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When Is a Partner Not a Partner - Wheeler v. Main Hurdman and Caruso v. Peat, Marwick, Mitchell & (and) Co.

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When Is a Partner Not a Partner? *Wheeler v. Main Hurdman*[1] and *Caruso v. Peat, Marwick, Mitchell & Co.*[2]

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A working man was discharged from his job. Believing he had been fired from his job because of his age, he filed a discrimination suit against his employer. A working woman, believing she was dismissed for unlawful reasons of sex and age, also filed suit against her former employer. The two situations are similar in other respects. Both of the employers engaged in the same business and had thousands of workers in over seventy cities across the country. The man and woman had the same job titles and performed similar functions.

The results of the suits, however, differed greatly. In the man's case, *Caruso v. Peat, Marwick, Mitchell & Co.*,[3] the United States District court said that workers such as Conrad Caruso are protected by the Age Discrimination in Employment Act (ADEA) and therefore have a cause of action under the Act to remedy discriminatory conduct of their employers.[4] The woman did not fare as well. In *Wheeler v. Main Hurdman*[5] the Tenth Circuit dismissed Marilyn Wheeler's discrimination claim, holding that workers of her type are not covered by any of the federal Antidiscrimination Acts protecting "employees."[6]

What was the reason for the differing treatment? Caruso and

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* B.A., B.S., University of Minnesota (1983); J.D., University of Minnesota (1989).

1. 825 F.2d 257 (10th Cir. 1987).

2. 664 F. Supp. 144 (S.D.N.Y. 1987).

3. *Id.*

4. *Id.* at 150. The Age Discrimination in Employment Act of 1967 (ADEA) is codified at 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986). See Section II(A) *infra* for discussion of the coverage of the ADEA.

5. 825 F.2d 257 (10th Cir. 1987).

6. *Id.* at 277. Marilyn Wheeler claimed her dismissal violated Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (1982); the ADEA, 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986); and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), a subpart of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (1982 & Supp. IV 1986). *Id.* at 258. For convenience these statutes will be referred to as the Antidiscrimination Acts or Acts. See Section II(A) *infra* for further discussion of the Antidiscrimination Acts.

Wheeler were both partners in accounting firms. They had similar responsibilities and duties. Why should the law deny them similar remedies? The outright dismissal of Ms. Wheeler's claim is a result of a continuing failure of the courts to determine whether partners are covered by federal antidiscrimination laws on a case by case basis. When the economic reality of the work relationship is analyzed properly, a low-level partner in a large, nation-wide partnership of essentially perpetual duration quite frequently looks like an employee in a corporation.[7] The *Caruso* court made this analogy in extending such a partner the protection of the federal Antidiscrimination Acts.

The Antidiscrimination Acts have been very effective in promoting the entrance and advancement of women and minorities into large sectors of the workforce. The advancement of women and minorities to the rank of partner, however, has been slow.[8] As a result, the issue whether *partners* are protected from discrimination under the Acts did not present itself until recently. The *Wheeler* decision allows many of the professions organized as partnerships—doctors, attorneys, architects—to discriminate against partners at will, notwithstanding federal antidiscrimination laws.

The Antidiscrimination Acts have opened the front door of partnerships to women and minorities; the Supreme Court has held that the *advancement* of an employee to partner is covered by the Acts.[9] The legality of partnerships then quietly showing partners out the back door once they are designated as such must not rest on a narrow judicial interpretation of "employee" for purposes of the Acts. If partners are categorically excluded from the definition of "employee," the result will be the inability of the Acts to prevent discrimination in many of the most prized and respected professions.

Comparison of the *Wheeler* and *Caruso* decisions demonstrates partners' need for discrimination protection and the error of the *Wheeler* court's broad denial of such protection. The work relationships from which the two plaintiffs found themselves so rudely evicted were far more similar than different, making a comparison of the two cases appropriate. Each firm was a large, na-

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7. *See infra* note 47 and accompanying text.

