Partners Without Power: Protecting Law Firm Partners from Discrimination

By LAUREN WINTERS*

It is undisputed that Title VII of the 1964 Civil Rights Act1 ("Title VII") applies to law firm partnerships; however, under traditional jurisprudence, equity partners are not entitled to Title VII protection from the discriminatory acts of other equity partners or the discriminatory actions of the partnership as a whole.2 This is because courts have held that partners do not fall within the statutory definition of the term "employee."3 Such logic is flawed, however, because Title VII does not provide a substantive definition of "employee." Instead, it defines an employee as an "individual employed by an employer."4 In deciding that partners do not fall within the statutory definition of "employee," courts have relied on the traditional notion that all partners are equal, possessing the same ability to affect or remedy partnership conduct.5 This is at odds with the current structure of many law firms. Firms today may have two classes of partners: equity and non-equity partners.6 The significant differences 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 the partnership profits; and they do not have an ownership interest in the firm.7 Furthermore, the size or structure of firms today may create a situation that effectively divests equity partners of significant management con-

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3. Burke v. Friedman, 556 F.2d 867, 868 (7th Cir. 1977).
5. Hishon, 467 U.S. at 79–80 (Powell, J., concurring); Burke, 556 F.2d at 869.
trol and job security. In both instances, an equity partner does not have access to the remedial provisions of Title VII. Thus, it is possible to be an equity partner and be subject to professional peril based on the unlawful employment practices of fellow equity partners and the partnership.

Whether equity law partners must work in a sexually or racially hostile work environment raises the issue of whether Congress intended to exclude individual partners from the protections of Title VII. Law firm partnerships should no longer receive an automatic exemption from liability when an equity partner alleges that the firm has engaged in unlawful discriminatory conduct. It is a well-established principle that pervasive sexual or racial hostility in the workplace violates Title VII. Courts look to the totality of the circumstances to determine whether the conduct is hostile or abusive, considering, among other things, whether the conduct was “physically threatening or humiliating” and “whether it unreasonably interferes with [the plaintiff’s] work performance.” Equity partners should be able to bring Title VII claims against law firm partnerships because Congress granted the victims of discrimination a private right of action against the perpetrators of workplace discrimination.

Congress used a term of art when it described persons eligible to bring Title VII claims as “person[s] adversely affected or aggrieved.” Congress used a term of art when it described persons eligible to bring Title VII claims as “person[s] adversely affected or aggrieved.”

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8. See, e.g., Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867–68 (9th Cir. 1996) (holding that a physician-partner in a 2,400 plus partnership may be entitled to employee status because the number of doctor-partners limited her ability to affect partnership policy).

9. Under Title VII, an employer is prohibited from discriminating against an employee with respect to the employee’s “compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Likewise, the Age Discrimination in Employment Act prohibits employers from discriminating against employees on the basis of age. 29 U.S.C. § 623(a) (2000). Finally, the Americans with Disabilities Act prohibits employers from discriminating against employees with disabilities on the basis of the disabilities. 42 U.S.C. § 12112(2). This Article uses Title VII for its analysis; however, all three statutes use the same statutory definition of employee: “an individual employed by an employer.” 29 U.S.C. § 621(4); 42 U.S.C. § 12112(4). Therefore, it is reasonable to discuss the courts’ interpretation of employee under each of these statutes interchangeably.


12. See Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126 (1995) (explaining that “[t]he phrase ‘person adversely affected or aggrieved’ is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts”).
claim against the respondent named in the Equal Employment Opportunity Commission ("EEOC") charge. According to federal jurisprudence, a person is aggrieved if the respondent's action did in fact injure the person seeking Title VII protection and the person's complaint falls within the zone of interests protected by Title VII. Interpreting the term “employee” to include aggrieved equity partners is consistent with Congress's goal to eliminate discriminatory conduct that pollutes the American workplace. Despite Congress's mandate, courts have declined to exercise jurisdiction over discrimination lawsuits between law firm partners and partnerships, reasoning that partners are not eligible to claim the protection of Title VII.

As partnerships became professional corporations, courts were required to determine whether shareholders were entitled to bring discrimination claims against them. This meant that courts had to determine whether shareholders fell within the statutory definition of employee under laws prohibiting workplace discrimination. The circuits used one of two tests to determine whether courts had jurisdiction over a shareholder's discrimination lawsuit.

Under the first test, courts held that a professional corporation was analogous to a partnership. In deciding whether the shareholder was analogous to a partner, courts considered the following factors: (1) whether the shareholder's compensation was based on the firm's profits; (2) whether the shareholder was liable for the firm's debts and obligations; and (3) whether the shareholder had a right to vote on matters concerning the firm's operation. Under this ap-

15. "[A] broad reading of the term 'employee' [is] consistent with the statutory purpose of rid[ing] the nation of unlawful workplace discrimination"; thus, courts should liberally construe Title VII statutory provisions to limit the number of partnerships that can escape liability for their unlawful discriminatory conduct against members of the partnership. See Clackamas Gastroenterology Assoc's., P.C. v. Wells, 538 U.S. 440, 446 n.6 (2003).
16. See, e.g., Serapion v. Martinez, 119 F.3d 982, 991–92 (1st Cir. 1997) (stating that, under the totality of the circumstances, the evidence showed that the plaintiff was not an employee but an equity partner, and, therefore, the plaintiff was ineligible to claim Title VII protection); Devine v. Stone, Leyton & Gershman, 100 F.3d 78, 82 (8th Cir. 1996) (refusing to exercise jurisdiction because defendant was not an "employer" that could be sued under Title VII).
18. Id. at 1178.
19. Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1399 (11th Cir. 1991) (finding that the plaintiff was not entitled to employee status because the plaintiff had the right to vote on amendments to the firm's agreement, admission of new shareholders, termination of a shareholder's interest, and approval of compensation including the distribution of net profits).
approach, a court did not have jurisdiction over a shareholder's discrimination claim if the shareholder had the right to control how the business would operate, had a right to share in the business's profits, and was liable for the business's debts and obligations.

Under the second test, courts focused on the decision of the shareholders to incorporate.\(^\text{20}\) Courts following this approach held that the decision to incorporate and reap the rewards and benefits of incorporation prevented shareholders from arguing that they were analogous to partners in a partnership.\(^\text{21}\) Under this analysis, courts had jurisdiction to hear a shareholder's discrimination claim based on the fact that the firm was a professional corporation.\(^\text{22}\)

In 2003, the Supreme Court abrogated the two tests.\(^\text{23}\) The Court adopted a control test to determine whether, under laws prohibiting workplace discrimination, shareholders in a professional corporation fell within the statutory definition of "employee."\(^\text{24}\) Under the control test, courts must focus on whether the shareholder is subject to the control of the professional corporation.\(^\text{25}\) In making this determination, courts should consider such factors as whether the corporation can hire or fire the shareholder; whether, and to what extent, the corporation supervises the shareholder's work; whether the shareholder shares in the corporation's profits, losses, and liabilities; and whether the shareholder is able to influence the decision-making process of the corporation.\(^\text{26}\) The control test offers non-equity law partners access to Title VII protections because they do not have an ownership interest in the law firm partnership, they do not share in the firm's profits, and they do not have a right to vote in how the firm will conduct its business.\(^\text{27}\)

For example, in 2002, the EEOC used the control test to determine whether thirty-one demoted partners at the Sidley Austin law firm were entitled to protection under federal law prohibiting discrimination based on the employee's age.\(^\text{28}\) In January 2005, based on its investigation, the EEOC filed a lawsuit against Sidley Austin, alleg-

\(^{21}\) Id. at 798.
\(^{22}\) Id.
\(^{24}\) Id. at 449–50.
\(^{25}\) Id.
\(^{26}\) Id. (construing EEOC Compliance Manual).
\(^{27}\) See Cobb, supra note 6, at 10. While there are no reported cases applying the control test to non-equity partners, this conclusion is a relatively straightforward application of the control test.
\(^{28}\) EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002).
ing that the law firm implemented and maintained an age-based re-
tirement policy.\textsuperscript{29} Using the control test, the EEOC maintained that
the demoted partners were employees for purposes of federal anti-
discrimination law because they did not have the attributes associated
with being an equity partner.

The control test, however, ignores the inability of \textit{equity} partners
to protect themselves from discrimination if they lack the power to
force the firm to take remedial action to eliminate the discrimination
despite possessing other attributes of being an equity partner.\textsuperscript{30} An
equity partner should be entitled to the remedial protections of Title
VII if she can prove that she has standing to invoke federal jurisdic-
tion. This approach ensures that law firms will not discriminate
against equity partners; if they do, they will face the legal conse-
quences of their unlawful employment practices.

This Article examines the implications of the control test on the
ability of non-equity and equity partners to bring discrimination
claims against their law firms. Part I traces the development of the law
that led to the adoption of the control test. Part II examines the limi-
tations of the control test in determining whether an equity law part-
ner is entitled to the protections of federal law prohibiting workplace
discrimination. Finally, Part III suggests a three-part test based on \textit{Mc-
Donnell Douglas Corp. v. Green}\textsuperscript{31} to determine whether equity law part-
ners are entitled to protection under laws prohibiting workplace
discrimination.\textsuperscript{32} This three-part test would require the aggrieved
partner or shareholder to establish a prima facie case of discrimina-
tion. If the partner is able to meet the initial burden, the firm would
have to show that the partner or shareholder enjoyed the full benefits
and protections of partnership or ownership status. The burden
would then shift back to the aggrieved partner to produce evidence
showing that (1) the partner lacked the power and control to force
the firm to take remedial action to eliminate the illegal discrimina-
tion, and (2) other partners, either through the firm’s executive com-
mittee or managing partner, knew of the discrimination and failed to
take remedial action to eliminate it.

\textsuperscript{29} William Sluis, \textit{Sidley Austin Brown \& Wood: EEOC Files Age-Discrimination Suit}, CHI.
TRIB., Jan. 16, 2005, at 3.

