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PARTNERS SUING THE PARTNERSHIP: ARE COURTS CORRECTLY DECIDING WHO IS AN EMPLOYER AND WHO IS AN EMPLOYEE UNDER TITLE VII?

"[E]mployment relationships vary greatly and often defy easy categorization."¹ Although Title VII of the Civil Rights Act of 1964² states that an employee has standing to sue an employer for sexual harassment, many questions remain as to exactly who is an employer and who is an employee. Title VII defines who constitutes an employee³ and an employer,⁴ but the definitions under Title VII, as well as other similar statutes,⁵ are very broad. A person must be either an employee or an employer; a person cannot be both. As a result of Title VII's broad definitions of employee and employer, courts have struggled with defining who constitutes an employee and who constitutes an employer, especially in the realm of partnerships.⁶ A "partner," in most courts' views, is not automatically an employer or an employee.⁷ Many courts have set out criteria differentiating partners that are employees from partners that are employers.⁸ This area of the law has yet to be

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

2. 42 U.S.C. § 2000e (1994).

3. See *id.* § 2000e(f).

4. See *id.* § 2000e(b).

5. Although this Note focuses on Title VII, other statutes with similar definitions of employee will be discussed as they often are relevant to courts' rationale in Title VII cases. See *infra* text accompanying notes 101-21.

This Note will not address the issue of whether a partner is considered an employee for purposes of worker's compensation, compensation plans, or federal income tax regulations. For a discussion of these issues, see Randall J. Gingiss, *Partners as Common Law Employees*, 28 IND. L. REV. 21, 21 (1994) (discussing the issue of employer versus employee partners in situations outside of the statutory context).

6. See *infra* text accompanying notes 44-100.

7. See, e.g., Wheeler v. Hurdman, 825 F.2d 257, 271 (10th Cir. 1987) (applying a test that examines the economic benefits of being a partner); see also *infra* text accompanying notes 44-57.

8. See, e.g., Serapion v. Martinez, 119 F.3d 982, 990 (1st Cir. 1997) (establishing the three categories of ownership, remuneration, and management to determine if a partner is an employee); see also *infra* text accompanying notes 68-100.

For purposes of this Note, partners that are considered employees by the court will simply be called employees and partners that are considered to be employers will be called employers. Courts have used a variety of terms to describe employer partners, including bona fide partner and proprietor. See, e.g., Serapion, 119 F.3d at 990 (using the term "proprietor"); Wheeler, 825 F.2d at 277 (using the term "bona fide general partner"); Siko v. Kassab, Archbold & O'Brien, L.L.P., No. CIV.A.98-402, 1998 WL 464900, at *5 (E.D. Pa. Aug. 5, 1998) (same). Some courts have referred to a partner found to be an employer as a "partner" and a partner found to be an employee as an "employee." See Strother v. Southern Cal. Permanente Med. Group, 79 F.3d 859, 865-68 (9th Cir. 1996) (using the term "partner" to refer to a partner who is also an employer and "employee" to refer to a partner who is not an employer); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1537-40 (2d Cir. 1996) (same);

settled because of the variety of tests used by courts to make this determination.⁹

Only within the last fifteen years have courts recognized that a partner can be an employee.¹⁰ Before that time, courts automatically considered partners to be employers, merely because of their "partner" title.¹¹ This inability of partners to sue their own partnership under Title VII has been called the "Title VII gap."¹² Because of this gap, countless numbers of women partners who have been subject to discrimination have been denied legal recourse.¹³ Today, courts consider the possibility that a woman partner is an employee, but until courts engage in a uniform inquiry into the nature of partnership relationships, women partners will continue to be denied the protection of Title VII and other anti-discrimination laws.¹⁴

In early Title VII cases, courts recognized that the purpose of Title VII was to stop discrimination in employment.¹⁵ In furthering that purpose, courts must somehow recognize, in a fair and consistent manner, who is and who is not an employee. The courts' uncertainty in this area disproportionately affects women. Women only joined the workforce in large numbers in the last sixty years¹⁶ and are still a minority of workers.¹⁷ Thus, women have not been in the workforce for as long as men and not in the same numbers as

Simpson v. Ernst & Young, 100 F.3d 436, 439-46 (6th Cir. 1996) (same).

9. Compare *Serapion*, 119 F.3d at 990 (using three broad categories to determine if a partner is an employee), with *Siko*, 1998 WL 4649000, at *5 n.4 (listing thirteen specific criteria that a court should examine to determine if a partner is an employee).

10. See *infra* text accompanying notes 68-100.

11. See *infra* text accompanying notes 27-36.

12. See Elizabeth K. Ziewacz, *Can the Glass Ceiling Be Shattered?: The Decline of Women Partners in Large Law Firms*, 57 OHIO ST. L.J. 971, 981 (1996) (citing Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 41 (1994)).

13. See *infra* text accompanying notes 68-100.

14. The uniformity of courts' reviews of partnership situations also will benefit men, as uniformity of review in any situation will make the law fairer and easier to follow.

15. See Patricia Davidson, Comment, *The Definition of "Employee" under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 203 (1984) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1973)).

16. Women first joined the workforce in large numbers during World War II. See, e.g., Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 590-91 (1997) (describing how World War II increased the number of women in the workplace).

17. Women now make up close to half of the workforce, but it has taken 100 years for the number of women in the workforce to reach that level. See, e.g., John Taylor, *How We Worked in the 20th Century*, OMAHA WORLD-HERALD, Sept. 6, 1999, at 1 (reviewing changes of gender composition in the workforce during the twentieth century).

men.¹⁸ Due to that fact, many women have become partners only recently. In light of their proportionately limited compensation, decision-making power, and involvement in partnership decisions, women often are still actual employees of the partnerships they join. As employees, Title VII requires that they be protected against discrimination. Courts must contemplate a fair and consistent test to determine whether a partner is an employee for the purposes of Title VII so that women can receive the protection they deserve.

