IN THE SUPREME COURT OF THE UNITED STATES

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CLACKAMAS GASTROENTEROLOGY :

ASSOCIATION, P.C., :

Petitioner :

v. : No. 01-1435

DEBORAH WELLS. :

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Washington, D.C.

Tuesday, February 25, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

STEVEN W. SEYMOUR, ESQ., Portland, Oregon; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

CRAIG A. CRISPIN, ESQ., Portland, Oregon; on behalf of the Respondent.

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P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 01-1435, Clackamas Gastroenterology Association versus Deborah Wells.

Mr. Seymour.

ORAL ARGUMENT OF STEVEN W. SEYMOUR

ON BEHALF OF THE PETITIONER

MR. SEYMOUR: Mr. Chief Justice, and may it please the Court:

The four doctors who are shareholder-directors of the petitioner are not employees under the ADA, the Americans With Disabilities Act, because, like partners, they own and manage their own clinic.

QUESTION: What -- what is the common law rule on respondeat superior for an ordinary corporation vis a vis a director? Is a director of an ordinary corporation an employee of the corporation?

MR. SEYMOUR: In an ordinary corporation, the common law rule is that the employee is like a servant.

QUESTION: Well, if -- if that's so --

QUESTION: Well, what is your answer?

QUESTION: I didn't hear you.

QUESTION: I couldn't hear the response.

MR. SEYMOUR: I'm sorry.

QUESTION: Your answer was yes, was -- he is an employee?

MR. SEYMOUR: Yes.

QUESTION: Okay. Well, then Darden says common law, common law says directors are employees, and these are directors, end of case. Why not?

MR. SEYMOUR: Because Darden doesn't apply here. Darden was --

QUESTION: Well, you didn't even cite Darden, I don't think.

MR. SEYMOUR: I believe I did.

QUESTION: Did you?

MR. SEYMOUR: Yes.

QUESTION: I would think Darden would be the first place we'd look.

MR. SEYMOUR: Well, the difference between this case and Darden is significant. Darden was a case in which the Court was required to determine whether an individual was an independent contractor --

QUESTION: Yes.

MR. SEYMOUR: -- or an employee.

QUESTION: Yes.

MR. SEYMOUR: That's not a choice here.

QUESTION: No, but the decision has to be made on whether these people are employees.

MR. SEYMOUR: That's right.

QUESTION: And Darden says, well, we're going to look to the common law, so what makes you think we'd do something else in this situation?

MR. SEYMOUR: Because there are frankly not much common law that gives us guidance on how to decide whether a director-shareholder in a professional corporation is an employee or not.

The -- in Darden, it cited factors that are really quite good at determining whether an individual is an independent contractor or an employee. Those factors don't work very well here, because they're not designed to address the issues that we're looking at.

That is, for example, one of the factors that the common law looks to to determine whether a -- an individual is an independent contractor is whether the individual provides their own tools of the trade. Well, that's not the kind of factor that's going to work very well in this kind of case. Therefore, we're suggesting that a Darden-like analysis is very appropriate, but we think that it's better to use factors such as suggested by the Government in their brief, that is, the EEOC guidance, because those kinds of factors suggested in the EEOC guidance go the heart of the difference between shareholder-directors and employees.

The factors in Darden do not, so therefore the Darden factors are like trying to pound a round peg into a square hole. We shouldn't do that, because it becomes clumsy.

QUESTION: It may be clumsy --

QUESTION: But this was a case where it was very important to the shareholders in this corporation that they be labeled employees for ERISA purposes. It had to be -- if they weren't employees, they weren't going to be able to get themselves covered under the retirement plan as the law then was, so in -- in the ERISA context you would be saying, of course they're employees. That's how they qualified under ERISA. We set this thing up solely for that reason.

MR. SEYMOUR: Yes, Your Honor, except that I think that the -- the tax purposes were more under the general tax laws, not under ERISA, because they could establish an ERISA plan and deduct the expenses.

QUESTION: But didn't they -- in order to be covered, didn't they have to be employees?

MR. SEYMOUR: Yes.

QUESTION: Yes.

MR. SEYMOUR: And -- and just --

QUESTION: And they wouldn't -- on your theory, they're not -- so they are employees for that purpose?

MR. SEYMOUR: Well, they're treated as employees for that purpose, but they should not be treated as employees for purposes of the ADA.

For example, if we turn the coin over and look at the other side, and the Court is required to examine whether someone who is labeled a partner is, in reality, a -- an employee. If the Court finds that, looking at the economic realities of that situation, that the partner is really an employee, that doesn't mean that the now-employer should issue W-2's, or that they should have been withholding. Those are tax issues, and they don't have the same purposes as the ADA.

QUESTION: But the -- am I wrong in thinking that the -- the whole thing was set up the way it was, instead of as a partnership, for the reason that these people needed to be characterized as employees for retirement plan purposes?

