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Effect of Professional Incorporation on an Organization's Liability to Shareholder's under the Age Discrimination in Employment Act of 1967, The

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THE EFFECT OF PROFESSIONAL INCORPORATION ON AN ORGANIZATION'S LIABILITY TO SHAREHOLDERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Hyland v. New Haven Radiology Associates, P.C.[1]

INTRODUCTION

Modern America is preoccupied with youth. As the average life expectancy has increased,[2] a greater number of older workers have joined the ranks

1. 794 F.2d 793 (2d Cir. 1986).

2. In 1920, the average life expectancy at birth was 54.1 years. By 1960, it had risen to 69.7 years, and was greater than 70 years in 1965. In 1984, according to preliminary calculations, the average infant could expect to live 74.7 years. These figures are reflected in the following chart:

Expectation of Life at Birth: 1920-1984

Year	
1920	54.1
1930	59.7
1940	62.9
1950	68.2
1955	69.6
1960	69.7
1965	70.2
1970	70.8
1975	72.6
1980	73.7
1984	74.7 (preliminary)

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986, TABLE NO. 106 (1986).

of American laborers.[3] Consequently, concern has developed over the employment well-being of this group. When the median age dropped below twenty-eight in the 1960's,[4] a noticeable trend existed whereby employers preferred younger workers to their older counterparts.[5] In his 1967 Older Americans message to Congress,[6] President Johnson addressed the negative impact of discrimination against workers over the age of forty-five. Of all unemployed individuals, 27 percent were above age forty-five, and of the long-term unemployed, 40 percent fell into this category.[7] The general plight

3. Projections of the Total Population By Race, Sex, and Age: 1985-2000

Age	1985	1990	2000
0-5	18,453,000	19,198,000	17,626,000
5-17	44,385,000	45,139,000	49,763,000
18-24	28,739,000	25,794,000	24,601,000
25-44	73,792,000	81,376,000	80,158,000
45-64	44,652,000	46,453,000	60,886,000
65-	28,608,000	31,697,000	34,921,000

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986, 10 (1986).

4. Resident Population, By Sex, Race, Residence and Median Age: 1790-1984

Year	Median Age
1950	30.2
1960	29.5
1970	28.0
1980	30.0
1984	31.3

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMENCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986, 25 (1986).

5. Congressman Perkins, in 1967, stated:

> The setting of the specific age limitation beyond which an employer will not consider a worker for a vacant job regardless of ability has become a common practice. That is what we are trying to eliminate here. In the States that do not prohibit such practices, over half of all employers are presently applying such limitations using maximum age limits typically set at 45 to 55 years of age.
>
> In other words, approximately one-half of the job openings which develop in the private economy each year are closed to applicants over the age of 55 years. Mr. Speaker, one-quarter of these jobs are closed to applicants over 45 years of age and even a greater percent are closed to applicants over the age of 55 years.
>
> The same report shows — that is, the report that has been made of the matter by the Employment Service of the U.S. Department of Labor — that in 70 percent of the establishments surveyed by the Employment Service, less than 5 percent of the newly hired are workers over the age of 45, and that one-half of all our workers in this age group constitute anywhere from 25 to 30 percent of the unemployed.

113 CONG. REC. H34741 (daily ed. Dec. 4, 1967) (statement of Rep. Perkins).

6. Special Message to the Congress Proposing Programs for Older Americans, PUB. PAPERS 32-39 (Jan. 23, 1967).

7. *Id.* at 37. The President's message, in the section on job opportunities,

of and hope for these older persons was eloquently described by President Johnson:

> Too many of our senior citizens have been left behind by the progress they worked most of their lives to create. . . . We should look upon the growing number of older (Americans) not as a problem or a burden for our democracy, but as an opportunity to enrich their lives and, through them, the lives of all of us.[8]

During the Congressional debates on the Civil Rights Act of 1964, the possibility of including a category of age discrimination in employment was discussed.[9] Although this did not come to fruition then, a study was initiated to investigate the proposal.[10] The Secretary of Labor prepared a report which indicated pervasive discrimination against older workers in American society.[11] These findings culminated in passage of the Age Discrimination in Employment Act of 1967 (ADEA).[12]

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stated:

> Hundreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over who are unemployed. Today more than three-quarters of the billion dollars in unemployment insurance is paid each year to workers who are 45 and over.

