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# The Applicability of the ADEA to Professional Corporations: Hyland v. New Haven Radiology Associates, 794 F.2d 793

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# THE APPLICABILITY OF THE ADEA TO PROFESSIONAL CORPORATIONS: *Hyland* v. *New Haven Radiology Associates*, 794 F.2d 793 (2d Cir. 1986)

Doctors, lawyers and other professionals often incorporate their practices as professional service corporations[1] to gain advantages such as tax benefits.[2] To avoid liability to shareholders[3] under federal antidiscrimination laws,[4] these practitioners may decide against incorporating.[5] One such law, the Age Discrimination in Employment Act

1. The primary purpose of a professional service corporation is to render a specific kind of professional service. J. Philipps, J. McNider, D. Riley, *Origins of Tax Law: The History of the Personal Service Corporation*, 40 WASH. & LEE L. REV. 433, 434 (1983). Today, every state has some statutory provision for the incorporation of professionals. Bowman, *The Professional Corporation—Has the Death Knell Been Sounded?*, 10 PEPPERDINE L. REV. 515, 516 (1983).

2. Initially, tax considerations were the primary advantage for incorporating a professional practice. The Tax Equity and Fiscal Responsibility Act (TEFRA) effectively eliminated the major tax advantages of incorporation. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) (amending several Code sections in chapters 26 and 42). *See generally* Bowman, *supra* note 1, for an analysis of the major tax benefits of incorporation and the effect of TEFRA on professional service corporations. The author also examines several nontax advantages for incorporation, including limited liability, centrality of management, continuity of life, transferability of ownership and increased efficiency. *Id.* at 520-23.

Provisions of the Tax Reform Act of 1986 also affected professional services corporations. *See* Labiner, *There's Still Life in Professional Corporations*, A.B.A. J. 34 (March 15, 1987) (arguing that there are good reasons for incorporation after the Tax Reform Act); Witman and Murray, *Professional Corporations: Are They Still Viable?*, 27 LAW OFFICE ECON. & MGMT. 327 (1986) (Tax Reform Act of 1986 tips scales against incorporation); Heilbronner and Stopek, *1986 Tax Reform: How It Will Impact the Typical Florida Lawyer*, 61 FLA. BAR J. 19 (1987) (recommending incorporation only for limited liability and not tax purposes).

3. "Most states [permit] only licensed members of the profession . . . to own shares in a professional corporation." *See* Bowman, *supra* note 1, at 522 (giving examples of state statutes).

4. This type of action should be distinguished from those in which a non-shareholder brings suit under an antidiscrimination act. The Supreme Court addressed the latter situation in Hishon v. King and Spalding, 467 U.S. 69 (1984). *See infra* note 31 for discussion of *Hishon*.

5. *See generally*, Bowman, *supra* note 1 at 523-24, 530-33 (discussing traditional tax

(ADEA),[6] governs only "employee"[7] causes of action against employers.[8] Because shareholders in professional service corporations resemble both employers and employees,[9] application of the ADEA to such corporations is problematic. In *Hyland v. New Haven Radiology Associates*,[10] the Second Circuit held that a shareholder of a professional service corporation was an employee entitled to ADEA protection.[11]

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and nontax disadvantages of incorporation); Whitman, *supra* note 2, at 339-41 (discussing disadvantages created by the Tax Reform Act of 1986).

6. 29 U.S.C. §§ 621-34 (1982).

7. The ADEA defines "employee" as "an individual employed by any employer." 29 U.S.C. § 630(f) (1982).

8. *See* EEOC v. Zippo Mfg. Co., 713 F.2d 32, 35 (3d Cir. 1983) (if appellants were not Zippo employees, ADEA is inapplicable to their cause of action); Garrett v. Phillips Mills, Inc., 721 F.2d 979, 980 (4th Cir. 1983) (a plain reading of the ADEA indicates that an individual has a cause of action only if he or she is an employee when terminated); *but see* Comment, *EEOC v. Zippo Mfg. Co.: Choice of a Test for Coverage of the Age Discrimination in Employment Act*, 64 B.U.L. REV. 1145, 1168-69 (1984) (The statutory language refers to discrimination against "individuals," not employees or applicants for employment, thereby indicating a Congressional intent to avoid limiting coverage to employees in a strict sense). *See also* Doe *ex rel.* Doe v. St. Joseph's Hospital, 788 F.2d 411, 422 (7th Cir. 1986) (there are no indications that "any individual" means only an employee or an employer). *Doe* interpreted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982). *See infra* note 26 for applicability of Title VII decisions to ADEA cases.

