No. _____

In The
Supreme Court of the United States

ROBERT A. MARIOTTI, SR.,
Petitioner,

v.

MARIOTTI BUILDING PRODUCTS, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Thomas H. Roberts
Counsel of Record
THOMAS H. ROBERTS & ASSOCIATES, P.C.
105 South 1st Street
Richmond, VA 23219
(804) 783-2000
Tom.roberts@robertslaw.org

Clifford B. Cohn
ATTORNEY AT LAW
925 Public Ledger Building
620 Chestnut Street
Philadelphia, PA 19106
(215) 545-9660
cbcohn@cbcohn.com

Jeffrey J. Malak
CHARITON, SCHWAGER & MALAK
138 South Main Street
Post Office Box 910
Wilkes-Barre, PA 18703
(570) 824-3511
Jjm@charitonschwager.com

Counsel for Petitioner

Dated: August 13, 2013

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1. Is an employee, who also is a shareholder-director of a nonprofessional business corporation, protected by Title VII where the corporation's shareholders and directors create a hostile work environment and specifically target the individual employee's distinct employment relationship with the nonprofessional corporation for adverse employment action based on religious animus?

2. Did the District and Circuit Courts misapply the Clackamas test and the Twombly standard in finding on this Rule 12(b)(6) motion that Petitioner was not an "employee" protected by Title VII because he, as a minority shareholder and director, had "control" over the nonprofessional business corporation, where the majority of the shareholders and directors created a hostile work environment, terminated his employment benefits and salary, barred him from the company's facilities, notified him specifically that his employment was terminated, and constructively terminated his employment?

PARTIES TO THE PROCEEDING

Petitioner, who was appellant below, is Robert A. Mariotti, Sr., represented by lead attorney Thomas H. Roberts, Esq. of Thomas H. Roberts and Associates, P.C., as well as Jeffrey J. Malak, Esq. of Chariton, Schwager & Malak and Clifford B. Cohn, Esq.

Respondent, who was appellee below, is Mariotti Building Products, Inc., a Pennsylvania nonprofessional corporation, represented by Daniel T. Brier, Esq., Donna A. Walsh, and M. Jason Asbell, Esq., of the firm Myers, Brier & Kelly, LLP.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULE

OTHER AUTHORITY

CITATION TO REPORTS OF THIS CASE

Mariotti v. Mariotti Bldg. Products, Inc., 714 F.3d 761 (3d Cir. 2013) (published).

Mariotti v. Mariotti Bldg. Products, Inc., No. 3:11-CV-737, 2011 U.S. Dist. LEXIS 73636 (M.D. Pa. July 8, 2011) (unpublished).

INTRODUCTION

This case offers this Court the opportunity to address several ambiguities and deficits arising from a test devised ten years ago in Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003). In Clackamas this Court examined the statutory meaning of "employer" and "employee" in federal antidiscrimination law as applied to nontraditional business entities. Specifically, this Court ruled that in calculating the number of individuals employed by a professional corporation or a similar nontraditional business entity for purposes of determining whether the federal law applies, courts must exclude that "person, or group of persons, who owns and manages the enterprise." Id. at 450. Focusing on the issue of control, the Court articulated six nonexhaustive factors to aid in determining whether an individual had sufficient control over the company so as to be excluded from this count. Id. at 450-451.

This "Clackamas test" has now been employed beyond its original design and purpose, as illustrated by this case. Petitioner was a minority shareholder in a family-owned nonprofessional business

corporation and one of three individuals on its board of directors. In January 2009, the other shareholders and directors, based on religious animus, notified Petitioner that they had met to discuss specifically his employment with the company and that his employment and employment benefits were terminated. While the purported meeting was invalid for lack of notice, Petitioner's employment benefits were terminated, and he was barred from the corporate facilities. Petitioner, however, remained a director for seven months and continues as a minority shareholder.

On a Rule 12(b)(6) motion in this Title VII action, the District and Circuit Courts cited the Clackamas test in ruling that Petitioner was not an "employee" protected under Title VII. (Pet.App. at 7-16, 23-26). There is no question that Respondent is an "employer" under the statute. (Pet.App. at 10). This ruling applies the Clackamas test to the victim of adverse employment action in a traditional, nonprofessional business corporation, deciding on a Rule 12(b)(6) motion that he had such "control" over the company that he was not an "employee" but rather an "employer" and therefore unprotected by Title VII—despite the fact he was denied participation in the decision affecting his employment with the company.

Petitioner asks this Court to address the deficits in the Clackamas test as it has been applied that permit this unjust result, or alternatively to recognize the error of the lower courts in dismissing this matter on a Rule 12(b)(6) motion, and to remand the case for further proceedings.

JURISDICTION

The order of the District Court was entered on July 8, 2011. (Pet.App. at 29). The United States Court of Appeals for the Third Circuit issued a published opinion and affirming the judgment on April 29, 2013. (Pet.App. at 1-18). A petition for rehearing was filed, which was denied on May 30, 2013. (Pet.App. at 30-31).

This Court has jurisdiction to review this petition for a writ of certiorari pursuant to 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 2000e:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .
>
> . . . .
>
> (f) The term "employee" means an individual employed by an employer . . . .
>
> . . . .

2. 15 Pa. C.S. § 102:

> Subject to additional or inconsistent definitions contained in

subsequent provisions of this title that are applicable to specific provisions of this title, the following words and phrases when used in this title shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

. . . .

"Profession." --Includes the performance of any type of personal service to the public that requires as a condition precedent to the performance of the service the obtaining of a license or admission to practice or other legal authorization from the Supreme Court of Pennsylvania or a licensing board or commission under the Bureau of Professional and Occupational Affairs in the Department of State. Except as otherwise expressly provided by law, this definition shall be applicable to this title only and shall not affect the interpretation of any other statute or any local zoning ordinance or other official document heretofore or hereafter enacted or promulgated.

"Professional services." --Any type of services that may be rendered by a member of a profession within the purview of his profession.

. . . .

3. 15 Pa. C.S. § 1502. General Powers

> (a) General rule. --Subject to the limitations and restrictions imposed by statute or contained in its articles, every business corporation shall have power:
>
> . . . .
>
> (16) To elect or appoint and remove officers, employees and agents of the corporation, define their duties, fix their compensation and the compensation of directors, to lend any of the foregoing money and credit and to pay bonuses or other additional compensation to any of the foregoing for past services.
>
> . . . .

4. 15 Pa. C.S. § 1526. Liability of shareholders.

> (a) General rule. --A shareholder of a business corporation shall not be liable, solely by reason of being a shareholder, under an order of a court or in any other manner for a debt, obligation or liability of the corporation of any kind or for the acts of any shareholder or representative of the corporation.
>
> (b) Professional relationship unaffected. --Subsection (a) shall not

afford the shareholders of a business corporation that is not a professional corporation but that provides professional services with greater immunity than is available to the officers, shareholders, employees or agents of a business corporation that is a professional corporation. See section 2925 (relating to professional relationship retained).

(c) Disciplinary jurisdiction unaffected. --A business corporation providing professional services shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the court, department, board, commission or other government unit regulating the profession in which the corporation is engaged. The court, department, board or other government unit may require that a corporation include in its articles provisions that conform to any rule or regulation heretofore or hereafter promulgated for the purpose of enforcing the ethics of a profession. This subpart shall not affect or impair the disciplinary powers of the court, department, board, commission or other government unit over licensed persons or any law, rule or regulation pertaining to the standards for professional conduct of licensed persons or to the professional relationship

between any licensed person rendering professional services and the person receiving professional services.

5. 15 Pa. C.S. § 1703. Place and notice of meetings of board of directors.

(a) Place. --Meetings of the board of directors may be held at such place within or without this Commonwealth as the board of directors may from time to time appoint or as may be designated in the notice of the meeting.

(b) Notice. --Regular meetings of the board of directors may be held upon such notice, if any, as the bylaws may prescribe. Unless otherwise provided in the bylaws, written notice of every special meeting of the board of directors shall be given to each director at least five days before the day named for the meeting. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board need be specified in the notice of the meeting.

6. 15 Pa. C.S. § 1704. Place and notice of meetings of shareholders.

. . . .

(b) Notice. --Written notice of every meeting of the shareholders shall be given by, or at the direction of, the secretary or other

authorized person to each shareholder of record entitled to vote at the meeting at least:

> (1) ten days prior to the day named for a meeting that will consider a fundamental change under Chapter 19 (relating to fundamental changes); or
>
> (2) five days prior to the day named for the meeting in any other case.

If the secretary or other authorized person neglects or refuses to give notice of a meeting, the person or persons calling the meeting may do so.

(c) Contents. --In the case of a special meeting of shareholders, the notice shall specify the general nature of the business to be transacted, and in all cases the notice shall comply with the express requirements of this subpart. The corporation shall not have a duty to augment the notice.

7. 15 Pa. C.S. § 1712. Standard of care and justifiable reliance.