MR. SEYMOUR: Yes.

QUESTION: And are they not also employees for Worker's Compensation purposes?

MR. SEYMOUR: Under Oregon law, they can opt out of Worker's Compensation.

QUESTION: But they'd have to opt out. They start out by being in.

MR. SEYMOUR: Yes.

QUESTION: They start out as being -- do they get salaries?

MR. SEYMOUR: They get salaries plus a bonus, which is the division of their profits.

QUESTION: But they get salaries. There's nothing inconsistent with being, say, the president of the company and principal shareholder and being both an owner and an employee.

MR. SEYMOUR: That's true. There's nothing inconsistent about that, and our concern with this case is, the court didn't go past the fact that the clinic was organized as a professional corporation, and when the --

QUESTION: Why should it, because I'm still stuck with the language of Darden, which reads as a general rule, when Congress has used the term, employee, without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine, and it says, that rule stood as an independent authority for the copyright decision. So, too, should it stand here.

Now, is your view, it should not stand here in this case --

MR. SEYMOUR: That's our view.

QUESTION: -- as sufficient?

MR. SEYMOUR: That's our view.

QUESTION: All right, so you're asking us to depart from Darden and to make an exception from the Darden rule for the -- this particular act.

MR. SEYMOUR: For this --

QUESTION: Is that right?

MR. SEYMOUR: For this particular circumstance, that's correct, Your Honor.

QUESTION: Well, when you say circumstance, there's a word in an act, so you're saying that the word, employee, in this title of the ADA does not bear the common law definition?

MR. SEYMOUR: Well, I think the common law definition is one thing to look at. That is the --

QUESTION: No, no, I'm asking -- they said in Darden that's the end of it, and you say -- I want to be just clear about it. You say, it is not the end of it. Common law is not the end of it.

MR. SEYMOUR: Yes, that's what we're saying.

QUESTION: All right, and so --

MR. SEYMOUR: Common law is not the end of it.

QUESTION: Okay. Now I understand.

QUESTION: Would -- would you say that the EEOC guidelines and writings and treatises on the differences between professional corporations and other corporations

might themselves be part of what we call the common law?

I -- I take it part of your position is based on the proposition that the common law, I suppose of agency, up through the 1950s just didn't have much on this subject at all, when we're talking about the difference between partners and professional and -- and employees of a professional corporation. There just wasn't a corpus of writing on that subject.

MR. SEYMOUR: No, there isn't much in the common law, because a professional corporation is not a product of the common law, nor is a limited liability partnership, nor a limited liability company, and all three of those organizations are virtually functionally identical once they're up and running. They have the same --

QUESTION: Well, and as -- as courts begin to write about these things in the area of subchapter S status, tax status and so forth, there is an emerging decisional law, at least, that's -- that's evolving, I take it, and you might say that has some common law attributes. It might not be common law as we -- as we usually define it.

MR. SEYMOUR: Attributes, yes, but not that focus on this particular question, and that is whether a shareholder-director in a professional corporation should be considered an employee for purposes of defining who --

QUESTION: Who -- Darden also says, a couple of pages after the quote that Justice Breyer -- since the common law test contains no shorthand formula or magic phrase that can be applied to find the answer, all of the incidents of the relationship must be assessed and weighed with no one factor being decisive, which suggests a more fluid test, certainly, than the other language.

MR. SEYMOUR: And a more fluid test would be certainly more flexible, because --

QUESTION: But that's exactly my point. That's why I started out asking you whether you concede that a director of a corporation is an employee under the common law, because if you concede that, you're saying that the common law fluid test ends up with the director being an employee, and I take it that it's well-established a director is an employee.

MR. SEYMOUR: Well, that's -- I -- I understood your question to be --

QUESTION: No, my question was to try to get the framework. Either you're saying the common law, you win, or you're saying, common law, I lose, but I win anyway because it's not the common law, so if you want to take the tack, common law test, I still win, explain it to me. How is a director ordinarily an employee, but this one isn't?

MR. SEYMOUR: Well, under an ordinary corporation, I think your -- your question would be yes, but under a professional corporation, it's different.

It's much more like a partnership, because if we look at the emergence of these new entities like limited liability partnerships, limited liability corporations, and professional corporations, they're all emerging for professional businesses like this clinic from sole proprietorships or general partnerships, and the only -- there's really no difference, functionally, when we look at those different entities.

QUESTION: Oh, but isn't there a huge difference, that they've got limited liability?

If you have -- the corporation is liable if you have, you're incorporated? Isn't that the true with your case, too?

MR. SEYMOUR: No, the --

QUESTION: Whereas in partnership, the individuals are liable?

MR. SEYMOUR: In the partnership, individuals are liable, but in a professional corporation, in a limited liability partnership, in a limited liability company, the -- for professionals, those limited liabilities are all the same, and they're not as good as a general corporation, or an ordinary corporation.