\textsuperscript{30} See, e.g., \textit{Sidley Austin}, 315 F.3d at 704 (acknowledging that an equity partner’s
liability for the partnership’s debts is meaningless if the equity partner is subject to unlaw-
ful workplace discrimination).

\textsuperscript{31} 411 U.S. 792 (1973).

\textsuperscript{32} \textit{Id.} at 802–04.
I. Unequal Protection Under the Law

Traditionally, the fact that a plaintiff was a partner in a law firm prevented the plaintiff from suing the firm for discriminatory acts that occurred while the plaintiff was a partner. For example, consider the story of Abby. Abby joined her law firm as an associate in 1994. The firm had more than seventy equity partners, twenty-five associates, and approximately fifty administrative and clerical employees. Rob, a partner and member of the firm’s executive committee, supervised Abby’s work. During that time period, Rob made personal comments to Abby about her appearance, including how she looked in certain outfits. While working with him, Abby complained to the firm’s managing partner that Rob had a pornographic screen saver on his work computer.

In 2001, Abby became a partner. To “celebrate” her promotion, Rob circulated throughout the firm a mock advertisement featuring Abby. The advertisement welcomed Abby to the partnership. It stated that, over the years, Abby had satisfied many clients’ needs. The advertisement listed the names of famous men known for their sexual exploits as Abby’s satisfied clients. Rob also sent sexually suggestive poetry to the partners, which Abby received. Abby filed a formal complaint with the firm’s executive committee, but the executive committee took no action. After Abby became a partner, Rob suggested that they step up their relationship from colleagues to “true” partners. He asked Abby to join him on vacations and began calling her at home. Abby told Rob that his advances and comments were unwelcome. Still, everyone in the firm came to believe that Rob and Abby were having an office affair.

Now Abby wants to assert a Title VII claim against the law firm for Rob’s conduct that occurred while she was an associate. If a reasonable person standing in Abby’s shoes would find the workplace so objectively and subjectively sexually hostile that it created an abusive working environment, she might have a successful claim as to the conduct that occurred while she was an associate. But Abby’s promotion

34. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998) (explaining that the reasonable person standard used to determine workplace hostility should be based on the perspective of a reasonable person sharing the characteristics of the plaintiff); Ellison v. Brady, 924 F.2d 872, 878–79 (9th Cir. 1991) (holding that, in the context of a sexual harassment claim, courts were to use a reasonable woman standard to determine whether the working environment was hostile). Cf. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1115 (9th Cir. 2004) ("[A] llegations of a racially hostile workplace must be assessed
will prevent her from holding the firm liable for the discriminatory acts that occurred while she was a partner.\textsuperscript{35} Abby's Title VII claim will fail because courts traditionally hold that, as a matter of law, a bona fide equity partner cannot state a colorable discrimination claim against a partnership.\textsuperscript{36} Courts routinely reason that equity partners are not entitled to employee status under laws prohibiting workplace discrimination because they are co-owners who manage and control the partnership. Contrary to the belief that individual partners possess the ability to affect partnership policy, many equity partners lack the bargaining power to protect themselves from the discriminatory conduct of their fellow equity partners and the partnership as a whole.\textsuperscript{37} Becoming a partner in a law firm leaves women, lawyers of color, and older attorneys vulnerable to unlawful employment practices, such as sexual harassment.\textsuperscript{38} Thus, despite the economic benefits of being an equity partner, Abby would face professional peril because, even though the firm knew of the harassment, it failed to take any steps to eliminate it and Abby's single partnership vote could not force the firm to take action against Rob. Abby's only choice to remedy the situ-

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\textsuperscript{35} See Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 797 (2d Cir. 1986) ("It is generally accepted that the benefits of the antidiscrimination statutes [prohibiting unlawful employment practices] ... do not extend to those who properly are classified as partners."). Cf. \textit{Hishon}, 467 U.S. at 80 n.2 (explaining that a partnership cannot avoid Title VII liability by simply "labeling" employees "partners").

\textsuperscript{36} See Burke v. Friedman, 556 F.2d 867, 869 n.1 (7th Cir. 1977) ("[I]f the attorneys [are] partners in [a] law firm rather than associates, they [will] not be considered to be employees [for purposes of federal laws prohibiting workplace discrimination]."); \textit{accord Hishon}, 467 U.S. at 79–80 (Powell, J., concurring) ("The reasoning of the Court’s opinion [that an associate may bring a Title VII action against a law firm partnership] does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply.").

\textsuperscript{37} See EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 700 (7th Cir. 2002).

\textsuperscript{38} Three-quarters of women lawyers believe that sex discrimination is a problem within the workplace. Recent surveys found that one-half to two-thirds of female lawyers report experiencing or observing sexual harassment. ABA Comm'n on Women in the Profession, \textit{The Unfinished Agenda} 19 (2001). The number of complaints concerning sex discrimination has doubled since 1991. According to the ABA report, "About 90% of reported [sexual harassment] complaints are from women, and many pay a substantial price in both economic and psychological terms, such as loss of employment opportunities, unwanted transfers, anxiety, depression, and other stress-related conditions." \textit{Id.} at 19. The ABA report also states that (1) women of color and other identifiable subgroups face racial and sexual bias, (2) homophobic jokes and comments are not uncommon among lawyers, and (3) lawyers with disabilities report "disparaging remarks and lack of reasonable accommodations." \textit{Id.} at 21. "Women also report recurring instances of being ignored, interrupted, or mistaken for nonprofessional support staff." \textit{Id.} at 21.
A. The Evolution of Employee Status

Congress expressly included partnerships in the definition of "employer" when it enacted laws prohibiting workplace discrimination; however, Congress did not address whether the individual partners fell within the statutory definition of "employee." Courts have assumed that partners are excluded from the definition of "employee" based upon the common law principle that a partnership does not have an independent legal identity. Under this "aggregate" theory of partnership law, a partner cannot sue the partnership because the partner would, in effect, be suing herself. The Uniform Partnership Act adopted and codified common law principles of partnership law, including the common law principle that a partnership and its partners are a single unit. Thus, it was inconceivable that a partner could sue the partnership for anything other than a breach of fiduciary duties.

Prior to 2003, when the Supreme Court decided Clackamas Gastroenterology Associates, P.C. v. Wells, the leading case that addressed whether a partner was entitled to employee status under Title VII was Burke v. Friedman. In Burke, the Seventh Circuit considered whether an accounting firm had the requisite fifteen employees to trigger application of Title VII. To trigger Title VII, the firm's four partners had to fall within the statutory definition of employee.

40. See Burke, 556 F.2d at 869.
41. See Allan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnerships § 6.08(c) (3d ed. 1994).
43. See Simpson v. Ernst & Young, 100 F.3d 436, 443-44 (6th Cir. 1996) (discussing common law principles as codified in the UPA); Helvering v. Smith, 90 F.2d 590, 591 (2d Cir. 1937) (rejecting the argument that the UPA made the partnership an "independent juristic entity").
46. 556 F.2d 867, 868 (7th Cir. 1977).
cuit held that the partnership was not subject to Title VII, finding that, as a matter of law, a partner who owned and managed the operation of the accounting firm could not be an employee under Title VII.\textsuperscript{48}

The \textit{Burke} analysis, however, ignored three important facts. First, a partnership has a legal identity separate and apart from the members of the partnership.\textsuperscript{49} That is, it can sue and be sued in its own name.\textsuperscript{50} Second, a partnership and its partners may have a master-servant relationship.\textsuperscript{51} Specifically, a law firm partnership may dictate the parameters of the partner's work, such as what cases the partner may take, how the partner will charge a client for services performed on a case, and what partnership resources, such as associates and staff, the partner may use when working on a case.\textsuperscript{52} Third, law firm partnerships have characteristics and attributes of corporations.\textsuperscript{53} Large and mid-size law firms have administrative committees, with control of

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\item \textsuperscript{48} \textit{Burke}, 556 F.2d at 869.
\item \textsuperscript{49} Cf. \textit{Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council}, 506 U.S. 194, 202 (1993) (interpreting the rule that corporations are prohibited from appearing pro se in federal court as applying to all artificial entities).
\item \textsuperscript{50} See, e.g., \textit{Fed. R. Civ. P. 17(b)} (stating that a partnership "may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or the laws of the United States"). \textit{Accord Or. R. Civ. P. 26B}. Oregon Rule of Civil Procedure states:
\begin{quote}
Any partnership or other unincorporated association, whether organized for profit or not, may sue in any name which it has assumed and be sued in any name which it has assumed or by which it is known. Any member of the partnership or other unincorporated association may be joined as a party in an action against the partnership or unincorporated association.
\end{quote}
\item \textsuperscript{51} \textit{See Restatement (Second) of Agency} § 14a (1958).
\item \textsuperscript{52} Gone are the genteel days of Atticus Finch in Harper Lee's \textit{To Kill a Mockingbird}. Today's motto is "the business of law is business." \textit{See} Edward S. Adams & Stuart Albert, \textit{Law Redesigns Law: Legal Principles as Principles of Law Firm Organization}, 51 \textit{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."). Firms carefully calculate the costs of inviting associates to become partners based on their contributions to the firm's bottom line and firm resources. \textit{John G. Iezzi, Compensation and Benefits for Law Offices, How to Calculate the Costs of New Partner Admissions} 10 (2003–04).
\item \textsuperscript{53} \textit{See, e.g., EEOC v. Sidley Austin Brown & Wood}, 315 F.3d 696, 699 (7th Cir. 2002) (finding that a self-perpetuating executive committee controlled the law firm and that the committee controlled important terms and conditions of employment such as partnership compensation and the right to fire, promote, and demote partners). \textit{See generally Thomas F. Gibbons, Law Practice in 2001, 76 A.B.A. J. 69, 71 (1990)} (explaining that law firms will no longer operate as true partnerships in the twenty-first century; instead, a management
the firm's affairs resting in the hands of an executive committee or managing partner.\textsuperscript{54}

Indeed, the practice and the business of law have changed in the twenty years since Justice Powell's concurring opinion in \textit{Hishon v. King \& Spalding}.\textsuperscript{55} Justice Powell stated that "[t]he relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement . . . or consent among the partners."\textsuperscript{56} Today, instead of the common law partner/partnership relationship, a partner may have a relationship with her law firm that resembles the common law master-servant relationship. Law firms have developed multi-tiered partnerships "to keep well trained lawyers who understand the culture and clients of the law firm" and "to provide . . . a consistent compensation package with benefits to people who do not have the talent or capabilities to materially affect the revenues of the firm."\textsuperscript{57} Other partnerships have increased in size and have limited the rights of partners to fully participate in the management of the partnership.\textsuperscript{58} Because of these changes, courts should exercise jurisdiction over an equity partner's discrimination claim if the evidence shows that the equity partner is unable to eliminate the unlawful discriminatory conduct, regardless of the firm's organizational structure or its size.

