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**The Reality of Making Partner:  
The Red Pill May Be Tough to Swallow**  
by  
Josh McCann

Submitted in partial fulfillment of the requirements of the  
King Scholar Program  
Michigan State University College of Law  
under the direction of  
Professor Michael Zimmer  
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## **I. Introduction**

One would probably expect that as a law student on the verge of graduating and beginning his career in legal practice, I would be filled with optimism and hope for what the future will bring. On the contrary, a sluggish economy, tight job market, and the lurking presence of my financial backers, Citibank and the Federal Government, both of which will soon be demanding a return on their investment in my education, have evoked more trepidatious sentiment than optimistic eagerness. There can be no doubt that coming to terms with this kind of reality is a task that law students and young attorneys in generations past have also had to overcome. They, however, likely had the hope that one day they would pay off their loans, climb the ranks, and hold the coveted title of “partner”; indulging in all the perceived esteem, power, and wealth that attaches, to boost their morale while fighting through such trying times. It is safe to say that nothing is more motivating to law students and young attorneys than the dangling “partner” carrot.

I now pose the question to law students and associates: Which do you prefer, the blue pill or the red pill?<sup>1</sup> Taking the blue pill will allow you to continue down your career path with the valuable motivation that the aspiration of making partner provides. The red pill may, or may not, rid you of this motivation, but will enlighten you as to the truth of what you might actually be chasing. If you prefer the blue pill, then you should discontinue reading this article. If you prefer the red pill, then continue reading and pay close attention.

## **II. The Red Pill**

Having chosen the red pill, you will now be privy to the reality of what making “partner” actually entails. Today’s partners at prestigious law firms do not take three-hour lunches or

leave early to play golf on Wednesday afternoons. You will also not find them reclined in their plush, rustic leather office chairs with their feet atop their desks, shoes off, ties loosened, sleeves rolled up, snifter of scotch in one hand, Cuban cigar in the other, talking on speaker phone with their travel agents planning their next vacations. This is the situation many young attorneys envision for themselves after fifteen or twenty years of dedicated practice with the law firm they call home. A more accurate vision might be one of them working the 8:00 to 8:00 shift, stained ties thrown over the back of their chairs, half-eaten lunches precariously set atop stacks of unread case law, feet firmly on the ground while frantically searching for new ways to build their book of business and increase their bottom line, lest the firm guillotine cut off their expensive and easily replaced head.

So partners work more today<sup>2</sup>, big deal right? After all, by the time law students reach graduation, they realize the career path they have chosen is very demanding; nobody thinks the rewards of making partner will come easy. Still, with hard work, determination, and a little luck, when the dream of making partner is finally realized, it comes with the typical benefits, right? Partners still get peace of mind and gratification in the form of firm control, job security, and their fair share of firm profits, right? The answer lies somewhere between not necessarily and probably not. A case pending before the United States District Court for the Northern District of Illinois, *EEOC v. Sidley Austin Brown & Wood*<sup>3</sup>, illustrates the disheartening reality that partners at many law firms today are being denied the benefits typically associated with the position of partner while still being subjected to the typical partner liabilities and downfalls. Specifically, while partners might not have any substantial control within a firm or receive their fair share of firm profits, they might also not be protected from age, race, and gender discrimination due to their technical designation as “partner.”

First, this paper will take a look at the new breed of “partner” that exists within many top law firms today. Then, the history, facts, and legal issues of the pending *Sidley Austin* case will be presented, followed by an analysis of the legal arguments that were advanced by both Sidley Austin and the Equal Employment Opportunity Commission (EEOC) on the same legal issue presented in a closely related 7<sup>th</sup> Circuit Court case decided in 2002.<sup>4</sup> Also, the law applicable to the facts and legal issue in *Sidley Austin* has been changed by the recent Supreme Court case, *Clackamus Gastroenterology Associates, P.C. v. Wells*<sup>5</sup>. Therefore, an analysis of *Clackamus* and the application of its holding to *Sidley Austin* will be conducted, followed by the predicted outcome based on that application. Finally, the implications and ramifications of the *Sidley Austin* case will be discussed.

### **III. The Role of “Partner” in Today’s Law Firm**

The role of a “partner” in today’s law firms is not what it used to be. One illustration of this change is the growing trend of law firms creating a second tier of non-equity partners, or “artners” (with “p” removed to symbolize the lack of rights to share in profits).<sup>6</sup> These partners have little or no control within the firm and may not be compensated based on the firm’s financial success.<sup>7</sup> Furthermore, while one might expect that non-equity “artners”, who have not contributed the stifling sums of money to firm capital that equity partners have, would not have significant control within the firm, the fact is that even the equity partners may only have illusory control.<sup>8</sup>

Why has this change occurred? Well, the creation of the two-tier partner system, as well as the decreasing degree of control that most equity partners have over law firm operations, is a product of the changing economic environment and, more specifically, the changing degree of

susceptibility that organizations providing legal services have to that environment.<sup>9</sup> Other business organizations which do not provide professional services like accounting, medical, or legal services, have had to adjust to changes in the economic environment in order to merely survive, let alone thrive, for quite some time now. Thus, nimble adaptability has become an absolutely essential function for almost any business. At one time, the relationship between employee and employer was characterized by a sense of loyalty to one another. It was not uncommon for an employee to spend thirty or more years working for the same company. But changing economic forces, such as the ever expanding global economy, have created a relationship between employer and employee characterized by temporariness. Corporate America and the general public have come to accept the cut-throat employment practices necessitated by achieving a highly adaptable business structure.

Law firms, however, have traditionally been largely immune from external economic forces due to the legislatively created monopoly that law firms enjoy. Thus, the nimble adaptability, or the ability to change even at a snail's pace for that matter, has not been a characteristic shared by law firms generally. Legislatures have created laws which intensely restrict entry into the legal services market and strictly prohibit the unauthorized practice of law. This is a result of the determination by legislatures that attorneys are "professionals" who offer services that are paramount to the function of society and require increased skill and competency. This legislatively created immunity has allowed law firms to thrive without adaptation and without improved efficiency. For instance, in the past, although businesses in other industries underwent of severe layoffs, downsizing, and various mergers and acquisitions necessitated by economic conditions, it was very rare to hear about law firms undergoing similar

restructuring.<sup>10</sup> The immunity from external economic forces that law firms once enjoyed, however, has past.<sup>11</sup>

Today, law firms are finding that the economic forces at work today are simply too robust to ignore and they, like businesses hoping to stay competitive in other industries, must operate with increasing efficiency to be successful. In fact, the necessity for other businesses to operate efficiently is largely responsible for law firms now having to operate more efficiently. While businesses may have looked at other ways to cut costs in the past, intense competition in their respective markets has caused them to leave no stone unturned when trimming expense fat. Because businesses can have substantial legal expenditures, they have begun “shopping around their legal work out to the best bidder” to decrease those expenditures.<sup>12</sup> Thus, while there was once a sense of loyalty between clients and attorneys, that loyalty, like the loyalty between employers and employees, has evaporated. Unfortunately, for the partners who once rode on the backs of overworked young associates, this means that even they might find their head on the chopping block if they do not contribute significantly to the firm’s bottom line.<sup>13</sup> This is a threat to both “artners” and equity partners alike.<sup>14</sup>

There is nothing inherently wrong with any business “ruthlessly pursuing the bottom line”, however, law firms, in doing so, lose their professional distinctiveness and may become “de facto corporations”.<sup>15</sup> Many law firms today are even abandoning the partnership business model altogether and incorporating as professional corporations or reorganizing as other types of business entities that have become allowable by recently enacted state laws.<sup>16</sup> These “de facto corporations” have essentially been able to get the benefits of corporate status, namely limited liability and a free pass by society to implement crude employment practices as a matter of economic necessity, without being subjected to the rigors of the corporate form, namely strict

adherence to state and federal antidiscrimination statutes. The justification for exempting law partners from liability for discriminating against one another based on age, sex, or race, has been that partners play a unique role as owners and operators of law firms.<sup>17</sup> But, as the foregoing discussion illustrates, partners' roles have changed. As law firms begin to more closely resemble corporations, and partners begin to more closely resemble employees, they lose their distinguishing professional characteristics. This renders the justifications for legislatively created economic immunity and, more importantly, justifications for exemption from antidiscrimination statutes and other corporate regulations invalid.<sup>18</sup> The growing disparity between the partner's perceived, or traditional role, and their actual role, has become so blatant that, as *Sidley Austin* illustrates, courts can no longer turn a blind eye in good conscience.

#### **IV. *EEOC v. Sidley Austin Brown & Wood***

##### **A. Background**

With over 900 attorneys, more than 400 of whom were partners, The Chicago based law firm of Sidley Austin Brown & Wood was the 8<sup>th</sup> highest grossing firm in the county in 1998.<sup>19</sup> It was no exception to the growing trend seen in law firms today and in the late 1990's; after a new management team took control of the firm, it began to trim their partner fat.<sup>20</sup> In a plan to improve the firm's financial performance, Sidley Austin demoted thirty-two of their lower performing "partners" from equity partners to "senior counsel" or "counsel."<sup>21</sup> These demotions eventually became the subject of acrimonious litigation, which today, almost 10 years later, is still in the discovery phase. As could be expected, every major law firm in the country is waiting to see what happens.



