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The Application of Antidiscrimination Statutes to Shareholders of Professional Corporations: Forcing Fellow Shareholders Out of the Club

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THE APPLICATION OF ANTIDISCRIMINATION STATUTES TO SHAREHOLDERS OF PROFESSIONAL CORPORATIONS: FORCING FELLOW SHAREHOLDERS OUT OF THE CLUB

INTRODUCTION

The disparity between the treatment of professionals and corporate employees under the Internal Revenue Code has caused professionals to seek alternative business structures that would give them equal tax benefits. In recent years, an increasing number of professionals have incorporated under state professional corporation statutes to gain tax as well as civil liability advantages.

At the same time, firms and professional corporations (P.C.'s) are dividing shrinking profits among a larger number of co-owners. As a result, more firms force partners, or shareholders in the case of P.C.'s, who


2. G. Ray, supra note 1, at 11, 25; see Coté v. Wadel, 796 F.2d 981, 983 (7th Cir. 1986); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 798 (2d Cir. 1986); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984); Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc., 710 F.2d 87, 89 (2d Cir. 1983). A major tax advantage of incorporating is the ability to deduct pension and benefit plans, such as insurance and medical plans, as corporate expenses. G. Ray, supra note 1, at 25. Partners and sole proprietors, who, unlike professional corporation shareholders, are considered self-employed for tax purposes, are limited to annual deductible pension contributions of $30,000. See I.R.C. § 415(c) (CCH 1986) (commonly referred to as Keogh plans). Yet professional corporations (P.C.'s) can circumvent these limitations. See Fink, supra note 1, at 123-28.

The 1986 Tax Reform Act eliminated one corporate advantage for taxable years after 1987, when it eliminated favorable tax rates for corporations. The 1986 Act implemented lower rates for individuals, including partners, than for corporations—a maximum rate of 28% for individuals versus 34% for corporations. Compare I.R.C. § 1(a)-(d) (CCH 1986) (rate tables for individuals) with I.R.C. § 11(b) (CCH 1986) (rate tables for corporations). Nevertheless, P.C.'s should remain advantageous despite this change because of the other advantages of incorporation previously mentioned.


4. For example, law firms are losing business from corporations that have recently developed larger in-house capabilities. See Altman, Slicing the Partner Pie, 72 A.B.A. J. 62, 62 (Sept. 1, 1986). Therefore, the associates added in the "boom" of the sixties and seventies, who have become co-owners today, find it difficult to obtain clients. Id.
they believe to be underproductive, into retirement. A number of aggrieved former partners and shareholders have responded by suing under the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act (Title VII), raising the issue of whether partners and P.C. shareholders have standing to sue under these antidiscrimination statutes.

Although courts have interpreted the remedial nature of the ADEA and Title VII to endorse a broad application of the Acts, the statutes prohibit discrimination only by employers against employees. Accordingly, partners lack standing under these statutes because courts treat them as co-owners who manage and control their business, rather than as employees.

5. Id. at 66. Altman deals with partnerships, but the problems and solutions mentioned relate to all professionals—incorporated or unincorporated.


8. See, e.g., Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 795 (2d Cir. 1986) (radiologist who was forced into retirement sued P.C. for age discrimination); EEOC v. Peat, Marwick, Mitchell & Co., 775 F.2d 928, 929 (8th Cir. 1985) (EEOC investigated retirement practices and policies of firm to determine whether they violated the ADEA), cert. denied, 106 S. Ct. 1263 (1986); Reiver v. Murdoch & Walsh, P.A., 625 F. Supp. 998, 1004-07 (D. De. 1985) (former shareholder and director of corporation of lawyers sued corporation under Title VII for termination of employment contract, but court refrained from deciding whether she was an employee); Holland v. Ernst & Whinney, 35 Emp. Prac. Dec. (CCH) ¶ 34,653 at 34,949-50 (N.D. Ala. 1984) (terminated partner of accounting firm not employee, and thus could not sue under ADEA).


10. See 29 U.S.C. § 630(f) (1982); 42 U.S.C. § 2000e(f) (1982). But see Doe v. St. Joseph's Hosp., 788 F.2d 411, 425 & n.28 (7th Cir. 1986) (although other Title VII cases have required employment relationship between physician and her patient for standing to sue under antidiscrimination legislation, claim of discrimination should not be dismissed at pleading stage because physician was not employee).

The Acts further limit coverage to employers employing twenty or more individuals under the ADEA, 29 U.S.C. § 630(b) (1982), and fifteen or more under Title VII, 42 U.S.C. § 2000e(b) (1982). Congress further restricted standing in the 1978 amendments to the ADEA, exempting bona fide executives and high policymaking employees below the age of sixty-five and seventy, employed in the position for two years immediately before compulsory retirement, if such employees are entitled to annual retirement benefits of at least $27,000. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978). The 1986 amendments removed the age seventy upper limitation, broadening the exemption to all employees sixty-five or older, and raised the benefit limitation to $44,000. See Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 171 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5628 (codified at 29 U.S.C.A. § 631(c) (Supp. 1987)). Even ignoring the high $44,000 annual retirement benefit requirement, only 2.9% of the 1984 male workforce and 2.5% of the female workforce in the United States were over the age of sixty-five. See U.S. Bureau of the Census, Statistical Abstract of the United States: 1986, Table 663, at 394 (106th ed. 1985). This new exemption is an example of the trend toward narrowing the ADEA's coverage of business managers.
employees controlled by their employers. Whether the shareholders of a P.C. should be accorded the same treatment, however, is unsettled. This Note proposes that the courts focus on the true nature of the employment relationship to determine whether a P.C. shareholder has standing under the ADEA and Title VII, rather than rely solely on the shareholder's title. Part I outlines the development of the standards used to determine an employment relationship under antidiscrimination statutes. Part II considers the application of such standards to partners suing under these statutes. Part III examines the inconsistent judicial interpretations that have resulted when courts have considered whether P.C. shareholders have standing under these statutes, and highlights the similarities between P.C.'s and partnerships. Finally, this Note concludes that the application of a test that considers the economic reality of the employment relationship generally determines that shareholders of P.C.'s are not employees standing under either the ADEA or Title VII.