In other words, the doctors in this clinic, in a PC, have liability for their own acts, and limited vicarious liability for the acts of the other doctors. That's not true inside an ordinary corporation. It is true inside a limited liability partnership and a limited liability company.

QUESTION: Am I wrong in thinking that the -- that the individual liability is not across the board, but it's only for malpractice-type claims?

MR. SEYMOUR: That's right, it's for malpractice-type claims, and I think --

QUESTION: So --

MR. SEYMOUR: -- that's pretty much true not just in --

QUESTION: But other claims against the clinic, it -- they -- they would have limited liability?

MR. SEYMOUR: Yes, they do, and that's true for all three of those emerging types of entities, professional corporations, limited liability partnerships, and limited liability companies.

QUESTION: Well, maybe there isn't -- there isn't any settled law, is there, that a limited liability partnership would not be treated the same way that this entity is -- is treated?

MR. SEYMOUR: Well, for example, as a partner in

a partnership, limited liability partnership, I have exactly the same limits on my liability as the doctors in this clinic, and I am not an employee, I'm a partner, and the only difference between my status and the status of these doctors is the form of the business, and that's really just a label.

QUESTION: Well, you say you're not an employee, but isn't that the question we have to decide?

MR. SEYMOUR: Well, every court that's addressed the issue of whether partners are employees, including this Court --

QUESTION: Well, you wouldn't suggest that every partner -- no partner is ever an employee. You're not suggesting that, are you? Say you've got a law firm that's got 250 partners, you're going to say none of them are -- are employees?

MR. SEYMOUR: I'm sure there are some who would say that, but I think that what the courts need to do is look at the individual, not just at a label, and look beyond the label to find out, as the EEOC standards --

QUESTION: Well, we don't have a partnership here. We have a professional corporation --

MR. SEYMOUR: Yes.

QUESTION: -- do we not?

MR. SEYMOUR: That's correct.

QUESTION: That's what we're talking about. We're not talking about partnership.

MR. SEYMOUR: But I'm saying that a -- a limited liability partnership and a professional corporation should be treated alike for purposes of the EEOC. Excuse me, for purposes of --

QUESTION: But then we're away from --

MR. SEYMOUR: Pardon me?

QUESTION: I thought you had a very good case in your brief, and then I read Darden, and I realized the reason I was thinking it, I was out of date and thinking that Hearst was still good law. That's Frankfurter's opinion on employee. I thought it was a great opinion, all right, but I can't square that with what the Court said. That was my initial question, and I'm still there, because I haven't really heard you explain why it is that the common law test won't pick up your clients.

MR. SEYMOUR: And I'm -- if I may, the -- the problem with Darden is, it's examining a different relationship than we have in this case.

In the Darden case, the issue was whether an individual was an independent contractor, and we deal with those issues all the time. Our clients come and say, I want to be an independent contractor, or make my employees independent contractors, and we have to go through the

books and say, no, we can't let you do that because of Darden, or whatever.

We don't see those kinds of circumstances in the law. There's no common law --

QUESTION: Well, maybe the price that has to be paid for professionals to set up a professional corporation is to be subject to the ADA, and the anti-discrimination law of title VII, and so forth, because these people are going to be counted. In this case, it makes a difference.

MR. SEYMOUR: Well --

QUESTION: Is that all bad, that they have to be subject to these provisions?

MR. SEYMOUR: The reason that it's bad -- yes, it is all bad.

QUESTION: Why?

MR. SEYMOUR: And the reason is that we should treat similarly situated businesses the same, and there are a -- a class of partner-like or proprietor-like individuals, and there is a class of employee-like individuals, and just because -- let's say it starts out as a general partnership. Just because they shift into a limited liability partnership, or a professional corporation, or a limited liability company, that shouldn't change who belongs in which class, and if we

look beyond the label of professional corporation, then we can see what the relationships are and therefore settle that issue.

I'd like to reserve the balance of my time for rebuttal.

QUESTION: Very well, Mr. Seymour.

Mr. Gornstein, we'll hear from you.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. GORNSTEIN: Mr. Chief Justice, and may it -- may it please the Court:

Under the EEOC's guidance, the question whether shareholder-directors are employees depènds on whether they operate independently and manage the business or, instead, are subject to the organization's control. That standard aligns the test for determining the employment status of shareholder-directors with the test that courts have long used in deciding whether partners are employees.

QUESTION: Well, do you say that the EEOC has adopted standards that differ from the common law, and has by regulation or otherwise determined that we should apply its test to this question?

MR. GORNSTEIN: I guess largely, yes. The EEOC started with the common, common law right to control test

that is used to distinguish between independent contractors and employees and adapted it to make a distinction between those who were the proprietors of the business and that business' employees, and it did so in a way to align its standards for looking at the question of shareholder-director with the same standards that have been used by all the courts in deciding whether partners or -- are employees

QUESTION: And do you agree with the petitioner's attorney that if you look to the common law test, these people would be employees?