The facts of the case begin to take shape in 2000 when the EEOC opened a formal inquiry to determine whether Sidley Austin had violated the Age Discrimination in Employment Act (ADEA) by demoting the thirty-two “partners”.<sup>22</sup> The ADEA makes it unlawful for employers to discriminate against employees on the basis of age<sup>23</sup> and the EEOC believed that Sidley Austin might be looking to age as a factor when deciding whom to demote. The EEOC served Sidley Austin with a subpoena duces tecum requesting all information relevant to their decision to demote the partners.<sup>24</sup> Sidley Austin provided most, but not all, of the information requested.<sup>25</sup> It contended that all of the documentation necessary for the EEOC to determine that the partners were “real” partners was produced to them, and thus, the EEOC had “no basis to continue the investigation.”<sup>26</sup> The EEOC then applied to the District Court for the Northern District of Illinois for full enforcement of the subpoena. The District court ordered that Sidley Austin was to comply fully with the EEOC’s subpoena, including requests relating to the merits of the discrimination claim.<sup>27</sup> Sidley Austin then appealed that decision to the Seventh Circuit and received a partly favorable ruling. The Seventh Circuit held that Sidley Austin did not have to produce documents to the EEOC relevant to the merits of the discrimination claim, but that they did have to produce documents to it relevant to the determination of whether the “partners” should be classified as “employees”, an issue that would determine whether the EEOC had jurisdiction over the matter.<sup>28</sup>

After the subpoena issues were settled by the 7<sup>th</sup> Circuit Court, and after another three years of investigation, the EEOC determined that the “partners” were properly classified as “employees” under the ADEA and were thus protected from age discrimination. The EEOC filed an age discrimination lawsuit against Sidley Austin with the United States District Court for the Northern District of Illinois in 2005.<sup>29</sup> The court will eventually have to make a decision as

to whether the demoted partners are, in fact, “employees” under the ADEA. Sidley Austin’s Partnership Agreement governs the relationship amongst partners within the firm and will be an essential evidentiary document in the case.

## **B. Sidley Austin’s Partnership Agreement**

While partners at other top law firms may still have the traditional rights and powers that partners had during the “golden age”<sup>30</sup>, the vast majority of partners at Sidley Austin, including the thirty-two demoted partners, have very little control within the firm. That model is representative of the growing trend in many law firms today. This is due to the control structure mandated by Sidley Austin’s Partnership Agreement. The Partnership Agreement establishes a thirty-four member Executive Committee that governs virtually every aspect of the firm’s operations.<sup>31</sup> The “Executive Committee” is “charged under the Partnership Agreement with ‘all Partnership governance, including determination of salaries, expenses, Partners’ participations in Partnership profits and losses, required Minimum Balances of Partners, investment of Partnership funds, designation of Counsel, and admission and expulsion of Partners’ . . . .”<sup>32</sup> This provision implies that partners not serving on the Executive Committee do not have control over these matters. The ability to exercise control over these matters, however, epitomizes the kind of powers that partners traditionally had in the past; they are the defining powers of a partner.

One might make the argument that the absolute control given to the Executive Committee was simply for practical reasons and point out that it would be highly impractical for a firm as large as Sidley Austin to take a vote every time a decision needs made or an issue needed resolution. But for this argument to hold water, the firm would at least have to operate in some

sort of democratic fashion; possibly holding periodic elections where the partners could vote-in members to the Executive Committee. But this was not the case. The Executive Committee was, in fact, a self-elected and self-perpetuated committee, making it impossible for any partner to become a member without the votes of those already on the Executive Committee.<sup>33</sup> These circumstances effectively excluded any partner not already on the “Executive Committee” from exercising any substantial control within the firm and from even having a meaningful voice. Therefore, Sidley Austin’s control structure is more akin to a dictatorship than a partnership.<sup>34</sup> In fact, “partners can and do go through entire careers in the firm without ever having their vote solicited, cast or counted” on any matter at all.<sup>35</sup> In order to determine the degree of power that any one partner at Sidley Austin has, one need not inquire into such matters as number of years the partner has been with the firm, or the amount of hours worked, or how engaged in firm politics the partner is. The only question that need be asked is whether that partner is on the Executive Committee. If the answer is yes, that partner is one of few that have absolute and total control since the Executive Committee *is* the employer if the answer is no, that partner has virtually no control at all.

**C. Parties’ Legal Arguments in *EEOC v. Sidley Austin Brown & Wood* (2002) Based On Controlling Law Before the Holding in *Clackamus v. Gastroenterology Associates v. Wells***

The ADEA, like other Federal antidiscrimination statutes, provides protection against discrimination in an employment relationship context only to those individuals who are deemed “employees” or “potential employees.” Those who are deemed “employers” are not protected.<sup>36</sup> This fact makes the court’s preliminary determination of the individual’s status as an employee every bit as significant as the ultimate question of whether the individual was actually

discriminated against. The court's determination that a plaintiff is not an employee is fatal to the plaintiff's cause of action.

Looking to the definition of "employee" found in the ADEA provides little, if any, guidance in the determination of "employee" status. The ADEA, as well as the Americans with Disabilities Act (ADA) and Title VII, define "employee" as "an individual employed by any employer."<sup>37</sup> The circuity of this definition renders it practically useless for purposes of determining who is, or is not, an employee, hence the voluminous litigation attempting to interpret it.

Courts have struggled to reach a consensus on what criteria should be used to determine whether an individual is an "employee." The courts have found it particularly difficult to determine the employee status of "partner's". Some courts have held that the determination that an individual is a "partner" *necessitates* a determination that he or she is also not an employee.<sup>38</sup> For instance, in *Wheeler v. Hurdman*, the court stated that although "there may be aspects of a partner's work environment in a partnership which are indistinguishable from that of a corporate employee . . . in general the total bundle of partnership characteristics sufficiently differentiates between the two to remove general partners from the statutory term 'employee.'"<sup>39</sup> The holding was based on the fact that the plaintiff had "participation in profits and losses, exposure to liability, investment in the firm, partial ownership of firm assets, and [] voting rights."<sup>40</sup> Other courts have rejected the *per se* approach in favor of looking at the actual role of the "partner" and determining whether that role is similar to more traditional ownership roles.<sup>41</sup> The arguments made by Sidley Austin and the EEOC lie at these two ends of the spectrum, respectively.

Sidley Austin argues the existence of three "undisputed" facts is legally determinative as to the issue of the demoted partners' status as "non-employees."<sup>42</sup> These facts are (1) that the

partners own the firm by having contributed capital; (2) that the partners share in the profits of the firm and are liable for the firm's financial losses and financial obligations; and (3) that all of the partners can bind the firm and that "virtually" all of the partners administer the firm by serving on one or more of the firm's twenty-five management committees and administrative committees.<sup>43</sup> Sidley Austin asserts that "[n]o court has ever found a partner in a professional partnership to be a covered employee where (as here): the partner shared in the profits and losses of the firm and was liable for the partnership's debts; the partner contributed significant capital; and the partner could bind the firm and had management/supervisory [sic] responsibilities."<sup>44</sup> While this assertion may *generally* be true, the facts in this case are distinguishable from the facts of the cases upon which Sidley Austin relies as persuasive authority for this assertion. Furthermore, the "undisputed facts" are "vigorously disputed" by the EEOC.<sup>45</sup>

The first "undisputed" fact is that the demoted partners had an ownership interest in the firm. This is evidenced by existence of each partner's capital account, which averaged \$385,552.<sup>46</sup> Sidley Austin points out that as owners, the partners have access to, and the right to inspect, the firm's financial documents. Sidley Austin also notes that the partners pay their own individual self-employment taxes. Even Sidley Austin, however, does not argue that this fact alone determines the issue of "employee" status. For instance, one can be an "employee" of a corporation and own stock in the corporation at the same time. Also, for purposes of tax law, courts look to "substance over form" when determining the correctness of one's elected tax status.<sup>47</sup> The fact that the demoted partners are filing tax returns as "self-employed" individuals, however, does not mean they are, in fact, self-employed.

The second "undisputed" fact posited by Sidley Austin is that the partners share in the firm's profits and losses. This is illustrated by Sidley Austin's compensation system. Under this

system each partner is assigned a set number of units and/or percentages, which are re-determined every year.<sup>48</sup> Each partner's yearly compensation is then computed in accordance with his or her assigned units and/or percentages.<sup>49</sup> Sidley Austin argues that this means each partner's compensation is based upon the financial success of the firm and that the "ultimate responsibility for any financial loss will rest with all Sidley partners".<sup>50</sup> The EEOC, however, did not find the fact that the demoted partners' income depends "somewhat upon the firm's profitability" to be compelling.<sup>51</sup> The EEOC reasoned that because the compensation of each non-Executive Committee partner is ultimately determined solely by the Executive Committee, the partners were, in effect, getting paid a salary.<sup>52</sup> It is a stretch for the EEOC to correctly characterize the partners' compensation as a salary. "Salary" is defined as a "fixed compensation for services, paid periodically"<sup>53</sup>, but the partners' amount of compensation was not fixed, only their percentage was fixed.<sup>54</sup> By the EEOC's reasoning, even two partners who mutually agreed to pay themselves each 50% of a firm's income would be getting a "salary" because each partner is getting a fixed percentage, but this would be an incorrect conclusion. Still, the fact that the partners' percentages are determined solely by the Executive Committee is crucial.