. . . .

(c) Officers. --Except as otherwise provided in the bylaws, an officer shall perform his duties as an officer in good faith, in a manner he reasonably believes to be in

the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. A person who so performs his duties shall not be liable by reason of having been an officer of the corporation.

8. 15 Pa. C.S. § 1713. Personal liability of directors.

> (a) General rule. --If a bylaw adopted by the shareholders of a business corporation so provides, a director shall not be personally liable, as such, for monetary damages for any action taken unless:
>
> > (1) the director has breached or failed to perform the duties of his office under this subchapter; and
> >
> > (2) the breach or failure to perform constitutes self- dealing, willful misconduct or recklessness.
> >
> > . . . .

9. 15 Pa. C.S. § 1721. Board of Directors

> (a) General rule. --Unless otherwise provided by statute or in a bylaw adopted by the shareholders, all powers enumerated in section 1502

(relating to general powers) and elsewhere in this subpart or otherwise vested by law in a business corporation shall be exercised by or under the authority of, and the business and affairs of every business corporation shall be managed under the direction of, a board of directors. . . .

. . . .

10. 15 Pa. C.S. § 1725. Selection of Directors

(a) General rule. --Except as otherwise provided in this section, directors of a business corporation, other than those constituting the first board of directors, shall be elected by the shareholders. A bylaw adopted by the shareholders may classify the directors with respect to the shareholders who exercise the power to elect directors.

. . . .

11. 15 Pa. C.S. § 1732. Officers

(a) General rule. --Every business corporation shall have a president, a secretary and a treasurer, or persons who shall act as such, regardless of the name or title by which they may be designated, elected or appointed and may have such other officers and assistant officers as it may authorize from time to time. The

bylaws may prescribe special qualifications for the officers. The president and secretary shall be natural persons of full age. The treasurer may be a corporation, but if a natural person shall be of full age. Unless otherwise restricted in the bylaws, it shall not be necessary for the officers to be directors. Any number of offices may be held by the same person. The officers and assistant officers shall be elected or appointed at such time, in such manner and for such terms as may be fixed by or pursuant to the bylaws. Unless otherwise provided by or pursuant to the bylaws, each officer shall hold office for a term of one year and until his successor has been selected and qualified or until his earlier death, resignation or removal. Any officer may resign at any time upon written notice to the corporation. The resignation shall be effective upon receipt thereof by the corporation or at such subsequent time as may be specified in the notice of resignation. The corporation may secure the fidelity of any or all of the officers by bond or otherwise.

(b) Authority. --Unless otherwise provided in the bylaws, all officers of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in

the management of the corporation as may be provided by or pursuant to the bylaws or, in the absence of controlling provisions in the bylaws, as may be determined by or pursuant to resolutions or orders of the board of directors.

12. 15 Pa. C.S. § 2903. Formation of professional corporations.

(a) General rule. --A professional corporation shall be formed in accordance with Article B (relating to domestic business corporations generally) except that its articles shall contain a heading stating the name of the corporation and that it is a professional corporation.

(b) Legislative intent. --It is the intent of the General Assembly to authorize by this chapter licensed persons to render professional services by means of a professional corporation in all cases.

(c) Single-purpose corporations. --Except as provided in subsection (d), a professional corporation may be incorporated only for the purpose of rendering one specific kind of professional service.

. . . .

13. 15 Pa. C.S. § 2922. Stated purposes.

> (a) General rule. --A professional corporation shall not engage in any business other than the rendering of the professional service or services for which it was specifically incorporated . . . .
>
> . . . .

14. 15 Pa. C.S. § 2923. Issuance and retention of shares.

> (a) General rule. --Except as otherwise provided by a statute, rule or regulation applicable to a particular profession, all of the ultimate beneficial owners of shares in a professional corporation shall be licensed persons and any issuance or transfer of shares in violation of this restriction shall be void. . . .

15. 15 Pa. C.S. § 2925. Professional relationship retained.

> (a) General rule. --This subpart shall not affect the law of this Commonwealth applicable to the professional relationship and the contract, tort and other legal rights, duties and liabilities between the person furnishing professional services and the person receiving professional services and to the standards for professional conduct, including the law

of this Commonwealth applicable to the confidential relationship, if any, between the person rendering professional services and the person receiving professional services, and all confidential relationships enjoyed under statutes heretofore or hereafter enacted shall remain inviolate.

(b) Professional liability unaffected. --Any officer, shareholder, employee or agent of a professional corporation shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of the corporation to the person for whom the professional services were being rendered.

. . . .

(e) Disciplinary jurisdiction unaffected. --A professional corporation shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the court, department, board, commission or other government unit regulating the profession in which the corporation is engaged. The court, department, board or other government unit may require that a professional corporation include in its articles provisions that conform to

> any rule or regulation heretofore or hereafter promulgated for the purpose of enforcing the ethics of a profession, but, unless otherwise provided by statute, a rule or regulation shall not require the issuance by the corporation of assessable shares or require the inclusion of any provision in the articles that is inconsistent with the provisions of Article B (relating to domestic business corporations generally) as modified by this chapter. This chapter shall not affect or impair the disciplinary powers of the court, department, board, commission or other government unit over licensed persons or any law, rule or regulation pertaining to the standards for professional conduct of licensed persons or to the professional relationship between any licensed person rendering professional services and the person receiving professional services.

STATEMENT OF THE CASE

Remove "," after "Inc."

eferred to herein as "Mariotti") was an employee, officer, director, and is a shareholder of Respondent Mariotti Building Products, Inc., ("MBP"), a family-owned Sub-S business corporation with approximately 100 employees. Mariotti brought claims for employment discrimination under Title VII related to the hostile work environment and his constructive termination of employment from MBP, as well as various state

claims. Federal jurisdiction was proper in the first instance under Title VII of the Civil Rights Act of 1964 and 28 U.S.C. § 1343(a)(4). MBP filed a motion to dismiss the amended complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The U.S. District Court for the Middle District of Pennsylvania granted the motion with respect to the Title VII claims and declined pendent jurisdiction of the state claims. (Pet.App. at 28-29). On the Rule 12(b)(6) motion, the District Court ruled that Mariotti was not an "employee" for Title VII purposes, citing the Clackamas test, and that Mariotti had failed to allege severe and pervasive discrimination to support his hostile work environment claim. (Pet.App. at 23, 27).

Mariotti appealed to the United States Court of Appeals to the Third Circuit. The Court of Appeals in a published opinion affirmed the district court's judgment, stating that Mariotti "did not establish that he was an employee under Title VII" (Pet.App. at 16). By deciding this question, the Court of Appeals declined to decide the related question of whether Mariotti had alleged severe and pervasive discrimination to support his hostile work environment claim.

STATEMENT OF FACTS

In January 2011, Mariotti filed a six-count complaint against MBP, alleging *inter alia* violation of Title VII through adverse employment action based on religious discrimination (Count I) and violation of Title VII through a hostile work environment based on religious discrimination by

which he was barred from the work place (Count II), as well as various state claims. (See Pet.App. at 5). On March 7, 2011, Mariotti filed his amended complaint, containing the same substantive claims. (See Pet.App. at 6).

change "employing over" to "with more than"

As alleged in Mariotti's amended complaint, Mariotti is a Catholic who suffered religious discrimination that targeted his employment relationship with MBP, a nonprofessional business corporation employing over 15 employees. In 1995 Mariotti experienced what he describes as a religious awakening, and he became involved in a lay ministry known as Our Father's Divine Work. In connection with this, Mariotti left the Roman Catholic Church that he and most of his family members (including the other shareholders, officers, and directors of MBP) attended for many years and joined the local Byzantine Catholic Church. The other officers, shareholders and directors of MBP disapproved of Mariotti's religious practices and began a systematic pattern of antagonism towards Mariotti, including but not limited to negative and humiliating statements made in the work place directed towards Mariotti and his religious affiliation. MBP also engaged in disparate employment treatment and discrimination culminating in hostility that barred him from the workplace. Illustrative examples of this treatment are detailed in the amended complaint. (See Pet.App. at 4, 20-21).

MBP is a nonprofessional business corporation organized under Pennsylvania law with a Subchapter S Election for tax purposes under 26 U.S.C. § 1362. (See Pet.App. at 11, 25). Mariotti

and his two brothers were founding members of MBP and together grew the company into a leading regional provider of building materials. Mariotti himself developed and grew various divisions of MBP, and trained staff to take over day-to-day management of the business. Despite his significant role in the company, Mariotti reported to the President of the company (his brother Eugene) and to the board of directors. He did not control MBP and did not have veto power over MBP or its decisions. He was also regularly excluded from important decisions at MBP. (See Pet.App. at 3-4, 20, 25). He was not personally liable for the debts of MBP, as it was a business corporation and not a professional corporation. See 15 Pa. C.S. §§ 1713, 1526.