MR. GORNSTEIN: If you look to the Restatement as the measure of the common law --

QUESTION: Yes.

MR. GORNSTEIN: -- then generally speaking, a -- a director who didn't employ service -- perform services would not have been an employee, but a director who performed services would be.

Now, the only hesitation I would have is to say that the -- that at the time of the Restatement there wasn't -- there weren't professional corporations that mixed and matched features of partnership and corporations, so there's not as clear an answer on that.

QUESTION: Do we owe deference to the EEOC standard?

MR. GORNSTEIN: The -- the Court should give weight to the -- the EEOC's test because it reflects its accumulated and longstanding experience in administering the act, but we're not asking for Chevron deference here.

QUESTION: Didn't the Court say the EEOC doesn't get such deference? I mean, didn't -- wasn't that way back in the Gilbert case?

MR. GORNSTEIN: It -- it did say that, that it -- it doesn't get Chevron deference. Now, there is an exception now. Under the ADA, the EEOC can issue regulations, and this Court has held that those regulations are entitled to Chevron deference, but this is guidance that applies across the board to all the nondiscrimination laws, and what the Court has said in that context is that the EEOC's analysis gets weight, in light of the fact that it has accumulated experience under the law.

QUESTION: But it would be kind of a Skidmore deference.

MR. GORNSTEIN: It would be a Skidmore deference, that's correct. Now, what --

QUESTION: I hate to be a bore on this, but will you please write the two sentences for me where I have to say either that, we apply the common law test, and in this instance, the common law test comes out in your favor, or

we have to say, we don't apply the common law test because the EE -- this statute is different. Which of those two paths, both of which could lead to your victory or your defeat, do you think we should take?

MR. GORNSTEIN: Neither of those two, Justice Breyer.

QUESTION: Neither, all right. Then write that section of the opinion.

MR. GORNSTEIN: I -- let me get to Darden, because I think that's the focus of your questions.

As we read Darden, there is language that is certainly broad enough in it to say that any time you use the word, employee, you mean common law employee, but I think that those, what -- you have to understand Darden in the context of the -- the issue it was resolving in that case, and there it was trying to draw a distinction, whether the term employee embraces independent contractors, and in that setting, Congress had twice amended statutes to make clear that the term, employee, did not mean independent contractor after this Court has said that it could, and in that context, it makes perfect sense to start out with a very strong presumption that when Congress uses the term, employee, it does not mean independent contractor.

But that's not the situation we have here, and

in other cases where the Court has looked at statutes that use common law terms, like Title VII does with respect to the term, agent, it has felt a lot more freedom to adjust that common law term to the purposes of the statute, and I would point you to the Faragher case and the Kolstadt case as two examples of that, and that's what the EEOC has done here.

It has adapted that common law principle in light of the fact that we have an established tradition in the courts, well-established, of looking at the question of partnership in a functional way, does this person actually operate as a proprietor of the business, or is this a partner in name only, and it makes perfect sense for the EEOC to apply that same kind of functional analysis in deciding whether shareholder-directors are employees, because for purposes of deciding who should get the protection of the act, and that's what we're talking about primarily here, there is no practical difference between shareholder-directors who run a business and partners who run a business, and so it makes sense to -- to use the same test.

Applying the same test also makes sense in light of the purposes of the small business exemption, because the purpose of that exemption is to spare small businesses the very substantial burdens of complying with the

nondiscrimination laws, and those burdens are experienced in exactly the same way regardless of whether those who choose to organize a small business do so through a partnership form or a corporate form, and the -- the analysis that the tests should be the same across the board also makes --

QUESTION: May I ask you a question about the application of your test? You -- you urge us to remand the case, as I understand it --

MR. GORNSTEIN: Yes, we do.

QUESTION: -- to answer the question whether these individuals operate independently and manage and control the business on the one hand, or are subject to the organization's control on the other, and I ask you, is it not possible that the same individual could meet both halves of that test?

MR. GORNSTEIN: No.

QUESTION: Some of his duties, he'd be manager, and some others he'd have to respond to what the group told him to do?

MR. GORNSTEIN: Well, it -- it's possible that's true, but what the EEOC's guidance --

QUESTION: What do you do if you find such a case?

MR. GORNSTEIN: You make --

QUESTION: With respect to surgery, he takes orders from the directors. With respect to advising patients, he's on -- on his own.

MR. GORNSTEIN: What -- what we have here under the EEOC's guidance is, ultimately you make an overall judgment that's either-or, based on all the considerations in the guidance, and they are at page 9 of our brief, so that, just as in the partnership context, you look at all of these factors, and just as you would in an independent contractor status kind of situation, you look at all the relevant factors, and then you make an overall judgment about, essentially does this person function as a proprietor of the business, or is he functioning as an employee of the business overall.