I. Determining an Employment Relationship

The substantive prohibitions of the ADEA were derived verbatim from Title VII; therefore, decisions relating to the scope of one statute's substantive prohibitions are persuasive authority for cases under the other. Both statutes make it unlawful for an employer to discharge or otherwise to discriminate against any individual with respect to any matter related to his employment on the basis of age, race, religion, sex, or national origin. Although the statutes protect only employees, neither


12. The Seventh Circuit, in EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984), concluded that the economic reality of the relationship between a P.C. shareholder and his company was analogous to the relationship between a partner and a partnership and, thus, beyond the scope of Title VII. Id. at 1178. In Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793 (2d Cir. 1986), another case addressing P.C. shareholder standing under an antidiscrimination statute, id. at 797, the Second Circuit specifically rejected the analysis in Dowd, holding that the use of the corporate form by a P.C., and the professional corporation's characterization of shareholders as employees in its shareholder agreement, precluded any examination of the economic reality of the employment relationship for ADEA purposes. Id. at 798.

13. See Lorillard v. Pons, 434 U.S. 575, 584 (1978) (the substantive provisions of the ADEA were derived in haec verba from Title VII).


15. Compare 29 U.S.C. § 623(a) (1982) (provides in relevant part that it "shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age") with 42 U.S.C. § 2000e-2(a)(1) (1982) (provides in relevant part that it "shall be an unlawful employ-
statute provides much guidance for determining when an employment relationship exists. Consequently, courts have developed tests that incorporate common law principles, factors considered under analogous legislation, and the congressional purposes underlying the ADEA and Title VII to define an employment relationship.

A. Common Law Agency Test

The common law test to determine an employer-employee relationship evolved from agency law. Under the common law, an employment relationship exists when one person, who employs another, exercises the right of control over the performance of the other’s work to the extent of describing the manner in which it is to be executed. The tests currently in practice for an employer . . . 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.

16. The ADEA and Title VII merely define an employee as an individual employed by an employer. See 29 U.S.C. § 630(f) (1982) (ADEA); 42 U.S.C. § 2000e(f) (1982) (Title VII). Title VII’s legislative history indicates that the term "employer" should have "its common dictionary meaning except as expressly qualified by the Act," 110 Cong. Rec. 7216 (daily ed. April 8, 1964) (Remarks by Senator Clark), and Webster's Unabridged Dictionary (2d ed. 1983) defines an employer as "one who employs," while defining an employee as "one who is hired by another, or by a business firm, etc., to work for wages or salary." Courts have found these definitions of little help. See, e.g., Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (Title VII statute is "scant help" in defining employee); Hishon v. King & Spalding, 678 F.2d 1022, 1027 (11th Cir. 1982) (status of employee under Title VII is a "gray area"), rev'd, 467 U.S. 69 (1984); Hyland v. New Haven Radiology Assocs., P.C., 606 F. Supp. 617, 619 (D. Conn. 1985) (definition does not help resolve the issue in this case), rev'd on other grounds, 794 F.2d 793 (2d Cir. 1986). There is no ADEA legislative history that clarifies the terms employer and employee.

17. See infra notes 21-22 and accompanying text.

18. See infra note 24 and accompanying text.

19. See infra note 22 and accompanying text.

20. See Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (first test was traditional common law test of agency); Garrett v. Phillips Mills, Inc., 721 F.2d 979, 981 (4th Cir. 1983) ("common law test derived from principles of agency"); 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, 1155 (1984) [hereinafter Choice of a Test] ("The traditional test of employee status was an agency test derived from common law."); see also Restatement (Second) of Agency § 220, at 486 (1958) (employee is one who "is subject to the control or to the right to control of the other as to the manner of performing the service").

21. See Cobb v. Sun Papers, Inc., 673 F.2d 337, 340-41 (11th Cir. 1982) ("right of employer to control the employee [is] determinative"), cert. denied, 459 U.S. 874 (1983); Safeway Stores, Inc. v. Wilcox, 220 F.2d 661, 665 (10th Cir. 1955) (employee is one who is under control of employer); Smith v. Dutra Trucking Co., 410 F. Supp. 513, 516-17 (N.D. Cal. 1976) (plaintiff not employee because defendant did not control details and means of performance), aff'd without opinion, 580 F.2d 1054 (9th Cir. 1978); see also Restatement (Second) of Agency § 220, at 486 (1958) (employee is one who "is subject to the control or to the right to control of the other as to the manner of performing services"). Generally, an employment relationship is contractual in nature, and can be created by an express written or oral contract, or by implication. See Hollingbery v. Dunn, 68 Wash. 2d 75, 79, 411 P.2d 431, 435 (1966).
applied in ADEA and Title VII cases consider control an important factor, but the common law control test is not used in these cases because exclusive reliance on control makes it too difficult for plaintiffs to establish standing—a result considered inconsistent with the remedial nature of the statutes. 22

B. The Economic Realities and Hybrid Tests

The first cases to consider the question of standing under the ADEA and Title VII adopted the "economic realities" test, 23 which originated in cases interpreting the Fair Labor Standards Act (FLSA). 24 Under this test, an employment relationship exists if the employee is economically dependent on the business to which he renders service. 25

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pendence is determined by the employer’s right to control the alleged employee, the investment in facilities by the alleged employee, and the method of payment.27

Most ADEA and Title VII cases currently apply a hybrid of the economic realities and the common law control tests.28 The hybrid test, originally used to distinguish employees from independent contractors,29 considers the employer’s right of control the most important factor to determine whether an employment relationship exists.30 Like the eco-

26. “Investment in facilities,” in the partner and P.C. shareholder context, refers to the amount of risk capital or equipment the plaintiff has invested in the business. See infra notes 63-64 & 95-98 and accompanying text.

27. “Method of payment” refers to the structure of the plaintiff’s compensation—salary, bonus, percentage of the profits or any combination of these. See infra notes 59-62 & 99-102 and accompanying text. The court in Hickey v. Arkla Indus., 699 F.2d 748 (5th Cir. 1983) was the first to apply the economic realities test in an ADEA case. Id. at 751-52. Hickey, a former manufacturer’s sales representative, was discharged when the corporation realigned its marketing administration and terminated his contract. Id. at 751. In turn, he sued Arkla under the ADEA, claiming that he was discriminated against because of his age—he was forty-nine years old. Id. Applying an economic realities test, the court considered the sales representative a non-employee. Id. at 752-53. A major factor in the court’s decision to deny standing under the ADEA was that the plaintiff had a continuing investment in his business, and, therefore, was not dependent on the corporation for his livelihood. Id.


