Mandatory Retirement of Law Firm Partners

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In January 2010, the Equal Employment Opportunity Commission ("EEOC") filed a lawsuit against the law firm Kelley Drye and Warren LLP, claiming that its alleged mandatory retirement of partners at age 70 violates the Age Discrimination in Employment Act ("ADEA").[1] This is not the first law firm to face claims of age discrimination regarding partners. In 2007, Winston & Strawn LLP settled a suit challenging various aspects of its alleged "decompression" policy that reduced partners' pay after age 65.[2] The same year, Sidley Austin LLP paid $27.5 million to settle a well-publicized EEOC suit brought on behalf of 32 ex-partners who were "de-equitized" allegedly on the basis of age.[3] In a ruling preceding the settlement, Judge Richard Posner of the Seventh Circuit found that the EEOC had alleged facts sufficient to show that the Sidley partners may qualify as "employees" protected by the ADEA, rather than "partners" who would not fall within the Act's coverage because they are employers rather than "employees."[4]

There is no question but that "[w]ith so many baby boomers reaching traditional retirement age, retirement policies are probably one of the biggest issues facing law firms today."[5] This article will discuss the key employment law issues involved in mandatory retirement of law firm partners.

When Are Partners De Facto Employees?

The ADEA protects "employees" from age discrimination, including mandatory retirement,[6] unless they qualify as bona fide executives or high policymakers (discussed below). The ADEA defines "employee" simply as "an individual employed by any employer.'"[7] In *Clackamas Gastroenterolgy Associates, P.C. v. Wells*,[8] the Supreme Court ruled that in determining whether an individual will be found to be an "employee," (1) "the common law element of control is the principal guidepost that should be followed"[9] and (2) control will be analyzed under six factors set forth in EEOC guidelines.[10] These factors are:

1. "Whether the organization can hire or fire the individual or set the rules 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
6. "Whether the individual shares in the profits, losses, and liabilities of the organization."[11]

Clackamas "made clear that neither an entity's status as a 'partnership' nor an individual's designation as a 'partner' would automatically bar the partner from bringing a discrimination claim against the firm under federal law."[12] The Supreme Court found "no 'shorthand formula or magic phrase' that is determinative of the issue whether a person is an employee, which must be determined on a case by case basis with reference to the totality of the facts."[13] "The six *Clackamas* factors are non-exhaustive and 'the answer to whether a [partner] is an employee depends on all the incidents of the relationship with no one factor being decisive.'"[14]

Small law firms have had some success defending age discrimination cases under the six *Clackamas* factors. In *Solon v. Kaplan*, the Seventh Circuit carefully followed the Supreme Court's six-factor analysis and affirmed the district court's finding that a small-firm partner was not an "employee."[15] The Seventh Circuit found:

> Plaintiff was one of four general partners who, by virtue of his voting rights, substantially

> controlled the direction of the firm, his employment and compensation, and the hiring, firing, and compensation of others. He played an active role in the operation of the firm as trustee of its 401(k) account, as managing partner, and informally thereafter. Under the facts of this case, he was an employer as a matter of law.[16]

More recently, in *Kirleis v. Dickie, McCamey & Chilcote*,[17] another small law firm case, a Western District of Pennsylvania court found persuasive on the law firm's motion for summary judgment that the plaintiff-partner owned a significant stake in the partnership (as many shares as the members of the firm's Executive Committee) and shared in the firm's "profits, losses and liabilities, unlike those employees and associate attorneys whose salaries are fixed."[18] The court observed, "Moreover, the comprehensive and generous fringe benefit package that plaintiff accepts is obviously an emollient of ownership that . . . other employees of the Firm do not receive. Additionally, plaintiff participates meaningfully in Board of Directors meetings, decisions, policy and business of the Firm, although members of the Executive Committee have greater participation by virtue of the delegation given to them by plaintiff and the 3/4 majority of the Board of Directors." The court, following *Solon*, concluded that the "factors relevant to ownership and remuneration provide powerful indications that the … [law firm shareholder] should not be treated as an employee."[19]

