

Labor and Employment Law—Determining Employee Status for Evolving Business Associations Under the Americans with Disabilities Act—*Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003)

The Americans with Disabilities Act (ADA) aims to protect individuals with disabilities by providing a legal remedy against discrimination.¹ The ADA, however, does not apply to small businesses of fewer than fifteen employees that would otherwise be heavily burdened by the expense of defending against discrimination actions.² In *Clackamas Gastroenterology Associates, P.C. v. Wells*,³ the Supreme Court of the United States addressed the issue of what constitutes an “employee” for determining whether a business association qualifies for the small business exemption under the ADA.⁴ The Court relied upon the common-law element of control as the guidepost for analyzing an employee’s true status and rejected any approach based solely upon the labels attached to the individual within the business association.⁵

The Clackamas Gastroenterology Medical Clinic (Clinic) employed Deborah Wells as a bookkeeper from 1986 until her termination in 1997.⁶ After being diagnosed with mixed connective tissue disorder, Wells sought special accommodations to assist in her employment duties.⁷ In response, the Clinic transferred Wells to a receptionist position at another location.⁸ Wells did not return to her employment under an extended doctor’s medical release, due to

1. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a) (2001) (setting forth findings of discrimination against individuals with disabilities); *id.* § 12101(b) (declaring congressional purposes for enacting ADA).

2. *Id.* § 12111(5) (defining “employer” under ADA). The ADA definition of “employer” includes any person who employs more than fourteen employees each working day for at least twenty weeks annually. *Id.*

3. 538 U.S. 440 (2003).

4. *Id.* at 442 (introducing question presented in *Clackamas*). Specifically, the Court considered whether physician-shareholders within a professional corporation constituted employees under the ADA. *Id.* If the physician-shareholders were considered employees, the professional corporation would no longer be exempt as a small business because it would then be employing over fifteen employees. *Id.*

5. *Id.* at 447-49 (considering common-law element of control as guide in determining employee status). After focusing upon the common-law element of control, the Court adopted a six factor analysis endorsed by the Equal Employment Opportunity Commission (EEOC). *Id.* The Court then remanded the case for further inquiry with instructions to utilize the factors specified by the EEOC to analyze and determine an individual’s actual employee status under the ADA. *Id.* at 1679-81.

6. *Id.* at 442 (describing Wells’ employment); Br. for Pet’r at 6, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003) (No. 01-1435) [hereinafter Petitioner’s Brief] (detailing responsibilities as bookkeeper). Wells’ employment responsibilities in addition to bookkeeping included handling patient collections for the clinic. Petitioner’s Brief at 6.

7. Br. for Resp’t at 1, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003) (No. 01-1435) [hereinafter Respondent’s Brief] (noting Clinic’s prior knowledge of Wells’ medical condition).

8. Petitioner’s Brief, *supra* note 6, at 6 (summarizing employment decisions made prior to Wells’ termination).

stress caused by refusing the transfer.⁹ The Clinic disregarded the medial release, terminated Wells, and contended that she voluntarily resigned by not reporting to her new position and location.¹⁰

Upon termination of her employment, Wells brought action against the Clinic under the ADA, alleging that the Clinic terminated her based upon her medical condition.¹¹ The Clinic responded with a motion for summary judgment asserting that the four physician-shareholders who managed the Clinic were not considered employees under the ADA and, as a result, the Clinic had fewer than the fifteen employees necessary to establish jurisdiction and be considered a covered entity under the ADA.¹² The district court concluded that the physician-shareholders did not constitute employees under the ADA, and, following the reasoning of the Court of Appeals for the Seventh Circuit, were therefore eligible for the small business exception.¹³

Wells appealed to the Court of Appeals for the Ninth Circuit that, in turn, reversed the district court decision and adopted the Second Circuit Court of Appeals reasoning.¹⁴ The Ninth Circuit Court of Appeals held that the physician-shareholders constituted employees due to the Clinic's voluntary organization as a corporation.¹⁵ The United States Supreme Court then granted certiorari to resolve the split in the circuits and to address the central issue of

