

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 09-4498

ALYSON J. KIRLEIS,

Appellant,

v.

DICKIE, MCCAMEY & CHILCOTE, P.C.,

Appellee.

On Appeal from the United States District Court
for the Western District of Pennsylvania
No. 06-cv-1495

BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN &
FAMILIES, THE NATIONAL WOMEN'S LAW CENTER, AND THE
WOMEN'S LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFF-APPELLANT ALYSON J. KIRLEIS'S APPEAL FROM THE
DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT TO
DEFENDANT-APPELLEE

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I. INTRODUCTION.

Sex discrimination continues to limit women's advancement in the workplace. Despite dramatic gains women have made in employment, a woman working full time is paid only 77 cents to a man's dollar.¹ The wage gap persists even among men and women with higher levels of education and even when relevant factors such as work experience are taken into account.² Further, women are excluded from the upper levels of management; at top companies, women make up only 15% of board directors.³

The lower court's decision in this case denied a female employee's right to bring a sex discrimination claim against her law firm by misconstruing anti-discrimination law and improperly limiting its reach. In reaching its conclusion, the district court relied on the wrong legal standard and ignored disputed issues of material fact. If sanctioned by this Court, this decision will immunize employers from discrimination suits simply based on the title they give their workers.

¹ U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States, 2008 annual averages (2009)

<http://www.census.gov/prod/2009pubs/p60-236.pdf>.

² AAUW Educational Foundation, Public Perceptions of the Pay Gap (2005), <http://www.aauw.org/research/upload/perceptionsPayGap.pdf>.

³ Catalyst, Fortune 500 Women Board Directors (2009), http://www.catalyst.org/file/320/2009_fortune_500_census_women_board_directors.pdf.

II. BACKGROUND.

Alyson J. Kirleis has been an attorney at Dickie, McCamey & Chilcote, P.C. (“DMC”) since 1988. In 1998, she was promoted from associate to a class B shareholder, and in 2001, she became a class A shareholder, which made her a member of the Board of Directors. Her compensation, her minimum and maximum billable hours, and 90% of her case assignments were set by the Executive Committee, who supervised her work. Order Granting Mot. Summ. J. (Oct. 28, 2009) 36, 39.

In March of 2005, Kirleis filed a charge with the Equal Employment Opportunity Commission and the Pennsylvania Human Relations Commission alleging that she was paid less than her male coworkers, that DMC maintained a separate and lower employment track for female attorneys, and that the working conditions at DMC constituted a hostile work environment for women. This lawsuit followed, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (“Title VII”), the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.* (“the Equal Pay Act”), and the Pennsylvania Human Relations Act, 43 P.S. § 951, *et seq.* (“the PHRA”).

III. THE DISTRICT COURT APPLIED THE WRONG STANDARD TO DETERMINE IF KIRLEIS WAS COVERED BY ANTI-DISCRIMINATION LAW.

The district court granted summary judgment to the defendant on the threshold issue of whether Kirleis is covered by the relevant statutes. The court held that “plaintiff is not an ‘employee’ within the meaning of the anti-discrimination laws,” characterizing her instead as “a statutory employer who cannot claim the protection afforded by those laws.” Order 2. This faulty conclusion resulted from the court’s misapplication of the relevant law.

Title VII defines an employee as “an individual employed by an employer.” 42 U.S.C. § 2000e(f). The same wording appears in the Equal Pay Act, which prohibits discrimination in pay on the basis of sex. 29 U.S.C. § 203(e)(1). Because that language lacks a substantive definition, courts have developed tests to determine whether an individual shareholder is an employee under anti-discrimination law. Originally, courts applied either the corporate form or the economic realities test to make this determination. The former found the decision to incorporate to be dispositive, see Hyland v. New Haven Radiology Assoc., P.C., 794 F.2d 793, 797 (2d Cir. 1986) (“[T]he use of the corporate form precludes any examination designed to determine whether the entity is in fact a

partnership.”), and the latter sought to determine whether the employees were partners in practice or effectively employees. See EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) (determining employee status “with strong consideration of the economic realities of the employment relationship.”)

The Supreme Court ultimately resolved this circuit split by rejecting both tests in Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003). It adopted instead a test that focuses on “the common-law touchstone of control,” and takes into account several factors to determine whether an organization exercises control over the plaintiff, such as hiring and firing, supervision, hierarchy, liability, and influence. Id. at 449-50. The Court cautioned that the listed factors are nonexhaustive and are not “a shorthand formula or magic phrase,” but rather are intended to guide the inquiry into “whether the employer controls the means and manner of the worker’s work performance.” Id. (citations omitted.)

