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Statutory Protection for the Discriminatorily-Discharged Partner: Two Recent Decisions

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COMMENT

STATUTORY PROTECTION FOR THE DISCRIMINATORILY-DISCHARGED PARTNER: TWO RECENT DECISIONS

I. INTRODUCTION

America's economy has undergone drastic changes within the past decade. Movement from an industry-based, production-oriented economy to a service-based, white-collar economy has changed the face of traditional employment relationships. Accompanying this change has been a large influx of women[1] and minorities into white-collar positions traditionally occupied by white males.

At the same time, the growth of the service sector has created a level of "middle managers"[2] with questionable entitlement to statutory protection under such "Antidiscrimination Acts" as Title VII of the Civil Rights Act of 1964[3] (Title VII), the Age Discrimination in Employment Act of 1967[4] (ADEA), and the Equal Pay Act of 1963.[5] This problem is particularly acute in large partnerships. Unlike large corporations, where there is usually a distinct demarcation between "line" and "staff" functions,[6] large partnerships often have extremely ambigu-

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1. For instance, the percentage of accountants who are women increased from 17% in 1960 to 44.1% in 1985. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 361–63 (96th ed. 1975) [hereinafter STATISTICAL ABSTRACT OF THE UNITED STATES]; *id.* at 385 (107th ed. 1987). The percentage of women among law school graduating classes also increased during this period from 2.5% in 1960 to 36% in 1984. *Id.* at 148 (107th ed. 1987).

2. The total number of persons employed in the service sector increased from approximately 14 million in 1970 to 24 million in 1984. *Id.* at 389 (107th ed. 1987). For 1970, the Bureau of the Census reported approximately 6.5 million persons as employed in "administrative and managerial" positions. *Id.* at 361 (96th ed. 1975). For 1985, the Bureau reported approximately 12.2 million persons as employed in "executive, administrative, and managerial positions." *Id.* at 385 (107th ed. 1987). The inclusion of an additional "executive" category in the 1985 report should not defeat the inference of a distinct upward trend in the numbers of middle-level managers and administrators.

3. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

4. 29 U.S.C. §§ 621–634 (1985).

5. 29 U.S.C. § 206(d) (1985).

6. For conceptual purposes, the personnel field has generally classified work in large organizations into "line" functions, employees who carry out actual production of a product or service,

ous management structures. In recent years, this ambiguity has been highlighted by the growth of large, service-oriented partnerships and—due to the size and division of labor within these organizations—by the creation of a class of middle-level workers who possess partnership status.[7] It is these new "middle-level" partners whose coverage under the Antidiscrimination Acts has been the subject of recent litigation.

Most notably, this conflict exists because a partner's traditional entitlement to a portion of the business' profits makes a partner more closely resemble an owner than he does an employee entitled to protection under the Antidiscrimination Acts. However, courts have begun to look beyond form and occupational titles—and entitlement to a small share of the profits—in an effort to extend such protections to individuals who would not have been classified as employees under traditional, common-law principles.[8] Yet, it is still unclear whether or under what circumstances coverage under the Antidiscrimination Acts will be extended to persons with partnership status. Presently, courts have taken differing views and applied varying classification tests under the Acts.

This comment examines two recent cases that have applied very different approaches to classification. After examining the statutory protections provided by the Antidiscrimination Acts, the comment discusses the background of the cases and compares and contrasts them. Next, the comment analyzes the relevant precedent interpreted—often in support of very differing propositions—by the two cases. Finally, the comment examines the public policy arguments for and against classifying partners as employees and considers whether any proposed test presents a satisfactory resolution of the classification issue.

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and "staff" functions, support activities such as management. Corporate line functions have been easier to classify as employees within the meaning of the Antidiscrimination Acts than have middle-managers in large, service-oriented partnerships.

7. This trend can be inferred from the fact that the number of partnerships in the service sector grew from 239,000 in 1979 to 306,000 in 1983. STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 1, at 506 (107th ed. 1987). The number of partners increased from 813,000 in 1979 to approximately 1.3 million in 1983. *Id.* at 506.

8. *See, e.g.*, Hyland v. New Haven Radiology Assocs., 794 F.2d 793 (2d Cir. 1986) (despite resemblance to partnership, defendant's elected corporate form entitled plaintiff to ADEA coverage); Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144 (S.D.N.Y. 1987) (plaintiff-partner received ADEA coverage based upon his low level of management responsibility and strong expectancy of continued employment with defendant-partnership). *But see* Wheeler v. Main Hurdman, 825 F.2d 257 (10th Cir.) (partners not entitled to Antidiscrimination-Acts protection), *cert. denied*, 108 S. Ct. 503 (interim ed. 1987).