8. *See, e.g.*, *Still a Long Way to Go For Women, Minorities*, Nat'l L.J., Feb. 8, 1988, p. 1. Over 90% of the partners in the law firms surveyed by the National Law Journal were white males. In this survey of 19,610 partners, less than eight percent were women, only .81% were black, and combined numbers of Asian and Hispanic partners were less than one percent.

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

tion-wide accounting firm;[10] Main Hurdman had 502 partners,[11] Peat, Marwick & Mitchell had over 1350 partners.[12] Each firm was managed by a hierarchical structure of managing partners;[13] neither plaintiff was a member of the management structure.[14] Each had been employed by their firm for roughly ten years before promotion to partner.[15] Their work duties remained essentially the same after the supposed change in status from employee to partner.[16] Their wages varied little with profits.[17] The sole relevant difference was ownership interest: Mr. Caruso had none in his firm[18] while Ms. Wheeler owned a minute share in Main Hurdman.[19]

The first section of this article discusses the coverage of the Antidiscrimination Acts, focussing on the definition of "employee" in the statutes and its case law definition under the "economic realities" test. The courts have developed the "economic realities" test to determine if relationships not fitting the historical label of "employee," but functionally similar are covered by the Acts. The second section analyzes the concept of partnership, particularly those aspects of a large partnership that can be more indicative of an "employment" relationship than that of a partner status. The third section discusses the facts and conflicting holdings of the two cases. The conclusion of the article advocates a case by case ap-

10. Peat, Marwick, Mitchell had over one hundred domestic offices. Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 145 (S.D.N.Y. 1987). Main Hurdman had over eighty. Wheeler v. Main Hurdman, 825 F.2d 257, 261 (10th Cir. 1987).

11. *Wheeler*, 825 F.2d at 260.

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

13. Peat, Marwick, Mitchell was run by a board of directors. Under the board was a six-tier management structure ranging from the Chief Executive Officer to the Partners in Charge at each office. These management positions contained 300 of the firm's 1350 partners. *Id.*

Main Hurdman was managed by a Managing Partner/Chief Executive Officer, a National Policy Board, and a National Nominating Committee. All partners could vote but only on ratification of the decisions of these three managing groups. Each office had a managing partner residing over department heads. Ms. Wheeler was supervised by the same partner prior and successive to her becoming a "partner." *Wheeler*, 825 F.2d at 261.

14. *Caruso*, 664 F. Supp. at 145; *Wheeler*, 825 F.2d at 261.

15. *Caruso*, 664 F. Supp. at 145; *Wheeler*, 825 F.2d at 258.

16. *Caruso*, 664 F. Supp. at 145; *Wheeler*, 825 F.2d at 261.

17. Mr. Caruso had a base salary which could be slightly incremented by profits. But the increments were based on a point system through which management assigned ratings to Mr. Caruso. His point accrual was minimal. *Caruso*, 664 F. Supp. at 146.

Ms. Wheeler's wages were established by management. *Wheeler*, 825 F.2d at 261.

18. *Caruso*, 664 F. Supp. at 146.

19. Ms. Wheeler's initial contribution of $4,000 amounted to a .000058 share of the firm. *Wheeler*, 825 F.2d at 262.

proach to determining the reality of the "partnership" working relationship so that partners such as Marilyn Wheeler and Conrad Caruso receive the protections of the Antidiscrimination Acts. By agreeing with and expanding on the reasoning of the *Caruso* decision, it demonstrates the error of the *Wheeler* opinion and the need for "partner protection."

I. Coverage of the Acts

Three federal acts—Title VII of the Civil Rights Act of 1964 (Title VII),[20] the Age Discrimination in Employment Act (ADEA),[21] and the Equal Pay Act of 1963, a subpart of the Fair Labor Standards Act of 1938 (FLSA)[22]—prohibit a broad range of discriminatory practices in the work place. Title VII provides:

> (a) . . .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
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> (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.[23]

The language of the ADEA is nearly identical except that it expressly prohibits discriminatory practices based on age.[24] The Equal Pay Act of the FLSA prohibits wage discrimination based on sex.[25]