These small law firm cases notwithstanding, *Clackamas* raised eyebrows among larger law firms, not least because Justice Stevens, writing for the majority, specifically noted that modern partnerships can have "hundreds of members," "where control is concentrated in a small number of managing partners."[20] This dictum did not have to wait long for an influential ruling applying *Clackamas* in the "big law" context. In 1999, the law firm Sidley Austin demoted 32 of its older equity partners to "counsel" or "senior counsel" positions.[21] The EEOC charged Sidley with having violated the ADEA by doing so. The EEOC issued an investigatory subpoena, with which Sidley refused to comply in part, arguing that "it had given the Commission enough information to show that before their demotion the 32 had been 'real' partners and so there was no basis for the Commission to continue its investigation."[22] The district court enforced the EEOC's subpoena and Sidley appealed to the Seventh Circuit.[23] Judge Posner observed that the Sidley law firm was "controlled by a self-perpetuating executive committee," and that the demoted partners' "own status [was] at the committee's mercy."[24] Noting several other features of the law firm that could lead a court to deem the demotees protected employees, the Seventh Circuit ordered the Sidley partnership to comply with the portion of the subpoena it had challenged.[25] Sidley subsequently settled the case, but larger law firms should note that under the operative control test, "the record establish[ed] that the 32 partners had very limited voting rights and no voice in hiring or firing decisions," and thus "the 32 partners in *Sidley* had much less power than the partner in *Solon*."[26]

Bona Fide Executives and High-Level Policy Makers

As to whether a law firm still could successfully defend mandatorily retiring a partner even though he or she is found to be a de facto employee, the ADEA exempts from its protection "compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position," as long as the executive or high policymaker is entitled to an immediate retirement benefit plan worth at least $44,000.[27]

None of the decisions applying the six *Clackamas* factors have considered the bona fide executive/high policy maker exemption, which allows employers little wiggle room. The Code of Federal Regulations provides that this exemption "must be narrowly construed," and places the burden on the employer to show "that every element has been clearly and unmistakably met."[28] This exemption applies "only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business."[29] Whether a particular de facto employee titled partner would qualify for the bona fide executive/high policymaker exemption would necessarily be a fact-specific inquiry. A bona fide executive is defined as one who makes at least $455 per week, whose primary duty is management of a business or subdivision, who customarily and regularly directs the work of at least two subordinates, and who has the authority to hire or fire employees or make personnel recommendations that are given particular weight.[30] "[C]ertain top level employees" who are not bona fide executives may nevertheless be in high policymaking positions if the "position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof."[31]

At least two courts have declined to apply the bona fide executive/high policymaker exemption to the retirement of in-house attorneys.[32] In *Whittlesey v. Union Carbide Corp.*, the seminal case construing this exemption, a Southern District of New York court found that while the plaintiff, an in-house Chief Labor Counsel of a large corporation, "had some administrative or executive responsibility over the functioning of his small section[,] his supervisory duties nevertheless were quite minimal and occupied a very small portion of his time."[33] The court "rejected the argument that Whittlesey's high salary and title of chief labor counsel automatically removed him from coverage" as a bona fide executive.[34] A Northern District of Illinois court, following *Whittlesey*, likewise denied application of this exemption to the retirement of a "[p]laintiff [who] was primarily an attorney doing legal work, and not a high policymaking employee."[35]

Waiver of ADEA Rights in Partnership Agreements

Unlike some other protected rights, ADEA rights can be waived.[36] The question then becomes whether a law firm can effect such a waiver by having its partners, whether de facto employees or not, sign partnership or other agreements providing for mandatory retirements, de-equitization or decreased compensation at a certain age.[37] This appears at first blush not to be possible because Section 7(f)(1)(C) of the ADEA prohibits the waiver of rights or claims that arise following the execution of the waiver.[38] However, the EEOC's regulations provide that ADEA Section 7(f)(1)(C) "does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcements of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date."[39] The other statutory requirements to which the EEOC regulations refer are contained in the Older Workers Benefit Protection Act ("OWBPA"),[40] and include, inter alia, the requirement that the waiver must be "knowing and voluntary."[41] Query whether a "partner" who signed such a waiver at the commencement of partnership would be able to successfully argue that it was not "knowing" because the putative partner signed thinking that he/she would be a "real" partner but turned out to be a de facto employee? Aside from the fact that courts do not always defer to the EEOC's interpretation of statutory provisions,[42] it would come as no great surprise if the EEOC were to decide to change its mind and reverse its position in new regulations regarding waiver of future rights if law firms defended mandatory retirement of de facto employees on the basis of such waivers.[43]

End of an Era?