U.S. CODE CONG. & ADMIN. NEWS, 2213, 2214 (1967).

8. 113 CONG. REC. H34749 (daily ed. Dec. 4, 1967) (statement of Rep. Halpern quoting President Johnson).

9. McKenry, *Enforcement of Age Discrimination in Employment Legislation*, 32 HASTINGS L.J. 1157, 1158 (1981).

10. 1967 U.S. CODE CONG. & ADMIN. NEWS, 2213, 2214:

> Over the last several years a number of bills have been introduced in both the House and Senate to bar discrimination in employment on account of age. . . . It followed then, for section 715 of Public Law 88-352 (Civil Rights Act of 1964) to direct the Secretary of Labor to make a study of the problem of age discrimination in employment. . . . In his report, the Secretary recommended . . . : "The possibility of new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren. . . . A clear cut and implemented federal policy . . . would provide a foundation for a much-needed nationwide campaign to promote hiring without discrimination on the basis of age."

Id. A newspaper article at the time discussed the significance of the problem:

> In a comprehensive 1965 study, the Labor Department found that during the previous year, job-seekers over 45 years old accounted for 27 per cent of the unemployed. Only 8.6 per cent of new workers hired by companies surveyed were over 45 — less than one-third this age group's proportion among the jobless. Public employment offices queried said older workers constituted about 30 per cent of all applicants registered for employment.

Murchison, *Sorry, You're Too Old For Us*, Dallas Times Herald, Nov. 19, 1967, at 2, col. 3.

11. U.S. DEPT. OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 at 5-19 (1965).

From its inception, caselaw on the ADEA has not been overly abundant. *Hyland v. New Haven Radiology Associates, P.C.*,[13] is an important decision, because it adopts different interpretations of key definitions in the ADEA from those previously used by other circuits in the employment discrimination law area. Specifically, the Court in *Hyland* formulated a rigid definition of "employee" for situations where the organization/employer involved is a professional corporation.[14] The Second Circuit refused to characterize the professional corporation as a partnership, regardless of how the business was operated, and held that a shareholder could be classified as an "employee."[15]

Approaching the problem from a different perspective, the Seventh Circuit in *EEOC v. Dowd & Dowd*[16] found that shareholders in a professional corporation were, in reality, more akin to "partners" than "employees."[17] The EEOC filed a complaint on behalf of a woman who was undoubtedly an "employee" for purposes of a sex discrimination suit;[18] however, the parties disputed whether the professional corporation was a proper employer/defendant. Title VII requires an organization to have at least fifteen "employees" to be an "employer" within the meaning of the act.[19]

As yet the split between the Second and Seventh Circuits created by *Hyland* has not been addressed by the United States Supreme Court. There exists a multiplicity of approaches to interpreting amorphous definitional provisions contained in employment discrimination legislation. This Note will discuss the various tests utilized by the federal courts to determine if the requisite employment relationship exists for the ADEA to apply. To understand the foregoing dilemma of form over substance faced by the courts, it is necessary to focus on the development of the ADEA itself.

One of the primary aims of the ADEA was to eradicate mandatory retirement.[20] For one to have standing under the ADEA, he must be over

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Once a person over 45 loses a job, the chances against finding another like it are 6 to 1 against him. 113 CONG. REC. H34752 (daily ed. Dec. 4, 1967) (statement of Rep. Dwyer).

12. 29 U.S.C. §§ 621-634 (1982); *see also* McKenry, *supra* note 9, at 1158.

13. 794 F.2d 793 (2d Cir. 1986).

14. *Id.* at 798.

15. *Id.*

16. 736 F.2d 1177 (7th Cir. 1984). The EEOC sued Dowd & Dowd, alleging that the professional corporation of attorneys violated Title VII by failing to amend its Health Benefits Plan to include pregnancy benefits for its female employees by the effective date of the Pregnancy Discrimination Act. *Id.* at 1177.

17. *Id.* at 1178.

18. *Id.* at 1177.

19. 42 U.S.C. § 2000e(b). As to the ADEA, *see infra* note 30 and accompanying text.