The EEOC cites *E.E.O.C. v. Johnson & Higgins, Inc.* as persuasive authority for its contention that when an individual's compensation is based on a percentage of profits that is determined by an authoritative evaluation of superiors, that is evidence the individual is an "employee" under the ADEA.<sup>55</sup> In the *Johnson* case, owner-directors of a private corporation who continued to conduct employee like activities within the firm and who had compensation based on a certain "percentage of the firm's profits determined annually by the Directors' Compensation Committee" were held to be "employees" for purposes of the ADEA.<sup>56</sup> Like

Sidley Austin's Executive Committee, the members of the "Director's Compensation Committee" were solely responsible for appointing new members to the Committee. The *Johnson* case is distinguished in that it involved owner-directors in a private corporation, not partners in a partnership. While the roles of shareholder-directors and partners can be very similar, and while these two positions have often been analogized in prior cases, this distinction effectively precluded the case from being on all fours for the EEOC.

The third "undisputed fact" posited by Sidley Austin is that the partners "participated" in the administration of the firm through their service on one of the twenty-three "administrative committees", each of which "is empowered to reach decisions and to act in carrying out its delegated functions."<sup>57</sup> Each administrative committee, however, serves at the pleasure of the Executive Committee.<sup>58</sup> Sidley Austin states that "almost all" of the thirty-two demoted partners served on an administrative committee.<sup>59</sup>

Sidley Austin glosses over their own admission that *almost all* of the thirty-two demoted partners served on an administrative committee." This begs the question: What about those partners that do not serve on an administrative committee? What participation in the "administration" of the firm do they take? Sidley Austin does not address this issue. Sidley Austin simply maintains that the "advice and factual input from individual partners is sought as a matter of routine."<sup>60</sup> For argument's sake, it will be assumed that all of the partners actually served on one or more administrative committees.

Sidley Austin asserts that,

[e]ach and every partner (but only a partner) is empowered to sign opinion letters. Sidley partners hire new associates and other employees. Sidley partners enter into contracts on behalf of the firm. Sidley partners have negotiated and signed contracts with clients for equity ownership in their business in payment or partial payment for firm legal services. Sidley partners have negotiated the terms of and

signed agreements for services by investment advisory consultants in connection with investment of employee and partner-pension moneys.<sup>61</sup>

Assuming, *arguendo*, that the non-Executive Committee partners have this degree of control, this falls short of the degree of control necessary for Sidley Austin to prevail in this case. Literally *every* case upon which Sidley Austin relies as persuasive or controlling authority to support their proposition that this degree of control, combined with the other two “undisputed facts”, is determinative to the issue of “employee” status, can be factually distinguished on the basis of control.<sup>62</sup> Sidley Austin does not cite even one case where a partner or director-shareholder of a professional corporation has been held to be an “employer” (and thus not an “employee”) when they do not have the ability to exercise voting rights on at least some mandatory issues, or, at very least, the right to vote in the election of who will have ultimate control. Sidley Austin’s Partnership Agreement explicitly and unequivocally states that “[e]ach partner shall, on all matters related to the affairs of the Partnership, be subject to the direction and control of the Executive Committee.”<sup>63</sup>

In fact, the only action referred to by Sidley Austin in any of their pleadings that is not determined solely by the Executive Committee is the expulsion of a partner.<sup>64</sup> This is implied by Sidley Austin’s statement that expulsion of a partner requires a “majority vote of those holding percentage interests in the partnership”.<sup>65</sup> The EEOC aptly points out, however, that “it is undisputed that Executive Committee members always hold a majority of percentages and that they alone assign such percentages.”<sup>66</sup> The EEOC argues that this fact, combined with the fact that non-Executive Committee members have absolutely no right to vote in the election of members to the Executive Committee<sup>67</sup>, renders any apparent control of non-Executive Committee members completely illusory and, thus, Sidley Austin’s implication is misleading.<sup>68</sup>



Remarkably, it seems that Sidley Austin is advocating the application of a standard for determining “employee” status under which the demoted partners would clearly be deemed “employees”. Sidley Austin never attempts to address the distinguishing factors pointed out by the EEOC, namely partner voting rights on mandatory subjects and Executive Committee elections.<sup>69</sup> In fact, not only does Sidley Austin fail to address this glaring distinction, but it also shamelessly asserts in one pleading filed with the District Court that “matters of ultimate partnership governance have been delegated to the Executive Committee” and “Sidley generally does not make its decisions based on a vote of the partners” in one pleading filed with the District Court.<sup>70</sup> The statement that the firm “generally” does not take a vote is misleading because it implies that, at least on some occasions, decisions are made based on a vote of all the partners. This is not the case and, in fact, prior to the EEOC commencing its investigation, a full partnership vote had *never* been taken on *any* decision at Sidley Austin.<sup>71</sup>

While Sidley Austin never addresses the partners’ lack of voting rights, they do refute the validity of what they mischaracterize as the EEOC’s “domination theory” argument.<sup>72</sup> Sidley Austin uses three pages of one pleading filed with the District Court to cite cases that have rejected this “domination theory” as grounds for finding an individual to be an “employee.”<sup>73</sup> All of the cases cited hold that the “domination” of control over partners within a firm or director-shareholders within a professional corporation, do not necessarily mean that those individuals are “employees.”<sup>74</sup> The problem with Sidley Austin’s application of these holdings to the case at bar is the context in which “dominance” is referred to by the cited cases. In each case, the individuals at the least had voting rights over some aspects of firm governance or the election of the “dominating” entities.<sup>75</sup> Sidley Austin, again, glosses over the fact that the partners have essentially *no* control and *no* voting rights.

#### **D. 7<sup>th</sup> Circuit Court's Legal Analysis in *EEOC v. Sidley Austin Brown & Wood* (2002)**

The majority opinion starts the analysis by noting that Federal antidiscrimination laws do not exempt partnerships from coverage.<sup>76</sup> Neither does the fact that the demoted individuals were partners necessarily mean that they were “employers.”<sup>77</sup> The Court acknowledged Sidley Austin’s argument that partners could be classified as employers rather than employees because under partnership there are “effective remedies against oppression by their fellow partners, because partnership relations would be poisoned if partners could sue each other for unlawful discrimination, and because the relation among partners is so intimate that they should be allowed to discriminate, just as individuals are allowed to discriminate in their purely personal relations.”<sup>78</sup> The court stated, “this was not the occasion to come down on one side or the other of the issue.”<sup>79</sup>

The Court analogized the demoted partners to executive-level employees at corporations and noted that employee shareholders of a professional corporation have been held to be employees, not employers, for purposes of Federal antidiscrimination law in some instances.<sup>80</sup> Accordingly, this meant that the demoted partners might also be employees.

Finally, the court mentioned the glaring and undeniable fact that Sidley Austin failed to explicitly address even once in their pleadings: The Executive Committee is self-elected and self-perpetuating. Sidley Austin’s only argument which, at most, grazed the voting rights issue, is their contention that the entire partnership, rather than the Executive Committee, had control over the firm due to the delegation of that authority by the Partnership Agreement, the terms of which every partner must explicitly agree to before they become partner.<sup>81</sup> Presumably, Sidley Austin was contending that this one-time delegation of power should be viewed as evidentiary

support for the proposition that the partners had meaningful control rights, which was willingly given to the executive committee. The Court found this “particularly unconvincing”<sup>82</sup> and postulated that, using Sidley Austin’s reasoning, “if the people elect a person to be dictator for life, the government is a democracy rather than a dictatorship.”<sup>83</sup> The Court apparently found this assertion to be a ridiculous assertion and, therefore, Sidley Austin’s “delegation” theory is flawed. The Court noted that the partners do not elect members of the Executive Committee, thus, they simply “have no control, direct or indirect, over its composition.”<sup>84</sup> Although this point was mentioned only once in the opinion, it seems to have been a pivotal point in the Court’s decision.

The majority opinion did not provide a specific set of factors that are pertinent to the determination of “employer/employee” distinction. The Court did, however, reject the fact that the individuals were “bona fide” partners under Illinois state law as a determinative consideration. Because the issue of “bona fide” partner status under state law was disposed with so quickly, it would *seem* that it is not even a relevant consideration, but this is uncertain from the Court’s holding.