While paying lip service to the Clackamas factors, the lower court failed to apply the required standards. Instead, the court relied on outdated assumptions regarding law firm structure and employed the discredited corporate form and economic realities tests to deny Kirleis her day in court.

a) The Court Applied Outdated Assumptions About Law Firms and Summarily Concluded that Partners Are Not Employees

The district court stated that, in general, “the indicia of control and ownership in traditional large firm partnerships tilts toward recognizing equity partners as employers and not employees.” Order 50. This categorical conclusion is misplaced, not only because it circumvents the Supreme Court’s requirement of individualized assessments, Clackamas, 538 U.S. at 451, but also because it relies on outdated assumptions about how law firms operate.

The district court cited Justice Powell’s concurrence in Hishon v. King & Spalding, 467 U.S. 69, 79 (1984), to support its argument that law firm partnerships are exempt from Title VII. Relying on pre-Clackamas caselaw, the district court noted that “several appellate courts have followed Justice Powell’s lead and declared, with varying nuances, that partners are not protected as employees under federal antidiscrimination laws.” Order 50 (citations omitted).

In Justice Powell’s understanding of law firm management in the mid-1980s, “the relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement ... or consent among the partners.” Hishon, 467 U.S. at 80. However, “the practice and the business of law have changed in the twenty years since

Justice Powell's concurring opinion in Hishon v. King & Spalding.⁴ Firms have adopted entirely new methods of operating, including multi-tiered partnerships, increasingly large partnerships that confer limited rights, and Executive Committees that exercise full control over the hiring, firing, promotion, and compensation of the attorneys in the firm.⁵ The Clackamas decision reflects this reality; it is intended "to distinguish traditional partnerships from more modern business associations in which many individuals are only nominally partners." Simons v. Harrison Waldrop & Uhereck, L.L.P., 2006 U.S. Dist. LEXIS 43968 (S.D. Tex. June 14, 2006).

⁴ Lauren Winters, Partners Without Power: Protecting Law Firm Partners from Discrimination, 39 U.S.F. L. Rev. 413, 422 (2005). "The traditional partnership structure in which the partners make decisions through common agreement or consent no longer exists in many law firms today." Id. at 436.

⁵ Rachel M. Milazzo, Note, Circular Definitions of What Constitutes an Employee: Determining Whether the Partners of Sidley Austin Brown & Wood Qualify as Employers or Employees Under Federal Law, 51 St. Louis L.J. 1329, 1353 (2007) ("Law firms have changed. Firms have grown in size and in structure, and many have even created several tiers of partnership. The majority of larger firms, including Sidley, have centralized power structures and decision-making is devolved on a small executive committee...As large law firms continue to expand, the majority of partners appear more like employees and less like employers."); Edward S. Adams & Stuart Albert, Law Redesigns Law: Legal Principles as Principles of Law Firm Organization, 51 Rutgers L. Rev. 1133, 1139 (1999) ("The evolution in the late twentieth century of the ethical standards governing lawyers provides more evidence of the identity shift that law has experienced as the practice becomes more and more like a business."); William H. Rehnquist, The Legal Profession Today, 62 Ind. L. Rev. 151, 156 (1987) (stating that the practice of law has dramatically changed and is becoming "more and more like a business").

The lower court's opinion fails to account for this well-documented change in how law firms function.

b) The District Court Employed the Repudiated "Corporate Form" Test by Relying on the Written By-Laws, Rather than the Actual Degree of Control the Firm Exercised Over Kirleis

The district court relied heavily on the written By-Laws of the firm and ignored their effect in practice—essentially resurrecting the rejected "corporate form" test, by focusing only on the structure of the employment agreement.

However, there is genuine dispute as to how the By-Laws operate. The district court disposed of this essential issue by observing that, "[a]lthough plaintiff maintains that in practice, the DMC By-Laws are not routinely followed or distributed to Shareholders, and that she never received a copy or saw the By-Laws until after she commenced this litigation, the relationship between DMC's Shareholders, associate attorneys and staff officers and employees and the professional corporation is ostensibly governed by detailed By-Laws of the corporation." Order 15.