9. Although variations exist, professional service corporations typically operate like partnerships in that the corporation's member-shareholders have an equal interest in corporate management, control, ownership, and profits. *See infra* notes 12-15 and accompanying text for discussion of shareholder status in New Haven Radiology Associates (NHRA), a professional corporation. *See also* Equal Employment Opportunity Comm'n v. Dowd and Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (the management, control, and ownership of a professional corporation is like the management, control, and ownership of a partnership).

Shareholders of professional corporations also resemble corporate employees because they act as corporate officers, draw salaries as employees, and perform traditional employee duties. *See infra* notes 12-15 and accompanying text for discussion of shareholder status in a professional corporation. *See also* EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982) (salaried officers of association who performed traditional employee duties are employees for purpose of the ADEA, regardless of their status as directors).

10. 794 F.2d 793 (2d Cir. 1986).

11. The court in *Hyland* stated that the corporate form of business precludes a court from examining whether the entity in fact operates as a partnership. *Id.* at 798. The court rejected NHRA's claim that the court should use an economic realities test to determine whether Hyland was a partner or an employee. *Id.* at 797-98. The court reasoned that the economic realities test failed to apply because courts developed the test to distinguish employees from independent contractors. *Id.* at 797. *See infra* notes 39-48 and accompanying text for a discussion of the economic realities test.

In *Hyland*, Dr. Hyland and four other radiologists organized New Haven Radiology Associates (NHRA) as a professional service corporation.[12] Each of the founding members was an officer and director with an equal voice in management.[13] Every shareholder-physician executed an employment agreement requiring each member to be a full time corporate employee.[14] In 1980, the other members asked Hyland to resign.[15] Alleging a violation of section 623(a)(1) of the ADEA,[16] Hyland filed this cause of action claiming that NHRA discriminated against him on the basis of age. Hyland contended that NHRA was an employer[17] and that he was an employee protected by the Act.[18] The District Court of Connecticut rejected Hyland's argument and held that the ADEA failed to cover Hyland because he was more like a partner than a corporate employee.[19] The Court of Appeals for the

12. *Id.* at 794. The physicians organized NHRA in 1972 under the laws of Connecticut. *Id.*

13. *Id.* at 794. Each member contributed the same amount of capital, received the same amount of stock, and shared equally in any profits or losses. *Id.*

14. *Id.* at 795. The employment agreement also required each physician to submit to the corporation all compensation earned from rendering any kind of professional service. *Id.* Hyland's employment agreement differed from those of the other co-founders because it required six months' written notice of his intention to leave the corporation's employ. *Id.*

15. *Id.* Dr. Hyland was 51 years of age. *Id.* According to NHRA, complaints of unavailability, lack of cooperation, and abusive conduct prompted the resignation request. *Id.*

16. 29 U.S.C. § 623 (a)(1) (1982). This section prohibits an employer from discharging any individual on the basis of age.

17. The ADEA defines "employer" as "a person engaged in an industry affecting commerce who has twenty or more employees . . ." 29 U.S.C. § 630(b) (1982). The Act defines "person" as "one or more individuals, partnerships, associations . . . or any organized groups of persons." 29 U.S.C. § 630(a) (1982). The legislative history of the nearly identical definitional provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1982), states, "[t]he term 'employer' is intended to have its common dictionary meaning, except as expressly qualified by the act." *Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly By Senator Joseph S. Clark and Senator Clifford P. Case, Floor Managers*, 88th Cong., 2d Sess., 110 CONG. REC. S7216 (April 8, 1964).

18. *See supra* notes 7-8 and accompanying text for a definition of "employee" and the Act's applicability to employees.

19. Hyland v. New Haven Radiology Associates, 606 F. Supp. 617, 621 (D. Conn. 1985). The District Court decided that NHRA incorporated to gain advantageous tax and civil liability treatment. *See also* Battle, *The Use of Corporations by Persons Who Perform Services to Gain Tax Advantages*, 57 TAXES 797 (1979) (discussing the federal income tax advantages and potential detriments of professional service corporations). The District Court applied an economic realities test and found that NHRA is a part-

Second Circuit reversed, holding that incorporation as a professional service corporation precludes any further examination into the form of business.[20] Therefore, the ADEA covered Hyland as a corporate employee.[21]

Congress passed the Age Discrimination in Employment Act to encourage the employment of able older persons and to prohibit arbitrary discrimination based on age.[22] Since the ADEA is remedial, courts must interpret the Act liberally[23] to effectuate its purpose.[24] Due to the ADEA's similarities to other remedial legislation such as Title VII of the Civil Rights Act of 1964[25] and the Fair Labor Standards Act,[26]

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nership in all but name. *Hyland*, 606 F. Supp. at 621. The court reasoned that NHRA's structure consists of an equal division of ownership and management and an equal sharing of profits and losses among members, which are hallmarks of partnership status. *Id.* The court therefore concluded that Hyland could not separate himself from his management and ownership roles for a court to consider him an "employee." *Id.*

20. *Hyland*, 794 F.2d at 798.