QUESTION: Why isn't it simpler just to say, well, they picked a corporate form with their eyes open because it was important for them to be labeled employees, at least for retirement purposes, so they have to take the bitter with the sweet. They got that qualification so they could have their retirement plans, and then it's just much simpler to say, that's the form that they chose, and the law for many -- in many contexts does follow what -- the form parties choose for their arrangement. Why shouldn't that be the answer?

MR. GORNSTEIN: The -- the approach that the

EEOC has taken is to -- is a functional approach that tries to treat all people alike, and to look to the real functional relationship between the individual and the employee, and the fact that somebody may have chosen to do something for tax consequences, or chose to do something for purposes of limiting individual liability, really doesn't have anything to do with whether he is the sort of person who should receive protection under the nondiscrimination laws, and this is ultimately what we are determining here, are these shareholder-directors people who are employees and therefore receive protection under the nondiscrimination laws, because it's only those people who are the --

QUESTION: Well, I thought we were looking to see if some other, lower employee was covered, not these directors, and that turns on whether you count them as employees --

MR. GORNSTEIN: That's --

QUESTION: -- or not.

MR. GORNSTEIN: That's correct.

QUESTION: We're not looking to see if they themselves are covered under the ADA in this case.

MR. GORNSTEIN: But in order to answer the question you have in front of you, which is, is this a small business and does this employee get protection, you

first have to answer the question of, are these shareholder-directors employees who get protection under the law, so that is the inevitable product of having to decide the small business exemption, is that you have to decide, these are people who get protection under the laws, and it -- it's just not the case that the policies that underlie decisions about incorporation having to do with tax consequences and individual liability have anything to do with whether these are the kind of people who should receive protection under the nondiscrimination laws.

QUESTION: Well, I just thought Congress was more concerned with not making really small businesses covered by these acts, that we weren't focused on whether these professional shareholders should be covered, but whether this was the kind of small business that shouldn't be covered at all.

MR. GORNSTEIN: Well -- I'm sorry, Justice O'Connor.

QUESTION: Is that right?

MR. GORNSTEIN: I -- what Congress did in the small business exemption is to link the exemption to the number of people who receive protection under the laws, and that makes sense, because it means that at most, when the small business exemption applies, at most, 14

individuals will be excluded who otherwise would have had protection.

QUESTION: Thank you, Mr. Gornstein.

Mr. Crispin, we'll hear from you.

ORAL ARGUMENT OF CRAIG A. CRISPIN

ON BEHALF OF THE RESPONDENT

MR. CRISPIN: Mr. Chief Justice, and may it please the Court:

The position of the clinic and the Government in this case essentially is to look to ignore the form and structure of the corporate business, yet just 2 years ago, in Cedric Kushner versus King, this Court held that a sole shareholder was separate and distinct from the corporate structure itself, and that's the -- the essence of the question.

QUESTION: What kind of a legal issue was it there, Mr. Crispin? What act were we construing?

MR. CRISPIN: That was a RICO question, and the question was whether or not the two parts of the -- the RICO enterprise on the one hand and the -- the other aspect of the RICO question existed with both the individual sole shareholder and director of the corporation as being separate and distinct from the corporation itself, and in that case the Court said, you cannot collapse the two.

The defense position was, they are, in fact, the same identity, and this Court said no, that's not true. What -- the corporate structure is something separate and distinct, which is recognized by this Court, has been recognized for years and years and years, and that that is something that cannot and should not be ignored.

QUESTION: Well, the -- the reason we said it was that we couldn't find any basis in the statutory history or the text that -- that gave us a clue that Congress, in effect, wanted to ignore something which is such hornbook law.

The argument on the other side, I think, is that there is a reason to think Congress would want to look at -- at nontraditional concepts here. The argument is that the common law definition of employee does not axiomatically apply because it's not addressing the issue that Congress was addressing in that -- in this statute. The issue that Congress was addressing in this statute, as I understand the argument, in fact taking the -- the very words that Mr. Gornstein used a moment ago, was the issue of protecting people who can be hurt by discrimination. It was a protection issue.

So that I think what he's saying, and -- and what the petitioner's counsel are saying is, the one thing that we do know about employees is that they were people

who were intended to be protected by this statute. If that is true, it is not probable that they were trying to include as employees, the protected category, people who don't need protection because they are in ultimate control of the business, the ones who, if there's going to be discrimination, are going to be doing the discriminating, so it's probable that the people who have that ultimate control would intend it to be within the employee category. That's an issue that the common law didn't address.

How do you respond to that argument?

MR. CRISPIN: Justice Souter, the individuals that are subject to discrimination in this particular case are not only the lower-level employees as this case presents. We have four shareholder-directors, and any one of those could come down with a disability and have the remaining three shareholders refuse to accommodate or otherwise violate the ADA with respect to that one individual, so the -- the individual --

QUESTION: So you're saying, even on the premise of their argument, it does not exclude any one of the four.