As a result of this sweeping and unwarranted conclusion that the By-Laws as written dictate the employment relationship, the court ignored several disputed issues of material fact regarding the degree of control exercised over Kirleis, which should have precluded summary judgment.

Specifically, there are disputes about the degree to which the Executive Committee supervised her work; Kirleis testified that she was assigned 90% of her cases and told how to proceed with the litigation. Order 36. There are disputes about the extent to which she was able to influence the organization; Kirleis claims that she was not given the right to vote on mergers and new offices until after the decisions had been made by the Executive Committee, making her vote entirely meaningless. Order 23. There are disputes about whether the firm can hire and fire her; Kirleis contends that the executive committee can constructively fire her by reducing her caseload to nearly zero. Order 29. There are disputes about the relevance of her membership on committees; Kirleis alleges that her duties were merely administrative and afforded her no real authority. See EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 703 (7th Cir. 2002) (holding that plaintiffs' involvement in committees with merely administrative functions did not qualify them as employers). Order 40. There is at least one indicia of control over which there is no dispute: the Executive Committee set Kirleis's compensation, in private, and without granting her knowledge of her coworkers' compensation. Order 34. See Simpson v. Ernst & Young, 100 F.3d 436, 441 (6th Cir. 1996) (finding a law firm to exercise control over a partner where "[t]he Management Committee

unilaterally determined the compensation of all personnel, which authority was exercised and executed in total secrecy”).

Where, as here, disputed issues of material fact exist, summary judgment is inappropriate. Fed. R. Civ. P. 56. Courts have denied summary judgment in cases analogous to this one, where disputed issues of material fact remained as to employee status under anti-discrimination law. For example, in Strother v. Southern Cal. Permanente Medical Group, 79 F.3d 859, 867 (9th Cir. 1996), the court overturned a grant of summary judgment where “the district court made a determination that [Plaintiff] was not an employee based solely on her complaint, the attached partnership agreement, and [Plaintiff’s] ‘partner’ label.” In that case, as here, a small control group conducted the affairs of the partnership, “over which [the plaintiff] has little control and to which she has limited access.” Id. The district court had ruled as a matter of law based on the partnership agreement, and the appellate court found this to be reversible error because “[t]he complaint and the partnership agreement leave many unanswered questions about how the partnership actually conducts itself.” Id. at 868. The Sixth Circuit has also noted that an employment agreement is not dispositive as to the actual degree of control exercised by partners; a law firm may draft a partnership agreement “in such a way as to generate the belief in its employees that they

enjoyed partnership status and to permit them to represent themselves as partners” without actually affording them any control. Simpson, 100 F.3d at 442.

c) The District Court Explicitly Relied on Outdated Cases that Used the Economic Realities Test, Rather than the Control Test

The district court also erred in relying on cases that analyzed law firm partnerships under the economic realities approach. The court observed that they were “most helpful” in this inquiry because “the economic realities test takes into account myriad facts and circumstances similar to those considered under Clackamas.” Order 42. In this way, the court incorrectly conflated Clackamas and the economic realities test, failing to give primary consideration to the element of control. While there is some overlap between the two tests, the economic realities test ultimately asks whether the plaintiff is a “true” partner and therefore focuses on various elements of partnership, such as ownership, remuneration and management. “The question whether a shareholder-director is an employee, however, cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner.” Clackamas, 538 U.S. at 445.

For example, although both the economic realities inquiry and the Clackamas test inquire into the plaintiff’s liability for the debts of the partnership, this element is far less important when viewed as an indication

of the control exercised by the plaintiff. After all, “[i]f implicit in the ADEA’s exemption for employers is recognition that partners ordinarily have adequate remedies under partnership law to protect themselves against oppression (including age or other forms of invidious discrimination) by the partnership, then [Plaintiffs’] exposure to liability can hardly be decisive.” Sidley, 315 F.3d at 704.