This Note will focus on courts' analyses of the Title VII employee/employer debate within partnerships. First, this Note will review the genesis of Title VII liability for partnerships in lawsuits by members of the partnership. The second part of this Note will examine recent cases and courts' analyses of partnership situations.¹⁹ Cases involving statutes with definitions of employer and employee similar to that of Title VII also will be examined, as they often affect Title VII jurisprudence.²⁰ Third, this Note will contemplate the policy implications behind different courts' uses of various factors and tests in deciding who is a partner. Finally, a recommendation will be made that courts use a test that examines in more detail the indicia of control in a partnership rather than focusing on the financial aspects of a partnership. This test would determine whether a partner is an employee or an employer so as to better protect partners who are truly employees.

18. *See id.*

19. This Note will not discuss the reasons for discrimination in partnerships or recommended remedies. For a discussion of those topics, see generally Bridge, *supra* note 16 (analyzing how gender stereotyping is a form of sex discrimination in that it negatively influences performance evaluations of women in male-dominated fields); Nancy L. Farrer, *Of Ivory Columns and Glass Ceilings: The Impact of the Supreme Court of the United States on the Practice of Women Attorneys in Law Firms*, 28 ST. MARY'S L.J. 529 (1997) (examining the effects of Supreme Court decisions on gender discrimination in the legal profession); Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171 (1994) (examining sexual harassment in the legal profession and reviewing the different enforcement mechanisms).

20. *See, e.g., Rosenblatt v. Bivona & Cohen, P.C.*, 969 F. Supp. 207, 214-15 n.5 (S.D.N.Y. 1997) (relying on the interpretation of the meaning of the word employee in the ADEA to determine if a partner is an employee for Title VII purposes).

TITLE VII AND THE EVOLUTION OF PARTNERS AS EMPLOYERS TO PARTNERS AS POSSIBLE EMPLOYEES

As previously discussed, the definition of employee under Title VII is very broad.²¹ Title VII defines an employee as "an individual employed by an employer."²² Under Title VII, an employer is not allowed to discriminate, because of sex,²³ against an employee.²⁴ The result is the question of who qualifies as an employee?

Due to such a broad definition of employee, many courts have called the definition of employee in Title VII "circular."²⁵ Litigation involving such a broad definition was inevitable.²⁶ Initially, courts found partners to have no liability under Title VII for discrimination against other partners.²⁷ One of the earliest

21. See *supra* notes 3-5 and accompanying text.

22. 42 U.S.C. § 2000e(f) (1994). Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). Title VII further defines a person as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, *partnerships*, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 [of the United States Code,] or receivers." *Id.* § 2000e(a) (emphasis added).

23. See *id.* § 2000e-2(a). Title VII also prohibits discrimination on the basis of race, color, national origin, and religion. See *id.* This Note, however, will focus only on discrimination because of sex.

24. See *id.* Title VII also speaks of not discriminating against an individual. See *id.* § 2000e-2(a)(1). Some courts have interpreted this to mean employee or potential employee. See *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997).

25. See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). In *Nationwide Mutual*, the Supreme Court said of the definition of employee under ERISA, which is very similar to that in Title VII, that the "nominal definition . . . is completely circular and explains nothing." *Id.*; see also *Serapion*, 119 F.3d at 985 (calling the Title VII definition of employee "a turn of phrase which chases its own tail"); *Wheeler v. Hurdman*, 825 F.2d 257, 263 (10th Cir. 1987) (explaining that the definition of employee under Title VII is circular in its description).

26. Some may suggest that the Supreme Court already ruled on the interpretation of the term "employee" in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), *overruled in part by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992), but most courts have not recognized the opinion as shedding any light on the issue. See *Darden*, 503 U.S. at 319. In *Hearst*, the Court said that "the term 'employee' 'derives meaning from the context of [the] statute, which 'must be read in light of the mischief to be corrected and the end to be attained.'"" Howard McCoach, *Applying Title VII to Partners: One Step Beyond*, 20 RUTGERS L.J. 741, 747 n.26 (1989) (quoting *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944)).

27. See RODNEY A. SMOLLA, *FEDERAL CIVIL RIGHTS ACTS* § 9.02[5][c] (3rd ed. 1999) (discussing the argument made by the law firm of King & Spaulding in the famous case of *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), and stating that the law firm claimed "that 'partnership' in a law firm did not constitute the type of employer-employee relationship covered by Title VII"; see also JOSEPH G. COOK & JOHN L. SOBIESKI, JR., *CIVIL RIGHTS ACTIONS* chs. 20-21, § 21.08[E], at 21-58 (1999) ("While employees of a partnership are protected by Title VII, the partners themselves are not." (citing *Burke v. Friedman*, 556 F.2d

cases that started the discussion of this issue was *Burke v. Friedman*.²⁸ In *Burke*, the Seventh Circuit determined that partners in an accounting firm are employers for purposes of Title VII liability.²⁹ The court, focusing on the Uniform Partnership Act,³⁰ opined that an entity that owns and manages a business cannot be an employee.³¹ Judge Wood wrote for the court: "Partners manage and control the business and share in the profits and losses. . . . [W]e do not see how partners can be regarded as employees rather than employers who own and manage the operation of the business."³² The court held that everyone with the title of partner must be an employer, because persons with the title partner do the particular things described above.³³ The court did not examine the facts and apply some kind of test to the facts. The court implied that a test was not necessary because the title of partner automatically means that one has the attributes of an employer.³⁴ Thus, the early cases like *Burke* either used a per se rule of no liability when a partner sued other partners or used tests

867 (7th Cir. 1977) and *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987))).

28. 556 F.2d 867 (7th Cir. 1977).

29. See *id.* at 869-70. The court wrestled with the issue because Title VII applies only to employers with more than fifteen employees. See 42 U.S.C. §2000e(b) (1995). Considering partners as employees in this case would cause the firm to be subject to Title VII. The firm had thirteen nonpartners and four partners. See *Burke*, 556 F.2d at 868.