21. *Id.*

22. The purpose of the act 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." 29 U.S.C. § 621(b) (1985). *See generally* Comment, *supra* note 8 (discussing numerous studies and reports which culminated in the ADEA's passage). *See also* Levine v. Fairleigh Dickinson University, 646 F.2d 825, 828 (3d Cir. 1981) (Congress' broad language in defining "employee" accords with congressional intent to prohibit age discrimination against "any individual"); Equal Employment Opportunity Comm'n v. Peat, Marwick, Mitchell and Co., 589 F. Supp. 534, 538 (E.D. Mo. 1984) (the ADEA's primary purpose is to prohibit employment discrimination based on age).

23. Zimmerman v. North American Signal Co., 704 F.2d 347, 353 (7th Cir. 1983). *See generally* Comment, *supra* note 8, at 1168 (discussing broad remedial legislation and listing ADEA cases in support of a liberal interpretation). *See also* Equal Employment Opportunity Comm'n v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982) (courts used a broad definition of "employee" when interpreting social welfare legislation such as the ADEA and Title VII in order to effectuate the stated purposes of the Acts).

24. The ADEA, as originally enacted, vested the responsibility for administration and enforcement of its provisions in the Secretary of Labor. Congress transferred this responsibility to the Equal Employment Opportunity Commission (EEOC), effective Jan. 1, 1979. Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19807 (1978). *See* 29 U.S.C. § 626 (1985).

25. 42 U.S.C. § 2000e (1982). Title VII and the ADEA contain similar definitions of the terms "employee" and "employer." *Compare* 29 U.S.C. § 630(b) & (f) (1982, Supp. 1987) (definitions of the two terms in the ADEA) *with* 42 U.S.C. § 2000e(b) & (f) (1978) (the definition of "employer" and "employee" contained in Title VII). In addition, the verbiage proscribing age discrimination from the ADEA directly parallels similar prohibitions against discrimination based on race, sex, national origin, and religion contained in Title VII. *Compare* 29 U.S.C. § 623 (1982) (proscribing age discrimina-

decisions defining "employee" and "employer" under these Acts assist courts in defining these terms under the ADEA.[27]

The ADEA's broad definitions provide little guidance for effectively and uniformly determining who is an "employee"[28] of a partnership or a professional service corporation.[29] Although partnerships[30] are "employers" under the ADEA,[31] the status of partners as "employees" is

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tion) *with* 42 U.S.C. § 2000e-2 (1978) (Title VII proscriptions against discrimination based on race, sex, national origin, and religion). *See also* B.L. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 393 (1976) (stating that some courts rely on Title VII precedent to interpret similar ADEA provisions).

26. 29 U.S.C. §§ 201-219 (1978). Congress intended that the ADEA's enforcement provisions mirror those in the FLSA. H.R. REP. NO. 805, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2213, 2218. *Compare* 29 U.S.C. § 626 (1982) (ADEA enforcement provision) *with* 29 U.S.C. §§ 211(b), 216, 217 (1978) (FLSA enforcement provision).

27. Title VII, concerning race, color, religion, sex, or national origin, and the ADEA, concerning age, prohibit an employer ". . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e(2)(a)(1) (1982); 29 U.S.C. § 623(a)(1) (1982). *See* Lorillard v. Pons, 434 U.S. 575, 584 (1978) (Title VII and the ADEA have similar aims and substantive prohibitions, including the elimination of discrimination in the workplace); Equal Employment Opportunity Comm'n v. Zippo Mfg. Co., 713 F.2d 32, 38 (3d Cir. 1983) (Title VII determines the scope of the ADEA's substantive prohibitions against discrimination). *But see* Comment, *supra* note 8, at 1159 where the author argues that the court in *Zippo* inaccurately relied on *Lorillard*. In dictum, the court in *Lorillard* stated that the substantive prohibitions of Title VII could be the basis for the substantive prohibitions of the ADEA. *Id.* at 1159-60. Thus, the court in *Zippo* based its decision on dictum which has little precedential value. *Id.* at 1160.