II. BACKGROUND

A. *Protection Under the Antidiscrimination Acts*

As a result of statutory ambiguity, entitlement to Antidiscrimination Acts protection is primarily a matter of case law. For example, Title VII[9] prohibits discrimination by an employer on the basis of an "individual's race, color, religion, sex, or national origin."[10] However, while Title VII's protections are granted only to persons who can be characterized as employees,[11] the statute contains no clear definition of "employee." Indeed, Title VII defines "employee" as "an individual employed by an employer."[12] The other Antidiscrimination Acts contain very similar definitional sections;[13] in fact, "cases construing the definitional provisions of [any of the Antidiscrimination Acts] are persuasive authority when interpreting the others."[14]

Given this statutory ambiguity, courts have adopted differing approaches in determining employee status. Many courts have applied a common-law classification test[15] based on agency principles,[16] thereby

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9. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

10. *Id.* § 2000e-2(a). The section states:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

11. *See* Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 77–78 (1984).

12. 42 U.S.C. § 2000e(f). The statute is similarly vague in its definition of "employer." *See id.* § 2000e(b). However, it is clear that the definition of "employer" includes partnerships. *See id.* § 2000e(a).

The ADEA definition of "employer" as "a person engaged in an industry affecting commerce" is nearly identical to the definition of "employer" in Title VII. ADEA limits its term to persons employing 20 or more employees, 29 U.S.C. § 630(b) (1985), while Title VII limits its term to persons employing 15 or more employees. 42 U.S.C. § 2000e(b). The definition of "employer" in the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (1985), is similar: " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* § 203(d). In addition, both ADEA and FLSA include partnerships within the definition of "person." *See id.* §§ 630(a), 203(a).

13. For example, ADEA, like Title VII, defines an "employee" as "an individual employed by any employer," 29 U.S.C. § 630(f). Similarly, the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1985), defines an "employee" as "any individual employed by an employer." *Id.* § 203(e)(1).

14. Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 796 (2d Cir. 1986). *See generally* Lorillard v. Pons, 434 U.S. 575, 584 (1978); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980).

15. *See, e.g.*, Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir.), *cert. denied*, 459 U.S. 874

narrowing the group deserving protected status.[17] Embodied in section 220 of the *Restatement (Second) of Agency*, the common-law test concentrates on the distinction between employees and independent contractors.[18] It focuses on a number of factors, including the employer's control over the worker; the nature of the employee's business as a part of, or distinct from, that of the employer; the skill required to perform the work; and the length of time for which the worker is employed.[19]

Historically, courts applying the common-law, "control" test have given the most weight to an employer's ability to control the worker's role in the production process to the exclusion of other components of the Restatement test.[20] Consequently, "courts that have adopted the common-law test to determine employee status under Title VII . . . have focused on the right to control as the determinant of employee status."[21]

However, the control test has been widely criticized.[22] Some courts

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(1982); Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980); McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

16. Traditional agency principles, used to distinguish between employees and subcontractors, as well as between employees and employers, are based on whether the worker in question falls within the following definition of "servant":

> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
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> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment whether by the time or by the job;
>
> (h) whether or not the work is part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
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> (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220 (1957).

17. Dowd, *supra* note 11, at 79.

18. *See* RESTATEMENT (SECOND) OF AGENCY, *supra* note 16, § 220.

19. *Id.*

20. *See* Dowd, *supra* note 11, at 81–82.

21. *Id.* at 81.

22. Numerous commentators have discussed extending Title VII coverage to partners, based upon an expansion of the definition of "employee." *See, e.g.*, Dowd, *supra* note 11; Newcom, Hishon v. King & Spalding: *Discrimination in Professional Partnerships*, 62 DEN. U.L. REV. 485

and commentators argue that a narrow reading of the term "employee" is inconsistent with the purpose of the Antidiscrimination Acts — to remedy discrimination in a wide variety of employment settings and work place relationships.[23] Many suggest that the Acts' remedial purpose would better be met by an "economic-realities" test,[24] which looks beyond the legalistic form of the employment relationship and examines whether the employer has significant control over the labor market and the terms and conditions of employment.[25] Under this test, a worker is entitled to protection under the Antidiscrimination Acts when the "economic realities" of the employment relationship reflect an inequality of bargaining power and subject the worker to the type of discriminatory conduct the Antidiscrimination Acts were designed to prohibit.[26]

A third test combines elements of both the control and the economic-realities tests.[27] This "hybrid" test examines the extent of an employer's control over the manner and means of the worker's day-to-day duties, as well as the employer's domination of the labor market and the inequality of bargaining power between the parties. Designed to determine Antidiscrimination Acts coverage on a case-by-case basis, the hybrid test provides for an evaluation more extensive than either the control or the economic-realities tests. In this regard, the control prong of the test has been expanded by some courts[28] to reflect the

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(1985); Comment, *Partners as Employees Under Federal Employment Discrimination Statues: Are the Roles of Partner and Employee Mutually Exclusive?*, 42 U. MIAMI L. REV. 699 (1988); Note, *EEOC Subpoena Enforcement to Determine ADEA Coverage of Partnership Retirement Policy*—EEOC v. Peat, Marwick, Mitchell & Co., 19 CREIGHTON L. REV. 967 (1986).

23. *See, e.g.*, Davis v. Valley Distributing Co., 522 F.2d 827, 832 (9th Cir. 1975) (citing EEOC v. Wah Chang Albany Corp., 499 F.2d 187, 189 (9th Cir. 1974)); Dowd, *supra* note 11, at 75–77, 87–89.