30. UNIF. PARTNERSHIP ACT, 6 U.L.A. 125 (1914). The Uniform Partnership Act (UPA) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." *Id.* at §6. Some courts have relied on UPA definitions in examining the attributes of an employer. See, e.g., *Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996). In *Simpson*, the court used the UPA as guidance by following some of the common law principles codified in the UPA, such as the "right and duty to participate in management[,] . . . exposure to liability, the fiduciary relationship among partners[,] . . . participation in profits and losses[,] . . . [and] the extent of [an] individual's employment security . . ." *Id.* at 443-44 (footnote omitted). Other recent cases, though, do not seem to emphasize it. This is strange because in the states that have adopted the UPA, it governs partnership agreements. See *id.* at 444.

Although the Revised Partnership Act (RUPA) has been enacted only in a few states, it makes very clear that a partner is a separate entity from the partnership and seems to support liability within partnerships for suits by partners. See UNIF. PARTNERSHIP ACT §405, 6 U.L.A. 256 (1994). RUPA does not address the employee status of partners but does permit a partner to sue other partners for various reasons and recover damages. See *id.* For a more complete discussion of this issue, see generally Gingiss, *supra* note 5.

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

32. *Id.* (citations and footnote omitted). The court noted that in an earlier case, *EEOC v. Rinella & Rinella*, 401 F. Supp. 175 (N.D. Ill. 1975), the Northern District of Illinois found that two attorneys were employees because the attorneys were not listed as "of counsel" in a firm that was not a partnership. See *Burke*, 556 F.2d at 869 n.1. The court in *Burke* interpreted this to mean that "if the attorneys were partners in the law firm rather than associates, they would not be considered to be employees." *Id.*

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

34. See *id.*

that acted as per se rules.³⁵ Yet, in later cases, this type of reasoning was dismissed summarily.³⁶

The case of *Hishon v. King & Spalding*,³⁷ although not directly addressing partners as possible employees for Title VII purposes, is important because of the language that members of the Supreme Court used in the decision. The case dealt with the issue of liability under Title VII for partnerships that discriminated on the basis of sex when deciding whom to make a partner.³⁸ In this well-known case, Elizabeth Hishon, an associate in the law firm of King & Spaulding, felt she was denied membership in the partnership because of her sex.³⁹ The Court held that a partnership could be liable for discrimination, because of sex, in the decision of whom to make a partner.⁴⁰

For the purposes of this Note, this case is noteworthy because of the language in Justice Powell's concurrence. In his opinion, Powell warned that liability for discrimination against partners should not be read into the Court's decision given the very different relationship that existed among partners, as compared with the partner and nonpartner relationship.⁴¹ Powell wrote:

I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply.⁴²

The concurrence noted, however, that the label of "partner" does not *automatically* allow an employer to avoid Title VII liability.⁴³ This point is important because it reflects a movement away from the per se rule in *Burke* and other earlier cases that did

35. See *id.* at 870; see, e.g., *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) (treating shareholders in a professional corporation the same, for purposes of Title VII, as the *Burke* court treated partners in an accounting firm).

36. See, e.g., *infra* text accompanying notes 68-100 (discussing the case of *Serapion* in which the court used a multiple factor test).

37. 467 U.S. 69 (1984).

38. See *id.* at 71-73. See generally Farrer, *supra* note 19 (examining the effect of Supreme Court decisions on sex discrimination in the legal profession); Jeffrey D. Horst, Note, *The Application of Title VII to Law Firm Partnership Decisions: Women Struggle to Join the Club*, 44 OHIO ST. L.J. 841 (1983) (exploring Title VII's applicability in the law firm setting).

39. See *Hishon*, 467 U.S. at 72.

40. See *id.* at 78-79.

41. See *id.* at 79-80 (Powell, J., concurring).

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

43. See *id.* at 80 n.2 (Powell, J., concurring).

not examine the facts of each partnership situation, but rather assumed that a person with the title partner is always an employer due to her assumed role.

Soon after *Hishon*, courts began to examine more closely the facts of the relationship at issue and determine on a case-by-case basis whether a partner was an employee or an employer. In the case of *Wheeler v. Hurdman*,⁴⁴ one partner sued the other partners in an accounting firm for sexual discrimination under Title VII.⁴⁵ In determining whether Wheeler was an employee or employer, the court noted that Wheeler gave up certain rights of an employee to become a partner and gained other rights as a general partner.⁴⁶ Her duties after she became a partner, though, remained the same as before she became a partner.⁴⁷ The court decided that because the Supreme Court had not ruled on the issue of liability within a partnership, the Eleventh Circuit's view that partners are not employees should stand.⁴⁸ Still, the court opined that the chance of discrimination in a partnership would become more likely as the number of partnerships, and the number of women in partnerships continued to grow.⁴⁹

The court applied what has become known as the "economic realities test."⁵⁰ The focus of the test is "whether the individual is economically dependent on the business to which he renders service."⁵¹ As with most courts, the *Wheeler* court relied on five factors in applying the economic realities test: "(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work."⁵² The court also listed factors that were "unhelpful" in deciding whether a

44. 825 F.2d 257 (10th Cir. 1987).

45. *See id.* at 258.

46. *See id.* at 260-61.

47. *See id.* at 261.

48. *See id.* at 265.

49. *See id.* at 266 & n.17 (citing statistics that showed the number of partnerships were increasing). At the time, Main Hurdman, the accounting firm involved in the case, had 3570 personnel, 502 (14%) of which were partners. *See id.* at 260.

50. *See id.* at 268; *see also* Gingess, *supra* note 5, at 35 (discussing the economic realities test); Alan Ross Haguewood, *Gray Power in the Gray Area Between Employer and Employee: The Applicability of the ADEA to Members of Limited Liability Companies*, 51 VAND. L. REV. 429, 444-47 (1998) (same); McCoach, *supra* note 26, at 746-50 (same); Leigh Pokora, *Partners as Employees Under Title VII: The Saga Continues, A Comment on the State of the Law*, 22 OHIO N.U. L. REV. 249, 258-59 (1995) (same).