20. 29 C.F.R. § 1625.9(b)(1) (1985).

the age of forty at the time of the alleged discrimination.[21] This Act makes it "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."[22] As a measure to address this discrimination, Congress enumerated three purposes of the ADEA: (1) to promote older worker employment based on ability instead of age; (2) to eliminate arbitrary age discrimination; and (3) to assist workers and employers in coping with the problems faced by age in employment.[23]

Originally, the Department of Labor was given authority to enforce the legislation,[24] but President Carter transferred this duty to the Equal Em-

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21. 29 U.S.C. § 631(a) (1982). Originally, the ADEA required a complainant to be between the ages of forty and sixty-five, and later the ceiling was raised to age seventy. Age Discrimination in Employment Amendments, Pub. L. No. 95-256, § 12(a), 92 Stat. 189 (1978). Additionally, the ADEA provides that it shall be unlawful for an employer:

> (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 (1982).

22. 29 U.S.C. § 623(a)(1) (1982). For the complete text of the Age Discrimination in Employment Act, see 29 U.S.C. §§ 621-634 (1982). It is the purpose of H.R. 13054 [ADEA] to promote the employment of older workers based on their ability. This would be done through an education and information program to assist employers and employees in meeting employment problems which are real and dispelling those which are illusory, and through the utilization of informal and formal remedial procedures. The prohibitions in the bill apply to employers, employment agencies and labor organizations. *See* U.S. CODE CONG. & ADMIN. NEWS 2213 (1967). Section 621 of the Act provides the congressional statement of findings and purpose:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. § 621(a) (1982).

23. 29 U.S.C. § 621(b) (1982).

24. *See* U.S.C. §§ 625-626 (Supp. 1969).

ployment Opportunity Commission (EEOC) in 1978.[25] Because many of the provisions of Title VII and the ADEA overlap, President Carter reasoned that the EEOC would be better equipped to handle the burgeoning ADEA matters.[26]

In addition, since most of the definitional provisions of the ADEA, Title VII and the Fair Labor Standards Act (FLSA) are nearly identical, courts construing the ADEA have relied on judicial interpretation of these other antidiscrimination acts.[27] When interpreting the particular statutory definitions, courts will attempt to discover the legislative intent underlying them.[28] Courts have consistently stated that the ADEA is to be interpreted broadly so that its intended purposes may be effectuated.[29]

As used in the ADEA the term "employer" refers to "[a] person engaged in an industry affecting commerce who has twenty or more employees. . . ."[30] The term "employee," vaguely enough, refers to an individual employed by an employer.[31] Because of its conclusory nature, this latter definition has proven difficult for courts to apply.

A significant problem created by the vague definition of "employee," is whether or not it is mutually exclusive with the term "partner." To answer this question, sources outside the ADEA should be employed as well as general rules of statutory construction. The term "partnership" has been variously defined, but perhaps the best definition is contained in the Uniform Partnership Act (UPA): "A partnership is an association of two or more persons to carry on as co-owners a business for profit."[32] Almost every state has adopted the UPA, and the provision enumerating the rights and duties of partners is appropriate in solving the employee/partner dilemma: "[a]ll partners have equal rights in the management and conduct of the partnership business."[33] Should a partnership be considered an entity separate and distinct

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25. Reorganization Plan No. 1 of 1978, 3 C.F.R. § 321 (1978).

26. Remarks Announcing Reorganization Plan No. 1 of 1978, 1 PUB. PAPERS 398, 403 (1978).

27. *See* Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 796 (2d Cir. 1986) (discussing the approaches taken by courts in interpreting the ADEA).

28. When a question arises concerning applicability of a statute a decision can be reached only by applying some kind of a criterion. For the interpretation of statutes, "intent of the legislature" is the criterion that is most often recited. An overwhelming majority of judicial opinions considering statutory issues are written in the context of legislative intent. The reason for this lies in an assumption that an obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government is mandated by principles of separation of powers.

SUTHERLAND, SUTHERLAND STAT. CONST. § 45.05 (1984).

29. *See, e.g., Hyland*, 794 F.2d 793, 796 (2d Cir. 1986).

30. 29 U.S.C. § 630(b) (1983).

31. 29 U.S.C. § 630(f) (1983).