In justifying its use of the economic realities test, despite that test’s repudiation by the Supreme Court, the district court cited Ziegler v. Anesthesia Assocs. of Lancaster, Ltd., 74 Fed. Appx. 197, 201 (3d Cir. 2003), for the proposition that such a test “closely tracks the analysis articulated by the Supreme Court in Clackamas.” However, that was not the holding of Ziegler. The Third Circuit did not generalize about the two tests’ similarity in Ziegler, but instead merely upheld the analysis of the lower court judge in that particular case. Another post-Clackamas case affirmed a ruling based on a combination of the economic realities and control test, yet explicitly noted that while the outcome was correct, the reasoning was not. Arbaugh v. Y&H Corp., 380 F.3d 219, 230 (5th Cir. 2004) (“Applying the six-factor test established in Clackamas to the facts in the instant case, we conclude that the district court ultimately reached the correct result, albeit based on different reasoning.”). In Clackamas itself, the district court had

conducted an economic realities test, but the Supreme Court nevertheless remanded for further inquiry. The Court explained that, while several relevant issues had been considered, “there may, however, be evidence in the record that would contradict those findings or support a contrary conclusion under the EEOC’s standard that we endorse today.” Clackamas, 538 U.S. at 451. The district court’s reliance on cases using the economic realities test without parsing its analysis for elements of control is therefore misplaced.

IV. THE DISTRICT COURT’S RULING IS CONTRARY TO THE INTENT OF THE ANTI-DISCRIMINATION STATUTES.

a) Title VII Provides Broad Remedial Powers to Eliminate Discrimination Against Women and Minorities

Title VII was enacted to eliminate employment discrimination, and its mandate has long been described in broad terms—terms that are frustrated by the district court’s decision in this case. The open-ended nature of the definition of “employee” is intended to reflect this expansive mandate. Congress stated that the term “employee” is “defined for purposes of the Act in the manner common for federal statutes.” H.R. 1370, 87th Cong., 2d Sess., reprinted in EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 2155. While there is no single definition for “employee” in federal labor statutes, “[t]he judicial and statutory evolution

of the definition of employee status in the major federal labor statutes prior to the passage of Title VII indicates that Congress made a conscious choice to broadly define employee status under Title VII by providing no definition at all.”⁶

Congressional findings regarding the subordinate status of women and minorities led to the statute’s far-reaching goals, and they serve to inform its application. See H.R. Rep. No. 92-238 at 2140 (1971) (“Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.”); Civil Rights Act of 1991, 105 Stat. 1071, 1082 (1991) (“[D]espite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business. Artificial barriers exist to the advancement of women and minorities in the workplace.”).

b) The Problems Title VII Was Enacted to Address Still Exist

Today, disparities in representation of women and minorities in the workplace persist in many areas, including law firms. Women are now graduating from law schools at nearly the same rate as men, but traditional

⁶ Nancy Dowd, The Test of Employee Status: Economic Realities and Title VII, 26 Wm and Mary L. Rev. 75, 93 (1984).

gender roles continue to define the legal profession: only 34.4% of lawyers are women, yet women make up a full 87.7% of legal assistants and paralegals.⁷

Among lawyers, the stratification remains. For every woman who has made partner, there are three women in the nonpartner ranks; for men, the ratio of nonpartner to partner is approximately one to one.⁸ Professional organizations have noted that “[w]omen play a surprisingly small role in the highest levels of law firm leadership,” as the average firm’s highest governing committee consists of only 15% women, and in about 14% of the nation’s largest firms, no women sit on their governing committees at all.⁹ Even women who become equity partners typically earn \$66,000 less than the men at that level.¹⁰ Women lawyers overall only earn 80.5% of what their male counterparts earn.¹¹ In Allegheny County, where Kirleis

⁷ Bureau of Labor Statistics, U.S. Department of Labor, Employed persons by detailed occupation and sex, 2008 annual averages (2009) <http://www.bls.gov/cps/wlftable11.htm>.

⁸ Emily Barker, Stuck in the Middle, *The American Lawyer* (June 1, 2009), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202430856584&slretur n=1&hbxlogin=1>.

⁹ The National Association for Women Lawyers, Report of the Fourth Annual National Survey on Retention and Promotion of Women in Law Firms (2009), <http://nawl.org/Assets/Documents/2009+Survey.pdf>.

¹⁰ Id.