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20. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
21. 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986).
22. 29 U.S.C. §§ 201-219 (1982 & Supp. IV 1986).
23. 42 U.S.C. § 2000e-2(a).
24. 29 U.S.C. § 623(a) provides:
    (a) . . .It shall be unlawful for an employer—
    (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
    (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
    (3) to reduce the wage rate of any employee in order to comply with this Act.
25. 29 U.S.C. § 206(d)(1) provides:
    No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such em-

A. *Definition of "Employee" Under the Antidiscrimination Acts*

Analysis of the applicability of the Acts to partners may proceed only after the broad language and its broad interpretation is noted. Congress, in enacting and amending the Acts, used open-ended definitions and terminology to carry out its purpose: the eradication of discrimination. The courts, in interpreting the Acts, are explicitly aware of, and guided by, this purpose in reaching their decisions.

The broad definition given the term employee is virtually identical in all three Acts: an employee is an individual employed by an employer.[26] The circularity of the definition, although unhelpful, would seem to indicate that Congress desired breadth in the definition. It demonstrates that Congress purposefully avoided a restrictive definition in order to extend the Acts' protections to large segments of the workforce.[27] One court has broadly interpreted the Acts' coverage, saying, in effect, that if the work rela-

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> ployees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .

26. 29 U.S.C. 203(e)(1)(". . .any individual employed by an employer."); 29 U.S.C. 630(f)(". . .an individual employed by any employer. . ."); 42 U.S.C. 2000e(f)(". . .an individual employed by an employer. . .").

27. *See, e.g.*, Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 Wm. & Mary L. Rev. 75, 89 (1984) ("Congress deliberately left the term employee undefined, recognizing the difficulties of constructing a technical definition that would include the broad range of employment relationships."); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 617 (1944) ("If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction.").

It should also be noted that while there are explicit exceptions in the coverage of the Acts, there is no explicit exception for professional associations. Note, *Tenure and Partnership as Title VII Remedies*, 94 Harv. L. Rev. 457, 460 (1980). *See also* EEOC v. Rinella & Rinella, 401 F. Supp. 175, 180 (N.D. Ill. 1975) ("since the primary objective of Title VII is the elimination of the major social ills of job discrimination, discriminatory practices in professional fields are not immune from attack").

Furthermore, legislative history indicates explicit intentions to cover professionals. H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 28 (1963) (representatives' views that Title VII should apply to engineers, scientists, lawyers, doctors, and teachers); 118 Cong. Rec. 3801-02 (1972) (Sen. Javits' opposition to amendment exempting hospital-employed physicians from Title VII coverage). Sen. Javits said:

> [O]ne of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and drawers of water; that only blue-collar jobs and ditchdigging jobs are reserved for them; and that. . .they cannot ascend the higher rungs in professional and other life.

tionship is such that the worker is in a position subject to discrimination and the Acts are appropriate to remedy that discrimnation, then that worker is an employee.[28]

Mere designation of a worker as a "partner" does not place that individual outside the protections of the Acts.[29] The label is not determinative. The actuality of the work relationship determines true "employee" status.[30] In analyzing that actuality, the Supreme Court has stated that the broad inclusiveness of Title VII must not be restricted by lower court "interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."[31] The term "employee" is to be "understood with reference to the purpose of the Act. . . ."[32]

Both the *Wheeler* and *Caruso* courts began at this starting point—broad legislative language, broad precedential interpretation—but the *Wheeler* court failed to keep the goal of the Acts in mind when it reached the next step of analysis: the economic realities test.

B. The Economic Realities Test

Given the freedom to broadly construe the Acts, the courts have adopted a test to discern employee status and therefore the coverage of the Antidiscrimination Acts. Title VII, the ADEA, and the FLSA are federal acts designed to eradicate discrimination in the economy. The definition given to "employee" is critical to the coverage of the Acts.

The courts developed the "economic realities" test to extend protection of the Acts to those work relationships not fitting traditional definitions of "employee." The word employee has a long history of common law definition, but the Supreme Court has rejected that common law definition in "federal legislation, administered by a national agency, intended to solve a national problem on

28. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 129 (1944). *See also* Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich. L. Rev. 282, 290 (1977); Arthur J. Paone & Robert Ira Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. Cal. L. Rev. 615, 633 (1967).

