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No.

In the

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Clackamas Gastroenterology Associates, P.C. is a medical clinic formed as a professional corporation but which operates and has legal attributes of a partnership.

The question presented is whether a federal court should apply an economic realities test to determine if the Clinic's physician-shareholders are counted as "employees" for the purpose of determining if the Clinic is a "covered entity" subject to the ADA and other federal anti-discrimination statutes.

In this case, the Ninth Circuit concluded that the physician-shareholders are employees. The court below rejected the holdings of the Seventh, Eighth and Eleventh Circuits which used an economic realities test. Instead, it adopted the reasoning of the Second Circuit which rejected that test.

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PARTIES TO THE PROCEEDINGS

Petitioner

Clackamas Gastroenterology Associates, P.C., an Oregon professional corporation. It has no parent corporation; and no publically held company owns ten percent or more of its stock.

Respondent

Deborah Ann Wells.

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

CASES

STATUTES

Curry & Taylor Supreme Court Printers

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 271 F. 3d 903 and is reprinted in the appendix hereto at p.1a-10a, *infra*.

The memorandum decision of the United States District Court for the District of Oregon (Panner, D.J.) has not been reported. It is reprinted in the appendix hereto at p.17a-25a, *infra*.

JURISDICTION

The Court of Appeals entered its opinion and order on November 26, 2001. No petition for re-hearing was sought.

On February 15, 2002, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including March 26, 2002.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12101(a)(1), (b)(1) and (2).

(a) ***Findings***
The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

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(b) ***Purpose***
It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

42 U.S.C. § 12111(2), (4), and (5)(A) Definitions under the Americans with Disabilities Act.

(2) Covered entity
The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(4) Employee
The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general
The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

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42 U.S.C. 12112(a) Discrimination under the Americans with Disabilities Act.

> (a) General rule
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Petitioner is a medical clinic organized as an Oregon professional corporation with four physician-shareholders, who constitute the board of directors. They own the professional corporation and control the management and operation of the medical practice. They each share equally in the profits of the corporation by annual bonuses. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations.

Respondent was, until she voluntarily terminated in May 1997, an employee of the medical clinic. After she terminated, she brought an action against the petitioner under Title I of the ADA, 42 U.S.C. § 12101-12117, and other supplemental state claims.

The clinic moved for summary judgment against Wells' ADA claim on the grounds that it was not an "employer" and, consequently, not a "covered entity" within the meaning of the ADA because it did not have 15 or more employees for the 20 weeks required by the statute. It is undisputed that if the clinic's physician-shareholders are not counted as "employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then

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the number of employees would have exceeded the number required to bring the clinic under the coverage of the ADA.

The District Court applied an economic realities test and found that the four shareholders should be regarded as "partners" and not as "employees" within the meaning of 42 U.S.C. § 12111(4) and (5). The District Court considered conflicting cases from the Second Circuit (*Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2nd Cir. 1986)) which rejected the use of an economic realities test and the Seventh Circuit (*EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984)), which used an economic realities test. The District Court found the Seventh Circuit case to be a better-reasoned approach because it exalted substance over form.

The Ninth Circuit reversed in a two-to-one decision with Judge Graber dissenting. The majority found the Second Circuit approach more persuasive, and reversed the judgment of the District Court.

The majority embraced the Second Circuit's reasoning that the use of the corporate form "precludes any examination designed to determine whether the entity is in fact a partnership." *Hyland*, 794 F.2d at 798. The dissent cautioned that the law should be governed by realities, rather than labels. The dissent also observed both that a physicians' professional corporation has many attributes of a partnership as a matter of law, and that the purpose of the 15 employee threshold is to spare very small firms from the potentially crushing expenses of mastering the intricacies of the anti-discrimination statutes. This purpose would be frustrated by the majority's approach, because two clinics, identical in all respects but corporate formality, would be treated differently.

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REASONS FOR GRANTING THE WRIT

I. There is a Conflict Among the Circuits Concerning the Use of an Economic Realities Test to Determine Whether a Professional Corporation is a "Covered Entity" for Purposes of the ADA and other Federal Anti-Discrimination Statutes.