¹¹ Bureau of Labor Statistics, U.S. Department of Labor, Median usual weekly earnings of full-time wage and salary workers by detailed occupation and sex (2009), <http://www.bls.gov/cps/wlftable18.htm>.

practices, the local bar association noted a “clear gendered discrepancy in earnings” among its surveyed members.¹²

The numbers are even more dismal for people of color, who accounted for only 6% of partners in the nation’s major firms in 2009.¹³ “Whites constitute about 70% of working people over age 16, yet they represent 89% of all lawyers and 90% of all judges, according to 2009 census data.”¹⁴ As a result, “[w]hile the legal profession has achieved some diversity in the ‘lower ranks,’ diversity remains thin in the ‘higher ranks’ of

¹² Allegheny County Bar Association, Report & Recommendations of the Gender Equality Task Force of the Allegheny County Bar Association (2008) at 2, http://www.acba.org/ACBA/pdf/ACBA_GenderReport_2008.pdf. Observing that the authors of the 2005 survey stated that “our most important finding is the difference in income by gender,” the Task force reported that

no female respondent who graduated from law school in the 1990s was earning above the \$200,000–\$249,999 level, while over 10% of the male graduates for the same time period were being compensated at that level. In 2005, only 5% of the female respondents earned \$250,000 or more while almost 20% of the men earned at this level. Also, while the rank of the law school an attorney attended . . . seems to impact earning power, no female respondents from the top tier law schools who responded did in fact break this economic barrier.

Id.

¹³ National Association for Law Placement, Law Firm Diversity Demographics Show Little Change, Despite Economic Downturn (October 21, 2009), <http://www.nalp.org/oct09lawfirmdiversity>.

¹⁴ American Bar Association, Diversity in the Legal Profession: The Next Steps (2010) http://new.abanet.org/centers/diversity/PublicDocuments/Diversity_Summary_Report.pdf.

law firm managing and equity partners, general counsels, state or federal appellate judges, and tenured law professors.”¹⁵ The current economic climate has only made matters worse. In the U.S. offices of the largest law firms, for the first time in a decade, the proportion of minority lawyers dropped, to 13.4 percent.¹⁶ Additionally, women who work part-time were disproportionately let go during the recession, even compared to male part-time workers.¹⁷

Discrimination against women and people of color serves to limit their employment opportunities. These attorneys report feeling that they are unable to compete successfully to advance in their firms, at rates far greater than white males.¹⁸ Further, significant numbers of attorneys report experiencing acts of sexist or racist conduct in their firms.¹⁹ In order to address inequities in the workplace, these workers need to be able to use a

¹⁵ Id.

¹⁶ Emily Barker, The Diversity Scorecard 2010: One Step Back, *The American Lawyer* (March 2010)

<http://amlawdaily.typepad.com/amlawdaily/2010/03/onestepback.html>.

¹⁷ NAWL supra note 10 at 4 (“[M]en and women lawyers generally lost their jobs in numbers commensurate to their percentages as associates and partners. The exception concerns terminations of part-time lawyers, which fall disproportionately on women even after taking into account that women fill the majority of part-time positions. The vast majority of part-timers who were cut were women lawyers.”).

¹⁸ Catalyst, Women of Color in U.S. Law Firms (2009)

http://www.catalyst.org/file/304/woc_law-report.pdf.

¹⁹ Richard H. Sander, The Racial Paradox of the Corporate Law Firm, 84 *N.C. L. REV.* 1755, 1804 (2006).

comprehensive mix of strategies, one of which may be access to courts through anti-discrimination laws. These employees will be severely harmed if the district court's determination is accepted by this Court.

V. CONCLUSION.

Alyson Kirleis alleges that she was paid less than her male colleagues, given less opportunity for advancement, and subject to sex discrimination and retaliation at her law firm. Title VII is designed to remedy exactly this type of discrimination, which denies opportunities to women and minorities in the workforce. However, the district court relied on a mistaken view of how law firms currently function and misapplied the appropriate legal standard, denying Kirleis a day in court. This Court should reverse the ruling of the district court and allow these claims to proceed to a jury.

Respectfully submitted,

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CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Susan Frietsche, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Service

I hereby certify that electronic copies of the foregoing Motion of Amicus Curiae for Leave to File a Brief in Support of Plaintiff-Appellant and the proposed brief were sent to all CM/ECF Filing Users through the CM/ECF system, and that no parties are Non-Filing Users.

3. Certification of Compliance

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,713 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in size 14 Times New Roman.

4. Certification of Text of E-Brief

I certify that the text of the E-Brief and the text of the hard copies of the Brief *Amici Curiae* of National Partnership for Women & Families, National Women's Law Center, and Women's Law Project in support of Plaintiff-Appellant Alyson J. Kirleis are identical.

5. Certification of Virus Check

I certify that a virus check was performed on the PDF file of the foregoing Brief *Amici Curiae* using Symantec Anti-Virus software.

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