32. UNIF. PARTNERSHIP ACT § 6(1) (1969).

33. *Id.* at § 18(e).

from the individual partners, or should it be deemed an extension of the partners themselves, without its own legal existence? The UPA does not answer this question with certainty; rather, its characterization of a partnership's legal status is ambiguous. The true nature of a partnership may be broken down into two theories: the aggregate theory and the entity theory, both of which are contained in the UPA.[34]

At common law, the aggregate theory of partnerships was used almost exclusively.[35] Under this doctrine a partnership is viewed as the totality of individuals engaged in a business or joint enterprise, without its own identity under the law.[36] Because of the characterization of a partnership as an aggregate for some purposes under the UPA, a partnership cannot sue or be sued in the organization's name without a permissive statute.[37] A partnership cannot be an employer under the aggregate theory, instead the individual partners, singly and as a group, comprise the "employer."[38] As a result, the ADEA and Title VII (implied from their definitions of "employer"), dictate that partners do not pass the necessary employment relationship test because partners are not employees.[39]

The entity theory, on the other hand, creates a legal fiction that enables a partnership to be a unit with a recognized capacity of having legal rights and being subject to legal duties.[40] Unlike a corporation, a partnership at common law was not deemed an artificial person with a separate legal existence apart from its members. Instead of individual partners being classified as employers, the partnership as an entity is the sole employer. Conceptually, this enables a partner to be viewed as an employee in some instances. Despite the aggregate theory being ostensibly chosen by the UPA, entity-based provisions are pervasive in the act.[41] Therefore, depending on the situation involved, either theory may be utilized so that the intended purposes of the UPA will be realized.[42]

Case Analysis

Plaintiff-appellant, John Hyland, M.D., and four other physicians were the founding members of defendant-appellee New Haven Radiology Asso-

34. Jensen, *Is a Partnership Under the Uniform Partnership Act An Aggregate or An Entity?*, 16 Vand. L. Rev. 377, 381 (1963).

35. R. Hamilton, Corporations Including Partnerships and Limited Partnerships, 77 (1986).

36. Black's Law Dictionary 60 (5th ed. 1979).

37. L. Smith & G. Roberson, Business Law 623 (1982).

38. Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977).

39. Zimmerman v. North American Signal Co., 704 F.2d 347, 354 (7th Cir. 1983).

40. L. Smith, *supra* note 37, at 623.

41. J. Crane & A. Bromberg, Law of Partnership 16 (1968).

42. Jensen, *supra* note 34, at 381.

ciates, P.C. (NHRA).[43] All physician-shareholders held positions as officers and directors of the corporation.[44] Pursuant to the terms of the stockholders' agreement, each member shared equally in profits and losses of the corporation. After making equal contributions of capital, shares of the professional corporation were divided evenly among the shareholders, who acquired certain rights in the management of the association.[45]

In order to maintain the initial form of the organization, provisions were made in the shareholders' agreement for additional radiologists to become "Stockholder-Employees," who would also acquire rights of management equal with the other members.[46] At the resignation, death or termination of any member, the NHRA was required to purchase that member's stock at a price determined by the valuation provisions of the agreement.[47]

During the entire term of a two year employment contract signed by the shareholders, each was to remain "a full time employee of the company. . . ."[48] Each doctor was further required to turn over to the corporation all compensation received from rendering professional services.[49] The contract stipulated that each physician receive certain benefits, including: four weeks paid vacation, disability payments, permission to attend and compensation for expenses of educational programs, and specific payments on termination of employment.[50]

Termination of a shareholder from NHRA without good cause was possible only by a three-fourths vote of the membership.[51] All of the stockholders' employment agreements were identical, except that Hyland was required to give six months notice prior to resignation.[52] At the age of fifty-one, Hyland was asked to leave NHRA by a unaminous vote of the membership.[53] As the basis of its decision, NHRA cited "complaints of appellant's unavailability, lack of cooperation and abusive conduct."[54] Subsequently,