24. Dowd, *supra* note 11, at 102–14. The economic-realities test was first applied by the Supreme Court in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) (construing the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (1982)). In *Hearst*, the Court upheld the NLRB's determination that newsboys were not independent contractors but employees protected under NLRA. *Id.* at 131–32; *see also* United States v. Silk, 331 U.S. 704 (1947) (applying *Hearst*-NLRA test in construing the Social Security Act, 42 U.S.C. § 301 (1982)).

For application of an economic-realities test to the classification of partners, compare Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 148–50 (S.D.N.Y. 1987) (applying an economic-realities test) *with* Wheeler v. Main Hurdman, 825 F.2d 257, 268–71 (10th Cir.) (rejecting plaintiff's argument for application of an economic-realities test), *cert. denied*, 108 S. Ct. 503 (interim ed. 1987).

25. Dowd, *supra* note 11, at 102.

26. *Id.* at 103.

27. *Id.* at 108–10; *see also* Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983); EEOC v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983) (extending Title VII hybrid classfication test to ADEA); Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979); EEOC Decision No. 85-4, 2 Empl. Prac. Guide (CCH) ¶ 6846, at 7040–41 (1985).

28. *See, e.g., Spirides*, 613 F.2d at 831–32; Dowd, *supra* note 11, at 109.

original multifactor analysis of Section 220 of the *Restatement (Second) of Agency*. Judicial analysis under the hybrid test's control prong may include the following factors:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, *i.e.*, by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[29]

B. Recent Cases

Two recent cases well-demonstrate the schism in legal thought regarding classification of partners under the Antidiscrimination Acts. This section explores the factual settings of the cases and their holdings.

1. *Wheeler v. Main Hurdman*[30]

a. Facts

During her ten and one-half years as an accountant with Main Hurdman, Marilyn Wheeler advanced steadily through its management ranks, becoming a partner in April 1982. As a partner, her compensation changed from salary to a share of the firm's profits "paid by draw" and "allocat[ed] . . . based on points."[31] Wheeler became a participant in the firm's governance; the partnership agreement provided that Wheeler was entitled to vote on "approval of mergers with other accounting firms of a certain size, admission of new partners, termination of a partner's interest,"[32] allocation of income to a partner upon dissolution, and "approval of draws, shares of net profits, [and] special distributions."[33] She was also entitled to vote on amendments to the partnership agreement itself. Wheeler was subject to involuntary termination of her interest in the partnership by "(1) a unanimous vote

29. *Spirides*, 613 F.2d at 832.
30. 825 F.2d 257 (10th Cir.), *cert. denied*, 108 S. Ct. 503 (interim ed. 1987).
31. 825 F.2d at 260.
32. *Id.*
33. *Id.*

of the firm's policy board, or (2) an affirmative vote of no less than 75% of the members of the firm's advisory board, or (3) an affirmative vote of no less than 75% of all partners casting votes."[34] In addition, upon becoming a partner, Wheeler also had to "surrender[] certain employee benefits including prepaid health and life insurance."[35] Seventeen months after her elevation to the partnership, Wheeler was discharged, and she brought a lawsuit alleging violations of Title VII and ADEA.

b. The Tenth Circuit's Decision

Wheeler urged the court to apply an economic-realities test, arguing that Main Hurdman had significant control over the labor market and dictated the terms and conditions of her employment and that, under such economic realities, she should be covered by the Antidiscrimination Acts notwithstanding her status as a partner.[36] Pointing out that her duties had not changed significantly upon her elevation to the partnership, and that her hourly rate, profit-sharing points, and tenure were all determined by Main Hurdman's managing partners,[37] Wheeler also contended that, despite her title of "partner," her status more closely resembled that of an employee for purposes of Title VII and the ADEA.[38] In addition, Wheeler argued that Main Hurdman's size[39] made it resemble a corporation more than a partnership. Wheeler's voting rights, restricted to mere "ratifications" of management policy, and her contribution to capital, a minuscule percentage of the total,[40] also were more akin to a corporate shareholder than to a partner.

The United States Court of Appeals for the Tenth Circuit declined to apply either the economic-realities test urged by Wheeler or the hybrid control/economic-realities test advocated by amicus curiae United States Equal Employment Opportunity Commission (EEOC).[41] The court read existing case law as showing "no discernible trend to erase

34. *Id.* at 261.

35. *Id.*

36. *See id.* at 268–69.

37. *Id.* at 261. Wheeler contended that a recommendation by a managing partner that another partner be terminated was "the final word," routinely adopted without an opportunity for appeal. *Id.*

38. *Id.*

39. At the time that Wheeler was elevated to the partnership, Main Hurdman employed 3,570 people, 14% of whom were partners. *See id.* at 260.