Courts do not always distinguish between the tests, and sometimes fail to use the test they claim to apply. See Mares v. Marsh, 777 F.2d 1066, 1067 n.1 (5th Cir. 1985) (“One difficulty posed by the cases on the subject is that the courts sometimes claim to be applying one test when they are, in fact, applying another.”); EEOC v. Zippo Mfg., 713 F.2d 32, 38 (3d Cir. 1983) (“The district court purported to apply the economic realities test . . . [but] [i]t appears instead to have applied the hybrid standard.”). For example, Judge Cardamone, in the Hyland dissent, proposed a new test, but actually applied the major factors of the economic realities test—compensation and control. See Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 801-02 (2d Cir. 1986) (Cardamone, J., dissenting) (proposal of new two-pronged test for determining an employment relationship for P.C. shareholders). The results are usually the same, however, since the economic realities test and the hybrid test apply the same factors, with varying emphasis.

29. See Garrett v. Phillips Mills, Inc., 721 F.2d 979, 982 (4th Cir. 1983) (employment agreement stated that plaintiff was not employee and his performance under agreement supported that he was independent contractor); EEOC v. Zippo Mfg., 713 F.2d 32, 38 (3d Cir. 1983) (sales district manager considered independent contractor and not employee).

30. See Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985) (test focuses more on “the extent of the employer’s right to control the ‘means and manner’ of the worker’s performance”) (quoting Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979)); Garrett v. Phillips Mills, Inc., 721 F.2d 979, 981-82 (4th Cir. 1983) (under hybrid test,
nomic realities test, the hybrid test also considers the investment in facilities by the alleged employee and the method of compensation.\textsuperscript{31}

Although courts are divided over whether the economic realities or the hybrid test is appropriate to determine standing under the ADEA and Title VII,\textsuperscript{32} both tests consider the same factors, with varying emphasis.\textsuperscript{33} Hence, the application of either test usually reaches the same result.\textsuperscript{34}

II. STANDING FOR PARTNERS—DETERMINING AN EMPLOYMENT RELATIONSHIP

Although only a few courts have addressed the issue, they all agree that partners do not have standing to sue under the antidiscrimination statutes because they are not employees.\textsuperscript{35} In \textit{Burke v. Friedman},\textsuperscript{36} the plaintiff employee filed a charge of sex discrimination under Title VII against her employer, an accounting firm.\textsuperscript{37} The court considered whether to include the four partners as employees to determine if the control is most important factor, but not dispositive; EEOC v. Zippo Mfg., 713 F.2d 32, 37 (3d Cir. 1983) (courts look to economic realities of the situation but focus on employer’s right to control the “means and manner” of the worker’s performance as most important factor).


32. See, \textit{eg.}, Mares v. Marsh, 777 F.2d 1066, 1067 & n.l (5th Cir. 1985) (joined majority of courts and applied hybrid test over economic realities test); Garrett v. Phillips Mills, Inc., 721 F.2d 979, 981-82 (4th Cir. 1983) (applied hybrid test); EEOC v. Zippo Mfg., 713 F.2d 32, 36-38 (3d Cir. 1983) (courts have used either economic realities test or hybrid test); Hickey v. Arkla Indus., 699 F.2d 748, 751 (5th Cir. 1983) (courts have either applied the economic realities test or the hybrid test).

33. \textit{See supra} notes 23-31 and accompanying text.

34. \textit{See, eg.}, Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 801-02 (2d Cir. 1986) (Cardamone, J., dissenting) (plaintiff not employee under hybrid test, but merely considering the compensation and control factors would have reached the same result); EEOC v. Zippo Mfg., 713 F.2d 32, 36-38 (3d Cir. 1983) (plaintiffs were independent contractors under either the economic realities or hybrid test).

35. See \textit{Hishon v. King & Spalding}, 678 F.2d 1022, 1028 (11th Cir. 1982) (partners are not employees), \textit{revid on other grounds}, 467 U.S. 69 (1984); \textit{Burke v. Friedman}, 556 F.2d 867, 869-70 (7th Cir. 1977) (partners of accounting firm not employees for Title VII purposes); Holland v. Ernst & Whitney, 35 Emp. Prac. Dec. (CCH) \# 34,653, at 34,949, 34,950 (N.D. Ala. 1984) (terminated partner not employee, and therefore not protected by ADEA); \textit{see also Hishon}, 467 U.S. at 79 (Powell, J., concurring) (majority opinion should not be read to extend Title VII to the management of a firm by its partners); Trail & Livesay, \textit{supra} note 11, at 547 (the few Title VII cases find that partners are not employees); \textit{cf. Lucido v. Gravath, Swaine & Moore}, 425 F. Supp. 123, 128 (S.D. N.Y. 1977) (associate of firm had standing for claim of discrimination when he was not made a partner, but a suit by a partner might have caused different result) (dictum). The issue has never been decided in a reported ADEA case. \textit{See EEOC v. Peat, Marwick, Mitchell & Co.}, 589 F. Supp. 534, 538 (E.D. Mo. 1984) (Seventh and Eleventh Circuits have held that partners are not employees under Title VII but issue has never been decided in an ADEA case), \textit{aff’d}, 775 F.2d 928 (8th Cir. 1985), \textit{cert. denied}, 106 S. Ct. 1263 (1986).

36. 556 F.2d 867 (7th Cir. 1977).

37. \textit{Id.} at 868.
partnership had the requisite number of employees to establish subject matter jurisdiction under Title VII. The court reasoned that partners are co-owners of the firm, rather than employees, because they manage, own, and control the partnership, and share in profits and losses. Thus, the court affirmed the district court's order to dismiss the case for lack of subject matter jurisdiction.