43. This professional corporation was organized under the laws of Connecticut in 1972 to provide radiology services in New Haven, Connecticut. Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 794 (2d Cir. 1986).
44. *Id.*
45. *Id.*
46. *Id.* at 794-95.
47. *Id.* at 794.
48. *Id.* at 795.
49. *Id.*
50. *Id.*
51. *Id.*
52. The agreement between NHRA and Dr. Shapiro, the corporation's president, was also somewhat different from the rest in that it provided for a $500 a month payment to a deferred compensation account to replace a benefit Dr. Shapiro had lost from another source when he joined NHRA. Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 795 (2d Cir. 1986).
53. *Id.*
54. *Id.*

Hyland and NHRA entered into an agreement specifying, among other things, the terms of his termination as "an employee, shareholder, director and officer of the corporation."[55] Severance pay, a lump-sum withdrawal and the repurchase of appellant's shares were all included in this post-employment contract.[56]

Hyland initiated a cause of action for age discrimination under the ADEA against NHRA, and the other shareholders individually.[57] NHRA moved for summary judgment, arguing that it was not an "employer" and Dr. Hyland was not an "employee" for purposes of the ADEA. The district court agreed with NHRA in stating that it had chosen the corporate form of doing business merely "to gain advantageous tax and civil liability treatment," but that in reality NHRA was more like a partnership than a corporation.[58] In addition, the trial court ruled that while NHRA could be classified as an "employer" as defined by the ADEA, Hyland was not an "employee," because the corporation functioned more like a partnership, and he could not separate his ownership/management role so as to be considered an "employee."[59]

The ADEA applies only to those individuals who are or are about to be in a "direct employment relationship" at the time of the alleged age discrimination.[60] In analyzing the case, the Second Circuit followed prior authority in observing that the ADEA was established as a remedial measure.[61] Accordingly, it should be interpreted broadly to bring about its intended results in the employment arena.[62]

The court looked to previous decisions construing the three closely related discrimination acts: the ADEA, the FLSA and Title VII. Because of their similar purpose, i.e., to stamp out discrimination in employment, and nearly identical definitional sections, the court was persuaded by these earlier opinions to interpret the ADEA in a similar manner.[63] Where the foregoing statutes have been applied, it has been held that one's status as an officer, director or major stockholder of a corporation does not prohibit being simultaneously labeled an "employee."[64] The court in *Hyland* held that own-

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. This was so because NHRA was for most intents and purposes a "partnership" and Hyland as a "partner" could not separate his proprietary roles so as to be deemed an "employee." *Id.*
60. *Hyland*, 794 F.2d at 796; *see* Garrett v. Phillips Mills, Inc., 721 F.2d 979, 980-81 (4th Cir. 1983).
61. Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 796 (2d Cir. 1986).
62. *Id.*
63. *Id.*
64. *Id.*

ership and employment relationships are not mutually exclusive.[65]

Notwithstanding the court's agreement that the remedies provided by the anti-discrimination acts do not apply to "partners" (as potential plaintiffs) in a true partnership, once an employment contract is created the ADEA strictures apply and dictate certain areas of that employment relationship.[66]

While the district court ignored the form of business association entered into by the original radiologists, the appellate court refused to say NHRA was effectively a "partnership."[67] The Second Circuit chose not to adopt the economic realities test used by the lower court, which was first utilized by the courts to differentiate an employee from an independent contractor.[68] The most important factor of consideration under this test is the extent of control the employer has over the purported employee in performing his work duties.[69]

When distinguishing an employee from a partner or independent contractor, the economic realities test may be appropriate.[70] However, such an examination is irrelevant when attempting to classify as a partner one associated with a corporation, because one cannot be a partner and also own shares in the same firm.[71] The court held that if persons opt to use the corporate form of business, for whatever reasons, it is not material that the entity is structured and operated like a partnership.[72]

Dr. Hyland's position in NHRA was simultaneously one of officer, director, shareholder and employee. This conclusion follows from the court's finding that no inherent inconsistency existed between an ownership/management interest and an employment relationship.[73] This finding was bolstered by the existence of an employment agreement detailing terms and conditions of employment, and specifically delineating Hyland as an "employee" of NHRA.[74] Ultimately, the appellate court reversed the district court's summary judgment and remanded the cause of action to determine if Hyland had been in fact discharged in violation of the ADEA.[75]

INTER-CIRCUIT COMPARISONS

Relying on prior Internal Revenue Service caselaw, the district court in *Hyland* stated the general rule that the law will ignore an entity's legal status