29. Hishon v. King & Spalding, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring).

30. Carter v. Dutchess Community College, 735 F.2d 8, 13 (2d Cir. 1984); Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983); Zimmerman v. N. Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983); EEOC v. First Catholic Ladies Slovak Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982); Unger v. Consol. Foods Corp., 657 F.2d 909, 916 (6th Cir. 1981).

31. County of Washington v. Gunther, 452 U.S. 161, 178 (1981).

32. Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) (FLSA).

a national scale."[33]

In *NLRB v. Hearst Publications, Inc.*,[34] the Supreme Court first used an analysis of the working relationship that was later designated the "economic realities" test. The Court upheld the NLRB's finding that men who sold papers on the street were employees of the newspaper rather than independent contractors and were therefore covered by the National Labor Relations Act.[35] The test the Court used looked to the "economic facts of the [work] relation" to determine when these "characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections. Congress recognized that these economic relationships cannot be neatly fitted into a definition of 'employee' that earlier law had shaped for a different purpose."[36] The Court concluded that the term employee is to be defined with reference to the purpose of the Act and the economic relationship involved.[37] Furthermore, the fact that the worker in question has been subjected to discrimination that the Act was designed to prevent, is a relevant consideration in finding that he or she is an "employee."[38]

With the purpose of the Acts in mind, the work relationship may then be analyzed. Factors critical to the employment relation are: the employer's degree of control, the method of compensation, the method of hiring and firing, the degree of investment by the individual in the business, and the liability of the individual to the business.[39] Yet, "[c]onsideration of all of the circumstances

33. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 123 (1944). Common law definitions of employee-employer status are not binding in construing federal employment statutes. Walling v. Portland Terminal Co., 330 U.S. 148, 152-53 (1947); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 123 (1944); Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983); Calderon v. Martin County, 639 F.2d 271, 272-73 (5th Cir. 1981); Clarkson Constr. Co. v. OSHA, 531 F.2d 451, 457-58 (10th Cir. 1976). *See also* Dowd, *supra* note 27, at 86 ("The fundamental injustice resulting from the use of the common law test of employee status in Title VII cases is that the test fails to consider the employee's perspective of the relationship and the employer's ability to manipulate access to employment opportunities and to control the terms and conditions of employment.").

34. 322 U.S. 111 (1944).

35. *Id.* at 131-32.

36. *Id.* at 128. The Court went on to say:

> [T]he broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.

Id. at 129.

37. *Id.* at 129.

38. *Id.* at 127.

39. Spirides v. Reinhardt, 613 F.2d 826, 831-32 (D.C. Cir. 1979).

surrounding the work relationship is essential, and no one factor is determinative."[40] It is the substance of the working relationship that is critical, not the label applied to its form.

In addition, it is critical to note that when Congress has disagreed with judicial definitions of "employee" that use the economic realities test, it has expressly amended the Acts to use the common law definition of "employee."[41] There was no such amendment to the FLSA following the *Hearst* Court's economic realities definition. Subsequent determinations of employee status under the FLSA have used the economic realities test.[42] Furthermore, judicial definitions construing one Antidiscrimination Act are "persuasive authority when interpreting the others."[43] Many courts interpreting the ADEA and Title VII have applied the economic realities test in discerning the true working relationship.[44]

The following section describes the nature of partnership and shows that application of the Acts to partners in certain circumstances is consistent with and does not overly intrude upon the concept of partnership.

II. The Nature of Partnership

One basic argument against allowing a partner to sue the partnership is that a partnership is an aggregate made up of the individual partners leaving no separate entity which may be sued.[45] Under this theory, a partner in essence would be suing himself. The history and judicial development of partnership law, however, demonstrate that partnership law contains aspects of both the aggregate and entity theories. In fact, the first two drafts of the Act to Make Uniform the Law of Partnership in 1902 con-

40. *Id.* at 831. *See also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947)(the test should not focus on "isolated factors" of the work relationship).

