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CIRCULAR DEFINITIONS OF WHAT CONSTITUTES AN EMPLOYEE: DETERMINING WHETHER THE PARTNERS OF *SIDLEY AUSTIN BROWN & WOOD* QUALIFY AS EMPLOYERS OR EMPLOYEES UNDER FEDERAL LAW

INTRODUCTION

Federal employment discrimination statutes[1] are aimed at providing protection to "employees."[2] However, the statutes fall short of providing clear guidance as to what constitutes an employee.[3] The definitional provisions of most statutes utilize inadequate and ambiguous language.[4] For example, the Americans with Disabilities Act, Title VII, and the Age Discrimination in Employment Act all contain similar ambiguous and circular definitions.[5] All

1. There are a number of federal laws prohibiting employment discrimination, including the following: (1) Title VII of the Civil Rights Act of 1964, which prohibits job discrimination based on an individual's religion, sex, race, color, or national origin, (2) the Equal Pay Act of 1963 (EPA), which protects from sex-based discrimination, (3) the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are forty and older from job-related discrimination, (4) Title I and Title II of the Americans with Disabilities Act of 1990 (ADA), which protects individuals with disabilities that work for private companies or for state and local government from employment discrimination, (5) Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibits discrimination against people with disabilities who work for the federal government, and (6) the Civil Rights Act of 1991, which allows for monetary damages in instances of intentional job discrimination. *See* U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination: Questions and Answers* (May 24, 2002), http://www.eeoc.gov/facts/qanda.html.

2. Stephen M. Olson & Jeremy A. Mercer, *Employment Law, Physician-Shareholders and Law or Accounting Partners—Are They Employers or Employees?*, K & L ALERT (Kirkpatrick & Lockhart LLP, Boston, Mass.), April 2003. The Acts apply to "employers" with a stated minimum number of employees. *Id.* Pursuant to 42 U.S.C. § 12111(5) (2000), a business or entity must employ a minimum of fifteen employees in order to qualify as an "employer."

3. *See Whether Partners are 'Employees'*, WASH., D.C. EMP. L. LETTER (Washington, D.C.), Mar. 2003. Provisions defining "employer" and "employee" are difficult to understand in many of the Acts. The Employment Retirement Income Security Act (ERISA) defines "employee" as "any individual employed by an employer." E.R.I.S.A., Pub. L. No. 93-406, § 3(6), 88 Stat. 833, 834 (1974). The Family Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA) also use the very same definition. *See* 29 U.S.C. § 2611(3) (2000); 29 U.S.C. § 203(e)(1) (2000).

4. *See* 29 U.S.C. § 2611(3) (2000); 29 U.S.C. § 203(e)(1) (2000).

5. Kristin Nicole Johnson, *Resolving the Title VII Partner-Employee Debate*, 101 MICH. L. REV. 1067, 1070–71 (2003).

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three statutes define employee as "an individual employed by an employer."[6] Lack of clarity among the statutes makes it difficult to determine whether individuals should be treated as employees or employers under various circumstances. Furthermore, such vague definitions leave many questions as to what factors actually determine one's status as an employee.

Should lawyers who serve as partners in a law firm always be considered employers, thereby barred from the protection of employment discrimination laws? This question is not easily answered. Modern law firms present courts with a unique problem: the difficulty of delineating between those who are afforded protection under the federal anti-discrimination statutes (employees) and those who are not (employers).[7] In order to effectively answer this question, courts need to reexamine and expand traditional notions of who is a covered employee under the federal anti-discrimination acts.

It is important for courts to establish a uniform standard to determine what factors qualify an individual as an employee because many circuits are split on how to reach this conclusion.[8] Many different tests exist, each with particularized criteria.[9] Further, it is important to have a proper understanding of who qualifies as an employee because it will determine who may bring a cause of action under the federal anti-discrimination acts.[10] Therefore, it is time to solidify and determine what factors constitute an employer and an employee.

In *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood*,[11] the Seventh Circuit opened the door to the possibility that equity partners in a law firm may be considered employees and may therefore be afforded protection under federal anti-discrimination statutes.[12] Regardless of the final outcome, the decision in *Sidley* will likely "send shock waves through law firm executive committees" nationwide and will have a lasting effect on

6. *Id.*; *see* Title VII, 42 U.S.C. § 2000(f) (2000); A.D.E.A., 29 U.S.C. § 630(f) (2000); A.D.A., 42 U.S.C. § 12111(4) (2000). Courts treat Title VII, the ADEA, and the ADA "as standing in *pari passu* and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another." Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997); *see also* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

7. Catherine Lovly & Matthew J. Mehnert, *Something Every Lawyer Needs to Know: The Employer-Employee Distinction in the Modern Law Firm*, 21 HOFSTRA LAB. & EMP. L.J. 663, 664 (2004).

8. *Id.* at 665–66.

9. *Id.*

10. Peter J. Prettyman, *How to Discriminate Against Old Lawyers: The Status of Partners, Shareholders, and Members Under the Age Discrimination in Employment Act With Addendum Discussing* Clackamas Gastroenterology Associates, P.C. v. Wells, 37 IND. L. REV. 545, 546 (2004).

11. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002).

12. *Employment Bibliography Roundup of Select Articles for Employment Practitioners*, EMP. L. STRATEGIST (ALM Law Journal Newsletters, Phila., Pa.), Dec. 2002.

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how law firms are managed.[13] It appears likely that courts will adopt the analysis of the Supreme Court's 2003 *Clackamas Gastroenterology Associates, P.C. v. Wells* decision and use the common law right of control test to resolve the issue of whether partners may be considered employees.[14] Law firm partners that do not possess substantial control and decision-making power within their firms should be considered employees and should be protected under the federal anti-discrimination statutes. Therefore, the thirty-two demoted partners at *Sidley* should be considered employees and should be protected under the Age Discrimination in Employment Act.[15]

This Casenote examines whether partners of a law firm should be protected by federal anti-discrimination statutes, or in the alternative, whether partners should be barred from suing for discrimination because they are employers. Part I of this Note sets forth the facts, history, and holding of the Supreme Court's decision in *Clackamas*. Part I also explains various tests established by the Supreme Court and the circuit courts to determine what constitutes one's status as an employee. Part II describes the facts of the *Sidley* case, the common law control test, and cases following the *Clackamas* decision. Part III analyzes the *Sidley* case and the common law control test. Part III also discusses why the *Sidley* decision matters. Particularly, the analysis of this Note focuses on the outcome and implications of *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood* and any impact the decision may have on the infrastructure of law firms in America.

I. THE PRECEDENTS

A. Clackamas Gastroenterology Associates, P.C. v. Wells

In the 2003 *Clackamas* decision, the Supreme Court utilized the common law agency control test to determine who qualifies as an employee under the Americans with Disabilities Act (ADA).[16] Along with the control test, the Supreme Court used the Equal Employment Opportunity Commission's (EEOC) guideline factors to resolve the issue of whether partners may be considered employees.[17]

13. *Id*.

14. *See generally* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (finding that the common law right of control test and the EEOC guideline factors should be used to make the employer/employee distinction).

15. The congressional purpose behind the ADEA is to protect individuals forty and over from job-related discrimination. A.D.E.A., 29 U.S.C. § 631(a) (2000). Further, the Act aims to protect against discrimination between individuals protected by the Act. *See* A.D.E.A., 29 U.S.C. § 630(f) (2000).

16. *Clackamas*, 538 U.S. at 449.

17. *See id.* at 451.

