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Civil Rights - Employment Practices: Common Law Control Is the Best Test of Employee within Employment Discrimination - Clackamas Gastroenterology Associates, P.C. v. Wells

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CIVIL RIGHTS—EMPLOYMENT PRACTICES: COMMON LAW CONTROL IS THE BEST TEST OF "EMPLOYEE" WITHIN EMPLOYMENT DISCRIMINATION

Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003)

I. FACTS

Clackamas Gastroenterology Associates, P.C. (CGA) is a medical clinic in Oregon that was created as a professional corporation in 1979.[1] The doctors belonging to CGA were the sole shareholders and comprised the board of directors.[2] However, the physicians regarded each other more as partners than shareholders.[3] The physicians exercised sole control and management of CGA.[4] Annual profits were shared between the physician-shareholders in the form of a bonus.[5] Under Oregon Revised Statute Section 58.185, each physician-shareholder enjoyed limited liability from the obligations of the firm because of CGA's corporate form, but each physician-shareholder was individually liable for any malpractice suit brought against him or her.[6] At the time of this lawsuit, CGA had four physicians who were physician-shareholders.[7]

Deborah Anne Wells (Wells) was hired by CGA as a bookkeeper in 1986.[8] Wells was diagnosed with mixed connective tissue disorder.[9] As a

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1. Brief for Petitioner at 6, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (No. 01-1435).

2. *Id.*

3. *Id.* The physician-shareholders shared in the management, operations, and profits of the clinic. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* Oregon Revised Statute § 58.185(3) states,

> In the rendering of specified professional services on behalf of a domestic professional corporation to a person receiving the service or services, a shareholder of the corporation is personally liable as if the shareholder were rendering the service or services as an individual, only for negligent or wrongful acts or omissions or misconduct committed by the shareholder, or by a person under the direct supervision and control of the shareholder.

OR. REV. STAT. § 58.185(3) (2003).

7. Brief for Petitioner at 6, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (No. 01-1435).

8. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 442 (2003).

result of her disorder, Wells made several requests that would have allowed her to continue her bookkeeping position.[10] CGA offered Wells a transfer to a patient coordinator/receptionist position.[11] Wells was given medical leave from CGA until May 12, 1997.[12] On May 12, Wells was terminated for not returning to work at the end of her first medical leave.[13]

Wells sued CGA for a Title I violation of the Americans with Disabilities Act (ADA).[14] The ADA states that it is unlawful for employers to discriminate against qualified individuals based on a disability.[15] CGA moved for summary judgment, arguing that it was not within the scope of the ADA.[16] Only a business with fifteen or more employees is a "covered entity" subject to the ADA.[17] If the four physician-shareholders were not considered employees, CGA would not be a covered entity under the ADA because it had fifteen employees for only ten weeks in 1996 and for only eight weeks in 1997, making CGA two weeks short of being a covered entity.[18]

The United States District Court for the District of Oregon distinguished the two tests it could apply.[19] The first test the court analyzed was the "economic realities test," which examines the factual characteristics of the business to determine whether the shareholders are more like partners rather than director-shareholders.[20] The other test analyzed was the "per se" approach, which holds a business to the corporate form it has chosen,

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9. Brief for Respondent at 1, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (No. 01-1435).

10. *Id.*

11. Petitioner's Brief at 6, *Clackamas* (No. 01-1435).

12. Respondent's Brief at 1, *Clackamas* (No. 01-1435).

13. *Id.* at 2. One disputed issue was whether Wells had notified CGA that her personal doctor had given her a second medical leave. *Id.* at 1. Wells claimed she notified CGA of the second medical leave. *Id.* CGA claimed she voluntarily resigned by not returning to work on May 12 and that she never contacted CGA about the second medical leave. Petitioner's Brief at 6, *Clackamas* (No. 01-1435).

14. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 442 (2003); *see generally* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117 (2000) (prohibiting employment discrimination of disabled people and requiring accommodations for disabled people).

15. Wells v. Clackamas Gastroenterology Assocs., P.C., No. CV 99-406-AS, 2000 WL 776416, at *2 (D. Or. May 5, 2000) (citing 42 U.S.C. §§ 12111(2) & 12112(a)).

16. *Clackamas*, 538 U.S. at 442.

17. *Id.* "Employer" under the ADA is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person[.]" 42 U.S.C. § 12111(5)(A).

18. *Wells*, 2000 WL 776416, at *2.

19. *Id.* at **3-4.

20. *Clackamas*, 538 U.S. at 442 (2003).

making director-shareholders employees.[21] The district court found the economic realities test to be more persuasive because it emphasized more function rather than form.[22] After examining the characteristics of CGA, the district court held CGA's physician-shareholders were "more analogous to partners in a partnership than to shareholders in a general corporation."[23] The district court granted CGA's motion for summary judgment.[24]

On appeal, the Ninth Circuit Court of Appeals reversed the district court's decision.[25] The court compared the economic realities test and the per se approach and found that use of a corporate form of business ends the debate over whether director-shareholders are partners.[26] The court found that the decision to incorporate was a voluntary one, which yielded limited liability and retirement tax benefits.[27] Furthermore, the court held that a company should not receive the "best of both possible worlds" by allowing shareholders to be considered partners, consequently excluding the business from the scope of the ADA.[28] The court concluded that CGA's physician-shareholders were employees, thus meeting the ADA's fifteen employee threshold.[29]

Judge Graber issued a strong dissent in the case arguing that the economic realities test should have been applied.[30] Judge Graber concluded that the per se approach was too concerned with labels rather than realities.[31] CGA was required to follow many aspects of a partnership.[32] In closing, Judge Graber reemphasized that the original purpose of the fifteen

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21. *Wells*, 2000 WL 776416, at **2-3. This approach is referred to as the "per se" approach by Kristin Nicole Johnson in her Michigan Law Review note. Kristin Nicole Johnson, Note, *Resolving the Title VII Partner-Employee Debate*, 101 MICH. L. REV. 1067, 1091 (2003).

22. *Wells*, 2000 WL 776416, at *4.

23. *Id.* The district court found that with the fast changing landscape of available business forms, economic realities must be applied because the labels of partnership or professional corporation does not answer the question of who is an employee. *Id.* Also, under professional corporation statutes, directors of professional corporations are similar to partners in that they are owners who share in management and control. *Id.*

24. *Id.* at *5.

25. Wells v. Clackamas Gastroenterology Assocs., P.C., 271 F.3d 903, 903 (9th Cir. 2001)

26. *Id.* at 905.

27. *Id.*

28. *Id.*

29. *Id.* at 906.

30. *Id.* (Graber, J., dissenting).