41. *See, e.g.*, 42 U.S.C. § 410(j)(2) (1982) (Social Security Act).

42. *See, e.g.*, Goldberg v. Whitaker House Coop., 366 U.S. 28 (1961); Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376 (3d Cir. 1985); Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984); Doty v. Elias, 733 F.2d 720 (10th Cir. 1984); Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977).

43. Hyland v. New Haven Radiology Assoc., P.C., 794 F.2d 793, 796 (2d Cir. 1986).

44. *See, e.g.*, Garrett v. Phillips Mills, Inc., 721 F.2d 979, 981 (4th Cir. 1983)(application of the economic realities test to determine coverage of the ADEA); EEOC v. Zippo Mfg. Co., 713 F.2d 32, 37-38 (3d Cir. 1983)(test applied to ADEA coverage determination); Armbruster v. Quinn, 711 F.2d 1332, 1341-42 (6th Cir. 1983)(test applied to Title VII coverage determination); Unger v. Consol. Foods Corp., 657 F.2d 909, 915 n.8 (7th Cir. 1981)(test applied to Title VII coverage determination); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979)(test applied to Title VII coverage determination).

45. A. Ladru Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 Vand. L. Rev. 377, 384-85 (1963).

tained a single definition describing a partnership as a legal person or an entity.[46] The final draft of the Uniform Partnership Act (UPA), adopted in 1914, showed the results of the compromise between the competing theories reached at the 1914 National Conference of Commissioners on Uniform Laws.[47] Although the UPA contains an "aggregate" definition of partnership,[48] it contains nineteen sections that refer to the entity concept of partnership.[49]

Because of this dual characterization, it would not be an inherent violation of traditional partnership law to treat the partnership as an entity and its partners as employees in certain circumstances. One commentator has argued that treatment of partnership as an entity should depend on the particular question before the court.[50] Courts and legislatures have often done so for tax purposes[51] and for worker's compensation statutes.[52] Two of the leading authorities on partnership, Crane and Bromberg, also support this position:

> There is no doubt of the ability of legislatures to treat partnerships as entities. They have often done so, either by specific mention of partnerships in operative provisions, as in the Bankruptcy Act or in authorizations for suit in the firm name, or by defining operative words like "person" or "whoever" to include partnerships along with other persons and organizations.[53]

Crane and Bromberg make a statement particularly relevant to the work relationships in partnerships with many partners: "no corporation is more entity-like than a large law or accounting firm which has been going for generations, often under the name of someone long since dead, with dozens or hundreds of partners (of whom only a handful, as managing partners or an executive committee, make major decisions). . . ."[54]

As these firms become more like corporations, they maintain

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46. *Id.* at 377.

47. *Id.* at 378-79.

48. "A partnership is an association of two or more persons to carry on as co-owners a business for profit." U.P.A. § 6(1) (1914).

49. U.P.A. §§ 2, 8, 9, 10, 12, 13, 14, 15, 18, 19, 21, 24, 25, 26, 27, 28, 30, 35, 40 (1914).

50. Jensen, *supra* note 45, at 384.

51. *See, e.g.*, Armstrong v. Phinney, 394 F.2d 661 (5th Cir. 1968); Temp. Treas. Reg. § 1.274-6T(e)(2)(ii,iii) (1985).

52. *See, e.g.*, Trappey v. Lumbermen's Mut. Cas. Co., 229 La. 632, 86 So. 2d 515 (1956); Ohio Drilling Co. v. State Indus. Comm'n, 86 Okla. 139, 207 P. 314 (1922); Cal. Lab. Code § 3351(f) (West 1971); Mich. Comp. Laws Ann. § 418.161 (West Supp. 1977); Ore. Rev. Stat. § 656.128 (1965); 85 Okla. Stat. Ann. § 3 (West Supp. 1977); Utah Code Ann. § 35-1-43(4) (1953); Wash. Rev. Code § 51.32.030 (1977).