The situation between MBP and Mariotti reached a breaking point after the death of Mariotti's father. On January 6, 2009, Mariotti delivered a eulogy at his father's funeral filled with religious references. The other shareholders of MBP, upset by the comments, improperly called a special meeting of the shareholders on January 8, 2009, without notifying Mariotti, who was a shareholder and MBP's secretary. See 15 Pa. C.S. §§ 1703, 1704(b)-(c). At this meeting, which Mariotti did not know about or attend, the other shareholders voted to terminate Mariotti's employment with MBP, notifying him of their decision by fax two days later. (See Pet.App. at 4-5, 21). The notice of the purported termination (the action being *ultra vires*, due Mariotti's lack of notice about the meeting), sent to Mariotti via fax on January 10, 2009, stated as follows, with emphasis added:

The shareholders of Mariotti Building Products asked for a meeting which was held on Thursday, January 8, 2009. With the exception of you, all shareholders were in attendance. **The purpose of the meeting was to discuss your future status as an employee of Mariotti Building Products.**

It is with deep regret and sadness that by unanimous vote we have decided **to terminate your employment with Mariotti Building Products** effective immediately.

By this termination, the following benefits will be addressed as follows:

1) Car owned by the company will be transferred to you personally at no cost to you. You will be responsible for all costs associated with your car including insurance, fuel, etc. . .

2) Health insurance will be your responsibility

3) Cell phone will be canceled

4) ADT Code to the building will be canceled

> 5) All vendors, customers and employees will be notified
>
> 6) You are no longer authorized to sign any type of company check or use any company credit cards
>
> 7) Your office at 1 Louis Industrial Drive will no longer be available to you
>
> 8) Any and all company benefits that may apply in the future will not be available to you
>
> **Your share of any draws from the corporation or other entities will continue to be distributed to you.** We have enclosed a letter of resignation as an option to you which would avoid embarrassment to yourself. We ask that you consider signing this resignation.
>
> We regret this action which you have brought upon yourself. Good Luck and God Bless you in the future.

Following this purported (but *ultra vires*) termination, Mariotti was excluded from the business, and MBP represented to others that Mariotti had retired or that he had left the company to follow his religious pursuits. Mariotti filed his EEOC claim alleging religious discrimination on October 22, 2009, and subsequently received a right

to sue letter before bringing this action. (See Pet.App. at 5, 21-22).

Remove all three quotation marks in this sentence

change "having" to "has"

Mariotti suffered the "loss of salary" and other employment benefits and was deprived of past and future income." His past and prospective pay and benefits lost due to MBP's actions and discrimination described in the amended complaint having a value of at least $1,860,000 and $986,268 respectively. He continued as a director until the end of his term on August 6, 2009, when he was not reelected. (See Pet.App. at 5, 20). He remains a minority shareholder of MBP.

Mariotti filed suit in United States District Court. As relevant here, he made two claims under Title VII—adverse employment action based on religious discrimination (Count I) and a hostile work environment based on religious discrimination by which he was barred from the work place (Count II).

MBP filed a motion to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(6). On July 8, 2011, District Judge Richard A. Caputo granted MBP's motion to dismiss Count I and Count II on the pleadings, and declined to exercise jurisdiction over the remaining state claims. (Pet.App. at 28-29). Judge Caputo's memorandum decision opined that Mariotti was not an "employee" of MBP citing Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003), and therefore could not assert a religious discrimination claim under Title VII. (Pet.App. at 23). Judge Caputo's memorandum decision further opined that the amended complaint failed to allege pervasive and regular discrimination

necessary for a hostile work environment. (Pet.App. at 27).

Mariotti appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the dismissal on the pleadings on the ground that Mariotti failed to show he was an "employee" entitled to Title VII's protections. (Pet.App. at 16). The Third Circuit did not reach the other ground offered by the District Court, that Mariotti failed to show a hostile work environment. The Third Circuit rejected a petition for rehearing. (Pet.App. at 30-31). Mariotti now files this petition with this Court.

ARGUMENT

I. THE SIX FACTORS DESCRIBED IN CLACKAMAS FOR DETERMINING IF AN INDIVIDUAL IS AN "EMPLOYEE" DO NOT AND SHOULD NOT APPLY IN THIS CASE, WHERE MBP, A NONPROFESSIONAL BUSINESS CORPORATION, SPECIFICALLY TARGETED MARIOTTI'S EMPLOYMENT RELATIONSHIP BASED ON RELIGIOUS ANIMUS.

Title VII makes it illegal for employers to discriminate against employees on the basis of religion, among other things. 42 U.S.C. § 2000e-2(a). An "employer" is a person or organization "who has fifteen or more employees." 42 U.S.C. § 2000e(b). The word "employee" refers to "an individual employed by an employer." 42 U.S.C. § 2000e(f).

This Court considered the definitions of an "employer" and "employee" under federal antidiscrimination law in Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003). The legal issue in Clackamas was whether a professional corporation had the prerequisite fifteen "employees" so as to be a statutory "employer" subject to the federal antidiscrimination laws. Id. at 441-42. The resolution of this question turned on whether the four physicians who owned and managed the professional corporation were counted as "employees" for this purpose. Id. at 441-42. If they were not "employees" for this purpose, there were not fifteen "employees" and the corporation was not a statutory "employer."

The Court noted the difficulty of distinguishing between employers and employees in the recently devised business models such as professional corporations. "[W]e are dealing with a new type of business entity that has no exact precedent at the common law." Id. at 447. This Court quoted at length the significant differences between the "physicians' professional corporation and an ordinary business corporation," as identified at the Court of Appeals level by a dissenting judge. Id. at 443 n. 2. For instance, the shareholder of the professional corporation remained liable for malpractice as an individual. Id. The corporation could only merge with other professional corporations and the physicians remained subject to the requirements of their licenses. Id. Ordinary rules of business applied to the professional

corporation only apart from the rendering of professional services. Id.

In light of these difficulties, the Court turned to the common law, focused on control, and concluded an "employer" in the context at bar represented "the person, or group of persons, who owns and manages the enterprise." Id. at 450. The Court also stated an "employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed." Id. The Court cautioned that a person's title did not determine his or her status. "The mere fact that a person has a particular title – such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or a proprietor." Id. at 450. A person may be an "employer" for one purpose but an "employee" for another purpose of Title VII. The Court specifically noted, "Today there are partnerships that include hundreds of members, *some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners*." Id. at 446 (emphasis added). The Court stated "whether a shareholder-director is an employee depends on 'all of the incidents of the relationship…with no one factor being decisive." Id. at 451 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1993)).

In light of the circumstances of the case, Clackamas identified six nonexhaustive factors to assist courts in determining an individual's status:

> [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
>
> [2] Whether and, if so, to what extent the organization supervises the individual's work;
>
> [3] Whether the individual reports to someone higher in the organization;
>
> [4] Whether and, if so, to what extent the individual is able to influence the organization;
>
> [5] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
>
> [6] Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50. The Court stated the decision depended on a case-by-case analysis of all the facts. Id. at 451. In a ruling on the pleadings, the lower courts in this case cited to these factors in determining that Mariotti was not protected under Title VII.

reword "decision depended" to "determination depends"

In Clackamas, the four physicians were a unified and controlling unit. None of the four physicians were the victims of the adverse employment action. Instead, the particular legal question at issue was whether the professional corporation had fifteen statutory "employees," a prerequisite to being an "employer" subject to the federal antidiscrimination laws. Id. at 441-42.

In contrast to Clackamas, this case puts squarely before the Court a situation in which a company, who is undeniably a statutory "employer" subject to the federal antidiscrimination laws (Pet.App. at 10), specifically targets for termination the employment relationship of one of its employee shareholders and directors based on religious animus. The January 10, 2009 letter, *supra* at 19-20, shows that the benefits of Mariotti's employment were terminated, and MBP attempted to terminate Mariotti's employment itself without voting to remove him as a nominal and minority director. Additionally, MBP promised that the termination of employment would not affect Mariotti's "share of any draws from the corporation," i.e., a benefit to which Mariotti was legally entitled as a shareholder and not as an employee. In other words, this termination targeted Mariotti's employment relationship, a relationship that existed separate and distinct from his role as a shareholder and director. Mariotti remains a minority shareholder.

It was not the intent of this Court that the six nonexhaustive Clackamas factors would be used to determine that the victim of discrimination was not an "employee" where the individual's employment

status was specifically targeted in the discrimination. This case shows that clarification of the Clackamas test is necessary and appropriate.

The further complication in applying Clackamas to this case comes from the fact that MBP is a traditional, business corporation, not a professional corporation or other nontraditional business entity. The differences between professional corporations, as contemplated in Clackamas, and business corporations, as involved in this case, are significant and affect control.