31. *Id.*

32. *Id.* at 908. Professional corporations are owned by the directors who share in the management and profits of the business. *Id.* The directors also enjoy limited liability from the obligations of the firm, although each director is personally liable for any malpractice claim made against him or her. *Id.*

employee threshold was to relieve very small businesses from the potentially crushing expenses of defending ADA claims.[33]

CGA appealed to the United States Supreme Court.[34] The Court framed the issue as "whether four physicians actively engaged in medical practice as shareholders and directors of a professional corporation should be counted as 'employees.'"[35] It *held* that control within the common law of agency was the best gauge of whether a director-shareholder of a professional corporation was an employee for employment discrimination laws.[36]

II. LEGAL BACKGROUND

The ADA's purpose of requiring an employer to have fifteen or more employees is to spare small businesses from the potentially catastrophic economic effects of having to learn the details of employment discrimination laws and developing policies to deal with them.[37] The ADA defines an employee as "an individual employed by an employer,"[38] which provides little help when applying the ADA.[39] Three different tests developed as methods of determining who is an employee within the context of federal laws: (1) the "Economic Realities Test" (ERT), (2) the "Per Se" Approach, and (3) the "Common Law of Agency Test" (agency test).[40] A very sharp circuit split developed between the ERT and the Per Se Approach within employment discrimination laws.[41] The agency test had mainly been used by the Supreme Court to determine whether a person was an employee or an independent contractor under federal law.[42]

A. THE ECONOMIC REALITIES TEST

The ERT did not make a decision based on an individual's title within an association; instead it looked beyond the label to the facts of the case to

33. *Id.* (citing Papa v. Katy Indus. Inc., 166 F.3d 937, 940 (7th Cir. 1999)).

34. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444 (2003).

35. *Id.* at 442.

36. *Id.* at 448.

37. *Papa*, F.3d at 940 (citing Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)).

38. 42 U.S.C. § 12111(4) (2000).

39. *Clackamas*, 538 U.S. at 444.

40. *Id.* at 442-45.

41. *Id.* at 444 (citing EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 798 (2d Cir. 1986); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996)).

42. *Id.* at 444-45 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)).

determine whether an individual is an employee.[43] With professional corporations, the issue has been whether director-shareholders are employees or more analogous to partners.[44] In the context of general partnerships, the issue has been whether a partner was an employee or a "bona fide partner," who is considered an employer.[45] A "bona fide partner" is an individual who has unlimited personal liability in partnership obligations, shares the profits and losses of the partnership, shares joint ownership in the partnership, and/or is a fiduciary to the partnership.[46]

One of the first cases dealing with the issue of who an employee is within the context of a corporate entity was *Goldberg v. Whitaker House Cooperative, Inc.*[47] *Goldberg* involved a member cooperative corporation rather than a professional corporation.[48] Whitaker House Cooperative, Inc. (Whitaker) sold knitted, crocheted, and embroidered goods made by its members in their own homes.[49] New members joined by submitting a work sample to Whitaker.[50] If the sample was acceptable, the person was made a member by paying dues of $3 and accepting Whitaker's bylaws.[51]

Goldberg sued Whitaker for violations of the minimum wage, record-keeping, and industrial homework regulations of the Fair Labor Standards Act (FLSA).[52] The Court held that members of a cooperative were employees protected by the FLSA.[53] In examining the relationship between the members and Whitaker, the Court noted that the members were part of one organization, they were paid for their work from the organization, the management of Whitaker set all prices, and the management could fire the

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43. Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400 (11th Cir. 1991).

44. *See Dowd & Dowd, Ltd.*, 736 F.2d at 1177 (stating that "the narrow issue presented in this appeal is whether shareholders in a professional corporation engaged in the practice of law are also employees of that corporation for purposes of Section 701(b) of Title VII of the Civil Rights Act of 1964 . . .").

45. *See* Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 864 (9th Cir. 1996) (reviewing lower court's granting of the defendant employer's motion for dismissal for failure to state a claim for which relief can be granted).

46. *See* Wheeler v. Hurdman, 825 F.2d 257, 267, 276 (10th Cir. 1987) (referring to the various factors of the partnership position as "the total bundle of partnership characteristics").

47. 366 U.S. 28 (1961).

48. *Goldberg*, 366 U.S. at 29. A professional corporation is a corporate business entity whose business is within a professional trade such as law, medicine, or engineering. 18 AM. JUR. 2D *Corporations* § 37 (1985). A member cooperative corporation is a separate corporate cooperative association that is owned and operated by members who buy into the corporation to make a profit. 18 AM. JUR. 2D *Cooperative Association* § 1 (1985).

49. *Goldberg*, 366 U.S. at 29.

50. *Id.*

51. *Id.*

52. *Id.* at 29-30; *see generally* 29 U.S.C. §§ 201-19 (2000) (preserving minimum standards for employment issues such as workable hours and a minimum wage that employers must follow with their employees).

53. *Goldberg*, 366 U.S. at 32.

members.[54] The economic reality of the situation was that the member homeworkers were identical to other employees.[55] However, the Court also stated that "[t]here [was] nothing inherently inconsistent between the co-existence of a proprietary and an employment relationship," holding open the possibility a person could be both a person of authority within a business association and an employee within the meaning of employment law.[56]

In *EEOC v. First Catholic Slovak Ladies Association*,[57] the Sixth Circuit Court of Appeals addressed an Age Discrimination in Employment Act (ADEA) lawsuit against a nonprofit charitable society.[58] The suit involved the First Catholic Slovak Ladies Association's (FCSLA) policy that women serving as officers and on the board of directors must have been sixty-six or younger when they were nominated for the position.[59] The district court held that since the women involved in the suit were serving as directors of the FCSLA, they were employers and not employees protected under the ADEA.[60] The Sixth Circuit Court of Appeals reversed, holding that the district court had interpreted the ADEA definition of employee, which was exactly the same as the ADA's definition of employee, too narrowly.[61] The court noted that the term "employee" should have a broad meaning; the court stated labels such as director should have no bearing on whether an individual is an employee.[62] The women performed normal salaried employee duties such as maintaining records, preparing financial statements, and managing the office.[63] The women were employees entitled to the protection of the ADEA.[64]

The United States Supreme Court again addressed who was a protected employee under employment discrimination statutes in the important case of *Hishon v. King & Spalding*.[65] Hishon was an associate attorney who had been passed over for promotion to partner by the law firm of King & Spalding (K & S).[66] Claiming the rejection was based on her sex, Hishon

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54. *Id.* at 32-33.
55. *Id.* at 33.
56. *Id.* at 32.
57. 694 F.2d 1068 (6th Cir. 1982).
58. *First Catholic Slovak Ladies Ass'n.*, 694 F.2d at 1069.
59. *Id.*
60. *Id.*
61. *Id.* at 1070; *see also* 29 U.S.C. § 630(b) (2000) (defining employee).
62. *First Catholic Slovak Ladies Ass'n.*, 694 F.2d at 1070 (citing Cincinnati Ass'n for the Blind v. NLRB, 672 F.2d 567, 570 (6th Cir. 1982); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 142 (6th Cir. 1977)).
63. *Id.*
64. *Id.*
65. 467 U.S. 69 (1984).
66. *Hishon*, 467 U.S. at 72.