Recognizing that partnerships no longer operate in the manner that Justice Powell suggested in \textit{Hishon}, courts correctly refuse to find the "partner" label dispositive in determining whether jurisdiction exists over a partner's discrimination claim against the partnership. In \textit{Simpson v. Ernst \& Young},\textsuperscript{59} the plaintiff, a managing partner in a 2,200-member partnership, sued his employer, an accounting firm, for allegedly violating the Age Discrimination in Employment Act\textsuperscript{60} committee or a managing partner would assume responsibility for the decision-making process).

\textsuperscript{54} \textit{See} Sidley Austin, 315 F.3d at 702-03 (finding that Sidley Austin is a "partnership of more than 500 partners in which all power resides in a small, unelected committee" that has thirty-six members).
\textsuperscript{55} 467 U.S. 69, 79-81 (1984) (Powell, J., concurring) (stating that an associate could bring a Title VII action against the law firm partnership for failing to promote her to partner).
\textsuperscript{56} Id. at 80 (Powell, J., concurring).
\textsuperscript{57} Cobb, \textit{supra} note 6, at 10.
\textsuperscript{58} \textit{See}, e.g., Simpson v. Ernst \& Young, 100 F.3d 436, 442 (6th Cir. 1996) (finding that a partner in a firm with almost 2,200 "partners" lacked the ability to affect partnership policy and other meaningful attributes of being a partner).
\textsuperscript{59} 100 F.3d 436 (6th Cir. 1996).
\textsuperscript{60} 29 U.S.C. §§ 621-634 (2000).
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("ADEA"), Employment Retirement Income Security Act\(^{61}\) ("ERISA"), and state laws prohibiting workplace discrimination.\(^{62}\) The district court denied the accounting firm’s motion for summary judgment, finding that the plaintiff was an employee under laws prohibiting workplace discrimination.\(^{63}\) The Sixth Circuit affirmed, concluding that the evidence showed that "[the plaintiff] had no bona fide ownership interest, no fiduciary relationship, no share in the profits and losses, no significant management control, no meaningful voting rights, no meaningful vote in firm decisions, and no job security."\(^{64}\) Consequently, the plaintiff possessed none of the "meaningful attributes of being a partner."\(^{65}\)

In reaching its conclusion, the Sixth Circuit stated there was no substantive conflict between the "economic realities" test and common law agency principles.\(^{66}\) The court recognized that "the underlying common denominator of the employer/employee rubric [is] the employer’s ability to control job performance and employment opportunities."\(^{67}\) Relying on precedent, the Sixth Circuit stated that the "employer’s ability to control the job performance and the employment opportunities of the plaintiff is the most important factor" in determining whether the plaintiff was a partner or an employee.\(^{68}\) A partner is not entitled to employee status if the partner has equal right to manage the business's affairs, has apparent authority to bind the business contractually, has the power to subject the business to liability for torts committed within the scope of the business, is compensated based on the business's profits, and is personally liable for the business's debts.\(^{69}\) In this instance, a court would not have jurisdiction to hear the partner's discrimination claim against the partnership because in theory the meaningful attributes of being an equity partner should afford protections against partnership discrimination.\(^{70}\)

The Ninth Circuit also addressed whether a partner fell within the statutory definition of employee in *Strother v. Southern California...*
In *Strother*, the plaintiff was a physician-partner in a partnership that had more than 2,400 partners. The plaintiff sued the partnership under state discrimination laws. The district court dismissed the plaintiff’s discrimination claims, holding that she was not entitled to employee status because she was a partner. The Ninth Circuit reversed and remanded, holding that the district court erred in deciding that the plaintiff was a partner based solely on the complaint, the partnership agreement, and the fact that the partnership labeled the plaintiff a partner. Instead, the Ninth Circuit required the district court to analyze the partnership’s economic structure and the manner in which the partnership operated to determine whether the plaintiff was entitled to employee status. The Ninth Circuit reasoned that the true nature of the partnership could not be determined without answering questions about “how the partnership actually conduct[ed] itself.”

The First Circuit specifically addressed whether a partner engaged in the practice of law was entitled to Title VII protection in *Serapion v. Martinez*. In that case, the district court granted the defendants’ motion for summary judgment. It held that the plaintiff “was not an employee as that term had been developed in federal jurisprudence” and, therefore, she was not entitled to pursue a Title VII action against her former partners. The court affirmed, holding that the defendants were entitled to judgment as a matter of law because the undisputed evidence showed that the plaintiff was an equity partner. The First Circuit reasoned that the distinction between a partner and an employee must be based on a totality of the circumstances, stating that “[a] court must peer beneath the label and probe the actual circumstances of the person’s relationship with the partnership.”

71. 79 F.3d 859 (9th Cir. 1996).
72. Id. at 863, 867.
73. Id. at 863.
74. Id. at 864.
75. Id. at 867–68.
76. Id. at 867.
77. Id.
78. Serapion v. Martinez, 119 F.3d 982, 984 (1st Cir. 1997).
79. Id. at 986.
80. Id.
81. Id. at 992.
82. Id. at 990.
83. Id. at 987.
According to the First Circuit, in determining employee status under the totality of the circumstances, courts should consider compensation, ownership, and management. When examining compensation, a court should consider the individual’s investment in the firm, the individual’s ownership of firm assets, and the individual’s liability for the firm’s debts and obligations. When assessing ownership, the court should consider whether the individual’s “compensation is based on the firm’s profits.” Finally, when determining whether a management right exists, the court should consider the individual’s right to determine how the firm will operate.

Applying these factors to the *Serapion* case, the First Circuit found that the plaintiff’s status was more akin to that of an employer than an employee. The evidence showed that the plaintiff’s compensation was predicated in substantial measure on the firm’s profits; she received seventy-five percent of what the four named partners received. Additionally, the plaintiff served on the firm’s executive committee. The evidence also showed that the plaintiff was “a robust participant in important policy decisions; for example, the minutes reflect[ed] that she made several motions [on] the admission of new partners.” Given the totality of the circumstances, she was not entitled to employee status because there was no evidence from which a reasonable finder of fact could conclude that she was anything other than an equity partner with the meaningful attributes of being a partner.

The Sixth, Ninth, and First Circuits correctly rejected the Seventh Circuit’s holding that a partner could not bring a discrimination claim against a partnership. A partner should be entitled to employee status if the partner lacks the meaningful attributes of being a partner; however, when considering partner discrimination lawsuits, courts should not focus solely on the common law factors of compensation, ownership, and control. Instead, courts should focus on whether the

84. *Id.* at 990.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 992.
89. *Id.* at 991 n.6.
90. *Id.* at 992.
91. *Id.*
92. *Id.* at 992.
partner has suffered a distinct injury based on the partnership's violation of federal laws prohibiting workplace discrimination. This approach will ensure that partnerships comply with federal law prohibiting workplace discrimination and encourage equity partners to treat their fellow equity partners fairly.

B. The Status of Lawyer-Shareholders in a Professional Corporation

The importance of focusing on whether the partner has suffered a distinct injury based on the partnership's discriminatory conduct is underscored by the number of law firms electing to operate as professional corporations, limited liability partnerships, or limited liability companies. Rather than finding a professional corporation analogous to a partnership, the Supreme Court, in Clackamas Gastroenterology Associates, P.C. v. Wells, adopted a new test for determining whether a professional corporation shareholder falls within the statutory definition of an employee under laws prohibiting workplace discrimination. In a 7-2 decision resolving a split among the circuits, the Supreme Court held that whether a shareholder is an employee depends on whether the shareholder is subject to the professional corporation's control. The circuits had developed two tests for determining whether courts had jurisdiction to hear a discrimination claim against a professional corporation, each test having dramatically different results.

The first test focused on the economic realities of the workplace rather than the organizational form of the business. Under this test, courts examined the relationship between the business entity and the shareholders to determine whether the shareholders were employees.

94. See Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who would otherwise be barred by prudential standing rules.").

95. In Texas, for example, more than 1,200 law firms, including all of the state's largest firms, elected to become L.L.P.s within one year after the limited liability partnership act was enacted. Robert W. Hamilton, Registered Limited Liability Partnerships: Present at the Birth (Nearly), 66 U. COLO. L. REV. 1065, 1065 (1995).


97. Id. at 444 n.3.

98. Id. at 468.

99. Id. at 442–44 (following Hyland v. New Haven Radiology Assoc's., P.C., 794 F.2d 793 (2d Cir. 1986)). Hyland held that professional corporation shareholders were per se employees for purposes of laws prohibiting workplace discrimination and refused to follow EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984), which focused on the economic relationship between the shareholders. Hyland, 794 F.2d at 797–98.
The leading case using this test was *EEOC v. Dowd & Dowd, Ltd.*, \(^{100}\) a Seventh Circuit opinion. In *Dowd*, the plaintiff brought a Title VII lawsuit against a professional corporation engaged in the practice of law. \(^{101}\) Under Title VII, employers with fewer than fifteen employees are not required to comply with its provisions. \(^{102}\) In deciding whether the court had jurisdiction to hear the plaintiff's discrimination claim, the Seventh Circuit had to determine whether the professional corporation had the requisite number of employees. \(^{103}\) The professional corporation had three attorney-shareholders; if the shareholders were not counted as employees, the plaintiff’s Title VII claim failed as a matter of law. \(^{104}\) The district court dismissed the plaintiff’s claim, holding that the law firm did not have the requisite number of employees. \(^{105}\) The Seventh Circuit affirmed, reasoning that "[t]he role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation." \(^{106}\) The Seventh Circuit stated that "[t]he economic reality of the professional corporation . . . is that the management, control, and ownership of the corporation is much like the management, control and ownership of a partnership." \(^{107}\) The Seventh Circuit concluded that professional corporation shareholders should not be treated differently than partners in a partnership. \(^{108}\) Under this analysis, professional corporation shareholders did not fall within the statutory definition of employees.

