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Partners as Employees Under the Federal Employment Discrimination Statutes: Are the Roles of Partner and Employee Mutually Exclusive?

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COMMENTS

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I. INTRODUCTION

In an effort to combat employment discrimination against present and prospective employees, Congress enacted Title VII of the Civil Rights Act of 1964,¹ the Age Discrimination in Employment Act of 1967 (ADEA),² and the Equal Pay Act of 1963.³ Although these statutes define the terms "employer" and "employee," they do not specifically address whether partners can qualify as employees in employment discrimination actions.⁴ Thus, in a growing number of

1. 42 U.S.C. §§ 2000e to e-17 (1982).

2. 29 U.S.C. §§ 623-634 (1982 & Supp. IV 1986).

3. 29 U.S.C. § 206(d) (1982).

4. Congress has adopted several statutes that address discriminatory employment practices. This Comment will confine its discussion to Title VII, the ADEA, and the Equal Pay Act because they currently represent the only federal employment discrimination statutes under which the issue of whether partners can qualify as employees has arisen. See *infra* text accompanying notes 47-152. Although outside the scope of this Comment, other federal statutes that prohibit employment discrimination include the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982), the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), and Title VI of the Civil Rights Act of 1964, 42 U.S.C.

cases,⁵ courts have struggled with the issue of whether partners in general partnerships should be permitted to invoke the protections of these antidiscrimination laws.⁶ The majority of courts that have faced this question have held that a partner's unique status as co-owner and manager of the partnership precludes that partner from qualifying as an employee.⁷

Considerable uncertainty remains as to the status of partners under these statutes, however, because the courts that have confronted the issue generally have relied upon faulty assumptions regarding the operation of modern partnerships, and have otherwise failed to rigorously analyze the issue. The courts, therefore, have yet to determine conclusively whether, and under what circumstances,

§ 2000d (1982). For a discussion of the various federal statutes that prohibit employment discrimination, see P. COX, *EMPLOYMENT DISCRIMINATION* (1987); G. RUTHERGLEN, *MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION* (1983); C. SULLIVAN, M. ZIMMER & R. RICHARDS, *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* (1980) [hereinafter C. SULLIVAN].

5. Between 1978 and 1983, the total number of partnerships in the service industry in the United States increased from 241,000 to 306,000, and the number of partners increased from 783,000 to 1,275,000. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES 1987*, at 506 (107th ed. 1987). This tremendous growth has increased the probability that partners will bring more discrimination claims against partnerships. *Wheeler v. Hurdman*, 825 F.2d 257, 266 (10th Cir.), *cert. denied*, 108 S. Ct. 503 (1987).

6. *Courts Split on Whether Partners Are "Employees" Under Discrimination Laws*, 56 U.S.L.W. 1021 (Aug. 11, 1987). The question of whether partners may be considered employees has arisen in other contexts. In most states, for example, a partner cannot receive workmen's compensation because he is not considered an employee. See A. BROMBERG, *CRANE AND BROMBERG ON PARTNERSHIP* 24 (1968); see also 1C A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 54.30 (1986) ("With the exception of Oklahoma and Louisiana, every state that has dealt judicially with the status of 'working partners' or joint venturers has held that they cannot be employees."). The courts have reached this conclusion through the use of the aggregate theory of partnership, whereby the partner "is an employer, which precludes his being an employee. As an entrepreneur, he does not belong to the working class for whose benefit compensation acts were passed." A. BROMBERG, *supra*, at 24; see also A. LARSON, *supra*, at § 54.31 ("[Because] the partnership is nothing more than the aggregate of the individuals making it up, a partner-employee would also be an employer. The compensation act cannot be supposed to have contemplated any such combination of employer and employee status in one person."). Under the aggregate theory of partnership, a partnership is not treated collectively as an entity, but rather, it is viewed as a group of individuals. A. BROMBERG, *supra*, at 18-19. In a minority of jurisdictions, however, a partner can receive workmen's compensation under the entity theory of partnership. See A. BROMBERG, *supra*, at 24; see also A. LARSON, *supra*, at § 54.30-31. Under the entity theory of partnership, a partnership is "a distinct entity or legal person separate and distinct from the persons composing it as in the case of the corporation." F. MECHEM, *ELEMENTS OF THE LAW OF PARTNERSHIP* 8 (1920). For an examination of the conflict between the aggregate and entity theories of partnership, see Crane, *The Uniform Partnership Act: A Criticism*, 28 HARV. L. REV. 762 (1915); Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838 (1916); Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377 (1963); Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158 (1915).

7. See *infra* text accompanying notes 47-78 & 90-130.

Congress intended to allow partners to prosecute claims of employment discrimination.⁸ Few partners have initiated suits in this context because until recently, the number of women and minorities in professional partnerships was negligible.⁹ As women and minorities enter professional schools, and subsequently into professional partnerships with increasing frequency, the number of discrimination claims is likely to grow significantly.¹⁰ Courts must therefore determine whether to afford partners the protections of the employment discrimination statutes.

The determination of whether a partner qualifies as an employee often turns on whether a true partnership relationship exists. Resolving this question, however, is not a simple process¹¹—especially in light of the antiquated notions that pervade the present understanding of modern partnerships, their members, and their operations.¹² Such notions impede any attempt to establish standards for distinguishing a partner from an employee. This Comment suggests a viable approach to the issue that is consistent with Congress' intent in enacting the employment discrimination statutes. Section II of this Comment examines the statutory language relating to employee coverage under Title VII, the ADEA, and the Equal Pay Act. This Section also reviews the various tests that courts have implemented to construe the term "employee" under these statutes. Section III focuses specifically on the different approaches that federal courts have taken to decide whether partners may be considered employees. Finally, Section IV rejects the various approaches taken by the federal courts and concludes that in light of the language, history, and purpose of the federal

8. According to one court, there is currently no logical test to distinguish a partner from an employee under federal employment discrimination statutes. *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144, 148 (S.D.N.Y. 1987).

9. See *Wheeler*, 825 F.2d at 266-67; see also Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 948 (1982) (noting the historical absence of blacks in "jobs with high pay or status, or with significant social or political power.").

10. *Wheeler*, 825 F.2d at 266.

11. *Caruso*, 664 F. Supp. at 148.

12. Professor Hillman has noted that "partnership law has not been tested against the conditions under which partnerships today operate." Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 429 (1987). In addition, Professor Hillman has raised questions that focus on how partnerships truly function:

How many partnerships are formed without written agreements? What do partners assume concerning the norms that will govern their conduct? Do partners regard themselves as fiduciaries? What types of bargaining activities occur when the parties do not focus their attention on development of a written partnership agreement? Is bargaining an activity that takes place continuously throughout the life of a partnership? How important are non-economic interests, such as status and self-esteem, to partners? How egalitarian are partnerships?

Id.

employment discrimination statutes, partners should be permitted, under certain circumstances, to invoke the protections given to employees under these laws.

II. WHO IS AN "EMPLOYEE" UNDER THE FEDERAL EMPLOYMENT DISCRIMINATION STATUTES?

A. *The Statutory Definitions of the Term "Employee"*

The determination of whether a partner may be considered an employee under the Equal Pay Act, Title VII, and the ADEA must commence with an examination of the term "employee" as it is defined in these statutes. In 1963, Congress enacted the Equal Pay Act as an amendment to section 6 of the Fair Labor Standards Act of 1938 (FLSA).¹³ The Equal Pay Act codifies the principle of "equal pay for equal work" by prohibiting employers from paying disparate wages to their employees on the basis of gender.¹⁴ The Equal Pay Act provides that "the term 'employee' means any individual employed by an employer."¹⁵ This definition of "employee," however, is vague and circular, and does not directly address the status of partners.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against present or prospective employees on the basis of race, color, gender, religion, or national origin.¹⁶ The statute

13. See C. SULLIVAN, *supra* note 4, at 587 ("[The Equal Pay Act] contains only a few coverage provisions of its own, looking mainly to the FLSA to define its reach.").

14. Section 3 of the Equal Pay Act provides in relevant part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1982).

15. 29 U.S.C. § 203(e)(1) (1982).

16. Section 703(a) of Title VII provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

defines "employee" as "an individual employed by an employer."¹⁷ Because of the circularity and ambiguity of this definition, one can only speculate whether the term "employee" encompasses partners under Title VII.¹⁸ In addition, the statutory exemptions to the definition of "employee," although explicitly excluding certain individuals, do not cover partners.¹⁹

The ADEA emanated from a series of civil rights laws that began with the passage of the Equal Pay Act of 1963, and continued with Title VII of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.²⁰ The ADEA makes it unlawful for an employer to discriminate against present or prospective employees on the basis of age,²¹ and employs a definition of "employee" that is nearly identical to that found in the Equal Pay Act and Title VII.²² The ADEA, therefore,

employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

17. 42 U.S.C. § 2000e(f) (1982).

18. See C. SULLIVAN, *supra* note 4, at 94 ("Title VII does not, in its definition of 'employer' or 'employee,' indicate what tests will be applied in this regard, with the result that several decisions have had to wrestle with the question of when 'employment' leaves off and some other form of business association begins.").

19. Section 701(f) of Title VII, which contains a definition of the term "employee," provides:

[T]he term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. § 2000e(f) (1982).

20. J. KALET, *AGE DISCRIMINATION IN EMPLOYMENT LAW* 1 (1986).

21. Section 4(a) of the ADEA provides:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1982). For an examination of the ADEA in the context of the compelled retirement of partners in law firms, see Note, *The Age Discrimination in Employment Act and Mandatory Retirement of Law Firm Partners*, 53 S. CAL. L. REV. 1679 (1980).

22. Section 11(a) of the ADEA provides the following definition of "employee":

The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or

provides no guidance to determine whether Congress intended to protect partners from age discrimination.

Similarly, the Uniform Partnership Act (UPA), which the majority of jurisdictions has adopted,²³ fails to provide definitive guidance for determining whether partners should be considered employees. The UPA defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."²⁴ The UPA is useful in ascertaining whether a particular individual is a partner because it identifies certain attributes that are traditionally indicative of partner status.²⁵ It does not, however, address whether a partner may qualify simultaneously as an employer and employee. Furthermore, the UPA's utility is severely limited because partners may override the UPA's provisions by entering into a written agreement.²⁶ The UPA, therefore, applies only if the partners are in dispute regarding an aspect of the partnership's operations.²⁷ Thus, an individual may be a partner under the UPA even if those traditional attributes of the partnership relationship that are identified in the statute are absent with regard to certain "partners."

Because the statutory language of the federal employment discrimination statutes fails to indicate whether a partner can invoke the protections given to employees, and the decisions of administrative

any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

29 U.S.C. § 630(f) (1982 & Supp. IV 1986).

23. UNIF. PARTNERSHIP ACT, 6 U.L.A. 1 (Supp. 1984).

24. UNIF. PARTNERSHIP ACT § 6(1), 6 U.L.A. 22 (1969).

25. Under section 7(4) of the UPA, for example, with certain specified exceptions, partner status may be inferred if an individual receives a share of business profits. 6 U.L.A. 39 (1969). Sections 9, 13, and 14 of the UPA make it clear that partners are agents of the partnership, and as such, they may bind the partnership. *Id.* at 132, 163, 173. Partners may be jointly and severally liable for debts of the partnership under section 15 of the UPA. *Id.* at 174. Additionally, under section 18(e), partners are equally entitled to manage and operate the partnership. *Id.* at 213.