28. *See supra* note 7 for definition of "employee."

29. EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1069 (6th Cir. 1982) (the definitions of "employee" and "employer" leave great room for interpretation); *see also* Dake v. Mutual of Omaha Insurance Company, 600 F. Supp. 63, 64 (N.D. Ohio 1984) (Congress obviously left the ADEA definition of "employee" for the courts to decide).

30. Section 6 of the Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." *See also* Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) (partners manage and control the business and share in the profits and losses).

31. 29 U.S.C. § 630(a), (b). *See supra* note 17 for a definition of "employer." *See also* Lucido v. Cravath, Swaine and Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977) (Title VII's objective, the elimination of job discrimination, clearly extends to the professional fields of law and medicine). The legislative history for a proposed amendment to Title VII adds further support. This amendment, ultimately defeated, would have exempted physicians employed by hospitals, thus lending support to the proposition that professionals are within the scope of Title VII. 118 CONG. REC. 3798-3802 (1972).

less certain.[32] This uncertainty becomes even more pronounced when a group of professionals rely on the corporate form to carry out their practice.[33] Moreover, an individual's title within the organization is inconclusive in determining whether the individual is actually an employee.[34] Courts developed several tests to analyze employment situa-

32. *See* Hishon v. King and Spalding, 467 U.S. 69, 79 (1984). In *Hishon*, the Supreme Court held that an associate in a law firm, organized as a partnership, stated a cause of action under Title VII. 457 U.S. at 78. The Court stated that an associate was an employee within the meaning of Title VII. *Id.* at 77.

The Court rejected the argument that Title VII exempts partnership decisions from Title VII scrutiny. *Id.* The Court further found that the statute failed to create a *per se* exemption for partnerships. *Id.* The Court reasoned that when Congress intends to create an exemption to the Act, it expressly does so. *Id.* at 78. The Court noted the express exemptions granted Indian tribes, 42 U.S.C. § 2000e(b)(1) (1982), small businesses, bona fide private membership clubs, 42 U.S.C. § 2000e(b)(2) (1982), and certain employees of religious organizations, 42 U.S.C. § 2000e-1 (1982). *Hishon*, 467 U.S. at 78 n.11.

In a concurring opinion, Justice Powell emphasized that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. *Id.* at 79 (Powell, J., concurring). Justice Powell stated that the relationship among partners differs markedly from that of an employer and employee. *Id. But see* Reiver v. Murdoch and Walsh, P.A., 625 F. Supp. 998, 1005 (D. Del. 1985) (applying Title VII to decisions among partners despite the majority opinion in *Hishon*).

In EEOC Decision No. 85-4, EMPL. PRAC. DEC. (CCH) ¶¶ 6845, 7040 (March 18, 1985), the Commission refused to classify partners in a law firm as employees for the purpose of reaching the jurisdictional prerequisite of fifteen employees under Title VII. *But see* Bellis v. United States, 417 U.S. 85 (1974) (partners are employees when the partner asserts a fifth amendment privilege for partnership documents).

33. *See supra* note 9 for a discussion of the difficulty in distinguishing between professional service corporation shareholders, corporate employees, and partners. In Reiver v. Murdoch & Walsh, P.A., 625 F. Supp. 998 (D. Del. 1985), the court indicated the difficulty of applying Title VII to professional corporation directors, noting that both the statutory language and the legislative history failed to indicate an express intent to exclude the directors from Title VII scrutiny. *Id.* at 1005-06. Moreover, the court pointed out that an amendment to Title VII extending the Act's coverage to educational institutions, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972) (amending 42 U.S.C. § 2000e-1 (1982)), indicated congressional intent to make Title VII's coverage more extensive. *Reiver*, 625 F. Supp. at 1005. The *Reiver* court points out, however, that the Seventh Circuit in EEOC v. Dowd and Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984), held that Title VII does not apply to professional service corporation shareholders. *Reiver*, 625 F. Supp. at 1005-06. The *Reiver* court refrained from determining whether Title VII applies to a professional service corporation shareholder. *Id.* at 1007. The court concluded that such a decision would not have palpable consequences on parties' legal interests in this case.