In *Clackamas*, the Supreme Court acknowledged that federal anti-discrimination statutes, including the ADA, provide nominal and circular definitions of what constitutes an employee.[18] In an attempt to remedy this problem, the Court set forth a control test to determine who qualifies as an employee.[19] The Court stated that when Congress used the term employee without defining it, "Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[20] At common law, the master-servant relationship focused on the master's control over the servant.[21]

In *Clackamas*, there was a question as to whether four physicians, directors, and shareholders of a medical clinic were employers or employees.[22] The Court faced a difficult decision. Certain factors supported the conclusion that the physicians were employers.[23] For example, the physicians controlled the operation of the clinic, shared the clinic's profits, and were liable for medical malpractice claims.[24] However, evidence on the record also supported the conclusion that the physicians were employees.[25] For example, the record demonstrated that the physicians earned annual salaries, complied with the standards and rules set by the clinic, and reported to a superior.[26]

The plaintiff, a terminated employee, advocated that the Court determine whether the physicians were employees by asking whether they were "partners."[27] The Court rejected this approach, concluding that "[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners."[28]

18. *Id*. at 444.

19. *Id*. at 449–50. The Court was persuaded by the EEOC's focus on the common law element of control. *Id*. at 449. The common law definition of control examines the master-servant relationship, specifically, the master's control over the servant. *Id*. at 448.

20. *Id.* at 445 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992)).

21. *Clackamas*, 538 U.S. at 448. The Court noted that "'servant' . . . refers to a person whose work is controlled or is subject to the right to control by the master." *Id*. (citing THE RESTATEMENT (SECOND) OF AGENCY § 2(2) (1957)). "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Id.* (citing THE RESTATEMENT (SECOND) OF AGENCY § 220(1) (1957)).

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

23. *Id*. at 451.

24. *Id*.

25. *Id*.

26. *Id.* at 451 n.11.

27. *Clarkamas*, 538 U.S. at 445. The plaintiff advocated this approach rather than the common law approach. *Id.*

28. *Clarkamas*, 538 U.S. at 446; *see also* Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring).

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With nothing but past precedent to work from, the Court turned to the EEOC for guidance.[29] The EEOC employs a six-factor test to consider the question of whether an individual is subject to an organization's control.[30] The non-exhaustive list contains the following:

> 1) Whether the organization can hire or fire the individual or establish 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.[31]

Under the EEOC approach, particular titles, such as "partner," "shareholder," or "manager" are inadequate as a means to determine whether a person is, or is not, an employer.[32] To the contrary, the EEOC approach considers all pertinent factors and occurrences involved in a relationship before determining whether an individual is an employee.[33]

The Court was persuaded by the EEOC's six-factor test which analyzed said factors and focused on the common law touchstone of control.[34] The Court reasoned that all incidents in an employment relationship should be analyzed when making a determination of an individual's status as an employer or employee, and that no one factor should be decisive.[35]

In adopting the approach advocated by the EEOC, the Court concluded that courts should examine how a company or organization treats an individual when determining whether federal discrimination statutes are applicable to that

29. Lovly & Mehnert, *supra* note 7, at 671.

30. *Clackamas*, 538 U.S. at 449–50. The EEOC's six-factor inquiry lists several factors relevant to determining an individual's status as an employee. Courts look to the six factors when deciding coverage of partners, officers, members of boards or directors, and major shareholders. Craig A. Crispin, Clackamas Gastroenterology v. Wells*, An Assessment by Craig A. Crispin, Counsel for Wells* 5–6 (American Bar Association Annual Meeting Paper, 2003), *available at* http://www.bna.com/bnabooks/ababna/annual/2003/crispin.doc. The EEOC's approach emphasizes that a person's title or rank, such as partner or director, should not automatically remove an individual from the Act's coverage. *Id.* at 5. The EEOC's main goal is to protect individuals who are vulnerable to the kinds of treatment that the anti-discrimination statutes are intended to prohibit. *Id.* at 4.

31. *Clackamas*, 538 U.S. at 449–50 (quoting EEOC Compliance Manual § 605:0009).

32. Olson & Mercer, *supra* note 2.

33. *Id.*

34. *Id.*; *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

35. *Clackamas*, 538 U.S. at 451.

individual.[36] Courts need to look beyond labels and corporate form to analyze whether an individual manages and operates the business or, alternatively, whether the individual is controlled by the business.[37] Overall, the Court ruled that that the "employer" is the entity that owns, manages, and operates the business.[38] The Court emphasized that determining whether an individual is an employer or an employee requires an analysis that looks past the individual's title and beyond the title of the organization.[39]

The Court reached its conclusion in *Clackamas* after carefully analyzing different tests and methods used to make the employer/employee distinction. Therefore, case law leading up to the decision inevitably impacted the Court's ruling.

B. Supreme Court History Leading to Clackamas

Prior to *Clackamas*, the Supreme Court had first addressed the partner/employee controversy in its 1984 decision *Hishon v. King & Spalding*.[40] In *Hishon*, the Supreme Court reversed the Eleventh Circuit and held that when an associate is being considered for partner, the associate qualifies as an employee for the purposes of Title VII.[41]

Petitioner Elizabeth Anderson Hishon alleged that King & Spalding had promised to consider her for partner on a fair and equal basis.[42] Hishon further alleged that the firm rejected her for admission to the partnership on the basis of her sex, in violation of Title VII.[43] Hishon asserted that King & Spalding's acts were covered under Title VII because she was denied a term, condition, or privilege of employment.[44] Hishon further alleged that King & Spalding used the possibility of partnership to entice her into accepting an associate position.[45]

The Court held that if Hishon's allegations that the firm had promised to consider her for partnership fairly and equally were proven, partnership consideration was a term, condition, or privilege of her employment contract and, therefore, was governed by Title VII.[46] The Court further determined that

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36. Timothy M. Singhel, *Supreme Court Broadens Class of "Employees" Subject to the Federal Antidiscrimination Laws* (Holland & Knight LLP, Atlanta, Ga.), EMP., LAB. & BENEFITS (June 2003).

37. *See id*.

38. *See Clackamas*, 538 U.S. at 450; *see also* Singhel, *supra* note 36.

39. *See* Singhel, *supra* note 36. Specifically, the lower courts will be required to evaluate the six factors established by the EEOC. *Id*.

40. 467 U.S. 69 (1984).

41. *Id.* at 77.

42. *Id.* at 71–72.

43. *Id.* at 72.

44. *Id.* at 73–74.

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

46. *Id.* at 75.

Hishon likely had a cognizable claim under Title VII because the benefit of partnership consideration appeared to have been directly linked to an associate's status as an employee.[47] The Court noted in its decision that employers may not evade Title VII by labeling employees partners.[48]

In the 1992 decision, *Nationwide Mutual v. Darden*,[49] the Supreme Court recognized that the Employee Retirement Income Security Act of 1974 (ERISA) provided a nominal and circular definition of the term employee.[50] The Court concluded that when Congress uses the term "employee" and does not define it, Congress intends to describe the conventional master-servant relationship as understood by common law agency doctrine.[51] Under the common law agency approach, the following factors help determine whether a party is an employee:

> [(1)] the hiring party's right to control the [production of the product;] . . . [(2)] the skill required; [(3)] the source of the instrumentalities and tools; [(4)] the location of the work; [(5)] the duration of the relationship between the parties; [(6)] whether the hiring party has the right to assign additional projects to the hired party; [(7)] the extent of the hired party's discretion over when and how long to work; [(8)] the method of payment; [(9)] the hired party's role in hiring and paying assistants; [(10)] whether the work is part of the regular business of the hiring party; [(11)] whether the hiring party is in business; [(12)] the provision of employee benefits; and [(13)] the tax treatment of the hired party.[52]

The aforementioned list of factors is not exhaustive.[53] Under the common law agency approach, all incidents of a relationship must be analyzed because no one factor is decisive and courts must look at all factors surrounding the circumstances.[54]

Supreme Court decisions prior to *Clackamas* did not provide clear guidance for circuit courts regarding how to make the employer/employee distinction. As a result, circuit courts established different approaches to resolve the question of what constitutes an employee.