MR. CRISPIN: That's correct.

QUESTION: I suppose if one of the four had a 51 percent, a truly indefeasibly controlling interest,

you'd concede that, but short of that, which apparently is not the case here, you say, even if I take their premises, they lose.

MR. CRISPIN: That's right, Your Honor, I -- although I -- let me comment that I'm not sure I would concede the 51 percent, all -- I would concede it for your hypothetical.

QUESTION: Yes, right.

MR. CRISPIN: But our position is that the employing enterprise is the determining factor.

QUESTION: How -- how does the EEOC treat an ordinary corporation that, let's say, has 12 regular employees and then three directors, the cousin, the father, the son, or whatever, of the owner, so there -- so it's as -- if you count the three -- and it's a perfectly ordinary corporation. There's nothing special about it. Do they count those three directors, or not, as employees?

MR. CRISPIN: As I read their position, I -- I believe that they, under the new guidance, would count those directors under their balancing test. They would apply the -- this multiple-factor balancing test, look at the degree of control, and decide on a case-by-case basis.

QUESTION: So remember, these three are just cousins. They're not -- I mean, they only show up once a year, and they vote, and -- and that's it. That's their

connection.

MR. CRISPIN: Well, in that case, Your Honor --

QUESTION: Do they count them or not?

MR. CRISPIN: In that case, Your Honor, they would not be counted.

QUESTION: They don't count?

MR. CRISPIN: They don't count, because they're not performing services --

QUESTION: All right. Then -- and those are people who the common law really would consider to be employees, at least while they're there for that hour a year, is that right?

MR. CRISPIN: I'm not sure what the answer would be. We know that -- that employee is considered a person who performs services for the corporation --

QUESTION: Well, they're there once a year for an hour, and during that time they spill some water, somebody slips -- I mean, a corporation, I guess, would be liable, or -- or not?

MR. CRISPIN: On their acts, if they are performing services --

QUESTION: Yes.

MR. CRISPIN: -- for the corporation for compensation they would at -- for that hour --

QUESTION: Yes, for that hour.

MR. CRISPIN: -- be considered employees.

QUESTION: Right.

MR. CRISPIN: Now, of course, under the ADA we're looking at numbers of employees over 20 weeks within a calendar year.

QUESTION: Yeah, yeah, yeah, right.

MR. CRISPIN: But again, the idea, as this Court recognized in Walters versus Metro Educational, was that the determinations under the employment discrimination statutes should be subject to ready and easy determination. Complex and expensive factual inquiries should be avoided, but yet the Government's test and the clinic's test, which has adopted the Government's test, would have this Court look at the facts in each individual case every time --

QUESTION: Well, don't we have to give some weight to the EEOC view? Do you just want to ignore it completely?

MR. CRISPIN: No, Your Honor. The Skidmore deference is appropriate, Justice O'Connor.

QUESTION: Why? Why, because I would think then you lose. I mean, here -- if I'm very frank about it, there are two competing things here, and the one thing, give weight to the agency, let them define these terms, particularly at the margin, but that's Hearst, and -- and

the other is, no, no, it doesn't matter what they say, pay no attention whatsoever to what they say. What they have to do is follow the common law definition. That's Darden.

So if Darden applies, I take it you win, but if Darden doesn't apply, it seems to be much harder for you to win, because then the agency should get deference under Skidmore, at least, in applying the term, and the agency here has a different definition than the one that helps you.

So that's where I am, and I'm quite uncertain about it.

MR. CRISPIN: Your Honor, two -- two responses to your question. Under Darden, it -- it does -- the Court has decided that the common law applies, and we would say that's appropriate. The precise test under Darden dealt with the independent contractor versus employee test. That is not absolutely translatable here, but the key concept is that the common law applies is appropriate.

The second aspect of your question, Your Honor, was on the deference entitled to the EEOC opinion, and as I understand Skidmore deference, it's only that deference which is appropriate under the circumstances of their test. In this case, the EEOC's test is not workable. It leads to inconsistent results, and it fails to further

the -- the interests that are looked at under the statute, and I can turn to those points.

QUESTION: Doesn't it, perhaps better than the, just straight common law, of course, deal with the coming of -- of age, so to speak, of the professional corporation, which really didn't -- didn't amount to much, if -- if it even existed 20 or 25 years ago?

MR. CRISPIN: Mr. Chief Justice, it may address it, but it need not. It need not treat a corporation, whether it's a professional corporation or a general corporation, differently --

QUESTION: No, it need not, but it has chosen to do so, and the -- the question, I guess, before us is, under Skidmore deference, is that a reasonable decision?

MR. CRISPIN: It's not a reasonable decision in looking at the professional corporation as the EEOC's test would apply to it, and -- and the reasons are that, as -- as the EEOC and the clinic has suggested, an important issue is one of consistency, yet applying their test does not lead to consistent results.

