach that serves as a critique of the various circuit court approaches, but which contains some serious problems that must be addressed.

The biggest problem with the EEOC's test is the same problem that the *Simpson, Devine, Strother,* and *Serapion* tests suffer from, namely a failure to narrow the scope of the test. Factor four of the test calls for an examination of the extent to which an "individual is able to influence the organization."[278] This is an obvious attempt to explore the extent to which a partner has a meaningful voice or significant impact on the policy and decision making of the firm. However, in not describing how such an analysis should be accomplished, the EEOC has left too much room for interpretation. There is also a lack of specificity as to how influence is to be exerted. A partner may be able to exercise control over a firm without having a vote on the firm's managing board. For instance, a partner who is not on the board, yet remains one of the firm's most profitable attorneys may be able to exert enormous influence over the board based on the amount of business that the lawyer can bring in. Under these circumstances, how the partner would be viewed under the EEOC's test is unclear.

mission at *9–10, Clackamas Gastroenterology Assocs. P.C. v. Wells, No. 01-1435, 2002 WL 31746517 (U.S. 2002).

275. *Id.* at *9–10, 13.

276. For a full listing of the six factors, *see supra* page 27.

277. Brief of Amici Curiae of the United States and the EEOC at *7.

278. EEOC Compliance Manual ¶ 7110, § 2-III(d).

The extent of supervision over an individual and whether that same individual reports to someone higher in the firm are essentially the same thing. The EEOC has listed these factors separately when they could more effectively be listed together. Generally speaking, someone who must report to someone who is higher in the corporate structure or business hierarchy is supervised by that person. The separation of these elements was probably meant to distinguish between those partners who are answerable only to a board of directors/managing board, as opposed to a direct supervisor.[279] Either way, the individual is supervised at some level, indicating employee status.

The final problem with the EEOC's test is its reliance on labels. Specifically, the test calls for an examination of the intentions of the parties, as expressed by any written agreements.[280] Despite discouraging reliance upon any title or label,[281] the commission has included labels in its analysis and, in doing so, has given such labeling weight in making a determination of employee status. By including this factor among the five others, the EEOC has sent a message that the corporate label/business hierarchy is at least as important as the indicia of partnership and the extent of control and management that an individual exercises over the business. Such inclusion flies in the face of judicial precedent and the EEOC's own guidance.

XI. HOW DO WE RESOLVE THE PROBLEM?

The dissent among the circuit courts, combined with the Court's holding in *Clackamas*, serves as an indication that there is a need for clarity in answering questions about a partner's status as an employer or an employee. There has been a wealth of possible solutions proposed since *Hishon,*[282] but as of now there has not been a definitive answer

279. This distinction can be inferred based on the examples provided by the EEOC in its Compliance Manual. In the first example, the partner is supervised by an individual who is higher in the firm. *Id.* In the second, the partner has no supervisor, but is ultimately answerable to the board of directors of the firm. *Id.* The Compliance Manual is meant to cover not only partners at a law firm, but also officers, and shareholders of professional corporations as well. *Id.*

280. *Id.*

281. Brief of Amici Curiae of the United States and the EEOC at *17.

282. One source would allow a partner filing suit under Title VII "to enjoy a rebuttable presumption of employee status" overcome only by substantive evidence that the partner "shared in the firm's profits and had joint control of the partnership." Sherman, *supra* note 4, at 663. Under this proposed solution, the partner could more easily make a claim against his or her employer. *Id*. Another source, relying heavily on the Supreme Court's holding in *Darden*, noted that "[i]t seems clear, following *Darden* and *Simpson*, that the next Title VII case dealing with the issue of whether partners can be employees will be decided using the common law test." Pokora, *supra* note 4, at

from either Congress or the Court.[283] While the Court has shown a willingness to at least listen to the issue, as evident from *Darden* and *Clackamas*, the vagueness with which it has dealt with the issue thus far, combined with the open questions that remain, leaves this problem largely unresolved at the present time. Even now, the Court has yet to consider a single case relating to a partner's status as an employee.[284]