#### **E. 7<sup>th</sup> Circuit Court’s Holding of *EEOC v. Sidley Austin Brown & Wood* (2002)**

The impact of the 7<sup>th</sup> Circuit Court’s holding in *Sidley Austin* on future cases is somewhat unclear. What *is* clear is that the Court found that question of whether or not the demoted partners were “employees” under the ADEA had not been answered by the alleged “undisputed facts” and held that Sidley Austin must comply with the EEOC’s subpoenas to the extent necessary to answer that question.<sup>85</sup> What *is not* clear is whether this holding meant that the demoted partners might not be, in fact, “real partners”, therefore opening up the possibility that

they are “employees”, or whether it meant that, even if the demoted partners are “real partners”, they could still be “employees.”<sup>86</sup>

This lack of clarity is created by the flow of the Seventh Circuit Court’s majority opinion, written by Judge Posner. First, he clarifies the legal issue.<sup>87</sup> He states the issue as being whether the demoted partners were “employers”, rather than whether the demoted partners were “bona fide partners.”<sup>88</sup> He then opines, “the two classes, ‘partners’ under state law and ‘employers’ under Federal antidiscrimination, may not coincide.”<sup>89</sup> He notes that there is no explicit partner exemption in Federal antidiscrimination legislation.<sup>90</sup> After finding that Sidley Austin has taken all of the steps necessary under Illinois law to establish a partnership, and that the demoted partners are correctly classified as “partners” under Illinois partnership law, he goes on to state that “[a]n individual who is classified as a partner under state partnership law, might be classified as an employee for other purposes, including the purpose for which antidiscrimination law extends . . . .”<sup>91</sup> Later, he states that the demoted partners “are, or were, partners but it does not follow that they were employers.”<sup>92</sup>

At this point in the opinion, a reasonable person reading Judge Posner’s opinion might conclude that the determination of whether one is a partner, “bona fide” under state law or otherwise, is not determinative to the issue of whether he or she is an “employee” for purposes of Federal antidiscrimination law. But that conclusion would be premature because Judge Posner then begins assessing the demoted partners’ “partneresque” relations to the firm, namely their financial liability to the firm.<sup>93</sup> Then, he distinguishes a case, cited by the EEOC as being the most “factually similar” case available,<sup>94</sup> on the grounds that the “partners” in that case were not “bona fide partners.”<sup>95</sup> Finally, right before Judge Posner states the holding, he acknowledges Sidley Austin’s “respectable argument” that “it would be better if the courts and the Commission

interpreted the employer exclusion to require treating all partners as employers, with perhaps a narrow sham exception.”<sup>96</sup> The sentence following this acknowledgment states, “[t]hese issues will become ripe when Sidley finishes complying with the coverage part of the subpoena.”<sup>97</sup> This statement implies that the issue of whether all “real partners” should be considered “employers” was either not ruled on, or not before the court. Rather, he held “only that there is enough doubt about whether the 32 demoted partners are covered by the age discrimination law.”<sup>98</sup>

Judge Posner’s opinion went to great lengths to make clear that the demoted partners were, indeed, “bona fide partners” under state law and that bona fide partner status is not dispositive as to the issue of “employer/employee” status. At the same time, his opinion also assessed the “partneresque” characteristics of the demoted partners as criteria for the determination of “employer/employee” status. One might inquire as to whether the determination of partner status, “bona fide” or otherwise, is at all relevant. Is there a different definition of partner, perhaps under common law or using more *traditional* partner criteria, which would constitute “real partner” status and be conclusive to the determination of “employee” status? All in all, it seems that while an individual’s status as “partner” under state law criteria *is not* even a relevant consideration to the determination of “employer/employee” status, the consideration of the individual’s “partneresque” qualities under more *traditional* partner criteria *is* relevant. Presumably, this is simply because traditional partner characteristics coincidentally resemble the characteristics of an “employer”. Thus, the determination of an individual as a *traditional* partner, or “real” partner, may be dispositive to “employer/employee” status, but only coincidentally. Determination of an individual’s status as “partner” under state partnership law, on the other hand, is not relevant because partnership laws generally allow the

partners to divide risk, return, and control among themselves however they please. Thus, partner status under state law is meaningless “as to what role any particular partner plays and, thus, whether the individual is an employee [under] the ADEA as well as a partner under state partnership law.”<sup>99</sup> The conclusion that partner status, “bona fide”, “real”, or otherwise, is only, at most, coincidentally determinative to the issue of “employee” status, begs the question: What, then, are the criteria for determining the “employee/employer” status of a partner?

**F. Application of holding in *Clackamas Gastroenterology Associates, P.C. v. Wells* to *EEOC v. Sidley Austin Brown & Wood***

Any uncertainty as to what factors are relevant to the determination of “employee” status for purposes of Federal antidiscrimination legislation might be cleared up by the United States Supreme Court’s decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*.<sup>100</sup> In that case the Supreme Court held purposes of determining whether a director-shareholder was an “employee” under the ADA and, thus, was protected against discrimination based on the existence of a qualified disability, the focus should be on the common law touchstone of control.<sup>101</sup> The court officially endorsed a six-factor inquiry, proffered by the EEOC and outlined in their Compliance Manual, as being the relevant factors for determining whether a shareholder-director of a professional corporation was an “employee”.<sup>102</sup> These six factors are:

Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; [w]hether and, if so, to what extent the organization supervises the individual's work; [w]hether the individual reports to someone higher in the organization; [w]hether and, if so, to what extent the individual is able to influence the organization; [w]hether the parties intended that the individual be an employee, as expressed in written agreements or contracts; [and] [w]hether the individual shares in the profits, losses, and liabilities of the organization.<sup>103</sup>

While no one factor is decisive, the court states that the “common-law element of control is the principal guidepost.”<sup>104</sup>

Consideration of the court’s rationale in *Clackamus* should dispel any doubts as to whether that holding applies to the facts of *Sidley Austin*. The two most feasible arguments for why it should not apply are that *Clackamus* considered the determination of “employees” in the context of the ADA and not the ADEA, and that the business entity in *Clackamus* was a professional corporation and not a partnership. Each of these arguments, however, can be convincingly countered.

First, the court explicitly “endorsed” the “EEOC’s standard”<sup>105</sup>, which, according to the EEOC, and acknowledged by the court in a footnote to the majority opinion, is a standard that applies “across the board to other federal antidiscrimination statutes”, including the ADEA.<sup>106</sup> It is reasonable to assume that if the court intended to limit the endorsement of the EEOC’s standard for determining “employee” status to application solely under the ADA, it would have mentioned this limitation in the opinion. Furthermore, the EEOC’s standard applies to “partners” because the EEOC Compliance Manual states that the factors are “factors to be considered with regard to coverage of partners, officers, members of boards of directors, and major shareholders.”<sup>107</sup> Once again, if the court intended to endorse the EEOC’s standard only with regard to shareholder-directors and not partners, the court would have explicitly limited the endorsement in this case.

Second, the court explicitly rejected an exemption for shareholder-directors on the ground that they were analogous to partners.<sup>108</sup> The court articulated the rationale for rejecting this approach by stating, “today there are partnerships that include hundreds of members, some of whom may well qualify as ‘employees’ because control is concentrated in a small number of

managing partners . . . [t]hus, asking whether shareholder-directors are partners—rather than asking whether they are employees—simply begs the question.”<sup>109</sup> Not only does this statement imply that the EEOC’s standard would also apply in the context of partnerships generally, but it implies application of that standard to *exactly* the same kind of situation as the demoted partners at Sidley Austin.

If the holding in *Clackamus* is applicable to *Sidley Austin*, then the six-factor control test outlined in *Clackamus* must be applied. In doing so, the factors are being applied to determine whether the *demoted partners* are “employees” and *not whether other partners* are employees or whether the firm is a true partnership.

**1. Factor 1: Did Sidley Austin hire or fire the demoted partners or set the rules and regulations of their work?**

There are two parts to this question. First, the question is who makes the decision to hire and fire? Do the demoted partners participate in the decision to hire and fire or does some other person or entity make that determination? All evidence points to the conclusion that the Executive Committee had the ultimate authority regarding hiring and firing, and not the demoted partners. While some of the demoted partners may have the ability to hire and fire subordinates<sup>110</sup>, they did not participate in decisions to promote or demote partners. This is supported by the fact that there had never been a firm wide vote prior to the EEOC’s investigation.<sup>111</sup> From all the available evidence, it appears that the decision to promote and/or demote partners was based on a majority vote of those holding percentages, which at all times, was held by the Executive Committee.<sup>112</sup> The second question is who set the rules and regulations of the demoted partners’ work? The evidence shows that these decisions were



explicitly within the province of the Executive Committee. Because the demoted partners were not on the Executive Committee, and because they could not vote on the election of Executive Committee members, they are controlled by Sidley Austin. The consideration of “factor 1” plainly weighs in favor of the EEOC.

**2. Factor 2: To what extent did Sidley Austin supervise the demoted partners’ work?**

The degree of supervision over the demoted partners’ work is not determinable with any certainty based on the facts gleaned from the documents available to the general public. Presumably, however, the demoted partners were not “supervised” heavily by anyone other than themselves. They likely came in and out of the office and assessed the quality of their own work. Also, the demoted partners likely supervised others, namely associates and secretaries, closely. The consideration of “factor 2” weighs in favor of Sidley Austin.