26. See B. DEFREN, PARTNERSHIP DESK BOOK 16-17 (1978); see also A. BROMBERG, *supra* note 6, at 365 ("The incidents of the relation as between the partners are subject to such agreements as they may make. . . . If the partners make no specific agreements with regard to certain details, the law applies rules which are in accordance with mercantile usage.").

27. See B. DEFREN, *supra* note 26, at 3 ("The provisions of [the UPA] generally govern the rules of behavior for the members of a partnership, but a binding agreement can vary most of the Act's provisions as they affect the relationship of the partners to each other."); Hillman, *supra* note 12, at 433 ("Deference to agreements is a recurring theme of the U.P.A., which expressly subordinates many of its more important provisions to contrary agreements between partners.").

agencies interpreting these statutes shed little light on this issue,²⁸ a review of the judicial construction of the term "employee" is required.

B. *The Judicial Construction of the Term "Employee"*

Before a plaintiff may invoke the protections afforded by federal employment discrimination statutes, he must show that an employment relationship exists between him and the defendant.²⁹ Deciding whether partners can establish the requisite employment relationship under these laws poses a new inquiry for the courts. In cases arising under the employment discrimination laws, courts have found it necessary to adopt employee coverage tests that were developed in other contexts to distinguish between employees and independent contractors.³⁰

In Title VII cases, for example, courts have employed three different tests to determine whether a particular individual is an

28. H. EGLIT, AGE DISCRIMINATION § 16.04 (1987) ("[T]he Department of Labor merely indicated that the term *employee* included an applicant for employment; the Equal Employment Opportunity Commission guidelines simply refer to the statutory definition."). The Equal Employment Opportunity Commission (EEOC) is the agency responsible for interpreting and enforcing Title VII, the ADEA, and the Equal Pay Act. *Wheeler v. Hurdman*, 825 F.2d 257, 265-67 (10th Cir.), *cert. denied*, 108 S. Ct. 503 (1987); *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 797 (2d Cir. 1986). In a case in which a female law clerk brought a claim for sex discrimination against a law firm partnership that employed her, the EEOC addressed the question of whether some or all of the individual partners of the partnership could be considered employees under Title VII. EEOC Dec. No. 85-4, 2 Empl. Prac. Guide (CCH) ¶ 6,846 (Mar. 18, 1985). In this case, the EEOC did not view the partners as employees because each had an equal voice in the control and management of the firm, and shared the profits and losses from the enterprise among themselves. *Id.* In holding that the partners could not be considered employees under Title VII, the EEOC noted that, in some circumstances, persons who have the status of partner may in reality be employees. *Id.* n.4. The EEOC specified some of the factors that it would consider: "In determining whether the individual is a partner or an employee in a particular case, the Commission will consider relevant factors including, but not limited to, the individual's ability to control and operate the business and to determine compensation and the administration of profits and losses." *Id.* The EEOC, however, has not consistently followed this approach to determine employee status. See *Wheeler*, 825 F.2d at 265-67.

29. See *Hyland*, 794 F.2d at 796 (stating that the ADEA's "protection extends only to those individuals who are in a direct employment relationship with an employer, and that a claim under its provisions lies solely in favor of a person who is an employee at the time of termination"); *Kyles v. Calcasieu Parish Sheriff's Dep't*, 395 F. Supp. 1307, 1310 (W.D. La. 1975) ("[A]n employer-employee relationship is an essential element of coverage under [Title VII]. There is no such relationship here. . . . [T]herefore . . . this Court is without jurisdiction over those portions of the complaint which would rest on Title VII."); C. SULLIVAN, *supra* note 4, at 587 ("As with Title VII, a prerequisite for FLSA coverage [of which the Equal Pay Act is an amendment] is an employer-employee relationship, a concept which may raise such problems as distinguishing 'employees' from 'independent contractors' or other relationships.").

30. See, e.g., *Mares v. Marsh*, 777 F.2d 1066 (5th Cir. 1985); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32 (3d Cir. 1983); *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983).

employee or an independent contractor.³¹ Under the common law "right-to-control" test,³² a person is an employee—not an independent contractor—if the person for whom the work is being performed reserves the right to control the end product, as well as the details and means of achieving that result.³³

The second test that courts have applied to determine employee status under Title VII is an "economic realities" test.³⁴ Under this test, the court determines employee coverage by examining "the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the

31. See, e.g., *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158 (5th Cir. 1986); *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983); *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978).

32. *Dutra*, 410 F. Supp. at 516.

33. *Id.* Before 1947, the common law right-to-control test was the generally accepted standard for distinguishing employees from independent contractors. *Zippo*, 713 F.2d at 36. The *Dutra* court, however, rejected cases that were decided after 1947 that called for the application of a much broader test in suits involving such federal social legislation as the Fair Labor Standards Act, the Social Security Act and the National Labor Relations Act. *Dutra*, 410 F. Supp. at 516. In adopting the common law test, the *Dutra* court relied on the judicial construction of "employee" under the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (Supp. II 1984)). *Id.* Any review of the decisions interpreting "employee" under the NLRA is beneficial to an understanding of Congressional intent in enacting Title VII because Congress specifically modeled Title VII after the NLRA. *Armbruster v. Quinn*, 711 F.2d 1332, 1341 (6th Cir. 1983). In the landmark case of *NLRB v. Hearst Publications, Inc.*, the Supreme Court of the United States construed the term "employee" under the NLRA. 322 U.S. 111, 113 (1944). The NLRA's definition of employee is just as ambiguous and circular as the definition contained in Title VII. Section 2(3) of the NLRA provides in relevant part: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." 29 U.S.C. § 152(2) (1982). The Supreme Court in *Hearst* found that the common law right-to-control test was too restrictive, and stated that the term "employee" in the NLRA must be broadly construed "in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications," with a view toward fulfilling the purpose of the Act. 322 U.S. at 129.

Twenty-four years after the *Hearst* decision, however, the Court again faced the question as to the proper test that courts should utilize to distinguish employees from independent contractors under the NLRA. In *NLRB v. United Insurance Company of America*, the Court adopted the traditional common law agency test as the standard for determining employee status. 390 U.S. 254, 256 (1968). The principal reason why the Court departed from the expansive *Hearst* test was because Congress, in its adverse reaction to the *Hearst* Court's interpretation of the NLRA, passed an amendment that explicitly excluded independent contractors from the NLRA's definition of "employee." *Id.* Thus, the *Dutra* court believed that Congress intended for courts to determine employee coverage under Title VII by applying the traditional common law test because of the Supreme Court's construction of "employee" under the NLRA, and because of the *Dutra* court's failure to discover any Congressional intent to the contrary in Title VII's legislative history. *Dutra*, 410 F. Supp. at 516.

34. *Armbruster*, 711 F.2d at 1341.

act was designed to eliminate.”³⁵ In contrast to the common law right-to-control test, the economic realities test gives the term “employee” an expansive meaning by requiring it to be construed in light of the purpose to be achieved under the statute and the evil that Congress sought to eradicate.³⁶ The determinative question under this test is whether the individual so depends upon the business with which he is connected that he comes within the protection of Title VII, or is “sufficiently independent to lie outside its ambit.”³⁷

The third, and most common, test that courts utilize in Title VII cases to determine employee status is a hybrid of the economic realities and the common law right-to-control tests.³⁸ Under the hybrid

35. *Id.* at 1340. The Supreme Court of the United States first applied this test in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 113, 132 (1944) (In applying the test to determine whether newsboys were employees or independent contractors under the NLRA, the Court held that the National Labor Relations Board's determination that the newsboys were employees was supported by the record and had a rational basis in the law). See *supra* note 33.

36. *Armbruster*, 711 F.2d at 1340. Courts have also applied the economic realities test in cases arising under the Social Security Act, ch. 531, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397 (1982 & Supp. IV 1986)), and the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982 & Supp. IV 1986)). In *United States v. Silk*, the Supreme Court of the United States found the traditional common law right-to-control test inappropriate for determining employee coverage under the Social Security Act. 331 U.S. 704, 713-14 (1947). Rather, the Court used the economic realities test that it earlier had espoused in the context of the National Labor Relations Act. *Id.* The Court stated that “degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required” were significant factors to consider under the economic realities test, without any single factor disposing of the existence of an employment relationship. *Id.* at 716. Seven days after deciding *Silk*, the Court confirmed the propriety of applying the economic realities test under the Social Security Act. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). In *Bartels*, the Court recognized the element of control as a traditional characteristic of the employer-employee relationship but reasoned that “in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.” *Id.* Under the *Bartels* test, courts must examine the total relationship along with the *Silk* factors. *Id.*

Courts generally apply the economic realities test in cases arising under the FLSA. *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982) (“It is well-established that the issue of whether an employment relationship exists under the FLSA must be judged by the ‘economic realities’ of the individual case.”); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (“Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA.”). Courts have been reluctant, however, to use the economic realities test in Title VII cases. See *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983).

37. *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-12 (5th Cir.) (reasoning that “[i]t is dependence that indicates employee status”), *cert. denied*, 429 U.S. 826 (1976). For an illustration of how the economic realities test is applied under social legislation such as the FLSA, see *Mednick v. Albert Enters., Inc.*, 508 F.2d 297 (5th Cir. 1975).

38. Comment, *The Application of Antidiscrimination Statutes to Shareholders of Professional Corporations: Forcing Fellow Shareholders Out of the Club*, 55 *FORDHAM L. REV.* 839, 844 (1987) (maintaining that true partners are not employees under the federal employment discrimination laws whether courts apply the common law agency test, the economic realities test, or the hybrid test). For a contrary view, see Paone & Reis, *Effective*

test, the economic realities of the work relationship is a significant consideration, but the primary focus is on the degree of control that the employer may exercise over an individual's performance of his responsibilities.³⁹

The tests for determining employee status in Title VII cases also apply to cases arising under the ADEA and the Equal Pay Act. These statutes not only define "employee" similarly, but also, they have the common purpose of prohibiting employers from discriminating against employees.⁴⁰ In addition, courts generally agree that the

Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers, 40 S. CAL. L. REV. 615, 639-40 (1967) ("Using either the common law test or the Social Security test, there are some partners who should be considered employees who are protected by federal nondiscrimination controls.").

39. *Mares v. Marsh*, 777 F.2d 1066, 1067 (5th Cir. 1985) (discussing the common law test, the economic realities test, and the hybrid test, and listing the various jurisdictions in which they have been adopted). The hybrid test was first articulated in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979). See Comment, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 214 (1984). The *Spirides* court listed the following factors for courts to consider under the hybrid test:

- 1) [T]he kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
- 2) the skill required in the particular occupation;
- 3) whether the "employer" or the individual in question furnishes the equipment used and the place of work;
- 4) the length of time during which the individual has worked;
- 5) the method of payment, whether by time or by the job;
- 6) the manner in which the work relationship is terminated; i.e. by one or both parties, with or without notice and explanation;
- 7) whether annual leave is afforded;
- 8) whether the work is an integral part of the business of the "employer";
- 9) whether the worker accumulates retirement benefits;
- 10) whether the "employer" pays social security taxes; and
- 11) the intention of the parties.