53. Alan R. Bromberg, Crane and Bromberg on Partnership § 3, at 25 (1969) (footnotes omitted).

54. *Id.* at 19-20.

many of the benefits of the partnership form. Evading the scope of antidiscrimination laws should not be one of these benefits. Indeed, if the *Wheeler* court interpretation is used to broadly exempt partners from the Acts' protections, then the fortuity of a firm's choice of business organization could determine if a partner has a claim. For instance, if a law firm is organized as a professional corporation rather than as a partnership, the partner's counterpart is characterized as an employee and is protected by the Acts.[55] The two positions, while analogous, thus would receive differing treatment under the law of *Wheeler*.

Questions of partnership law should not be solved by an assumption of which theory—aggregate or entity—prevails. Since aspects of both are injected into partnership law, "[a] pragmatic approach to the controversy is to reject either theory and simply to solve problems of partnership law as they arise, with the solution being dictated not by legal formalism, but by the merits of particular solutions."[56]

A partner's ability to control and manage the partnership is a critical indication of partnership status. According to the Uniform Partnership Act, every partner acting as an authorized agent of the partnership has the power to bind the partnership.[57] Partners also share in profits and are personally liable for losses,[58] and each partner takes part in running the partnership business.[59] Because of these attributes of co-management and co-ownership, the partnership was traditionally viewed as a more personal relationship than other business forms. The UPA was drafted nearly a century ago; the large nationwide organizations called partnerships today are certainly not the personal business relationships originally envisioned by the drafters. In fact, co-management of the business, one of the critical, original indications of partnership, is an attribute most likely to disappear in the bureaucracy of a large partnership. This fact was demonstrated by Mr. Caruso's and Ms. Wheeler's lack of participation in the management of their firms.[60]

The next section discusses the *Wheeler* and *Caruso* courts' reasoning behind their applications of the economic realities test to partners.

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55. Note, *Tenure and Partnership as Title VII Remedies*, 94 Harv. L. Rev. 457, 462-63 (1980).

56. Harold Gill Reuschlein & William A. Gregory, Handbook on the Law of Agency and Partnership 263 (1979).

57. U.P.A. § 9.

58. *Id.* §§ 7, 15.

59. *Id.* §§ 6, 9, 24.

60. *See supra* note 13.

III. The Economic Realities Analysis of the *Caruso* and *Wheeler* Courts

A. *Caruso*

The *Caruso* court looked at three factors "traditionally associated with an individual's status as a partner. . . ."[61] While the court never explicitly referred to the economic realities test, the three factors coincide with those often used in the economic realities test: the partner's ability to control and operate the business; the method of compensation; and the permanence of the work relationship.[62]

Concerning the control factor, the court pointed out that the unilateral control of a partner by another member of the business is more like an employment relationship than that of a partner; a true partner should have a "joint right of control over the business. . . ."[63] Focussing on the plaintiff's lack of decision discretion and need for management approval of the few decisions he could make, the court found his position was more characteristic of an employee than of a partner.[64] As for the wage factor, the court pointed out that although there was a lack of evidence showing exact wages, plaintiff's small "unit" accumulation indicated that his salary varied little with profits.[65] The court stated that a partner's compensation is typically a percentage of firm profits rather than a fixed wage or salary.[66] Finally, plaintiff's permanence of employment depended on his meeting standards set out in regular job evaluations by other partners. The court said these performance standards were not indicative of a partner who was a permanent member of the firm.[67]

The court found that Caruso's status was more like that of an employee than a partner and held that the plaintiff was protected by the ADEA and could sue under the Act.[68]

B. *Wheeler*

The *Wheeler* court began its analysis by asserting that there was no common standard of the economic realities test that could

61. Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 148-49 (S.D.N.Y. 1987).
62. *Id.* at 149-50.
63. *Id.* at 149 (quoting Hayes v. Irwin, 541 F. Supp. 397, 415-16 (N.D. Ga. 1982)).
64. *Id.* at 150.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

be used for partners.[69] The lower court had examined three factors: defendant's power to hire or fire, defendant's control of work schedules and employment conditions, and defendant's power to determine compensation. Judge Carrigan pointed out in the opinion that even the plaintiff and the EEOC, who had joined the plaintiff as amicus curae, were not in agreement as to the factors determinative of the economic reality of the work relationship.[70] The plaintiff and the EEOC agreed on the question to be asked—"Economic reality to them translates into a condition of domination: Is the individual so dominated in or by the organization that he or she is really like an employee, with corollary susceptibility to discrimination?"[71] The EEOC argued for an economic realities test that would look to all of the circumstances of the working relationship but emphasized the employer's degree of control as most important.[72] The plaintiff viewed the nature of the work and the independence, or lack thereof, as the critical factors of the test.[73]

The court recognized that application of the economic realities test was appropriate in determining the coverage of remedial social legislation such as the Antidiscrimination Acts, but only in the proper circumstances.[74] The court stated that the economic realities test could be applied to partnerships, but rejected the versions put forth by Ms. Wheeler and the EEOC as incomplete.[75] The court found two problems with the tests offered. First, since the tests were developed for application to independent contractor situations, they were not practical in application to partnerships.[76] Second, use of the domination factor would force every partnership to prove that all partners were free of control and held some sort of parity in the management process or all partnerships would be subject to the Acts no matter how small.[77] Hypothetically, even in a small firm, one partner may dominate the others.[78] Judge Carrigan considered other economic realities of partnership status critical: liability for the partnership losses, the large size of a partnership creating a tempting litigation target, profit sharing,

69. Wheeler v. Main Hurdman, 825 F.2d 257, 271 (10th Cir. 1987).
70. *Id.* at 269.
71. *Id.* at 268-69.
72. *Id.* at 269-70.
73. *Id.* at 269.
74. *Id.* at 271.
75. *Id.*
76. *Id.* at 271. The independent contractor determination involved drawing a line between those persons who were really a part of the business (employees) and those operating a separate business (independent contractors). *Id.* at 272.
77. *Id.* at 273.
78. *Id.*

capital contribution, and the right to share in management.[79] Finding these factors of critical relevance in the partnership context, the court held that the analysis of these economic realities of the work relationship demonstrated that Wheeler was not an employee for purposes of the Acts.

In deciding which of the factors of the economic realities test to emphasize, the *Wheeler* and *Caruso* courts parted ways to reach opposite results. While both courts applied three of the same factors—control, compensation, and hiring/firing power—the *Wheeler* court felt compelled to give more weight to other factors, such as the employee's investment in the firm and the liabilities of the employee for partnership debts and tort settlements.

The next section shows that partners such as Mr. Caruso and Ms. Wheeler are susceptible of categorization as "employees" and that the *Caruso* court's analysis, ignoring or greatly discounting factors that the *Wheeler* court seemed to think important, was correct.

IV. Conclusion

The economic realities test is appropriately applied to partnerships. Although all factors should be considered, the *Caruso* court was correct in its emphasis on the control factor. In the context of large corporate-like partnerships, such as the accounting firms in the *Wheeler* and *Caruso* cases, control is the most critical factor relevant to the application of the Antidiscrimination Acts to partners. The opportunity for discrimination against a person is inversely related to their control in the business. The greater a person's power to manage the more they are able to protect themselves from discrimination. When one has essentially no power in the management of the business, as is the case for junior partners in large accounting partnerships, then the protection of the federal Antidiscrimination Acts is needed.

The ability of a partner to control the business in many large partnerships is more like that of a shareholder in a corporation. Both are allowed to vote, but usually only as a ratification of decisions made by the managing group of the business. Interestingly, a corporate shareholder's voting ability has not barred him or her from also being considered an employee of the corporation.[80]

Other factors, such as the variation of partner wages accord-

79. *Id.* at 274.