In *Hishon v. King & Spalding*, the Court of Appeals for the Eleventh Circuit considered whether a former associate of a law firm could sue the firm for sex discrimination because it refused to invite her into the partnership. The court held that Hishon lacked standing under Title VII, because a partnership invitation, unlike a corporate promotion, is not covered under Title VII as a "term, condition, or privilege of employment." The court also noted that partners are owners, and, since the essence of a partnership is the voluntary joinder of these co-owners, partners are not employees.

The Supreme Court reversed, reasoning that partnership invitations are an "employment opportunity" or a "term, condition, or privilege of employment" protected by Title VII. The majority of the Court, however, did not address the issue of whether partners themselves are employees.

Justice Powell addressed the partner-employee distinction in his concurrence. Although he agreed that consideration for partnership status is a contractual employment condition under Title VII, he stated that the majority's decision should not be read to extend statutory coverage to the relationship among partners.

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38. *Id.* Title VII only applies to employers with at least fifteen employees. 42 U.S.C. § 2000e(b) (1982). The accounting firm in *Burke* had thirteen employees and four partners. See *Burke*, 556 F.2d at 868. Thus, unless the partners were included as employees, the plaintiff employee would not meet the statutory requirements of Title VII. The ADEA only applies to employers with twenty or more employees. 29 U.S.C. § 630(b) (1982).

39. *See Burke*, 556 F.2d at 869. The court in *Burke* noted that the same conclusion had been reached indirectly in EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975). See *Burke*, 556 F.2d at 869 n.1. In *Rinella*, the court determined that associates in a law firm were employees for the purpose of a sex discrimination complaint under Title VII. See *Rinella*, 401 F. Supp. at 180. The court reasoned that "[s]ince the firm is not a partnership, and the associates are not listed as 'of counsel,' it is only reasonable to conclude that they are employed by the firm." *Id.* at 181. This reasoning implies that if the plaintiff were a partner, she would not be an employee.

40. *See Burke*, 556 F.2d at 870.


42. *See id.* at 1024-25.


44. *See id.*


46. *Id.* at 76-79.

47. *See id.* at 79 (Powell, J., concurring) (the majority opinion should not be read to extend coverage of Title VII to partners in a law firm).

48. *Id.* at 79-81 (Powell, J., concurring).

49. *See id.* at 79-80.

50. *See id.* at 79 ("the Court's opinion does not require that the relationship among
Indeed, under any of the standing tests used by the courts in antidiscrimination cases, 51 true partners are not employees. True partners manage and control their own business. 52 A "full partner" 53 has an equal vote on all partnership business. 54 Moreover, under partnership law in most jurisdictions, a partner can dissolve the organization immediately upon his withdrawal, thereby giving an individual partner's vote substantial weight. 55 Typically, partners make decisions about the day-to-day management of the firm. 56 The partners, as owners, bring in the work, then assign it to their employees. 57 Finally, partners, unlike employees, decide whether to accept, and how to service, new clients. 58 Partners also are distinguished from employees by their method of payment. Partners share in profits and losses and, therefore, are co-own-

51. See supra notes 20-34 and accompanying text.

[Partnership] decisions concern such matters as participation in profits and other types of compensation; work assignments; approval of commitments in bar association, civic, or political activities; questions of billing; acceptance of new clients; questions of conflicts of interest; retirement programs; and expansion policies. Such decisions may affect each partner of the firm. Divisions of partnership profits, unlike shareholders' rights to dividends, involve judgments as to each partner's contribution to the reputation and success of the firm. Id.

53. A "full partner" is a partner with an equal vote on partnership business and a full share of partnership profits. See K. Strong & A. Clark, Law Office Management 28 (1974); see also Unif. Partnership Act § 18(e), 6 U.L.A. 213 (1969) (unless otherwise agreed, each partner has equal rights in management and conduct of partnership business). This Note section assumes the partners discussed to be true partners or "full partners," not "junior partners" or any other title of an individual who has no share in the firm's management and capital, and, therefore, is not a partner at all. For example, at the New York City law firm of Anderson, Russell, Kill & Olick, all lawyers are hired as "partners," but they do not share in firm profits and can be discharged if they do not "work out." Quade, Partners all, 70 A.B.A. J. 30-31 (June 1984). The economic realities or hybrid test would lead to the conclusion that these "partners" are employees. See supra notes 35-64 and accompanying text.

54. See K. Strong & A. Clark, supra note 53, at 28 (referring to the equal vote of a "full partner").
55. See id. at 36-37.
57. Hishon v. King & Spalding, 467 U.S. 69, 79-80 n.3 (1984) (Powell, J., concurring); accord EEOC v. Rinella & Rinella, 401 F. Supp. 175, 180-81 (N.D. Ill. 1975) (associates of a law firm were employees, for the purposes of Title VII, partially because the owners assigned work to them).
ers as opposed to employees. The division of profits affects each partner of the firm, and reflects each partner's performance in the organization. This is true whether the partnership distributes earnings by percentages, salaries, bonuses, or any combination of these. Finally, partners are not employees because they own the assets of the business. This ownership gives the partners a continuing investment in the firm that assures their independence.

III. THE CONTROVERSY—ARE P.C. SHAREHOLDERS EMPLOYEES?

Two recent cases have considered the standing of P.C. shareholders under the antidiscrimination statutes. In EEOC v. Dowd & Dowd, Ltd., the Court of Appeals for the Seventh Circuit focused on the true nature of the employment relationship enjoyed by P.C. shareholders to determine whether the defendant corporation satisfied the fifteen employee requirement of Title VII. The plaintiff alleged that her employer, a P.C. of lawyers, violated Title VII because it failed to provide pregnancy benefits for its female employees. Including the three shareholders as employees would have raised the number of employees above fifteen, thereby satisfying the jurisdictional requirements of Title VII. Apply-

59. See Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977); Hyland v. New Haven Radiology Assocs., P.C., 606 F. Supp. 617, 620 (D. Conn. 1985) (citing Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977), although Burke dealt with P.C. shareholders), rev’d, 794 F.2d 793 (2d Cir. 1986). A partnership is formed “when persons join together their money, goods, labor, or skill[s]” for profit. Commissioner v. Tower, 327 U.S. 280, 286 (1946). In addition, section 6 of the Uniform Partnership Act defines a partnership as “an association of two or more persons to carry on as co-owners a business for profit.” Unif. Partnership Act § 6, 6 U.L.A. 22 (1969); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) (citing Unif. Partnership Act § 6, 6 U.L.A. 22 (1969)).