Spirides, 613 F.2d at 832. Under the economic realities test, an individual is deemed an employee if he is economically dependent upon the business to which he renders service. Under the hybrid test, however, "it is the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative." *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir.), cert. denied, 459 U.S. 874 (1982). For examples of cases in which courts have applied the hybrid test under Title VII, see *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158 (5th Cir. 1986); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984), aff'd, 770 F.2d 157 (2d Cir. 1985).

40. Compare *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978) ("The specific evil at which Title VII was directed was not the eradication of all discrimination by private individuals, undesirable though that is, but the eradication of discrimination by employers against employees.") with *EEOC v. Chrysler Corp.*, 759 F.2d 1523, 1524 (11th Cir. 1985) ("Congress passed the ADEA in 1967 to protect older workers against discrimination in the workplace.") and *Ende v. Board of Regents of Regency Universities*, 757 F.2d 176, 183 (7th Cir. 1985) ("Although the Equal Pay Act is narrowly focused on the problem of wage differentials based on sex its broad remedial purpose is the elimination of sexual discrimination against women.") and *Shultz v. American Can Co.*, 424 F.2d 356, 360 (8th Cir. 1970) ("[T]he elimination of gender discrimination and the raising of the level of women's wages" were included in the broad remedial purposes of the Equal Pay Act.).

remedial nature of these statutes necessitates liberal construction.⁴¹ Consequently, decisions that construe a provision of one of these statutes may be persuasive authority for construing similar provisions contained in the other statutes.⁴²

In cases arising under the ADEA, courts are divided as to the proper test for determining employee status. In *Hickey v. Arkla Industries, Inc.*,⁴³ for example, the Fifth Circuit applied the expansive economic realities test, but expressed "no opinion on whether it or one of the tests used in Title VII cases should ultimately be used to determine employee status in ADEA cases."⁴⁴ The Third Circuit, however, has adopted the hybrid test in the ADEA context.⁴⁵

Because the Equal Pay Act is an amendment to the FLSA, and courts have routinely used the economic realities test in cases arising under the FLSA, there is a strong inference that the economic realities test is appropriate for determining whether a person is an employee under the Equal Pay Act.⁴⁶

41. See *Hein v. Oregon College of Educ.*, 718 F.2d 910, 913 (9th Cir. 1983) ("The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.") (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974)); *Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983) ("To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction."); *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976) ("The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment."), *aff'd*, 434 U.S. 99 (1977).

42. See *EEOC v. Reno*, 758 F.2d 581, 583-84 (11th Cir. 1985) ("[Because] the 'prohibitions of the ADEA were derived *in haec verba* from Title VII,' . . . decisions under the analogous section of Title VII [are] highly relevant to the issue [of the personal staff exemption of the ADEA].") (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)); *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981) ("The analysis of a claim of unequal pay for equal work is essentially the same under both the Equal Pay Act and Title VII."); *Hodgson v. First Fed. Sav. & Loan Ass'n of Broward County, Fla.*, 455 F.2d 818, 820 (5th Cir. 1972) ("With a few minor exceptions the prohibitions of [the ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex, or national origin.'").

43. 699 F.2d 748 (5th Cir. 1983).

44. *Id.* at 751. The case involved the issue of whether a manufacturer's sales representative was an employee under the ADEA. *Id.*

45. *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983). According to one commentator, the economic realities test that developed in cases arising under the FLSA is the proper test that for determining employee coverage under the ADEA, rather than the hybrid test. See Comment, *Equal Employment Opportunity Commission v. Zippo Manufacturing Co.: Choice of a Test for Coverage of the Age Discrimination in Employment Act*, 64 B.U. L. REV. 1145, 1185 (1984) (contending that *Zippo* was incorrectly decided).

46. *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974); see *supra* note 13 and accompanying text. In *Blankenship v. Western Union Telephone Co.*, the Fourth Circuit held that the FLSA does not apply to partnerships. 161 F.2d 168 (4th Cir. 1947). The *Blankenship* court stated, however, that it did not hold "that members of partnerships may not, acting

III. CAN A PARTNER QUALIFY AS AN "EMPLOYEE"?

A. *The Per Se Rule*

In *Burke v. Friedman*,⁴⁷ the United States Court of Appeals for the Seventh Circuit became one of the first courts to determine whether partners can qualify as employees under federal employment discrimination legislation. The plaintiff in *Burke* sued an accounting firm that was organized as a partnership, and the individual partners, alleging that the partnership discriminated against her with regard to employment terms and conditions, and discharged her on the basis of gender in violation of Title VII.⁴⁸ Because Title VII applies only to employers with fifteen or more employees, and the defendant firm employed only thirteen employees, both parties agreed that Title VII would apply to the defendant firm only if the individual partners also qualified as employees under the statute.⁴⁹ The district court held that the partners' roles could not be that of employer and employee, and therefore granted the defendants' motion to dismiss the case for lack of subject matter jurisdiction.⁵⁰ The court reasoned that because the defendants had hired and fired the plaintiff, they must have been her employer.⁵¹ The Seventh Circuit, on appeal, confronted the question of whether the lower court erred in refusing to view the individual partners as employees within the meaning of Title VII's definition of "employee."⁵² In holding that the defendant partners were not employees under Title VII, the Seventh Circuit affirmed the district court's order.⁵³ Because the court perceived a partnership as an association of co-owners who control and manage a business and share in the resulting profits and losses, it could not envision partners as employees.⁵⁴ Although the *Burke* court "recognize[d] that 'Title VII's definition of "employee" is not restrictive, [and that] the existence of such a status for a certain individual must turn on the facts of

purely in their individual capacities, be 'employees' under the Act," therefore suggesting that partners may be employees under the FLSA. *Id.* at 169.

47. 556 F.2d 867 (7th Cir. 1977).

48. *Id.* at 868.

49. *Id.* at 868-69.

50. *Id.* at 869.

51. *Id.* As a consequence of this finding, the defendants did not meet Title VII's jurisdictional requirement of fifteen or more employees. *Id.* at 868-69. Title VII's provisions only apply to employers that are "engaged in an industry affecting commerce [and have] 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) (1982).

52. 556 F.2d at 868-69. The court stated that "[t]he narrow question which is raised in this case is whether a partner can be an employee within the meaning of § 2000e(f) despite the fact that the partnership can be an employer pursuant to § 2000e(b)." *Id.*

53. *Id.* at 870.

54. *Id.* at 869.

each case,' ”⁵⁵ it maintained that Title VII “does not expand the definition of employee to include a partner.”⁵⁶ The court in *Burke* thus adopted a per se rule that partners cannot be considered employees under Title VII.⁵⁷

In *EEOC v. Dowd & Dowd, Ltd.*,⁵⁸ the Seventh Circuit reaffirmed its reluctance to equate partners with employees under Title VII.⁵⁹ The court in *Dowd* faced the question of whether shareholders in a professional corporation, who were engaged in the practice of law, were employees of that corporation under Title VII.⁶⁰ In disposing of this question, the Seventh Circuit held that shareholders of a professional corporation could not qualify as employees.⁶¹ The court perceived “no reason to treat the shareholders of a professional corporation differently for purposes of Title VII actions than [it] did partners of the accounting firm in *Burke*.”⁶²

The Eleventh Circuit, in *Hishon v. King & Spalding*,⁶³ also adopted the per se rule that partners cannot be considered employees. The plaintiff in *Hishon* initiated a Title VII suit against the defendant law firm, contending that the defendant discriminated against her on the basis of sex by refusing to invite her into its partnership.⁶⁴ To establish the necessary employment relationship under Title VII, the plaintiff asserted that the partners in the law firm were treated in a way that was similar to the way in which corporate employees are treated.⁶⁵ The district court, however, held that Title VII is inapplicable to partnership decisions and dismissed the case for lack of subject matter jurisdiction.⁶⁶

On appeal, the plaintiff exhorted the court “to adopt an ‘economic reality’ test for determining whether the partners at King & Spalding [were] ‘employees.’ ”⁶⁷ The Eleventh Circuit, however,

55. *Id.* (quoting *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, *reh'g denied*, 409 U.S. 1050 (1972)).

56. *Id.* at 870.

57. *Id.*

58. 736 F.2d 1177 (7th Cir. 1984).

59. *Id.* at 1178.

60. *Id.* at 1177.

61. *Id.* at 1178.

62. *Id.* The Second Circuit rejected this approach in *Hyland v. New Haven Radiology Associates*, in which the court stated: “We disagree with the Seventh Circuit and hold that the use of the corporate form precludes any examination designed to determine whether the entity is in fact a partnership.” 794 F.2d 793, 798 (2d Cir. 1986).

63. 678 F.2d 1022 (11th Cir. 1982), *rev'd on other grounds*, 467 U.S. 69 (1984).

64. *Id.* at 1024.

65. *Id.* at 1026.

66. *Id.* at 1024.

67. *Id.* at 1027 n.9.

adopted the test employed by the Fifth Circuit in *Calderon v. Martin County*,⁶⁸ in which the Fifth Circuit stated that the status of "an employee under Title VII is a question of federal, rather than of state, law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand."⁶⁹ Although the *Hishon* court found that the statutory language and legislative history of Title VII did not provide a basis upon which to consider partners as employees,⁷⁰ it found the *Burke* decision insightful, and in accordance with *Burke*, refused to equate partners with employees.⁷¹ The Eleventh Circuit found "a clear distinction between employees of a corporation and partners of a law firm."⁷² The *Hishon* court therefore affirmed the lower court's dismissal, holding that Title VII is inapplicable to partnership decisions.⁷³ The fact that the partners owned the partnership and practiced law as "joint venturers"⁷⁴ played a decisive role in the court's analysis.⁷⁵ The court stated that "[t]he very essence of a partnership is the voluntary joinder of all partners with each other."⁷⁶ The court further stated that it was "unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII."⁷⁷ Consistent with the *Dowd* decision, the Eleventh Circuit thus adopted the mindset that the roles of partner and employee are mutually exclusive.⁷⁸

The Supreme Court of the United States reversed the judgment of the Eleventh Circuit,⁷⁹ holding that the plaintiff's complaint in

68. 639 F.2d 271 (5th Cir. 1981).

69. *Id.* at 272-73. In *Calderon*, the Fifth Circuit addressed the question of whether the district court erred in dismissing the plaintiff's complaint for lack of subject matter jurisdiction because the complaint presented a factual question of whether the plaintiff was an employee under Title VII. *Id.* at 272.

70. *Hishon*, 678 F.2d at 1027.

71. *Id.* at 1027-28.

72. *Id.* at 1028.

73. *Id.* at 1024.