34. Equal Employment Opportunity Comm'n v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982). *See also* Zimmerman v. North Am. Signal Co., 704 F.2d 347, 352 n.4 ("The issue is whether an employer-employee relationship exists, not what title a worker holds. . ."); *Hishon*, 467 U.S. at 79 n.2 (Powell, J., con-

tions and to ascertain who is an "employee."[35]

In *Bartels v. Birmingham*,[36] the United States Supreme Court found that for the purposes of the Social Security Act, band leaders, rather than dance hall owners, employed the band members.[37] The Court first examined the employer-employee relationship, using the common law "right to control" test.[38] This test emphasizes the degree of control an employer exercises over the details and methods of an employee's performance.[39] In *Bartels*, however, the Supreme Court rejected the "right to control" test as too narrow for use with social legislation, noting the absence of control under such legislation.[40] The Court in *Bartels* held that under social legislation "employees" are those individuals who, as a matter of economic reality, depend on the business to which they render service.[41]

After *Bartels*, courts relied on two standards to determine who is an employee under social legislation: the *Bartels* "economic realities" test

curring) ("An employer may not evade the strictures of Title VII simply by labelling its employees as 'partners'."). Moreover, employment contracts labelling an individual are not necessarily controlling. Spirides v. Reinhardt, 613 F.2d 826, 832-33 (D.C. Cir. 1979).

35. Generally, courts consider the Act's statutory language, the legislative history, existing federal law, and the particular circumstances of the case at hand. Calderon v. Martin County, 639 F.2d 271, 273 (5th Cir. 1981). The first two factors give little guidance because of the lack of specific language defining "employee." *See supra* note 29 for discussion of the Act's broad definition of "employee." The final two factors provide the primary gudiance in discrimination cases. *See infra* notes 36-63 and accompanying text for a discussion of the specific tests federal courts adopted in various circumstances.

36. 332 U.S. 126 (1947).

37. *Id.* at 132.

38. *Id.* at 129-30.

39. *Id.* The common law agency test is the basis for the right to control test. Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985). *See also* Restatement (Second) of Agency § 220(2)(a) (1957) (to determine whether one is an employee or an independent contractor, the court must consider the extent to which a master exercises control over the details of work). *See also* Equal Employment Opportunity Comm'n v. Zippo Mfg. Co., 713 F.2d 32, 32 (3d Cir. 1983) (in describing the "right to control" test, the court stated that if the alleged employer had the right to determine both the type of work and its performance the worker was an employee).

40. *Bartels*, 332 U.S. at 130.

41. *Id.* The court relied on United States v. Silk, 331 U.S. 704 (1947), and indicated that the permanency of the relation, the skill required, the investment in the facilities for work, the opportunities for profit or loss are all factors a court should consider. 332 U.S. at 130. The court in *Bartels* concluded that it is the total situation which controls. *Id.*

and a hybrid "right to control-economic realities" test.[42] Echoing *Bartels*, some courts which used the economic realities test found that an employer-employee relationship exists where a strong degree of economic dependence is present.[43]

For example, the Court of Appeals for the Seventh Circuit adopted an "economic realities" test in *Equal Employment Opportunity Commission v. Dowd and Dowd, Ltd.*[44] In *Dowd*, the court addressed the issue of whether shareholders in a professional service corporation are employees under Title VII.[45] The E.E.O.C. alleged that Dowd & Dowd violated Title VII when it denied pregnancy benefits to an employee.[46] The court looked beyond the corporate form of business and analyzed the economic reality of shareholders in a professional service corporation. The court in *Dowd* held that a shareholder's role in a professional service corporation is closer to that of a partner in a partnership than it is to a general corporate shareholder.[47] The court con-

42. *Zippo Mfg.*, 713 F.2d at 37-38. *See generally* Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (listing cases according to the test the court applied).

43. *See, e.g.*, Hickey v. Arkla Industries, 699 F.2d 748, 751 (5th Cir. 1983). The court in *Hickey* based its determination of the degree of economic dependence on the factors listed in *Bartels, supra* note 41, and added a fifth factor, the degree of control. *Hickey*, 699 F.2d at 751-52. *See also* Donovan v. Sureway Cleaners, 656 F.2d 1368, 1370 (9th Cir. 1981) (the court considered an additional factor, the importance of the service to the alleged employer).

44. 736 F.2d 1177, 1178 (7th Cir. 1984). The EEOC relied on *Dowd* and decided that in determining whether an individual is a partner or an employee, it will consider such relevant factors as the individual's ability to control and operate the business, to determine compensation, and to administer profits and losses. EEOC Decision No. 85-4, EMPL. PRAC. DEC. (CCH) ¶ 7041 (1985). In Donovan v. DialAmerica Marketing, 757 F.2d 1376 (1985), the court explained the economic dependence aspect of the economic realities test. *Id.* at 1385. The court stated that economic dependence disregards whether the workers depend on the money they earn for obtaining the necessities of life. *Id.* Rather, the test examines whether the workers depend on the employer for their continued employment. *Id.*

45. 736 F.2d at 1178.