In Pennsylvania, the formation, ownership, and management of professional corporations is substantially limited to professionals rendering professional services. See, e.g., 15 Pa. C.S. §§ 102, 2903(a)-(c), 2922(a), 2923(a). Many professional corporations operate on the traditional partnership model, whereby all shareholders are also necessarily managers and employees of the professional corporation, merging the ownership-management-employee distinctions. With the merger of these distinctions, courts require a more flexible analysis in determining who should be counted as employees of professional corporations to determine whether the Court has jurisdiction under Title VII. Clackamas, 538 U.S. at 448-51.

Unlike professional corporations, nonprofessional business corporations such as MBP have a long-established and legally mandated corporate structure. The company is owned by shareholders who elect a board of directors and participate in decisions profoundly affecting the

corporation. 15 Pa. C.S. § 1725(a). The board of directors selects officers and exercises the general powers of the corporation. 15 Pa. C.S. §§ 1502, 1721. The officers manage the business under the general supervision of the board of directors. See 15 Pa. C.S. § 1732. Under Pennsylvania law, the corporation has the power to elect or appoint and remove officers, employees and agents of the corporation, and that power is exercised in the name of the corporation. 15 Pa. C.S. § 1502(a)(16). Employees are employees of the corporation—they are not employees of the shareholders, officers or directors. See id.

Within this traditional structure, the factors enunciated in Clackamas are not particularly useful. For instance, the first Clackamas factor considers the corporate power to hire and fire the individual and the power to regulate his work. This case illustrates the fact that a company can fire (or attempt to fire) based on religious animus an employee who owns shares in the corporation, even if he while he remains a director. Under the second and third Clackamas factors, the supervisory structure is well defined in nonprofessional business corporations, as are the rules concerning conflicts of interest and participation in decision-making when a managerial decision will affect a shareholder or director personally. MBP specifically ignored these corporate governance rules by not notifying Mariotti of a shareholder meeting so that it could attempt to terminate his employment with the least resistance. Under the fifth factor, the employment and management roles in a business corporation are legally and practically distinct, unlike the

nontraditional business entities the Court contemplated in Clackamas, where the roles are more often blurred. Here, the MBP letter of January 10, 2009, *supra* at 19-20, specifically identifies Mariotti as an "employee." While corporate titles are not determinative, when the company specifically targets an individual's employment while acknowledging it to be an employment relationship, that acknowledgment is determinative in a subsequent Title VII action. As courts have noted, a shareholder or director of a general or business corporation is not an employee by virtue of that position, but "may accept duties that make him also an employee." See, e.g., Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 984 (10th Cir. 2002); Kern v. City of Rochester, 93 F.3d 38, 47 (2d Cir. 1996); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1538 (2d Cir. 1996); Chavero v. Local 241, Division of Amalgamated Transit Union, 787 F.2d 1154, 1157 (7th Cir. 1986); Lattanzio v. Sec. Nat'l Bank, 825 F. Supp. 86, 90 (E.D. Pa. 1993). Finally, the Clackamas test looks at whether the person shares in the liabilities of the company. 538 U.S. at 450. In nonprofessional business corporations, neither the shareholders, nor the directors, nor the officers, nor the employees are liable for the business corporation's liabilities and debts. See, e.g., 15 Pa. C.S. §§ 1526(a), 1712(c), 1713(a). Moreover, while the professionals in a professional corporation cannot avoid personal liability for professional malpractice, this breach in the shield of limited liability does not extend to nonprofessionals in a traditional business corporation. See, e.g., 15 Pa. C.S. §§ 1526, 1712(c), 1713(a), 2925.

Application of the Clackamas test to nonprofessional businesses leads to confusion over where the test applies. In De Jesus v. LTT Card Services, Inc., 474 F.3d 16, 24 (1st Cir. 2007), the court held the Clackamas test "applies to close corporations as well as to professional corporations." The court did not opine on what constitutes a "close corporation" versus a large corporation, where the Clackamas test would presumably not apply. The court expressly noted that "Clackamas does not directly decide the question" of whether the test applies to small companies. Id. In Smith v. Castaways Family Diner, 453 F.3d 971, 978 (7th Cir. 2006), the court, while stating that nonprofessional companies may fall under the Clackamas test, pronounced that an employer should have "authority and interests . . . so aligned with the business as to render them the legal personification of the business." It is by no means clear how much authority and interests are necessary in a nonprofessional entity with numerous shareholders and directors. In the decision in this case, where the Court of Appeals agreed with De Jesus that Clackamas applies to nonprofessional corporations (Pet.App. at 11-12), it is again unclear how large a company must become before a director or shareholder may no longer be identified with the company.

Moreover, when courts have claimed to apply the Clackamas test to business corporations such as MBP, they often do not weigh the individual Clackamas factors with all the other facts and circumstances, but rather focus on one factor or another to the exclusion of all else. Thus, in this

case, the Court of Appeals looked only at the source of Mariotti's authority (which it considered to be an element implicit in the first and fourth factors). (Pet.App. at 12-16).

Given the foregoing considerations, the six-factor Clackamas test does not and should not apply to nonprofessional, business corporations. The test was developed for professional corporations, which represent the only type of case where this Court has applied it.

If Clackamas does not apply, the question of what should apply must arise. As the Clackamas Court identified, since Title VII supplies no meaningful definition of "employer" and "employee," the Court should look to the common law for guidance. 538 U.S. at 444-45 (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)). The common law meaning of an "employee" and "employer" describes the traditional master-servant arrangement. Darden, 503 U.S. at 322-23. In this case, MBP was the master and Mariotti was the servant, at least insofar as the religiously motivated employment discrimination is concerned.

Mariotti did not employ a single person. Obviously, a corporation acts through its officers, directors, and agents. The employee and the corporation, however, are distinct persons, even where the employee is the partial or sole owner of the corporation. See United States v. Park, 421 U.S. 658, 668 (1975). After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers and privileges different

from those of the natural individuals who created it, own it, or whom the corporation employs. See Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001). Individual employees of a corporation are not liable under Title VII but employers are. Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1077 (3d Cir. 1996). See also Fantini v. Salem State College, 557 F.3d 22, 31 (1st Cir. 2009) (Title VII addresses the conduct of employers only and does not impose liability on co-workers).

In light of the legal distinction between the corporation and the employee, the congressional intent would be thwarted by a determination that Title VII does not protect a fully employed member of a nonprofessional business corporation when the employment relationship is targeted for discrimination on religious grounds.

Nothing in Title VII precludes a shareholder or director of a corporation from being employed by the corporation and therefore receiving classification as an "employee" when that individual is targeted for termination based upon animus prohibited under Title VII. Prominent corporate officers regularly enter into negotiated employment contracts, obtain salaries, and receive employment-related benefits such as health insurance and life insurance. Indeed, one of the factors the Clackamas Court identified was "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts." 538 U.S. at 449-50.

The conventional meaning of a servant encompasses someone "'employed by a master to

perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.'" Id. at 452 (Ginsburg, J., dissenting) (quoting Restatement (Second) of Agency § 2(2) (1958)). One of the definitions of "service" is "the performance of work commanded or paid for by another." Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2721 (2010).

Mariotti was an employee of MBP and should be entitled to the protections of Title VII. As an employee, Mariotti reported to his brother Eugene the President of MBP and to the board of directors. He was employed by MBP to perform a traditional class of duties for an employee, albeit a highly placed employee and received a salary and other benefits as an employee, distinct from the rights and privileges as a shareholder and a director. As such, he is an employee entitled to protection under Title VII.

Significantly, MBP itself believed Mariotti to be an employee and treated Mariotti as an employee, targeting his employment relationship for discrimination. MBP's letter of January 10, 2009, *supra* at 19-20, states the shareholders met to discuss Mariotti's status as an *employee* of MBP. Mariotti was informed that his *employment* was terminated. The January 10, 2009 letter notes Mariotti would continue to receive draws as a shareholder, thereby distinguishing *employment* from his minority interest in MBP's ownership as a shareholder. Even after Mariotti's notice of termination from employment, he continued to serve as a director until August 2009, making it clear that

his status as an employee was distinct from his status as a minority director or minority shareholder of MBP. The letter in January 10, 2009 informed Mariotti he would lose certain benefits of employment. MBP took his company cell phone, terminated the payments for his health insurance, and denied him access to MBP facilities, including his office. Mariotti suffered the "loss of salary" and other employment benefits and was deprived of past and future income. These were not rights he received as a director or shareholder. The January 10, 2009 letter constitutes overwhelming evidence that Mariotti was an employee, even without viewing the evidence in the light most favorable to Mariotti or giving to him the reasonable and favorable inferences to which he is entitled on this Rule 12(b)(6) motion.