74. A joint venture is defined as "an association created by co-owners of a business undertaking differing from partnership (if at all) in having a more limited scope. In all important respects, the joint venture is treated as a partnership." A. BROMBERG, *supra* note 6, at 189.

75. *Hishon*, 678 F.2d at 1028. The court further stated that "King & Spalding operates as a partnership under the laws of Georgia. It files tax returns as a partnership. It is comprised of fifty active partners and employs approximately fifty associates It has a lengthy partnership agreement with detailed provisions as to profits, losses, withdrawal, dissolution, etc." *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984).

Hishon stated a valid cause of action under Title VII.⁸⁰ The Court reasoned that "in appropriate circumstances partnership consideration may qualify as a term, condition, or privilege of a person's employment with an employer large enough to be covered by Title VII."⁸¹ The Court thereby avoided the plaintiff's argument in *Hishon*⁸² that the partners of the defendant law firm were employees of the partnership rather than owners.⁸³ Thus, the Supreme Court left open the question of whether partners can qualify as employees under the federal employment discrimination laws.

In a concurring opinion, Justice Powell stated 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."⁸⁴ He perceived a significant difference between the relationship among law partners and the relationship between an employer and employee.⁸⁵ Justice Powell cautioned, however, that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners,'"⁸⁶ thereby creating a "sham" exception to the per se rule.⁸⁷ Although the majority did not share Justice Powell's views, courts in subsequent cases have used Justice Powell's *Hishon* concurrence to justify both decisions to deny partners the right to invoke the federal employment discrimination statutes,⁸⁸ and decisions to permit partners to bring such actions.⁸⁹

Courts also have applied the per se rule to disputes arising under the ADEA. In *Holland v. Ernst & Whinney*,⁹⁰ the plaintiff attempted to bring an ADEA action in federal district court against a partnership in which he had been a partner for eleven years prior to his dismissal for allegedly discriminatory reasons.⁹¹ The district court rejected the plaintiff's contention that the Supreme Court's decision

80. *Id.* at 78.

81. *Id.* n.10.

82. *Id.* at 74 n.4.

83. 678 F.2d at 1026.

84. *Hishon*, 467 U.S. at 79 (Powell, J., concurring).

85. *Id.*

86. *Id.* n.2.

87. See *infra* notes 101-02 & 201 and accompanying text.

88. See, e.g., *infra* text accompanying notes 96-102.

89. See, e.g., *infra* text accompanying notes 132-55.

90. 35 Empl. Prac. Dec. (CCH) ¶ 34,653 (N.D. Ala. Aug. 17, 1984).

91. *Id.* Although the court never discussed it, the fact that the plaintiff in *Holland* had been a partner at the defendant partnership for eleven years may have been a compelling factor in the court's decision.

in *Hishon* made the ADEA applicable to his dismissal.⁹² The district court stated that the plaintiff's role as partner in the defendant partnership did not constitute employment, and that because the "ADEA applies only to discrimination in the context of employment, [the ADEA] has no application in the context of [the] case."⁹³ The court dismissed the plaintiff's ADEA action for failure to state a claim upon which relief could be granted, but in so doing, the court failed to cite any cases to support its holding.⁹⁴ Thus it would appear that the district court, like the Seventh Circuit in the *Burke* and *Dowd* decisions and the Eleventh Circuit in *Hishon*, refused to accept the view that a partner could be considered an employee under legislation such as the ADEA.⁹⁵

In *Maher v. Price Waterhouse*,⁹⁶ another case in which a court ruled that partners cannot be considered employees under the ADEA, the plaintiff, a former partner of an accounting firm, brought an ADEA action against the defendant partnership contending that the partnership violated the ADEA by forcing him to retire when he reached the age of sixty years old.⁹⁷ The district court granted the defendant's motion for summary judgment, relying principally on the Seventh Circuit's *Burke* and *Dowd* decisions,⁹⁸ and on Justice Powell's concurring opinion in *Hishon*.⁹⁹ After holding that partners of an accounting firm are not employees under the ADEA, the court proceeded to determine whether the plaintiff was truly a partner rather than an employee.¹⁰⁰ The *Maher* court, in its analysis, focused primarily on sham relationships, in which persons are merely labeled partners to evade the proscriptions of the employment discrimination laws. After considering all the relevant facts in the case, the court found that the "[p]laintiff clearly was not simply labeled a 'partner' to avoid the scope of the ADEA."¹⁰¹ Thus, following Justice Powell's

92. *Id.*

93. *Id.* One district court has expressly refused to follow *Holland*. See *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144, 147 n.4 (S.D.N.Y. 1987).

94. *Holland*, 35 Empl. Prac. Dec. at ¶ 34,653.

95. *Id.*

96. No. 84-1522C(2) (E.D. Mo. Apr. 8, 1985).

97. *Id.*

98. *Id.* For a discussion of these cases, see *supra* text accompanying notes 47-62.

99. *Maher*, No. 84-1522C(2) (E.D. Mo. Apr. 8, 1985). For a discussion of Justice Powell's concurring opinion, see *supra* text accompanying notes 84-89.

100. No. 84-1522C(2) (E.D. Mo. Apr. 8, 1985). The court heeded Justice Powell's warning that employers cannot evade the scope of federal employment discrimination legislation by labeling employees as partners. *Id.*

101. *Id.* The fact that the plaintiff had signed a partnership agreement was determinative in the court's view. The court stated:

Under the Price Waterhouse Partnership Agreement new partners are admitted to the partnership by a two-thirds vote . . . and can be expelled only by three-

Hishon concurrence, the *Maier* court ruled that the only exception to the per se rule that partners cannot qualify as employees, involves sham relationships.¹⁰²

B. *The Traditional Partnership Indicia Test*

Not all courts follow the per se rule that partners cannot be employees for purposes of the federal employment discrimination statutes. Rather, in determining whether a particular individual is an employee, some courts will analyze certain traditional partnership attributes that often are considered crucial to the existence of a bona fide partnership. If any of these attributes is lacking to a significant degree, a partner may qualify as an employee. The traditional partnership indicia test is highly fact sensitive, and requires courts to balance various factors and view the totality of the purported relationship. Under the traditional partnership indicia test, partners may qualify as employees in the context of Title VII, the ADEA, and the Equal Pay Act, even if no sham situation is involved.¹⁰³ The following cases demonstrate the application of the traditional partnership indicia test.

In *Wheeler v Hurdman*,¹⁰⁴ the Tenth Circuit addressed the question of whether Marilyn Wheeler, a general partner of Main Hurdman, an accounting firm organized as a general partnership, could sue the partnership for discrimination claims under the federal employment discrimination statutes.¹⁰⁵ Wheeler brought an action in federal district court under Title VII, the ADEA, and the Equal Pay Act against the firm, alleging discrimination against her in compensation and work assignments.¹⁰⁶ She also alleged that the firm dismissed her because of her age, or in the alternative, because of her

fourths vote of the partners The Partnership Agreement further specifies that "[i]n all matters relating to the practice of the partnership the decision of the majority of the partners shall be conclusive" Although the partnership is managed by a policy board, and a chairman and senior partner, the partners may by vote remove such persons at any time.

Id. This determination precluded any further analysis of whether the totality of the relationship demonstrated that the plaintiff was in reality an employee. Such emphasis on the partnership agreement is misplaced because it places form over substance.

102. *Id.*

103. This test goes beyond the sham situation that Justice Powell addressed in his *Hishon* concurrence, which allows employers to circumvent the employment discrimination laws by providing partner status to certain individuals. See *supra* text accompanying notes 84-89.

104. 825 F.2d 257 (10th Cir.), cert. denied, 108 S. Ct. 503 (1987).

105. *Id.* at 258.

106. *Id.* After working for the defendant general partnership as a certified public accountant for nine years, the plaintiff attained partner status. *Id.* Seventeen months after her promotion, however, at age forty-seven, the plaintiff was dismissed. *Id.*

sex.¹⁰⁷ Main Hurdman moved to dismiss the complaint for failure to state a cause of action; it contended that Wheeler, as a partner of the firm, was not an employee under federal law.¹⁰⁸ The district court denied the motion, and applying an "economic realities" test, held that the plaintiff was an employee despite her partner status.¹⁰⁹

Wheeler and the EEOC, which filed an *amicus curiae* brief, conceded that she was a bona fide general partner of Main Hurdman under state partnership law;¹¹⁰ no party to the suit alleged that the partnership labeled Wheeler as a "partner" to evade the strictures of Title VII, the ADEA, or the Equal Pay Act.¹¹¹ Wheeler contended, however, that her status at the firm was, in economic reality, both that of an employee and partner in light of the particular facts of the case.¹¹² After attaining partner status, for instance, Wheeler claimed that her work changed very little:

She had the same client load, same duties and responsibilities, same support staff, and was supervised in her work and work assignments, by the same department head. A personnel file was maintained with respect to her and all other personnel, including partners. The amounts charged for her services were established by managing partners. The number of partnership points allocated to her for income purposes was, as a practical matter, determined

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 261. The court permitted the EEOC to file an *amicus curiae* brief and to argue the case orally. *Id.* at 258 n.2.

111. *Id.* at 261. After being elected to the partnership, the plaintiff executed the defendant's partnership agreement, which provided the following:

[A] change in compensation from salary to a share of the Firm's profits, paid by draw and an allocation of profits based on points; a contribution to capital; establishment of a capital account; unlimited personal liability for the debts and obligations of the partnership; rights under the partnership agreement to vote on such matters as amendments of the partnership agreement, approval of mergers with other accounting firms of a certain size, admission of new partners, termination of a partner's interest, approval of draws, shares of net profits, special distributions, and any other income to be allocated to any partners, and dissolution of the firm. In addition, Wheeler became eligible for certain rights and privileges which were enjoyed only by partners of the firm, such as the right to sign audit reports and tax returns and the right to be reimbursed for membership dues in certain clubs; and, she was subject to involuntary termination of her interest in the partnership only by either: (1) a unanimous vote of the firm's policy board, or (2) an affirmative vote of no less than 75% of the members of the firm's advisory board, or (3) an affirmative vote of no less than 75% of all partners casting votes. Furthermore, by becoming a partner Wheeler surrendered certain employee benefits including prepaid health insurance and life insurance.

Id. at 260-61.

112. *Id.* at 261.

by the managing partner of her office. Also as a practical matter, a recommendation by the same managing partner that she or any other partner of that office be expelled from the partnership was the final word, since such recommendations, according to Wheeler, were routinely adopted and appeals of such decisions pursuant to terms of the partnership agreement were unavailing.¹¹³

Furthermore, Wheeler argued that Main Hurdman's organizational structure and management style were similar to that of a corporation. This structure included a managing partner and a policy board with primary responsibility for the management and control of the partnership.¹¹⁴

The Tenth Circuit began its analysis by acknowledging that the federal employment discrimination statutes are fundamentally remedial in nature.¹¹⁵ The court recognized that these statutes must be liberally construed to effectuate their purposes, but cautioned against judicial legislation, stating that "[l]egislative ends are circumscribed by statutory means."¹¹⁶ Despite such liberal construction, the court observed a general reluctance among courts to expand the definition of "employee" to include general partners under Title VII, the ADEA, and the Equal Pay Act.¹¹⁷ Both Wheeler and the EEOC endeavored to persuade the court to adopt the economic realities test to determine whether individuals are partners or employees on a case-by-case basis.¹¹⁸ Such a test requires an analysis of whether the firm so controls an individual that, in reality, the individual is an employee

113. *Id.*

114. *Id.* at 261-62. The plaintiff contended that "although each partner is entitled to vote at annual or special meetings, the votes are primarily for the purpose of ratifying decisions made by the managing partner, policy board, or 'nominating' committee." *Id.* The plaintiff in *Hishon* also used this argument. See *supra* text accompanying note 65.