The decision of the Ninth Circuit in this case squarely and irreconcilably conflicts with the decisions in the Seventh Circuit, *Dowd & Dowd Ltd.*, (*supra*); the Eight Circuit, *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78, 80-81 (8th Cir. 1996);and the Eleventh Circuit, *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1400-01 (11th Cir. 1991).

Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability on the basis of that disability. 42 U.S.C. § 12112(a). The term "covered entity" includes an "employer." *Id.* §12111(2). An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.* §12111(5)(A). An "employee" is defined as "an individual employed by an employer." *Id.* §12111(4).

Although no circuit has interpreted these specific provisions of the ADA, the court below recognized that there were a number of cases that interpret nearly identical language in other federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. It is well recognized that the interpretations found in those cases should apply to all employment discrimination statutes. *See e.g. Serapion v. Martinez*, 119 F.3d. 982, 985 (1st Cir. 1997)("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating

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judicial precedents interpreting one statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d. 793, 796 (2nd Cir. 1986)(holding that for the FLSA, Title VII, and the ADEA, "Cases construing the definitional provisions of one are persuasive authority when interpreting the others.").

It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the anti-discrimination statutes. *See e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984). It is also generally accepted that corporate employees are employees under anti-discrimination statutes. *See, e.g.*, *Archer v. Globe Motorists Supply Co., et al.*, 833 F.Supp. 211, 213 (SDNY 1993). However, the status of a shareholder in a professional corporation remains unsettled because its organizational structure is a hybrid of a partnership and a regular corporation.

In *EEOC v. Dowd & Dowd Ltd.*, (*supra*) the Seventh Circuit addressed the specific issue of whether the shareholders of a professional corporation are employees for purposes of the anti-discrimination laws. It applied an economic realities test and concluded that "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." *Id.* at *1178*. The court found that the economic reality of a professional corporation is that the management, control and ownership of the professional corporation is much like the management, control and ownership of a partnership. *Id.* The Seventh Circuit's approach was followed by the Eighth Circuit in *Devine*, 100 F.3d at 80-81; and the Eleventh Circuit in *Fountain*, 925 F.2d at 1400-01.

The Ninth Circuit rejected the approach of the Seventh Circuit and refused to apply an economic realities test. Instead, the majority adopted the approach of the Second Circuit in *Hyland v. New Haven Radiology Associates, P.C.* (*supra*). In *Hyland*, the court held that the

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use of the corporate form, including professional corporations, "precludes any examination designed to determine whether the entity is in fact a partnership." 794 F.2d at 798. The Second Circuit's position was that once the physicians had chosen a form of business organization, the use of the corporate form precludes any examination designed to determine whether the entity more closely resembles a partnership. *Id.* at *798.*

The approach of the Seventh, Eighth and Eleventh Circuits, which adopts an economic realities test cannot be reconciled with the approach of the Second and Ninth Circuits which rejects an economic realities test on virtually identical facts. There is, therefore, an irreconcilable conflict among the circuits concerning the use of an economic realities test to determine whether a professional corporation is a "covered entity" for purposes of the ADA and other federal anti-discrimination statutes.

This Court should take this case to resolve the conflict among the circuits and to establish a uniform rule. Employers and employees in different parts of the country should not be subject to different standards for determining whether they are subject to the ADA and other anti-discrimination statutes.

II. The Question Presented is Important

The Question Presented has a broad impact on small business throughout this country. Professional corporations with between 15 and 19 or more employees are likely to find themselves caught in the gray zone between small and large employer categories created by the ADA. The impact could go well beyond professional corporations. The same issue can arise with an ordinary corporation. S*ee e.g.*, *E.E.O.C. v. Pettegrove Truck Service, Inc.*, 716 F.Supp. 1430 (S.D. Fla. 1989) (economic realities test used to determine employee status of a director).