40. *Id.* at 261–62. Upon withdrawal of her capital account, Wheeler was entitled to .000058% of total partnership capital. *Id.* at 262. As an actual dollar amount, this percentage represented approximately $15,000. *Id.*

41. *Id.* at 268, 271–74.

the traditional line between partners and employees."[42] Moreover, the court reasoned that the economic-realities test was only applicable to cases distinguishing employees from independent contractors and that it would be futile to attempt to draw a distinction between "employee" partners and "non-employee" partners.[43]

Ultimately, the *Wheeler* court concluded that the factors that distinguish a partner, such as limited liability and profit sharing, were sufficient to preclude classification of a given partner as an employee.[44] The court stated: "In summary, while we do not reject invocation of any economic realities test in this case, we reject as incomplete the version used by Wheeler and the EEOC. That version itself fails to reflect economic reality."[45] In addition, the court rejected Wheeler's arguments that the remedial purpose of the Antidiscrimination Acts necessarily required classification as an employee; instead, the court chose to take a narrow view of the Acts' coverage.[46]

2. *Caruso v. Peat, Marwick, Mitchell & Co.*[47]

a. Facts

Conrad Caruso was hired by the management consulting department of Peat, Marwick, Mitchell & Co. (Peat, Marwick), a "Big Eight"[48] accounting firm, in 1969 as a senior consultant. In 1970, Caruso was promoted to the position of manager and ten years later was made a partner. As a partner, Caruso earned a base salary of $25,000 and a share of profits beyond this amount, based on points allocated by the firm's upper-level management, but acquired no ownership interest. Caruso also had no real management role. The firm was controlled by a twenty-one member Board whose decisions were then implemented by a six-tier management hierarchy. Caruso's input into day-to-day, discretionary work decisions and personnel matters was limited to recommendations to a supervisor. Like Wheeler, Caruso was

42. *Id.* at 268.

43. *See id.* at 271–72.

44. *Id.* at 276 (noting that "in general the total bundle of partnership characteristics sufficiently differentiates between the two to remove general partners from the statutory term 'employee' ").

45. *Id.* at 275.

46. *See id.* at 275–76.

47. 664 F. Supp. 144 (S.D.N.Y. 1987).

48. The "Big Eight" accounting firms are: Arthur Anderson & Co.; Arthur Young & Co.; Coopers & Lybrand; Deloitte, Haskins & Sells; Ernst & Whinney; Peat, Marwick, Main, Hurdman & Co.; Price, Waterhouse; and Touche, Ross. In 1985, when Caruso was asked to resign, Peat, Marwick had 1,350 partners and "several thousand" employees. *Id.* at 145.

Coincidentally, the two defendants in the lead cases discussed in this comment (Peat, Marwick and Main Hurdman) merged subsequent to the initiation of the antidiscrimination litigation against them.

not assigned increased responsibilities after becoming a partner.[49]

Voting power in the firm was also determined by a partner's point allocation. Caruso had a disproportionately-low point allocation: while the average partner had accumulated approximately 1,500 points, Caruso had accumulated only 350. Thus, in his fifth year of partnership, Peat, Marwick asked Caruso to resign, citing his failure to bring a sufficient number of new clients to the firm. Caruso, who was fifty years of age at the time, resigned shortly thereafter and, joined by amicus curiae EEOC, brought an age discrimination action under the ADEA.[50]

b. The District Court Decision

The United States District Court for the Southern District of New York accepted Caruso's argument to be classified as an employee for purposes of the ADEA. Although declining to approve similar classification for "corporate decision makers," the court noted that "the mere fact that an employee [has] an impressive title does not mean that this employee loses the protection of the ADEA."[51]

The court flatly rejected the idea that partners per se should be denied employee classification. Stating that "recent cases" were inconsistent with a narrow reading of the Antidiscrimination Acts, the court concluded that such a per se rule would allow employers to hide behind a partnership veil and effectively shield themselves from liability under the Acts by merely labeling their workers "partners."[52]

Ultimately, the *Caruso* court held that a partner could bring an ADEA action if his or her "duties . . . more closely resembled those of a typical salaried worker, with little role in corporate decision making."[53] The court premised its decision upon the traditional conception of a partner's role in a partnership, reasoning that a partner generally "participates in business policy decisions,"[54] usually receives a fixed percentage of profits instead of a wage or salary, and usually is considered "a permanent employee of [the] firm."[55]

Based upon this reasoning, the court developed a three-pronged classification test. The court held such a test should consider "[t]he extent of the individual's ability to control and operate [the] business," "[t]he extent to which . . . compensation is calculated as a percentage

49. *Id.* at 145–46; *see also Wheeler*, 825 F.2d at 261.
50. *Caruso*, 664 F.2d at 145–46.
51. *Id.* at 146.
52. *Id.* at 147–48.
53. *Id.* at 148.
54. *Id.* at 148–49.
55. *Id.*

of . . . profits," and "[t]he extent of the individual's employment security."[56] Applying this test to Caruso, the court classified him as an employee entitled to ADEA coverage.[57]

III. ANALYSIS: COMPARISON OF *WHEELER V. MAIN HURDMAN*[58] AND *CARUSO V. PEAT, MARWICK, MITCHELL & CO.*[59]

The *Wheeler* and *Caruso* courts were faced with the same issue, yet reached opposite conclusions. This analysis first considers the related case law utilized by both courts and its support for their decisions. Second, the analysis considers whether the different classification tests were tailored by the two courts to fit the respective employment situations. Third, this analysis considers which test should be applied and what policy reasons would underlie such test's application.