EEOC v. Sidley Austin Brown & Wood presents exactly the type of case that should be heard by the Court. The Seventh Circuit's approach for answering the question will likely vary greatly from the EEOC's approach. In addition, there is certainly reason to believe that the Seventh Circuit might attempt to invoke the *Burke* holding, since this case involves partners and not shareholder-directors. Given the state of the law and the fact that the outcome in this case will be so critical to future developments in this area, the case is likely to be appealed up to the Supreme Court. When the Court does eventually hear the case, there are two possible resolutions to the problem:[285] 1) show deference to the EEOC and adopt its standard for determination of employee status, or 2) refine the EEOC's test and adopt a two-tiered approach to determine if one is a partner in the first instance, and secondly, whether that partner may qualify as an employee under the Acts.[286]

266. There are also some authors who question whether it is wise to distinguish some partners as employees and some as employers within the same firm because doing so would "only inject uncertainty into every equity partnership, leaving firms at a loss as to which partner is an employee and which is not until one decides to sue." Geri S. Krauss, *Are Law Firm Equity Partners Protected by Discrimination Laws,* 228 N.Y. L.J., Nov. 19, 2002, at 4, col. 4. Promoting a similar position, another source notes that, "there is little to be gained and much to be lost by close judicial scrutiny of law firm expulsion. The firm itself has strong incentives to avoid abusing the expulsion power and it is very hard for courts to determine when these abuses occur." Larry E. Ribstein, *Law Partner Expulsion,* 55 BUS. LAW. 845, 852 (2000). Further, laws such as Title VII and the ADEA only serve to "add a layer of scrutiny to expulsion decisions, particularly when they involve layoffs of senior partners covered by the ADEA. This could reduce firms' ability to discipline partners and maintain their reputations." *Id*. at 879.

283. *See* Krauss, *supra* note 282, at 4 (noting that the legislative branch, which originally created the laws, should be the branch that decides this issue).

284. While one would expect *Clackamas* to be informative in this area, the Court went to great lengths to avoid making it's holding applicable to cases involving partners instead of shareholder-directors. This failure on its part to extend the rule indicates the possibility that the rule will not extend, which would create an enormous amount of uncertainty.

285. This is assuming that the Court decides that there is a need for a uniform standard, which would seem apparent, but for which the Court may disagree. This also assumes that the Court finds all of the current tests inadequate, which is the contention of this Note. Finally, this also assumes that the Court will recognize the errors it made in its holding in *Clackamas*, which is not definite.

286. *See* Sherman, *supra* note 4, at 665 (noting that "the purpose of anti-discrimination statutes, such as Title VII, should be at the forefront of any debate regarding the definition of 'employer' and 'employee'").

XII. THE DEFERENCE APPROACH

In making a determination regarding which test should be applied, the courts should pay deference, at least to some extent, to the EEOC's test, which was reasonably constructed to clarify an ambiguity within the statute that the agency was created to administer.[287] Under *Chevron v. Natural Resource Defense Council, Inc*., in construing an agency's interpretation of the statute that it administers, the Court should first ask "whether Congress has directly spoken to the precise question at issue" in the statute.[288] If Congress has not spoken to the exact question at issue and the statute is silent or ambiguous "with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[289] If the agency's interpretation of the statute is reasonable, then a measure of deference should be given to the agency's interpretation.[290] The degree of deference that is afforded to an agency's interpretation varies according to the circumstances and, while not all agency rules and regulations have a binding effect on the courts, such rules and regulations may at least influence "courts facing questions that agencies have already answered."[291]

In *Clackamas*, the Court followed the EEOC's test to the extent that it highlighted "control" as the pinnacle of the analysis of whether shareholders are employees under the Acts, for control is the "touchstone" of the common law approach that the Court upheld in *Darden*.[292] However,

287. The term "employee," as used within all of the Acts, is ambiguous as to whether or not a partner could be considered an employee for purposes of the statute. The test formulated by the EEOC was intended to clarify that ambiguity and such clarification was necessary since Congress had not spoken directly on the issue.

288. 467 U.S. 837, 842–43 (1984).

289. *Id*. If the intent of Congress can be clearly delineated from the statute, both the Court and the agency must adhere to Congress' construction of the statute. *Id.* However, when Congress has left a specific gap within a statute for an agency to fill, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." United States v. Mead Corp., 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 843–44).

290. *Chevron*, 467 U.S. at 844. *See also* Krzalic v. Republic Title Co., 314 F.3d 875, 877 (7th Cir. 2002) (noting that "[w]hen a statute administered by a federal agency is unclear and the agency is authorized to interpret it, the agency's interpretation, unless unreasonable, may bind a reviewing court in accordance with *Chevron*").