**3. Factor 3: Did the demoted partners report to someone higher in the firm?**

Reporting in this context requires a hierarchy, i.e. laborer/foreman, teacher/principal, etc. At Sidley Austin, whether hierarchies between non-Executive Committee partners existed is a matter of interpretation. The firm is administered, in part, by twenty-three Administrative Committees, each of which is delegated a specific administrative function and has its members appointed by the Executive Committee.<sup>113</sup> Presumably, all of the partners at the firm must report to each Administrative Committee on matters related to that committee’s administrative function. These committees, however, were composed of non-Executive Committee members, including most of the demoted partners, and were equally powerful in that each committee

oversaw one distinct aspect of the firm and was subject to the absolute authority of the Executive Committee alike.<sup>114</sup> Thus, the issue of whether the partners reported to someone “higher” at the firm when they report to an Administrative Committee, is debatable.

What is not debatable, however, is that a hierarchy does exist between the Executive Committee partners and non-Executive Committee partners. This hierarchy is significant. In fact, it seems to be the primary distinguishing feature between Sidley Austin and other smaller firms, which would probably not find themselves in a discrimination suit like this. Presumably, the demoted partners were compelled to report to the Executive Committee on many aspects as a matter of necessity. For instance, it has already been established that the Executive Committee determined each partner’s units, percentages, and guarantees.<sup>115</sup> Obviously the Executive Committee had to base these determinations on some criteria that were likely reported to them by the partners. Furthermore, it is commonsense that any governing body having absolute and total control over individuals in a competitive work environment such as this would require some form of reporting from time to time. The consideration of “factor 3” weighs in favor of the EEOC.

**4. Factor 4: To what extent were the demoted partners able to influence the Executive Committee?**

This is a question that requires an analysis of detailed facts that are simply not available to the public at this point. Sidley Austin does, however, *claim* that their “management philosophy is consensus-based decision making. Sidley encourages individual partners to come forward with initiatives and ideas for addressing both external and internal relationships . . . [and] advice and factual input from individual partners is sought as a matter of routine.”<sup>116</sup> The extent to which this is true is unknown and will likely be debated at trial. One would expect that,

due to the absolute authority explicitly conveyed to the Executive Committee by the Partnership Agreement, Sidley Austin would need to present evidence showing that this claim is more than rhetoric.

This factor weighs in favor of the EEOC, but only as a rebuttable presumption. If Sidley Austin can show that actual deference is given to the Administrative Committees, then this factor may weigh in on its side. Sidley Austin should realize, however, that it will hardly be compelling evidence if it merely shows that the Administrative Committees make independent decisions because a law firm the size of Sidley Austin must, as a matter of necessity, delegate duties and responsibilities to several decision making bodies. To be compelling, the evidence must show that the Executive Committee gave genuine deference to the Administrative Committees regarding the firm's most crucial issues. For instance, two relevant considerations are how frequently the Executive Committee overturns a decision made by an Administrative Committees and what types of decisions, if any, are automatically deferred to the Executive Committee. The consideration of "factor 4" presumptively weighs in favor of the EEOC.

**5. Factor 5: Did the demoted partners and Sidley Austin intend for the demoted partners to be employees, as expressed by any written agreements or contracts?**

The EEOC does not point to any document that expressly states or even implies anyone's intention that the demoted partners be "employees". On the contrary, it is apparent from the Partnership Agreement and all other relevant documents that the intention of all parties involved was for the demoted partners to be "employers." This intention is implied by the fact that the legal issue presented in *Sidley Austin*, i.e. the issue of whether partners who have ownership in a law firm, share in the profits of a law firm, and, at least to some degree, administer the law firm may be "employees" under the ADEA, is relatively new. It would be tough to convince a judge

or jury that the demoted partners considered themselves to be “employees.” Furthermore, it is likely that the demoted partners would have even been insulted at the suggestion that they were “employees” rather than “employers.” Any argument made by the EEOC that the demoted partners considered themselves to be “employees” would likely be rejected, however, because the *Clackamus* decision clearly stated that the factor be measured objectively.<sup>117</sup> The consideration of “factor 5” weighs in favor of Sidley Austin.

**6. Factor 6: Did the demoted partners share in the profits, losses, and liabilities of Sidley Austin?**

The answer to this question is yes. The demoted partners contributed substantial capital, were compensated based on firm profits, and were personally liable to the firm. The EEOC’s argument that the demoted partners did not have control over the percentage of firm profits that they would receive, while pertinent to the general issue of control issue, is not compelling regarding this factor. Consideration of “factor 6” weighs in favor of Sidley Austin.

**G. Predicted outcome of *EEOC v. Sidley Austin Brown & Wood* (2005) regarding the issue of whether the demoted partners are “employees” under the ADEA.**

Application of the factors outlined in *Clackamus* leaves the EEOC and Sidley Austin tied with three factors weighing in for each. It would seem, however, that the EEOC has an overall advantage when the *general* element of control is used as the principal guidepost. The EEOC comes out ahead on the factors most closely related to common notions of control. The EEOC’s advantage is evidenced by the fact that Sidley Austin has not made a motion for summary

judgment based on the issue of the demoted partners' "employee" status. It also appears that no such motion will be forthcoming.<sup>118</sup>

What is left of the issue will be decided by a jury<sup>119</sup> Although the general public tends to have an unfavorable disposition towards attorneys, I believe that a jury will sympathize with the demoted partners as individuals being oppressed by an *unelected* authoritative body. The fact that the demoted partners were without without *any* substantial voting rights, even with regards to the election of the Executive Committee, will likely be the determining factor. The virtue of democracy is an ideal instilled in almost all Americans and is, in fact, a cornerstone of the American spirit. Americans generally believe that equal voting rights, at least on some issues, are a right, not a privilege or luxury. Furthermore, while the legal issue of "employee" status should be considered independently of the alleged discrimination, the jury will likely find the proposition that an *unelected* body can legally discriminate against an individual based upon their age in any context to be offensive. For the aforementioned reasons, it is the writer's opinion that the jury will find the demoted partners to be "employees" under the ADEA.

## **V. Tough Decision Ahead**

*Sidley Austin* is a case of first impression in that it considers, for the first time, the possibility that law firm partners having ownership interests, shares in firm profits and losses, and some degree of ostensible administrative control, may be protected under the ADEA and other Federal anti-discrimination statutes from illegal discrimination. Hopefully, at least regarding sex and race discrimination, this should not be an earth shattering revelation for law firms because they should not be engaged in such invidious discrimination anyway, even if exempt. Age discrimination, however, is a much more common practice for law firms through

the implementation of mandatory retirement policies. This is likely more common due to the fact that age discrimination, for good or bad, is not as morally repugnant as sex and race discrimination; it is merely an out with the old, in with the new type of policy. There may be well intended objectives behind such mandatory retirement policies, i.e. the firm wants to keep a more recently educated, technologically savvy, and “with the times” management team that might have fresher ideas and be less opposed to change. The problem, however, like with most all discrimination based upon demographic criteria, is that it places great weight on stereotypes. It is quite possible for a seventy-five year old attorney to have kept up on his education and familiarized himself with technological innovations and modern marketing techniques more than a thirty-something attorney. This is exactly the kind of situation that anti-discrimination legislation is intended to address. Also, law firms may look at mandatory retirement as a way of making room so that the younger attorneys may have their turn occupying a top spot and getting a bigger chunk of the profits.<sup>120</sup> Of course, there is no finite amount of partner positions, only finite profits, which the partners already enjoying those profits do not always want to share.

Regardless of whether mandatory retirement is benign or malignant, it is barred by the ADEA for “employees.” *Sidley Austin* causes every law firm with a mandatory retirement policy to reevaluate whether it should continue to implement that policy. This evaluation will proceed in as many as two phases. First, law firms must assess, using the *Clackamus* holding as guidance, whether their partners are “employees”. This, of course, will force them to consider whether they have given their partners sufficient control/voting rights. If they determine that *all* of their partners have sufficient control, then they are not subject to the ADEA and they may continue implementing their mandatory retirement policy as they were. If there is doubt, however, then the firm must weigh the benefits of their mandatory retirement policy against the

benefits of withholding significant control from their “partners”. Put another way, those that *do* have sufficient control within the firm must ask the question: Is it more important to the success of our firm that we deny individuals having dedicated ten, twenty, or even thirty years of their lives to our firm *any substantial right* of control on *every significant aspect* of firm governance, or that we have the freedom of unbridled discrimination against those individuals on the basis of sex, race, and age? This may be a cynical way of phrasing the question, but it seems accurate none the less.

Interestingly, even after the 7<sup>th</sup> Circuit Court held that law firm partners may be “employees” under the ADEA and, thus, law firms may be subject to age discrimination liability for having mandatory retirement policies, for the most part law firms have maintained those policies.<sup>121</sup> In fact, in 2005 a survey found that over 57% of law firms maintained their mandatory retirement policy.<sup>122</sup> It seems that law firms are waiting on the *Sidley Austin* case before they start changing their policies.