This Court does not need to abandon Clackamas and the consideration of control in determining whether a company has sufficient employees to be classified as an "employer" under Title VII, provided that it clarifies that an individual may be considered an "employer" for one purpose but an "employee" for another purpose under Title VII. Cf. Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 16 (2004) ("Under ERISA, a working owner may have dual status, i.e., he can be an employee entitled to participate in a plan and, at the same time, the employer (or owner or member of the employer) who established the plan. Both Title IV and the IRC describe the 'employer of a sole proprietor or partner. These descriptions expressly anticipate that a working owner can wear two hats, as an employer and

employee." (citation omitted)). Establishing mutually exclusive categories of statutory employers and statutory employees is neither required nor suggested by the statutory text. The statutory text defines "employer" to include agents of the employer and defines "employee" as anybody employed by the employer. 42 U.S.C. § 2000e. Often, as in this case, the agent and the employee are one and the same. Courts have long recognized that an individual may be an "employer" for one purpose and an "employee" for another under Title VII, denying individual liability for individuals who are "employers" i.e., the "any agent of such person" referenced in Title VII. Treating "employer" and "employee" as mutually exclusive categories under the Clackamas test results in absurdities such as seen in this case where, due to religious animus by the controlling majority of the company, Mariotti was the victim of adverse employment action by the company that he supposedly "controlled" and is denied protection under Title VII by courts citing Clackamas. Failure to correct this misapplication of Clackamas will invite unscrupulous employers to simply provide the vulnerable employee a minority stake in the company, a seat on the board of directors and in the hot tub, effectively removing Title VII's protection to those Congress and society intend to protect.

Given the foregoing considerations, the Clackamas test does not and should not apply to nonprofessional business corporations to exclude from Title VII's protection an employee like Mariotti whose employment is targeted for termination based upon religious animus. The Clackamas test was developed for professional corporations, and this

Court has only applied it to professional corporations. Professional corporations are legally and practically distinct, requiring a more nuanced analysis. The question here is whether Mariotti, a shareholder and director, also accepted and performed the duties of an employee. He obviously did and the discrimination against him specifically targeted his employment. Mariotti is an employee within the meaning of Title VII.

II. IF THE CLACKAMAS TEST APPLIES TO THIS CASE, MARIOTTI IS A TITLE VII "EMPLOYEE" OF MBP FOR PURPOSES OF THIS RULE 12(B)(6) MOTION.

In Clackamas, this Court reversed a grant of summary judgment and remanded the case for further proceedings because the lower court may not have considered "evidence in the record that would contradict those findings or support a contrary conclusion under the EEOC's standard that we endorse today." Clackamas, 538 U.S. at 451. This case, however, involves a Rule 12(b)(6) motion rather than summary judgment. The lower courts ignored factual allegations within the amended complaint and the reasonable and favorable inferences to which Mariotti was entitled under Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). The lower courts failed to permit the record to be developed through discovery before attempting to apply the Clackamas test. Moreover, the lower courts erred in their application of the Clackamas test to this case. In Clackamas, this Court announced six non-exclusive factors to consider in determining whether someone is an employee for purposes of Title VII. A point-by-

point *de novo* application of the Clackamas factors shows that Mariotti is an employee.

Factor 1: MBP could hire and fire Mariotti.

This factor weighs heavily in favor of classifying Mariotti as an employee. Mariotti specifically alleged that MBP had the power to terminate his employment. MBP also believed it had the power to terminate Mariotti's employment as evidenced by the letter of January 10, 2009, which states the shareholders met to discuss Mariotti's status as an employee of MBP and specifically asserts that Mariotti's employment was terminated.

The only right claimed by Mariotti over and above other employees was the right to be terminated only for cause, a right which he claimed based upon an early oral agreement. Mariotti does not claim a right to only face termination after a vote of the shareholders. He claims that the meeting of the shareholders was improperly called and therefore *ultra vires*. He does not claim that he could not be fired–he claims that if he was fired without cause he could sue for breach of contract. He claims that because he was constructively terminated based upon his religious practice by MBP, an employer with more than 15 employees, he is entitled to the protection of Title VII and the relief provided therein.

While the amended Complaint does not detail what rules are in place governing Mariotti, it notes that Mariotti, in his role as employee, reports to his brother Eugene (the president of MBP), and the

board of directors, which reasonably implies that rules are in place or could be in place governing his work. A conclusion to the contrary requires an inference of fact against the non-moving party, which is improper at the Rule 12(b)(6) stage.

Factors 2-3: Plaintiff Reported to the President of MBP, Eugene Mariotti, Who Supervised His Work.

The facts of this case relative to the second and third factors of the Clackamas test are essentially the same. Mariotti was an employee who handled important business matters for MBP. Mariotti was not independent of supervision. He reported to the President of MBP, his brother Eugene, who supervised his work.

Although Mariotti did run several divisions of MBP and train personnel, these do not permit an inference that Mariotti was free from supervision at MBP or that Mariotti did not report to a higher officer or to the board of directors Mariotti alleged that he reported to the board of directors and to his brother Eugene. Even under Clackamas, "managers or supervisors may not be determined to be non employees merely on the basis that they have managerial or supervisory control." De Jesus, 474 F.3d at 24. Significant "authority does not distinguish the supervisor in *kind* from other employees." Smith, 453 F.3d at 979. Mariotti's role as manager of divisions simply makes him a higher employee, "differing only in the dignity and importance" of his role. Id. Moreover, even if Mariotti was not supervised, it has been stated:

> [F]ully employed but highly placed employees of a corporation . . . are not less servants because they are not controlled in their day-to-day work by other human beings. Their physical activities are controlled by their sense of obligation to devote their time and energies to the interests of the enterprise. At a fundamental level, then, a supervisor or manager, however highly placed, is still an employee.

Id.

Factor 4: Mariotti Could Not Control MBP.

The fourth Clackamas factor, which is whether and to what extent a person may influence an organization, considers more directly whether Mariotti had the type of control typical of an employer. Though Mariotti may have had some influence in the organization, the extent of that influence was not discussed at length in the amended Complaint and therefore few conclusions or inferences may be drawn at the Rule 12(b)(6) stage, except the most obvious, which was overlooked by the lower courts—he obviously did not have such control or influence over the organization to prevent his termination. Mariotti alleged that he did not have veto power within the organization, that he owned a minority share of stock, and that he was regularly excluded from important decisions at MBP.

Again, the most obvious example of Mariotti's limited influence was that MBP purported to

terminate his employment by a unanimous vote of other shareholders after calling a meeting without Mariotti's knowledge, consent, or participation. The conduct makes it clear that Mariotti had little or no influence over the company.

Factor 5: MBP Considered Mariotti an Employee.

Mariotti also alleged an oral agreement or understanding recognizing him as an employee that could only be terminated for cause. He contended that this oral agreement is evidenced by the fact that a purported shareholder agreement extended an explicit right of employment to children and grandchildren of the founders, from which it is reasonable to conclude that a similar right would have been previously given to Mariotti and his brothers.

In the January 10, 2009 letter, MBP explicitly acknowledges that Mariotti is an employee, with a role as an employee, separate and distinct from his role as a shareholder who receives draws or more accurately dividends from the company.

Factor 6: Mariotti Did Not Share MBP's Losses or Liabilities.

Since MBP is a nonprofessional, business corporation, Pennsylvania law shields Mariotti from personal liability. 15 Pa. C.S. §§ 1526(a), 1712(c), 1713(a). Mariotti therefore does not share in the losses or liabilities of the company. This distinguishes MBP from the professional corporation

in Clackamas, and it distinguishes Mariotti (a nonprofessional without professional liability concern) from the purported employees discussed in Clackamas. This factor also weighs in favor of classifying Mariotti as an employee.

In summary, even under the Clackamas test, if applicable and properly applied, Mariotti is an employee of MBP.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant his petition for certiorari, reverse the judgments of the district and circuit courts, and remand for further proceedings.[1]

[1] The Third Circuit did not consider the district court's finding that Mariotti had failed to allege facts supporting a hostile work environment claim since the Third Circuit held Mariotti was not an "employee." Mariotti asks that the case be remanded for consideration of this issue, unless this Court determines that the matter should simply be remanded to the district court. In addition to the various hostile annoyances recited, informing Mariotti that he was not welcome at MBP after January 10, 2009 is ipso facto a hostile work environment leading to a constructive discharge upon his filing with the EEOC.

Respectfully submitted

ROBERT A. MARIOTTI, SR.

By Counsel:

Thomas H. Roberts, Esq. (Pa. #312652)
Counsel of Record
Tom.roberts@robertslaw.org
Thomas H. Roberts & Associates, P.C.
105 South 1st St.
Richmond, VA 23219
(804) 783-2000
Fax: (804) 783-2105
Lead Attorney for Robert A. Mariotti, Sr.

Clifford B. Cohn, Esq. (Pa. #25847)
cbcohn@cbcohn.com
925 Public Ledger Bldg.
620 Chestnut St.
Philadelphia, PA 19106
(215) 545-9660
Fax: (215) 925-5991
Attorney for Robert A. Mariotti, Sr.

Jeffrey J. Malak, Esq. (Pa. 86071)
Jjm@charitonschwager.com
Chariton, Schwager & Malak
138 South Main St.
Post Office Box 910
Wilkes-Barre, PA 18703
(570) 824-3511
(570) 824-3580
Attorney for Robert A. Mariotti, Sr.