Kelley Drye is not the first law firm to face an ADEA challenge regarding mandatory retirement of partners, but it may well become one of the last. "In the wake of *Clackamas* and *Sidley*, it seems clear that utilizing a mandatory retirement policy creates significant potential exposure for a firm under the ADEA."[44] In the face of such precedents, close attention will be paid to the Kelley Drye lawsuit. Kelley Drye's defense includes waiver, and it remains to be seen whether the EEOC will attempt to walk away from its own regulations. Another issue will be whether the alleged de-equitized partner failed to mitigate damages, such as by staying at that law firm rather than taking a position at another firm that does not have a mandatory retirement policy. This may have been a real option given that the EEOC's *Kelley Drye* complaint states that the alleged de-equitized partner's "collections and other measurers of productivity were similar to those in previous years," i.e., before he turned 70.[45] If the *Kelley Drye* case settles at an early stage, like *Sidley* before it, these and the employment issues discussed above will remain open questions and mandatory larger law firm partner retirement could live to fight another day. Should there be a decision on the merits, however, the survival of this traditional practice may be at stake.

Conclusion

As baby boomer law partners reach what previously has been considered to be retirement age, the employment law issues discussed here will take on increasing importance. Law firms, particularly larger ones, would be well advised to reexamine mandatory retirement and determine whether or not it continues to be important to them.[46] If so, to avoid successful ADEA challenges, larger law firms at least should implement or review and likely revise waivers to meet OWPBA requirements. The safer course of action would be for larger law firms to review their policies and practices to make the best practical effort for their partners to qualify as such under *Clackamas* and *Sidley.*

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1. *EEOC v. Kelley Drye & Warren, LLP*, No. 10 Civ. 0655 (S.D.N.Y. 2010) (Swain. J.).
2. Marc Tracy, *Winston & Strawn, Partner Settle Salary Suit*, Law 360, Nov. 20, 2007, at http://www.law360.com/articles/40639.
3. Anthony Lin, *Sidley Austin Settles Age Bias Suit; No Determination of Merits*, N.Y. L.J., Oct. 8, 2007, at http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1191834192615.
4. *See EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) (Posner, J.). Kelley Drye's Answer to the EEOC's Complaint asserts that the individuals on whose behalf the EEOC is seeking relief are not and were not employees but, rather, are and were partners who qualify as employers.
5. Ammet Sachdev, *EEOC Sues Law Firm for Age Discrimination*, Chicago Tribune, February 2, 2010.
6. 29 U.S.C. § 630(f); 29 U.S.C. §§ 621 et seq.
7. 29 U.S.C. § 630(f).
8. 538 U.S. 440 (2003).
9. *Id.* at 448.
10. *Id.* at 449.
11. *Id.*, at 449–50.
12. Jessica Fink, *A Crumbling Pyramid: How the Evolving Jurisprudence Defining Employee Under the ADEA Threatens the Basic Structure of the Modern Large Law Firm*, 6 Hastings Bus. L.J. 35, 42 (2010).
13. *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, No. 06-CV-01495, 2009 BL 232991 (W.D. Pa. Oct. 28, 2009) (quoting *Clackamas*, 538 U.S. at 449, n.10).
14. *Id.* (quoting *Clackamas*, 538 U.S. at 450–51). Kelley Drye's Answer to the EEOC's Complaint expressly relies on some but not all of the six non-exhaustive *Clackamas* factors in its assertions regarding supervision, autonomous handling of client matters, and expressions of intent as to partnership status.
15. *Solon v. Kaplan*, 398 F.3d 629 (7th Cir. 2005).
16. *Id.* at 634.
17. *Kirleis*, 2009 BL 232991 (W.D. Pa. Oct. 28, 2009).
18. *Id.* at *50. As to the viability of a motion to dismiss as contrasted to a motion for summary judgment, an Eastern District of Michigan court drew a distinction between the two when a decision turns on whether a partner is an employer or employee. In *Panepucci v. Honigman, Miller Schwartz & Cohn LLP*, 408 F. Supp. 2d 374 (E.D. Mich. 2005), a partner sued her 220-attorney law firm, alleging discrimination under Title VII, the ADA, the Pregnancy Discrimination Act and Michigan state law. The court denied the motion to dismiss that the law firm had made on the grounds that the plaintiff was not an employee, noting that the "evidence weighs in part toward a finding that plaintiff is an employee, and in part that she had the real ability to exercise control over the organization. The court is convinced that the answer to this question would become clear only after further discovery clarifies Ms. Panepucci's role with the firm." *Panepucci*, 408 F. Supp. 2d at 337.
19. *Id.*
20. *Clackamas*, 538 U.S. at 446.
21. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002).
22. *Id.* at 698–99.
23. *EEOC v. Sidley & Austin*, 88 Fair Empl. Prac. Cas. (BNA) 64, at *13–14 (N.D. Ill. Feb. 11, 2002).
24. *Sidley Austin Brown & Wood*, 315 F.3d at 699.
25. *Id.* at 707.
26. Rachel M. Milazzo, *Note - Circular Definitions of What Constitutes an Employee: Determining Whether the Partners of Sidley Austin Brown & Wood Qualify as Employers or Employees Under Federal Law*, 51 St. Louis L.J. 1329, 1345 (2007).
27. 29 U.S.C. § 631(c)(1). On its face, this inquiry may appear counterintuitive on the basis that if a denominated partner does not even rise to that title but, rather, is found to be a de facto employee, how could such a non- " real " partner qualify as a bona fide executive or high policymaker? However, a non-partner, such as an executive director of a partnership, for example, could qualify by playing a significant role in the development and implementation of