A. Inconsistent Holdings and Core Reasoning

A comparison of the reasoning of *Wheeler* and *Caruso* illustrates their different approaches. *Wheeler* was premised on an inherent inconsistency in classifying partners as employees: "[s]tatus as a co-owner precludes simultaneous status as an employee."[60] While the *Wheeler* court seemed to agree with plaintiff's argument that "categorical absolutes are difficult to sustain,"[61] its decision seems to support a per se classification of all partners as non-employees. In this regard, the court noted that the "total bundle of partnership characteristics" prohibits partners from enjoying the benefits of Title VII coverage.[62] Indeed, in creating a legal distinction between partners and statutorily-protected employees, the court utilized traditional, common-law characteristics suggested by the Uniform Partnership Act including unlimited liability,[63] the right to share in profits and participate in management subject to agreement between partners,[64] the right and duty to act as an agent for other partners,[65] and shared ownership.[66] These characteris-

56. *Id.* at 149–50.

57. *Id.* at 150.

58. 825 F.2d 257 (10th Cir.), *cert. denied*, 108 S. Ct. 503 (interim ed. 1987).

59. 664 F. Supp. 144 (S.D.N.Y. 1987).

60. *Wheeler*, 825 F.2d at 267; *see also id.* at 264 (partners not classified as employees for the purpose of determining the Title VII 15-employee minimum (citing Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977))); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984) (attorneys who were partners in a professional corporation could not be classified as employees).

61. *Wheeler*, 825 F.2d at 268. The court denied that partners could be classified as employees, notwithstanding respondent's discussion of instances where individuals with ownership interests were classified as employees in non-Antidiscrimination Acts settings. *See id.* at 267–68.

62. *Id.* at 276.

63. UNIF. PARTNERSHIP ACT § 15 (1969).

64. *Id.* § 18(a), (e).

65. *Id.* § 9.

tics certainly draw an unequivocal distinction between a partner's economic and management interests and an employee's interest. However, economic and control benefits should not of itself remove a partner from the purview of the Antidiscrimination Acts.[67]

While the *Wheeler* court emphasized the traditional interests created by the partnership arrangement, the *Caruso* court focused on a partner's expectation of continued employment. Drawing the line at employee classification for "central corporate decision makers," the *Caruso* court was willing to confer such classification on partners, since an implied guarantee of permanent employment is often one of the key characteristics of partnership status.[68]

B. Related Case Law

A number of relevant decisions were examined by both *Wheeler* and *Caruso* in support of different conclusions. This section considers these cases.

1. *Hishon v. King & Spalding*[69]

Most important to both *Wheeler* and *Caruso* was the United States Supreme Court's determination in *Hishon* that Title VII applies to law-firm partnership decisions.[70] Concluding that the terms of the employment contract created between plaintiff and defendant-partner-

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66. *Id.* § 6.

67. The *Wheeler* court recognized, as plaintiff argued, that there are many situations in which possession of an ownership interest does not preclude a finding of employee status. *See Wheeler*, 825 F.2d at 267. Wheeler cited Goldberg v. Whitaker House Coop., 366 U.S. 28 (1961), as the touchstone of her argument for the application of an economic-realities test and for the notion that a partner could be classified as an employee. *See Wheeler*, 825 F.2d at 270. In *Goldberg*, the Supreme Court found that home-worker members of a cooperative could be classified as employees under the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1985). *Goldberg*, 366 U.S. at 33. For other situations in which owners may be classified as employees, see EEOC v. First Catholic Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982) (in holding that status as officer-director does not preclude employee status under ADEA, the court stated that it was "revers[ing] the decision of the District Court because we believe the court interpreted the term 'employee' too narrowly and failed to assess the true nature of the position of officer of the Association"), *cert. denied*, 464 U.S. 819 (1983); Hoy v. Progress Pattern Co., 217 F.2d 701, 704 (6th Cir. 1954) (in according employee status for purposes of FLSA to shareholder who was director and chairman of board of corporation, the court stated, "In present-day industry many employees of large corporations, who perform routine duties and are clearly covered by the Act, are also stockholders, and in numerous instances one or more of such stockholder-employees also act as directors.").

68. *Caruso*, 664 F. Supp. at 149 (citing Snell v. J.C. Turner Lumber Co., 285 F. 356 (2d Cir. 1922) (refusing to find the existence of a partnership agreement where plaintiff seeking contract damages could discharge the defendant at will), *cert. denied*, 261 U.S. 616 (1923)); *see also* Infusaid Corp. v. Intermedics Infusaid, Inc., 739 F.2d 661, 670 (1st Cir. 1984) (noting that one of the attributes of partnership is a relatively high level of job security).