filed a complaint with the EEOC.[67] The district court dismissed Hishon's Title VII action, stating that it did not apply to selection of partners in a partnership.[68] The Eleventh Circuit Court of Appeals affirmed the decision.[69] The issue before the Supreme Court was whether individuals vying for the position of partner in a partnership were employees and covered by Title VII.[70] Looking at Title VII and its legislative history, the Court found nothing that excluded partner candidate decisions.[71] Had Congress wanted to exclude such employment decisions from protection under Title VII, it would have affirmatively stated partnership decisions are exempt from Title VII coverage.[72] Thus, there could be no per se exclusion of partners under Title VII.[73]

Justice Powell delivered a clarifying concurrence.[74] He emphasized that the majority's holding did not extend Title VII protection to partners who truly make up the management of the partnership, stating that the relationship between partners was significantly different than the relationship between employer and employee.[75] Justice Powell made certain that employers could not escape employment discrimination laws by labeling employees as partners.[76] Thus, the title alone is not important; the factual context of his or her employment relationship is the controlling test.[77] In this form of the ERT, only bona fide partners are excluded from employment discrimination protection.[78]

Soon after *Hishon*, in *EEOC v. Dowd & Dowd, Ltd.*,[79] the Seventh Circuit Court of Appeals faced essentially the same issue presented in

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67. *Id.*

68. *Id.* at 72-73.

69. *Id.* at 73.

70. *Id.* at 73-74.

71. *Id.* at 77; *see also* 42 U.S.C. §§ 2000e – 2000e-17 (2000) (prohibiting employment practices based on an individual's race, color, religion, sex, or national origin).

72. Hishon v. King & Spalding, 467 U.S. 69, 77-78 (1984).

73. *Id.*

74. *Id.* at 79 (Powell, J., concurring).

75. *Id.*

76. *Id.* at 80 n.2.

77. *Id.*

78. *See* EEOC v. Sidley, Austin, Brown & Wood, 315 F.3d 696, 707 (7th Cir. 2002) (finding that the EEOC may enforce its subpoena duces tecum to investigate whether thirty-two terminated partners are bona fide partners or employees under the ADEA); *see also* Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867-68 (9th Cir. 1996) (reversing the district court's grant of the defendant's FED. R. CIV. P. 12(b)(6) motion because the plaintiff partner's rights in a 2,400 to 2,500 partner medical partnership was limited enough to be an employee under the control of the partnership's board of directors); Wheeler v. Hurdman, 825 F.2d 257, 277 (10th Cir. 1987) (holding that bona fide general partners are not employees under the employment anti-discrimination acts).

79. 736 F.2d 1177 (7th Cir. 1984).

Clackamas Gastroenterology Associates, P.C. v. Wells [80] in the form of a Civil Rights Act of 1964 Title VII (Title VII) lawsuit.[81] Dowd was a professional corporation that had three shareholders and an insufficient number of traditional employees to bring it under the umbrella of Title VII's fifteen employee minimum.[82] The district court found that Dowd could not be an employer because it did not have the minimum number of employees and granted Dowd's motion for summary judgment.[83] When *Dowd* came before the Seventh Circuit, the court held that the shareholders in a professional corporation were more similar to a partner in a partnership than a shareholder of a corporation.[84] The economic reality of the case was that Dowd's shareholders managed, controlled, and owned the professional corporation, much like partners manage, control, and own a partnership.[85]

The reasoning in *Dowd* was soon adopted by other courts.[86] In *Fountain v. Metcalf, Zima & Company, P.A.*,[87] a member-shareholder of a professional corporation brought a claim of age discrimination under the ADEA against his former firm.[88] The district court granted summary judgment for Metcalf, Zima, & Company (Metcalf), stating Fountain was not an employee.[89] The Eleventh Circuit Court of Appeals followed the Seventh Circuit, stating labels like professional corporation or partnership are not controlling.[90] The facts of the case must be the determining factors.[91] The court acknowledged the ERT was more probative than the per se approach.[92] The ERT factors important to this court included Fountain's role in management, level of control, and ownership of Metcalf.[93] Fountain shared in Metcalf's profit and losses, was compensated based on profits, was personally liable, and at the time in dispute had a thirty-one per cent

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80. 538 U.S. 440 (2003).

81. *Dowd*, 736 F.2d at 1177; *Clackamas*, 538 U.S. at 442.

82. *Dowd*, 736 F.2d at 1178; *see also* 42 U.S.C. § 2000e(b) (2000) (defining employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year").

83. *Dowd*, 736 F.2d at 1177-78.

84. *Id.* at 1178.

85. *Id.*

86. Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400 (11th Cir. 1991); *see also* Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80 (8th Cir. 1996) (holding that the facts of the case, and not the kind of business association, should control the outcome of the case).

87. 925 F.2d 1398 (11th Cir. 1991).

88. *Fountain*, 925 F.2d at 1399.

89. *Id.*

90. *Id.* at 1400.

91. *Id.* (citing EEOC v. Pettegrove Truck Serv., Inc., 716 F. Supp. 1430, 1433 (S.D. Fla. 1989)).

92. *Id.* at 1401.

93. *Id.* at 1400-01.

interest in Metcalf.[94] Weighing these factors, the economic reality was that Fountain was a partner, not an employee.[95] Fountain was not protected by the ADEA and summary judgment was affirmed.[96]

In *Devine v. Stone, Leyton & Gershman, P.C.*,[97] the Eighth Circuit Court of Appeals also adopted the ERT.[98] Devine brought a Title VII action against Stone, Leyton & Gershman (SL & G), claiming she had been fired for complaining of sexual harassment.[99] The district court granted SL & G's motion for summary judgment, concluding it was not an employer because its director-shareholders were not employees.[100] Since its director-shareholders were not employees, SL & G did not have the prerequisite fifteen employees to be an employer.[101]

The Eighth Circuit considered both the ERT and per se approach to determine whether the director-shareholders were employees.[102] The per se approach was deemed too rigid and exalted form over substance[103] The Eighth Circuit concluded the better test was to look at the facts surrounding the case and examine the heart of the employment relationship.[104] Like the Eleventh Circuit, the relevant factors the court considered were the director-shareholders' management, ownership, and control of SL & G.[105] It was undisputed that the director-shareholders of SL & G had sole control of management, ownership, and decisions regarding policy.[106] Therefore, SL & G's director-shareholders were not employees, and SL & G was not an employer under Title VII.[107]

Judge Heaney dissented.[108] He argued that the per se approach of holding a firm to its corporate form was the correct rule.[109] The most important consideration for Judge Heaney was that all people within pro-

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94. *Id.* at 1401.