partnership policy and/or managing the partnership and having other executive authority.

28. 29 C.F.R. § 1625.12.
29. *Id.* at (d)(2).
30. General rule for executive employees, 29 C.F.R. § 541.100.
31. 29 C.F.R. § 1625.12(e).
32. *Stinneford v. Spiegel Inc.*, 845 F. Supp. 1243 (N.D. Ill. 1994); *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320 (S.D.N.Y. 1983), aff'd 742 F.2d 724 (2d Cir. 1984); see also, *Rand v. CF Indus.*, 797 F. Supp. 643 (N.D. Ill. 1992).
33. *Whittlesey*, 742 F.2d 724, 726 (internal quotations omitted).
34. *Id.*
35. *Stinneford*, 845 F. Supp. at 1246. Nevertheless, Kelley Drye's Answer to the EEOC's Complaint relies on the bona fide executive/high policymaker exemption "[t]o the extent any person on whose behalf the EEOC seeks relief, is or was an employee of Kelley Drye…."
36. *See* 29 U.S.C. § 626(f) (Waiver).
37. Kelley Drye's Answer to the EEOC's Complaint relies on waiver, including ratification of the Kelley Drye partnership agreement and acceptance of the benefits and compliance with the requirements of that partnership agreement regarding "Life Partners."
38. *See* 29 U.S.C. § 626(f)(1)(C).
39. 29 C.F.R. § 1625.22(c) (2010) ("Waiver of future rights").
40. 29 U.S.C. § 626(f) (2010).
41. *See* 29 U.S.C. § 626(f)(1) (2010). It could be argued that the OWBPA would be inapplicable if the waiver was signed when the "partner" was under 40. This argument would likely be unavailing because the challenge would be brought to mandatory retirement over the age of 40 and, hence, the OWPBA would be applicable.
42. *E.g., Kania v. Archdiocese of Phila*, 14 F. Supp. 2d 730, 735–36 (E.D. Pa. 1998).
43. *See, e.g.*, 29 C.F.R. § 1625.32 ("Coordination of retiree health benefits with Medicare and State health benefits") (the EEOC reversing its previous position).
44. Fink, *A Crumbling Pyramid*, at 60. Also, after the Sidley settlement, the American Bar Association adopted a recommendation that law firms discontinue the use of mandatory retirement policies, calling them an "unacceptable practice" that is "unwarranted and unwise." American Bar Association House of Delegates, Daily J., Aug. 13–14, 2007, Report 10A at 11–12, available at http://www.abanet.org/ leadership/2007/annual/dailyjournal.doc. Citing *Clackamas* and *Sidley*, the ABA recommendation stated, "until recently, the [mandatory] retirement of law firm partners widely was regarded as lawful and outside the permissible scope of review by [the EEOC] and the courts," but *Sidley* has " caused the legal profession to sit up and take notice, and to consider whether established assumptions regarding the inapplicability of certain civil rights protections to partners . . . need to be reexamined." *Id.*
45. *Kelley Drye*, No. 10 Civ. 0655 (Compl. ¶¶ 3, 4). Kelley Drye's Answer to the EEOC's Complaint includes in its defenses failure to make reasonable efforts mitigate damages but does not set forth any specifics.
46. According to the April 9, 2010 *New York Law Journal*, Kelley Drye, after the EEOC's lawsuit, has amended its partnership agreement to drop its mandatory retirement policy because, among various reasons, it "doesn't serve … [the firm's] business interests anymore." *New York Law Journal* reported Kelley Drye's Chairman as saying, "[s]enior partners will now be judged solely on performance, like other partners." Nate Raymond, *Facing EEOC Suit, Kelley Drye Drops Retirement Policy*, N.Y. L.J., Apr. 9, 2010, at http://www.law.com/jsp/article.jsp?id=1202447792307.