60. See supra note 60 and accompanying text.

61. See supra note 60 and accompanying text.

62. See supra note 60 and accompanying text.

63. See Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) (partners are not employees because they own and manage the operation of the business); EEOC Decision No. 85-4, Emp. Prac. Guide (CCH) ¶ 6846, at 7040 (1985) (citing Burke v. Friedman, 556 F.2d at 869); EEOC v. Rinella & Rinella, 401 F. Supp. 175, 181 (N.D. Ill. 1975) (factor in considering associates of law firm employees under Title VII was that the sole proprietor owned fixed assets of firm and provided office space); B. Hildebrandt & J. Kaufman, supra note 56, at 101-02 (firms require capital investment from partners-shareholders since they, like other businesses, need some plant and equipment).

64. Cf. Hickey v. Arkla Indus., 699 F.2d 748, 752-53 (5th Cir. 1983) (independent contractor was not dependent on alleged employer for his livelihood since contractor provided the risk capital). For a discussion of the investment factor see supra note 26 and infra notes 95-98 and accompanying text.

65. 736 F.2d 1177 (7th Cir. 1984) (a Title VII case).

66. Id. at 1177-78.

67. Plaintiff claimed that defendant violated 42 U.S.C. § 2000e-2(a) (1982), which prohibits discrimination on the basis of an individual’s sex. Id.

68. EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1177 (7th Cir. 1984).

69. Id. at 1178.
ing an economic reality test, the court reasoned that the management, control, and ownership of a P.C. parallels that of a partnership. Thus, the court held that P.C. shareholders should be treated like partners under Title VII and affirmed the district court's grant of summary judgment in favor of the defendant.

In Hyland v. New Haven Radiology Associates, P.C., the Court of Appeals for the Second Circuit considered whether a shareholder, forced to retire upon the unanimous vote of all other shareholders from a professional corporation comprised of radiologists, was an employee within the meaning of the ADEA, and thus entitled to sue under the Act. The court specifically rejected Dowd, and held that the corporate form of a P.C. precludes use of the hybrid test to determine the existence of an employment relationship. The court stated that P.C.'s are not analogous to partnerships, and, since the stockholders were termed corporate employees in the shareholder agreement, any analysis of the economic reality of the shareholder's roles in the P.C. was irrelevant. Thus, the Hyland court strictly construed the shareholder agreement and refused to go beyond the agreement to discern the true nature of the employment relationship.

By holding that the P.C.'s decision to call its shareholders employees precluded any examination of the economic reality of the relationship, the Hyland court, in effect, adopted a label test. Label tests, however, are inconsistent with the overwhelming weight of authority in ADEA and Title VII cases, which requires a court to look beyond an individual's job title to determine standing. Although most ADEA and Title VII cases

70. See id.
71. See id. at 1178-79.
72. See id. at 1179.
73. 794 F.2d 793 (2d Cir. 1986).
74. Id. at 795.
75. See id. at 797-98. The dissent in Hyland, however, adopted Dowd's general analysis, but only applied the compensation and control "prongs" of the economic realities test. See id. at 801-02 (Cardamone, J., dissenting). The dissent, in reality, is consistent with Dowd since the court in Dowd applied only those factors relevant to the "management, control, and ownership" of the professional corporation. Compare Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 801-02 (2d Cir. 1986) (Cardamone, J., dissenting) (court must evaluate compensation and control to decide whether alleged partner should be classified as an employee) with EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (P.C. shareholders should be treated like partners because they manage, control, and own the P.C.). Dowd considered the factors relevant to the shareholder's power in the organization. See 736 F.2d at 1178.
76. See Hyland, 794 F.2d at 798.
77. See id.
78. See id. at 797-98.
79. See id. at 798.
80. See, e.g., EEOC v. Peat, Marwick, Mitchell, & Co., 775 F.2d 928, 930 (8th Cir. 1985) (ADEA case rejecting use of label tests to determine standing for accounting firm partners), cert. denied, 106 S. Ct. 1263 (1986); EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982) (determination of whether individual is employee, and therefore covered by ADEA, should not center on labels that the organiza-
rejecting label tests involve business entities attempting to avoid the strictures of antidiscrimination statutes by labelling plaintiffs as something other than employees. Labels should also not be used to provide standing to plaintiffs who are not, in substance, employees.

Had the *Hyland* court analyzed the substance of the plaintiff's relationship with the professional corporation, applying either of the tests used by the courts in antidiscrimination cases, the plaintiff would not have been considered an employee. *Hyland*, as a P.C. shareholder, managed and exercised control over the closely held company, as opposed to being controlled by an employer. Each shareholder, including *Hyland*, had an equal voice in the operation of the P.C. Since no shareholder exercised greater control over the management of the P.C., *Hyland* clearly was not controlled by the company as an employee. Moreover, calling a P.C. shareholder an employee is deceptive because in P.C.'s the professional relationship is between the individual professional and the client, rather than between the corporation and the client, to ensure personal liability for malpractice. Finally, *Hyland* was compensation itself chose to give the position), *cert. denied*, 464 U.S. 819 (1983); Levine v. Fairleigh Dickinson Univ., 646 F.2d 825, 828-30 (3d Cir. 1981) (court found professor to be an employee despite that he was labeled "retired" by the university when he lost tenure). In *Peat Marwick*, the district court rejected the use of a label test because it feared that the firm might label some of its employees as partners, to deny them ADEA protection. *See Peat Marwick*, 589 F. Supp. at 539, *aff'd*, 775 F.2d 928 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986). The circuit court granted the EEOC a subpoena to investigate the firm's retirement policies and to determine which plaintiffs were, in reality, employees protected by the ADEA, but did not rule on the issue of partner standing under the ADEA. *Peat Marwick*, 775 F.2d at 929. The EEOC feared that the firm might label some of its members as partners when they do not meet the traditional definition of a partner. Label tests are even more troublesome in the case of P.C. shareholders because the creation of employment contracts for shareholders is recommended as a procedure of incorporation merely to ensure that the P.C. can deduct shareholder salaries for tax purposes. *See G. Ray*, *supra* note 1, at 98; *Law Office Economics, supra* note 3, at 222.