95. *Id.*

96. *Id.*

97. 100 F.3d 78 (8th Cir. 1996).

98. *Devine*, 100 F.3d at 81 (citing Fountain v. Metcalf, Zima & Company, P.A., 925 F.2d 1398, 1401 (11th Cir. 1991); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977)).

99. *Id.* at 79.

100. *Id.*

101. *Id.* at 80-81 (citing 42 U.S.C. § 2000e(b)).

102. *Id.* at 81.

103. *Id.*

104. *Id.*

105. *Id.* at 80-81 (citing Fountain v. Metcalf, Zima, & Co., 925 F.2d 1398, 1401 (11th Cir. 1991); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977)).

106. *Id.* at 82.

107. *Id.*

108. *Id.* (Heaney, J., dissenting).

109. *Id.* (citing Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 798 (2d Cir. 1986)).

fessional corporations, including shareholders (especially junior shareholders), should be protected from employment discrimination.[110]

The ERT in professional corporations returned to the Seventh Circuit in *Schmidt v. Ottawa Medical Center, P.C.*[111] Schmidt, who was a director-shareholder for Ottawa Medical Group (OMG), brought a suit under the ADEA.[112] The district court, relying on the Seventh Circuit's holding in *Dowd* and *EEOC v. Sidley, Austin, Brown & Wood*,[113] granted summary judgment for OMG because it found that Schmidt was a partner and not an employee protected by the ADEA.[114] The Seventh Circuit treated the issue in *Schmidt* different from the issue in *Dowd* because *Dowd* featured a true employee suing a professional corporation and *Schmidt* featured a director-shareholder suing a professional corporation.[115] The language in *Sidley*, holding that the ERT was the proper test in the context of a partnership, provided the court the link it needed between *Dowd* and *Schmidt*.[116]

However, the ERT had been developed without stating what specific factors should be applied.[117] The *Schmidt* court noted how "matter-of-factly" the Seventh Circuit had been in *Dowd* while describing the ERT.[118] The factors to give the ERT structure could come from two places: (1) statutory purpose or (2) the common law of agency.[119] The court noted that the United States Supreme Court would soon decide the issue in *Clackamas*.[120] Therefore, the Seventh Circuit felt no reason to establish a list of factors.[121] However, in its opinion, the element of control would be

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110. *Id.*

111. 322 F.3d 461 (7th Cir. 2003).

112. *Schmidt*, 322 F.3d at 462.

113. 315 F.3d 696 (7th Cir. 2002).

114. *Schmidt*, 322 F.3d at 462, *see also Sidley*, 315 F.3d at 699, 703 (stating that the thirty-two terminated partners seemed to be bona fide partners in that they shared the firms profits, contributed capital to the firm, maintained some managerial duties, and maintained unlimited liability, but they also had little control, which was organized primarily with the executive management committee); *see also* EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th. Cir. 1984) (holding that shareholders in a law firm were not employees under Title VII).

115. *Schmidt*, 322 F.3d at 464; *see also Dowd*, 736 F.2d at 1177 (alleging that Dowd was in violation of Title VII by failing to amend its benefit plan to include pregnant women).

116. *Schmidt*, 322 F.3d at 464, *see also Sidley*, 315 F.3d at 699 (alleging that the demotion of thirty-two partners violated the ADEA); *see also Dowd*, 736 F.2d at 1178 (holding that shareholders in a law firm were not employees under Title VII).

117. *Schmidt*, 322 F.3d at 464.

118. *Id.*

119. *Id.* at 464-65 (citing *Sidley*, 315 F.3d at 702 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)), Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-25 (1992)).

120. *Id.*; Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 442 (2003).

121. *Schmidt*, 322 F.3d at 466.

the most important factor under both statutory purpose and agency common law.[122]

When examining the level of control Schmidt had at OMC, there was little doubt that he was more analogous to a partner than an employee.[123] As a director-shareholder, Schmidt sat on the board of directors, voted on company policy, made decisions regarding hiring and firing of new physicians, made decisions pertaining to compensation, and actively participated in the management of OMC.[124] To summarize the ERT, the factors of (1) control, (2) management, and (3) ownership developed as the factors that determine whether a director-shareholder is an employee; the greater the strength of the factors, the more likely the director shareholder is not an employee.[125]

B. THE PER SE APPROACH

The per se approach holds that since a company freely chooses its form of business organization, it should not be allowed to take advantage of other business forms when it serves the business's purpose.[126] The first case to adopt the per se approach was *Hyland v. New Haven Radiology Associates, P.C.*[127] Hyland was an officer and director of New Haven Radiology Associates (NHRA), a professional corporation.[128] He brought suit under the ADEA, claiming he was forced to resign because of his age.[129] Applying the ERT, the district court granted NHRA's motion for summary judgment because NHRA was more analogous to a partnership, making Hyland more like a partner and not covered by the ADEA.[130] Although the Second Circuit Court of Appeals recognized that NHRA shared many characteristics with partnerships, it found no reason to allow NHRA the benefits of a partnership by allowing it to become a pseudo-partnership when it served NHRA's purpose.[131] The court held that all individuals of a

122. *Id.*
123. *Id.* at 467.
124. *Id.*
125. *See* Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996) (stating that the factors of control, management, and ownership do not need to be equal, and other relevant factors can be evaluated).
126. Hyland v. New Haven Radiology Assocs., P.C., 793, 798 (2d Cir. 1986).
127. 794 F.2d 793 (2d Cir. 1986).
128. *Hyland*, 794 F.2d at 794.
129. *Id.*
130. *Id.* at 794-95.
131. *Id.* at 798.

professional corporation, no matter what his or her position within the company, were employees protected by the ADEA.[132]

Judge Cardamone dissented.[133] He reasoned that there was no need to accept a per se approach because labels and titles do not dictate outcomes.[134] Also, the ADEA does not require all people working for a professional corporation be an employee.[135] The Supreme Court and the EEOC had both endorsed the fact based ERT.[136] Judge Cardamone would have adopted a two factor ERT as follows: (1) whether the director-shareholder was compensated through profits and losses of the professional corporation, and (2) how much control the director-shareholder exercised in the professional corporation.[137]

The Second Circuit began to show how unworkable the per se approach could be in *EEOC v. Johnson & Higgins, Inc.*[138] Johnson & Higgins, Inc. (J & H) was a private corporation managed by a board of directors.[139] Members of the board of directors were also employees of J & H and had to maintain regular employee duties after joining the board of directors.[140] The directors had almost exclusive ownership of J & H's stock and were compensated based on the firm's profits.[141] J & H had a retirement policy requiring members of the board to retire between the ages of sixty and sixty-two.[142]

A former director, who was forced to resign for reasons other than the retirement policy, contacted the EEOC.[143] The EEOC began an investigation of J & H for possibly violating the ADEA.[144] The EEOC brought a claim against J & H based on its own investigation.[145] Relying on *Hyland,* the district court partially granted the EEOC's motion for summary

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132. *Id.*

133. *Id.* (Cardamone, J., dissenting).