46. The EEOC filed a complaint against Dowd and Dowd, a professional service corporation. *Id.* at 1177. The complaint alleged that the corporation violated Section 703(a) of Title VII by failing to amend its Health Benefits Plan to include pregnancy benefits for its female employees. *Id.* An organization must have at least 15 employees to be subject to Title VII. 42 U.S.C. § 2000e(b) (1982). Unless shareholders of the professional corporation were employees, Dowd and Dowd would lack the requisite number of employees to be subject to the Act. *Dowd*, 736 F.2d at 1178.

47. *Id.* The court reasoned that the economic reality of the professional service corporation in Illinois is that management, control, and ownership of the corporation is much like the management, control, and ownership of a partnership. *Id.* In addition, the court found that the overlap of state regulations governing professional service cor-

cluded that professional service corporation shareholders are not corporate employees and that Title VII, therefore, was inapplicable.[48] Thus, the court treated professional service corporation shareholders the same as partners under Title VII.[49]

The second test developed by the courts to determine an individual's employment status is the hybrid right to control-economic realities test.[50] In *Spirides v. Reinhardt*,[51] a female broadcaster filed a complaint alleging that her termination resulted from sex discrimination.[52] The Court of Appeals for the District of Columbia Circuit found it necessary to consider the economic realities of all the circumstances surrounding the employment relationship.[53] Stating that no factor alone is determinative, the court held that an employer's right to control the means and manner of the worker's performance is important.[54] The court reasoned that if an employer controls and directs all aspects of an individual's work, an employer/employee relationship probably exists.[55] The increased importance of the employer's right to

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porations and partnerships supports the court's decision to treat shareholders of professional corporations similar to partners in a law firm. *Id.* at 1179.

48. *Id.* at 1178. The *Dowd* court relied on Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977). In *Burke*, the court considered whether an accounting firm consisting of four partners and thirteen non-partners had fifteen or more employees and was, therefore, an employer under section 701(b) of Title VII, 42 U.S.C. § 2000e(b). *Burke*, 556 F.2d at 868. The court concluded that Title VII does not apply to partners in a partnership. *Id.* at 869.

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

50. *See generally* Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (listing cases that adopted the hybrid test).

51. 613 F.2d 826 (D.C. Cir. 1979).

52. Spirides worked as a foreign language broadcaster for the Greek division of the Voice of America. *Id.* at 827. She worked primarily under "purchase order vendor" contracts. *Id.* The contracts provided that the contractor is independent and not an agency employee. *Id.* After the addition of two female foreign nationals to the staff, the Chief of the Service informed her that he could no longer justify spending funds on a female voice. *Id.* at 827-28.

53. *Id.* at 831. The court expressly rejected the District Court's near exclusive reliance on the employment contract language as indicative of the individual's employment status. *Id.* at 833.

54. *Id.* at 831.

55. *Id.* at 831-32. Additional factors a court or agency must consider include: (1) the kind of occupation, and whether the work is usually done under supervision; (2) the skill required in the particular occupation; (3) whether the employer or the individual furnishes the equipment and place of work; (4) the length of time for which the individual worked; (5) the method of payment, whether by time or by job; (6) the manner in which the work relationship is terminated; (7) whether the employer gives annual leave;

control thus distinguishes the hybrid test from the economic realities test.

The decision in *Equal Employment Opportunity Commission v. Zippo Manufacturing Co.*[56] supports the use of the hybrid standard in ADEA cases. In *Zippo*, the company discharged four district managers pursuant to a clause in their employment agreement requiring termination at age 65.[57] According to the *Zippo* court, the procedural and remedial sections[58] of the ADEA derive from the Fair Labor Standards Act (FLSA),[59] while Title VII provides the ADEA's substantive basis.[60] The court in *Zippo* reasoned that because courts generally apply the hybrid standard in Title VII actions[61] and because employee status is a substantive issue,[62] the hybrid test is appropriate for determining employee status under the ADEA.[63] Under the hybrid test, the court held that the district managers were not employees for ADEA purposes; rather, they were independent contractors.[64]

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(8) whether the worker is an integral part of the employer's business; (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.

56. 713 F.2d 32 (3d Cir. 1983).