The second test placed form over substance in determining whether professional corporation shareholders and directors were employees under federal laws prohibiting workplace discrimination. Under this test, the decision to incorporate made shareholders and directors per se employees. \(^{109}\) *Hyland v. New Haven Radiology Associates, P.C.* \(^{110}\) was the leading case that held that shareholders were employees for purposes of laws prohibiting workplace discrimination. In *Hyland*, the plaintiff, an officer and director of a professional corporation engaged in the practice of medicine, sued the corpora-
tion, alleging violations of the ADEA. The plaintiff averred that he was forced to resign as an employee, officer, and director because he was fifty-one years of age. The district court granted the corporation's motion for summary judgment. The district court found that, despite calling itself a corporation, the corporation was a de facto partnership. As such, the plaintiff lacked standing to pursue his age discrimination claim because a partner is not an employee. The Second Circuit reversed and remanded, holding that the district court erred as a matter of law in applying the "economic realities" test. Instead, the court held that because the doctors chose to incorporate as a professional corporation, the aggrieved shareholder had standing as an employee to bring an ADEA claim. The Second Circuit acknowledged the generally accepted principle that "the benefits of the antidiscrimination statutes . . . do not extend to those who properly are classified as partners[.]", but found that individuals who make "the election to incorporate . . . should not now be heard to say that their corporation is 'essentially a medical partnership among co-equal radiologists.'" Thus, under this analysis, professional corporation shareholders fell within the statutory definition of employee.

In Wells, the Supreme Court resolved this split among the circuits but refused to adopt either test. Instead, the Supreme Court required courts to consider several factors in determining whether a shareholder should be counted as an employee when trying to decide if the professional corporation has the requisite number of employees to trigger application of laws prohibiting workplace discrimination. The Wells plaintiff sued the defendant, a professional corporation engaged in the practice of medicine, under the Americans with Disabilities Act ("ADA"). Employers with fewer than fifteen employees

111. Id. at 794; 29 U.S.C. § 623(a) (2000).
112. Hyland, 794 F.2d at 794.
113. Id.
114. Id.
115. Id.
116. Id. at 794, 798.
117. Id. at 798.
118. Id. at 797.
119. Id. at 798 (quoting affidavit in support of defendant's motion for summary judgment).
121. Id. at 450.
123. Wells, 538 U.S. at 442.
are not required to comply with the ADA. The Supreme Court considered whether the shareholders should be considered employees for purposes of this exception. The ADA only applied in Wells if the four physician-shareholders fell within the statutory definition of "employee." Like Title VII, the ADA defines "employee" as an "individual employed by an employer." The defendant moved for summary judgment, arguing that it did not have the required number of employees to trigger the ADA's application because the physician-shareholders were analogous to partners. The physicians exercised full control over the medical practice, shared the practice's profits, and were jointly and severally liable for medical malpractice claims.

The district court granted the defendant's motion for summary judgment. Applying the "economic realities" test, the district court looked beyond the organizational form of the medical practice and focused on whether the shareholders held an ownership interest in the practice, received profit-based compensation, and possessed the right to control and manage the practice. The district court concluded that the shareholders were analogous to partners in a partnership. Thus, the defendant did not have the requisite number of employees to trigger the ADA's application.

The Ninth Circuit reversed, holding that "the use of the corporate form, including a professional corporation, 'precludes any examination designed to determine whether the entity is in fact a partnership.'" The Ninth Circuit reasoned that the physicians could not "reap the tax and civil liability advantages" of incorporation and at the same time argue that they were analogous to partners in a partnership "to avoid liability for unlawful discrimination." The Ninth Circuit followed the Second Circuit, which held that professional corporation shareholders were barred from asserting that they

125. Wells, 538 U.S. at 443.
126. Id. at 442.
128. Wells, 538 U.S. at 442.
129. Id. at 451.
130. Id. at 442.
131. Id. (citing EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984).
132. Id.
133. Id. at 442.
135. Id.
were partners.\textsuperscript{136} The Ninth Circuit found that the shareholders were referred to as employees under their employment agreements with the professional corporation. Based on the decision to incorporate and the employment agreements, "'any inquiry respecting partnership status [was] irrelevant.'"\textsuperscript{137}

The Supreme Court rejected both tests and adopted the guidelines that the EEOC uses to determine whether a partner is an employee. Using the same test, the Supreme Court concluded that whether a professional corporation shareholder is an employee depends upon whether a professional corporation controls the means and manner of the shareholder's performance or whether the shareholder acts independently and participates in the management of the professional corporation.\textsuperscript{138} Under \textit{Wells}, courts are to consider the following factors in determining whether a shareholder is an employee:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. Whether, and, if so, to what extent the organization supervises the individual's work;
3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements and contracts; and
6. Whether the individual shares in the profits, losses, and liabilities of the organization.\textsuperscript{139}

Under the control test, neither the individual's label nor the employment agreement is outcome determinative.\textsuperscript{140} Instead, the focus is on the relationship between the parties and the enterprise.\textsuperscript{141} In adopting the EEOC guidelines, the Supreme Court relied on the common law test used to determine master-servant relationships.\textsuperscript{142} Under this test, whether a person is a servant depends upon the master's control of the person in the performance of the person's duties for the master.\textsuperscript{143} Consistent with common law principles of agency, the Su-

\begin{itemize}
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id. (quoting \textit{Hyland}, 794 F.2d at 798).
\item \textsuperscript{138} \textit{Wells}, 538 U.S. at 449–50.
\item \textsuperscript{139} Id. (quoting BNA, \textit{EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE MANUAL} § 2, at 605:0009 (2002)).
\item \textsuperscript{140} Id. at 450.
\item \textsuperscript{141} Id. at 451.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. at 448.
\end{itemize}
LAW FIRM PARTNERS AND DISCRIMINATION

The Supreme Court recognized that the determination of whether a shareholder is an employee should be made on a case by case basis. Thus, a court should not count a professional corporation shareholder as an employee if the shareholder operates independently and manages the corporation. The Supreme Court remanded, requiring the district court to apply the new test and make evidentiary findings to determine whether the shareholders were subject to the professional corporation's control.

Under the control test, non-equity partners will be entitled to bring discrimination claims against a partnership because their compensation is not based on the firm's profits, they do not have an ownership interest in the firm, and they lack a meaningful voice in firm management. The control test, however, does not address whether equity partners are entitled to bring discrimination claims against their partnerships. The Wells decision affects those situations in which courts are trying to determine whether small professional corporations engaged in the practice of medicine, law, or accounting are subject to federal laws prohibiting workplace discrimination. Courts, however, should not apply Wells in such a way as to ignore Congress's mandate to eliminate discrimination in the workplace.

C. The Elimination of Workplace Discrimination

Allowing equity partners to pursue discrimination claims if they are victims of unlawful workplace discrimination is consistent with Congress's intent to eliminate workplace discrimination. Neither Title VII's plain language nor its legislative history suggest that Congress intended professionals, such as lawyers, doctors, or accountants, to work in sexually or racially hostile environments. An equity law partner should be entitled to employee status when pursuing a discrimination claim against her law firm because Congress enacted

144. Id. at 450 n.10.
145. Id. at 449.
146. Id. at 451.
147. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1972) (explaining that Title VII's language shows that "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameters of such nefarious activities... knowing that constant change is the order of our day and that seemingly reasonable practices of the present can easily become the injustices of the morrow"); Pub. L. No. 102-166, tit. II, 105 Stat. 1081 (1991) (codified as amended at 42 U.S.C. § 2000e (2000)) (finding that women and minorities are underrepresented in business management and decision-making).
these laws to eliminate workplace discrimination.\textsuperscript{148} Determining whether an equity partner should be entitled to protection under federal laws prohibiting workplace discrimination requires a two-step process.\textsuperscript{149} The first step is to examine the text of the pertinent statute.\textsuperscript{150} If the text of the statute unambiguously discloses Congress's intent in enacting the statute, then the inquiry ends.\textsuperscript{151} If, however, the statute is ambiguous or silent on the issue, the second step is to construe the statute's words together with the surrounding circumstances, taking care not to insert what Congress omitted or omit what Congress inserted.\textsuperscript{152}

It is a well-established principle that partnerships are subject to laws that prohibit workplace discrimination.\textsuperscript{153} Title VII prohibits an employer from discriminating against an employee on the basis of "race, color, religion, sex, or national origin."\textsuperscript{154} It defines an employer as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."\textsuperscript{155} The statutory definition of person includes a partnership.\textsuperscript{156} Thus, Title VII applies to partnership decisions if those decisions are based on statutorily impermissible reasons.\textsuperscript{157}