134. *Id.* at 798-99

135. *Id.* at 799.

136. *Id.* at 801 (citing Hishon v. King & Spalding, 467 U.S. 69, 77 (1984); EEOC Decision No. 85-4, Emp. Prac. Guide (CCH) ¶ 6845, at 7040 (Mar. 18, 1985)).

137. *Id.* at 802.

138. 91 F.3d 1529 (2d Cir. 1996).

139. *Johnson & Higgins*, 91 F.3d at 1531.

140. *Id.*

141. *Id.* at 1532.

142. *Id.*

143. *Id.* at 1533. The director Burt Sempier was asked to resign as part of a downsizing retirement program for "poorly performing" employees who were fifty-five or older. Sempier v. Johnson & Higgins, Inc., 45 F.3d 724, 726 (3d Cir. 1995). He was eventually terminated. *Id.*

144. *Johnson & Higgins*, 91 F.3d at 1533.

145. *Id.* at 1533-34.

judgment because J & H was a corporate entity so its directors could not be partners outside the ADEA.[146]

On appeal, J & H argued its board of directors was analogous to partners rather than employees.[147] The Second Circuit stated its holding in *Hyland* did not require all director-shareholders of a closely held corporate entity to be considered employees.[148] It instead purported that "the *Hyland* court looked to the director's role in the company to determine whether there existed an employment relationship in addition to the role of director."[149] Citing a district court opinion, the Second Circuit pointed to other courts that have applied a common law agency test to determine the issue.[150] The test had three factors: "(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."[151] The court found that all three prongs were satisfied and held that J & H's directors were employees under the ADEA.[152]

Judge Jacobs dissented in the opinion.[153] He argued the correct approach was the ERT.[154] Control of the corporation was with the board of directors, and the economic reality of the case was that the members of the board of directors were employers and not within the ADEA.[155] Judge Jacobs also stated that the three factor test applied by the majority was not helpful in determining whether a director is an employee within a firm.[156]

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146. *Id.* at 1533 (citing Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 798 (2d Cir. 1986)).

147. *Id.* at 1537.

148. *Id.* at 1539.

149. *Id.* (citing *Hyland*, 794 F.2d at 798).

150. *Id.*

151. *Id.* (citing Lattanzio v. Sec. Nat'l Bank, 825 F. Supp. 86, 90 (E.D. Pa. 1993)); *see also* Chavero v. Local 241, Div. of the Amalgamated Transit Union, 787 F.2d 1154, 1157 (7th Cir. 1986) (holding that a union's executive board members were not employees under Title VII); Zimmerman v. N. Am. Signal Co., 704 F.2d 347, 351-52 (7th Cir. 1983) (holding that two directors were not employees under ADEA); EEOC v. Pettegrove Truck Serv., Inc., 716 F. Supp. 1430, 1433-34 (S.D. Fla. 1989) (finding two family members were employees protected by Title VII); Schoenbaum v. Orange County Ctr. for the Performing Arts, Inc., 677 F. Supp. 1036, 1038 (C.D. Cal. 1987) (concluding that assuming the roles of director and trustee was sufficient to qualify as an employee under ADEA).

152. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539 (2d Cir. 1996). The court held that a retirement policy requiring employees to retire based only on their age, if under sixty-five, was a violation of the ADEA. *Id.* at 1540.

153. *Id.* at 1543 (Jacobs, J., dissenting).

154. *Id.*

155. *Id.* at 1545-46 (citing *Chavero*, 787 F.2d at 1157 (per curiam)).

156. *Id.* at 1544.

C. THE COMMON LAW OF AGENCY TEST

The third approach to define employee was developed through the common law of agency.[157] The agency test follows the non-exhaustive factors found in the Restatement (Second) of Agency Section 220(2).[158] The following factors determine if an individual is an employee or independent contractor:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.[159]

In *NLRB v. United Insurance Company of America*,[160] the National Labor Relations Board (NLRB) held that the debit agents of United

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157. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989) (finding a sculptor was an independent contractor and his work was not work for hire in the context of copyright laws); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (ruling that the common law of agency should be applied to determine if an insurance agent was an employee or an independent contractor under the Employee Retirement Income Security Act (ERISA)); NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258-59 (1968) (holding that insurance agents were employees and not independent contractors exempt from the National Labor Relations Act).

158. *See Cmty. for Creative Non-Violence*, 490 U.S. 751-52 (finding a sculptor was an independent contractor and his work was not work for hire in the context of copyright laws).

159. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1957).

160. 390 U.S. 254 (1968).

Insurance Company of America (UICA) were employees for purposes of the National Labor Relations Act (NLRA) and ordered UICA to bargain with the agents.[161] The Seventh Circuit Court of Appeals reversed, holding the agents were independent contractors and exempt from coverage under the NLRA.[162] The Supreme Court stated that the proper test to use in light of the NLRA's purpose was the agency test.[163] Applying the agency test, the Court noted that UICA's agents were part of the normal operations of UICA, were trained by UICA, did business under UICA's name with guidance from UICA's managers, were compensated by UICA, reported to UICA, and were terminated by UICA if their performance dropped.[164] The Court concluded for these reasons the agents were employees and the NLRB's order should be enforced.[165]

In *Community for Creative Non-Violence v. Reid*,[166] the Supreme Court expanded the use of the agency test to copyright law.[167] Reid was a sculptor who agreed to create a modern nativity scene for the non-profit group Community for Creative Non-Violence (CCNV).[168] The dispute arose when Reid and CCNV wanted to take the nativity sculpture on separate tours.[169] CCNV sued Reid for copyright ownership.[170] The district court concluded that the statue was "work made for hire," Reid was CCNV's employee, and CCNV was the exclusive trustee with all copyrights to the work.[171]

The Court of Appeals for the District of Columbia Circuit reversed, stating Reid was an independent contractor and the sculpture was not work made for hire.[172] Thus, the issue for the Supreme Court was whether Reid

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161. *United Ins. Co. of Am.*, 390 U.S. at 255; *see generally* 29 U.S.C. §§ 151–169 (2000) (providing a basic structure for labor relations between employers and unions).

162. *United Ins. Co. of Am.*, 390 U.S. at 255.

163. *Id.* at 256.

164. *Id.* at 259.

165. *Id.* at 260.

166. 490 U.S. 730 (1989).

167. *Cmty. for Creative Non-Violence*, 490 U.S. at 751.

168. *Id.* at 733.

169. *Id.* at 735.

170. *Id.*

171. *Id.* at 738. A work made for hire is,

> (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (2000). If work is work made for hire, it belongs to the person for whom the work was made. 17 U.S.C. § 201(b).