81. See *supra* note 80 and accompanying text.


83. See *supra* notes 22-31 and accompanying text.

84. See *Hyland v. New Haven Radiology Assocs.*, P.C., 794 F.2d 793, 802 (2d Cir. 1986) (Cardamone, J., dissenting) ("it is evident that [the shareholder plaintiff] was in fact a traditional partner, and not an employee"); *Hyland v. New Haven Radiology Assocs.*, P.C., 606 F. Supp. 617, 621 (D. Conn. 1985) (district court applied economic realities test and found P.C. shareholder was not employee), *rev'd*, 794 F.2d 793 (2d Cir. 1986).


86. *Id.*

87. *See id.*

88. *See infra* note 108 and accompanying text.
ated as a partner. Each shareholder received an agreed annual salary and an equal share of the profits or losses. As the Hyland dissent noted, the shareholders shared profits and losses in a predetermined formula, in effect, carrying on the business as partners.

A. The Typical P.C. Shareholder is not an Employee under Either the Economic Realities or Hybrid Test

Although the mere denomination "P.C.," like all labels, does not automatically preclude ADEA and Title VII protection of P.C. shareholders, the typical P.C. shareholder lacks standing to sue under the antidiscrimination statutes. The state statutes under which professional corporations, or professional service corporations, are formed merely permit professionals to utilize the corporate form to receive federal tax benefits enjoyed by executives in other businesses. The governing law makes it clear that a P.C. is not as much a corporation as it is an individual professional or firm permitted to assume corporate status for tax purposes. That purpose is reflected in the almost identical internal workings of partnerships and professional corporations.

First, P.C. shareholders own the business. The professionals each


91. A typical P.C. shareholder is an owner of the company, receives a share of company profits, and manages and controls the P.C.—the factors considered under either the economic realities or hybrid tests. See infra notes 95-107 and accompanying text.


93. See In re Educ. Law Center, Inc., 86 N.J. 124, 136 n.6, 429 A.2d 1051, 1057 n.6 (1981); see also First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 847, 302 S.E.2d 674, 676 (1983) ("no distinction between partnerships and [P.C.'s]"); Weiner v. Weiner, 88 Misc. 2d 920, 924, 390 N.Y.S.2d 359, 362 (1976) (relationship between principals of a P.C. and P.C. entity is closer than relationship between principals of a business corporation and the business corporation entity, therefore, the parallel between partnership law and P.C. law is readily apparent); South High Dev. Ltd. v. Weiner, Lippe & Cromley, Co., 4 Ohio St. 3d 1, 3-4, 445 N.E.2d 1106, 1108-09 (1983) (per curiam) (P.C. shareholders personally liable for P.C. business debts as if they were partners); In re Rhode Island Bar Ass'n, 106 R.I. 752, 763, 263 A.2d 692, 698 (1970) ("practice in [the] corporate form will be . . . substantially similar to the practice of law as it presently exists in firms operating as law partnerships"); Melby v. O'Melia, 93 Wis. 2d 51, 54, 286 N.W.2d 373, 375 (Ct. of App. 1979) (P.C. not treated like regular business corporation in all situations).

94. See K. Strong & A. Clark, supra note 53, at 36 (P.C. shareholders, like partners, are employers because they own the business).

95. See EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (P.C. shareholders are owners not employees); B. Hildebrandt & J. Kaufman, supra note 56, at 101 (P.C.'s require capital investment from shareholders-partners since they, like other businesses, need some plant and equipment); cf. EEOC v. Rinella & Rinella, 401 F. Supp.
own a share of P.C. property and are entitled to the value of their share upon liquidation, or redemption of their shares.96 Moreover, only professionals can own the shares in the P.C.97 They have provided their own

175, 181 (N.D. Ill. 1975) (sole proprietor's ownership of firm's fixed assets was a consideration in finding law firm's associates employees for Title VII purposes); Dunn, Income Tax Considerations in the Transition to a Professional Corporation, 6 Akron L. Rev. 23, 31-33 (1973) (discussing the best way to structure shareholder ownership of furniture, equipment, and real estate for tax purposes).

96. See Quinn v. Cardiovascular Physicians, P.C., 254 Ga. 216, 219-20, 326 S.E.2d 460, 464-65 (1985) (shareholder entitled to fair value of her share of P.C. assets); Bump v. Stewart, Wimer & Bump, P.C., 336 N.W.2d 731, 734-35 (Iowa 1983) (P.C. shareholder entitled to his share of assets when discharged); G. Ray, supra note 1, at 73-74 (discussing shareholder's share of the assets in a professional corporation, and valuation at the date of liquidation or redemption).

risk capital that can be used in future business endeavors, and their success greatly depends on their own initiative—unlike an employee who is solely dependent on a salary for his livelihood. See EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (P.C. shareholders are not employees because they own the company like partners); cf. Hickey v. Arkla Indus., 699 F.2d 748, 752 (5th Cir. 1983) (manufacturer's representative not employee because of his own investment in equipment); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) (partners are not employees because they own and manage business).


101. Id. at 486 (“stockholders of a close corporation occupy a position similar to that of joint adventurers and partners”).

102. Id. (courts that have held that stockholders of a close corporation do not owe each other the same fiduciary duty as partners “[ignore] the practical realities of the organization and functioning . . . [where] the stockholders, directors and managers are
Powell’s statement is applicable to P.C.’s.\textsuperscript{107}

B. \textit{P.C.’s are Distinguishable from Conventional Corporations}

Many of the essential characteristics of conventional corporations do not apply to professional corporations. First, because the professional relationship in a P.C. is between the individual professional and the client, rather than between the corporation and the client, the professional remains personally liable for malpractice.\textsuperscript{108} Therefore, the corporate