9. Petitioner's Brief, *supra* note 6, at 6 (stating Clinic's reasons for employment transfer); *Respondent's Brief*, *supra* note 7, at 1 (detailing medical condition as result of transfer order). Wells refused the transfer because she believed the new location would be too far from her home and that the position was a demotion. *Respondent's Brief*, *supra* note 7, at 1. The Clinic's Administrator responded to Wells' refusal by suggesting that she resign from her position at the Clinic. *Id.* Wells' doctor acknowledged her worsened condition and provided a medical release to the Clinic. *Id.*

10. Petitioner's Brief, *supra* note 6, at 6 (explaining Clinic's understanding of Wells' termination); *Respondent's Brief*, *supra* note 7, at 1 (detailing correspondence between Clinic and Wells). The Clinic further responded by letter that Wells must report to her new position or face termination. *Respondent's Brief*, *supra* note 7, at 1. Wells did not return and the clinic officially terminated her six days later prior to the expiration of her medical release. *Id.*

11. 538 U.S. 440 (detailing Wells' initial legal action).

12. 42 U.S.C. § 12111(5) (2003) (defining applicable employers under ADA); 538 U.S. at 442 (describing Petitioner's Motion for Summary Judgment). The Clinic is a professional corporation that was organized in Oregon in 1979. 538 U.S. at 442. At the time the plaintiff filed her lawsuit, the Clinic comprised fewer than fourteen employees, excluding the four physician-shareholders. *Id.* In addition to acting as a patient's physician, these physician-shareholders were responsible for the management and direction of the Clinic. *Id.*

13. 538 U.S. at 442 (detailing district court's analysis). The district court used an "economic realities" test to determine the true nature of the physician-shareholder's position within the professional corporation. *Id.* The court concluded that the physicians more closely resembled partners within a partnership in their capacity as directors of the clinic, and therefore, did not constitute employees under the ADA. *Id.*

14. *Id.* at 442 (announcing lower court's holding).

15. *Id.* at 442-443 (describing lower court's analysis). The court rejected any analysis beyond an organization's status as a corporation and adopted the reasoning of the Second Circuit Court of Appeals. *Id.* The court further held that a traditional corporation's shareholders would be considered employees, and therefore, the physician-shareholders in the present case would also be considered employees. *Id.* This court stressed that a different ruling would result in these voluntarily organized business associations being granted positive treatment for tax and liability purposes by incorporation, while at the same time avoiding other responsibilities such as federal compliance by arguing that they were not in fact a corporation. *Id.*

what determines an employee's status for the ADA and other anti-discrimination statutes.¹⁶

The ADA provides legal recourse for the physically or mentally disabled who have experienced discrimination stemming from their disability.¹⁷ Congressional findings acknowledged that with no protection, discrimination and prejudice would result in billions of dollars lost in economic productivity.¹⁸ By enacting the ADA, Congress sought to establish clear standards whereby the government could play a central role in eliminating discrimination against disabled Americans.¹⁹

The ADA creates a small business exemption by conferring jurisdiction over business entities consisting of fifteen or more employees.²⁰ Congress determined these smaller entities would be unable to carry the burden of defending lawsuits when compared to their larger competitors.²¹ Several other federal anti-discrimination statutes also contain this exemption.²² As a result, the ADA does not cover over twenty million employees due to the size of the business.²³

The ADA and other federal anti-discrimination statutes define the term

16. 538 U.S. at 444 (discussing reasoning for granting certiorari). The Court first noted the splits among the Seventh and Second circuits regarding this issue with respect to the ADA. *Id.* The Court then recognized that this issue extended beyond the ADA to other federal anti-discrimination statutes, including Title VII of the EEOC and the Age Discrimination in Employment Act of 1967 (ADEA). *Id.*