172. *Cmty. for Creative Non-Violence*, 490 U.S. at 736.

was an employee or an independent contractor in light of copyright law.[173] The Court decided to continue the tradition of applying the common law of agency when the definition of employee is unclear.[174] It adopted the agency test, stating,

> Among the other factors relevant to this inquiry are [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.[175]

The control factor of the common law is the dominating aspect of whether an individual is an employee or an independent contractor.[176] Reid was an independent contractor because he exercised absolute control over his own work.[177]

The Court followed *Community for Creative Non-Violence* and the agency test in *Nationwide Mutual Insurance Company v. Darden*.[178] Darden was an agent for Nationwide Mutual Insurance Company (Nationwide).[179] When Nationwide terminated its relationship with Darden, he began selling insurance policies issued by Nationwide's competitors.[180] Nationwide retaliated by stripping Darden of his retirement benefits.[181] Darden claimed Nationwide violated the Employee Retirement Income Security Act (ERISA).[182] The district court granted Nationwide's motion for summary judgment, finding Darden was an independent contractor.[183] The Fourth Circuit Court of Appeals reversed, adopting an

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173. *Id.* at 738.
174. *Id.* at 739-41.
175. *Id.* 751-52 (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).
176. *Id.* at 751.
177. *Id.* at 752-53.
178. 503 U.S. 318 (1992).
179. *Darden*, 503 U.S. at 319-20.
180. *Id.* at 320.
181. *Id.*
182. *Id.*
183. *Id.* at 321.

alternative to the agency test.[184] The Supreme Court reversed stating that the test to apply was the agency test adopted in *Community for Creative Non-Violence*.[185] It was for the court of appeals to decide the ultimate decision of whether Darden was an employee, and the case was remanded.[186]

III. ANALYSIS

Justice Stevens delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, and Thomas joined.[187] The majority concluded that how much control a director-shareholder of a professional corporation exercised over the professional corporation was the correct test to determine whether a director-shareholder of a professional corporation was an employee.[188] The factors of this test were the non-exhaustive list provided in the EEOC Compliance Manual.[189] Justice Ginsburg dissented, in which Justice Breyer joined.[190]

A. MAJORITY OPINION

Certiorari was granted to enable the Court to settle the circuit split that had emerged regarding who was an employee in the context of professional corporations.[191] The Court noted that the circuit split involved the ADA and other employment discrimination statutes.[192]

The Court acknowledged that the definition of "employee" in the ADA is completely circular, so a gap-filler was needed to construe a true meaning of employee.[193] As demonstrated in *Darden*, the Court stated it has preferred the common law of agency to be the gap filler when providing a definition for employee.[194]

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184. *See id.* at 321-22 (stating the test as, (1) the individual reasonably believed he would receive benefits, (2) the individual relied on this belief, and (3) the individual could not bargain out of the contracts forfeiture provisions).

185. *Id.* at 323 (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)); *see also* Simpson v. Ernst & Young, 100 F.3d 436, 442-44 (6th Cir. 1996) (adopting its own common law test, which was very similar to the ERT, in an ADEA and ERISA action to determine whether a former partner of Ernst & Young was an employee or bona fide partner).

186. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 328 (1992).

187. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 441 (2003).

188. *Id.* at 448.

189. *Id.* at 449-450 (citing EEOC COMPLIANCE MANUAL (BNA) § 605:0009 (2002)).

190. *Id.* at 451 (Ginsburg, J., dissenting).

191. *Id.* at 444.

192. *Id.* n.3 (citing Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 798 (2d Cir. 1986); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984)).

193. *Id.* (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992)).

194. *Id.* at 444-45 (citing *Darden*, 503 U.S. at 322-23).

The Court considered CGA's argument for the ERT, which urged the Court to determine whether a director-shareholder was in reality a partner.[195] However, the Court found that the ERT, which inquired whether director-shareholders were in reality partners, would "simply beg the question" in a world where some firms have hundreds of partners, including many who would be more appropriately deemed employees because of their lack of control.[196] The appropriate consideration would be whether the director-shareholders were employees, not whether the director-shareholders were partners.[197] Simply looking at whether a director-shareholder was more analogous to a partner did not solve the problem.[198]

The Court was equally unpersuaded by Wells' argument that the Ninth Circuit correctly decided the case.[199] It noted that applying the per se approach ignored two things: (1) the purpose of the fifteen employee threshold was to give small firms a better chance of success and (2) Congress expected the courts to apply common law when Congress has not been exact in a statute.[200]

The Court shifted its focus to the common law of agency.[201] The Court stated the agency definition of "servant" provided guidance by focusing on the control a master has over its servant.[202] The Restatement's specific test distinguishing servants from independent contractors was deemed applicable by the Court as the crucial first step in determining the control relationship between a director-shareholder and a professional corporation.[203] It agreed with the EEOC's view that if the director-shareholder was subject to the control of the professional corporation, he or she was an employee of the professional corporation.[204] However, the Court

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195. *Id.* at 445 (citing Brief for Petitioner at 9, 15-16, 21, Clackamas Gastroenterology Assocs., P.C. v. Wells, 358 U.S. 440 (2003) (No. 01-1435)).

196. *Id.* at 446.

197. *Id.*

198. *Id.* (citing Hishon v. King & Spalding, 467 U.S. 69, 80 n.2 (1984) (Powell, J., concurring); EEOC v. Sidley, Austin, Brown, & Wood, 315 F.3d 696, 709 (7th Cir. 2002) (Easterbrook, J., concurring in part and concurring in judgment); Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867-68 (9th Cir. 1996)).

199. *Id.*

200. *Id.* at 447 (citing Wells v. Clackamas Gastroenterology Assocs, P.C., 271 F.3d 903, 908 (9th Cir. 2001) (Graber, J., dissenting) (quoting Papa v. Katy Indus., Inc., 166 F.3d 937, 940 (7th Cir. 1999)); Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 324-25 (1992)).

201. *Id.* at 448.

202. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958) (stating "A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master")).

203. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1958)).

204. *Id.* (citing Brief of Amici Curiae the United States and the Equal Employment Opportunity Commission at 8, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (No. 01-1435)).

continued, if the director-shareholder controlled the professional corporation, he or she was a proprietor, and not an employee for ADA purposes.[205]

The Court stated that the EEOC was the expert body that must address discrimination in employment issues.[206] It was persuaded by the EEOC Compliance Manual, which contained a list of six factors the Court found helpful in determining whether the professional corporation controlled the director-shareholder or the director-shareholder controlled the professional corporation.[207] The six factor test the Court deferred to was,

> [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
>
> [6] Whether the individual shares in the profits, losses, and liabilities of the organization.[208]

The Court stated that its model definition of employer was a person or persons who owns and manages a business, hires and fires employees, assigns work to the employees, supervises that work, and decides how to distribute profits and losses.[209] The Court emphasized that titles alone are not determinative.[210]

The Court noted that the list was not exhaustive and should be considered along with all the other facts of the case.[211] The Court held that control, found in the common law of agency and the EEOC Compliance Manual, should guide a court's decision on the issue of who was an

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205. *Id.* (citing United States' Brief at 8, *Clackamas* (No. 01-1435)).