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The purpose of the numerical requirement in the ADA is to separate small from large enterprises. Congress decided to "spare very small firms from the potentially crushing expense of mastering the intricacies of the anti-discrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 940 (7th Cir.)(discussing the Congressional purpose "of exempting tiny employers from the anti-discrimination laws," including the ADA), *cert. denied*, 528 U.S. 1019 (1999).

The U.S. Small Business Administration estimates that in 1999 some 429,718 employers had between 15 and 19 employees. These businesses employed a reported 3,451,611 workers, with an annual payroll of $93,753,309,000 [www.sba.gov/advo/stats/#Firm]. Many, if not most, of these gray-zone employers have owners active in management who share risks and profits, and treat each other as partners in a partnership, just like the petitioners. Many are organized as professional corporations, professional associations, limited liability partnerships, and limited liability companies, all of which may be far more analogous to a partnership than a corporation. In today's business climate, many of these enterprises have multi-state (and, consequently, multi-circuit) economic operations. Therefore, there are a significant number of enterprises affected by the Question Presented.

When Congress passed the ADA in 1990, it found that some 43,000,000 Americans had one or more physical or mental disabilities, and this number was increasing as the population as a whole grows older. 42 U.S.C. § 12101(a)(1). The number of those individuals with disabilities who find themselves applying for work with, or are employed by, a small business, including professional corporations in the gray-zone of 15 to 19 employees, is not insignificant. Because of the split in the circuits, ADA protection varies for those disabled Americans who work for identical firms and clinics across the country. Since the numerical requirement for determining ADA coverage varies among the federal circuits, many disabled Americans enjoy ADA protection based solely

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upon their employer's geographic location in one circuit or another.

This inconsistency has a nationwide impact on both employers and disabled Americans. It is unlikely that Congress expected people in one circuit to enjoy a different level of protection than people in another circuit. It is also doubtful that Congress intended ADA coverage of identical small businesses to vary from circuit to circuit. The purpose of the ADA is, in part, to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; and, to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1) and (2).

Because of the split in the circuits, a small medical clinic in Oregon, like the petitioner, is treated differently under the ADA than an identical medical clinic in the Seventh Circuit, only because of its location. This disparate treatment is unfair and incompatible with the purpose of the ADA.

It is important that the courts provide clear, strong, and consistent enforcement standards so that small businesses, and their employees, are treated equally and fairly in all parts of the country.

III. The Decision of the Court of Appeals is Erroneous

A professional corporation has some attributes of an ordinary incorporated business, but it is not identical and retains attributes of a professional partnership. The use of the word "corporation" in both contexts should not limit a court's analysis.

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The Ninth Circuit's approach exalts form over substance. Its analysis stops at the label of "corporation." The majority approach of the Seventh, Eighth, and Eleventh Circuits looks at the true relationships among the individual shareholders, including their method of compensation, their responsibility for the entity's liabilities, and the management structure of the entity to determine if the entity should be treated as a partnership or a corporation. This is, in effect, an economic realities test that eschews labels and instead investigates economic reality. This court adopted such an economic reality test in *Goldberg v. Whitaker House Cooperative, Inc., et al.*, 366 U.S. 28, 33 (1961)(an economic reality test was applied to determine whether home workers were employees).

The reason that Congress limited the ADA's coverage to entities with 15 or more employees is economic. Congress decided that smaller employers should not be required to devote the burdensome time and expense to insure compliance with the ADA and other anti-discrimination statutes. The result of the Ninth Circuit opinion is demonstrated by comparing two clinics. Clinic "A, P.C." (the petitioner) is a "covered entity" for ADA purposes. Next door, clinic "B", which is identical in all respects is not a "covered entity" because its four physicians decided not to adopt the P.C. format. Since the purpose of the 15 employee threshold is economic, it makes no sense to treat clinics A and B differently.

The economic reality of the petitioner is that the shareholders are more analogous to partners in a partnership than to shareholders in a corporation. If an economic reality test were applied, the judgment of the District Court should be affirmed.

Certiorari jurisdiction is warranted to correct this error and clarify the law.

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CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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