47. *Id.* at 76.
48. *Id.* at 77.
49. 503 U.S. 318 (1992).
50. *Id.* at 323.
51. *Id.* at 322–23.
52. *Id.* at 323–24.
53. *Id.* at 324.
54. *Nationwide Mutual*, 503 U.S. at 324.

C. Circuit Splits

Circuit courts have addressed the employer/employee issue by utilizing a number of different tests.[55] These tests set the stage for the *Clackamas* decision and gave the Supreme Court a number of approaches from which to choose. For example, the Tenth Circuit utilized the "total bundle" approach in order to determine whether a partner was an employee.[56] Under this approach, courts look at the total bundle of partnership characteristics in making a determination.[57] The Eleventh Circuit "look[ed] to the particular circumstances of the case at hand and, in so doing," focused "not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership."[58]

Some courts use specific tests to determine what constitutes an employer. For example, the Ninth Circuit[59] has utilized the "economic realities" or "right of control test."[60] Under this approach, courts look at factors including: compensation, claimant's liability for the company's losses, management structure of the company, and the claimant's role in management.[61]

Another type of test that several circuit courts have embraced is the hybrid test.[62] Under this approach, courts combine the "common law agency" test and the "economic realities" test.[63] Under this approach, the main factors the courts evaluate are: (1) the partner's ownership in the company, (2) the partner's managerial power, (3) the partner's compensation, (4) the partner's job security, and (5) the partner's liability for firm losses.[64]

55. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 442–44 (2003).

56. *See* Wheeler v. Hurdman, 825 F.2d 257, 276 (10th Cir. 1987).

57. *See id.*

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

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

60. Leonard Bierman, *So, You Want to be a Partner at Sidley & Austin?*, 40 HOUS. L. REV. 969, 992 (2003).

61. *Id.*

62. *See, e.g.*, Drescher v. Shatkin, 280 F.3d 201, 203 (2d Cir. 2002); Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996); Simpson v. Ernst & Young, 100 F.3d 436, 443–44 (6th Cir. 1996); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 797 (2d Cir. 1986); Hickey v. Arkla Indus., Inc., 699 F.2d 748, 751–52 (5th Cir. 1983); Goudeau v. Dental Health Servs., Inc., 901 F. Supp. 1139, 1143–44 (M.D. La. 1995); Vick v. Foote, Inc., 898 F. Supp. 330, 333–34 (E.D. Va. 1995), *aff'd*, 82 F.3d 411 (4th Cir. 1996); Jones v. Baskin, Flaherty, Elliot and Mannino, P.C., 670 F. Supp. 597, 602 (W.D. Pa. 1987), *aff'd*, 897 F.2d 522 (3d Cir. 1990) (without opinion); *see also* Lovly & Mehnert, *supra* note 7, at 681.

63. Lovly & Mehnert, *supra* note 7, at 681.

64. *See id.* at 682–87.

In the 1977 *Burke v. Friedman*[65] decision, the Seventh Circuit, interpreting Title VII of the Civil Rights Act of 1964, classified partners as possible "persons" that can act as an employer.[66] The court analyzed whether four defendant partners of an accounting firm could be considered employees.[67] The four partners had part ownership in the firm and wholly operated the firm.[68] In addition, the partners were responsible for hiring and firing, and made the final decision to fire plaintiff Barbara Burke.[69] The court adopted a per se rule as it relates to partners and concluded that where partners own and manage the operation of a business, they cannot be considered employees.[70] The court held that the equity partners of the accounting firm were employers under Title VII.[71]

In the 1996 Sixth Circuit decision *Simpson v. Ernst & Young*,[72] the court applied the hybrid test.[73] The Appellee (Simpson) was an accountant that was terminated by Ernst & Young, a large accounting company, after a merger.[74] Simpson brought suit under the Age Discrimination in Employment Act[75] (ADEA) and ERISA, and brought a supplemental state claim.[76] Ernst & Young argued that Simpson was a partner rather than an employee and that, therefore, the action was not cognizable under the ADEA or ERISA.[77]

Ernst & Young, in a matter of eighteen months, terminated 120 partners over the age of forty, while admitting 162 new partners under the age of

65. 556 F.2d 867 (7th Cir. 1977).

66. *Id.* at 869. Title VII defines an employer in part 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 year weeks in the current or preceding calendar year, and any agent of such a person . . . ." 42 U.S.C. § 2000e(b) (2000).

67. *Burke*, 556 F.2d at 868–69. Pursuant to Title VII, "employee" is defined not as a "person" but rather as "an individual employed by an employer." 42 U.S.C § 2000e(f) (2000). The Seventh Circuit analyzed whether a partner can be considered an employee under 42 U.S.C. § 2000e(f). *Burke*, 556 F.2d at 868.

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

69. *Id.*

70. *Id.*; Lovly & Mehnert, *supra* note 7, at 677–78.

71. *Burke*, 556 F.2d at 869–70.

72. 100 F.3d 436 (6th Cir. 1996).

73. *Id.* at 443. The hybrid test is a combination of the common law control test and economic realities test. *See id.*

74. *Id.* at 438–39.

75. The ADEA covers private employers, state and local government, and employment agencies that employ twenty or more persons. Crispin, *supra* note 30, at 2. In order for an individual to support a prima facie case of an ADEA violation, he must prove he "lost out because of his age." *Simpson*, 100 F.3d at 444 (citing O'Connor v. Consolidated Coin Caterers, 517 U.S. 308, 311 (1996)). Additionally, courts must find that age was a "determining factor" in a person's discharge or demotion and that such an act was willful. *Id.*

76. *Simpson*, 100 F.3d at 439.

77. *Id.*

forty.[78] Simpson was replaced by a partner under the age of forty.[79] Although Simpson was given the title "partner," the firm's business, assets, and affairs were directed exclusively by a ten to fourteen member Management Committee.[80] Simpson had no significant management control, no meaningful voting rights, no fiduciary relationship, and no job security.[81] Simpson was not a bona fide partner by any stretch of the imagination.[82] "For all practical purposes, [Simpson] was an employee with the additional detriment of having promised to be liable for the firm's losses."[83]

The trial judge concluded that Simpson was an "employee" for the purposes of ADEA, ERISA, and Ohio state law.[84] Further, the trial court entered judgment for Simpson on his ERISA claim, concluding that his discharge was in retaliation for persistent requests concerning his retirement benefits.[85] The jury returned a verdict in favor of Simpson on his ADEA claim, finding that age was a "determining factor" in Simpson's discharge and that his termination was "willful."[86] The jury awarded past earnings, past benefits, future earnings, and future benefits.[87] The United States Court of Appeals for the Sixth Circuit affirmed.[88]

Although these cases all established important tests that assuredly influenced the Clackamas decision, the cases in Part III.C. of this Note, *infra*, have applied Clackamas and demonstrate the effectiveness of the Clackamas decision.