206. *See id.*

207. *Id.* at 449.

208. *Id.* at 449-50 (quoting EEOC COMPLIANCE MANUAL (BNA) § 605:0009 (2002)).

209. *Id.* at 450.

210. *Id.* (citing EEOC COMPLIANCE MANUAL (BNA) § 605:0009 (2002)).

211. *Id.* n.10 (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992); Brief of Amici Curiae the United States and the Equal Employment Opportunity Commission at 9, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (No. 01-1435)).

employee.[212] It concluded that the control emphasis found in the EEOC factors will prevent a court from becoming preoccupied with titles such as shareholder, director, partner, or employee.[213] Because there were facts that indicated that CGA's physician-shareholders were not employees, as well as facts that would have indicated that they were employees, the Court decided that lower courts should apply the standard set forth in the opinion to the facts of *Clackamas* rather than make a final determination.[214]

B. JUSTICE GINSBURG'S DISSENT

Justice Ginsburg agreed that the common law servant test was a legitimate way of determining if CGA's physician-shareholders were employees.[215] However, she argued that the element of control was given too much importance.[216]

Justice Ginsburg reasoned that the physician-shareholders of CGA fit the test as servants.[217] The physician-shareholders provided services on behalf of CGA.[218] The physician-shareholders signed employment contracts with CGA, received salaries and bonuses, and worked in facilities acquired by CGA.[219] Justice Ginsburg argued that the physician-shareholders must also follow the standards of CGA.[220]

Justice Ginsburg noted that the physician-shareholders voluntarily assumed the role of employee for several purposes.[221] They were employees for the purposes of ERISA,[222] and she stated that the physician-shareholders were employees under Oregon's workers compensation

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212. *Id.* at 448-50.

213. *Id.* at 450.

214. *Id.* at 451. The physician-shareholders shared in the management and profits of CGA. Brief for Petitioner at 6, Clackamas Gastroenterology Assocs., P.C. v. Wells, 358 U.S. 440 (2003) (No. 01-1435). However, the physician-shareholders also signed employment contracts, received salaries, and were considered employees for ERISA and workers compensation. Clackamas Gastroenterology Assocs., P.C. v. Wells, 358 U.S. 440, 452-53 (2003) (Ginsburg, J., dissenting). *See also Darden*, 503 U.S. at 323, 328 (adopting the common-law test for employee and remanding to the circuit court to decide the issue).

215. *Clackamas*, 538 U.S. 440, 452 (2003) (Ginsburg, J., dissenting) (citing *Darden*, 503 U.S. at 322-23).

216. *Id.*

217. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 2(2) (1957)).

218. *Id.* (citing OR. REV. STAT. § 58.185(1)(a) (2001) (stating that "shareholders of a professional corporation 'render the specified professional services of the corporation'")).

219. *Id.* at 452-53 (citing Tr. of Oral Arg. at 8, Clackamas Gastroenterology Assocs., P.C. v. Wells, 358 U.S. 440 (2003) (No. 01-1435)).

220. *Id.* at 453.

221. *Id.*

222. *Id.* (citing Tr. of Oral Arg. at 6-7, *Clackamas* (No. 01-1435)).

laws.[223] Also, they enjoyed limited liability by being a professional corporation.[224]

Justice Ginsburg also warned that the control test could prove to be unpredictable because it may turn on the business' structure rather than business' volume.[225] Using CGA as an example, she noted that for much of the time in question CGA had fourteen employees, excluding the physician-shareholders.[226] If one physician-shareholder would have sold his or her interest in CGA and became a physician-employee, CGA would have fallen within the scope of the ADA.[227] However, Justice Ginsburg argued that the amount of business done by CGA would not have changed.[228] Finally, the dissent warned that the control test may jeopardize the most important purpose of the ADA, discouraging discrimination toward people with disabilities like Wells.[229]

IV. IMPACT

The Ninth Circuit remanded the case back to the district court to apply the test.[230] The Court's ruling in *Clackamas* is considered a gap-filler for employment discrimination statutes when it comes to professional corporations.[231] One criticism was that the Court has taken a "miserly reading of this broad civil rights law."[232] Another was that the holding has created a new "procedural hurdle" that will allow small firms a new way to have employment discrimination lawsuits dismissed.[233]

However, there is praise for the control test because it is specific and could make it harder for some firms to escape discrimination laws by claiming that their shareholders are not employees.[234] The holding has been further supported because it will protect potential plaintiffs more by allowing judges more leeway to determine whether shareholders or partners

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223. *Id.* (citing Tr. of Oral Arg. at 7, *Clackamas* (No. 01-1435)).

224. *Id.* (citing OR. REV. STAT. §§ 58.185(4), (5), (10), (11) (2001)).

225. *Id.* at 454.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 455.

230. Wells v. Clackamas Gastroenterology Assocs., P.C., 332 F.3d 1177, 1177 (9th Cir. 2003).

231. Robert S. Greenberger, *High Court Clarifies Who Must Heed Disability Act*, WALL ST. J., Apr. 23, 2003, at B4.

232. Gina Holland, *Supreme Court Gives Small Companies Room to Avoid Disability Law*, ST. PAUL PIONEER PRESS, Apr. 23, 2003, at C3.

233. Brent Hunsberger, *Oregon Clinic's Victory in Suit Opens Door to Claims*, THE OREGONIAN, Apr. 23, 2003, at A01.

234. Holland, *supra* note 232, at C3.

are in fact employees.[235] Ironically, CGA grew to have twenty-five employees and six physician-shareholders, so CGA would now be a covered entity.[236]

The *Clackamas* test has been used by the courts in unique and resourceful ways.[237] In the unpublished opinion of *Ziegler v. Anesthesia Associates of Lancaster, Ltd.*,[238] the Third Circuit returned to a case it had deferred a decision on until after *Clackamas* was decided.[239] The plaintiffs were staff physicians of the professional corporation Anesthesia Associates of Lancaster (AAL) who wished to become shareholders.[240] When they were no longer part of AAL, they sued for sexual discrimination and retaliation under Title VII.[241] The district court dismissed the claim on March 12, 2002, prior to *Clackamas*, for lack of jurisdiction because AAL had only thirteen non-shareholder employees rather than the fifteen employee threshold required under Title VII.[242] The Third Circuit, after discussing the *Clackamas* decision, explained that the ERT applied by the district court closely resembled the *Clackamas* test.[243] Therefore, the court held that the correct outcome had been made and affirmed the district court's dismissal.[244]

In *EEOC v. Pacific Maritime Association*,[245] a panel of the Ninth Circuit used the holding in *Clackamas* to develop a definition of employer in a different employment issue.[246] The EEOC brought a claim on behalf of Teresa Jones, a longshore worker who was hired by Marine Terminals Corporation (MTC) through a dispatch hall operated by Pacific Maritime Association (PMA).[247] After leaving MTC, Jones intervened in the EEOC claim against both MTC and PMA for sexual harassment in violation of Title VII.[248] After settling with MTC, she pursued PMA on the theory that

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235. Hunsberger, *supra* note 233, at A01.