291. *Mead*, 533 U.S. at 227. In deciding the fair measure of deference that should be given to an administrative agency's interpretation of the statute it administers, courts have looked to "the degree of the agency's care" that went into the rulemaking decision, the consistency of the rule in relation to other provisions of the statute and other decisions by the agency, the formality of the rulemaking process, relative expertness of the agency in regard to the issue being regulated, and to "the persuasiveness of the agency's position." *Id*. at 228.

292. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 123 S. Ct. 1673, 1679–80 (2003). The court did note in passing that the strict common law right of control test used to de-

with minimal faulty analysis, the Court noted that the test was not controlling and did not warrant *Chevron* deference,[293] leaving open the Court's probable rejection of the test in the future or in other situations, such as the analysis of whether partners are employees.

The Court in *Clackamas* should have given the EEOC's test at least a minimal level of deference instead of looking at it only for guidance. The EEOC was given the authority under Title VII and other anti-discrimination statutes to "issue, amend, or rescind suitable procedural regulations" to carry out the provisions of the Acts.[294] The test formu-

termine whether independent contractors are employees would not work in the analysis of whether shareholder-directors are employees for the determination of whether a shareholder is an employee depends on a combination of factors. *Id*. at 1681. However the Court was "persuaded by the EEOC's focus on the common-law touchstone of control." *Id.* at 1680.

293. *Id.* at 1680 n.9. The Court simply followed the acknowledgement of the Government that the Compliance Manual is not controlling and noted that the Manual constitutes "a 'body of experience and informed judgment' to which we [the Court] may resort for guidance." *Id*. (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). The Court also cited *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) for the proposition that agency manuals do not warrant *Chevron* deference. *Clackamas*, 123 S. Ct. at 1680 n.9. In *Christensen*, a county sheriff wrote to the United States Department of Labor's Wage and Hour Division in regard to an overtime payment issue affecting the county. *Christensen*, 529 U.S. at 580. The Department of Labor replied to the letter stating its opinion and thereafter, the petitioners and the United States stated that the letter should receive *Chevron* deference. *Id*. at 586. In noting that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . do not warrant *Chevron*-style deference," the Court was concerned that agency statements such as the opinion letter in *Christensen*, which were created with minimal formal deliberation and could have simply been written with little thought, should not be afforded the force of law. *Id*. at 587. The EEOC's manual is extremely different from the opinion letter in *Christensen*. The manual is backed by the entire agency, instead of simply being written by one individual. It is a public document and can be commented on by anyone who so desires, unlike a personal letter. Based on the content of the manual, the rules promulgated therein were not simply written on a whim, but were the product of deliberation and a formal process, assuaging the concerns of the Court in *Christensen*. Further, since this test in particular is mainly procedural in nature, the EEOC does not have to go through a formal notice and comment session, further relieving the concerns of the Court in *Christensen*. *See* Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 902 (8th Cir. 1979). If nothing else, the manual is similar to the Bureau of Prisons internal agency guidelines, which does not have to go through the notice and comment procedure and is still an enforcement guideline, but as noted by the Court is still "entitled to some deference." Reno v. Koray, 515 U.S. 50, 61 (1995).

294. 42 U.S.C.§ 2000e-12. The EEOC has no rulemaking power over a substantive issue. Edelman v. Lynchberg Coll., 535 U.S. 106, 113 (2002). A substantive regulation is defined as one "that affects individual rights and obligations" and whether or not a rule affects individual rights and obligations "depends largely on the rights and obligations in existence at the time of the rule's promulgation." Emerson, 609 F.2d at 902. In *Emerson*, the EEOC and the Department of Labor's Office of Federal Contract Compliance Programs formed a memorandum of understanding. *Id.* at 901. The memorandum was formulated by the two departments as a means by which they shared information and established a mechanism by which a complaint filed with the Department of Labor would be deemed a charge filed with the EEOC. *Id.* This process was found to be procedural in nature. *Id*. at 904. If the agency's rule or regulation is found to be substantive, the agency must comply

lated by the EEOC, while having substantive components, is essentially procedural in nature and, thus, creation of such a test is within the EEOC's authority.[295] As such, the Court should have given the test a degree of deference instead of leaving the test as it did in *Clackamas*, as a useful guidepost without much authority.[296]