APPENDIX

APPENDIX TABLE OF CONTENTS

[ENTERED APRIL 29, 2013]

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-3148

ROBERT A. MARIOTTI, SR.,
Appellant

v.

MARIOTTI BUILDING PRODUCTS, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 3-11-cv-00737
District Judge: The Honorable A. Richard Caputo

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
March 18, 2013

Before: SMITH, GREENAWAY, JR., and VAN ANTWERPEN,
Circuit Judges

(Filed: April 29, 2013)

Clifford B. Cohn
Suite 925
620 Chestnut Street
Public Ledger Building
Philadelphia, PA 19106

Jeffrey J. Malak
Chariton, Schwager & Malak
138 South Main Street
P.O. Box 910
Wilkes-Barre, PA 18703

Thomas H. Roberts
Thomas H. Roberts & Associates
105 South First Street
Richmond, VA 23219
Counsel for Appellant

Daniel T. Brier
Donna A. Walsh
Myers, Brier & Kelly
425 Spruce Street
Suite 200
Scranton, PA 18503
Counsel for Appellee

OPINION

SMITH, *Circuit Judge.*

In *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), the Supreme Court set out a test for determining whether a shareholder-director of a professional corporation is an "employee" for purposes of the Americans with Disabilities Act (ADA). *Id.* at 449-50. This appeal allows us to consider whether that test applies to business entities that are not professional corporations in a Title VII employment action. We hold that it does.

I.

Mariotti Building Products, Inc., is a "closely held family business." Louis S. "Babe" Mariotti started the family business in 1947, operating "a small lumber yard." In the 1960s, Babe's sons, Plaintiff Robert A. Mariotti, Sr. (Plaintiff), and his two brothers, Eugene L. Mariotti, Sr. and Louis C. Mariotti "joined the business." Babe and his sons continued to develop the business, eventually incorporating it as Mariotti Building Products, Inc. (MBP). The business "experienced substantial growth" over the years with "annual sales skyrocketing from less than $250,000 to over $60 Million." MBP, according to the amended complaint, is "recognized as the area's best source for building materials[.]" Plaintiff averred that he was "responsible for developing and growing a number of areas" of MBP's business, "principally manag[ing] the manufactured housing sales division of the company together with customer credit, bill paying, and purchasing and inbound transportation of product lines[.]" Plaintiff further averred that the divisions he managed "earned profit" of more than

$15 million in the six years preceding termination of his employment, and that that amount exceeded the profit of the divisions managed by his brother Eugene.

As "one of the founders of MBP," Plaintiff was an officer of the corporation, serving as both vice-president and secretary. He also served as a member of the board of directors, and was a shareholder pursuant to a written agreement executed by the parties on July 23, 2007. Plaintiff averred that he and his brothers "were not at-will employees" of MBP because they were employed pursuant to an agreement that provided for termination "only for cause."

Plaintiff alleged that he had a "spiritual awakening" in 1995. His newfound spirituality, he claimed, resulted in "a systematic pattern of antagonism" toward him. It took the form of "negative, hostile and/or humiliating statements" about him and his religious affiliation. MBP"s officers, directors, and some employees were the source of this harassment. In 2005, the harassment increased.

Babe Mariotti, the family patriarch, died either at the end of 2008 or in the first days of January 2009. On January 4, 2009, while the family was making arrangements for the funeral, Eugene Mariotti, derided Plaintiff and his faith. At the funeral on January 6, Plaintiff delivered a eulogy, which included comments about his own faith, and his "father's good example." The eulogy upset members of the family. On January 8, the

shareholders of the closely held family business convened a meeting in Plaintiff's absence and decided to terminate his employment.

Two days later on January 10, 2009, Plaintiff received written notice of the termination of his employment. The notice recited that the shareholders had met to discuss his future status as an employee and that the vote to terminate his employment had been unanimous and was effective immediately. The letter explained that various benefits would cease, including the use of a company car, health insurance coverage, a cellular telephone, access to company credit cards, and the availability of an office. Finally, the letter explained that "[y]our share of any *draws* from the corporation or other entities will continue to be distributed to you."[1]

Despite his termination in January of 2009, Plaintiff continued to serve as a member of MBP"s board of directors "until August 6, 2009, when the shareholders did not re-elect him as a director" of the closely held family corporation. On October 22, 2009, Plaintiff filed a timely charge of religious discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e-2(a)(1). Thereafter, Plaintiff filed suit against MBP, asserting Title VII claims of religious discrimination and a hostile work environment. He also asserted several state law claims. MBP moved to dismiss the complaint under Federal Rule of Civil Procedure

---

[1] In a closely held corporation, a "draw" is a withdrawal of money from the business to the business owner. The American Heritage Dictionary of Business Terms (2010), *available at* http://business.yourdictionary.com/draw.

12(b)(6), arguing that Plaintiff was not an "employee" for purposes of Title VII and could not invoke its protections. An amended complaint followed, and was met with a second motion to dismiss asserting the same argument.

In a Memorandum dated July 8, 2011, the District Court granted the motion to dismiss the Title VII claims and declined to exercise supplemental jurisdiction over the state law claims. The Court concluded that Plaintiff was "not an 'employee' under Title VII." *Mariotti v. Mariotti Bldg. Prods., Inc.*, No. 3:11-CV-737, 2011 WL 2670570, at *4 (M.D. Pa. July 8, 2011). Alternatively, the Court determined that "[e]ven if [Plaintiff] was an employee under Title VII, he has failed to state a hostile work environment claim." *Id.* A timely notice of appeal followed.[2]

II.

Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court concludes that "the allegations in a complaint, however true, could not raise a claim of entitlement to relief[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). We exercise plenary review over an order granting a Rule 12(b)(6) motion. *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 97 (3d Cir. 2010). Whether the District Court applied the correct

[2] The District Court exercised jurisdiction under 28 U.S.C. §§ 1331, 1367. We have appellate jurisdiction under 28 U.S.C. § 1291.

legal standard in deciding that Plaintiff was not an employee for purposes of Title VII presents a legal question. Accordingly, we exercise plenary review. *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 484-85 (3d Cir. 1999).

III.

In *Clackamas*, the Supreme Court considered whether the shareholder-directors of a professional corporation should be counted as employees in determining whether the business entity met the threshold number of employees, and thereby qualified as an employer under the ADA. 538 U.S. at 442. Noting that the ADA purported to define the term "employee," the Court began its analysis by declaring that the statute "simply states that an 'employee' is 'an individual employed by an employer.'" *Id.* at 444 (quoting 42 U.S.C. § 12111(4)). This definition, in the Court's view, "surely qualifies as a mere 'nominal definition' that is 'completely circular and explains nothing.'"[3] *Id.* (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)). Consistent with precedent, the Supreme Court looked to the "'conventional master-servant relationship as understood by common-law agency doctrine'" in deciding what Congress intended the term "employee" to mean. *Id.* at 445 (quoting *Darden*, 503 U.S. at 322-23).

The Court observed that "the common law's definition of the master-servant relationship," focusing as it does on the "master's control over the

[3] We would go so far as to characterize it as tautological.

servant," provided "helpful guidance." *Id.* at 448. It concluded that "the common-law element of control is the principal guidepost that should be followed" in deciding whether an individual is an employee. *Id.* After considering the guidelines of the Equal Employment Opportunity Commission (EEOC) applicable to determining whether "partners, officers, members of boards of directors, and major shareholders qualify as employees[,]" *id.*, the Court declared that six factors in the EEOC guidelines were "relevant to the inquiry whether a shareholder-director is an employee," *id.* at 449. The six EEOC factors identified by the Court were:

> [1.] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
>
> [2.] Whether and, if so, to what extent the organization supervises the individual's work
>
> [3.] Whether the individual reports to someone higher in the organization
>
> [4.] Whether and, if so, to what extent the individual is able to influence the organization
>
> [5.] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

> [6.] Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50 (quoting EEOC Compl. Man. § 605:0009 (2000)).

The Supreme Court instructed that "[a]s the EEOC's standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise." *Id.* at 450. The Court cautioned against using an individual's title as the determinative factor and noted that the mere existence of an employment agreement is likewise not dispositive. *Id.* Rather, "the answer to whether a shareholder-director is an employee depends on all the incidents of the relationship . . . with no one factor being decisive." *Id.* at 451 (internal quotation marks and citations omitted).

Plaintiff contends that *Clackamas* should not be applied in this case. He is correct that there are several differences between *Clackamas* and this case. None of those differences, however, provides a sound basis for disregarding the Supreme Court's guidance in *Clackamas*.