51. *Wheeler*, 825 F.2d at 271.

52. *Id.*

partner is an employee,⁵³ and concluded by stating that "bona fide general partners are not employees under the Anti-discrimination Acts."⁵⁴

Still, the court believed that some partners could be employees, because Congress thought of the employer/employee relationship as one of master and servant, not as one determined by a person's title within an organization.⁵⁵ Yet, it found Wheeler, the plaintiff, a bona fide partner because of her liability for profits and losses, investment in the firm, partial ownership of firm assets, and voting rights.⁵⁶ *Wheeler* is still cited often because it was one of the initial cases that looked beyond the title of partner to distinguish between who is an employee and who is an employer.⁵⁷

MODERN JURISPRUDENCE: THE FACTORS CONSIDERED BY COURTS TODAY WHEN DECIDING WHO IS AND IS NOT AN EMPLOYEE

Title VII

The following recent cases exemplify the approaches modern courts have taken toward determining who is and is not an employee under Title VII.

*Rosenblatt v. Bivona & Cohen, P.C.*⁵⁸

In *Rosenblatt*, a federal district court determined that a nonequity partner in a law firm was an employee for Title VII purposes.⁵⁹ This case presented an interesting situation because when the plaintiff joined the firm, it was organized as a

53. See *id.* at 272. The court noted but basically disregarded the factors used in cases in which a court must distinguish between an independent contractor and an employee. Such factors include whether the occupation requires skill, "whether the employer 'furnishes the equipment used and the place of work,' [the] 'length of time during which the individual has worked,'" and whether payment is by the job or by time spent. *Id.* (citation omitted).

54. *Id.* at 277.

55. See *id.* at 275-76. In a later case, *Auld v. Cooper, Beckmen, & Tuerk*, No. 92-1356, 1992 WL 372949 (4th Cir. Dec. 18, 1992), The Fourth Circuit decided whether partners were employees to determine if a law firm had enough employees to be subject to Title VII. In holding that a partner is not an employee for purposes of Title VII, the court did not closely examine the duties and responsibilities of the partners, proclaiming only that "partners have a financial stake in the firm's success, and directly govern operations." *Id.* at *2.

56. See *Wheeler*, 825 F.2d at 276.

57. See, e.g., *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1089-90 (10th Cir. 1991) (discussing *Wheeler* in deciding if a franchisee is an employee for Title VII purposes).

58. 969 F. Supp. 207 (S.D.N.Y. 1997).

59. See *id.* at 208.

partnership, but when the firm dismissed the plaintiff, it was organized as a professional corporation.⁶⁰

The court did not fully explain its reasoning, but it appears the court applied a per se rule that only a shareholder in a professional corporation can be an employer. The court stated that "where defendant is admittedly a professional corporation of which plaintiff is a non-equity partner, plaintiff is a corporate employee for Title VII purposes."⁶¹ If the organization had been a partnership, the

60. See *id.* at 210. Due to the fact that professional corporations are a somewhat new entity, this area of the law has not yet completely evolved. All courts do not currently consider the facts of each situation in determining whether a shareholder is an employee of a professional corporation. For instance, in *EEOC v. Dowd & Dowd Ltd.*, 736 F.2d 1177 (7th Cir. 1984), shareholders in a professional corporation were held to be similar to partners and therefore not employees. The court stated that "[t]he economic reality of the professional corporation in Illinois is that the management, control, and ownership of the corporation is much like the management, control, and ownership of a partnership. We therefore see no reason to treat the shareholders of a professional corporation differently for purposes of Title VII actions than we did partners of the accounting firm in *Burke*." *Id.* at 1178; see also *supra* text accompanying notes 28-34.

Some courts have considered surrounding circumstances, but still found the shareholder to be an employer. In *Fountain v. Metcalf, Zima & Co. P.A.*, 925 F.2d 1398 (11th Cir. 1991), the court looked at control, management, and ownership factors, as did the court in *Serapion*. See *Serapion v. Martinez*, 119 F.3d 982, 990 (1st Cir. 1997). *Fountain*, a shareholder, was liable for the firm's losses and expenses, compensated based on the firm's profits, could vote his 31% share of ownership, and had input into employment decisions. See *Fountain*, 925 F.2d at 1401. The court found that *Fountain* was not an employee. See *id.* In another case, *EEOC v. Johnson & Higgins, Inc.*, 91 F.2d 1529 (2d Cir. 1996), in holding that the employer's directors were also employees for purposes of the ADEA, the court applied a three part test: "(1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; [and] (3) whether the director reported to someone higher in the hierarchy." *Id.* at 1539 (citing *Lattanzio v. Security Nat'l Bank*, 825 F. Supp. 86, 90 (E.D. Pa. 1993)).

Finally, some courts have found that shareholders of professional corporations are employees. See *Hyland v. New Haven Radiology, P.C.*, 794 F.2d 793, 798 (2d Cir. 1986) (holding that once the defendant corporation elected to do business in the corporate form, it was precluded from asserting that economic realities entitled it to be treated as a de facto partnership for Title VII purposes); *Johnson v. Cooper, Deans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D.N.H. 1994) (arguing that defendant corporation cannot avoid liability under Title VII by calling its employees who own shares "partners"); *Jones v. Baskin, Flaherty, Elliot and Mannino, P.C.*, 670 F. Supp. 597, 601 (W.D. Pa. 1987) (finding a shareholder in a professional corporation to be an employee and using a hybrid test, "combining the common law 'right to control' standard with the 'economic realities' standard").

The employer/employee dilemma has arisen in the context of other corporate entities as well. For a discussion of the liability of directors and officers in corporations, see generally Robert Cavallaro, Note, *Corporate Buyer Beware: Deficiencies in Directors' and Officers' Insurance for Employment Practices Liability*, 26 HOFSTRA L. REV. 217 (1997). For a complete discussion of the employee versus employer issue with regard to limited liability corporations, see generally Daniel S. Kleinberger, "Magnificent Circularity" and the *Churkendoose: LLC Members and Federal Employment Law*, 22 OKLA. CITY U. L. REV. 477 (1997).