The degree of deference that should be afforded to the rules promulgated by the EEOC, like the test discussed herein, is still a matter of debate.[297] However, in many situations, the courts have deferred totally to the EEOC's interpretation of an ambiguity within one of the Acts, all of which the agency was created to administer, and the courts should show such deference to the test formulated by the EEOC.[298] The EEOC

with the notice and comment provision of the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c) (West 2002). *Emerson*, 609 F.2d at 904. As noted in *Emerson*, if the EEOC's compliance manual is found to be procedural in nature, while the agency does not have to adhere to the notice and comment provisions of the Administrative Procedure Act, the EEOC "might find it advisable to provide opportunity for interested parties to comment on proposed rules in cases in which there may be some question about whether individual rights and obligations will be affected." *Id*. at 904.

295. Although the test formulated by the EEOC has substantive components, the test should be considered procedural in nature, since, but for the test itself, a partner who is actually an employee would not be given the opportunity to make a claim against his or her employer since the partner would not be covered by the statute and, thus, not be given any substantive rights. Further, the test is procedural in nature since it does not answer the question of whether the partner was actually discriminated against and should receive a remedy for that discrimination. The test only addresses the question of coverage under the statute. The EEOC's test can be differentiated from a substantive regulation since the test does not affect "individual rights and obligations" that were not in existence at the time the test was formulated, since many of the circuits have already deemed partners to be employees in the proper circumstances, before the test was ever formulated by the EEOC. *Id.* at 902. Thus, under the EEOC's test, partners are not given any additional rights nor are additional obligations imposed on employers, since such rights and obligations were already in existence at the time the EEOC's test came into existence.

296. *Clackamas*, 123 S. Ct. at 1680.

297. *Edelman*, 535 U.S. at 106, 114. In *Edelman*, the majority refused to resolve the question of the degree of deference that should be afforded to the EEOC's rule on what constituted a "charge" under Title VII since the rule chosen by the EEOC was reasonable and representative of the interpretation that the court would have selected itself. *Id*. However, Justice Thomas, in his concurrence, noted that the only reason he agreed with the majority opinion was because he read the opinion to hold that "the EEOC possessed the authority to promulgate this procedural regulation, and that the regulation is reasonable, not proscribed by the statute and issued in conformity with the APA [Administrative Procedure Act]." *Id*. at 119 (Thomas J., concurring). Further, Justices O'Connor and Scalia, also in concurrence, noted that since the statute contained an ambiguity, the EEOC's interpretation of the statute should be deferred to. *Id*. at 120 (O'Connor J., concurring). The Justices also noted that "because the EEOC was not given rulemaking authority to interpret the substantive provisions of Title VII, its substantive regulations do not receive *Chevron* deference" but instead would receive varying levels of consideration based on the thoroughness that went into the EEOC's formulation of the rule, the validity of the EEOC's reasoning behind the rule, and the rule's consistency with prior and subsequent agency pronouncements. *Id*. at 122 (O'Connor J., concurring).

298. *See* EEOC v. Commercial Office Prod. Co., 486 U.S. 107, 116 (1988). In *Commercial*

has been described as the "agency to which we [the court] owe deference in construing Title VII"[299] and such deference should be given not only because it is mandated by law but because the EEOC is the proper organization to resolve this dispute, based on it's knowledge, expertise in the field, and vast resources available to it in resolving this issue.[300]

XIII. THE TWO-TIERED APPROACH

While there are good reasons for the Court to pay deference to the EEOC and its rule, such an approach would tend to ignore some of problems that exist within the EEOC's test. A two-tiered analysis, taking into account the strengths and weaknesses of the various tests that are currently utilized by other courts, would better serve the purpose of the Acts. Such an approach would also provide the courts with ample guidance and a clear and concise rule to use in making these determinations.[301]

Under the first tier, the focus should be on whether the individual bringing suit is actually a partner. The relevant factors to this analysis can best be described as the indicia of partnership, which include 1) the individuals' share of firm profits,[302] 2) the individual's liability for firm

Office, the Court held that the EEOC's interpretation of the word "terminate" in regard to its work-sharing agreement with state agencies was amply supported by the "legislative history of the deferral provisions of Title VII, the purposes of these provisions, and the language of other sections of the Act" and, thus, should be afforded deference. *Id.* at 115–16. The Court noted that the EEOC's "interpretation of ambiguous language need only be reasonable to be entitled to deference." *Id.* at 115; s*ee* Chevron v. Echazabal, 536 U.S. 73 (2002). In *Echazabal*, the court deferred to the EEOC's regulation of the ADA, which "authorize[d the] refusal to hire an individual because his performance on the job would endanger his own health, owing to a disability." *Id.* at 76. In so holding, the court noted that "[s]ince Congress has not spoken exhaustively on threats to a worker's own health, the agency regulation can claim adherence under the rule in *Chevron* . . . so long as it makes sense of the statutory defense for qualification standards." *Id*. at 84 (citation omitted).