One can imagine the -- the circumstance of a professional corporation with one shareholder-director and 14 employees. Under their test, that individual corporation would not be covered. It has fewer than 15.

Take the situation, though, where there are 14,

15 director-shareholders of the professional corporation and 14 employees, a business nearly twice the size of the first one, and yet that one would be covered because of the 15 employees.

QUESTION: Are you -- are you basing your estimate of what the EEOC would cover on the materials set forth in the Government's brief at page 9?

MR. CRISPIN: Well, as I -- as I read the test, what the EEOC would do in that circumstance would look at the number of employees, and the 15 employees, whether there was 1 or 14 shareholders would make no difference, and -- and yet with 15 or 14, or 15 or 25 shareholders, whether or not they were considered employees or not, the 15 individual employees would be enough to provide coverage, yet take the same circumstance and back off the one with the number of employees, and under the EEOC's test, it would be a factual shareholder-by-shareholder determination which would be required to determine whether this company -- corporation is, in fact, covered or not.

And so we have the situations where many more entities, enterprises with a lot of people working for them, which may not be covered on the one hand, and down the street a very similar corporation --

QUESTION: But if they have many people working for them, they won't be subject to the small business

exception.

MR. CRISPIN: That -- that's right, unless they have less than 15 employees, but yet in a professional corporation as we have here, the individual shareholders are performing services for the corporation. In fact, that's the business of the corporation, is to provide the medical services that these four shareholders were performing. They created revenue which came into the corporation, they got the benefits of the corporate structure for tax benefits and for ERISA purposes, and yet they -- and yet the EEOC would -- would put a factual determination on whether or not one or more of the individuals were, in fact, employees.

The interest of predictability would be lost in such a situation. Predictability is important for both the enterprise itself to know whether it's covered, and also for the individual employee, the secretary or the nurse down the hall. In a -- a test that says, we adopt the corporate structure as the appropriate test, those individuals, the enterprise, the nurse, the secretary, all they have to do is look at their paycheck to see if it's a corporation, and count up the number of people working for that corporation, performing services --

QUESTION: Well, what -- why would they be doing this? I mean, are you suggesting that the secretaries

won't work for the corporation unless they know it's covered under this statute?

MR. CRISPIN: I -- I think that's a possibility, yes.

QUESTION: No, I mean, is it a realistic possibility? I mean, are people making employment decisions depending on whether they -- they're going to be able to sue if there is discrimination likely?

MR. CRISPIN: In -- in my practice, which is exclusively dealing with employment matters, yes, we see that, individuals who are quite concerned. Also, I am aware of, although I cannot cite you to studies which indicate that fear of retaliation for bringing a claim is a real factor on individuals. If they know they're not protected, they don't bring the claim. Now, that's --

QUESTION: But if there are no -- if they're not protected, they have no claim to make.

MR. CRISPIN: That's true. If they -- if they know they're not protected, then they -- they don't risk the kind of retaliation for raising the claim, and they go on and just do their jobs.

QUESTION: So I'm quite -- still -- I hate to go back to this, but it seems to me there might be millions of small businesses in the country that have about 10 or 12 employees where if you count their directors, they are

going to be covered, and if you don't count them, they won't be, and I'm curious about the practical effect of that. Of course, if the EEOC counts them now, there's no problem. If it doesn't count them now, this decision would -- would affect that. Do you have any sense of what the facts are?

MR. CRISPIN: I think the numbers are significant, that there are quite a number of -- of small businesses in that category, professional corporations, but whether that's a factor that should enter into the Court is, of course, your decision, not mine, but if Congress -- but the -- the touchstone of that question, then, would be, though, the intent of -- of Congress, whether Congress intended the term, employee, to have a common law application and, if that's the case, then they should be, in fact, covered. That's what Congress wanted to do.

QUESTION: How do you respond to the famous two clinic examples, one is set up as a partnership and one is a professional corporation?

MR. CRISPIN: Well, Your Honor, Number -- I've got two responses to that. Number 1, it -- it's one example of a way that it would provide inconsistent results, but I just talked about a different one which is very different, which provides inconsistent results by

their test.

Second, this Court has never held that a partnership is not subject to Title VII or ADA because it's a partnership. Some of the lower courts have done that, and Justice Powell in his concurring opinion in the Hishon case did, in fact, address that, but this Court has never so held. That's not a question that this Court need address in this opinion, but it is something that the Court may want to look at in terms of, under the -- for example, under the Restatement Second of Agency in 1958, the partnership was recognized as being able to have employees as members of its partners who were performing services for that partnership, so --

QUESTION: Are you making a distinction between owner-directors who are also working every day providing the services of the entity, and owner-directors who are not involved in the day-to-day service delivery function of the enterprise?