III. *SIDLEY* SHOULD BE EVALUATED USING THE *CLACKAMAS* CONTROL TEST

A. *The Facts of* Sidley

In 1999, Sidley & Austin[89] demoted thirty-two of its equity partners after implementing a retirement policy which changed the mandatory retirement age for partners from sixty-five to a discretionary age for any partner who was

78. *Id.* at 441.
79. *Id.*
80. *Id.*
81. *Simpson*, 100 F.3d at 441.
82. *Id.*
83. *Id.* at 442.
84. *Id.* at 439.
85. *Id.* at 440.
86. *Simpson*, 100 F.3d at 439.
87. *Id.*
88. *Id.* at 444.
89. On May 1, 2001, Sidley & Austin merged with Brown & Wood. EEOC v. Sidley & Austin, No. 01-C-9635, 2002 WL 206485, at *1 (N.D. Ill. Feb. 11, 2002). The firm is now known as Sidley Austin Brown & Wood. *Id.*

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between the ages of sixty and sixty-five.[90] Thirty of the thirty-two demoted partners were over the age of forty.[91] An executive committee made the decision and demoted the thirty-two partners to "counsel" or "senior counsel."[92] The EEOC[93] instituted an investigation to determine whether the demotions had anything to do with age.[94] The EEOC filed suit against Sidley based on the firm's practice of demoting or forcing older partners into retirement.[95] "In its complaint, the [EEOC] charged that [Sidley] violated the ADEA by 'maintaining and implementing, since at least 1978, an age-based retirement policy.'"[96]

Under the ADEA, only employees are protected from discrimination.[97] In response to the EEOC's allegations, Sidley asserted that the ADEA did not apply to the thirty-two partners because they were employers and not employees.[98] To determine whether the partners were employers or employees, the EEOC requested a subpoena duces tecum.[99] The EEOC sought documents from Sidley, including information regarding coverage[100] under the ADEA and discrimination.[101]

90. *Id.*

91. *Id.*

92. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698–99 (7th Cir. 2002).

93. The EEOC enforces the federal statutes that prohibit employment discrimination. U.S. Equal Opportunity Commission, *supra* note 1. Further, the EEOC provides guidance and oversight over federal equal employment opportunities guidelines and procedures. *Id.* The EEOC has offered guidance to determine when partners and shareholders should be regarded as employees for the purposes of the federal anti-discrimination statutes. Brief for the United States and the EEOC as Amici Curiae Supporting Petitioner in Part, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (No. 01-1435), 2002 WL 31746517, at *8. The EEOC has clearly established that a person's title or rank does not determine whether that person is a partner or a shareholder versus an employee. *Id.* at *8–9. One of the main factors the EEOC analyzes to determine whether an individual is an employee is whether "the individual is subject to the organization's control" or "whether the individual acts independently and participates in managing the organization." *Id.* at *9.

94. *Sidley*, 315 F.3d at 698.

95. Anthony Lin, *EEOC Sues Sidley Austin Alleging Age Discrimination*, N.Y. L.J., Jan. 14, 2005, at 1.

96. *Id.*

97. *Sidley*, 315 F.3d at 698.

98. *Id.* at 698–99.

99. *Id.* at 698. A "subpoena duces tecum" is "[a] subpoena ordering the witness to appear and to bring specified documents, records, or things." BLACK'S LAW DICTIONARY 1467 (8th ed. 2004).

100. The EEOC sought documentation to determine whether the thirty-two partners were covered by the ADEA. *Sidley*, 315 F.3d at 698. In order for the thirty-two partners to be covered under the ADEA, the EEOC would have to show that they were employees prior to their demotion. *Id.*

101. *Id.*

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Particularly, the EEOC sought information regarding the employment status of the demoted partners, information pertaining to how the new retirement plan was developed, and the rationale for the demotions.[102] Sidley presented a jurisdictional argument, asserting that its partners were not subject to EEOC regulation and refused to provide the EEOC with all of the requested information.[103] Sidley argued that the EEOC had no jurisdiction because a partner is considered an employer under the ADEA if "(a) his income included a share of the firm's profits, (b) he made a contribution to the capital of the firm, (c) he was liable for the firm's debts, and (d) he has some administrative or managerial responsibilities—and all these things, the firm argues, have been proved."[104] Sidley asserted that the EEOC had no basis for the inquiry because the thirty-two demoted individuals were "real" partners,[105] and therefore not covered under the federal statutes.[106]

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102. Lovly & Mehnert, *supra* note 7, at 675. The EEOC further sought

> names, dates of birth, hire and admission to partnership, current title, practice groups, billing rates, hours billed and amounts collected for a several-year period, compensation and evaluative materials, and dates and reasons for separation where applicable. With respect to the 32 demoted partners, EEOC further seeks documentation for the reasons for the change of status, the date the partner was informed and the partner's subsequent fate. Further, EEOC seeks information concerning retirement policies, formal or informal, which have been in effect at Sidley since 1970 and information about all partners who have retired under a retirement policy, including their compensation from two years before retirement to the present.

EEOC v. Sidley & Austin, No. 01-C-9635, 2002 WL 206485, at *2 n.3 (N.D. Ill. Feb. 11, 2002).

103. *Sidley*, 315 F.3d at 698–99. Sidley defines a "true partner" as one that "contributes to capital, shares in the profits, is subject to the liabilities of the partnership, and participates in administration of the firm." *Sidley*, 2002 WL 206485, at *3 n.7. However, the EEOC contends that a number of additional factors "may add or detract from the core elements of [a] partnership." *Id.* Specifically, Sidley refused to provide a copy of the retirement plan, profiles of the partners, and information regarding its past retirement policies. *Id.* at *2.

104. *Sidley*, 315 F.3d at 699.

105. *Id.* at 698–99. Although no statutory definition establishes what constitutes a "real" partner, Section 541.1 of the Fair Labor Standards Act defines a "bona fide executive" as an individual:

> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

The district court ordered Sidley to comply with the subpoena, acknowledging that the Supreme Court has stated that the EEOC has the authority to initiate an investigation for alleged violations of the ADEA.[107] The court further held that "where jurisdictional [or] coverage facts are incomplete, the court will enforce the subpoena."[108]

Sidley appealed to the Seventh Circuit, again asserting that the EEOC lacked jurisdiction to bring suit.[109] The Seventh Circuit ordered Sidley to comply with the subpoena to the extent that it sought information regarding coverage and the applicability of the ADEA to the thirty-two partners.[110] The court remanded and ordered the district court to determine whether the thirty-two partners were employers or employees, and thus, whether they were covered under the ADEA.[111]

In *Sidley*, the court established that employers cannot evade anti-discrimination law simply by labeling employees "partners."[112] The court questioned the legitimacy of Sidley's claim that the thirty-two persons were full-fledged partners.[113] One of the reasons the court questioned the status of the thirty-two as partners was the unequal distribution of power.[114] At Sidley, a self-perpetuating executive committee had the majority of the decision-making power.[115] This committee, merely thirty-six of the over 500 Sidley partners, had complete power over the hiring, firing, and demotion of the thirty-two partners.[116] In addition, any committee decisions made by the thirty-two demoted partners were subject to the control of the executive committee.[117]

The court's decision to issue the subpoena demonstrates the court's willingness to conclude that under certain circumstances even individuals that

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> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent . . . [of his or her] workweek to activities which are not directly and closely related to the performance of the work described . . . .

29 C.F.R. § 541.1 (2003); *see* Joel Bannister, Comment, *In Search of a Title: When Should Partners be Considered "Employees" for Purposes of Federal Employment Antidiscrimination Statutes?*, 53 U. KAN. L. REV. 257, 272 (2004).

