

# 4th Circuit Holds Law Firm Partner Is Not an Employee Protected Under Title VII

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On January 19, 2021, the U.S. Court of Appeals for the Fourth Circuit issued a noteworthy decision in *Lemon v. Myers Bigel, P.A.*, No. 19-1380, 2021 WL 161978 (4th Cir. 2021), affirming a decision by the Eastern District of North Carolina holding that a law firm equity partner was not an “employee,” and was therefore not entitled to protections against discrimination under Title VII of the Civil Rights Act.

## Background

The plaintiff joined the defendant, Myers Bigel, P.A., a North Carolina law firm, as an associate in 2001 and was promoted to an equity partner in 2007. The plaintiff alleged that she was treated with hostility after she provided information to an outside attorney retained by the firm to investigate gender discrimination claims, which, according to the plaintiff, culminated in her resignation. She thereafter filed suit, alleging gender and race discrimination, including under Title VII.

The defendant alleged that the plaintiff was not subject to the protections of Title VII because she was a business owner, and not an employee, of the firm. The firm relied on *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440 (2003), where the Supreme Court established a six-factor test to determine when a claimant is an employee, who is subject to the protections of statutory anti-discrimination laws, or a business owner who is not covered by those statutes.

The six *Clackamas* factors are:

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 or contracts; and
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

In applying these six factors, the Supreme Court held that the “common law element of control” serves as the “principal guidepost” for determining employer status.

The firm in this case argued that the plaintiff enjoyed numerous benefits of partnership, including ownership of shares in the firm and her entitlement to vote on matters of significance. Like other equity partners, the plaintiff's compensation was dependent on the firm's performance, and her employment could not be terminated except by a vote of the full partnership. The firm argued that the *Clackamas* factors favored the firm, and that the plaintiff's Title VII claims were subject to dismissal. The District Court agreed.

#### **Fourth Circuit Ruling**

The Fourth Circuit held that the six *Clackamas* factors led to a clear conclusion that as a voting partner and owner of the firm, plaintiff was not an employee but instead was a business owner.

The court found that the first and fourth *Clackamas* factors weighed in the firm's favor, as the plaintiff could only be fired by a majority vote of the full partnership, and each partner had an equal right to vote on firm matters. All equity partners were also eligible to run and serve on the firm's managing committee, as the plaintiff had done. The plaintiff thus had just as much control over the "rules and regulations" of the firm and ability to "influence the organization" as any other partner. Under the second factor, the court found that the firm's oversight of the plaintiff's work pursuant to a quality control policy, which required that partners submit their work product to other partners to ensure that it met expectations and to provide an opportunity for feedback, did not constitute "supervision" for purposes of *Clackamas*. Under the third factor, the court found that plaintiff did not "report" to anyone at the Firm in the manner an employee reports to a supervisor. Under the fifth factor, the court found dispositive that the plaintiff was a signatory to the firm's shareholder agreement, making her a partner and shareholder of the firm. Finally, the court held that the sixth factor also weighed against employee status, as plaintiff was not paid a salary or wage, but was compensated based upon the "profit [and] losses" of the firm.

Based on its analysis under the Supreme Court's *Clackamas* decision, the court concluded that the plaintiff was not an employee and therefore not subject to the statutory protections of Title VII.

### **Takeaways**

This case is notable in that it is one of a few Circuit Court decisions applying *Clackamas* to a law firm partnership. Significantly, the court noted that the defendant firm was "hardly an atypical one for private practice," and that the plaintiff's role as an equity partner demonstrated all of the hallmarks of business ownership.

The Court's decision is unequivocal, noting that dismissal "was to be expected" given the plaintiff's status. Notably, the Court explained:

For this court to treat Lemon, an equity partner in a conventionally-structured law firm, as an employee would be to assign ourselves the task of single-handedly refashioning the foundation of a prevailing form of legal practice. *Clackamas* provides no warrant for it. Our common law tradition provides no warrant for it. Our sister circuits warn against it. *See, e.g., Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005) (declining to treat an equity partner as an employee for purposes of Title VII); *von Kaenel v. Armstrong Teasdale, LLP*, 943 F.3d 1139 (8th Cir. 2019) (declining to treat an equity partner as an employee for purposes of the ADEA). In short, Lemon is a partner and equal owner of the firm, not an employee, and she is not within the scope of Title VII's coverage.

We will continue to monitor developments in this area and report on them as such developments occur.

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