MR. CRISPIN: Justice Ginsburg, I -- I believe -- I believe your question addresses whether those directors who are not involved day-to-day --

QUESTION: Right.

MR. CRISPIN: -- would be covered as employees, but the common law test, as I understand it, is that there's a question of compensation. If the services are

being provided, and there's compensation for those services, then the individual would be counted as an employee and, as we indicated earlier, the question under the ADA deals with five work days in 20 different weeks, so the -- the director who comes in just on occasional basis, even if compensated, would not be enough to -- to, typically to add another employee.

QUESTION: Well, if you say the director gets a fee, and the meetings are not frequent but the director is expected to remain au courant with what's going on in the business, so how do we judge that? We can't say, only the -- for the hour of the meeting that director counts.

MR. CRISPIN: Your Honor, the -- the decision of this Court in, in the A -- in determining what employees count for ADA purposes was, the -- the decision was the payroll method, and looked to the payroll, whether an individual is on the payroll for 5 days of the week for 20 weeks in the preceding or current calendar year, so the director, if that director is performing services adequate to put him or her on the payroll for the entire week, would be counted as an employee for that particular week.

I -- I would suggest that that would be a rare occasion where a director who had no other role in the company but to come in and sit in on a meeting or keep up with things would appear on the payroll, but if they were,

then they should be counted as employees, because they are performing services, receiving compensation, and then it just simply moves into the -- the method of counting those employees.

QUESTION: In any event, the director, the owner-directors, shareholder-directors that we have here are working for the corporation every day, and they are on salary?

MR. CRISPIN: They are on salary. They work every day. The compensation or revenue they produce goes into the corporation. They enjoy the corporate shield from liability for all but that small category of exposure to malpractice cases --

QUESTION: Why is that small, when you're talking about a professional medical corporation? It seems to me that that would be the biggest liability, not the small --

MR. CRISPIN: It very well may be the largest monetary, but one could -- could list a number of things, such as liability on the leasehold, liability for employee claims, liability for employment contracts, liability for tax payments, that would be the liability of the corporation, and for which the individual shareholder-directors would not have --

QUESTION: But with -- with malpractice, don't

you have a much greater likelihood of punitive damages and things like that, that you don't have arising just out of a contract claim?

MR. CRISPIN: Exactly, Mr. Chief Justice, that -- that is correct, and so, from the -- the monetary standpoint, as I said, that would be the greatest problem, but the -- the idea of limited liability exists in this corporation, as it does, in fact, in the limited liability partnerships and limited liability companies, and if the touchstone is whether there are corporate limited liability features, then it doesn't make any difference whatsoever whether we're dealing with a limited liability partnership, limited liability corporation, a professional corporation, or a general corporation, individuals would be employees if they met the requirements otherwise.

If there are no other questions, I'll conclude.

QUESTION: Thank you, Mr. Crispin.

Mr. Seymour, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF STEVEN W. SEYMOUR

ON BEHALF OF THE PETITIONER

MR. SEYMOUR: Thank you.

The protected class, people in the protected class should be the same as are counted toward the 15-employee threshold. That is, we should look at the individuals in the business enterprise the same, whether

we are determining whether they are eligible to file a lawsuit, or are protected by the act, or are counted towards the act's coverage.

Must these doctors take the bitter with the sweet? What we're saying is that what these doctors deserve is to be treated the same as their colleagues in businesses that are identical, but have a different form. That is, these doctors in the professional corporation should be treated the same as doctors in a limited liability partnership or a limited liability company.

Would it be simpler to simply look at the form of the business and stop there? It would, but it would also be simpler if we looked at the term, partner and said, well, partners can never be employees, or we look at the term, independent contractor, and say well, independent contractors can never be employees, but we don't do that for good reasons. We look beyond the label, and I'm suggesting that that is appropriate here as well. Look beyond the label and see what the realities are, a reality check.

Does the EEOC count directors as employees? Generally, in -- in business law there's a big difference between a director, an officer, a shareholder, and an employee, so as I read the EEOC guidance, that is a vehicle through which businesses, courts, and the EEOC can

look at an individual and determine, well, is the -- is the label, director, in this circumstance appropriate, or are they really functioning as an employee?

You can, of course, have inside directors, that is, employees who are appointed to the board of directors, or you can have outside directors in some circumstances where they aren't affiliated except in an advisory role, as a member of the board, and they -- members of the board of directors could be paid or they could be not paid, and I don't think that's an issue that should necessarily be determinative on deciding whether or not they are an employee.

The court of appeals here did not look beyond the fact that the shareholder-directors had organized as a professional corporation, but the trial court did, and looked at factors similar to those identified in the EEOC guidance, and concluded that these shareholder-directors were not employees. We believe that is the correct approach the Court should take.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Seymour. The case is submitted.

(Whereupon, at 11:48 a.m., the case in the above-entitled matter was submitted.)