First, Plaintiff argues *Clackamas* concerned the ADA, not Title VII. This distinction is without significance. The Supreme Court granted certiorari in *Clackamas* to address the conflict among the courts in determining whether an individual qualifies as an employee under the ADA, as well as under other antidiscrimination statutes, including Title VII and the Age Discrimination in Employment

Act (ADEA). 538 U.S. at 444 n.3. Because Title VII's definition of employee is the same as the ADA's definition, *see* 42 U.S.C. §§ 2000e(f), 12111(4), and because the EEOC's guidelines, on which the *Clackamas* Court relied, apply to coverage under Title VII, the ADEA, the ADA, and the Equal Pay Act, *see Clackamas*, 538 U.S. at 449 n.7, we conclude that the analysis set out in *Clackamas* applies to Title VII as well. *See De Jesus v. LTT Card Servs., Inc.*, 474 F.3d 16, 24 (1st Cir. 2007).

Second, we recognize that *Clackamas* concerned whether an individual was an employee for purposes of determining if the employee threshold had been met, thereby subjecting the business entity to the ADA's prohibitions against discrimination. 538 U.S. at 442. As Plaintiff correctly notes, there is no dispute in this case that MBP, which has more than 15 employees, qualifies as an employer covered by Title VII. Nonetheless, *Clackamas* remains applicable here because neither the ADA nor Title VII define the term "employee" solely for purposes of deciding which business entities may be subject to the proscriptions against employment discrimination.[4] Rather, the definitions in the ADA and Title VII also apply to the statutory provisions establishing enforcement mechanisms that may be exercised by the EEOC or the aggrieved employee. 42 U.S.C. §§ 2000e-5, 12117. Thus, the definitions of "employer" and "employee" set forth in

---

[4] *See* 42 U.S.C. § 2000e (providing that the definitions are for the purposes of "this subchapter," which is Subchapter VI, regarding equal employment opportunities); *see also* 42 U.S.C. § 12111 (specifying that its definitions are for purposes of Subchapter I of the ADA pertaining to employment).

both the ADA and Title VII are relevant in resolving (1) whether an entity qualifies as an "employer" under Title VII, and (2) whether an individual is an "employee" who "may invoke [Title VII's] . . . protections against discrimination[.]" *Clackamas*, 538 U.S. at 446 n.6. As a consequence, even though *Clackamas* considered the question of whether certain individuals were employees of a covered entity, its test informs our determination as to whether Plaintiff is entitled to invoke Title VII's protections.

Third, we consider Plaintiff's contention that the *Clackamas* test applies only to professional corporations. Because MBP is not a professional corporation, Plaintiff asserts that the District Court erred by applying the *Clackamas* test.

We are not persuaded. As the First Circuit noted in *De Jesus*, the EEOC Compliance Manual, on which the *Clackamas* Court relied, did "not restrict itself to professional corporations; indeed, it explicitly covers major shareholders." 474 F.3d at 24. For that reason, the First Circuit concluded that *Clackamas* "applies to close corporations as well as to professional corporations." *Id.* Similarly, in *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006), the Seventh Circuit reiterated "that the *Clackamas* test is not confined to shareholder-directors" of a professional corporation, but "may be applied" to other business entities as envisioned by the EEOC manual that the Court embraced. *Id.* at 977 (citing *Solon v. Kaplan*, 398 F.3d 629, 633 (7th Cir. 2005)). The Court proceeded to apply *Clackamas* in deciding whether the sole proprietor's mother and

husband, both of whom managed the business, qualified as employees, thereby subjecting the diner to Title VII coverage.

We agree with our sister Courts of Appeals that *Clackamas*'s application is not limited to professional corporations. The EEOC Manual on which the Court relied in *Clackamas* considered multiple business enterprises. 538 U.S at 449. Furthermore, the Supreme Court's analysis pointed out that the form of the business entity was not the key element, emphasizing that the determination of one's status cannot be decided simply on the basis of titles, such as an individual's status as a partner, director, or officer, or the existence of documentary evidence. *Id.* at 449-450. "Rather, . . . the answer to whether [an individual] is an employee depends on all of the incidents of the relationship with no one factor being decisive." *Id.* at 451 (internal quotation marks, ellipsis and citations omitted). We therefore conclude that the nature of the business entity is simply an attribute of the employment relationship that must be considered in applying the *Clackamas* test to determine whether an individual is an employee or an employer. For that reason, MBP's status as a closely held family business informs our analysis.

Consistent with *Clackamas*, our analysis focuses on the element of control and the six factors discussed in that precedent. 538 U.S. at 448-50. As the Seventh Circuit explained in *Castaways Family Diner*, the six factors address not only the extent of an individual's control, but also "the source of an individual's authority" to control. 453 F.3d at 983.

Castaways Family Diner recognized that in *Clackamas* the Supreme Court did not mention the source of an individual's authority as a factor in the analysis. *Id.* at 984. Nonetheless, the Seventh Circuit believed that the Supreme Court "hinted" as much "in at least one of the test's six factors," *i.e.* the factor regarding "'[w]hether the organization *can* hire or fire the individual or set the rules and regulations of the individual's work.'" *Id.* (quoting *Clackamas*, 538 U.S. at 449 (emphasis added)). It further noted that the

> significance of the source of an individual's authority is implicit in the framing of the test as one for partners, major shareholders, directors, and the like. . . . [as] those are the types of individuals whose status within an enterprise potentially gives them authority that is not dependent on the acquiescence of others. *Clackamas* itself speaks not only of the control that an employer exercises but his *right* to exert such control.

Id. at 984-85 (citing *Clackamas*, 538 U.S. at 448). We agree with the Seventh Circuit. As additional support for our view, we note that the fourth factor set forth in *Clackamas*, which scrutinizes the individual's ability to "influence the organization," implicitly examines the source of the individual's authority. *Clackamas*, 538 U.S. at 450.

Accordingly, we adopt the approach of the Seventh Circuit in *Castaways Family Diner*. In

determining whether Plaintiff's amended complaint states a claim for relief under Title VII, we "must take into account not only the authority [he] wields within the enterprise but also the source of that authority." *Castaways Family Diner*, 453 F.3d at 984. Specifically, we must consider whether Plaintiff "exercises the authority by right, or whether he exercises it by delegation at the pleasure of others who ultimately do possess the right to control the enterprise." *Id.*

Our review of the allegations of Plaintiff's amended complaint confirms that Plaintiff's status as a shareholder, a director, and a corporate officer gave him both substantial authority at MBP and the right to control the enterprise. He was entitled to participate in the management, development, and governance of MBP. By sitting on the board of directors and serving as a corporate officer, Plaintiff had the ability to participate in the fundamental decisions of the business. We cannot ignore Plaintiff's allegation, which we must accept as true, that after his termination in January of 2009, he continued to serve as a director of the closely held family corporation until August 6, 2009. Furthermore, the termination letter he received did not mention the cessation of any salary. Instead, it stated that "[y]our shares of any draws from the corporation or other entities will continue to be distributed to you." We conclude that Plaintiff's amended complaint fails to allege that he is "the kind of person that the common law would consider"

an employee. *Clackamas*, 538 U.S. at 445 n.5. He has not alleged a claim that entitles him to relief.[5]

We recognize that Plaintiff's amended complaint alleges that he did not have exclusive control of MBP. Exclusive control, however, is merely one attribute of the employment relationship. Its absence does not compel a conclusion that an individual who lacks it is an employee entitled to invoke Title VII's protections. Such a conclusion would ignore that the EEOC guidelines, which the Court embraced in *Clackamas*, pertained to business entities that do not vest exclusive control in any one

---

[5] The *Clackamas* test is a fact intensive one; therefore, cases requiring application of the test may generally require resolution at the summary judgment stage, rather than at the motion to dismiss stage. *See Decotiis v. Whittemore*, 635 F.3d 22, 35 n.15 (1st Cir. 2011) (noting in other context that courts hesitate to dispose of fact-intensive inquiry at motion to dismiss stage); *Todd v. Exxon Corp.*, 275 F.3d 191, 199-200 (2d Cir. 2001) (same). Similarly, we note that most of the decisions of our sister Courts of Appeals, in applying the *Clackamas* factors, dealt with motions for summary judgment, rather than motions to dismiss. *E.g., Fichman v. Media Ctr.*, 512 F.3d 1157, 1158 (9th Cir. 2008); *De Jesus v. LTT Card Servs., Inc.*, 474 F.3d 16, 18 (1st Cir. 2007); *Smith v. Castaways Family Diner*, 453 F.3d 971, 972 (7th Cir. 2006); *Solon v. Kaplan*, 398 F.3d 629, 630 (7th Cir. 2005). *Clackamas* itself was an appeal from a grant of summary judgment. 538 U.S. at 442.

The fact that we are affirming the District Court's dismissal of the complaint based on application of the *Clackamas* test does not alter the fact-intensive nature of the analysis nor does it indicate that the motion to dismiss stage will usually be the appropriate juncture for application of the test. Rather, on the clear facts and circumstances of this specific case, we find that the District Court's determination was the proper one.

individual. *Id.* at 448 (noting the guidelines applied to "partner*s*, officer*s*, member*s* of boards of directors, and major shareholder*s*" (emphasis added))

The allegations in the amended complaint make plain that Plaintiff was entitled to participate in the development and governance of the business His averment that he continued to serve after his termination on January 9, 2009 as a member of the board of directors confirms that he remained entitled by virtue of his position "to a say in the fundamental decisions" of the closely held family corporation for months after his termination. *Castaways Family Diner*, 453 F.3d at 983. For that reason, we conclude that the District Court did not err in its determination that the allegations in Plaintiff's complaint did not establish that he was an employee under Title VII. He is not entitled, therefore, to invoke its protections.