17. 42 U.S.C. § 12101(a) (2003) (detailing findings and purposes for enacting ADA). Congress acknowledged that millions of disabled Americans have historically faced discrimination. *Id.* With passage of the ADA, Congress sought to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency." *Id.*

18. 42 U.S.C. § 12101 (2003) (listing Congressional findings and purposes). Congress further justified its pursuit of eliminating discrimination against disabled Americans by recognizing the overall economic loss that results from lost individual productivity. *Id.* Congress invoked the Fourteenth Amendment and the Commerce Clause of the United States Constitution as authority to combat this discrimination. *Id.*; see also *Bostosan v. Paul McNally Realty* 216 F.3d 827, 827 (9th Cir. 2000) (holding ADA valid exercise of Fourteenth Amendment). The Court of Appeals for the Ninth Circuit determined that it did not have to decide whether the ADA was a proper invocation of power under the Commerce Clause because courts have already determined that the ADA is a valid Congressional exercise under the Fourteenth Amendment. *Bostosan*, 216 F.3d at 835-36.

19. 42 U.S.C. § 12101(b) (2003) (detailing purposes for enacting ADA).

20. 42 U.S.C. § 12111 (2003) (defining employer under the ADA).

21. See *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (1983) (discussing legislative history regarding small business exemption). In addition to competitive advantage concerns, the exemption sought to protect particularly disadvantaged businesses including rural, minority and family run businesses. *Id.* See generally Ruben H. Arredondo, Note, *Different Strokes for Different Folks: Balancing the Treatment of Employers and Employees in Employment Discrimination Cases in Courts within the Tenth Circuit Court of Appeals*, 16 *BYU J. PUB. L.* 261 (2002) (commenting on small employer exemption).

22. See Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (2003) (defining employer). The ADEA does not extend to employers of fewer than fifty employees. *Id.*; see also 42 U.S.C. § 2000(e) (2001) (limiting EEOC enforcement to employers with fifteen or more employees).

23. U.S. Census Bureau, Statistics about Business Size (including Small Business) from the U.S. Census Bureau: Table 2a-Employment Size of Employer Firms, at <http://www.census.gov/epcd/www/smallbus.html> (2000).

“employee” circularly as “an individual employed by an employer.”²⁴ With differing results, courts have looked to the traditional definition of employee to determine what qualifies within new and evolving types of business organizations.²⁵ The Seventh Circuit has held that within a professional corporation, shareholder employees are in effect partners and are precluded from asserting any claim as an employee.²⁶ The Second Circuit, however, rejected this approach, reasoning that the decision to organize as a professional corporation is a voluntary one and therefore the organizers should not be afforded the beneficial treatments of a corporation without its corresponding responsibilities.²⁷ The Supreme Court, by granting certiorari in the *Clackamas* case, decided to resolve this circuit split.²⁸

24. 42 U.S.C. § 12111 (2003) (defining employee under ADA). The definition of employee is also extended to citizens of the United States when employed in a foreign country. *Id.*; see also 29 U.S.C. § 630(a) (2003) (establishing same definition of employee under ADEA as under ADA); *id.* §203(a) (establishing same definition for employee under Fair Labor Standards Act as under ADA); *Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983) (discussing legislative history regarding employees covered under anti-discrimination statutes). The court concluded from the legislative history of the Civil Rights Act of 1964 that Congress intended all variations of employees to be eligible under the statute unless there is a specific statutory exclusion. *Armbruster*, 711 F.2d at 1339.

25. See also *Nationwide Mut. Ins. Co., v. Darden*, 503 U.S. 318, 322-23 (1992) (discussing difficulties faced by companies in determining who constitutes employees for federal compliance). The Court also noted that a broad interpretation of what defined an employee would result in more entities being subject to the ADA and be consistent with the ADA’s goals of ending discrimination. *Id.* at 324-25.