299. Hopkins v. Price Waterhouse, 920 F.2d 967, 979 (D.C. Cir. 1990). In *Hopkins*, a female employee in an accounting firm brought suit against her employer for discriminating against her in its consideration of her for partnership status. *Id*. at 970–71.

300. *See id.* at 979. The D.C. Circuit in *Hopkins*, citing the Senate Committee on Labor and Public Welfare, noted that "the Equal Employment Opportunity Commission would be expected to develop an important reservoir of expertise in these matters, expertise which would not readily be available to a widespread court system." *Id.*

301. A two-tiered approach is adequate to remedy a trend running throughout courts that once a person is deemed to be a bona fide partner, "most courts, including those adhering to the common law test, move to a per se rule that bona fide partners cannot be employees." Pokora, *supra* note 4, at 268. A two-tiered approach ensures that even if a person is properly designated as a partner, that person can still be considered an employee under the proper circumstances.

302. Sharing in firm profits constitutes prima facie evidence of the existence of a partnership under the UPA § 7(4).

losses or debts, 3) the individual's interest in firm capital and assets, 4) the individual's ability to speak on behalf of the firm, 5) the individual's ability to bind the firm to business obligations, 6) the ability of the individual to vote on matters of firm policy, 7) the existence of a fiduciary duty between the individual and the remainder of the partners of the firm, and 8) the individual's ability to approve or reject applications for inclusion in the partnership.[303] Also relevant to this level of analysis is the intent of the parties to define the individual as a partner, as evidenced through a writing that is signed by the firm and the individual.

At this level of analysis, the critical investigation is into the existence of the indicia of partnership, not the substance of their existence. In trying to establish that an individual is a partner, the existence of a signed agreement that grants the individual a majority of these factors clearly separates that individual from the balance of the employees of the firm. Similarly, in the absence of a signed agreement, or an agreement that fails to include a majority of the indicia, the actual existence of a majority of these factors must be present in the employment relationship in order to establish a mutual intent to define the individual as a partner. This level of analysis would weed out a "partner" who has enjoyed no changes from their associate status, but has nevertheless received the title "partner." In such situations, the title change is more indicative of a promotion and not a change in status. This would effectively end all types of "sham" partnerships, which Justice Powell was concerned with in *Hishon*.[304]

Once it is established, under the first tier, that the individual bringing suit is a partner of the firm, then the courts should proceed to the second tier of the analysis. The second tier is focused on the substance of the individual's relationship to the other partners in the firm, with particular attention paid to the extent to which the indicia of partnership are present. Under this analysis, the main investigation is into the extent to which other, more powerful, partners control the individual, and the extent to which the individual is in control of his actions.

Important to this analysis are the following: 1) the quantitative nature of the voting rights of the individual viewed as compared to the voting rights of the remaining partners, 2) the partner's ability to vote on matters of firm policy, including inclusion/exclusion of members, mergers or acquisitions, amendments to firm bylaws, and changes in the structure of the firm; 3) the partner's ability to propose policy changes

303. *See* UPA §§ 7, 11, 15, 18, 20–21.

304. Hishon v. King & Spalding, 467 U.S. 69, 79 n.2 (1984) (Powell J., concurring).

for the firm and/or the firm's procedure for proposing such changes, 4) the extent to which a managing board/partner may veto any proposed policy changes, 5) the ability of the partner to prevent his or her expulsion and the procedure for such expulsion under firm bylaws, 6) the extent to which the partner may control the manner and means by which they work on a day-to-day basis, 7) the extent to which the partner must answer to another partner in a supervisory capacity, and 8) the extent to which the partner supervises other partners and employees.