In \textit{Hishon v. King & Spalding}, the Supreme Court addressed whether an associate could bring a Title VII action against a partnership that was engaged in the practice of law.\textsuperscript{158} The plaintiff-associate

\begin{thebibliography}{99}
\item 151. \textit{Chevron}, 467 U.S. at 842.
\item 153. 42 U.S.C. § 2000e(a) (2000) (stating that person includes a partnership); \textit{Hishon v. King & Spalding}, 467 U.S. 69, 74–75 (1984) (finding that nothing in the statute or the legislative history supports the argument that partnerships are exempt from federal laws prohibiting workplace discrimination).
\item 154. 42 U.S.C. § 2000e-2(a) (1).
\item 155. \textit{Id.} § 2000e(b).
\item 156. \textit{Id.} § 2000e(a).
\item 157. \textit{Hishon}, 467 U.S. at 78–79.
\item 158. \textit{Id.} at 71.
\end{thebibliography}
alleged that the law firm violated Title VII because it refused to promote her from associate to partner on account of her sex.\textsuperscript{159} The district court dismissed the associate's law suit, holding that the associate's complaint failed, as a matter of law, because Title VII did not apply to partnership promotions.\textsuperscript{160} The Eleventh Circuit affirmed,\textsuperscript{161} but the Supreme Court reversed and remanded.\textsuperscript{162} It held that the district court erred in dismissing the associate's complaint because the allegations were sufficient to state a cognizable claim under Title VII.\textsuperscript{163} The Supreme Court reasoned that compensation, terms, conditions, and privileges of employment include the opportunity to become a partner; therefore, partnership promotions cannot be based on an individual's race, color, religion, sex, or national origin.\textsuperscript{164} The Supreme Court found that the associate's allegations, if proved at trial, were sufficient to show that the opportunity to become a partner was a term, condition, or privilege of the associate's employment contract; therefore, "partnership consideration must be [made] without regard to [the associate's] sex."\textsuperscript{165}

While Title VII prohibits partnerships from engaging in workplace discrimination, it does not expressly address whether a partner is entitled to the remedial provisions of the statute when the partnership engages in discriminatory conduct against individual partners. Section 2000e(f) of Title VII defines an employee as "an individual employed by an employer," a definition that provides very little assistance in determining who is entitled to enforce Title VII's remedial provisions.\textsuperscript{166} Because Title VII does not expressly define the term "employee," it is presumed that Congress intended courts to use the common law agency definition of "employee."\textsuperscript{167} Under common law agency principles, a partner can be an employee within the statutory definition of section 2000e(f) because a partner is a servant of the partnership if the partner "is in active management of the [partnership] business or is otherwise regularly employed in the [partnership] business."\textsuperscript{168}

\begin{thebibliography}{9}
\bibitem{159} Id. at 72–73.
\bibitem{160} Id.
\bibitem{161} Id.
\bibitem{162} Id. at 79.
\bibitem{163} Id. at 76.
\bibitem{164} Id. at 75.
\bibitem{165} Id. at 76.
\bibitem{166} See 42 U.S.C. § 2000e(f) (2000); Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) (stating the definition of employee is "a turn of phrase which chases its own tail").
\bibitem{168} \textit{Restatement (Second) of Agency} § 14A (1958).
\end{thebibliography}
This interpretation is consistent with the enforcement provision of Title VII. Section 2000e-5(f)(1) states that "a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the unlawful employment practice." Under principles of federal jurisprudence, to qualify as an aggrieved person, a plaintiff must be a member of a protected class for whom Congress enacted the statute. It therefore follows that an equity partner should be able to state a discrimination claim against a partnership if the partnership singles out the equity partner for adverse employment action because of the equity partner's race, color, religion, sex, or national origin. The primary purpose of Title VII was to create a work environment "free from discriminatory intimidation, ridicule, and insult." The legislative history of Title VII suggests that Congress wanted to remedy the effects of discrimination in the workplace. Congress believed that Title VII would eliminate the artificial barriers that "prevented [African-Americans] from securing jobs with a future."

170. The Supreme Court has yet to address whether a Title VII plaintiff must satisfy both Article III and prudential standing requirements. Nevertheless, Article III requires the plaintiff to allege and prove that (1) the plaintiff suffered actual or threatened harm; (2) the defendant's illegal conduct caused the plaintiff harm; and (3) a judgment in favor of the plaintiff will redress the harm. See Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979).
171. Cf. Hishon v. King & Spalding, 467 U.S. 69, 77-78 (1984) (noting that if Congress wanted to exempt partnership decisions from the provisions of Title VII, it would have expressly granted the partnership immunity from the Act's requirements). Adverse employment action includes "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
173. The primary goal of Title VII was the integration of African-Americans into the economic mainstream of American society. 110 Cong. Rec. 6548 (1964). Senator Humphrey recognized that African-Americans were relegated to "unskilled and semiskilled jobs." Id. at 7379-80. When Congress enacted Title VII, the nonwhite unemployment rate was approximately 124 percent higher than the white unemployment rate. Id. at 7204. Congress saw employment discrimination as a social malaise and a social situation that the Nation should not tolerate. Id.
174. Congress clearly intended to eliminate barriers that were preventing African-Americans from succeeding in the workplace. Id.

What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?
Congress believed that the solution to eliminating the artificial barriers was to "to open employment opportunities to [African-Americans] in occupations that had been traditionally closed to them."\textsuperscript{175} Congress further believed that the enactment of federal legislation dealing with workplace discrimination would "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination."\textsuperscript{176} Likewise, when Congress amended the Civil Rights Act, it found that artificial barriers continued to prevent women and minorities from holding management and decision-making positions in business.\textsuperscript{177} It is, therefore, logical to conclude that Congress intended to provide unlimited access to statutory remedies to anyone who needed protection from workplace abuses, provided the employer did not fall within the small business exemption to the statute.\textsuperscript{178}

\textit{Id.} at 6547.

Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a [person's] education, or that of his [or her] children. If [the person's] children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?

\textit{Id.} at 6552 (statement of Sen. Humphrey).

175. \textit{Id.} at 6548.


178. As Justice O'Connor stated during the \textit{Wells} oral argument, Congress intended Title VII's small business exemption to apply to "really small businesses." Transcript of Justice O'Connor's Questions, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (No. 01-1435), 2003 WL 840129, at *19. See \textit{Papa v. Katy Indus., Inc.}, 166 F.3d 937 (7th Cir. 1999) (explaining that Congress intended "to spare very small firms from the potentially crushing expense of mastering the intricacies of antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail"). Similarly, courts should assess whether the law firm falls within the small business exemption. For example, a partner should not be able to sue the law firm under Title VII if the firm is a small partnership with each partner having equal rights in the control and management of the firm or if an executive committee or managing partner does not exercise primary control over partnership decisions.
Based on Congress's intent in enacting Title VII, courts should liberally construe these provisions to protect the victims of workplace discrimination and strictly construe exceptions that would undermine their application. A narrow interpretation of the term "employee" that excludes equity partners who are the victims of unlawful workplace discrimination is inconsistent with a statute that allows any aggrieved person to enforce it. Thus, a partner should be included in the statutory definition of "employee" based on the partner's status as an aggrieved person.

II. Partners Without Power Are Entitled to Protection From Discrimination

The traditional partnership structure in which the partners make decisions through common agreement or consent no longer exists in many law firms today. In Hishon, Justice Powell acknowledged the unique relationship among law firm partners who are responsible for the distribution of profits, compensation, promotion, collections, and the effective and ethical representation of clients. In his concurring opinion, Justice Powell stated that "[t]he relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement ... or consent among the partners." For a number of reasons, however, most law firms have abandoned traditional partnerships as the basis for their organization's structure. First, a growing trend is for law firms to have two types of partners: equity and non-equity. Non-equity partners do not have an ownership interest in the firm or a vote in how the firm operates. "A decade ago, only a dozen of the top firms had two-

179. See Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 446 n.6 (2003); EEOC v. First Catholic Slovak Ladies Ass’n, 694 F.2d 1068, 1070 (6th Cir. 1982) (“When interpreting the term ‘employee’ in social welfare legislation such as the ADEA, Title VII, the Fair Labor Standards Act and the National Labor Relations Act, courts have used a broad definition so as to effectuate the stated purposes of these Acts.”).


181. Adams & Albert, supra note 52, at 1133 (citing 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").


183. Id. at 80 (Powell, J., concurring).

184. Hamilton, supra note 95.

185. See Cobb, supra note 6, at 10; Curriden, supra note 7, at 18; Steven T. Taylor, Beware Wholesale Associate Layoffs, Beware Unproductive Partners, Consider Two Tiers, OF COUNSEL, Feb. 2002, at 3.

186. Curriden, supra note 7, at 19.
tiered partnership tracks. Today, more than half of the nation's 100 largest firms openly boast of such a creature. Legal consultants say most of the rest have a two-tiered partnership track... . 187 Second, a number of law firms have abandoned partnerships in favor of professional corporations. Finally, many large firms delegate management to a managing partner and an executive committee, which are responsible for overseeing the hiring, firing, promotion, and compensation of the attorneys in the firm. 188

A. The Control Test and Attorney-Shareholders

The control test as applied in Wells focused on whether a small professional corporation was an employer under the ADA. 189 The Supreme Court did not address whether a shareholder could hold a professional corporation liable for violating federal laws prohibiting workplace discrimination. 190 The inevitable consequence of Wells, however, is that a shareholder will not be able to hold a professional corporation liable for violating federal laws prohibiting workplace discrimination even though the professional corporation has the requisite number of employees, the shareholder is a member of a protected class, and the shareholder is a victim of unlawful workplace discrimination.

The Seventh Circuit's decision in Schmidt v. Ottawa Medical Center, 191 which was decided before Wells, illustrates this principle. Schmidt held that professional corporation shareholders were not entitled to bring discrimination claims against professional corporations if they had equal rights to manage the business, their compensation was based on the business's profits, and they had significant control over their daily assignments. 192 In Schmidt, the plaintiff, a physician-shareholder in a closely-held professional corporation engaged in the prac-

187. Id.
188. See EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 702-03 (7th Cir. 2002). See generally Gibbons, supra note 53, at 71 (predicting that as law firms increased in size, they would centralize management rather than having all partners involved in the decision-making process).
190. During oral argument, Justice O'Connor specifically stated that the Court was "not looking to see if [the shareholders] themselves [were] covered under the ADA in this case." Clackamas Gastroenterology Assocs., P.C. v. Wells, No. 01-1435, 2003 WL 840129, at *19 (U.S. Feb. 25, 2003) (oral argument).
191. 322 F.3d 461 (7th Cir. 2003).
192. See id. at 467.
tice of medicine, sued the medical center for allegedly violating the ADEA. The district court granted the medical center’s motion to dismiss, finding that the relationship between the plaintiff and the medical center was analogous to a partnership. The Seventh Circuit affirmed. The evidence showed that the plaintiff was a shareholder and a director of the medical center. He had an equal right to vote on compensation plans, amendments to the employment agreements, and the hiring and firing of non-shareholder doctors. The plaintiff received a base salary and was eligible to share in the medical center’s profits. The Seventh Circuit concluded that, regardless of whether it used the “economic realities” test or adhered to common law agency principles, the plaintiff’s “role was akin to that of a bona fide partner-employer rather than that of an employee.” The Seventh Circuit rejected the plaintiff’s argument that he relinquished control over his employment because his employment agreement vested sole authority of patient assignment in the medical center’s board. Rather, the Seventh Circuit found that the evidence showed that the plaintiff’s “employment agreement vest[ed] in him absolute authority for the treatment of his patients once assigned to him. Therefore, while [the plaintiff] may not possess sole authority over the conditions of his employment . . . , he [did] exercise significant control” over his practice. Thus, the Seventh Circuit ignored the statutory purpose of the ADEA, which is the elimination of workplace discrimination on the basis of age. Instead, the Seventh Circuit focused on whether the plaintiff held the same economic attributes and ownership interest as a partner in a traditional common law partnership.

