No. 01-1435

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

REPLY TO BRIEF IN OPPOSITION

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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.

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REPLY TO ISSUE FIRST RAISED IN BRIEF IN OPPOSITION

In her brief in opposition, the Respondent raises, by inference, a new, but related issue: whether a federal court should apply an economic realities test when a claimant's right to sue is at issue, but not when the ADA's coverage of a business entity is at issue. This stems from the notion that it is one thing to determine that an owner of a business should be precluded from suing the entity he or she owns, and another to deprive a "lower level employee" of the protection of the anti-discrimination laws.

Respondent implies that where, as here, a claimant has no ownership interest in the business entity, the Court's inquiry should stop at the form of business structure, but if the claimant has an ownership interest in the business entity, an economic realities test should be applied to determine whether the claimant should be treated as an employee.

Respondent's argument bears more on the merits of the case than on whether certiorari should be granted. This is not a distinction that reconciles the conflict among the Circuits. Cases which reject the use of an economic realities test include plaintiffs who are owners *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793 (2nd Cir. 1986) and plaintiffs who are not owners (such as the instant case). Cases which apply an economic realities test include plaintiffs who are owners *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398 (11th Cir. 1991) and plaintiffs who are not owners *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996).

However, if, as Respondent argues, the issue is whether a Court's inquiry stops at the form of enterprise adopted by the business entity, then the impact on American business is substantially broader than just professional corporations with between fifteen and nineteen employees. Such a rule would affect entities such as large partnerships with hundreds or thousands of employees. Courts have often held that the form of organization does not control whether an individual is an employee. In *EEOC v. Peat Marwick, Mitchell & Company*, 775 F.2d 928 (8th Cir. 1985), the EEOC was allowed to investigate by subpoena whether some of the 1,300 partners were in fact employees. In *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (9th Cir. 1996) the Ninth Circuit applied an economic realities test to determine if the claimant had a right to sue; it held that a court must

> "[A]nalyze the true relationship among partners, including the method of compensation, the "partners" responsibility for partnership liabilities, and the management's structure in the "partners' role in the management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws."

Id. at 867.

In *Strother*, the medical partnership in which plaintiff was a partner had 2,400 to 2,500 partners. The affairs of the partnership were conducted predominantly by a board of directors, over which the plaintiff had little control and to which she had limited access. Her compensation was determined by her performance, and she could be disciplined for poor performance. The Ninth Circuit remanded to the District Court, finding that the plaintiff must be given the opportunity to demonstrate that "her actual partnership rights are limited enough that she should be characterized as an employee." Id. at 868.

The Respondent argues that the form of business structure selected by the entity should control. That approach, however, is inconsistent with cases like *Peat Markwick* and *Strother*. There is no reason to treat business entities differently based on whether the claimant has an ownership interest in the entity.

An economic realities test should determine not only whether partners, in reality, should be employees under the ADA; but also to determine whether shareholders of a P.C. should be, in reality, partners.

A federal court should apply an economic realities test to determine if a person is an employee under the ADA whether the issue is coverage (to determine if a shareholder in a P.C. is an employee under the anti-discrimination laws) or the issue is the right to sue (to determine if a partner is an employee under the anti-discrimination laws). There is no reason to disapprove the former and approve the latter.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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