115. *Wheeler*, 825 F.2d at 262.

116. *Id.*

117. *Id.* at 263-65 (citing *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2d Cir. 1986); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984); *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982); *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977); *Maher v. Price Waterhouse*, No. 84-1522C(2) (E.D. Mo. Apr. 8, 1985); *Holland v. Ernst & Whinney*, 35 Empl. Prac. Dec. (CCH) ¶ 34,653 (Aug. 17, 1984)). The court particularly noted Justice Powell's concurring opinion in *Hishon*, but it stated that "[t]he significance of Justice Powell's observation must, of course, be tempered by the fact that no other justice joined the concurring opinion, and by allusions to a highly interactive partnership characterized by common agreement or consent among the partners." *Id.* at 265.

The court found little guidance from agency constructions of the employment discrimination statutes. *Id.* at 265-67. Because the EEOC historically has not adopted the economic realities test as the proper standard for determining employee status, the court gave little weight to the EEOC's position in *Wheeler* that called for the application of the test to the defendant partnership.

118. *Id.* at 268.

and is therefore subject to an increased risk of discrimination.¹¹⁹ Although it rejected Main Hurdman's contention that "an economic realities test is categorically inapplicable to partnerships,"¹²⁰ the Tenth Circuit found that the economic realities tests that Wheeler and the EEOC advocated were inappropriate to apply to partnerships.¹²¹ In reaching this conclusion, the court took issue with two aspects of the proposed economic realities test. First, the economic realities test originated in cases in which courts attempted to determine whether an individual was an employee or an independent contractor. The Tenth Circuit reviewed the independent contractor-employee factors that courts consider under the economic realities test and the hybrid test, but found them to be of no assistance in the general partnership context because of the inherent differences between the relationship among partners and the relationship between employers and independent contractors.¹²² Second, the court found the economic realities test to be without reasonable limits because underlying this test is a theory "that any individual who is organizationally or economically dominated is an employee."¹²³ Such a theory, the court argued, would require the adoption of a series of unrealistic presumptions:

[T]here is an underlying assumption by [the proponents of the economic realities test] that a "true" general partnership operates like a New England town meeting; that "true" general partners are not employees because they personally control management of the business and their own affairs within the business; that "true" general partners are not "dominated;" they are not controlled; they enjoy equality of bargaining power. Presumably, a "true" partner is not only heard at partnership meetings but actually controls the result as it affects that partner.¹²⁴

The court concluded that under the proposed economic realities test, only sole proprietors and a limited number of dominant partners would qualify as "true partners."¹²⁵ The court then focused on the

119. *Id.* at 268-69. The EEOC and Wheeler advocated different tests for determining employee coverage. The EEOC proposed the application of the hybrid test, whereas Wheeler urged the court to apply the economic realities test used in FLSA cases. *Id.* at 268-71.

120. *Id.* at 271.

121. *Id.*

122. *Id.* at 271-72. Among the factors relating to independent contractor-employee status that the court determined to be irrelevant to inquiries about partnership relationships are the following: (1) Whether the employer provides the tools used and the workplace; (2) the time duration within which the person has worked; (3) payment by time or by the job; and (4) skill required. *Id.* at 272.

123. *Id.* at 273.

124. *Id.*

125. *Id.*

economic realities underlying the partnership relationship, and reasoned that another difficulty in applying the economic realities test to partners is the existence of partnership agreements: "[P]artner status is supported by [an] agreement—written, oral, or implied—and statutes; [and thus] 'domination' of a partner may consist not of an absence of rights, as with an independent contractor, but of an abdication of rights, which may or may not be a temporary submissiveness."¹²⁶ The court rejected both the proffered control and economic realities tests, arguing that such tests disregard or inappropriately reduce the crucial characteristics of partnership status and would be extremely difficult to apply.¹²⁷ The Tenth Circuit, "[p]ending examination of the question by Congress,"¹²⁸ therefore held that bona fide general partners are not employees.¹²⁹ Nevertheless, the court suggested that a contrary result would be possible if "[t]he bundle of partnership characteristics [the court] identified [were] lacking in important particulars, or there [were] some deception which compromise[d] the actuality of those characteristics."¹³⁰

In *Caruso v. Peat, Marwick, Mitchell & Co.*,¹³¹ the United States District Court for the Southern District of New York rejected any "*per se* rule that an individual denoted as a 'partner' falls outside the ADEA definition of employee."¹³² The plaintiff in *Caruso*, a former partner of a major national accounting and consulting partnership, brought an age discrimination action against Peat, Marwick under the ADEA.¹³³ Peat, Marwick moved to dismiss the suit on the ground that Caruso's status as a partner precluded him from being considered an employee.¹³⁴

After Peat, Marwick promoted Caruso to partner in 1980, his responsibilities remained relatively unchanged.¹³⁵ Although the part-

126. *Id.* at 274.

127. *Id.*

128. *Id.* at 277.

129. *Id.*

130. *Id.* Such characteristics include "participation in profits and losses, exposure to liability, investment in the firm, partial ownership of firm assets, . . . voting rights, [and the economic and legal significance of being a partner] under the partnership agreement and partnership laws." *Id.* at 276.

131. 664 F. Supp. 144 (S.D.N.Y. 1987).

132. *Id.* at 147.

133. *Id.* at 146. A twenty-one member board of directors governed the defendant firm and nominated employees for partner status. A six-tier management hierarchy, including a chief executive officer, who reported directly to the board, and partners in charge, who made routine administrative decisions at each of the defendant's many offices, carried out the policy decisions of the board of directors. The plaintiff worked at the defendant's New York office, which employed 128 partners, 36 of whom held management positions. *Id.* at 145.

134. *Id.*

135. *Id.* The plaintiff in *Wheeler* also alleged that her promotion to partner by the

nership gave Caruso discretionary power to make decisions regarding clients, his recommendations were subject to ratification or rejection by a member of Peat, Marwick's management.¹³⁶ The Peat, Marwick partners did not hold any ownership interest; rather, they "receive[d] a base salary of about \$25,000, with additional compensation derived from firm profits and determined by the number of 'units' assigned to each partner."¹³⁷ The court acknowledged that central corporate decisionmakers, or controlling owners, are not employees under the ADEA,¹³⁸ but it further stated that an employee would not be denied coverage under the act solely because his job description is "impressive."¹³⁹ In addition, the court determined that a per se rule that the ADEA cannot apply to individuals employed under the title of partner is inconsistent¹⁴⁰ with *Hyland v. New Haven Radiology Assocs.*,¹⁴¹ and *EEOC v. Peat, Marwick, Mitchell & Co.*¹⁴²

defendant partnership had a negligible effect on her duties. See *supra* note 113 and accompanying text.

136. *Caruso*, 664 F. Supp. at 145.

137. *Id.* at 146.

138. *Id.*

139. *Id.*

140. *Id.* at 147.

141. 794 F.2d 793 (2d Cir. 1986). In *Hyland*, the plaintiff, a one-fifth shareholder of the defendant professional corporation, brought an ADEA action against the defendant contending that he was unlawfully forced to resign as an employee, officer, and director on the basis of his age. *Id.* at 794. The district court applied an "economic realities" test and granted the defendant's motion for summary judgment, holding that the plaintiff was truly a partner and not an employee, because in reality the defendant functioned as a partnership. *Id.* at 794-95. On appeal, the Second Circuit reversed the lower court's judgment and held that if an entity operates under the corporate form of organization, there is no need to inquire whether that entity is, in essence, a partnership. *Id.* at 798 ("While those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive."). The Second Circuit's position regarding whether partners can be employees under the federal employment discrimination legislation is not clear. In the *Hyland* decision, the court pointed out that individuals properly classified as partners generally are not employees under such statutes. *Id.* at 797. The *Hyland* court cited both *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977), and Justice Powell's concurrence in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), for the proposition that "[i]t is by reason of their unique status as business owners and managers that true partners cannot be classified as employees." *Hyland*, 794 F.2d at 797. The court, however, also noted the EEOC's standard for distinguishing partners from employees, suggesting, at least, that it may be appropriate to apply an economic realities test or a partnership indicia test to determine whether an individual is an employee, individual contractor, or partner. *Id.*

142. 775 F.2d 928 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986). In *EEOC v. Peat, Marwick, Mitchell & Co.*, the EEOC brought an action in federal court to enforce a subpoena issued to the defendant partnership. 775 F.2d at 929. The subpoenaed documents pertained to the partners' relationship to the company and to each other, "and documents relating to [Peat, Marwick's] retirement practices and policies." *Id.* On appeal, the defendant partnership contended that the subpoena should not be enforced because Congress did not authorize the EEOC's investigation. *Id.* at 929. According to the defendant partnership, its partners were employers under the ADEA. *Id.* at 929-30. The Eighth Circuit affirmed the lower court's

Moreover, the district court in *Caruso* reasoned that Justice Powell's often quoted *Hishon* concurrence supported the rejection of a per se rule exempting partners from the ADEA's employee coverage.¹⁴³ The court argued that Justice Powell's concurrence underscores the inherent weakness of the per se rule. Under the per se rule urged by the defendant in *Caruso*, for example, employers could effectively deprive their employees of their rights under the ADEA by merely calling them "partners."¹⁴⁴ In addition, the court noted that the per se rule would prohibit "physicians, accountants, attorneys, and other professionals whose employers traditionally have organized their businesses as partnerships" from invoking the protections of the ADEA.¹⁴⁵

Peat, Marwick also argued that judicial interference in the partnership selection process violated "the first amendment freedom of association rights of partnership members."¹⁴⁶ In response, the district court noted that "[t]he Supreme Court has rejected this contention, [stating] that '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.'"¹⁴⁷

The *Caruso* court did not conclude that all "bona fide" or "true" partners were employees under the ADEA,¹⁴⁸ but it did toughen the standards by which courts should determine bona fide partner status. The court defined a bona fide partner as a policy decisionmaker whose work responsibilities are not controlled by any one member of the firm.¹⁴⁹ According to the *Caruso* court, a true partner not only receives a percentage of the firm's profits as compensation, but also remains a permanent member of the partnership except under excep-

order to enforce the subpoena. *Id.* at 931. It held that the EEOC's investigation "to determine whether individuals that [Peat, Marwick] classifies as 'partners' fall within the definition of 'employees' for purposes of the ADEA" was for a legitimate purpose authorized by Congress. *Id.* at 930. The court acknowledged the EEOC's position that job titles are not controlling in determining whether a person is an employee under the ADEA. *Id.*

143. *Caruso*, 664 F. Supp. at 147-48.