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the same persons”). \textit{But see} Cardullo v. Landau, 329 Mass. 5, 9, 105 N.E.2d 843, 846 (1952) (stockholders do not have the same fiduciary relationship as partners); Ross v. Biggs, 206 Miss. 542, 544, 40 So.2d 293, 296 (1949) (same).
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\textsuperscript{107} The three conditions that characterize a close corporation are a small number of shareholders, no ready market for corporate stock and substantial majority stockholder participation in the management, direction, and operation of the company. \textit{See} Donahue v. Rodd Electrotype Co., 367 Mass. 578, 586, 328 N.E.2d 505, 511 (1975). A professional corporation’s shares can only be held by the professionals of the P.C., \textit{supra} note 97 and accompanying text, therefore, the number of shareholders is limited and there is no ready market for these shares. Management control by majority shareholders is demonstrated by the very fact that majority shareholders are able to squeeze out the minority shareholder plaintiffs. \textit{See, e.g.}, Orchard v. Covelli, 590 F. Supp. 1548, 1556-58 (W.D. Pa. 1984), \textit{aff’d without opinion}, 802 F.2d 448 (3d Cir. 1986); Quinn v. Cardiovascular Physicians, P.C., 254 Ga. 216, 217-18, 326 S.E.2d 460, 462-63 (1985); Donahue v. Rodd Electrotype Co., 367 Mass. 578, 588-92, 328 N.E.2d 505, 513-14 (1975).
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form does not shield its shareholders from the largest potential source of personal liability. Second, professional corporations, as service organizations, rarely require substantial capital. Thus, the essential purpose of the corporate form—to raise substantial capital from investors while limiting their liability to the amount of their investment—is nonexistent. Last, there is effectively no free transferability of shares in a P.C. The P.C. may only issue shares to professionals who are practicing, or who intend to practice in the issuing corporation. In the case of lawyers, only lawyers can own shares in order to avoid “fee splitting” with non-lawyers—a practice prohibited by the Code of Professional Responsibility.

C. Even if P.C.’s are Considered Corporations, P.C. Shareholders are not Employees

Although the nature of a defendant’s business is instructive, the fundamental question for standing under the antidiscrimination statutes is the relationship of a plaintiff to the business entity. Hence, even if a P.C. is a corporation for some purposes, courts must decide whether the

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109. See Coté v. Wadel, 796 F.2d 981, 983 (7th Cir. 1986) (P.C.’s seldom require substantial capital other than “human capital”); B. Hildebrandt & J. Kaufman, supra note 56, at 101 (capital investment in service businesses is modest).
110. See supra note 108 and accompanying text.
111. See supra note 97 and accompanying text.
113. An individual can be both a shareholder of a corporation and an employee of that same corporation. See Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986); Campbell v. Ford Indus., 274 Or. 243, 246, 546 P.2d 141, 144 (1976); see, e.g., Zimmerman v. North Am. Signal Co., 704 F.2d 347, 350-54 (7th Cir. 1983) (ADEA plaintiff, corporate vice-president owning one-third of company, would have been allowed to bring suit if two inactive directors had been considered employees); EEOC v. First Catholic Slovak Ladies Ass’n, 694 F.2d 1068, 1070 (6th Cir. 1982) (officers-directors-shareholders considered employees for ADEA purposes since they performed traditional employee duties), cert. denied, 464 U.S. 819 (1983); Stanojev v. Ebasco Servs., Inc., 643 F.2d 914, 920 (2d Cir. 1981) (shareholder-executive protected by ADEA); Hoy v. Progress Pattern Co., 217 F.2d 701, 704 (6th Cir. 1954) (one-eighth shareholder, vice-president, chairman may be employee under FSLA).
114. P.C.’s are treated as conventional corporations for diversity jurisdiction purposes. Coté v. Wadel, 796 F.2d 981, 983 (7th Cir. 1986); Saxe, Bacon & Bolan, P.C. v. Martin-dale-Hubbell, Inc., 710 F.2d 87, 89 (2d Cir. 1983). But diversity jurisdictional rules must be simple so that judicial time is not wasted deciding where a case should be brought. Coté, 796 F.2d at 983. A bright line rule appropriate for diversity purposes, however, is inconsistent with the purposes of the antidiscrimination statutes. See supra note 80 and accompanying text.

Some courts have reasoned that a professional should not be permitted to pick and choose the advantages of the corporate form while avoiding its disadvantages by conveniently claiming partnership status. See Schenley Distillers Corp. v. United States, 326 U.S. 432, 437 (1946) (corporate form not disregarded for ICC permit purposes since shareholder enjoyed tax advantages of corporate form); In re A.V. Jellen, 521 F. Supp. 251, 253 (N.D. W. Va. 1981) (“Persons who create a corporation in order to enjoy the advantages flowing from its existence as a separate entity are not entitled to have the
plaintiff shareholder is an employee. The court in Hyland avoided examining the substance of the plaintiff's relationship to the P.C. by citing to cases where shareholders of conventional corporations established standing under the antidiscrimination statutes in their distinct roles as officers or executives of their corporations. The court analogized these cases to the defendant's decision to characterize the P.C. shareholders as employees in the shareholder agreement. The cases cited by Hyland, corporate entity disregarded in situations where it works to their apparent disadvantage.). This argument is unpersuasive for several reasons.

First, the complaining shareholder is also enjoying the corporate advantages of limited liability and lower taxes, therefore, he should not be handed the windfall of an ADEA or Title VII claim. Second, ADEA and Title VII liability is not a disadvantage of the corporate form—it is a disadvantage of being an employer. Persons who are truly the employees of a P.C. have standing to sue their employer under the antidiscrimination statutes. Cf. Hishon v. King & Spalding, 467 U.S. 69, 76 (1984) (associates of law firm are employees); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 128 (S.D.N.Y. 1977) (same); EEOC v. Rinella & Rinella, 401 F. Supp. 175, 181 (N.D. Ill. 1975) (same).