## **VI. Conclusion**

Taking the “red pill” has brought to light a reality that has an upside and a downside. The downside is that the benefits and perks that were once considered a corollary to holding the position of partner cannot be presumed to exist in all law firms today. Some law firms, typically the smaller ones, still grant the traditional benefits and control rights to partners. But other law firms, typically larger ones with centralized management, may not afford their partners many benefits or control rights at all. Also, partners are expected to work far many more hours a week today than they were in the past. The upside, while probably not significant enough to neutralize the effect of the downside, is that partners who are substantially denied traditional partner

benefits may at least be able to seek refuge from discriminatory demotion practices and mandatory retirement policies which threaten their livelihood. Only the most deprived partners, however, will have an opportunity to obtain such refuge.

All factors considered, most partners simply do not have it as good as they used. Even if the EEOC prevails in *Sidley Austin* and law firms change their policies, either by giving partners more control rights, or by ceasing mandatory retirement policies, this victory for the oppressed partner would probably be short lived. In cases that follow *Sidley Austin*, the courts will apply the *Clackamus* factors to what will likely be a slew of ADEA cases against law firms charging illegal age discrimination. Eventually, bright lines will be drawn and law firms will know exactly how much control they have to give their partners in order to limit their discrimination liability. To remain competitive, external market forces will cause larger law firms to give partners as little control as possible without subjecting the firm to discrimination liability for maintaining mandatory retirement policies.

In the past, making partner meant you had reached the top. It meant that all your hard work, determination, and dedication for the last seven to twelve years, had culminated to produce the result for which you had strived. Today, however, it may be unwise to put so much faith in attaining what may actually be a superficial title. This, of course, does not mean that making partner is not a significant milestone or feat. It also does not mean that the partner tree is completely fruitless. It simply means that, in order to avoid demoralizing disappointment, law students and associates should be aware that making partner may only be a stepping stone on their legal career path. For those law students and attorneys who took the red pill, they now realize the mountain they intend to climb might be twice as tall as they originally thought, but



they may take solace in knowing that they can now prepare themselves accordingly for the long climb ahead and they have an advantage over those of their colleagues who took the blue pill.

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<sup>1</sup> Oliver McAdoo, *Matrix Philosophy: Red or Blue Pill?*, <http://www.arrod.co.uk/essays/matrix.php> (Describing the philosophical undertones of the movie *The Matrix*. “The blue pill will leave us as we are, in a life consisting of habit, of things we believe we know. We are comfortable, we do not need truth to live . . . [t]he red pill is an unknown quantity. We are told that it can help us to find the truth . . . [t]he red pill symbolises [sic] risk, doubt and questioning.”).

<sup>2</sup> M. Thomas Collins, *Long Hours Limit Partner Income*, American Bar Association Law Practice Management Section (July 2006), <http://www.abanet.org/lpm/lpt/articles/fin07062.shtml>. (“Partners are logging more billable hours than their associates. Law firm partners are hoarding work rather than handing it off to others. Rather than bringing in new business or training others, they are piling up their own billable hours”).

<sup>3</sup> No. 05C-0208 (N.D. Ill. filed Jan. 13, 2005).

<sup>4</sup> *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7<sup>th</sup> Cir. 2002).

<sup>5</sup> 538 U.S. 440 (2003).

<sup>6</sup> David B. Wilkins, *Partner, Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264, 1266 (March 2007); Lauren Winters, *Partners Without Power: Protecting Law Firm Partners from Discrimination*, 39 U.S.F. L. REV. 413 (Winter 2005).

<sup>7</sup> *See id.* (“The significant difference between equity and non-equity partners are that non-equity partners do not have the right to vote at partnership meetings; they do not share in partnership profits; and they do not have an ownership interest in the firm”).

<sup>8</sup> *See* Winters, *supra* note 5, at 413-14 (stating that even equity partners may lack the right of firm control because “the size or structure of firms today may create a situation that effectively divests equity partners of significant management control”); *See also* David B. Wilkins, *Partners Without Power; A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15, 16 (1999) (“most firms have moved away from the lock-step compensation systems and ‘one person one vote’ regimes that characterized the so-called ‘golden age’ of the large law firm.” (quoting MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 30-32 (1991))).

<sup>9</sup> *See* Leonard Bierman and Rafael Gely, *So You Want to be a Partner at Sidley & Austin?*, 40 HOUS. L. REV. 969, 970 (Winter 2003).

<sup>10</sup> *Id.*

<sup>11</sup> *See id.* “[t]hat pleasant isolation has dissipated. Starting in the early 1990’s and certainly in the first couple of years of the new millennium, the harsh realities of the business cycle have touched even these organizations. Closing of operations, mergers, and downsizing have become common occurrences among professional organizations. More broadly, concerns about cost-cutting measures have become a common part of the operations of many professional organizations”).

<sup>12</sup> Email from Michael J. Zimmer, Law Professor, Seton Hall Law School, sent to Josh McCann (Apr. 12, 2007) (“there is intense competition within the legal profession as client loyalty has been replaced by clients shopping their legal work out to the best bidder.”).

<sup>13</sup> *See* Wilkins, *supra* note 8, at 16 (stating “retention now is almost as important an issue for partners as it is for associates.”).

<sup>14</sup> *See id.* (stating that even “senior” partners “depart involuntarily, when their fellow partners feel that these . . . lawyers are no longer producing sufficient revenues to justify their position.”).

<sup>15</sup> *See* Wilkins, *supra* note 6, at 1272 (pointing out that firms who do so become, what was referred to by Judge Posner in the majority opinion of *Sidley Austin*, 315 F.3d at 705, as “de facto corporations.”).

<sup>16</sup> *See* Krsitin Nicole Johnson, *Resolving the Title VII Partner-Employee Debate*, 101 MICH. L. REV. 1067 (Feb. 2003) (“In recent years, state legislatures began enacting business governance laws that permit law firms to select from a variety of business forms. [L]aw firms now organize as professional corporations, limited liability companies, and limited liability partnerships.”).

<sup>17</sup> *See* *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 698 (7<sup>th</sup> Cir. 2002) (“[p]artners should be classified as employers rather than employees for purposes of age discrimination law because partnership law gives them effective remedies against oppression by their fellow partners, because partnership relations would be poisoned if

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partners could sue each other for unlawful discrimination, and because the relation among partners is so intimate that they should be allowed to discriminate, just as individuals are allowed to discriminate in their purely personal relations.”).

<sup>18</sup> See Wilkins, *supra* note 6, at 1273 (“[T]he more closely large law firms resemble in structure and conduct the other targets of federal and state regulatory jurisdiction, the less credible any claim of professional distinctiveness will be.”).

<sup>19</sup> Wilkins, *supra* note 6, at 1265-66.

<sup>20</sup> *Id.* at 1265.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1266.

<sup>23</sup> 29 U.S.C. § 623(a)(1) (2006) (“It shall be unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .”)

<sup>24</sup> Wilkins, *supra* note 6, at 1266.

<sup>25</sup> EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698 (7<sup>th</sup> Cir. 2002).

<sup>26</sup> *Id.* at 699.

<sup>27</sup> See E.E.O.C. v. Sidley Austin Brown & Wood, LLP., No. 01-9635, 2002 WL 206485 at \*3 (N.D. Ill. Feb. 11, 2002) (ordering Sidley Austin to comply with the subpoena).

<sup>28</sup> See *Sidley Austin*, 315 F.3d at 707.

<sup>29</sup> E.E.O.C. v. Sidley Austin Brown & Wood, No. 05C-0208 (N.D. Ill. filed Jan. 13, 2005) (not yet decided).

<sup>30</sup> See Wilkins, *supra* note 8, at 16.

<sup>31</sup> See Respondent’s Memorandum in Opposition to the Application for an Order to Show Cause at \*6, EEOC v. Sidley Austin Brown & Wood, 2002 WL 206485 (N.D. Ill. Feb. 11, 2002) (No. 01-C9635) (the cited star page number is the page of the pleading as it is printed from Westlaw’s database, 2002 WL 32602594).

<sup>32</sup> Application for an Order to Show Cause Why Subpoena Should Not Be Enforced at 21, E.E.O.C. v. Sidley Austin Brown & Wood, 2002 WL 206485 (N.D. Ill. Feb. 11, 2002) (No. 01-C9635) (citing Sidley Austin’s Partnership Agreement).

<sup>33</sup> *Id.*

<sup>34</sup> E.E.O.C. v. Sidley Austin Brown & Wood, 315 F.3d 696, 703 (7<sup>th</sup> Cir. 2002) (Judge Posner infers that it is ridiculous to conclude that if the public elects a dictator for life it is a democracy rather than a dictatorship. The inference created by this inference is that this system would be a dictatorship.).

<sup>35</sup> Application for an Order to Show Cause Why Subpoena Should Not Be Enforced, *supra* note 32, at 21 (citing Sidley Austin’s Partnership Agreement).