144. *Id.* Of course, these "partners" would not be given the decisionmaking authority or job security traditionally associated with partnership status.

145. *Id.* at 148.

146. *Id.* n.5. According to Professor Mechem, the "right to choose one's own partner—the *delectus personarum*, as it is often called—is properly regarded as one of the most important characteristics of partnership." F. MECHEM, *supra* note 6, at 7.

147. *Id.* See *Hishon*, 467 U.S. at 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

148. 664 F. Supp. at 148. The *Caruso* court acknowledged that central corporate decisionmakers and owners do not qualify as employees.

149. *Id.* at 149.

tional circumstances.¹⁵⁰ The court listed three factors to consider when determining an individual's status as an employee or partner under the ADEA: "(1) The extent of the individual's ability to control and operate his business; (2) [t]he extent to which an individual's compensation is calculated as a percentage of business profits; and (3) [t]he extent of the individual's employment security."¹⁵¹ After applying this three-part test to the particular facts of *Caruso*, the district court held that the plaintiff qualified as an employee despite his partner title, and thus could bring an ADEA action.¹⁵²

IV. COMMENT

A. *The Proper Test for Determining Employee Status: The Economic Realities Test*

The most appropriate test for determining employee status under the federal employment discrimination statutes is the economic realities test that the Supreme Court enunciated in *NLRB v. Hearst Publications, Inc.*¹⁵³ Under this test, courts must construe the term "employee" in light of the goals of the statutes and the realities underlying the economic relationship between the employer and the alleged employee. Courts must extend protection if the circumstances of the work relationship demonstrate that protection is required.¹⁵⁴ Because an employer can control employment opportunities by virtue of his power to define employment terms and conditions and his influence in the employment market, the economic realities test focuses on "whether the employer's control of employment opportunities places the worker in a position of dependency on the employer which may expose the worker to discriminatory conduct."¹⁵⁵ The tremendous flexibility of this test allows courts to consider numerous factors in deciding whether the requisite employment relationship is present. These factors might include, among others, the organization and character of the employer's business; the employer's hiring, promotion, and termination practices; performance and reward criteria; the worker's ability to hire other workers; and the bargaining power of the worker vis-a-vis the employer.¹⁵⁶ Furthermore, the statutory scheme, purpose, and legislative history of the federal employment

150. *Id.*

151. *Id.* at 149-50.

152. *Id.* at 150.

153. 322 U.S. 111 (1944).

154. *Id.* at 129.

155. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 113 (1984).

156. *Id.* at 113-14.

discrimination statutes support the adoption of the economic realities test.¹⁵⁷

Equality of employment opportunity is the major objective of Title VII, the ADEA, and the Equal Pay Act.¹⁵⁸ Opportunity for employment is crucial not only because it provides the occasion to improve one's economic and social status, but also because it reduces the extent to which people depend on government assistance.¹⁵⁹ Society, therefore, has a tremendous interest in ensuring that artificial barriers to employment do not disadvantage individuals competing in the workplace. Through the federal employment discrimination statutes, Congress has determined that arbitrary factors such as age, race, color, religion, gender, or national origin, should not limit an individual's employment opportunities.¹⁶⁰ A significant advantage of applying the economic realities test is that the test is closely attuned to the prophylactic goals that underlie the federal statutes. Under this test, courts must broadly construe the statutory provisions to eliminate the evil at which the statutes were directed. This approach ensures that the wide spectrum of persons who rely on others for their livelihood may obtain the protections afforded to employees under the statutes if they are ever subjected to employment decisions that are based on illegitimate considerations.

Congress deliberately drafted a broad definition of the word "employee" in the federal employment discrimination statutes, thereby demonstrating that "[t]he word 'is not treated by Congress as a word of art having a definite meaning.'"¹⁶¹ Instead, the term "employee" takes its meaning from "'its surroundings [in] the statute where it appears.'"¹⁶² Because the economic realities test requires courts to construe the meaning of the term "employee" in light of the evil to be eradicated, the meaning of the word is derived from the federal employment discrimination laws themselves.

It is unclear from the legislative history of the federal statutes

157. See *infra* notes 165-70 and accompanying text.

158. See *infra* note 201.

159. See A. PINKNEY, *THE MYTH OF BLACK PROGRESS* 96-97 (1984). Alphonso Pinkney has argued:

[D]iscrimination is the most salient factor in black unemployment

In addition to the economic burdens of unemployment on blacks, they are affected in other ways. One of these is the loss of self-esteem. It makes it difficult for the husband to support his family, and frequently he takes the easiest way out by leaving the family to be supported by public assistance.

Id.

160. See *supra* notes 14, 16 & 21 and accompanying text.

161. *Hearst*, 322 U.S. at 124 (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 545 n.29 (1940)).

162. *Id.*

who may qualify as an employee.¹⁶³ One can make a strong argument, however, that the expansive interpretation of the term "employee" under the economic realities test comports with Congress' intent in enacting Title VII, the ADEA, and the Equal Pay Act.¹⁶⁴ Congress easily could have included a more restrictive definition, but it did not do so because such a definition would have impaired the broad purpose of the statutes. Congress, for example, modeled Title VII after the NLRA.¹⁶⁵ After the Supreme Court applied the economic realities test in a case arising under the NLRA, Congress specifically amended the NLRA to provide a more restrictive common law right-to-control test for determining employee status. Although "[t]his amendment was on the books *before* Title VII was formulated . . . Congress incorporated no similar provisions into Title VII."¹⁶⁶ Congress' silence should thus be interpreted as a tacit

163. In defending an amendment to restrict the application of Title VII to businesses with 100 or more employees, Senator Cotton asserted that "when a small businessman who employs 30 or 25 or 26 persons selects an employee, he comes very close to selecting a partner; and when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife." 110 CONG. REC. 13,085 (1964). The Supreme Court of the United States, however, noted that "[b]ecause Senator Cotton's amendment failed, it is unclear to what extent Congress shared his concerns about selecting partners." *Hishon*, 467 U.S. at 77-78 n.10. Senator Hugo Black, during the Senate debates on the Fair Labor Standards Act, took the position that the drafters of the Act gave "employee" its most expansive definition. 81 CONG. REC. 7,656-57 (daily ed. July 27, 1937). According to the Eleventh Circuit in *Cobb v. Sun Papers, Inc.*, courts are reluctant to apply the economic realities test in Title VII cases because "there is no statement in the Act or legislative history of Title VII comparable to [the] one made by Senator Hugo Black." 673 F.2d 337, 340 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982). In addition, during the Senate debate on Title VII, Senator Joseph Clark specified that "[t]he term 'employer' [was] intended to have its common dictionary meaning, except as expressly qualified by the act." 110 CONG. REC. 7,216 (daily ed. Apr. 8, 1964). See *Hishon*, 678 F.2d at 1027 n.9 (appellee contended that "the term [employee] should be given its common dictionary meaning as suggested by Senator Clark in reference to the term employer"). These pieces of legislative history, however, do not help to determine whether a partner should be considered an employee, because "nothing in the legislative history of these Acts explicitly addresses the definition of employee." *Wheeler*, 825 F.2d at 263. As a result, courts are divided as to the proper test for determining employee status. The Eleventh Circuit, for example, reasoned that Congress intended the term "employee" to be interpreted according to general common law principles. *Cobb*, 673 F.2d at 340-41. One district court also adopted this view in *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 516 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978). But cf. *Armbruster v. Quinn*, 711 F.2d 1332, 1339-41 (6th Cir. 1983) (attempting to demonstrate how the legislative history supports the adoption of the economic realities test to determine employee status under Title VII).

164. See *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977); Dowd, *supra* note 155, at 89-95.

165. *Armbruster*, 711 F.2d at 1341.

166. *Id.* ("[I]n that Congress was specifically aware of the judicial construction accorded the term 'employee' absent an *explicit* limitation, we now refuse to *imply* such a restriction into the otherwise broad terms of Title VII."). For the approach courts should follow when interpreting the term "employee" under the ADEA and the FLSA, from which the Equal Pay Act emanated, see *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (stating that if "Congress adopts

approval of those Title VII decisions in which courts applied the economic realities test.

B. A Partner as an "Employee" Under the Economic Realities Test

A partner may, under some circumstances, be considered an employee under Title VII, the ADEA, or the Equal Pay Act despite his partner status. Under the economic realities test, an employee is an individual who may be exposed to discriminatory conduct because of his economic dependence on the employer, measured by the employer's control of the worker's employment opportunities. A partner therefore may qualify as an employee if the economic realities of the employment relationship so dictate. The legal relationship involved in a particular case is not of itself determinative of employee status: An employer should not be allowed to circumvent the employment discrimination laws merely because the employer has chosen the partnership form of business organization.

The fact that a partner may be an employee is not inconsistent with the provisions of the UPA. Although the UPA seems to embody egalitarian principles,¹⁶⁷ partnerships may have strong nonegalitarian characteristics. Contrary agreements among partners will override many of the UPA's significant governance provisions. Under the UPA, for example, partners have equal rights in the management and conduct of the affairs of the partnership.¹⁶⁸ Partners, however, may expressly or impliedly agree that one or more of them shall have exclusive control over the management of partnership business.¹⁶⁹ In fact, partners can include almost any provision in their partnership agreement—they may even authorize self-dealing.¹⁷⁰ The tremendous

a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 142 (6th Cir. 1977) (In construing the term "employee" under the FLSA, the court stated that it was "guided by decisions defining the boundaries of 'employee' as that term is used in the Social Security Act, the National Labor Relations Act, and in Title VII of the Civil Rights Act.").

167. *See supra* note 25.

168. UNIF. PARTNERSHIP ACT, § 18(e), 6 U.L.A. 213 (1969).

169. *Id.* § 18 ("The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them."); *see also Parks v. Riverside Ins. Co. of Am.*, 308 F.2d 175, 180 (10th Cir. 1962) (stating that it is permissible for partners to agree that "as among themselves, one or more of them shall have exclusive control over the management of the partnership business, and that an agreement for exclusive control of the management of the business by one partner may be implied from the course of conduct of the parties.").