106. *See Sidley*, 2002 WL 206485, at *2.

107. *Id.* at *1 nn.2 & 4 (noting that the Supreme Court recognized this principle in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

108. *Id.* at *2 n.5.

109. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 699 (7th Cir. 2002).

110. *Id.* at 707.

111. *Id.*

112. *Id.* at 709 (Easterbrook, J., concurring in part and concurring in judgment).

113. *See*, *e.g.*, *id.* at 703 (majority opinion).

114. *Sidley*, 315 F.3d at 702–03.

115. *Id.* at 699, 702–03.

116. *Id.*

117. *Id.* at 699.

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are labeled "partners" may, nevertheless, be employees for the purposes of coverage under federal anti-discrimination laws. Currently, many courts, including the Seventh Circuit, remain without a legitimate test to deal with the issues presented in *Sidley*. Therefore, courts will likely look to the Supreme Court, primarily *Clackamas*, for guidance.

B. The Clackamas *Common Law Control Test*

In deciding *Sidley*, the district court should have applied the control test established in *Clackamas* because it provides the only clear guidance from the Supreme Court. Application of the control test should subdue some of the confusion among the circuits regarding how to make the employer/employee distinction. It appears that in the *Clackamas* decision, the Supreme Court somewhat settled the circuit split by following the six-factor test established by the EEOC.[118] The six-factor test establishes guidelines to determine whether a shareholder/director is an employee.[119] Although the decision provides courts with a better understanding of who qualifies as an employee for the purposes of establishing liability under the federal anti-discrimination acts, the decision allows for a fair amount of latitude in interpreting and applying the six factors.[120]

Now, even though some guidance exists, there is still a lack of predictability in applying the control test. Courts can interpret the six-factor test broadly, narrowly, or as the court sees fit. Nevertheless, the guidance provided by *Clackamas* gives all circuit courts a framework from which to work and a standard to uphold. The EEOC guidance endorsed by the Supreme Court in *Clackamas* will protect individuals "who, despite their titles, remain vulnerable to the kinds of treatment prohibited by the [anti-discrimination acts]."[121] Accordingly, the guidance applies to partnerships and its partners as well as to director/shareholders.[122] The decision may not lead to predictable results in *all* cases, but the decision will make the employer/employee distinction easier to determine.

For example, after the *Clackamas* decision, it was established that partnerships are not automatically exempt from coverage under the employment discrimination statutes.[123] Particularly, *Clackamas* established that if an executive, partner, or shareholder is subject to an organization's or

118. *Supreme Court Settles Circuit Schism on the Issue of Shareholders and Directors as "Employees" for the Purposes of Liability Under the Americans With Disabilities Act*, GIBBONS, July 9, 2003.

119. *Id.*

120. *See id.* Ambiguities brought about by the decision will inevitably leave some discretion to judicial decision-makers. *See* Bannister, *supra* note 105, at 261–62.

121. Crispin, *supra* note 30, at 8.

122. *Id.*

123. *Id.*

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partnership's control, then the person should be considered an employee and not an employer.[124] Therefore, in the *Sidley* case, it appears that the EEOC has a compelling argument that the thirty-two partners were partners in title only and that they should be protected under the federal anti-discrimination statutes.[125] Further, *Clackamas* established that the EEOC's six-factor control test should be applied in making the employer/employee distinction.[126] The control test furthers the policy goals of the anti-discrimination statutes by compelling courts to apply a factors test on a case-by-case basis. In applying the control test, the policy behind the anti-discrimination statues is furthered because more people will be protected under the statues. Through application of the test and through a totality of the circumstances analysis, courts will be able to determine whether a particular plaintiff is in need of and entitled to protection.

C. Cases Following the Clackamas *Decision*

It appears that the circuit courts are following the control test and EEOC guidelines established in the 2003 Supreme Court *Clackamas* decision. Nevertheless, there is no bright-line rule to determine the employer/employee distinction; therefore each decision will be made on a case-by-case basis.

In the 2005 decision *Solon v. Kaplan*,[127] the Seventh Circuit addressed the question of whether a partner (Solon) of a law firm was an employee, for the purposes of determining whether he was entitled to sue for retaliation under Title VII.[128] The record established that Solon was one of four general partners and that he exercised substantial control over allocation of the firm's profits, partnership agreements, and dissolution of the firm.[129] In addition, Solon had hiring and firing powers, voting rights, and an equity interest in the firm's profits.[130] The court applied the *Clackamas* control test.[131] After applying the control test, the court concluded that no reasonable juror could find that Solon was an employee of the firm.[132]

In the 2004 decision *Arbaugh v. Y & H Corp.*,[133] the Fifth Circuit utilized the *Clackamas* control test in the court's analysis of the district court's

124. *Id.*

125. *See id.* at 5; *see also* U.S. Equal Opportunity Commission, *supra* note 1 (stating that age discrimination in employment is prohibited by the ADEA).

126. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449–50 (2003).

127. 398 F.3d 629 (7th Cir. 2005).

128. *Id.* at 630.

129. *Id.* at 630–31, 633.

130. *Id.* at 633–34.

131. *Id.* at 633.

132. *Solon*, 398 F.3d at 633.

133. 380 F.3d 219 (5th Cir. 2004).

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opinion.[134] In the district court, the plaintiff (Arbaugh), who had filed a sexual harassment suit, argued that the owners of a restaurant and their wives were employees under Title VII.[135] On appeal, Arbaugh primarily argued that the owners' wives were employees of the restaurant.[136] The court looked to the following factors in reaching its conclusion: the wives were not designated as employees, and the wives, along with their husbands, shared in the restaurant's profits, losses, and liabilities.[137] The Fifth Circuit applied the six-factor control test established in *Clackamas* to the facts of the case and concluded that the district court reached the correct decision in finding that neither the owners of the restaurant nor their wives were employees.[138]

Similarly, in the 2004 Second Circuit decision *Rodal v. Anesthesia Group of Onondaga, P.C.*,[139] the *Clackamas* control test was once again utilized.[140] The Second Circuit remanded, finding that in light of the *Clackamas* decision, discovery should be reopened.[141] The court ordered the district court to determine, through applying the six-factor *Clackamas* control test, whether a doctor was an employee of an anesthesia group and thus entitled to the protections of the ADA.[142]

IV. ANALYSIS: WHY THE THIRTY-TWO SIDLEY PARTNERS ARE EMPLOYEES

A. The Sidley *Case and the Control Test*

Solon clearly demonstrates that the Seventh Circuit adheres to the *Clackamas* control test in making the employer/employee distinction. Therefore, in *Sidley*, upon remand by the Seventh Circuit, the district court will most likely apply the control test in deciding the case. However, the outcome in *Sidley* will probably be different from the outcome in *Solon* because the facts in *Sidley* are easily distinguishable. For example, in *Solon*, the facts clearly established that Solon had substantial power within the partnership on all operational levels.[143] Solon had control in areas ranging from hiring and firing to monetary decisions.[144] For these reasons, Solon was clearly an employer under the control test. On the other hand, the questions in *Sidley*

134. *Id.* at 230.
135. Arbaugh v. Y & H Corp., No. Civ.A. 01-3376, 2003 WL 1797893, at *1,*7 (E.D. La. April 3, 2003).
136. *Arbaugh*, 380 F.3d at 229.
137. *Id.* at 230.
138. *Id.*
139. 369 F.3d 113 (2d Cir. 2004).
140. *Id.* at 123.
141. *Id.*
142. *Id*.
143. *See* Solon v. Kaplan, 398 F.3d 629, 630–31 (7th Cir. 2005).
144. *See id*. at 630–31, 634.

surround the balance of power and profit sharing of the thirty-two partners. In addition, the record establishes that the thirty-two partners had very limited voting rights and no voice in hiring or firing decisions.[145] On a prima facie case basis, the thirty-two partners in *Sidley* had much less power than the partner in *Solon*.