<sup>36</sup> See *Simpson v. Ernst & Young*, 100F.3d 436, 443 (6<sup>th</sup> Cir. 1996) (stating that employers do not come within the protection or coverage of the ADEA); *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 796 (2<sup>nd</sup> Cir. 1986) (“A plain reading of the [ADEA] indicates that its protection extends only to those individuals . . . who [are] employee[s] . . . .”); *Serapion v. Martinez*, 119 F.3d 982, 985 (1<sup>st</sup> Cir. 1997) (“Title VII is directed at, and only protects, employees and potential employees”); *Clackamus Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 455-56 (2003) (dissent states that the court endorses the EEOC’s interpretation that only “employees” are protected).

<sup>37</sup> 29 U.S.C. § 630(f) (2006); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2006), Civil Rights in Employment Act of 1964, 42 USC § 2000e(f) (2006).

<sup>38</sup> See *Wheeler v. Hurdman*, 825 F.2d 257, 277 (10<sup>th</sup> Cir. 1987) (holding that a bona fide partner cannot be an employee).

<sup>39</sup> *Id.* at 276.

<sup>40</sup> *Id.*

<sup>41</sup> *Caruso v. Peat Marwick, Mitchell & Co.*, 664 F. Supp. 144, 148 (S.D.N.Y. 1987) (rejecting the per se approach in favor of using an analysis as to whether the “plaintiff acted as a corporate decisionmaker or owner, as the term ‘partner’ is traditionally conceived . . . .”); *E.E.O.C. v. Peat, Marwick, Mitchell & Co.* 589 F. Supp. 534, 539 (“it 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.”).

<sup>42</sup> See Respondent’s Memorandum in Opposition to the Application for an Order to Show Cause, *supra* note 31, at \*2, \*6.

<sup>43</sup> See *id.* These twenty-five committees are composed of twenty-three administrative committees, one management committee, and one executive committee.

<sup>44</sup> *Id.* at \*3.

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<sup>45</sup> *Id.* at \*1.

<sup>46</sup> *Id.* at \*3.

<sup>47</sup> See *Saviano v. Commissioner*, 765 F.2d 643, 654 (7th Cir. 1985) (“[T]he courts are empowered, and in fact duty-bound, to look beyond the contrived forms of transactions to their economic substance . . . .”); See also *Sidley Austin*, 315 F.3d at 705.

<sup>48</sup> See Respondent’s Memorandum in Opposition to the Application for an Order to Show Cause, *supra* note 31, at \*4.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*5

<sup>51</sup> EEOC’s Reply Memorandum in Support of Application for Order to Show Cause at \*4, *E.E.O.C. v. Sidley Austin Brown & Wood*, No. 01-C9635, 2002 WL 206485 (N.D. Ill. Feb. 11, 2002) (the cited star page number is the page of the pleading as it is printed from Westlaw’s database, 2002 WL 32953655).

<sup>52</sup> *Id.*

<sup>53</sup> AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> ed. 2007).

<sup>54</sup> See EEOC’s Reply Memorandum in Support of Application for Order to Show Cause, *supra* note 48, at \*4.

<sup>55</sup> *Id.* at \*5-6 (citing *E.E.O.C. v. Johnson & Higgins*, 91 F.3d 1529, 1540 (2<sup>nd</sup> Cir. 1996)).

<sup>56</sup> *Johnson & Higgins, Inc.*, 91 F.3d at 1532, 1540.

<sup>57</sup> Respondent’s Memorandum in Opposition to the Application for an Order to Show Cause, *supra* note 31, at \*6. It should be noted that the twenty-three committees referred to here represent the number of “administrative committees.” There are two other committees, the executive committee and the management committee, that are also related to the management of the firm.

<sup>58</sup> See EEOC’s Reply Memorandum in Support of Application for Order to Show Cause, *supra* note 518, at \*3.

<sup>59</sup> Respondent’s Memorandum in Opposition to the Application for an Order to Show Cause, *supra* note 31, at \*6.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*5.

<sup>62</sup> *Id.* at \*13. Sidley Austin lists a table of cases which it believes supports their proposition that no court has ever held that a partner who was found to have ownership, compensation based on profits and losses, and administrative control is also an “employee.” All of the cases that Sidley Austin cites as holding the individual was not an “employee” can be distinguished from the facts of the case at bar on the basis of the control factor. *Wheeler v. Hurdman*, 825 F.2d 257, 260 (10th Cir. 1987) (“partners had rights under the partnership agreement to vote on such matters as amendment of the partnership agreement, approval of mergers with other accounting firms of a certain size, admission of new partners, termination of a partner’s interest, approval of draws, shares of net profits; special distributions, and any other income to be allocated to any partners, and dissolution of the firm); *Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1399 (11th Cir. 1991) (“[t]he partners have final authority and responsibility in all aspects of the Firm’s operation. Responsibility for satisfactory completion of the Firm’s engagements, for general administration of the entire practice and contributions to solutions of problems affecting the Firm as a whole rest with the partners” and “had a right to vote on his shares on such matters as amendment of the Firm’s agreement, admission of new shareholders, termination of a shareholder’s interest, approval of draws, shares of net profits, special distributions, and any other income to be allocated to any shareholders and dissolution of the Firm.”); *Rhoads v. Jones Fin. Cos.*, 957 F. Supp. 1102, 1105 (E.D. Mo.), *aff’d*, 131 F.3d 144 (8th Cir. 1997) (“[u]nder the Partnership Agreement, [] the general partners have exclusive right to manage the business of the partnership . . . [the] managing partner is designated by the general partners . . . [t]he general partners may vote to remove any member of the executive committee and elect a new member in his/her place . . . the general partners may vote to remove the general partner . . . [e]ach general partner has voting power equal to his/her partnership percentage in the partnership.”); *Serapion v. Martinez*, 119 F.3d 982 (1st Cir. 1997); *Burke v. Friedman*, 556 F.2d 867, 991 (7th Cir. 1977) (“proprietary partners were guaranteed a vote in all matters brought before the board.”); *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984) (court found shareholders of a professional corporation were not employee by analogizing them to partners with management and control within a law firm) Although no statement; *Schmidt v. Ottawa Med. Ctr.*, 155 F. Supp. 2d 919, 921 (N.D. Ill. 2001) (shareholders had the opportunity to vote on a their compensation plan and is given a vote in all shareholder meetings; implication is that shareholders had voting rights); *Holland v. Ernst & Whinney*, 44 Fair Empl. Prac. Cas. (BNA) 474 (N.D. Ala. 1984) (court simply states that plaintiff was a partner and therefore was not an “employee”; this per se approach has not been followed, *supra* note 36, at 148); *Frasca v. Jones, Day, Reavis Pogue*, Los Angeles Superior Court Case No. BC 169886 (1999) (unpublished case; fact unavailable; state court; no precedential value); *Baker v. Berger*, 2001 U.S. Dist. LEXIS 14081 at \*12 (N.D.III. 2001) (sole shareholder of professional corporation had absolute control over management of

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the entity); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 82 (8th Cir. 1996) (attorney shareholder-directors “participated in all management decisions and set firm policy”); *Reddy v. Good Samaritan Hospital & Health Center*, 137 F. Supp. 2d 948, 976-77 (S.D. Ohio 2001) (holding a physician-shareholder having the right to vote on such matters as “amendment of the Code of Regulations, approval of corporate contracts, admission of new shareholders, termination of shareholder’s interest, approval of draws, shares of net profits and dissolution of corporation” would not have been an “employee”); *Saxon v. Thompson Orthodontics*, 71 F. Supp. 1085, 1086 (Kan. 1999) (shareholder-directors of professional corporation “participated in all management decisions and set firm policy”); *Maher v. Price Waterhouse*, 1985 U.S. Dist. LEXIS 20964 at \*4 (E.D. Mo. 1985) (“in all matter relating to the practice of the partnership the decision of the majority of the partnership shall be conclusive” and although a policy board manages the partnership, the “partners may by vote remove such persons at any time”); *Moebus v. Ob-Gyn Associates, Inc.*, 937 F. Supp. 867, 868 (E.D. Mo. 1996) (all physician-shareholders of the corporation had an equal vote and all major decisions of the corporation, “including acquisitions of material assets, execution of material contracts, funding decisions concerning the corporation’s benefit plans, and bringing in new physicians were made by the board of directors”, which each physician-shareholder served on); *Orton v. Pirro, Collier, Cohen, Crystal, & Block*, 1996 U.S. Dist. LEXIS 437, at \*4-5 (S.D.N.Y. 1996) (court simply finds that plaintiff was a partner and therefore was not an “employee”; this per se approach has not been followed, *supra* note 36, at 148).

<sup>63</sup> EEOC’s Reply Memorandum in Support of Application for Order to Show Cause, *supra* note 45, at \*2.

<sup>64</sup> See Respondent’s Memorandum in Opposition to the Application for an Order to Show Cause, *supra* note 31, at \*7.

<sup>65</sup> *Id.*

<sup>66</sup> EEOC’s Reply Memorandum in Support of Application for Order to Show Cause, *supra* note 51, at \*3.

<sup>67</sup> See Application for an Order to Show Cause Why Subpoena Should Not Be Enforced, *supra* note 32, at 21.