61. *Rosenblatt*, 969 F. Supp. at 215.

court would have found the plaintiff to be an employee of the partnership as well.⁶²

The court acknowledged that a partner is only an employer when a "true partnership relationship exists"⁶³ and this is to be determined on a case-by-case basis.⁶⁴ The court then looked to *Hyland v. New Haven Radiology Associates*,⁶⁵ a professional corporation case in which the plaintiff alleged discrimination under the ADEA. In *Hyland*, the court distinguished corporate employees from partners.⁶⁶ "Where the individual involved is a corporate employee . . . we hold that every such employee is 'covered' for purposes of the ADEA and that any inquiry respecting partnership status would be irrelevant."⁶⁷

The *Rosenblatt* court seemed to focus on the fact that *Rosenblatt* was a nonequity partner, not an equity partner. Without regard to *Rosenblatt*'s management duties or control of corporate decisions, the court found him to be an employee because he lacked a share of the financial pie that belonged to the two shareholders. Thus, to the *Rosenblatt* court, the only factor to be weighed in determining partnership status is whether an ownership interest is involved.

Serapion v. Martinez

One of the most notable recent cases is *Serapion v. Martinez*.⁶⁸ Margarita Serapion became a "junior" or "non-proprietary" partner in the firm of Colorado, Martínez, Odell Calabria & Sierra in 1986.⁶⁹ In 1990, she became a "senior" or "proprietary" partner.⁷⁰ Her compensation was not equivalent to the named partners,⁷¹ but she did become a voting member of the firm's Executive Board and assumed liability for the firm's actions.⁷² Although the named partners promised Serapion that she would be compensated equally to the named partners within three years, the firm broke up before the three year period ended and the promise was never realized.⁷³ Three of the named partners and most of the other lawyers at the

62. *See id.* at 214-16.

63. *Id.* at 214.

64. *See id.* at 215.

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

66. *See id.* at 798.

67. *Id.*

68. 119 F.3d 982 (1st Cir. 1997).

69. *See id.* at 984.

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.* at 985.

firm formed a new firm, which Serapión was not invited to join.⁷⁴ The lower court, at the summary judgment stage, found for the defendants because it found Serapión not to be an employee.⁷⁵ The Court of Appeals for the First Circuit affirmed the lower court.⁷⁶ The court used three basic categories, "ownership, remuneration, and management,"⁷⁷ to determine whether Serapión was an employee or an employer. Each category included a number of different factors that may vary from case to case.⁷⁸ The three categories themselves were only guidance, the court noted, and deserved a different amount of emphasis depending on the facts of the case at hand.⁷⁹ The court recommended the use of a "totality of the circumstances" standard for the "close" cases in which a court may find it difficult to decide whether a partner is an employee.⁸⁰

Factors under the first category, ownership, include "ownership of firm assets and liability for firm debts and obligations."⁸¹ The second category is remuneration. "Under [remuneration], the most relevant factor is whether (and if so, to what extent) the individual's compensation is based on the firm's profits."⁸² A less important factor is what kind of fringe benefits the person receives, as compared to "similarly situated employees who possess no ownership interest."⁸³ The factors in the third category, management, include the right to engage in policymaking, participation and voting power in firm governance, ability to direct firm activities of employees, and ability to act for the firm and its principles.⁸⁴

The court grouped together the categories of ownership and remuneration and found "powerful indications," in both categories, that Serapión was an employer.⁸⁵ Her compensation, to a great degree, depended on the firm's profits, and she was liable for any

74. *See id.*

75. *See id.* at 990.

76. *See id.* at 993.

77. *See id.* at 990. This test has been called the "ownership, compensation, and management hybrid test." David R. Stras, *An Invitation to Discrimination: How Congress and the Courts Leave Most Partners and Shareholders Unprotected from Discriminatory Employment Practices*, 47 U. KAN. L. REV. 239, 256 (1998).

78. *See Serapion*, 119 F.3d at 990.

79. *See id.*

80. *See id.* at 990. Because the decision was determining the outcome of a summary judgment motion, the court considered only the partnership agreement, the firm's Executive Committee notes, and facts agreed upon by the parties. *See id.* at 990-91.

81. *Id.* at 990.

82. *Id.*

83. *Id.*

84. *See id.*

85. *See id.* at 991.

losses of the firm.⁸⁶ Serapión also "received very generous fringe benefits," including a car allowance of over \$10,000 per year and a yearly discretionary allowance of \$16,400.⁸⁷ The court described this as "comparable" to other proprietary partners and "more extravagant" than junior partners.⁸⁸ Under the categories of ownership and remuneration, she was clearly an employer in the court's eyes.⁸⁹

In the third category, management, the court found the determination under this prong of the test "less clear."⁹⁰ Serapión attended meetings of the Board of Partners but did not vote because nonproprietary partners could not vote.⁹¹ She was, however, a voting member of the Executive Committee, a committee that dealt with issues such as employment matters, accession of new partners, and fees.⁹² Meeting minutes indicated she was an involved participant.⁹³ The court also made special note of the fact that she signed checks for the firm.⁹⁴ Thus, Serapión's management went beyond her membership on the Board of Partners and included her involvement as a voting member of the executive committee. This additional responsibility qualified her as an employer.⁹⁵

Serapión argued that her position and influence as a partner were less than those of the other four partners, and therefore she was an employee of the more senior partners.⁹⁶ The court made it clear, however, that having less power and influence than the other partners did not mean that she was an employee.⁹⁷

Serapión also pointed out that although she had the right to vote and was a member of the boards and committees of the firm, she had no influence within them.⁹⁸ The court again refuted her argument, stating that some persons naturally tend to dominate meetings but that this does not necessarily mean the others are

86. *See id.*

87. *Id.*

88. *Id.*

89. *See id.*

90. *Id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.* at 991-92.