Factor one is designed to examine the weight of the voting rights of the individual partner. Although a partner may possess the right to vote in certain matters of firm policy, that vote does not necessarily reflect a real say in firm policy when viewed in light of the voting power of the remaining partners. This concern goes to the heart of the Acts, which were designed to protect the minority from being suppressed by the will of the majority. For example, a twenty-five partner firm where all partners possess the same voting power is much different than the same twenty five-partner firm where five of those partners possess 50% of the voting rights, the remaining 50% being divided among twenty partners. In those situations, it is clear that the partner in the first firm has equal voting power with respect to his other partners, whereas in the second firm, the five majority owners possess different voting rights than the remaining twenty. In that scenario, the partner, although possessing voting rights, does not possess an equal right, and could therefore be subjected to the imposition of the will of another more powerful partner.

Factor two is intertwined with the first factor and the analysis of them will likely be done simultaneously.[305] Aside from quantitative equality, this factor is concerned with qualitative equality. Partners who are actually employers will have the ability to vote on all matters of firm policy. Partners who are better described as an employee will have limited voting ability, meaning that they will not have a say as it relates to particular areas of firm policy and decision making, including their possible expulsion.[306] For instance, a partner may possess equal voting rights, but may not be able to vote on potential mergers or acquisitions. The result of that situation is that the partner is in less of a position, if in any at all, to protect his interests with regard to the issues that he is not allowed to vote on. In that case, the partner more closely resembles an

305. The first two factors are to be considered separately, but will inevitably be considered together. However, that fact should not diminish the importance of either factor, nor lead to them becoming the same factor, because both represent important and distinct elements of the employment relationship.

306. *See* discussion of this element, *infra* p. 58.

employee with an increased role in decision-making, rather than an employer.

Factor three is also concerned with the ability of the individual partner to play a role in the policy and decision making of the firm, as well as how his or her role is perceived by the partnership. Aside from voting rights, a partner must be able to participate in the development of firm policy to truly be considered an employer. If a partner cannot, at minimum, propose a change to an existing firm policy, it is questionable whether that partner actually possesses any power or control within the firm.[307] If the partner does not possess the power to propose changes, then he is subject to the controls of others and is not in a position to materially alter his status. Similarly, an inability to voice one's opinion in the face of a possible policy shift in the firm demonstrates that the partner is under the control of the partnership and has little say in policy-making. For example, a firm/corporation whose policy making is completely controlled by a managing board or board of directors, subject to a firm-wide vote, subjects its policymaking process to the control of the board. The firm-wide vote is not one of substance, but rather a formality, which holds no real ability to change the decided-upon policy. A partner who is not on the managing board in such a scenario is more akin to an employee than an employer.

Factor four also relates to the firm policy and decision making process, but more specifically to the ability of some partners to maintain a high level of control over that process. A partner may have equal voting rights, and even an ability to speak about all matters affecting firm policy, but if that say is qualified by the ability of others to veto any opinions expressed by fellow partners, arguably the partner does not possess an equal say in firm policy and decision making. For example, a managing board that retains the ability to veto the results of any vote of the full partnership subjects the full partnership to their control and limits the actual role of the individual partners who are not on the managing board. In such a situation, the managing board would best be described as the employer, while the remaining partners would best be described as their employees.

Factor five relates to the most basic of all control concepts, the ability to expel fellow partners from a partnership or to be expelled. The

307. As one source notes, "it is the power of a person, or rather the lack thereof, that causes her to be subject to discrimination and at the mercy of those who discriminate." Sherman, *supra* note 4, at 662. Thus, if a person has little role to play or no power in the policy and decision making process of the firm, that person may not have any power to control whether or not he or she is discriminated against.

procedure for expulsion is central to one's ability to protect oneself from discrimination. If one does not have at least some role to play in the process, then he or she will be in no position to ensure that he or she will not be expelled for illegitimate purposes. For example, if the expulsion of partners is left in the hands of a managing board, consisting of only a few members, then the likelihood that the expulsion process may be abused is considerable. The ability or inability to control one's job security indicates that the person is an employee at-will, rather than an employer.

Factor six relates to the degree of management control present in the firm's daily operations. Partners, if they are indeed employers, will have the ability to determine on their own how their work will be done, which includes what clients they will take on and how to best handle their cases. There may be limits placed on the work of partners at a firm, particularly in larger firms. This may be unavoidable at some level. The focus then is not on specific types of controls, but whether, if those controls are exercised unilaterally, or subjectively over particular groups of partners. If the controls are exercised unilaterally, then each partner is treated the same, which is more indicative of employer status. However, if limits are imposed over particular groups of partners, then that group is likely to be the employees of the non-controlled group.