170. *Riviera Congress Assocs. v. Yasky*, 18 N.Y.2d 540, 548, 223 N.E.2d 876, 880, 277 N.Y.S.2d 386, 392 (1966) ("[P]artners may include in the partnership articles practically 'any agreement they wish' and, if the asserted self-dealing was actually contemplated and authorized, it would not, *ipso facto*, be impermissible and deemed wrongful.") (citations omitted).

deference to partnership agreements under the UPA permits employer-employee relationships to exist among bona fide partners. In one case, for example, a junior partner who contributed his services to the partnership and received a salary, but was prohibited from contributing any assets or property, and was not entitled to a share in the profits, and played only a nominal role in the management of the partnership, was deemed to be a true partner under the partnership agreement.¹⁷¹

Although it is true that entry into a partnership relationship is voluntary, a partnership agreement, whether written, oral, or implied, should not deprive an individual of the rights that are provided under Title VII, the ADEA, and the Equal Pay Act. As the following scenario demonstrates, a partner may have little choice regarding the terms and conditions of the partnership agreement:

Consider the plight of the large law firm's associate who labors five, seven, nine, or more years in the quest to become a partner. During this period, she knows little about the partnership or the income of partners. She is quite sure, however, that "partner" is a status worthy of pursuit. When the day of her reward arrives and she is invited to be a partner, the associate is presented with a copy of the partnership agreement, which obviously will provide a structure for the partnership quite different from that offered by the U.P.A.'s default provisions. This event is perfunctory; bargaining opportunities are nonexistent; the definitive agreement is an imposed agreement. Although the associate may have reservations concerning the agreement, she has only two choices: (1) she can sign it anyway; or (2) she can find another job. Inevitably, she will sign.¹⁷²

Despite the newly admitted partner's increased employment security, income, and status, she actually remains an employee, at least until she acquires a greater degree of power and status in the partnership.¹⁷³

The legal profession is the paradigmatic context for partner invocation of the federal employment discrimination statutes. Law firms traditionally have operated as partnerships,¹⁷⁴ and their hiring and employment customs historically have resulted in widespread dis-

171. *Provident Trust Co. v. Rankin*, 333 Pa. 412, 5 A.2d 214 (1939).

172. Hillman, *supra* note 12, at 441-42.

173. *Id.* at 442 n.61 (positing that "[b]argaining among partners in the firm may indeed occur, but it is typically a post-admission phenomenon reflective of existing partners' attempts to reallocate income based upon perceptions of their values to the firm").

174. *Caruso*, 664 F. Supp. at 148; see also Comment, *Civil Rights: Law Partners as Employees for Title VII Purposes?*, 35 U. FLA. L. REV. 201, 202 n.10 (1983).

crimination.¹⁷⁵ Many large law firms are organized with a hierarchical structure that clearly delineates between senior and junior partners.¹⁷⁶

Senior partners direct the work of the firm, determine the profit percentages paid each partner, and control firm policy. On the other hand, the junior partner in many firms is practically indistinguishable from the senior associates. Whatever his label, he is still an employee who has his time and work closely supervised and does not share in policy matters. In many firms the junior partners do not share on a percentage basis in the firm profits; nor do they have a vote at firm meetings.¹⁷⁷

These lower level partners are not only at a bargaining disadvantage vis-a-vis partners in the upper echelon of the partnership, but also their employment opportunities may be limited as a result of discriminatory attitudes or decisions by those at the top of the hierarchy. Under the economic realities test, partners in such nonegalitarian firms could invoke the protections of Title VII, the ADEA, or the Equal Pay Act if they had been victimized by discriminatory employment practices.

The negligible number of women and minorities who have attained and maintained partner status in the country's largest law firms indicates that partners should indeed be protected under federal law if the economic realities so dictate. In a recent survey of over two hundred of the largest law firms in the United States, less than ten percent of the partners in these firms were women and minorities.¹⁷⁸ Granting a partner the right to claim the protection of federal law in cases in which his relationship to the partnership provides the opportunity for employment discrimination is consistent with the broad remedial nature of the statutes. In addition, the application of Title VII, the ADEA, and the Equal Pay Act to partnerships does not violate any constitutional right of privacy or association.¹⁷⁹ Neverthe-

175. Paone & Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615, 615 (1967). The authors noted that "entrance into the upper echelons of the metropolitan legal profession is based as much upon ethnic and religious background as upon talent, education, and personality." *Id.* at 616.

176. *Id.* at 639; see also Hillman, *supra* note 12, at 441 (stating that "[o]ne of the better examples of hierarchical partnerships is found in large partnerships of professionals such as corporate law firms").

177. Paone & Reis, *supra* note 175, at 639.

178. Weisenhaus, *White Males Dominate Firms: Still a Long Way to Go for Women, Minorities*, Nat'l L.J., Feb. 8, 1988, at 1, col. 2.

179. The Supreme Court of the United States, in *Hishon v. King & Spalding*, rejected the argument that the constitutional rights of freedom of expression and association preclude the application of Title VII to partnership decisions not to consider an individual for promotion to partner status. 467 U.S. at 78. In reaching this conclusion, the Court stated:

less, many courts continue to apply employee coverage tests under which partners are not considered employees.

C. *The Rejection of the Per Se Rule*

The majority of courts that have addressed whether a partner can qualify as an employee subscribe to a per se rule that a partner cannot be considered an employee.¹⁸⁰ In deciding whether a particular individual is a partner or an employee under Title VII, the ADEA, or the Equal Pay Act, these courts have largely ignored the employment relationships to which these statutes were specifically directed. In *Burke v. Friedman*,¹⁸¹ for example, the Seventh Circuit "[did] not see how partners [could] be regarded as employees," because the court perceived partners as employers who "manage and control the business and share in the profits and losses."¹⁸² This view of partnership reflects the traditional concept of partnership status,¹⁸³ but minimizes the realities of the employment relationship. Moreover, the *Burke* decision is inconsistent in one respect: Although the court noted that the determination of whether an individual is an employee under Title VII depends on the facts of each case, it did not pursue any aggressive inquiry into the relationship among the partners to

Although we have recognized that the activities of lawyers may make a "distinctive contribution . . . to the ideas and beliefs of our society," respondent has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits. Moreover, as we have held in another context, "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union.

Id. (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); *NAACP v. Button*, 371 U.S. 415, 431 (1963)). Another court also found that applying Title VII to a law firm's partnership promotion decision did not violate the members' first amendment rights of privacy or freedom of association. *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 129 (S.D.N.Y. 1977) ("[T]he court does not recognize any First Amendment privacy or associational rights for a commercial, profit-making business organization of the nature of the Cravath partnership. Cases recognizing such First Amendment rights refer to fraternal or social organizations not business organizations.") (citing *Runyon v. McCrary*, 427 U.S. 160 (1976); *Bellis v. United States*, 417 U.S. 85, 92-95, 100-01 (1974); *Griswold v. Connecticut*, 381 U.S. 479, 483-86 (1965)); see also *Bartholet*, *supra* note 9, at 983-84 (contending that the argument that applying the federal employment discrimination laws to partnerships unconstitutionally infringes on associational rights of partners "is no more powerful at the upper level than at the lower" job levels.).

180. See *supra* text accompanying notes 47-79 & 90-102.

181. 556 F.2d 867 (7th Cir. 1977).

182. *Id.* at 869.

183. The UPA's definition of partnership coincides with this traditional view. See *supra* text accompanying note 24.

determine whether persons labeled "partners" were truly partners.¹⁸⁴ The selection of the partnership form of organization seemed to have precluded the existence of an employment relationship among the partners. Nevertheless, "despite *Burke*, the realities of at least many large firm partnerships require them to be considered 'employment' situations, at least for all except a few 'senior' partners."¹⁸⁵

The problems with the per se rule adopted in *Burke* are readily apparent. Under this rule, partners could circumvent the proscriptions of Title VII, the ADEA, and the Equal Pay Act by promoting their associates to partnership status, only to terminate their "employment" thereafter in violation of the federal statutes. The major weakness of the per se rule is that it does not adequately take into account the prophylactic goals of the employment discrimination statutes, nor the economic realities underlying the work relationship among partners.¹⁸⁶ Furthermore, the analyses of the courts that have adopted the per se rule have been incomplete, and in some cases, not entirely rational.¹⁸⁷

184. *Burke*, 556 F.2d at 869-70.

185. C. SULLIVAN, *supra* note 4, at 96.

186. In finding partners to be clearly distinguishable from employees, the Eleventh Circuit in *Hishon*, for example, reasoned that the partners in that case were not employees because the defendant partnership operated as a partnership under applicable state law. 678 F.2d at 1028. But the fact that an organization functions as a partnership under state law does not necessarily preclude a partner from being an employee under the federal employment discrimination statutes. See *Lucido*, 425 F. Supp. at 129 n.6 ("If the N.Y. Partnership Law § 40(7) is inconsistent with the application of Title VII in this case, Title VII, which expressly preempts state law contrary to it, controls.") (citation omitted). It appears that under *Hishon*, once it is determined that a partnership exists, the analysis need not proceed further because from the court's perspective, partners cannot be employees; this approach focuses on whether a partnership exists, and it largely ignores the realities underlying the work relationship between and among the partners. Thus, the presence of proscribed discriminatory conduct is inconsequential. This may be correct in other contexts, but with respect to the federal employment discrimination laws, the organizational form under which a business operates is merely a factor to consider in determining employee coverage. Title VII, the ADEA, and the Equal Pay Act deal primarily with employment relationships. Under the UPA, however, partners may enter into agreements whereby certain members of the partnership are in reality employees. An example of this situation occurs in some large hierarchical law firms where junior partners are no different from senior associates, except in job description. Under the Eleventh Circuit's *Hishon* analysis, partnerships could terminate such "partners" in seeming violation of Title VII, the ADEA, or the Equal Pay Act, and those partners would have no legal basis to challenge such decisions. Such an approach would render the application of the employment discrimination statutes wholly ineffective in protecting individuals who are for all practical purposes employees, and therefore, exposed to prohibited discriminatory conduct by those partners in the upper echelon of the partnership.

187. Despite the inherent weaknesses of the per se rule adopted in *Burke*, the Seventh Circuit relied upon *Burke* and refused to equate partners with employees in *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984). In *Maier v. Price Waterhouse*, the court also relied upon *Burke* in holding that partners cannot qualify as employees under the ADEA. *Maier*, No. 84-1522C(2) (E.D. Mo. Apr. 8, 1985). In adopting the per se rule, some courts