Courts are embracing the common-law control test as the principal guidepost in making the employer/employee distinction in employment discrimination cases.[146] Many factors in *Sidley* point to the conclusion that the thirty-two partners did not possess sufficient authority to be considered employers. Applying the six EEOC factors adopted in *Clackamas*, it appears that the thirty-two partners were employees.

1. Are the Individuals Supervised?

Courts must analyze whether and to what extent the organization supervises the individual's work.[147] At Sidley, the thirty-two demoted partners' work was closely supervised by the law firm's executive committee.[148] In *Sidley*, Judge Posner "pointed to the highly centralized management of [Sidley], in which partners never voted on issues, and a self-selecting executive committee made all major decisions, in suggesting that the partners could, in fact, be employees."[149] In addition to this unequal balance of power, the executive committee oversaw all hiring, firing, promotions,

145. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 699, 702–03 (7th Cir. 2002).

146. *But cf.* Colangelo v. Motion Picture Projectionists, Operators & Video Technicians, Local 110, No. 01-C-9417, 2004 WL 406770, *3 (N.D. Ill. Feb. 26, 2004) (distinguishing *Clackamas* on the grounds that *Clackamas* dealt with a corporation and director-shareholders rather than a union and its board members). However, according to EEOC guidance, which was adopted by the Court in *Clackamas*, the same analysis that applies to corporation/director-shareholders applies to a partnership and its partners. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450 (2003); Crispin, *supra* note 30, at 8.

147. *Clackamas*, 538 U.S. at 450. The EEOC advocated a six-factor test to consider the question of whether an individual is subject to an organization's control. The non-exhaustive list contains the following: (1) "Whether and, if so, to what extent the organization supervises the individual's work," (2) "Whether the individual reports to someone higher in the organization," (3) "Whether and, if so, to what extent the individual is able to influence the organization," (4) "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts," (5) "Whether the organization can hire or fire the individual, or establish rules and regulations of the individual's work," and (6) "Whether the individual shares in the profits, losses, and liabilities of the organization." *Id.*

148. *See Sidley*, 315 F.3d at 699.

149. Lin, *supra* note 95. Judge Posner said, "[T]he question . . . is not whether Sidley is a partnership; it is. The question is whether when, a firm employs the latitude allowed to it by state law to reconfigure a partnership in the direction of making it a de facto corporation, a federal agency enforcing federal antidiscrimination law is compelled to treat all the 'partners' as employers." *Sidley*, 315 F.3d at 705.

demotions, and compensation.[150] Inevitably, the committee monitored each partner's workload.[151] Sidley scrutinized the work of the thirty-two partners, and stated that the demotions were due to "shortcomings in performance."[152] Through making this statement, Sidley admitted to supervising the thirty-two partners' work.

2. Do the Individuals Report to Someone Higher?

Courts must analyze whether the individuals report to someone higher in the organization.[153] The thirty-two partners were by no means autonomous. In *Sidley*, the thirty-two partners had to answer to higher-level partners—the members of the executive committee.[154] None of the demoted partners were on the all-powerful executive committee; the committee that decided to demote the partners.[155] In addition, any decisions made by the thirty-two partners were subject to the veto power of the executive committee.[156] At Sidley, the partners always had someone higher looking over their shoulders.

The ADEA is inapplicable only to "a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business."[157] The ADEA is applicable in *Sidley* because the stipulated facts demonstrate that the thirty-two demoted partners were not top-level officials; they were subjected to the decisions of the executive committee.[158] Further, the ADEA is applicable in *Sidley* because the demoted partners did not exercise significant control over firm business by any stretch of the imagination.

3. Do the Individuals Influence the Organization?

Courts must analyze whether the individuals were able to influence the organization.[159] In *Sidley*, the record clearly establishes that the thirty-two partners had minimal if any influential power over decision-making.[160] The only inkling of power granted to the thirty-two partners was their ability to serve on committees.[161] All decisions reached by committees, however, were

150. *Sidley*, 315 F.3d at 699.
151. *See id*.
152. *Id*. at 698.
153. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450 (2003).
154. *Sidley*, 315 F.3d at 699, 702–03.
155. *See id*.
156. *See id*.
157. 29 C.F.R. § 1625.12(d)(2) (2003).
158. *See Sidley*, 315 F.3d at 699.
159. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450 (2003).
160. *See Sidley*, 315 F.3d at 699.
161. *Id*.

subject to the control of the executive committee.[162] In addition, the partners had no say whatsoever regarding their fate at the firm, no vote, and no voice.[163] Their status at the firm was 100% in the hands of the thirty-six member executive committee.[164]

Under the ADEA, individuals that play a *significant* role in the development, recommendation, and implementation of corporate policy are exempt from protection under the Act.[165] However, the ADEA does protect middle-management and individuals with *moderate* levels of control over the business.[166] At Sidley, the thirty-two partners at best had moderate levels of control over the firm.

4. Did the Parties Intend the Individuals to be Employees?

Courts must analyze whether the parties intended the individuals to be employees.[167] Clearly, Sidley intended, at least on paper, for the thirty-two partners to be employers. However, the EEOC contends that even when an individual signs a partnership agreement, if the individual lacks substantial control over the business, the individual should be considered an employee.[168] Further, the Supreme Court established in *Clackamas* that a firm cannot, by affixing the label "partner" to someone who is *functionally* an employee, avoid federal antidiscrimination law.[169] The important point is that regardless of the language of the partnership agreement, Sidley did not give the thirty-two partners sufficient power to render them real partners; therefore they should be considered employees.

5. Could the Organization Hire or Fire the Individuals?

Courts must analyze whether the organization can hire or fire individuals.[170] At Sidley, the firm's executive committee made decisions regarding the hiring, firing, and promotion of partners and associates.[171] The record in *Sidley* clearly establishes that the thirty-two demoted partners had little hiring and firing powers.[172] In fact, on most employment issues, they

162. *Id*.

163. *See id*.

164. *Id*. at 699, 702–03.

165. *See* 29 C.F.R. § 1625.12(d) (2003).

166. *Id.*

167. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450 (2003).

168. *A Rose by Any Other Name: Keeping Partners and Professional Shareholders From Becoming Employees*, EMP. L. BRIEFINGS (Sedgwick, Detert, Moran & Arnold LLP, Chi., Ill.), Feb. 2005, *available at* http://www.sdma.com/Publications/detail.aspx?pub=4130 (select link to "February 2005 (pdf)") [hereinafter EMP. L. BRIEFINGS].

169. *Clackamas*, 538 U.S. at 449.

170. *Id*. at 450.

171. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 699 (7th Cir. 2002).