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

70. *Id.* at 78–79. The plaintiff was a female associate in an Atlanta law firm.

ship included consideration for partnership, the Court stated that such a promise was part of the "terms, conditions, or privileges of employment," protected under Title VII.[71]

In his short, but often-quoted concurring opinion, Justice Lewis F. Powell added that "the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners."[72] Justice Powell highlighted the majority's failure to address the classification issue by noting that "[t]he reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply."[73]

Justice Powell's concurring opinion focuses mainly on the marked difference between the employer-employee relationship and the relationship between partners in a law firm. It is unclear whether Justice Powell considers large, non-legal partnerships to have a similar degree of differentiation. In addition, he condemned "sham" conferrals of partnership status by stating: "Of course, an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.' "[74]

The *Hishon* decision leaves a number of important questions unanswered. First, the Court did not squarely address classification of partners. While the Court did determine that Title VII applied to Hishon's employment contract, the concurring opinion seems to call into question the case's applicability to those already partners.[75] Thus, although an employee may not be discriminated against with regard to a decision involving his or her elevation to partnership, it is conceivable that a recently-elevated partner could be subjected to a discriminatory expulsion without triggering the sanctions of the Antidiscrimination Acts.

A second, related problem may arise with respect to court determinations of whether conferrals of partnership status are mere shams, designed to "evade the strictures of Title VII."[76] Justice Powell offers no standards or tests that would aid a reviewing court in making this determination. Moreover, in many circumstances, the "sham" distinction may not be a helpful one. The actions of an employer wishing to "evade the strictures of Title VII" and an employer wishing to discriminatorily discharge a bona fide partner may differ only in a conceptual

71. *Id.* at 74.

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

73. *Id.* (Powell, J., concurring).

74. *Id.* at 79 n.2 (Powell, J., concurring).

75. *See id.* at 76. Significantly, the court's analysis is predicated upon plaintiff's status as an *associate* in the law firm. *See id.* at 73–78. Furthermore, the court's opinion narrowly addresses the applicability of Title VII to the partnership *decision*, and, in this regard, is arguably inapplicable to situations where the plaintiff has already achieved partnership status.

76. *Id.* at 79 n.2 (Powell, J., concurring).

sense or in the length of time between the elevation and the discharge. Thus, case-by-case consideration will be more helpful than a per se rule that merely distinguishes between sham and bona fide partners.

The *Wheeler* court seemed to apply such a per se standard and, thus, read *Hishon* as clearly denying Title VII coverage to partners. Although noting *Hishon*'s failure to reach the classification issue, the *Wheeler* court stated that "the partners own the partnership; they are not its 'employees' under Title VII. We find a clear distinction between employees of a corporation and partners of a law firm."[77] The court also favorably cites Justice Powell's explicit denial of Title VII coverage to partners in the legal setting; however, the court notes that "[t]he significance of Justice Powell's observation must . . . be tempered by the fact that no other justice joined the concurring opinion, and by allusions to a highly interactive partnership characterized by common agreement or consent among the partners."[78]

Interpreting *Hishon* differently, the *Caruso* court ignores the *Hishon* majority's failure to address the classification issue and construes the concurring opinion as permitting an exception to per se classification of partners as non-employees.[79] Such an exception to the rule could, theoretically, cover any partner who resembles an employee more than he does a partner. In this regard, the concept of the "sham" partner would merely be expanded to focus not upon intent to evade the Antidiscrimination Acts, but upon discriminatory conduct regardless of intent.[80]

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77. *Wheeler*, 825 F.2d at 263–64.

78. *Id.* at 265.

79. *See Caruso*, 664 F. Supp. at 147.

80. The *Wheeler* court agreed with Justice Powell's concurring opinion and, like Powell, carved a "sham" exception from a per se rule where the partnership-employer has attempted to "evade the strictures of Title VII." *Wheeler*, 825 F.2d at 277 ("Furthermore, partnerships obviously cannot without impunity admit one to the partnership merely as a device for avoiding application of the Acts, for then the bona fides of partnership status would be in question.") (citing *Hishon*, 467 U.S. at 79 n.2 (Powell, J., concurring)).

This focus is misdirected with respect to the partnership's intent to avoid statutory coverage. Indeed, if the issue is whether a partner is a bona fide partner, a reviewing court would more properly be directed toward an analysis of such factors as the partner's duties and his amount of equity ownership. A partner who has been elevated with the intent of future discriminatory discharge may possess all of the necessary requirements for partnership status; in fact, a partnership wishing to effectively mask its discriminatory intent might be well-advised to confer numerous important partnership attributes upon a new partner whom it wishes to discharge discriminatorily. Furthermore, the partnership need only wait a legally-hazy time period during which, theoretically, a "sham" partner could become a bona fide partner. Hence, the partnership's intent to evade the statute is not an adequate touchstone—intent may easily be masked.

2. *Hyland v. New Haven Radiology Associates, P.C.*[81]

In *Hyland*, a shareholder of a professional corporation brought an age discrimination action under the ADEA. The defendant, New Haven Radiology, argued that the professional corporation resembles a partnership more than it does a corporation and thus plaintiff should not be classified as an employee. The United States Court of Appeals for the Second Circuit disagreed, holding that "the use of the corporate form precludes any examination designed to determine whether the entity is in fact a partnership."[82]

The *Hyland* court stated that "[t]he fact that certain modern partnerships and corporations are practically indistinguishable in structure and operation, however, is no reason for ignoring a form of business organization freely chosen and established."[83] In contrast, the Seventh Circuit, in a similar case, reached the opposite conclusion, applying an economic-realities test to determine that a professional corporation was equivalent to a "partnership" for Title VII purposes.[84] While the Seventh Circuit was willing to look beyond form to the substance of the plaintiff's employment relationship with the employer-entity, the *Hyland* court held that the chosen business form was controlling, regardless of the actual relationship between its members.