The courts adopting the per se rule unjustifiably discard the realities underlying the work relationship. Consequently, partners who do not possess the attributes generally associated with partner status are twice deprived merely because of the partnership label; i.e., they do not receive the full benefits of partnership, nor are they afforded the

have misconstrued prior decisions, resulting in a results-oriented approach; i.e., an approach under which the question posed—whether partners may qualify as employees—cannot be addressed, because these courts start with the premise that partners cannot be employees. In *Dowd*, for example, the Seventh Circuit reasoned that the Supreme Court's decision in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), supported the adoption of the per se rule that partners cannot be employees. *Dowd*, 736 F.2d at 1178. In its *Hishon* analysis, the Court presumed that the defendant partnership constituted an employer under Title VII. *Hishon*, 467 U.S. at 73-75 & n.3. Because the Supreme Court acknowledged that a partnership can be an employer under Title VII, the *Dowd* court reasoned that a partner cannot therefore be an employee. *Dowd*, 736 F.2d at 1178. This analysis is lacking in substance and only begs the question of whether partners can be employees. The language of Title VII unambiguously supports the proposition that a partnership can be an employer, because section 701 explicitly provides that "[t]he term 'employer' means 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, and any agent of such a person." 42 U.S.C. § 2000e(b) (1982). Moreover, section 701 of Title VII provides that "[t]he term 'person' includes 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, or receivers." 42 U.S.C. § 2000e(a) (1982) (emphasis added). The definitions of the term "employer" contained in both the ADEA and the Equal Pay Act also include partnerships. See 29 U.S.C. § 203(a), (d) (1982); 29 U.S.C. § 630(a), (b) (1982). The *Dowd* court further stated that Justice Powell's concurring opinion in *Hishon* suggested that partners cannot be employees. *Dowd*, 736 F.2d at 1178. Justice Powell recognized a clear distinction between the relationship among law partners and the relationship between employers and employees. *Hishon*, 467 U.S. at 79 (Powell, J., concurring). But "[t]he significance of Justice Powell's observation must, of course, be tempered by the fact that no other justice joined the concurring opinion, and by allusions to a highly interactive partnership characterized by common agreement or consent among the partners." *Wheeler*, 825 F.2d at 265. Justice Powell cautioned that employers cannot merely label some employees partners to circumvent Title VII's proscriptions. *Hishon*, 467 U.S. at 79 n.2 (Powell, J., concurring). This warning only clouds the issue by skewing the proper framework for analysis. The correct inquiry should be whether partners can be employees in light of the legislative history, language, and purpose of the federal employment discrimination statutes. Justice Powell, however, seems to have shifted the focus of analysis to the question of what constitutes a true partner. Although a partnership is generally described as an association of two or more individuals who manage and control a business for profit as co-owners, there is no bright line rule as to what constitutes a true partner. In addition, Justice Powell presumed that law firm partnerships generally function as egalitarian institutions in which the partners interact with each other to a significant extent on issues concerning the operations of the partnership. *Id.* at 79-80 & nn.2 & 3 (Powell, J., concurring). The traditional attributes of partnership that Justice Powell identified, however, may be lacking significantly with respect to certain partners in partnerships organized under the UPA. See *supra* text accompanying notes 167-77. Arguably, from Powell's perspective, these so-called partners would not be considered partners; yet they could still be bona fide partners under the UPA. One is left in a quandary as to whether these partners are protected under the employment discrimination laws. Despite the Seventh Circuit's understanding of the Supreme Court's opinion in *Hishon*, that opinion gives no indication whether partners can be considered employees.

protection given to employees. The per se rule, therefore, exalts form over substance.

D. *The Rejection of the Traditional Partnership Indicia Test*

The traditional partnership indicia test is not only too cumbersome, but also lacks a convincing degree of rationality. Courts that have adopted this test are unnecessarily preoccupied with determining what constitutes a bona fide partner. They start with the premise that bona fide partners cannot be employees and then proceed to examine whether the individual in question possesses the attributes that are perceived as being essential to the existence of partner status.¹⁸⁸

Because the courts are not in agreement as to what factors establish partner status and the weight to be accorded to these factors, the traditional partnership indicia test may produce inconsistent results in similar factual circumstances.¹⁸⁹ The various indicia of partner status are apparently extrapolated from the old common law of partnership and from the UPA. The tremendous emphasis that courts have placed on traditional notions of partnership is, however, unwarranted.

Partnership law has come to a virtual standstill since the majority of states adopted the UPA in its various forms more than sixty years ago.¹⁹⁰ A major weakness of the traditional indicia test is that it presumes too much. Because the UPA is technically deficient in many respects,¹⁹¹ and because the law of partnership has yet to be examined in light of the circumstances under which modern partnerships function,¹⁹² reliance on traditional concepts of partnership status is highly questionable.

There is no bright line rule as to what constitutes a bona fide or true partner. Although a partnership is generally perceived as an association of two or more individuals who manage and control a business as co-owners for profit, these attributes may be altered signif-

188. See, e.g., *Hyland*, 794 F.2d at 801 (Cardamone, J., dissenting) ("When all the indicia of partnership status are not present, an individual is an employee within the purview of the ADEA—regardless of the label attached to his position. Such an approach best fulfills the Act's remedial purposes.").

189. See *supra* notes 104-52 and accompanying text.

190. Hillman, *supra* note 12, at 426-31 (identifying possible reasons why partnership law has assumed both a revered and neglected status). According to Professor Hillman, the attention given to the partnership form of business organization in academia has been extremely sparse. *Id.* at 426-27.

191. *Id.* at 429. For an example of such a deficiency, "one need only look at the inconsistent and confusing terminology contained in section 38 of the U.P.A." *Id.* n.12. For criticisms of the UPA, see A. BROMBERG, *supra* note 6, at 103, 246-49, 296-97, 302, 416-17, 468.

192. Hillman, *supra* note 12, at 429.

icantly by agreement. In some modern partnerships, the partners may have signed an agreement under which the bundle of traditionally accepted partnership characteristics may be lacking to a significant degree with regard to some of the partners. It is questionable whether a court that has adopted the traditional partnership indicia test should disregard the agreement, adhering instead to its own notions of partnership, which may be greatly at odds with the intent of the original drafters of the partnership agreement. In light of the supplementary nature of the UPA regarding partnership agreements, such an approach seems impermissible. The partnership indicia test, therefore, is inappropriate for determining employee status. The test, like the traditional common law test and the *per se* rule, diminishes the reach of the federal employment discrimination statutes by excluding individuals "not on the basis of the realities of their interaction with employers, but rather upon the existence or nonexistence of a limited set of factors in the formal structure of the employment relationship."¹⁹³

E. *The Effect of the Status Quo*

The courts' reluctance to allow partners to invoke the federal employment discrimination statutes is partially a result of their tendency to give more deference to employment decisions made by upper level rather than lower level employers.¹⁹⁴ This institutional bias, however, unduly restricts the reach of federal legislation and has no basis in law or policy.¹⁹⁵ The courts that have addressed whether partners can be employees under Title VII, the ADEA, and the Equal Pay Act have not adopted the proper framework within which to achieve the objectives of the statutes. Rather than construing the employment discrimination laws in a manner that addresses the evil to which the statutes are directed, these courts have pursued formalistic and rigid analyses that focus primarily on the existence of characteristics commonly associated with employment relationships, or on generally understood attributes of partnership status. These analyses have for the most part ignored the underlying realities of the work relationship.

Although the prophylactic goals of the federal laws that pro-

193. Dowd, *supra* note 155, at 85-86.

194. Bartholet, *supra* note 9, at 959-78; *see also* D. BELL, RACE, RACISM AND AMERICAN LAW 632 (2d ed. 1980) (stating that courts are unwilling "to extend Title VII remedies beyond blue-collar workers").

195. *See generally* Bartholet, *supra* note 9, at 1026 ("argues that there is no legal basis for distinguishing between upper and lower level selection methods").

scribe employment discrimination are clear,¹⁹⁶ modern America continues to be plagued with intolerable discriminatory practices in the workplace.¹⁹⁷ The application of the common law right-to-control test, the hybrid test,¹⁹⁸ and the partnership indicia test results in a restrictive and inaccurate interpretation of the term "employee." Moreover, the legislative history, purpose, and language of the federal employment discrimination statutes do not support the application of these tests.¹⁹⁹

The effect of the courts' current refusal to permit partners to invoke the protections of Title VII, the ADEA, or the Equal Pay Act, even if the employment realities demonstrate that a partner is in need of protection, is that equal employment opportunity, the express goal of the statutes, is severely undermined. Women and minorities have been the traditional victims of employment discrimination in this country.²⁰⁰ Under the restrictive tests of employee status that courts

196. By enacting Title VII, Congress sought "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (discussing the expansiveness of Title VII's protections). The Equal Pay Act "was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). Finally, Congress enacted the ADEA in light of the disadvantages suffered by the elderly in the workplace. Congress outlined the ADEA's background and purpose as follows: "[I]n the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age." 29 U.S.C. § 621 (1982).

197. J. FERNANDEZ, *SURVIVAL IN THE CORPORATE FISHBOWL* 130 (1987) ("Racism and sexism continue to be two of the most powerful and complex social forces affecting American society."); A. PINKNEY, *supra* note 159, at 66 ("Although there has been a decline in prejudiced attitudes toward blacks and some decline in discrimination against them, both remain widespread and account for many of the differences between blacks and whites in income, employment, education, housing, health, and other sectors of the society."); S. SLAVIN & M. PRADT, *THE EINSTEIN SYNDROME: CORPORATE ANTI-SEMITISM IN AMERICA TODAY* 2 (1982) (positing that "contrary to popular belief, there is still a substantial amount of discrimination against Jews in large corporations"); B. WILLIAMS, *BLACK WORKERS IN AN INDUSTRIAL SUBURB: THE STRUGGLE AGAINST DISCRIMINATION* 10 (1987) ("[W]hite businessman aversion to blacks is not necessarily limited to workers with low human capital. Employer discrimination against blacks of all skill levels persists in spite of civil rights gains. Human capital, therefore, fails to account for the persistent discrimination in the workplace."); *see also* BELL, *supra* note 194, at 636 ("For blacks and other nonwhites seeking access to higher paying, higher status positions, Title VII has not proved to be particularly useful. To the extent that the white elite still hold most of the more desirable positions of employment in this country, Title VII has posed little threat to the status quo.").

198. For an argument that the traditional common law right-to-control test and the hybrid test should be rejected, *see generally* Dowd, *supra* note 155.

199. *See supra* text accompanying notes 161-66.

200. *See* J. FERNANDEZ, *supra* note 197, at 121-29 (discussing the history of racism and sexism in American society); *see also* P. COX, *supra* note 4, at ¶ 1.02 ("The primary

currently utilize, women and minorities who have labored hard to attain partner status may lose that status because these tests do not give partners the protections afforded to employees under the federal employment discrimination statutes. Furthermore, partnerships can deliberately circumvent the employment discrimination laws and the Supreme Court's decision in *Hishon v. King & Spalding* by merely promoting their undesirable associates to partnership status, only to terminate them subsequently because they are black, Hispanic, Jewish, Catholic, female, or too old. These discriminatory attitudes, of course, would be disguised as proper partnership decisions. Furthermore, the sham exception to the per se rule that Justice Powell identified does not adequately protect against such discrimination because many partnerships are large enough to absorb the cost of maintaining the undesirables as partners until the "sham period"²⁰¹ expires. Also, what one court may consider a sham, another court may consider a bona fide partner relationship. The courts, in effect, are closing their eyes to the discriminatory practices that Congress sought to prohibit by their refusal to regard partners as employees in circumstances that mandate such protection.

V. CONCLUSION

Courts are currently faced with the problem of deciding whether to permit partners to invoke the protections afforded to employees under Title VII, the ADEA, and the Equal Pay Act. The majority of courts that have addressed the issue have been reluctant to equate partners with employees. This hesitance has resulted from the application of various judicially created tests that largely ignore the prophylactic goals of the statutes. Furthermore, the application of these tests is inconsistent with both the language and legislative history of the statutes. The proper test for determining employee status in the context of employment discrimination is the economic realities test. Under this flexible test, a partner may be an employee if the partnership exerts the requisite control over his employment opportunities within the partnership. Such a partner, if exposed to proscribed discriminatory conduct, may invoke the protections afforded to employees under the federal employment discrimination statutes.

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congressional purpose underlying enactment of the statute [Title VII] was to prohibit employment discrimination against the historical victims of such discrimination: women and racial, ethnic and religious minorities.").

201. This is the period during which employers label employees as partners solely to circumvent the employment discrimination laws.