172. *See id*.

were not even given a vote. Most importantly, the hiring, firing, and demotion of the thirty-two demoted partners was in the sole discretion of the executive committee.[173]

6. Do the Individuals Share in Profits and Losses?

Courts must analyze whether the individuals share in the profits, losses, and liabilities of the organization.[174] Even if the court determines that the thirty-two demoted partners shared in the profits and losses of Sidley, this factor alone is not decisive. In *Sidley*, one of the firm's main arguments was that the EEOC had no jurisdiction to bring suit on behalf of the thirty-two partners because they were employers, not employees protected by the federal anti-discrimination laws, for the following reasons: (1) they shared in the firm's profits, (2) they contributed to the capital of the firm, (3) they were liable for the firm's debts, and (4) they had some administrative responsibilities.[175] However, the EEOC maintains that even where an individual has equity ownership, liability, and profit-sharing rights, to the extent that the individual is subject to the supervision of another and has little influence over business decisions, the individual should be considered an employee.[176] Further, under the Uniform Partnership Act (UPA),[177] a distinguishing characteristic of partnership is that partners share equally in profits.[178] In *Sidley*, the thirty-two partners' profits were determined by the executive committee.[179] Therefore, profits were not distributed equally among

173. *See id*.

174. *Clackamas*, 538 U.S. at 450.

175. *Sidley*, 315 F.3d at 699.

176. EMP. L. BRIEFINGS, *supra* note 168.

177. Under the Uniform Partnership Act, common characteristics of a partnership include the following:

> (1) The partners share equally in profits and losses . . . ; (2) they have equal rights in the management and conduct of the partnership business . . . ; (3) every partner is an agent of the partnership, and entitled to bind the other partners by his acts, for the purpose of its business . . . ; (4) all partners are liable for the debts of the partnership . . . ; (5) a fiduciary relation exists between the partners . . . ; (6) all property brought into the partnership stock is partnership property . . . ; (7) on dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

E.H. Schopflocher, *Partnership as Distinguished from Employment*, 137 A.L.R. 6 (2004) (citations omitted).

178. *Id*.

179. *Sidley*, 315 F.3d at 699. The thirty-two partners' incomes were "determined by the number of percentage points of the firm's overall profits that the executive committee assigned to each of them." *Id*.

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the partners, indicating that Sidley did not follow traditional guidelines of partnership law.[180]

The control test balances all six factors in making a final determination as to employment status. As the Court noted in *Clackamas*, "[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners."[181] At Sidley, the title "partner" was a meaningless term that attempted to bring about a false sense of distribution of power, when really all the power was centralized in one body, the executive committee. This was the case in *Sidley*, and the district court should hold that the thirty-two demoted partners at Sidley are in fact employees due to their lack of control and decision-making power.

B. The Uniform Partnership Act Suggests the Partners are Employees

Recent revisions to the UPA may have an impact in determining whether partners can be classified as employees with regard to the federal anti-discrimination statutes. The revised UPA, which has been adopted by a majority of the states, includes some provisions that appear to support a partner's right to sue as an employee for discriminatory conduct.[182] Under the revised UPA, partners can sue a partnership and a partnership may sue a partner.[183] This opens the door to litigation and inevitably takes away the sting that might otherwise come from allowing partners to sue on the basis of

180. If profits are received as wages, no proof of partnership is said to exist. *See* Schopflocher, *supra* note 177. A party is not inferred to be a partner merely because he or she is given profits as part of compensation for services. *See id.*

181. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 446 (2003). The term "partner" no longer "invokes reassuring connotations of equality" across the board. David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15, 16 (1999). In many law firms, some partners clearly possess more power than others. *Id*. Many firms divide partners into two tiers, separating them into either: (1) equity partners who divide the firm's profits, or (2) non-equity partners who are paid salaries. Geri S. Krauss, *The Nitty-Gritty on Equity*, LEGAL TIMES, Jan. 26, 2004. Even in the firms that do have a unified partnership, as opposed to a two-tiered system, there are discrepancies in compensation and control amongst partners. *Id*. The traditional "one person one vote" regime that characterized the voting scheme of law firms of the past has been replaced with firms that focus on each individual partner's contribution to the bottom line. *Id.* In many firms the partners that bring in the most clients and the most revenue receive the most profits and tend to have more significant roles in the firm's management and decision-making. *Id.*

182. Stephanie M. Greene & Christine Neylon O'Brien, *Partners and Shareholders as Covered Employees Under Federal Antidiscrimination Acts*, 40 AM. BUS. L.J. 781, 784, 808 (2003).

183. *Id*. at 812. "This right to sue permits actions during the term of the partnership and does not require dissolution in order to permit an action for an accounting. Neither does it require an action for an accounting as a prerequisite to any suit." *Id.* at n.147; *see also* UNIFORM PARTNERSHIP ACT § 405(b) (1997).

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discrimination. The revised UPA allows partners to sue firms or partnerships generally; therefore no logical reason exists to prohibit partners from suing on the basis of discrimination.

Further, the revised UPA emphasizes the importance of the entity theory.[184] The Act states that under the entity theory, "a partnership is an entity distinct from its partners."[185] The entity theory, by recognizing "partners as distinct from the partnership," increases the likelihood that a court will find a partner to be a covered employee under federal anti-discrimination statutes.[186] The theory clearly separates a partner from a partnership, the former as an individual, and the latter as a business. This important distinction demonstrates the revised Act's attempt to establish that partners possess individual rights and are not definitively tied to the partnership.

C. Partners as Employees: The Pros & Cons

In organizations that employ hundreds of partners, the supposed "co-owners of the company are, by necessity, so far removed from the seat of actual power as to be subject to the reach" of the offensive acts that anti-discrimination law seeks to remedy.[187] The *Sidley* decision may remedy this problem to a certain extent, by establishing that so-called "partners" can sue on the basis of discrimination in situations where partners lack significant control over the firm.

There are arguments both for and against considering partners to be employees. One argument against considering partners to be employees is that partnership relations could be poisoned if partners are allowed to sue each other for discrimination.[188] However, conversely, partnership relationships will be *ruined* if partners are subjected to disparate treatment and are forced to bear discrimination without any hope of recourse.

Another argument against considering partners to be employees is that because of Congress's small business exception, partners of small businesses would never be protected by anti-discrimination statutes.[189] Therefore, the

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184. UNIFORM PARTNERSHIP ACT Prefatory Note (1997). Although the revised UPA states that the entity theory should be the dominant model with regard to partnerships, "[i]t should be noted . . . that the aggregate approach, which views the partnership as a totality of persons rather than an entity in itself, is . . . retained in [the revised UPA] for some purposes, such as partners' joint and several liability." *See* Greene & O'Brien, *supra* note 182, at 809.

185. UNIFORM PARTNERSHIP ACT § 201(a) (1997).

186. Greene & O'Brien, *supra* note 182, at 809.

187. Simpson v. Ernst & Young, 100 F.3d 436, 445 (6th Cir. 1996) (Daughtrey, J., concurring).

188. Robert W. Hillman, *Law, Culture, and the Lore of Partnership: Of Entrepreneurs, Accountability, and the Evolving Status of Partners*, 40 WAKE FOREST L. REV. 793, 822–23 (2005).

189. Lauren Winters, *Partners Without Power: Protecting Law Firm Partners From Discrimination*, 39 U.S.F. L. REV. 413, 435 n.178 (2005). Congress enacted a small business

protection of partners under the Acts would be a moot point, because a portion of the population would be left unprotected.[190] However, the small business exception applies only to "really small businesses."[191] A nominal numbers of partners work in very small firms.[192] Therefore, allowing partners to be considered employees protects the great majority of the country's partners.

One of the main justifications for excluding partners from protection under the anti-discrimination statutes is that partners have other mechanisms under partnership law to protect themselves from disparate treatment.[193] At Sidley, however, none of the thirty-two demoted partners had a way to protect themselves from the committee that decided to demote them.[194] More importantly, the thirty-two partners had no vote in the decision on their demotion.[195] The *Sidley* case is a perfect example of how partnership law gives partners no effective remedy against oppression by their fellow partners.