The *Wheeler* court cited *Hyland* in support of per se classification of partners as non-employees and quoted passages from it stating that "[i]t is generally accepted that the benefits of the [A]ntidiscrimination [Acts] . . . do not extend to those who properly are classified as partners,"[85] and that "[w]hile those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive."[86]

Interestingly, despite the apparent support in *Hyland* for *Wheeler's* per se test, the *Caruso* court found language in *Hyland* to cite for the opposite conclusion. The *Caruso* court cited *Hyland* for the proposition that "an employer's mere classification of an individual as a partner is not dispositive, and . . . courts instead must look to that individual's actual duties and status."[87]

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81. 794 F.2d 793 (2d Cir. 1986).
82. *Id.* at 798.
83. *Id.* at 797–98.
84. EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984).
85. *Wheeler*, 825 F.2d at 264 (quoting *Hyland*, 794 F.2d at 797).
86. *Id.* at 264 (quoting *Hyland*, 794 F.2d at 798).
87. *Caruso*, 664 F. Supp. at 147 (citing *Hyland*, 794 F.2d at 797–98).

3. *EEOC Decision No. 85-4*[88]

Caruso and *Wheeler* also differed in their analysis of a 1985 EEOC decision in which the agency "recognize[d] that there may be a case where an individual is called a partner, but . . . may really be an employee."[89] The agency held that "[i]n determining whether the individual is a partner or an employee in a particular case, the Commission will consider relevant factors including, but not limited to, the individual's ability to control and operate the business and to determine compensation and the administration of profits and losses."[90]

The *Caruso* court found the agency decision to support case-by-case classification.[91] In contrast, the *Wheeler* court rejected amicus curiae EEOC's argument that the decision supported application of a hybrid test. In distinguishing the EEOC decision, the *Wheeler* court reasoned:

> We do not view the decision, however, as squarely supporting the present EEOC position. The decision displays no agency inclination whatsoever to pursue an aggressive inquiry into whether or not, as a matter of economic reality, any of the partners involved in that case were dominated in their work, in management or control of partnership affairs, in decisions on sharing profits or in any other respect. . . . In the 1985 decision all such factors were essentially decided by the Commission by reference to the written terms of the partnership agreement, with only a passing reference to an absence of evidence that the "business is carried out in any other way than as indicated in the partnership agreement."[92]

4. *EEOC v. Peat, Marwick, Mitchell & Co.*[93]

An additional case arising from an EEOC investigation was analyzed by both the *Wheeler* and *Caruso* courts. In *Peat, Marwick, Mitchell & Co.*, the United States Court of Appeals for the Eighth Circuit—without deciding the classification issue—upheld EEOC power to investigate the compliance with ADEA of a retirement system

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88. EEOC Decision No. 85-4, *supra* note 27 (partners in an eight-member law firm are non-employees under Title VII). The *Hyland* court cited the EEOC decision in support of the general proposition that partners are not employees. *Hyland*, 794 F.2d at 797 (quoting EEOC Decision No. 85-4, *supra* note 31, at 7040–41).

89. EEOC Decision No. 85-4, *supra* note 27, at 7041 n.4.

90. *Id.*

91. *Caruso*, 664 F. Supp. at 148 (quoting *Hyland*, 794 F.2d at 797 (quoting EEOC Decision No. 85-4, *supra* note 27, at 7040–41)).

92. *Wheeler*, 825 F.2d at 265. In addition, the *Wheeler* court found that the EEOC lacked a coherent approach to the issue, pointing out that the 1985 decision was the only evidence of agency willingness to consider a detailed factual inquiry of employment status. *Id.* at 265–67.

93. 775 F. 2d 928 (8th Cir. 1985).

for partners.[94]

Neither the *Caruso* nor the *Wheeler* courts found the decision troubling. The Eighth Circuit's acceptance of at least the possibility of EEOC protection for partners would seem to be inherently incompatible with *Wheeler's* per se classification of partners as non-employees; however, the *Wheeler* court ignored that argument and instead pointed to the Eighth Circuit's failure to reach the classification issue.[95] In contrast, the *Caruso* court seems to have read the decision as support for case-by-case classification.[96]

C. *Public Policy Considerations*

Overall, the *Wheeler* court's reasoning appears more persuasive, since most of the related authority—although not directly addressing the classification issue—points away from classifying equity owners as employees.[97] In contrast, the *Caruso* reasoning seems tenuous at times. However, the *Caruso* court had undertaken a rather difficult task, attempting to support what would normally be classified as a "policy argument" as if it were favored by the preponderance of the case law.[98]

In contrast, the *Wheeler* court rejected the public policy argument, made by both plaintiff and amicus curiae EEOC, that the "remedial purpose" should be considered in developing a classification test. The court pointed out that a remedial-purposes analysis would mean that "[a]ny partner who can be discriminated against is, ipso facto, an employee. The problem with that reasoning is that it must include independent contractors and every other business relationship as well."[99] Discerning no legislative intent to extend coverage so broadly, the court held that such a construction would render meaningless the statutory language restricting protection to "employees."[100]

The *Wheeler* court did apply its own version of an economic-reali-

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94. *Id.* at 929.