97. *See id.* at 992.

98. *See id.*

employees.⁹⁹ The court concluded that "all roads lead to Rome. . . . [Serapión is a] bona fide equity partner."¹⁰⁰

Related Statutes

Statutes with similar definitions of employee and employer often are construed together.¹⁰¹ The following cases exemplify courts' recent decisions involving statutes with definitions of employer and employee similar to Title VII.

*Strother v. Southern California Permanente Medical Group*¹⁰²

In *Strother*, an African-American woman partner in a medical group alleged racial and gender discrimination under the California Fair Employment and Housing Act (FEHA).¹⁰³ FEHA defines an employee as "[a]ny individual under the direction and control of an employer."¹⁰⁴ The lower court dismissed the claim on summary judgment; the court said Strother could not possibly "plead [a] set of facts to show that she was actually an 'employee.'"¹⁰⁵ The lower court made its decision that she "was not an employee based solely on her complaint, the attached partnership agreement, and Strother's 'partner' label."¹⁰⁶ The appeals court reversed the lower court and noted that the partnership agreement stated that Strother had little control of the company (the control was within the Board of Directors), her compensation was based upon her performance to some degree, and she could be "disciplined for poor performance."¹⁰⁷ With only a few facts to consider, the appeals court found a genuine issue of material fact to sustain the case. The court declared that "determining whether an individual is an 'employee' typically requires a factual inquiry which goes beyond merely the partnership agreement and the 'partner' label."¹⁰⁸ The court stated:

Courts must analyze the true relationship among partners, including the method of compensation, the "partner's"

99. *See id.*

100. *Id.*

101. *See Rosenblatt v. Bivona & Cohen, P.C.*, 969 F. Supp. 207, 214 n.5 (S.D.N.Y. 1997).

102. 79 F.3d 859 (9th Cir. 1996).

103. *See id.* at 863-64.

104. CAL. CODE REGS. tit. 2, § 7286.5(b) (1995). California uses Title VII and ADEA cases to interpret FEHA. *See Strother*, 79 F.3d at 866.

105. *Strother*, 79 F.3d at 868.

106. *Id.* at 867.

107. *Id.*

108. *Id.*

responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.¹⁰⁹

The appeals court claimed that it examined the facts and analyzed whether a true partnership relationship existed, but in actuality, the court applied a per se rule.

*Siko v. Kassab, Archbold & O'Brien, L.L.P.*¹¹⁰

In *Siko*, the plaintiff alleged a violation of the Family and Medical Leave Act (FMLA).¹¹¹ As does Title VII, the FMLA also defines an employee as "any individual employed by an employer."¹¹² The court cited factors discussed in *Serapion*¹¹³ and *Simpson*¹¹⁴ as those a court should use when trying to determine whether an individual is a bona fide partner or an employee.¹¹⁵ The *Siko* court, however, analyzed the factors as a list of thirteen:

(1) the right and duty to participate in management; (2) the right and duty to act as an agent of other partners; (3) exposure to liability; (4) the fiduciary relationship among partners; (5) use of the term "co-owners" to indicate each partner's "power of ultimate control"; (6) participation in profits and losses; (7) investment in the firm; (8) partial ownership of firm assets; (9) voting rights; (10) the aggrieved individual's ability to control and operate the business; (11) the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; (12) the extent of the individual's employment security; (13) and other similar indicia of ownership.¹¹⁶

109. *Id.*

110. No. CIV.A.98-402, 1998 WL 464900 (E.D. Pa. Aug. 5, 1998).

111. 29 U.S.C. § 2601 (1994). Under the FMLA, the Act only applies to employers with fifty or more employees. *See id.* § 2611(4)(A)(i). The defendant in this case had 45 employees that were not partners. If the partners in the firm were considered employees, the plaintiff could have brought her case under the Act because the defendant would have employed more than fifty people. *See Siko*, 1998 WL 464900, at *4.

112. 29 U.S.C. § 2611(3) The FMLA actually defers to the Fair Labor Standards Act (FLSA) definition of employee, which is found in 29 U.S.C. § 203(e) (1994). *See Siko*, 1998 WL 464900, at *4. Senator Hugo Black stated that the definition of employee under the FLSA was the "broadest definition that has ever been included in any one [A]ct." 81 CONG. REC. 7657 (1937) (statement of Sen. Black).

113. *See Serapion v. Martinez*, 119 F.3d 982, 989 (1st Cir. 1997).

114. *See Simpson v. Ernst & Young*, 100 F.3d 436, 443 (6th Cir. 1996).

115. *See Siko*, 1998 WL 464900, at *5.

116. *Id.* at *5 n.4 (citations omitted).

The decision was made on a summary judgment motion, and the court found a genuine issue of material fact as to whether the partners were employers.¹¹⁷ The court found that the partners at issue could be considered employees.¹¹⁸ The important distinction, the court noted, was that as part of a limited liability partnership, the partners were not liable for all of the losses and benefits of the partnership—a very different situation from *Wheeler* and *Hull*.¹¹⁹ Thus, the existence of a limited liability partnership could support a finding that partners are employees in the Title VII area as well. The court noted that a dispute also existed as to whether “of counsel” employees are independent contractors rather than employees.¹²⁰ As the defendant had not provided the court with enough information to rule on that issue, the court noted only that the same factors listed above would be applied to “of counsel” members of the firm and used to establish their status as employer or employee.¹²¹

POLICIES UNDERLYING RECENT COURT DECISIONS

A few different rationales seem to underlie recent court decisions that determine who is and is not an employee. These rationales are explored below.

If one is a partner in a large group of partners, she is more likely to be classified as an employee.

It seems obvious that the role of one partner may not be the same as that of another partner.¹²² In today's world, large professional firms are getting larger; and with growth comes more partners.¹²³ Power still remains in the hands of the few, and lower level partners in a larger organization may more easily be seen as employees, as compared to small partnerships with only a few members and a more even distribution of power.¹²⁴

117. See *id.* at *5.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. See *Serapion v. Martinez*, 119 F.3d 982, 987 (1st Cir. 1997).