57. *Id.* at 34. Zippo engages district managers to sell its products to wholesale distributors and retailers. *Id.* at 33. Apart from commissions and bonuses, Zippo provides no other financial benefits or insurance benefits to the district managers. *Id.* Zippo exercises virtually no control over the district managers' operations. *Id.* District managers are accountable to Zippo only for their sales volume. *Id.* at 34.

58. *Id.* at 38. The *Zippo* court relied on Lorillard v. Pons, 434 U.S. 575 (1978). *Zippo*, 713 F.2d at 38. In *Lorillard*, the Supreme Court found that, except for certain express changes made by Congress, Congress intended to fully incorporate the remedies and procedures of the FLSA. *Lorillard*, 434 U.S. at 582.

59. 29 U.S.C. §§ 201-219 (1978). Congress enacted the FLSA to remedy labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers. 29 U.S.C. § 202. *See generally* Comment, *supra* note 8 (discussing the applicability of FLSA cases to ADEA cases).

60. In *Lorillard*, the Supreme Court found that Congress derived the ADEA's prohibitions directly from Title VII. 434 U.S. at 584. *But see* Comment, *supra* note 8 at 1173 (distinguishing congressional intent with regard to age discrimination from that of racial discrimination, concluding that the interpretation of congressional intent on race discrimination is not a reliable source for intent regarding age discrimination).

61. *Zippo*, 713 F.2d at 37. *See also* Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982) (courts should refrain from using economic realities test in Title VII cases).

62. *Zippo*, 713 F.2d at 38.

63. *Id.*

64. *Id.* The court in *Zippo* found that the sales practices of the district managers were not under Zippo's control. *Id.* Moreover, the district managers furnished their own equipment. *Id.*

In *Hyland v. New Haven Radiology Associates*,[65] the Second Circuit assessed the ADEA's applicability to a professional service corporation shareholder. Circuit Judge Miner, writing for the majority, initially addressed the issue of whether a court should treat a professional service corporation as a partnership.[66] Judge Miner rejected both the economic realities and hybrid tests,[67] finding that despite similarities in structure and operation the court must consider a corporation's freely chosen form of business.[68] Thus, use of the corporate form precludes any examination into whether the entity in fact operates as a partnership.[69]

The court then examined Dr. Hyland's employment relationship with NHRA.[70] The court rejected the economic realities test for determining when to define a corporate shareholder as a partner,[71] stating that the roles of shareholders and partners are mutually exclusive.[72] Therefore, the court concluded that any test designed to determine whether an individual is a partner or an employee is irrelevant because the ADEA covers every corporate employee.[73] Turning to Dr. Hyland's status in particular, the court reviewed his employment relationship with NHRA and concluded that he was a corporate employee.[74] The court found that Hyland's proprietary interest and his corporate

65. 794 F.2d 793 (2d Cir. 1986).

66. *Id.* at 797-98. The court also discussed the liberal interpretation which a court should give a remedial statute of this nature. *Id.* at 796. The court further focused on the congressional aim of prohibiting age discrimination. *Id.* The court also stated that the benefits of antidiscrimination statutes do not extend to partners. *Id.* at 797.

67. *Id.* at 797-98. Although the court recognized that shareholders of professional service corporations have many attributes of partners, it noted that partnerships often operate like corporations as well. *Id.* at 798.

68. *Id.* The court further reasoned that having made the decision to incorporate, NHRA should not now be able to claim that their corporation is a partnership. *Id.*

69. *Id.* at 797-98. The court disagreed with the Seventh Circuit's decision in *EEOC v. Dowd and Dowd*, 736 F.2d 1177 (7th Cir. 1984), which held that the management, control, and ownership of a professional corporation is similar to that of a partnership. *Id.* at 1178. *See supra* notes 44-49 and accompanying text for a discussion of *Dowd*.

70. Hyland v. New Haven Radiology Associates, 794 F.2d 793, 798 (2d Cir. 1986).

71. *Id.* The court, however, appeared to condone the application of the "economic realities" test to distinguish an employee from an independent contractor. *Id. See supra* notes 40-42 and accompanying text for discussion of the economic realities test and the hybrid test.

72. *Hyland*, 794 F.2d at 798.