26. See *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177, 1178 (7th Cir. 1984) (allowing employee-shareholders within professional corporations treated as partners not employees). The court addressed the issue of what constituted an employee under EEOC guidelines for the Fair Labor Standards Act (FLSA). *Id.* The EEOC definition of an employee is identical to the definition of employee under the ADA. *Id.* The court utilized an “economic realities test” to analyze the shareholders’ role within the organization. *Id.* The court concluded that, because shareholders within a professional corporation actively manage and control the corporation and are liable for malpractice, they share more attributes with partners within a partnership than shareholders in a traditional corporation. *Id.*; see also *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983) (establishing economic realities test). The court analyzed the economic reality of the relationship between the individual and the employer of a partnership. *Armbruster*, 711 F.2d at 1340. The court further reasoned that to be considered an employee and eligible for making legal claims under the FLSA, that same individual must be considered an employee for determining whether the entity is subject to jurisdiction under the FLSA. *Id.*; *Supreme Court Adopts EEOC Standard for Determining Employees Status*, EMP. TRENDS (Schottenstein Zox & Dunn, Columbus, Ohio) Summer 2003, at 2 (reasoning that *Clackamas* decision may result in partners suing other partners).

27. See *Hyland M.D. v. New Haven Radiology Assocs.*, 794 F.2d 793, 798 (2d Cir. 1986) (holding employee-shareholders constituted employees). The court rejected any inquiry into the relationship between the shareholder and the corporation. *Id.* The court found that, due to the voluntary incorporation, the shareholder was designated an employee and, as such, was covered under the ADEA. *Id.*

28. 538 U.S. at 444 (discussing Court’s reasoning for granting certiorari). The Court realized the central issue of what constituted an employee extended beyond the ADA to other federal anti-discrimination statutes including Title VII for the EEOC and under the ADEA. See *Hyland M.D. v. New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2d Cir. 1986) (discussing persuasive authority of definitional interpretations between anti-discrimination statutes); Jonathan C. Bumgarner et al., *High Court Considers Whether Shareholders Are Employers Under ADA*, April 30, 2003, at http://www.hallrender.com/articles/articles_details.asp?article_index=125 (providing guidelines for professional corporations to avoid compliance with anti-discrimination regulation). In response to the *Clackamas* holding, the authors suggest that professional corporations allocate shareholder compensation to clinic profits and not be fixed to services or hours performed. Bumgarner, *supra*.

In *Clackamas Gastroenterology Associates, P.C. v. Wells*, the Supreme Court sought to define what constitutes an employee for determining jurisdiction under the ADA.²⁹ The Court specifically addressed whether physician-shareholders within a professional corporation constituted employees.³⁰ The Court determined that courts should look to the common law for guidance when Congress fails to clearly define a term statutorily.³¹

The Court noted that the common law reflects a trend that focuses on the element of control in the master-servant relationship in order to determine whether an individual qualifies as an employee.³² The Court acknowledged that, although the professional corporation has no history in the common law, a court should still apply the common-law test.³³ The Court then adopted the EEOC guidelines, focusing on the element of control, one of EEOC's factors to determine whether an individual is an employee.³⁴ By a seven to two decision, the Court remanded the case to apply EEOC guidelines to the *Clackamas* situation.³⁵

The Court properly held that a fact-finder should use the common-law element of control in determining whether a physician-shareholder of a professional corporation qualifies as an employee under the ADA.³⁶ This

Additionally, a professional corporation could reduce the likelihood of physician shareholders being considered employees by not referring to the shareholders as employees in contracts or documents. *Id.*

29. 538 U.S. at 442 (introducing question presented).

30. *Id.*

31. 538 U.S. at 444-47 (acknowledging need for common law to fill statutory gaps).

32. *Id.* at 1677-78 (detailing where common law utilized to define statutory terms); *see* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989) (defining employee under Copyright Act of 1976 as applied to sculptor); Kelley v. S. Pac. Co., 419 U.S. 318, 331-32 (1974) (defining employee under Federal Employers' Liability Act); *see also* Nationwide Mut. Ins. Co., v. Darden, 503 U.S. 318, 322 (1992) (defining employee under ERISA as applied to independent contractors).