Factor seven also relates to management control, but more directly to the exact amount of control exercised over the partner who brings suit. There will always be a certain level of hierarchy within a large firm, but even at a smaller firm this may be true to some extent. The fact that some level of supervision is exercised has become more the norm than in the past. Taking this into account, the investigation here is the degree of supervision over the individual partner, including the responsibility of that partner to report to other partners who maintain higher positions in the structure of the firm. Also relevant to this investigation will be the hierarchical structure itself and the partner's placement in that structure. Certainly, those partners at the top of the structure may exercise significant control over those at the bottom of the structure. This disparity renders those at the bottom more like sham partners, based on the fact that their daily activities are controlled by other partners, like any other employee.

There are also differences in the types of issues on which a partner may be supervised, which should also be taken into account. For example, in a large firm, many partners may have a billable hours requirement, enforced by a small committee of partners, to whom the individual partner is responsible to report. In that same firm, the individual partner

may be responsible to report to five or six other partners as it relates to particular cases he or she is handling. In such a situation, the enforcement of billable hours is not so intrusive as to lead to a finding of employee status. On the other hand, reporting about specific cases and how they are handled is much more indicative of employee status because it is far more intrusive into the daily activities of the individual.

Factor eight is similar to Factors six & seven in that it deals directly with control over the individual. However, this factor is concerned with the amount of control that the individual partner who brings suit has over other partners and employees. The employer-employee relationship is, in many ways, defined by control. This factor looks specifically at the control that the individual exercises over others, which is a strong indicator of the extent to which that person is actually an employer. For example, a partner on the managing board supervises all of the daily activities of the partnership, including the day-to-day tasks taken on by individual partners. That partner would qualify as an employer under this factor. However, a partner who supervises the activities of only his own support staff would be more like an associate and, thus, an employee.

At this level of analysis, no one factor is designed to be determinative. Instead, the proper method would be to balance the eight factors together. Given the interdependent nature of many of the factors, it would be difficult to give greater weight to any one of them. This also forces the courts to look beyond the labels and corporate form, which will lead to greater protection under the Acts.

This approach also helps to eliminate many of the problems that exist in the current tests adopted by the circuit courts. Primarily, this approach separates economic and control factors, which has been the major problem for most of the courts. Assigning the proper weight to these different elements of the partnership relationship has caused several courts to overlook critical components of the employment relationship. A failure to inquire into the substance of the employment relationship will lead most courts to exclude individuals from protection who were intended to receive the very protection they are denied. Secondly, this approach clearly defines its parameters. In the first tier, there are eight indicia of partnership that tend toward a finding of partnership status, plus the existence of any written agreement. In the second tier, there are eight factors, which are clearly defined and present an exhaustive list of the factors that should be taken into consideration. Significantly, there are no catch-all categories that could lead a court to a prolonged and futile analysis of irrelevant facets of the employment relationship. Last, this approach does not make assumptions about the status of a partner. Sev-

eral of the circuit tests, as indicated, assume that a partner must be an employer. However, the two-tiered approach does not make such faulty assumptions.

The two-tiered approach is drastically different than most of the tests applied by the circuit courts. It requires a serious and comprehensive investigation on the part of the courts into the relationship between the partnership and its individual members. There is a concern for both the economic and control elements of the traditional partnership, but the test also takes into account the evolution of partnerships over the last twenty years. Such an approach allows some individuals who have become partners, but retain many employee characteristics, to enjoy employee status for purposes of the Acts and the protections that those statutes were designed to create.

XIV. CONCLUSION

The problem of partner's status as an employee is not going to be resolved until a definitive solution is reached. With the increase in the number and the size of law firms, the problem of classifying partners will continue to grow. *EEOC v. Sidley Austin Brown & Wood* has brought this mounting controversy to the forefront. The courts, as yet, have not adequately dealt with the issue and have instead applied confusing and murky standards that have no hope of clearly delineating between employers and employees in a partnership. Therefore, it is incumbent upon the Supreme Court to step in and remedy the problem with a more definitive response than that which has been provided by *Clackamas*. The two-tiered approach suggested by this note would resolve the lingering problems with the circuit courts' tests and provide some clarity to partnerships and individuals, who will continue to face questions over their employment status until this approach is adopted.

Catherine Lovly and Matthew J. Mehnert