123. See, e.g., *Wheeler v. Hurdman*, 825 F.2d 257, 266 (10th Cir. 1987) (citing statistical data reporting U.S. partnerships in service areas grew from 239,000 in 1979 to 306,000 in 1983).

124. See Charles S. Caulkins & James J. McDonald, Jr., *Lawyer Terminations: Increasingly the Subject of Employment Discrimination Suits*, FLA. B.J., Feb. 1991, at 27, 27.

For example, the *Strother* case involved a large medical partnership.¹²⁵ Although the decision involved was only a summary judgment motion and made no final determination as to Strother's status as an employee or an employer, the court suggested reasons why she might not have been an employer.¹²⁶ As with Strother, lower level partners often are subject to employment evaluations, do not participate in many "management" decisions, and their compensation may not be tied to the partnership's profits. These job characteristics reflect the role held by many lower level partners in large firms.

In another case involving a large firm, *Simpson v. Ernst & Young*,¹²⁷ the court held that the partner was an employee for the purposes of the ADEA.¹²⁸ The court found that the necessary indicia of ownership was not present.¹²⁹ In a similar large accounting firm case, *Caruso v. Peat, Marwick, Mitchell & Company*,¹³⁰ the court found that a genuine issue of material fact existed as to whether the plaintiff was an employee, able to sue under the ADEA.¹³¹ At the time of the case, the accounting firm had 1350 partners, only 300 of whom were in management positions.¹³² Thus, the size of the partnership and the allocation of management duties may be key factors in a court's decision.

If one holds the title "partner," one has the power to prevent discrimination against oneself.

Courts may be hesitant to find partners, even those with little or no control in the partnership, to be employees because of the belief that a partner is in a better position, as compared to a nonpartner, to stop discrimination due to the partner's co-ownership interest and all that comes with it.¹³³ Courts continually have struggled to determine where to draw the line in the spectrum

125. See *Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 863 (9th Cir. 1996).

126. See *supra* text accompanying note 107.

127. 100 F.3d 436 (6th Cir. 1996).

128. See *id.* at 444.

129. See *id.* at 443-44.

130. 717 F. Supp. 218 (S.D.N.Y. 1989).

131. See *id.* at 223.

132. See *id.* The ratio of partners to associates or nonpartners is not always a significant issue. As the court in *Serapion* stated, "[w]e take judicial notice of the fact that many law firms have partner/associate ratios near one-to-one, yet few lawyers working for these firms would deny that the partners enjoy a status fundamentally different from that of the associates." *Serapion v. Martinez*, 119 F.3d 982, 991 n.7 (1st Cir. 1997).

133. See *Gingiss*, *supra* note 5, at 31-37.

of power among partners in name only and partners with the power of a true employer.¹³⁴ Tests used by the courts often focus on various powers and sources of power available to partners because those powers theoretically will enable a partner to deal with discrimination more or less easily.

For example, in *Serapion*, although the court found clear indications that Serapion held the power of an employer,¹³⁵ that did not necessarily mean that she had the power to avoid discrimination. She attended partnership meetings and wrote checks for the firm, allowing her to have some power in the firm;¹³⁶ yet she did not have nearly as much power as the other partners in the firm did.¹³⁷

There are indications in recent cases, however, that some courts would label partners to be employers only when they have significant power in a partnership. For example, the court in *Siko* utilized factors that would attest to the power that is present in a partner who can prevent being a target of discrimination.¹³⁸ Three of the thirteen factors named by the court include the right and duty to participate in management, voting rights, and the extent of an individual's employment security.¹³⁹ Although the court made no determination as to Siko's status, a partner who meets those criteria likely can avoid workplace discrimination. In contrast, the court in *Strother* found that Strother did not have the power of a partner who can avoid discrimination; rather, Strother was a small fish in a big pond.¹⁴⁰ Thus, Strother properly was found to be an employee.

If one makes more money than most people do in the employ of the partnership, one must be an employer.

One of the major goals, if not the main goal, of any business is to make money. Partners make the most money in any partnership, although not all partners make the same amount of money. In fact, there may be a large gap in partners' salaries. Still, some courts consider the ability to make a lot of money to be key to

134. See, e.g., *Serapion*, 119 F.3d at 990 (holding status determinations must be made along a continuum with no single factor given significantly more weight).

135. See *supra* notes 85-89 and accompanying text.

136. See *Serapion*, 119 F.3d at 991.

137. See *id.* at 991-92; see also *supra* text accompanying notes 90-91.

138. See *Siko v. Kassab, Archbold & O'Brien, L.L.P.*, No. CIV.A.98-402, 1998 WL 464900, at *5 (E.D. Pa. Aug. 5, 1998).

139. See *supra* text accompanying note 116.

140. See *supra* text accompanying note 107.

the decision of who is and is not an employee. Courts generally give the economic strength of a partner more weight than the amount of management control of the partner. This is exemplified in both *Serapion* and *Rosenblatt*.

The grouping of the three overall factors used by the *Serapion* court—ownership, remuneration, and management—all seemed to come down to a bottom line: was Serapión making a lot of money? The court heavily weighed the economic factors and basically disregarded Serapión's lack of management control.¹⁴¹ Likewise, in *Siko*, ten of the thirteen factors listed by the court involved economic issues.¹⁴² Additionally, in *Rosenblatt*, the court based its decision on the fact that Rosenblatt was a nonequity partner, who did not hold the same economic power as partners with equity.¹⁴³ Many courts view salary as the deciding factors in determining who is an employer.