Partners with little power or control, such as the thirty-two demoted partners at Sidley, should be classified as employees and covered under federal anti-discrimination statutes. Regardless of how *Sidley* is decided, the outcome will likely impact how partnerships and executive committees operate their businesses.

D. Why Sidley *Matters*

Under the status quo, promotion from associate to partner can leave women, minorities, and older attorneys exposed to unlawful employment practices.[196] Women and minorities have historically been discriminated against and excluded from partnership.[197] Promotion of these groups may put them in a position where they have no method of recourse if faced with discrimination.[198] In addition, older partners, often forced out when the economy takes a turn for the worse, also lack a method of recourse to combat blatant age discrimination.[199] Currently, partners in these types of predicaments are usually forced to weigh the economic benefits of partnership

exception to exempt small businesses from having to face suit under federal anti-discrimination law. *See id*. The rationale behind this policy is that Congress intended "to spare very small firms from the potentially crushing expense of mastering the intricacies of antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Id*. (citing Papa v. Katy Indus., Inc., 166 F.3d 937 (7th Cir. 1999)).

190. *See id*.
191. *Id*.
192. *See id*.
193. *Id.* at 419.
194. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 699 (7th Cir. 2002).
195. *See id*.
196. Winters, *supra* note 189, at 419.
197. *See id*. at 435 n.177.
198. *See id*. at 419–20.
199. *Firing Partners*, 02-12 PARTNER'S REP. 4, Dec. 2002.

against the professional perils of being subjected to harassment.[200] Ultimately, the partner has two choices: to leave the firm or to face harassment and humiliation.[201] However, this could all change. In *Sidley*, if the district court applies the *Clackamas* control test broadly, future courts may be encouraged to do the same.[202] An expansive interpretation of the anti-discrimination acts would protect vulnerable groups in need of protection—groups such as women, minorities, and older attorneys.

Regardless of whether the district court decides to apply the *Clackamas* control test narrowly, broadly, or at all, the court will need to determine what type of authority the thirty-two demoted partners possessed. One possibility is that the district court in *Sidley* will determine the thirty-two partners are analogous to corporate executives, especially considering that in *Sidley*, the Seventh Circuit likened the thirty-two partners' authority to the authority possessed by corporate executives, who are considered employees under federal law.[203] After all, partners and business executives share several similarities including: (1) partners can commit a firm by writing opinion letters, just as corporate executives can commit a business to contractual obligations and tort liability, (2) both usually serve on administrative committees, and (3) partners own some firm capital, while corporate executives often share in profits by use of stock options in their corporations.[204] If the district court determines that certain partners are analogous to corporate executives, law firms are likely to rethink the operational structures of their firms or even to make an effort to distinguish partners from corporate executives in partnership agreements.

The *Sidley* decision will also affect how partnerships and organizations run their businesses,[205] especially since the EEOC can now file employment discrimination suits even when the victims waive their personal right to sue.[206]

200. *See* Winters, *supra* note 189, at 419.

201. *See id*. at 419–20.

202. "[A] broad reading of the term 'employee' [is] consistent with the statutory purpose of ridding the Nation of [unlawful workplace] discrimination." Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 446 n.6 (2003).

203. *See Are Partners Employees?*, ILL. EMP. L. LETTER, Mar. 2003.

204. *Id*.

205. The *Sidley* decision will likely alter the entire litigation process with respect to the employer/employee distinction. Following *Sidley*, it appears that a plaintiff will need to address the issue of coverage under federal anti-discrimination laws from the outset of a case in situations where a plaintiff is a partner, shareholder, or high-level executive. Plaintiffs should address control issues in the early stages of discovery so plaintiffs are prepared to combat a motion to dismiss or a motion for summary judgment, motions that will likely be filed by the opposition. Crispin, *supra* note 30, at 8.

206. Joanna Grossman, *Are Law Firm Partners "Employers" for Purposes of Discrimination Law? A Federal Court of Appeals Suggests They May Not Be*, FINDLAW, Dec. 17, 2002, http://writ.news.findlaw.com/grossman/20021217.html. The Supreme Court made the

Partnerships now have to worry about both the EEOC and their own members filing employment discrimination suits.[207] Ultimately, professional corporations and partnerships have to play by the rules, or else adverse action taken against partners may be challenged under federal anti-discrimination laws.[208] In order to play by the rules, most firms will have to make some major changes.

E. *Suggestions for the Problem*

The increasingly corporate-style management that many large law firms have adopted includes a greater risk that partners will be classified as employees.[209] There are, however, a few preemptive measures that firms can take as a means of damage control. First, firms should consider the control test in *Clackamas* when structuring their partnerships and executive committees.[210] Second, firms should involve all partners in the decision-making of central issues.[211] Third, firms should allow all partners to vote on promotions, demotions, and lateral hires.[212] Fourth and finally, all partners should have a voice in important issues such as allocation of shares and retirement.[213] If partnerships fail to take these precautions, they may end up paying for it in the long run—literally.

F. *Putting It All Together*

Law firms have changed. Firms have grown in size and in structure, and many have even created several tiers of partnership.[214] The majority of larger firms, including Sidley, have centralized power structures and decision-making is devolved on a small executive committee.[215] The inevitable truth is that the thirty-two demoted partners at Sidley were not true partners at all. In fact the only true partners—the only employers—were the thirty-six powerful attorneys that headed the executive committee.[216] Sidley conducted only one firm-wide vote in the past twenty-five years.[217] Other than that, all major

determination as to the EEOC's power to sue in *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002). *Id.*

207. Grossman, *supra* note 206.
208. Olson & Mercer, *supra* note 2.
209. Paul F. Mickey Jr., *Treat Your Partners Well*, LEGAL TIMES, Sept. 22, 2003, at 2.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. Grossman, *supra* note 206.
215. *Id.*
216. *See id.*
217. *Id.*

decisions were made or finalized by the executive committee.[218] Further, in *Sidley*, the thirty-two demoted partners lacked the pivotal privilege of partnership: "co-equal control and power over the firm."[219] Under traditional partnership law, there is a common understanding that decisions affecting the firm will be made by the agreement of *all* partners.[220] In partnerships, partners are supposed to act upon the "joint opinion of all."[221] Sidley does not follow the traditional tenets of partnership law. Since Sidley does not operate a traditional partnership, it does not "deserve the immunities granted to [a] traditional [partnership]."[222]

CONCLUSION

As large law firms continue to expand, the majority of partners appear more like employees and less like employers.[223] Without a clear statutory definition of the term "employee" or definitive case law on the question, it is difficult to make the employer/employee distinction. The best guidance is the *Clackamas* decision, which applies the control test. The control test indicates that law firm partners that do not possess substantial control, and decision-making power within their firm should be considered employees and should be protected under the federal anti-discrimination statutes.

In the *Sidley* decision, the district court is likely to apply the *Clackamas* control test. The court will likely conclude that the thirty-two demoted partners were in fact employees due to their lack of control, voting rights, and decision-making power. Ideally, the decision will shed some light on how to make the employer/employee distinction. In the meantime, it may be prudent for firms to err on the side of caution by assuming that all partners are employees for the purposes of the federal anti-discrimination statutes.[224]

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218. *Id*.
219. Grossman, *supra* note 206.
220. *Id*.
221. Hillman, *supra* note 188, at 797.
222. Grossman, *supra* note 206.
223. *Firing Partners*, *supra* note 199.
224. *Are Partners Employees*?, *supra* note 203.

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