65. *Id.*
66. *Id.* at 797.
67. The district court reasoned that Hyland, as one of the founding "partners," could not also be an "employee" with standing to invoke the ADEA. *Hyland*, 794 F.2d at 797.
68. *Id.*
69. *Id.*
70. *Id.* at 798.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

if the result would otherwise place form over substance.[76] Likewise, the dissenting opinion of Judge Cardamone in *Hyland* expressed the view that the way in which a business functions, rather than the business form, should determine how it will be treated under the various discrimination acts.[77]

A recent Eighth Circuit decision, *EEOC v. Peat, Marwick, Mitchell and Co.*,[78] allowing the Equal Employment Opportunity Commission to subpeona documents and records of a partnership, illustrates the opposite side of the form over substance argument. The tribunal addressed the ADEA definition of "employee," and stressed that the label given a position by a firm, e.g., partner, is not dispositive of how it will be treated under the ADEA.[79] Whether or not one is an "employee" should rest on the facts of each case, because the statutory definition in the discrimination acts is not restrictive.[80]

In *EEOC v. The First Catholic Slovac Ladies Association*,[81] the Sixth Circuit held that corporate officers were also employees for purposes of age discrimination:

> These individuals performed traditional employee duties: maintaining records, preparing financial statements, managing the office. They were responsible for their work to the governing body of the organization and they drew salaries as employees. Their participation on the policy-making Board of Directors does not detract from their primary role as employees.[82]

Similarly, the Seventh Circuit warned that employers cannot circumvent the ADEA by categorizing as directors or independent contractors those who meet the statutory definition of an employee.[83] The question seems to be "whether an employer-employee relationship exists, not what title a worker holds."[84]

Dr. Hyland initially argued, and maintained throughout his lawsuit, that NHRA was a corporation which should not have been treated like a partnership under any circumstances. In addition, there is some support for a secondary argument proffered by Dr. Hyland: treating NHRA as a partnership via the entity theory.[85] The trial court recognized this creative argument

76. Hyland v. New Haven Radiology Assocs., 606 F. Supp. 617, 619 (D. Conn. 1985).

77. Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 798-99 (2d Cir. 1986).

78. 775 F.2d 928 (8th Cir. 1985).

79. *Id.* at 930; *see also* EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983).

80. *See* Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977).

81. 694 F.2d 1068 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983).

82. *Id.* at 1070.

83. *See* Zimmerman v. North American Signal Co., 704 F.2d 347, 352 n.4 (7th Cir. 1983).

84. *Id.*

85. *See* Hyland v. New Haven Radiology Assocs., 606 F. Supp. 617 (D. Conn. 1985).

of Dr. Hyland, who employed the entity doctrine of partnerships.[86] Arguably, if NHRA had person status as a legal entity separate and distinct from its members, and controlled the conduct and compensation of those shareholders, they should conceptually be denominated employees.[87] But assuming that partners cannot also be employees, as most courts have held, what test should be utilized to distinguish employees from partners?

In *Burke v. Friedman*,[88] the Seventh Circuit addressed this exact question in a Title VII case, where the court found partnership and employee status to be mutually exclusive. Typically, a partnership exists where "persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession or business and when there is community of interest in the profits and losses."[89] Partners who manage and control a business cannot at the same time be considered employees.

Another Seventh Circuit decision, *EEOC v. Dowd & Dowd*,[90] is in direct opposition to the Second Circuit opinion of *Hyland*. This case held that a professional corporation of attorneys did not meet the definition of an "employer" under Title VII, because the shareholders could not be counted toward the threshold of fifteen "employees" required by the Act.[91] The EEOC as plaintiff brought the action on behalf of a female secretary, who was admittedly a proper "employee" to bring a sex discrimination suit.[92] In espousing the principle of substance over form the Seventh Circuit reasoned that a professional corporation is more like a partnership than a regular corporation; it was therefore appropriate to categorize a shareholder as a partner, rather than as an employee.[93]

Attempting to reduce the confusion, the Second Circuit in *Hyland* gave a short history of the caselaw surrounding the discrimination acts.[94] Although similar to other measures used, the EEOC created its own test to determine whether or not one should be deemed a partner or employee: "[t]he Commission will consider relevant factors including, but not limited to, the indiviual's ability to control and operate the business and to determine compensation and the administration of profits and losses."[95] At common