95. *See Wheeler*, 825 F.2d at 263 n.14.

96. *Caruso*, 664 F. Supp. at 147 ("[I]t is possible that respondent may label some of its members as 'partners' when, in fact, those members may not fit within the traditional definition of the term." (quoting EEOC v. Peat, Marwick, Mitchell & Co., 589 F. Supp. 534, 539 (E.D. Mo. 1984), *rev'd*, 775 F. 2d 928 (8th Cir. 1985))).

97. *See generally* Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977); Maher v. Price Waterhouse, Civ. No. 844-1522C(2) (E.D. Mo. Apr. 8, 1985); Holland v. Ernst & Whinney, 35 Empl. Prac. Dec. (CCH) ¶ 34,653 (N.D. Ala. Aug. 17, 1984); UNIF. PARTNERSHIP ACT, *supra* note 63, §§ 6, 9, 15, 18(a), (e).

98. *See Caruso*, 664 F. Supp. at 149. The *Caruso* court did not support its classification of partners as employees by reference to the arguments that either the "remedial purpose" of the Antidiscrimination Acts or public policy favored inclusion of partners. Instead, the court based its adoption of a three-pronged test on a favorable reading of relevant case law. *See id.* at 149–50.

99. *Wheeler*, 825 F.2d at 275.

100. *Id.*

ties test in classifying Wheeler, reasoning that it was bound by precedent to do so.[101] However, the court rejected arguments by plaintiff and the EEOC that the test should focus on "bargaining inequalities," instead believing that the true "economic reality" of Wheeler's employment situation was that her position as a partner placed her in an advantageous bargaining situation rather than a disadvantageous one.[102]

However, some courts and commentators have taken a very different view of the Antidiscrimination Acts.[103] Some have advocated broad construction in order to effectuate legislative intent, suggesting that the failure of Congress to limit coverage—as had been done with other labor legislation—manifests a congressional intent to broadly define "employee" in the context of the Antidiscrimination Acts.[104]

IV. CONCLUSION

None of the competing theories seem adequately tailored to partners who possess little management responsibility. Per se classification as non-employees may be unwise, particularly given the recent growth in the number of large partnerships whose partners may more resemble traditional employees. Even the *Wheeler v. Main Hurdman*[105] court recognized an exception, agreeing with Justice Powell that there may be instances where an employee is intentionally mislabeled by a partnership in order to avoid statutory coverage.[106]

Nor do any of the characterization tests provide adequate predictability and consistent results.[107] With regard to the economic-realities test, for example, it is unclear what degree of economic domination and bargaining inequality would suggest that a given partner be classified as an employee. Interestingly, the *Wheeler* court found that a partner was not disadvantaged at all in his bargaining relationship with management.[108]

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101. *Id.* at 271–75 (citing Doty v. Elias, 733 F.2d 720 (10th Cir. 1984)).

102. *See id.* at 274–75.

103. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (noting that Title VII should be read in light of its objectives—achieving equality in employment and removing barriers that have operated in the past to favor one race over another); Dowd, *supra* note 11, at 75 (asserting that "courts have liberally interpreted the substantive and procedural provisions of Title VII to achieve . . . [its] goals").

104. *See* Dowd, *supra* note 11, at 93–94 (discussing congressional restriction of Social Security Act to require use of common-law test to determine employee status (citing Pub. L. No. 734, 81st Cong., 2d Sess., 64 Stat. 500 (1950))).

105. 825 F.2d 257 (10th Cir.), *cert. denied*, 108 S. Ct. 503 (interim ed. 1987).

106. Hishon v. King & Spalding, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring), *cited with approval in Wheeler*, 825 F.2d at 277.

107. *See Wheeler*, 825 F.2d at 272 ("[The] difficulty with the proffered tests is that they purport to, but in fact do not, encompass reasonable limits.").

108. *See id.* at 274–75.

A case-by-case, fact-sensitive approach leaves pressing questions as well. For instance, with respect to the *Caruso v. Peat, Marwick, Mitchell & Co.*[109] three-pronged classification test, one may question how much control over his own activity, how large a share of profits, and how great an employment security will deny protection to partners.

Wheeler and *Caruso* illustrate the present split in the federal courts on classification of partners. The *Wheeler* approach fails in that it dictates a per se rule for an issue that is probably best dealt with on a case-by-case basis. While the *Caruso* three-pronged test may provide a more rational alternative, it suffers from a lack of both case law support and clear standards for application. Classification of partners and their entitlement to Antidiscrimination Acts protection is an issue that deserves a more satisfactory resolution.

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109. 664 F. Supp. 144 (S.D.N.Y. 1987).