P.C. shareholders may be considered employees in cases unrelated to standing under the ADEA. P.C. shareholders have been treated as employees when they assert their fifth amendment privilege, and since the fifth amendment privilege is a personal one, the courts did not allow the shareholders to assert the privilege on behalf of the corporation. See Reamer v. Beall, 506 F.2d 1345, 1346 (4th Cir. 1974) (per curiam) (sole stockholder of P.C. not allowed to invoke fifth amendment to protect corporate records), cert. denied, 420 U.S. 955 (1975); In re Zisook, 88 Ill. 2d 321, 340, 430 N.E.2d 1037, 1046 (1981) (P.C. shareholder not allowed to protect company records because treated like an employee), cert. denied, 457 U.S. 1134 (1982); cf. Bellis v. United States, 417 U.S. 85, 100-01 (1974) (partner treated like employee for fifth amendment purposes); Parsley v. Associates in Internal Medicine, P.C., 126 Misc. 2d 996, 997, 484 N.Y.S.2d 485, 486-87 (N.Y. Sup. Ct. 1985) (patient records considered personal corporate property, not the property of the individual professional who treated the patient). The policy behind these decisions is that the government must exercise the power to compel the production of evidence to enforce its laws. In re Zisook, 88 Ill. 2d at 340, 430 N.E.2d at 1045. Therefore, the privilege cannot be extended to protect a witness who merely holds records in a custodial, rather than a personal, capacity. Id. The policy considerations implicated by fifth amendment issues, however, are totally different from ADEA and Title VII policies. See EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 n.2 (7th Cir. 1984) ("economic realities" may determine that P.C. shareholders are not employees for Title VII purposes, but same shareholders may be employees for fifth amendment purposes); Hyland v. New Haven Radiology Assocs., P.C., 606 F. Supp. 617, 620 (D. Conn. 1985) ("The purpose and policy reasons for refusing to shield partnership records from production have nothing to do with the remedial purpose of the anti-discrimination acts."). The policy behind the antidiscrimination statutes is the protection of those most susceptible to employment discrimination. See supra note 22. Application of the economic reality or hybrid test determines who is accorded protection under the ADEA and Title VII.

The Hyland court cited Zimmerman v. North Am. Signal Co., 704 F.2d 347, 350-54 (7th Cir. 1983)(ADEA plaintiff, corporate vice-president owning one-third of company, would have been allowed to bring suit if two inactive directors had been considered employees), EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1058, 1070 (6th Cir. 1982) (officers-directors considered employees for ADEA purposes since they performed traditional employee duties), cert. denied, 464 U.S. 819 (1983), Stanojev v. Ebasco Servs., Inc., 643 F.2d 914, 920 (2d Cir. 1981) (executive employee protected by ADEA) and Hoy v. Progress Pattern Co., 217 F.2d 701, 704 (6th Cir. 1954) (one-eighth shareholder, vice-president, chairman may be employee under FSLA). See Hyland, 794 F.2d at 796.

however, are inapplicable to professional corporations because those cases involved corporate shareholders who had separate roles as employees of their corporations. For example, in *EEOC v. First Catholic Slovak Ladies Association*, the officers and directors performed ministerial tasks of employment that were separate and distinct from their positions as shareholders. In *Hyland*, by comparison, the P.C.'s decision to term its shareholders “employees,” in substance, did not give any shareholder a separate, independent role as an employee of the business. A P.C. may issue shares only to professionals who are practicing, or intend to practice, in the issuing corporation. Thus, in *Hyland* the P.C.’s decision to characterize P.C. shareholders as employees did not alter any shareholder’s status in the business.

D. An Alternative Cause of Action for P.C. Shareholders—Breach of Fiduciary Duty

Even if P.C. shareholders are not afforded the protection of the ADEA or Title VII, they should be able to sue for breach of fiduciary duty by majority shareholders. Stockholders in a close corporation owe each other a duty of loyalty, honesty, and good faith. Any attempt by the majority shareholders of a closely held corporation to “squeeze out” a minority shareholder is a breach of this fiduciary duty.

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118. 694 F.2d 1068, 1070 (6th Cir. 1982), cert. denied, 464 U.S. 819 (1983). The officers and directors were considered employees because they maintained company records, prepared financial statements, and managed the office. *Id.* The *Hyland* court also cited *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 350-54 (7th Cir. 1983), as a case where a shareholder/officer was considered an employee under the ADEA. 794 F.2d at 796. Yet a closer look reveals that the *Zimmerman* court actually dismissed the case for a lack of subject matter jurisdiction when two directors/officers were found to be inactive, and thus, not employees. 704 F.2d at 352 & n.4.

119. See supra note 97 and accompanying text.


The court in *Orchard* reasoned that close corporations should be treated like partnerships when a squeeze out of minority shareholders is in issue. See 590 F. Supp. at 1557-59. The plaintiff in *Orchard* was a minority stockholder of a close corporation who sued the majority shareholders when they terminated his employment contract, claiming an effort to systematically exclude him from any voice in management. *Id.* at 1557-58. The court imposed the same fiduciary duty on shareholders of a close corporation that is imposed on partners in a partnership. *Compare Orchard*, 590 F. Supp. at 1556-58 (shareholders of close corporation owe each other a duty of loyalty and fairness substantially the same as partners) and *Donahue*, 367 Mass. at 594, 328 N.E.2d at 516 (same) with Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (duty between partners represents the “punctilio of an honor the most sensitive”) and *Cardullo v. Landau*, 329 Mass. 5, 8, 105 N.E.2d 843, 845 (1952) (same for co-adventurers).

121. See, e.g., *Orchard v. Covelli*, 590 F. Supp. 1548, 1557-59 (W.D. Pa. 1984) (terminating plaintiff’s employment and forcing him to sell his stock may be breach of fiduciary duty), *aff’d without opinion*, 802 F.2d 448 (3d Cir. 1986); *Quinn v. Cardiovascular Physi-
corporations come under the closely held category, and a P.C. shareholder forced into retirement must sell his shares back to the corporation. In effect, compulsory retirement is a "squeeze out." Thus, although there is little case law in this area, P.C. shareholders who lack standing under the ADEA or Title VII may have an action for breach of fiduciary duty when they are forced to retire from the P.C.

**CONCLUSION**

Partners generally are not considered employees for antidiscrimination statute purposes. They are voluntary business associates who manage, control, and own their business, not employees controlled by their employers. The management, control, and ownership of a professional corporation is more like that of a partnership than a conventional corporation and the use of the corporate form should not preclude the application of a test to determine the economic reality of the employment

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122. See supra note 107 and accompanying text.

123. See supra note 97 and accompanying text.


125. See supra note 121 and accompanying text.
relationship. In the typical P.C., the application of such a test precludes P.C. shareholder standing under the ADEA and Title VII.

John Narducci