86. *Id.* at 620.
87. *Id.*
88. 556 F.2d 867 (7th Cir. 1977).
89. *Id.* at 869. 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." Partners manage and control the business and share in the profits and losses. UNIF. PARTNERSHIP ACT § 6(1) (1969).
90. 736 F.2d 1177 (7th Cir. 1984).
91. *Id.* at 1178.
92. *Id.* at 1177.
93. *Id.* at 1178.
94. *Hyland*, 794 F.2d at 796.
95. *Hyland*, 794 F.2d at 797.

law, courts used an agency test to differentiate an employee from an independent contractor, but this examination works better in the respondeat superior/tort liability context.[96] Later, courts developed the economic realities test for distinguishing employees and independent contractors in the discrimination law area.[97] However, the majority and dissent agreed that this was an inappropriate standard under the facts of *Hyland*.[98]

Lacking any valid precedent on which to rely, the district court in *Hyland* utilized the economic realities test and found that the "[NHRA] amounts to a partnership in all but name."[99] NHRA had a structure and organization of even distribution in ownership, management and sharing of profits and losses, which are all classic attributes of a partnership.[100] The Seventh Circuit in *EEOC v. Dowd & Dowd*, summarized the situation:

> The principal advantages gained by attorneys and other professionals who incorporate concern tax and civil liability (citation omitted). Shareholders in a professional corporation are not immune from malpractice liability. The economic reality of the professional corporation in Illinois is that the management, control and ownership of the corporation is much like the management, control and ownership of a partnership.[101]

Not to be left out, the dissenting judge in *Hyland* developed his own test for distinguishing partners from employees. He noted that the ADEA does not explicitly require that anyone who works for a corporation be axiomatically deemed an "employee."[102] When a violation of the ADEA is alleged, courts should examine a two-tier analysis when deciding if an individual, in what amounts to an effective partnership, is best categorized as an employee or a true partner: (1) compensation—whether profits and losses were shared according to a predetermined formula, and (2) control—responsibility vis-a-vis the other partners.[103]

CONCLUSION

By formulating a rigid rule of law in *Hyland* that a shareholder who works for a professional corporation is an "employee" for purposes of the ADEA, there is now a definite split between the Second and Seventh Circuits. Unfortunately, confusion and unpredictability are the ultimate results of such

96. Note, *The Age Discrimination in Employment Act and Mandatory Retirement of Law Firm Partners*, 53 S. CAL. L. REV. 1679, 1688 (1980).
97. 794 F.2d 793, 797 (2d Cir. 1986).
98. *Id.* at 798, 801-02.
99. *Hyland*, 606 F. Supp. 617, 621 (D. Conn. 1985).
100. *Id.*
101. EEOC v. Dowd & Dowd, 736 F.2d 1177, 1178 (7th Cir. 1984) (citations omitted).
102. *Hyland*, 794 F.2d 793, 799 (2d Cir. 1986).
103. *Id.* at 802.

a split. *Hyland* directly conflicts with the Seventh Circuit holding in *Dowd & Dowd*, which, unlike *Hyland*, allows courts to look behind the labels given to a firm and those individuals associated with it.

Although the Eighth Circuit has not faced a situation with shareholders in a professional corporation, its decision in *Peat, Marwick* indicates that form will not be exalted over substance in the context of employment discrimination. All businesses in general, and professional corporations in particular, should be wary of labeling workers as anything other than "employees" simply to avoid liability under the ADEA. It is difficult to assess how significant an effect the Second Circuit's decision will have, but it should be heeded by employers contemplating such measures as mandatory retirement before the age of seventy. Problems are likely to arise with the rule of law applied by *Hyland*, because carried to its extreme, form will undoubtedly win over substance in some cases. An arguably favorable result of this decision is that individuals will still be protected even when there is a shareholder agreement that provides for termination of a member without good cause. Nevertheless, the decision suffers from significant over-inclusiveness, and perhaps problems of this magnitude are best handled on an ad hoc basis. A final word on the subject is painfully absent; so, until the United States Supreme Court deals with this issue, employers and their counsel should be aware of all the possible approaches courts take in determining standing and liability for age discrimination in employment.

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