<sup>68</sup> Similarly, Non-Executive Committee partners cannot even amend the partnership agreement to gain some marginal control because amendment to the partnership agreement requires a vote of the majority of percentages. Again, the Executive Committee always has a majority of percentages and has absolute authority to assign the percentages. Amendments need not even be distributed to the other partners until after the amendment is effective. Reply Memorandum in Support of Application for Order to Show Cause, *supra* note 51, at \*3.

<sup>69</sup> See Respondent’s Surreply Memorandum in Opposition to the Application for an Order to Show Cause, *E.E.O.C. v. Sidley Austin Brown & Wood*, No. 01-C9635, 2002 WL 206485 (N.D. Ill. Feb. 11, 2002) (2002 WL 32602599). Sidley Austin had an opportunity in this pleading to respond to any of the EEOC’s arguments. Sidley Austin does make counter arguments and correct the EEOC on some issues, however, never addresses the voting rights distinction. One correction made by Sidley Austin was on the EEOC’s claim that members of the Executive Committee took 80% of the firm’s profits, while the non-Executive Committee partners took only 20%. Sidley Austin claims that it was actually the other way around and the Executive Committee only took 20%. This is still interesting considering that the Executive Committee consists of only 10% of the total number of partners. Also, while one might assume that because the EEOC’s profit percentage figures were incorrect, their voting percentage figures were incorrect too, Sidley Austin makes the correction only regarding “percentage for [the] purposes of profit sharing.” *Id.* at \*3.

<sup>70</sup> Respondent’s Memorandum in Opposition to the Application for an Order to Show Cause, *supra* note 31, at \*6.

<sup>71</sup> EEOC’s Reply Memorandum in Support of Application for Order to Show Cause, *supra* note 51, at \*2-3.

<sup>72</sup> See Respondent’s Memorandum in Opposition to the Application for an Order to Show Cause, *supra* note 31, at \*15-18.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (citing *Wheeler*, 825 F.2d 257; *Fountain*, 925 F.2d 1398; *Rhodes*, 957 F. Supp. 1102); see also *supra* note 62 (note stating distinguishing facts).

<sup>75</sup> See EEOC’s Reply Memorandum in Support of Application for Order to Show Cause, *supra* note 51, at \*3-4. See also *Supra* note 53 (stating distinguishing facts).

<sup>76</sup> *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696, 702 (7<sup>th</sup> Cir. 2002).

<sup>77</sup> *Id.* The court here essentially rejects the per se approach taken in *Wheeler v. Hurdman*, 825 F.2d 257, 277 (10<sup>th</sup> Cir. 1987) (holding that a bona fide partner cannot be an employee). Sidley Austin heavily relied on this case.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 703 (“[i]t is true that the partners can commit the firm, for example by writing opinion letters; but employees of a corporation, when acting within the scope of their employment, regularly commit the corporation to contractual undertakings, not to mention to tort liability. Partners who are not members of the executive committee share in the

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profits of the firm; but many corporations base their employees' compensation in part anyway, but sometimes in very large part, on the corporation's profits, without anyone supposing them employers. The participation of the 32 demoted partners in committees that have, so far as appears, merely administrative functions does not distinguish them from executive employees in corporations. Corporations have committees and the members of the committees are employees; this does not make them employers. Nor are the members of the committees on which the 32 served elected; they are appointed by the executive committee. The 32 owned some of the firm's capital, but executive-level employees often own stock in their corporations.).

<sup>81</sup> *See id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696, 707 (7<sup>th</sup> Cir. 2002) (“We hold that there is enough doubt about whether the 32 partners are covered by the age discrimination law to entitle the EEOC to full compliance with that part, at least, of its subpoena.”).

<sup>86</sup> The term “real” partner is being used in this context as something different than “bona fide” partner. In this paper, “bona fide partner” means a legitimate partner under state law. The term “real partner” is meant to describe a partner that has traditional partner powers, i.e. significant control over the firm’s affairs, equitable profit sharing, and ownership.

<sup>87</sup> *See Sidley Austin*, 315 F.3d at 704-05 (stating “the issue is not whether the 32 before their demotion were partners . . . the issue is whether they were employers” and “the question is whether, when a firm employs the latitude allowed to it by state law to reconfigure a partnership in the direction of making it a de facto corporation, a federal agency enforcing antidiscrimination law is compelled to treat all “partners” as employers).

<sup>88</sup> *See id.*

<sup>89</sup> *Id.* at 704.

<sup>90</sup> *See id.* at 701.

<sup>91</sup> *Id.* at 702.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 703.

<sup>94</sup> *See EEOC’s Reply Memorandum in Support of Application for Order to Show Cause*, *supra* note 51, at \*5.

<sup>95</sup> *See Sidley Austin*, 315 F.3d at 703-04 (distinguishing *Simpson v. Ernst & Young*, 100 F.3d 436 (6<sup>th</sup> Cir. 1996).

<sup>96</sup> *Id.* at 707.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Email from Michael J. Zimmer, *supra* note 12 (“[g]iven that state partnership laws generally allow the partners to divide up risk and return and all the other functions of the partnership pretty much as they please in their partnership agreement, the characterization of someone as a partner of a partnership is pretty meaningless as to what role any particular partner plays and, thus, whether she is an employee for the ADEA as well as a partner under state PA law.”).

<sup>100</sup> 538 U.S. 440 (2003).

<sup>101</sup> *See id.* at 449.

<sup>102</sup> *See id.*; *see also* Equal Employment Opportunity Commission, *Threshold Issues: Covered Parties*, EEOC Compliance Manual § 2-III(A)(1)(d) (June 2006).

<sup>103</sup> *Clackamus*, 538 U.S. at 449-50.

<sup>104</sup> *See id.* at 448, 451.

<sup>105</sup> *Id.* at 451.

<sup>106</sup> *Id.* at 449 n.7; *See also* EEOC Compliance Manual, *supra* note 97, at § 2-II(A)(2).

<sup>107</sup> *Id.* at § 2-III(A)(1)(d).

<sup>108</sup> *Clackamus*, 538 U.S. at 446 (“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.”).

<sup>109</sup> *Id.* at 446, 450 (the court also stated that “[t]he mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or a proprietor.”).

<sup>110</sup> *Sidley Austin Brown & Wood*, 315 F.3d 696, 699 (7<sup>th</sup> Cir. 2002).

<sup>111</sup> EEOC’s Reply Memorandum in Support of Application for Order to Show Cause, *supra* note 51, at \*2-3.

<sup>112</sup> *Id.* at 83.

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<sup>113</sup> See Respondent's Memorandum in Opposition to the Application for an Order to Show Cause, *supra* note 31, at \*6

<sup>114</sup> See *Id.*

<sup>115</sup> See *Id.* at \*4.

<sup>116</sup> *Id.* at 6.

<sup>117</sup> See *Clackamus Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 450 (2003) (court implied objective standard by its use of the phrase "as expressed in written agreements or contracts").

<sup>118</sup> The Federal Court PACER database shows that Sidley Austin has not made a motion for summary judgment based on the demoted partners' employee status. Furthermore, pleadings filed by the EEOC and Sidley Austin show that the parties are in the process of discovery on the issue of the merits of the discrimination issue. If Sidley Austin was going to seek summary judgment based on the "employee" status issue, they probably would have done it by now.

<sup>119</sup> See *E.E.O.C. v. Johnson & Higgins*, 91 F.3d 1529, 1546 (2<sup>nd</sup> Cir. 1996) ("To the extent that [the plaintiff-director] on remand pursues relief [under the ADEA] related to his status as a director, this issue should be resolved by trial on the basis of the parties' proof of his functions at J & H in that capacity." (quoting *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 n. 4. (3<sup>rd</sup> Cir. 1995)); see also *Caruso v. Peat, Marwick, Mitchell & Co.*, 717 F. Supp. 218, 222-23 (S.D.N.Y. 1989) (denying defendant's motion for summary judgment because material issues remained as to whether plaintiff-partner was an "employee"); *Caruso v. Peat, Marwick, Mitchell & Co.*, 779 F.Supp. 332, 333-34 n. 2 (S.D.N.Y.1991) (question of plaintiff's employee status was decided by jury).

<sup>120</sup> See Julie Creswell, *Law Firms Are Urged Not to Force Retirement*, N.Y. TIMES, Jan. 19, 2007 available at [www.nytimes.com/2007/01/19/business/19law.html?ex=1326862800&en=1786fa17127bb15b&ei=5089&partner=rssyahoo&emc=rss](http://www.nytimes.com/2007/01/19/business/19law.html?ex=1326862800&en=1786fa17127bb15b&ei=5089&partner=rssyahoo&emc=rss).

<sup>121</sup> See Leigh Jones, *Pitfalls of Mandatory Law Firm Retirement*, THE NATIONAL LAW JOURNAL, May 24, 2005 available at <http://www.law.com/jsp/article.jsp?id=1116851713539> ("it appears that many big firms are holding fast to their mandatory retirement policies. For example, Holland & Knight, with 1,159 attorneys, has required its attorneys since 1981 to retire at age 70.").

<sup>122</sup> Creswell, *supra* note 120.