When Employee = Employer

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Frank Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. Rev. 137 (2010).

I admit to being old-fashioned enough to like well-done doctrinal articles. Especially ones that upset conventional wisdom – the courts, the agencies, and the law reviews – by suggesting that, not to put too fine a point on it, everybody's wrong. Doctrinally. Such is Frank Menetrez's piece *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. Rev. 137 (2010). Frank doesn't appear to be in the academy at the moment, but we could use more scholars like him.

Admittedly, I came to the piece with pretty low expectations – agency, control, what new could be said? It turns out, plenty. Frank's target is the notion that someone can't be an employer and an employee at the same time, which explains why cases like *Clackamas Gastroenterology Associates, P.C. v. Wells* turn on whether the doctor-owners were "really" owners (in which case they were employers and, for the Court, couldn't also be employees).

Rather than approach the question from a policy perspective (are these the kind of people the employment discrimination laws were designed to protect?) or a formal one (is the entity the employer, thus rendering the owners employees insofar as they work for the entity?), Menetrez takes the Court at its word (in both *Clackamas* and its predecessor *Darden*) that Congress intended the concept of "employee" to turn on common law principles of agency. Under that approach, he argues, owners can be employees. It pretty much turns on whether the entity controls them in aspects of their work (even if, in other ways, they control the entity).

Among the ironies that this argument uncovers is that a "purposive" approach to the statute (usually thought to be expansive of its protections) is actually restrictive and a plain meaning approach (employee = controlled agent) is expansive. As was an issue in *Clackamas* itself, finding a person not to be an employee because she's an owner most often means that other workers are not covered by the statute since the entity then has too few employees to be a statutory "employer." Another irony is that the elusive search for the essence of "partner" (is an individual a partner in name only or "really" a partner) turns out to be unnecessary – "under the common law of agency, a bona fide partner can be, and often is, an employee regardless of the amount of managerial power the partner possesses. . . ."

I suspect the reader of this is as skeptical as I was when I picked up *Employee Status*, so maybe a brief excerpt will make it clearer than I could in the limited space that Jotwell allows. Menetrez views the case law, leading up to and including *Clackamas* as dependent on three arguments:

(1) An individual who owns and manages a business is an employer; (2) an individual cannot be both an employer and an employee; and (3) an individual cannot be both a partner and an employee. This Article argues that, evaluated under familiar common law agency principles, the defense arguments are unsound at every step.

First, an individual can own and manage a business without being the employer of the business's workers. Every corporate officer knows that, and every corporate defense counsel knows it too. If a

corporation's chief executive officer is also both the chair of the corporation's board of directors and a major shareholder, that person does not thereby become the employer of the corporation's employees. . . .

Second, if it were true that an individual who owns and manages a business thereby becomes an employer, then it would follow that an individual can be both an employer and an employee at the same time. Again, the reasons are uncontroversial. A factory worker who buys shares of his corporate employer's stock does not thereby cease to be an employee of the corporation. Rather, the worker is both an owner and an employee. . . .

Third, no less an authority than the Restatement (Second) of Agency states that, under certain easily satisfied conditions, partners can be employees of their own partnership. At common law, an employee is an agent whose principal has the right to control the agent's physical conduct. Partners are agents of their partnership, and there is no reason why the partnership cannot have an express or implied right to control the partners' physical conduct in the performance of their work for the partnership. Indeed, it would be surprising if a law firm, for example, did not have an express or implied right to prohibit its partners from physically assaulting the firm's clients. (P. 138, 139.)

According to Menetrez, the analysis of all of these questions is simple, and mandated by the common law agency principles. Thus, the first question is whether there is an agency relationship and, if so, who is the agent and who is the principal. Once we know that, the next question is whether the agent is an employee, which turns on the degree of control of the agent by the principal.

For Menetrez, *Clackamas* is profoundly wrong because it "positively endorsed" the ideas that being an owner and manager makes the individual an employer and that employers cannot be employees–while at the same time purporting to apply common law agency principles. He is persuasive that both cannot be true, and he views the common law referent as the more basic principle.

No matter how much I like a piece, I can always find something to carp about. One quibble is his failure to give more attention to *Hishon v. King & Spaulding*, which seemed to have created the false dichotomy between employers and employees by assuming that a bona fide partner could not also be an employee. A second quibble has to do with the notion of "control." At least to me, it seems that some courts view "control" as the central test, with, say, the 12 factors the Supreme Court endorsed in *Community for Creative Non-Violence v. Reid* as ways of determining control, while other courts view the question as looking to such factors to determine in a kind of free standing way whether someone is an employee. For example, *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486 (8th Cir. 2003), looking at these factors, found an orchestra not to be an employer of its members – although it would be hard to find more exacting control in any setting! But, of course, Menetrez's topic wasn't exploring whether "control" is really the watchword – it was revealing that the Court isn't consistent in its own use of doctrine.

I went to law school about the time that Agency & Partnership was being phased out as a separate course. Theoretically, it was merged into Business Associations, but all the BA teachers I ever met rushed past those issues so they could get to fun stuff like the business judgment rule and 10b-5. It may be that this shift in legal education is responsible for the failure Menetrez identifies in faithfully applying common law agency principles to the situation he discusses, and maybe a lot of other "employee" questions too.

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