The outcome of whether a shareholder in a large professional corporation may sue the professional corporation for violating laws prohibiting workplace discrimination remains the same after the Wells decision as before it—a court lacks jurisdiction to hear the shareholder’s discrimination claim because the shareholder is not subject to the control of the professional corporation. Under the control test

193. Id. at 462.
194. Id.
195. Id.
196. Id. at 467.
197. Id. at 462, 467.
198. Id. at 462–63.
199. Id. at 466.
200. Id. at 467.
201. Id.
202. Id. at 466.
set forth in Wells, courts assess whether a shareholder falls within the statutory definition of employee by continuing to look at concepts of compensation, management, and ownership. By focusing on these three factors, professional corporations that do not fall within the small business exception of laws prohibiting workplace discrimination may engage in discriminatory conduct against their shareholders without having to consider whether such conduct could withstand scrutiny under these laws.

B. The Control Test and Non-Equity Partners

Under the control test, non-equity partners are able to hold law firm partnerships liable for unlawful workplace discrimination. The Serapion factors of compensation, management, and control are moot in determining whether a non-equity partner qualifies for Title VII protection because, by definition and treatment, these partners do not possess the meaningful attributes of being an equity partner. Under this system of partnership, associates who become non-equity partners usually receive an increase in compensation without a right to share in the firm’s profits. The professional benefits of being a non-equity partner include protection from the “risk of [a] lower income in poor performance years.” Non-equity partners also receive the benefit of “being held out to the public and clients as a partner of the firm.”

The biggest advantage that non-equity partners have over equity partners, however, is access to the remedial provisions of federal laws prohibiting workplace discrimination. For example, return to the story of Abby. Assume Abby’s law firm has a two-tiered partnership, and Abby is a non-equity partner. As a non-equity partner, Abby receives a guaranteed salary of $150,000. Abby does not own any of the firm assets, and she is not liable for the firm’s debts or obligations. With respect to her work, Abby has a solid practice and supervises associates who work with her on cases; however, Abby’s ability to accept new clients or projects is subject to the approval of the firm’s executive committee. Senior partners continue to assign Abby cases to work on and supervise her work on those cases.

Under the control test, the court has jurisdiction to hear Abby’s Title VII claim. First, unlike equity partners, Abby’s compensation is

204. See Curriden, supra note 7, at 18.
205. Cobb, supra note 6, at 11.
206. Id. at 12.
not based on the firm's profits. Second, Abby does not have an ownership interest in the firm. Third, the partnership controls whether Abby is able to expand her practice because it determines which clients she can accept as firm clients and what projects will receive the firm's stamp of approval. As such, the firm dictates the parameters of Abby's work. Additionally, Abby does not have absolute authority over the cases that senior partners assign to her. Finally, and most importantly, Abby is not entitled to vote on internal firm policy. Even though Abby is held out to clients and the public as a partner, she lacks the meaningful attributes of being an equity partner. Thus, under the control test, Abby falls within Title VII's statutory definition of employee.

The practical effect of the control test is that the multi-tiered partnership has consequences beyond "keep[ing] well trained lawyers who understand the culture and clients of the law firm." It divides partners into two classes: those who have access to the remedial provisions of laws prohibiting workplace discrimination and those who must suffer the consequences of being forced to work in a sexually or racially hostile environment without legal recourse.

C. The Control Test and Equity Partners

The control test does not have any substantive effect on an equity partner's ability to bring a Title VII claim against a partnership; equity partners are forced to work in a hostile environment without legal recourse. Under the control test, contrary to Congress's intent to eliminate workplace discrimination, the Serapion factors of compensation, management, and control remain outcome determinative. After the Wells decision, the District Court for the Northern District of Illinois applied the control test to determine whether a partner engaged in the practice of law was entitled to employee status under Title VII and the ADEA. In Solon v. Kaplan, the plaintiff, himself a partner, sued the individual partners and law firm partnership for allegedly forcing him out of the law firm "based on his age and because of his investigation of two sexual harassment incidents." The district court granted the defendants' motion for summary judgment.

207. Id. at 10.
210. Id. at *2.
211. Id. at *1.
cause the evidence showed that the plaintiff was an equity partner. Like the Serapion plaintiff, the Solon plaintiff received a share of the firm’s income, was liable for the firm’s debts, individually contributed capital to the firm, and possessed managerial responsibilities with an equal vote in how the firm would operate. Thus, the district court found that there was “no genuine issue as to any material fact that [the plaintiff] was a partner” and that “no reasonable jury could find that [the plaintiff] was an employee.”

As the Solon decision demonstrates, under the control test, equity partners do not have access to the remedial protections of federal laws prohibiting workplace discrimination because courts focus on the attributes of being an equity partner and ignore who is entitled to enforce the provisions of the statute against a respondent for alleged violations of the law. Thus, if Abby were an equity partner, she would not be protected by Title VII; rather, she would be forced to tolerate Rob’s advances.

The control test fails to address a significant question: why should equity partners or professional corporation shareholders be denied access to the protection of federal laws prohibiting workplace discrimination where the intent of Congress in passing such laws was to remedy such discrimination?

An equity partner should be able to hold her law firm liable for violating federal laws prohibiting workplace discrimination because the purpose of these laws is to eliminate discrimination based on immutable characteristics such as sex or race. Further, the legislative history suggests that Congress intended professionals to have access to the remedial protection of federal laws prohibiting workplace discrim-

212. Id. at *5.
213. Id. at *4-*5.
214. Id.
215. Compare Simpson v. Ernst & Young, 100 F.3d 436, 442 (6th Cir. 1996) (holding that a partner is entitled to employee status if the partner does not possess the meaningful attributes of being a partner), and Serapion v. Martinez, 119 F.3d 982, 988 (1st Cir. 1997) (holding that a partner is not entitled to employee status if the partner owns and manages the business and has the right to share in the business’s profits), with 42 U.S.C. 2000e-5(f)(1) (2000) (expressly stating that an aggrieved person has standing to bring a discrimination claim against the respondent named in the EEOC charge).
216. See EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 702 (7th Cir. 2002) (“Neither party [before the court] addressed why some or all members of the partnership should . . . be deemed employers and so placed outside the protection of [federal anti-discrimination] laws.”).
Without the protection of these laws, however, equity partners do not have any power or control to force their fellow equity partners to eliminate unlawful employment practices. Contrary to the control test, an analysis of whether an equity partner may pursue a discrimination claim against the law firm should focus on (1) whether the partnership is a de facto corporation, and, ultimately, (2) whether the partner has the power to force the firm to take remedial action to eliminate the discrimination. Thus, the critical inquiry should be whether an equity partner is more akin to a corporate executive because she has the power to force the firm to take remedial action to eliminate discrimination or whether the partner is more akin to an employee, who lacks such power.219

D. Partnerships as De Facto Corporations

Ownership involves the power to control and the ability of co-owners to protect themselves from unlawful workplace discrimination.220 The assessment of whether a partner has the power to control or eliminate the discrimination should not be based on the right to share in the firm’s profits. Instead, the right to pursue a discrimination claim should be based on whether the equity partner is a victim of unlawful workplace discrimination. Courts reason that a partner should not be allowed to sue a partnership because partnership law gives [partners] 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 [partners] should be allowed to discriminate, just as individuals are allowed to discriminate in their purely personal relations.221

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219. Cf. Harold Gill Reuschlein, The Law of Agency and Partnership 250 (2d ed. 1990) ("Many decisions permit management to be centralized in one partner, or a small committee of partners. Where this is done, co-ownership is still found to exist frequently but only if other factors are consistent with partnership." (emphasis added)).

220. Schmidt v. Ottawa Medical Ctr., P.C., 322 F.3d 461, 466 (7th Cir. 2003) ("It is beyond reproach that both agency law principles and statutory purpose would consider control over employment opportunities to be a relevant factor [in determining whether a partner is an employee].").