33. 538 U.S. at 447 (recognizing courts' struggles when applying common law to new business entities).

34. *Id.* at 1679-81 (discussing EEOC guidelines). The Court acknowledged that the EEOC is the agency charged with enforcing the ADA and other anti-discrimination statutes, and that the EEOC had adopted the common-law rule of control into their own compliance manual. *Id.* at 450. The EEOC specified six factors to assist courts and businesses in determining whether an individual is an employee. *Id.* "[W]hether the organization can hire or fire the individual or set the rules and regulations of the individual's work;" "whether and, if so, to what extent the organization supervises the individual's work;" "whether the individual reports to someone higher in the organization;" "whether and, if so, to what extent the individual is able to influence the organization;" "whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;" and "whether the individual shares in the profits, losses, and liabilities of the organization." *Id.*

35. *See* 538 U.S. at 450-451 (announcing Court's holding). *But see id.* at 451-455 (Ginsburg, J., dissenting) (arguing common-law analysis fails when applied to professional corporations). Justice Ginsburg argued that the Court ignored the goals of the ADA in focusing on the common-law test, and that the Clinic was not really what Congress intended to be a shielded entity under the small business exemption. *Id.* By example, Justice Ginsburg noted that if just one physician-shareholder sold his shares and remained a mere employee of the corporation, there would be no question that the Clinic would have jurisdiction over the employer. *Id.*

36. *Supra* notes 31-32 and accompanying text (regarding role of court in filling statutory gaps with common law understanding).

flexible approach is ideal for a changing economy that encompasses new forms of business entities.³⁷ The approach as applied to professional corporations, however, may allow entities to manipulate their structure for the sole purpose of avoiding federal regulation.³⁸

The Court failed to take into account the unique structure of the professional corporation.³⁹ Although the ADA sought to balance the protection of smaller entities from the burden of litigation with the elimination of discrimination, the professional corporation as represented in *Clackamas* should not be shielded from compliance by its mere size.⁴⁰ Even though the physicians may not be considered employees under the common-law approach, the Clinic still maintains a continual business presence of over fourteen individuals providing medical services to the public.⁴¹

The *Clackamas* decision provided a much needed measure to define what roles individuals play within an organization and may actually have expanded the class of individuals protected by the ADA.⁴² In application, however, it can produce uneven results where an individual may qualify as an employee for certain statues and benefits but fails to qualify as an employee for compliance under the ADA or other anti-discrimination statutes.⁴³ Although this holding may shield some business entities from compliance, the holding may also allow non-traditional employees, such as partners, to sue under the ADA.⁴⁴

The Court's holding represents a traditional approach to the ever-changing modern economy. This analysis transcends labels and organizational structures that are easily manipulated and examines the true relationship between an employee and employer. Although the holding does not always provide consistent results, it does provide a dependable analysis for those trying to navigate compliance with the ADA.

Kathleen M. Nichols

37. *Supra* note 33 and accompanying text (pointing to difficulty of applying law to new entities).

38. *Supra* note 28 and accompanying text (regarding guidelines to avoid ADA compliance by professional corporations).

39. *Supra* note 26 and accompanying text (detailing characteristics of professional corporations). The professional corporation allows physicians who engage primarily in the caretaking of their patients to participate in the direction of their work environment. *Id.*

40. *Supra* notes 12, 31 and accompanying text (noting Clinic size and Ginsburg's dissent). Although the physician-shareholders may not be considered employees, when combined with the numbers of traditional employees, the Clinic's footprint clearly exceeds the small business exemption. *Id.*

41. *Supra* note 35 and accompanying text (describing dissenting opinion in *Clackamas* case).

42. *Supra* notes 23, 25 and accompanying text (noting broad scope and difficulties involved in determining what constitutes employees).

43. *Supra* note 26 and accompanying text (noting analysis of relationship between individual and employer may differ from employee label within organization).

44. *Supra* note 26 and accompanying text (arguing expansion of ADA between owners of corporation).