80. *See* Hoy v. Progress Pattern Co., 217 F.2d 701, 704 (6th Cir. 1954) (a stockholder-officer-director relationship does not prevent such a person from being an employee covered by Fair Labor Standards Act); Bonilla v. Oakland Scavenger Co.,

ing to firm profits, individual investment in the firm, and individual liability for partnership obligations, have been so diluted with the increasing size of partnerships that their importance must be greatly discounted in the balance. One factor given too much weight by the *Wheeler* court was the partner's investment in the firm. Marilyn Wheeler owned a minute share of Main Hurdman.[81] Although a traditional indication of partnership status, a partner's investment should be considered only to the extent that the ownership interest is reflective of the partner's share of control in the business. Minute capital shares in a partnership unaccompanied by any right of control should not determine employee status. In *Goldberg v. Whitaker House Cooperative, Inc.*,[82] members of a cooperative who had ownership shares were designated employees by the court due to the organization's control of the terms and conditions of the members' work. Among other rights, the organization retained the power to fire members.[83] While an ownership share in the partnership is another indication of partnership status, "[t]here is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship."[84]

As for the liability factor, the *Wheeler* court's fear that more litigation against partnerships will result is not a valid reason for disallowing discrimination suits against partnerships. The court said that because partners are jointly and severally liable for partnership debts and settlements and because of the large amount of capital in the firm, the partnership is a "tempting litigation target."[85] If a firm is in a position to discriminate, the Acts should apply, regardless of the possibility of unwarranted lawsuits. Entities are often the targets of unwarranted suits; courts have other methods available to screen and prevent such claims.[86]

A case by case approach to determining the economic reality of the "partnership" working relationship is sufficient protection for the integrity of the partnership. Under this approach not all partners would be held to be employees but only those who met the requirements of the test. Furthermore, such an approach would further the purpose of the Antidiscrimination Acts. As one author has pointed out, the definition of "employee" is critical to

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697 F.2d 1297, 1302 (9th Cir. 1982) (discriminatory employment practices are within reach of Title VII even though workers involved owned stock).

81. *See supra* note 19.

82. 366 U.S. 28 (1961).

83. *Id.* at 29.

84. *Id.* at 32.

85. Wheeler v. Main Hurdman, 825 F.2d 257, 274 (10th Cir. 1987).

86. *See, e.g.*, Fed. R. Civ. P. 11; Model Code of Professional Responsibility DR 7-102(A)(2) (1980); Model Rules of Professional Conduct Rule 3.1 (1983).

accomplishing the goal at the heart of the Acts: the prevention of discrimination in the work place.[87] In addressing this goal the courts should settle on a test which is capable of discerning the relevant economic realities of the work relationship and recognizing when the opportunity for discrimination exists. Indeed, one court has explicitly stated that the Acts' coverage should apply to "the full range of workers who may be subject to the harms the statute was designed to prevent, unless such workers are excluded by a specific statutory exception."[88] The *Wheeler* court's blanket denial of protection to partners would allow partnerships to evade a 1983 decision of the United States Supreme Court. *Hishon v. King & Spalding*[89] held that associates in a partnership were protected from discrimination when being considered for advancement to partner status.[90] Under *Wheeler's* rigid and mechanical analysis, a firm would be able to dismiss associates for discriminatory reasons by simply advancing them to partner and then firing them without worrying about discrimination suits.

The flexible application of the economic realities test by the *Caruso* court is the appropriate method for prevention of discrimination against partners. *Caruso* requires a case by case analysis and prevents partnerships from hiding discriminatory practices behind the label of "partner." The *Wheeler* court's fear that such an approach would burden every partnership with proving that the realities demonstrate the presence of a bona fide partnership is unwarranted. These firms have gained the many benefits of partnership form, however, freedom to discriminate against partners is not one these benefits. Whatever the designation of the organizational structure of a business, if a worker is in a position of such dependency that he or she is exposed to discrimination, then that person should receive the protections of the Antidiscrimination Acts.

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87. Dowd, *supra* note 27, at 75-77. The important question for Dowd is "whether the worker actually or potentially stands in a relationship in which the employer's control over employment opportunties permits the erection of artificial, unnecessary barriers to those opportunities based on the worker's race, sex, national origin, or religion." Id. at 86.

88. Armbruster v. Quinn, 711 F.2d 1332, 1339 (6th Cir. 1983).

89. 467 U.S. 69 (1983).

90. *Id.* at 78.