236. *Id.*

237. Ziegler v. Anesthesia Assocs. of Lancaster, Ltd., 74 Fed. Appx. 197, 201 (3d Cir. 2003).

238. 74 Fed. Appx. 197 (3d Cir. 2003).

239. *Ziegler*, 74 Fed. Appx. at 198; Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003).

240. *Ziegler*, 74 Fed. Appx. at 198.

241. *Id.*

242. *Id.* at 198-99.

243. *Id.* at 201.

244. *Id.*

245. 351 F.3d 1270 (9th Cir. 2003).

246. *Pac. Mar. Ass'n*, 351 F.3d at 1277.

247. *Id.* at 1272. A longshore worker, or longshoreman is, "a person who works at a waterfront loading and unloading ships." WEBSTER'S NEW WORLD DICTIONARY 348 (1990).

248. *Pac. Mar. Ass'n*, 351 F.3d at 1273.

PMA was also her joint employer.[249] The district court ruled that PMA was her joint employer and found for Jones.[250]

On appeal, the Ninth Circuit looked to the factors in the *Clackamas* test to construct a model definition of employer.[251] The Ninth Circuit first listed factors used by the Labor Department to implement the Agricultural Workers Protection Act (AWPA), which are very similar to the common law of agency factors and the EEOC Compliance Manual factors.[252] Next, the Ninth Circuit cited the EEOC Compliance Manual factors used in *Clackamas*.[253] The court also looked to the model definition that the Supreme Court outlined in *Clackamas* for guidance.[254] When applying these non-exhaustive lists, it became apparent that PMA had no control over MTC or Jones.[255] The court noted that PMA had no supervisor authority, it could not hire or fire, and it could not discipline workers.[256] Therefore, the court held that PMA was not Jones' joint employer and reversed the district court.[257] However, *Pacific Maritime Association* was vacated and an *en banc* hearing was granted by the Ninth Circuit.[258] Final adjudication of the issue had not been made at the writing of this comment.[259]

In *Pearl v. Monarch Life Ins. Co.*,[260] a plaintiff used *Clackamas* to prove that he was not an employee for ERISA purposes so that he could continue with his state claim for breach of contract.[261] Pearl was a surgeon and director-shareholder of D'Angelo, Pearl & Sasson, P.C. (DPS), who held three disability buyout insurance policies through the defendant insurance companies.[262] Pearl claimed a disability and attempted to collect

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249. *Id.* "'Two or more employers may be considered 'joint employers' if both employers control the terms and conditions of employment of the employee.'" *Id.* at 1275 (quoting Wynn v. Nat'l Broad. Co., 234 F. Supp. 2d 1067, 1093 (C.D. Cal. 2002) (citing Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993 n. 4 (6th Cir. 1997))).

250. *Id.* at 1271-72.

251. *Id.* at 1277.

252. *Id.* at 1275-76 (quoting Torres-Lopez v. May, 111 F.3d 633, 646 (9th Cir. 1997) (Aldisert, J., dissenting)). *See generally* 29 U.S.C. §§ 1801-1872 (2000); 29 C.F.R. § 500.20(h)(4)(ii) (2003).

253. *Id.* at 1276 (quoting Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449-50 (2003)).

254. *Id.* (quoting *Clackamas*, 538 U.S. at 450).

255. *Id.* at 1277.

256. *Id.* All of these powers belonged solely to MTC. *Id.*

257. *Id.*

258. EEOC v. Pac. Mar. Ass'n, 367 F.3d 1167, 1167 (9th Cir. 2004).

259. *Id.*

260. 289 F. Supp. 2d 324 (E.D.N.Y. 2003).

261. *Pearl*, 289 F. Supp. 2d at 328.

262. *Id.* at 325.

on the insurance policies, but the defendants denied his claims.[263] He sued for breach of contract, but the defendants removed the claim to federal court under the theory that the state contract claim was preempted by ERISA.[264] Pearl did not use the *Clackamas* test to prove that he was an employee, but rather an employer who was not protected under ERISA.[265] The court granted Pearl's motion to remand his claim back to state court.[266]

Clackamas has also been used as authority in tax cases.[267] The United States Tax Court in *Western Management, Inc. v. Commissioner of Internal Revenue*[268] denied applying the *Clackamas* control test as the common law test to determine when an individual was an employee for purposes of the Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA).[269] However, the United States Tax Court in *Cicciari v. Commissioner of Internal Revenue*[270] used *Clackamas* as supportive authority to look to different factors to determine the relationship between parties.[271]

Business owners must be prepared for *Clackamas's* impact.[272] There are a number of ways a business owner can be prepared, including setting clear expectations and providing feedback for partners, being candid with fellow owners, explaining business decisions carefully, and trying to be prepared for issues that arise from choosing one partner over another.[273]

V. CONCLUSION

The Court's decision in *Clackamas* has settled the circuit split on how to determine whether director-shareholders of professional corporations are "employees" in the context of employment discrimination laws.[274] The Court adopted the common law control test and used the six factors outlined in the EEOC's Compliance Manual to address the narrower issue of

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263. *Id.*

264. *Id.*

265. *Id.* at 326-28.

266. *Id.* at 328.

267. Western Mgmt., Inc. v. Commissioner, 85 T.C.M. (CCH) 1442, 1445 (2003).

268. 85 T.C.M. (CCH) 1442 (2003).

269. *See Western Mgmt.*, 85 T.C.M. at 1445 n.2 (stating the *Clackamas* rule applies only to employment discrimination laws).

270. 85 T.C.M. (CCH) 1515 (2003).

271. *Cicciari*, 85 T.C.M. at 1516.

272. Paul F. Mickey, Jr., *Treat Your Partners Well: Firms Should Heed a Decision That May Confer on Partners Equal Employment Opportunity Rights*, LEGAL TIMES, Sept. 22, 2003, at 14.

273. *Id.*

274. Clackamas Gastroenterology Assocs. P.C. v. Wells, 358 U.S. 440, 444 (2003).

whether an individual acts independently, or whether he or she is controlled by the firm.[275]

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275. *Id.* at 449-50 (citing EEOC Compliance Manual (BNA) § 605:0009 (2002)).

[*] Thank you to my wife and family for their support throughout law school.

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