RECOMMENDATION: A PRESUMPTION OF EMPLOYEE STATUS,
REBUTTED BY THE MANAGERIAL CONTROL/ECONOMIC STATUS TEST

The emphasis of courts seems to be moving more toward economic, rather than control, factors. Perhaps this movement is because the goal of a partnership or corporation is to make money, and a person's place in furthering that goal, or being held accountable for not reaching that goal, more accurately reflects who is an employer or an employee. Yet, this emphasis seems to go directly against the ideals of anti-discrimination statutes. It is the power of a person, or rather the lack thereof, that causes her to be subject to discrimination and at the mercy of those who discriminate.¹⁴⁴ Anti-discrimination statutes seek to protect those with less power. Perhaps an inquiry into the economic indicia of ownership is appropriate to determine who really has the power within an organization, but other indicia of power must be at least equally important. The *Serapion* test is good in that it combines such factors, yet the case exemplifies how such a test can be manipulated and abused. The two weighted factors, ownership and remuneration, were solely economic. The third factor,

141. See *supra* text accompanying notes 85-95.

142. See *supra* text accompanying note 116.

143. See *supra* text accompanying notes 59, 61.

144. See, e.g., Bridge, *supra* note 16, at 639-42 (analyzing the case of *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990), in which gender stereotypes may have influenced employment evaluations and allowed an all-male partnership to deny a woman promotion to partner).

management, was minimized completely. The court claimed that the "totality of the circumstances" must be viewed,¹⁴⁵ but it ignored the blatant action of forming an entire law firm less one person and the power differential that allowed such discriminatory action to occur.

Given that federal courts do not use a uniform test to determine whether a partner is an employer or employee, there is a great need for certainty in this area of the law. This problem of interpretation of a partner's status as an employer or employee within the partnership can be solved.¹⁴⁶ One solution would be to allow a partner filing suit under Title VII to enjoy a rebuttable presumption of employee status.¹⁴⁷ To overcome the presumption, the partnership would have to prove, using "substantial evidence[,] that the plaintiff shared in the firm's profits and had joint control of the partnership."¹⁴⁸ This would afford partners, who are functionally employees and therefore do not have the power of an employer, an easier process by which to make a claim. In this way, the interpretation of the anti-discrimination statutes would no longer contribute to the stronghold of discriminators.¹⁴⁹

Such a test would enable courts to apply the spirit of Title VII more fairly and consistently. The test would focus on two central principles that reflect power in the workplace to rebut the presumption: managerial control and economic situation. Managerial control, however, should be weighed more heavily, as it is a better indicator of whether the discriminatee has any power in the employment relationship. The following is a list of possible factors that courts could consider within each category:

Managerial Control: power to vote; percentage of voting power within the partnership; the size of the partnership; power to fire or hire nonpartners and partners; power to control her own business or assignments; power to provide input to the partnership.

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

146. The approach taken by the English, for instance, is to protect all partners from sex discrimination regardless of their status of employee or employer. See *Gingiss*, *supra* note 5, at 22.

147. See *McCoach*, *supra* note 26, at 774-75.

148. *Id.* at 775.

149. The Supreme Court said of the interpretation of the word "employee" in a congressionally approved statute: "Congress . . . was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the . . . dispute." *Wheeler v. Hurdman*, 825 F.2d 257, 276 (1987) (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944)).

Economic Situation: power to represent the partnership in economic matters, i.e. power to write checks, power over salaries, etc.; share in the losses or gains of the partnership; earning level as compared to other partners.

This test would make the courts' job easier and simpler. In a clear manner, the test considers the two most important parts of the equation: the actual control a partner has within the partnership and the economic power and liability a partner maintains within the partnership. Importantly, a court's main investigation is into the amount of managerial control, ensuring that one who is found to be an employer does have enough control to avoid discrimination.

By more clearly focusing on the most important indicia of true partners and emphasizing the control that is so key to the purpose of Title VII and other anti-discrimination statutes, courts could make better decisions as to who deserves their protection and who does not.

CONCLUSION: HONORING THE PURPOSE OF TITLE VII

Title VII and other statutes' definitions have not provided the guidance courts need to determine who is an employer and who is an employee. The courts have been forced to fill in the gaps. Originally, courts found no liability was possible for a partnership that was being sued by a member partner. Then, some courts, attempting to look at the facts of each case, found liability for a partnership in lawsuits by partners who were functionally closer to employees rather than employers.

The tests used by courts, with varying factors, have caused uncertainty. Although some of the same factors are being used today as were used by the early courts, the early courts "applied" such factors in what were really *per se* decisions of no liability, with no real examination of the factors, always finding a partner to be an employer. Today courts actually examine the circumstances instead of making an automatic assumption.

Questions still remain, though, regarding many aspects of the tests used by courts today. What factors are the most important in making the distinction between an employee and employer: economic status or managerial control? How can a partnership know who within the partnership is an employer or employee without litigating the question?

Courts have focused on a variety of factors, as evidenced by the discussions of the cases within this Note. Many of the same factors

continue to be used, but under different guises and with differing weight. Whereas some courts have relied on definitions and reasoning provided by the Uniform Partnership Act,¹⁵⁰ the economic indicia of ownership seem to continue to be a favorite of the courts,¹⁵¹ but should this be the case?

Anti-discrimination statutes should protect those who lack the power to protect themselves through other means. The economic position of a partner within a partnership may not provide the court with a clear picture, or at least not a complete picture, of the power relationship within a partnership. Other factors should be weighed equally with, or more heavily than, the economic factors emphasized by the courts today. One such issue that courts implicitly consider is the size of the partnership, which sheds light on one's power within the partnership. That and other indicia of managerial control will help courts determine whether a partner was truly vulnerable to discrimination.

A presumption that a partner is an employee for Title VII purposes, rebuttable by a primary examination of the partner's managerial control within the organization and a secondary examination of her economic status, will ensure that the courts engage in a proper balancing of factors when determining whether partners may involve Title VII.

The purpose of anti-discrimination statutes, such as Title VII, should be at the forefront of any debate regarding the definition of "employer" and "employee." To carry out the spirit of these statutes, as courts have been tasked to do, the courts must ensure that those who deserve the protection of these statutes are recognized as such and afforded the rights intended by Congress.

DAWN S. SHERMAN

150. See *supra* note 30.

151. See *supra* text accompanying notes 141-43.