73. *Id.*

74. *Id. See supra* notes 12-15 and accompanying text for discussion of Dr. Hyland's employment relationship.

employment were consistent.[75]

In his dissent, Circuit Judge Cardamone argued that the manner in which a corporation functions determines its form of business under the discrimination laws.[76] Judge Cardamone denied that everyone who works for a corporation is an employee within the ADEA.[77] A court therefore must analyze the organization's status to determine whether an individual is an employee under the ADEA.[78] Rejecting the hybrid test as inappropriate in a partnership setting,[79] Cardamone espoused an inquiry into the factors of compensation and control.[80] Cardamone applied the test to this case and determined that Hyland was a traditional partner.[81]

The *Hyland* decision attempts to resolve the status of shareholders of professional service corporations under the antidiscrimination laws.[82] The court's determination that these shareholders are employees covered by the ADEA establishes a clear standard in a murky area of the law.[83] Moreover, the court's departure from both the economic realities and the hybrid tests is sound because courts originally established these tests to distinguish employers from independent contractors.[84]

75. *Hyland*, 794 F.2d at 798.

76. *Id.* at 798-99.

77. *Id.* at 799. According to the dissent, case law elucidates the absence of a *per se* rule which includes all those working for a corporation as employees. *Id.* at 800. Further, Judge Cardamone points out that no rule excludes courts from considering high-level officers as employees. *Id.*

78. *Id.* The dissent began its analysis by discussing the operation of partnerships. *Id.* at 799-800. To the dissent, partners traditionally manage and control the business and share in the profits and losses. *Id.* at 800. The dissent then examined the NHRA within the partnership framework and concluded that structurally and economically NHRA is best characterized as a partnership. *Id.* The equal contributions of capital, equal sharing in profits and losses, and equal voice in management persuaded the dissent that partnership status for NHRA was appropriate. *Id.*

79. *Id.* at 801-02. The dissent agreed with the majority that the "hybrid" test is inappropriate because courts traditionally used this test to distinguish an employee from an independent contractor. *Id.*

80. *Id.* at 802. Cardamone apparently adopted this test from EEOC Dec. No. 85-4, EMPL. PRAC. DEC. (CCH) ¶¶ 6845, 7040 (1985), discussed *supra* notes 32 and 44, because there are similarities between the two tests and because he discusses the EEOC decision before pronouncing his test. *Hyland*, 794 F.2d at 801.

81. *Id.* at 802.

82. *Id.* at 798.

83. *See supra* notes 30-32 for problems of applying the ADEA to professional service corporations and partnerships.

84. *Hyland*, 794 F.2d at 798.

The decision also enforces the congressional intent to prohibit age discrimination in the work environment; prior to *Hyland*, shareholders of professional service corporations acting as partnerships could evade the Act's strictures.[85]

In the final analysis, however, the court adopted a form over substance approach to determine whether professional service corporations and their shareholders are subject to the ADEA. The dissent correctly points out that neither labels nor titles should determine the status of an organization; rather, the manner in which an entity functions should govern whether it is subject to the discrimination laws.[86] Although the economic realities and hybrid tests are inadequate when applied to professional service corporations and partnerships,[87] the court's analysis should include an examination into the organization's actual operation. Furthermore, the EEOC, which administers and enforces the ADEA,[88] established standards for courts to use in ascertaining the Act's applicability to professional service corporations.[89] The *Hyland* court erred in failing to defer to these standards for determining Dr. Hyland's discrimination claimed against NHRA.[90]

The *Hyland* decision extends the scope of antidiscrimination acts to include shareholders of professional service corporations. Therefore, the applicability of the antidiscrimination laws to these shareholders

85. *See supra* notes 44-48 and accompanying text for a discussion of *Dowd*, holding that shareholders of professional service corporations are not employees under Title VII. Equal Employment Opportunity Comm'n v. Dowd and Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984).

86. *Hyland*, 794 F.2d at 798-99 (2d Cir. 1986).

87. *Id.* at 801-02. The *Hyland* dissent stated that these tests are inadequate because the focus differs when analyzing employment in a partnership setting; the concern there is an individual's status within his or her organization. *Id.* at 802. By contrast, when examining an independent contractor, the question is whether the person is a member of the entity. *Id.*

88. *See supra* note 24 and accompanying text for a discussion of the EEOC's responsibility to administer and enforce the Act.

89. *See supra* note 44 discussing the factors the EEOC uses in determining whether an individual is an employee or a partner.

90. Moreover, the court's decision leaves open the possibility that individuals who are actually employers will receive benefits which Congress designed for employees. To more accurately follow Congressional intent, a court should examine the organization, recalling the need to prohibit employer discrimination against employees.

becomes an additional factor that professionals must weigh in deciding whether to incorporate their practice.

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# RECENT DEVELOPMENTS