221. See Sidley Austin, 315 F.3d at 702; Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring) ("The relationship among partners differs markedly from that between employer-employee—including that between the partnership and associates.").
But even Justice Powell, who believed that equity partners should not be allowed to bring Title VII actions against their partnerships, conceded that "'invidious private discrimination . . . has never been accorded affirmative constitutional protections.'"222

As law firms have abandoned traditional partnership structures and become larger, the inquiry into whether an equity partner is entitled to protection under laws prohibiting workplace discrimination should focus on whether the law firm partnership is a de facto corporation.223 The Seventh Circuit addressed whether a partnership was a de facto corporation in *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood*.224 In that case, the EEOC filed a motion for entry of an order compelling Sidley Austin to produce documents relating to the demotion of thirty-two senior equity partners to of counsel or senior counsel positions.225 The district court entered the order, and the law firm appealed.226 The Seventh Circuit vacated and remanded.227 The Seventh Circuit held that Sidley Austin was required to produce documents so the EEOC could determine whether the ADEA "arguably" protected the demoted partners.228 The Seventh Circuit recognized that one of the basic partnership benefits is the ability of equity partners to protect themselves from the partnership's unlawful discriminatory acts.229 The Seventh Circuit was concerned that in some partnership settings, such as the one before it, partners were defenseless without any power or control over their fates.230

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223. "'A de facto corporation is an apparent corporate organization asserted to be a corporation by its members and actually existing as such, but lacking the creative fiat of that State.'" *Di Francesco v. Kennedy*, 160 A. 72 (Conn. 1932) (citation omitted); see also *Sidley Austin*, 315 F.3d at 702-03 (finding that the law firm had more than 500 partners but that all the power resided in thirty-six members of a committee); *Reuschlein*, supra note 219. Courts consider the following factors in determining whether a corporate officer or director is entitled to employee status under laws prohibiting workplace discrimination: (1) whether a separate entity regularly employs the corporate officer or director; (2) whether the director has traditional employee duties and responsibilities; and (3) whether the director reports to someone higher in the organization. *EEOC v. Johnson & Higgins*, Inc., 91 F.3d 1529, 1539 (2d Cir. 1996).
224. 315 F.3d 696 (7th Cir. 2002).
225. *Id.* at 698.
226. *Id.* at 699.
227. *Id.* at 707.
228. *Id.*
229. See *id.* at 704 (stating that the basis for exempting partners from ADEA coverage is the presumption 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").
230. *Id.*
The Seventh Circuit acknowledged that Sidley Austin was a partnership. But the Seventh Circuit stated 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 federal antidiscrimination law is compelled to treat all the ‘partners’ as employees.” The Seventh Circuit compared the Sidley Austin partnership characteristics to those of a general corporation and found them substantially the same. Under partnership law, a partner may contractually bind the partnership. Likewise, the “employees of a corporation, when acting within the scope of their employment, regularly commit the corporation to contractual undertakings, not to mention tort liability.” A partner is also entitled to share in the firm’s profits; similarly, “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 fact that a partner serves on administrative committees for the partnership “does not distinguish them from executive employees in corporations. Corporations have committees and the members of the committees are [corporate] employees.” Finally, a partner has an ownership interest in the partnership; however, executive-level employees can also have an ownership interest in the corporation based on their ownership of corporate stock.

The most significant difference between a Sidley Austin partner and a corporate employee is that the Sidley Austin partner has unlimited liability for the firm’s debts, but “[i]s that enough to pin the partner tail on the donkey?” In deciding whether a partnership is a de facto corporation, the Seventh Circuit suggested that whether the demoted partners were nothing more than corporate employees depended, in part, on whether the partnership profits were “so concentrated in members of the executive committee, or in some smaller or larger set of partners, in relation to the profits that the executive committee allocated to [the demoted partners].”

231. *Id.* at 702.
232. *Id.* at 705.
233. *Id.* at 702-03.
234. *Id.* at 703.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 707.
court's examination of whether a partnership is a de facto corporation should not stop at compensation. Instead, the court should consider the EEOC guidelines that the Supreme Court adopted in *Wells*. A court should also consider whether the amount of control exercised by the equity partner is diluted by the size or structure of the firm and whether the equity partner lacks the power to eliminate the discrimination because the equity partner does not have the ability to make or affect internal firm policy.\(^{240}\)

Traditionally, when presented with small partnerships, courts held that partners were not entitled to protection under federal laws prohibiting workplace discrimination.\(^{241}\) But, in a large partnership, a partner's vote does not provide her with the ability to protect herself from discrimination.\(^{242}\) In a small partnership, each partner has the ability to block adverse partnership decisions by combining her votes with another partner.\(^{243}\) But in a large partnership, a partner controls "a minute fraction" of the partnership votes.\(^{244}\) In large partnerships, the inability to affect internal firm policy makes the partner more akin to an employee than an employer because the majority rules structure leaves the equity partner a defenseless victim of unlawful workplace discrimination.\(^{245}\) Thus, an equity partner should be entitled to the protection of laws prohibiting workplace discrimination if the equity partner can show that the size of the partnership precluded her from eliminating the discrimination because she controlled only a "minute fraction" of the partnership votes.


241. *Compare* Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1399 (11th Cir. 1991) (finding that the shareholder was one of four shareholders in the firm), EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1179 (7th Cir. 1984) (finding that the professional corporation had only three shareholders), and Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) (finding that the partnership had four partners), *with* Sidney Austin, 315 F.3d 696 (finding that the partnership had 500 partners), and Simpson v. Ernst & Young, 100 F.3d 436 (6th Cir. 1996) (finding that the plaintiff was a partner in one of the largest professional partnerships in the world), Aruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144 (S.D.N.Y. 1987) (finding that the partnership had 1,350 partners), and Jones v. Baskin, Flaherty, Elliott & Mannino, 670 F. Supp. 597, 601–02 (W.D. Pa. 1987) (holding that an attorney-shareholder was an employee because the evidence showed that the professional corporation was a large law firm with offices in several cities and with a board of directors who managed the firm).

242. *See* Strother, 79 F.3d at 868.


245. *See* Strother, 79 F.3d at 867–68.
III. Protecting Equity Partners from Partnership Discrimination

The term "employee" should have two different meanings depending upon the context in which it is used. Courts should liberally construe employee to include an equity partner or shareholder when determining whether partnerships or professional corporations that do not fall within the small business exception to Title VII have allegedly engaged in impermissible employment actions.246

This approach will prevent the inequitable result that occurred in Ballen-Stier v. Hahn & Hessen, L.L.P.247 In Ballen-Stier, the plaintiff, an equity partner, sued the law firm for violations of Title VII that occurred while she was an associate.248 She alleged that the defendant, one of her partners, created a hostile and abusive work environment based on his relentless sexual harassment that began while the plaintiff was an associate and continued after she became a partner.249 The New York Appellate Division held that the plaintiff could hold the law firm liable for discriminatory acts that occurred while she was an associate; however, her status as an equity partner barred her from holding the firm liable for discriminatory acts that occurred while she was a partner.250 To avoid the outcome in Ballen-Stier, courts should focus on the enforcement provision of Title VII rather than the plaintiff's status as an equity partner.

Allowing a partnership to discriminate against an equity partner based on the partner's race, sex, religion, age, disability, or national origin undermines the primary purpose of federal laws prohibiting workplace discrimination.251 It is also contrary to the national policy of preventing and eliminating unlawful employment practices.252 Courts should not interpret federal laws prohibiting workplace discrimination so as to allow law firms to ignore congressional and na-
tional mandates to end workplace discrimination. Holding law firm partnerships liable for discriminating against equity partners will encourage law firms to comply with federal laws prohibiting workplace discrimination. Thus, an equity partner should be entitled to pursue a discrimination claim against a law firm if the law firm failed to exercise reasonable care to prevent and correct the illegal discriminatory conduct.

While the control test may be helpful in determining whether the firm has a sufficient number of employees to give the court subject matter jurisdiction, it is insufficient for determining whether an equity partner or shareholder has standing to sue the law firm for violating a federal statute prohibiting workplace discrimination.

A. Keeping Pace with the New Partnership—Partner Protection Under the Revised Uniform Partnership Act

In determining whether an equity partner has standing to enforce the provisions of a particular statute prohibiting workplace discrimination, courts should focus on whether the equity partner is a member of a protected class, whether the equity partner has performed satisfactorily, whether the equity partner has suffered an adverse employment decision, and whether equity partners who are not members of a protected class received preferential treatment. This approach is consistent with Congress's intent to eliminate unlawful employment practices that prevent women and minorities from enjoying the benefits of a workplace free from discrimination. It is also consistent with current principles of partnership law.

In 1986, seventy-two years after the National Conference of Commissioners on United States laws proposed the UPA, an American Bar

253. Cf. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (reasoning that courts should interpret "employee" to include former as well as current employees because a more narrow construction would undermine the primary purpose of Title VII).
254. ABA Comm'n on Women, supra note 38, at 19–21.
256. ABA Comm'n on Women, supra note 38, at 20 (explaining that, while unlawful harassment persists in legal workplaces, most victims refuse to take action because they fear ridicule or retaliation).
258. See supra notes 173–79.
Association subcommittee recommended that the Commissioners revise the UPA to reflect changes in how partnerships operate. In 1992, the Commissioners proposed the Revised Uniform Partnership Act ("RUPA"). The RUPA expressly recognizes that a partnership has an independent legal identity distinct from the partners. Under the RUPA, a partner may sue the partnership in law and at equity. Section 405 states that a partner may maintain an action against the partnership or another partner, such as an accounting as to partnership business, to enforce a right under the RUPA, including sections 401, 403, and 404. Section 404 requires the partnership and its partners to "refrain from engaging in . . . a knowing violation of law." Thus, under the entity theory and the RUPA, a partner may sue the partnership if, like any other person subject to laws prohibiting workplace discrimination, the partnership knew of the discrimination and failed to take remedial action to eliminate it.

A partnership is also vicariously liable for torts that a partner commits in the course and scope of the partnership’s business or with the authority of her fellow partners. A partnership’s calculated inaction to a partner’s complaint of discrimination contemplates a knowing acceptance of a violation of federal law. Because federal and state laws prohibit workplace discrimination based on immutable characteristics, it would be a “striking limitation” of those laws to allow partners to ignore their requirements and freely discriminate against each other. Thus, courts should allow equity partners to pursue discrimination claims against their law firms if the other partners knew of and acquiesced to, or subsequently condoned, the discriminatory conduct.

263. Id.
264. Id. § 404(c) (1997).
265. BROMBERG & RIBSTEIN, supra note 41, §1.01, at 1–11.
268. It is a well-established principle of partnership law to impute notice to one partner to all of the other partners. UNIF. P'SHIP ACT OF 1914 § 12, 6 U.L.A. 275 (2001). See NLRB
B. Equity Partners and Standing

An equity partner should have standing to pursue a discrimination claim against the law firm because Congress granted a private right of action to any person who satisfies both Article III\(^{269}\) and prudential requirements.\(^{270}\) Federal courts are courts of limited jurisdiction,\(^{271}\) meaning that under Article III federal courts may hear only those disputes that the Constitution and Congress authorize them to hear.\(^{272}\) Even if federal courts have subject matter jurisdiction to hear the dispute, Article III limits their jurisdiction to deciding only actual cases or controversies.\(^{273}\) This limitation requires federal courts to determine whether the plaintiff has standing to pursue her cause of action in federal court.\(^{274}\) Thus, as a threshold matter, federal courts must decide "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant [the] invocation of federal-court jurisdiction."\(^{275}\)

To satisfy Article III standing requirements, equity partners must show that they "suffered some actual or threatened injury as a result of putatively illegal conduct" and that a favorable decision is likely to redress the harm.\(^{276}\) To satisfy prudential standing requirements, a plaintiff must show that the constitutional or statutory provision on which the plaintiff bases her claim grants persons in the plaintiff's position a right to the requested judicial relief.\(^{277}\) Courts consider the following factors in determining whether the plaintiff can meet her prudential burden of proof: (1) whether the injury "fall[s] within the zone of interests protected by the law invoked"; (2) whether the plaintiff is asserting her own legal rights or interests; and (3) whether the injury is specific or confined to a distinct group.\(^{278}\) Thus, an equity

\(^{269}\) U.S. CONST. art. III, § 2, cl. 1.


\(^{272}\) Compare Ankenbrandt v. Richards, 504 U.S. 689, 695–97 (1992) (explaining that Article III, Section 2 gives federal courts their power to resolve disputes), with Finely v. United States, 490 U.S. 545, 547–48 (1989) (stating that a plaintiff's claim must satisfy both Article III requirements and fall under a federal statute for a federal court to exercise jurisdiction over the matter).


\(^{274}\) Id. at 518.

\(^{275}\) Id. at 498.


\(^{277}\) Warth, 422 U.S. at 500.

partner should be able to satisfy the standing requirements for Title VII if the firm singled out the partner for adverse employment action based on the partner’s race, color, religion, sex, or national origin.279

Title VII grants a private right of action for “[a] person claiming to be aggrieved . . . by [an] alleged unlawful employment practice.”280 The Supreme Court interprets the phrase “person adversely affected or aggrieved” as a term of art used to identify those plaintiffs who have suffered an actual injury at the hands of the defendant and those who seek to vindicate an interest that “is arguably within the ‘zone of interests to be protected or regulated by the statute’ in question.”281 Unlike the term employee, Congress specifically invoked a term of art to define who could bring a claim under Title VII.282

In Trafficante v. Metropolitan Life Insurance Co.,283 the Supreme Court explained the statutory effect of the congressional use of a term of art.284 In that case, the Supreme Court compared Title VII to Title VIII of the 1964 Civil Rights Act, which prohibits discrimination in housing.285 Both statutes use the phrase “aggrieved person.”286 In Title VIII, Congress defined the phrase “aggrieved person” as “any person who claims to have been injured by a discriminatory housing practice.”287 In looking at Title VIII’s legislative history, the Supreme Court stated that Congress intended the Act to apply to individuals “who were not the direct objects of discrimination [but who] had an interest in ensuring fair housing, as they too suffered [from such discriminatory conduct].”288

282. See id. at 126.
284. Id. at 209–11.
285. Id. at 209.
286. Id. at 206 n.1, 209.
287. Civil Rights Act of 1968, 42 U.S.C. § 3602(i)(1) (2000); Trafficante, 409 U.S. at 208 (holding that Congress intended apartment dwellers to have a private right of action against one whose conduct violates the statute). Under Title VIII, a white tenant has standing to assert the rights of African-American renters. Section 3602(i)(1) gives apartment dwellers a private right of action “to be free from the adverse consequences flowing to them from racially discriminatory rental practices directed at third parties.” Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 121–22 (1979) (Rehnquist, J., dissenting) (emphasis added).
288. Trafficante, 409 U.S. at 210 (citations omitted); Childress v. City of Richmond, 134 F.3d 1205, 1210 n.3 (4th Cir. 1998) (en banc) (Luttig, J., concurring) (stating there is nothing in legislative history of Title VII like that in Title VIII that indicates “Congress
On the other hand, Title VII does not define "aggrieved person." In the absence of a statutory definition, courts should assume that Congress intended to incorporate the term of art definition for the meaning of the phrase. Congress's decision not to include a statutory definition of the phrase indicates that Congress intended anyone who was a victim of discrimination to have access to the remedial provisions of the Act. It follows, therefore, that a partner falls within the statutory definition of "aggrieved person" under Title VII if the equity partner is subject to unlawful workplace discrimination. As such, an equity partner falls within the statutory definition of "employee" if the equity partner is directly affected by conduct that Title VII expressly prohibits.

C. Substantive Burdens of Proof in Partner Discrimination Claims

Courts should apply the traditional McDonnell Douglas three-part burden shifting analysis to determine whether an equity partner is an aggrieved person under federal laws prohibiting workplace discrimination. Under the McDonnell Douglas test, the initial burden of production is on the plaintiff to establish a prima facie case of discrimination. The burden then shifts to the defendant to show a legitimate non-discriminatory reason for its action. Upon such a showing, the burden then shifts back to the plaintiff to show that the defendant's stated reason is a pretext and not the real reason for the defendant's action.

The United States District Court for the Southern District of New York used the McDonnell Douglas test to decide whether an at-will shareholder was entitled to bring a Title VII claim against a professional corporation engaged in the practice of law when the shareholder alleged that he was terminated based on his interracial

intended to broaden the scope of 'aggrieved' persons beyond those directly victimized by unlawful employment discrimination.

289. See Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126 (1995) (explaining that "aggrieved person" is a term of art used to designate who has standing to pursue a judicial remedy in federal court).

290. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) ("[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

291. Cf. REVISED UNIF. P'SHIP ACT § 404(c) (1997) (stating that each partner has a duty to refrain from engaging in a knowing violation of law).


293. Id. at 802–04.
marriage to an African-American woman.\footnote{294} The defendant moved for summary judgment, arguing that the plaintiff failed to satisfactorily perform his employment duties.\footnote{295} The district court held that the plaintiff satisfied his burden of showing that (1) he was a member of a protected class based on his interracial marriage; (2) he “satisfactorily performed his duties and was qualified for his position”; (3) the plaintiff suffered an adverse employment action because he was “terminated from his employment”; and (4) although the plaintiff was not replaced by someone who was not a member of a protected class, “he satisfied the requisite showing of preference for someone outside the protected class” in that he was treated differently than non-protected class members.\footnote{296}

The district court also held that the defendant met its burden of articulating non-discriminatory reasons for the termination.\footnote{297} The district court further held that the plaintiff met his burden of showing that the reasons for the termination were pretextual based on, among other things, the fact that “the defendant’s state of mind regarding the race of [the] plaintiff’s wife” was a question of fact for the jury.\footnote{298} Thus, equity partners may satisfy their burden of proof by showing that the partnership singled them out for adverse treatment based on the partner’s race, color, sex, religion, and national origin and by presenting evidence from which a reasonable person could conclude that (1) the partner lacked the power or control to force the firm to take remedial action to eliminate the discrimination, and (2) other partners, either through the firm’s executive committee or the managing partner, knew of the discrimination and failed to take remedial action to eliminate it.\footnote{299}

Under this approach, Abby could bring a Title VII action against the partnership, even if she is an equity partner. Abby, as a “person
aggrieved," would have standing because she is a member of the class of direct victims who are entitled to enforce the remedial provisions of Title VII. First, the firm has the requisite number of employees to trigger Title VII application based on the number of the firm's associates and administrative and clerical employees. Second, Abby can satisfy the traditional McDonnell Douglas test because (1) she is a member of a protected class; (2) she satisfactorily performed her duties as a partner; (3) she suffered adverse employment decisions because Rob's conduct was humiliating and unreasonably interfered with her ability to effectively carry out her duties as a partner; and (4) the partnership treated her less favorably than her fellow male equity partners by requiring her to work in a sexually hostile environment.

Abby could also satisfy her burden of showing that she lacked the power or control to force the firm to take remedial action. Abby is one of seventy partners; the size of the partnership prevents her from influencing internal firm policy. Moreover, Rob has significantly more power to affect the firm's policy as a member of the firm's executive committee. Finally, Abby can meet her burden of showing that the firm knew of the discriminatory conduct and failed to take any action to eliminate it. Abby filed a formal complaint with the firm's executive committee complaining about Rob's discriminatory conduct. In response to her complaint, the executive committee failed to discipline Rob or take any other action to protect Abby from Rob's sexual advances. Under the approach set forth in this Article, partnerships, faced with potential discrimination lawsuits from equity partners like Abby, will work to eliminate workplace discrimination wherever it exists in the partnership.

Conclusion

Lawyers should not lose access to the remedial protections of federal laws prohibiting workplace discrimination based on their successful promotion to equity partner. Allowing equity partners to pursue their rights as aggrieved persons under Title VII and the ADEA is consistent with the national and congressional mandates that unlawful workplace discrimination will not be tolerated.300 The Civil Rights Act

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300. As the Supreme Court recognized, "[T]he ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace." Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979). Congress intended these statutes to remedy "the last vestiges" of workplace discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975). Statutes prohibiting workplace discrimination are intended to deter and compensate the victims of prohibited workplace discrimination. Id. at 418.
of 1964, as amended in 1991, demonstrates that Congress did not intend to exclude lawyers, including equity partners, from the protections of federal laws prohibiting workplace discrimination. Forcing a lawyer to accept discriminatory conduct based on the lawyer’s status as an equity partner is inconsistent with Congress’s intent to eliminate workplace discrimination based on race, sex, and other immutable characteristics. Consistent with the purpose of federal laws prohibiting workplace discrimination, courts should examine whether an equity partner is seeking protection from unlawful employment practices. Thus, if the equity partner can satisfy both Article III and prudential standing requirements, then the court should find that an equity partner is entitled to “to work in an environment free from discriminatory intimidation, ridicule, and insult.”

302. See supra notes 9, 173–79.