We will affirm the judgment of the District Court.[6]

[6] Because we conclude that Plaintiff is not entitled to invoke the protections of Title VII, there is no need to consider whether his amended complaint sufficiently alleged a hostile environment claim

[ENTERED APRIL 29, 2013]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-3148

ROBERT A. MARIOTTI, SR.,
Appellant

v.

MARIOTTI BUILDING PRODUCTS, INC.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 3-11-cv-00737
District Judge: The Honorable A. Richard Caputo

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
March 18, 2013

Before: SMITH, GREENAWAY, JR., and VAN ANTWERPEN,
Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted on March 18, 2013.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered July 8, 2011, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against Appellant.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: April 29, 2013

[ENTERED JULY 8, 2011]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT A. MARIOTTI, SR.,

Plaintiff,

MARIOTTI BUILDING PRODUCTS, INC.,

Defendant.

CIVIL ACTION NO. 3:11-CV-737

(JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is defendant Mariotti Building Products, Inc.'s ("MBP") motion to dismiss plaintiff Robert Mariotti's amended complaint. (Doc. 22.) Mr. Mariotti essentially claims that MBP officers and directors harassed and ultimately fired him because of his religious affiliation in violation of federal and state antidiscrimination laws. MBP contends that this a family dispute, not a legal one. Specifically, it argues that the complaint should be dismissed for three reasons. First, Mr. Mariotti was not an employee under Title VII. Second, he has failed to adequately allege a "hostile work environment." Third, the Court should not exercise supplemental jurisdiction

over the remaining state law claims. The Court agrees and will grant MBP's motion to dismiss.

BACKGROUND

Mr. Mariotti's amended complaint alleges the following.

Mr. Mariotti's father, Louis S. Mariotti, founded MBP under the name Locket Lumber in August 29, 1947. Mr. Mariotti and his two brothers joined the business in the 1960s. Over the subsequent forty years, MBP's annual sales grew from less than two-hundred and fifty-thousand dollars ($250,000.00) to over sixty-million ($60,000,000.00). In his over forty-five years with the MBP, Mr. Mariotti developed a number of MBP's business areas. He trained staff in the day to day management of several product lines. He also principally managed the manufactured housing sales division, as well as customer credit, bill paying, purchasing, and the inbound transportation of product lines. As one of MBP's "founders" who "built the business," Mr. Mariotti served on the Board of Directors until August 6, 2009, and held the positions of Vice President and Secretary.

In 1995, after experiencing a "spiritual awakening," Mr. Mariotti began participating in the religious activities "Our Father's Divine Work" – a Roman Catholic lay ministry founded by Mary Ellen Lukas. Shortly thereafter, Mr. Mariotti switched Church affiliations. He began attending mass at St. Nicholas Byzantine Catholic Church and stopped going to St. Mary's, the Mariotti family church.

Subsequently, MBP officers and directors continually teased and taunted Plaintiff about his new spiritual orientation. They frequently referred to Mr. Mariotti as "Reverend Bob," and often insinuated that Ms. Lukas' lay ministry was a cult controlling Mr. Mariotti. MBP also stopped providing "Our Father's Divine Work" with special pricing, a favor routinely granted to charities and non-profit organizations. MBP officers were also openly hostile to Ms. Lukas. After Mr. Mariotti's wife passed away, Mr. Mariotti's sister-in-law told Ms. Lukas she was not welcome at the funeral despite Mr. Mariotti's wishes.

The tension over Mr. Mariotti's involvement with "Our Father's Divine Work" erupted in January 2009 at the funeral of Mr. Mariotti's father. Plaintiff's brother Eugene Mariotti Sr. made derogatory comments about Catholicism and also yelled at Mr. Mariotti for traveling separately to the service. Mr. Mariotti's heavily religious eulogy angered his family members. Shortly after the service, Mr. Mariotti received text messages from upset family members deriding his remarks. A few days later, a fax informed Mr. Mariotti that the shareholders had called an emergency meeting and unanimously voted to terminate him.

Mr. Mariotti then brought this suit after filing complaints with the Equal Employment Opportunity Commission and the Pennsylvania Human Rights Commission. In his amended complaint, Mr. Mariotti brings the following claims: religious discrimination and hostile work environment under Title VII (counts I and II); religious discrimination

under the Pennsylvania Human Rights Act ("PHRA") (count III); breach of employment agreement (count IV); unlawful termination (count V); and *ultra vires* action without proper notice (count VI). MBP then filed its motion to dismiss. The motion has been fully briefed and is ripe for review.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element, *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556); *see also Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993) (requiring a complaint to set forth information from which each element of a claim may be inferred). In light of Federal Rule of Civil Procedure 8(a)(2), the statement need only "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555). "[T]he factual detail in a complaint [must not be] so undeveloped that it does not provide a defendant [with] the type of notice of claim which is contemplated by Rule 8." *Phillips*, 515 F.3d at 232;

see also Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667 (7th Cir. 2007).

When considering a Rule 12(b)(6) motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of her claims. *See Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). The Court does not consider whether a plaintiff will ultimately prevail. *See id.* A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *See Gould Elecs. v. United States,* 220 F.3d 169, 178 (3d Cir. 2000).

DISCUSSION

I. Mr. Mariotti's Title VII Religious Discrimination Claim

The Court will dismiss Mr. Mariotti's Title VII religious discrimination claim because he was not an "employee" at the time of the alleged incidents.

Title VII defines "employee," rather unhelpfully, as "an individual employed by an employer." 42 U.S.C. § 2000e(f). To supplement this circuitous definition, the courts look at six factors in determining whether an individual is an employer or an employee entitled to invoke Title VII's anti-discrimination laws:

> (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

> (2) whether and, if so, to what extent the organization supervises the individual's work;
>
> (3) whether the individual reports to someone higher in the organization;
>
> (4) whether and, if so, to what extent the individual is able to influence the organization;
>
> (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
>
> (6) whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449-50 (2003). In this inquiry, "[t]he touchstone . . . is control . . . with no one factor being decisive." *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 09-4498, 2010 WL 2780927, *1 (3d Cir. July 15, 2010) (quoting *Clackamas*, 538 U.S. at 449, 451).

In *Kirleis*, plaintiff, a Class A shareholder-director, sued defendant law firm for employment discrimination. Defendant successfully argued that plaintiff was not an "employee" under Title VII and was granted summary judgment. On appeal, plaintiff argued that her position on the board of directors was a mere "rubber stamp," and that the

Executive Committee – rather than the board – set the firm's hourly rates, made compensation decisions, and had the power to fire shareholders. She also argued that her decision-making was limited and that the firm closely supervised her work. *Kirleis*, 2010 WL 2780927 at *1. Upholding the trial court, the Third Circuit pointed to several pertinent facts about plaintiff's position with the firm. As a Class A shareholder-director, plaintiff had the ability to participate in the firm's governance, as well as the right not to be terminated without a 3/4 vote of the board of directors for cause. Furthermore, she was entitled to a percentage of the firm's profits, losses, and liabilities. *Id.* at *2.

Here, MBP argues that Mr. Mariotti had even *more* control over the business than the plaintiff in *Kirleis*. Mr. Mariotti, however, contends that while *Kirleis* involved a professional corporation, MBP is a general, S-corporation. Additionally, Mr. Mariotti argues that unlike a shareholder in a professional corporation or a general partner: he did not share in MBP's profits or losses beyond the occasional dividend; he drew a fixed salary; he did not set company policy; and he had to report to the board of directors.

Eschewing formal titles and focusing on "control," the Court finds that Mr. Mariotti was an employer under Title VII. Specifically, Mr. Mariotti: was a founding member of MBP; ran several major divisions; trained employees in these divisions' day-to-day management; held board positions, including Secretary and Vice President; and was only terminated after a shareholder vote. Although the

amended complaint does not state Mr. Mariotti's ownership stake in MBP, he was, and continues to be, a shareholder in the company. While he did have to report to the Board, in a corporation, everyone does, including the CEO. Further, Mr. Mariotti claims he was fired only after a shareholder vote, a procedure not afforded the average employee but required to remove board members.

Therefore, the Court will dismiss Mr. Mariotti's federal religious discrimination claim because he was not an "employee" under Title VII.

II. Mr. Mariotti's Hostile Work Environment Claim

Even if Mr. Mariotti was an employee under Title VII, he has failed to state a hostile work environment claim.

To make out a religiously hostile work environment claim under Title VII, a plaintiff must demonstrate five elements:

> (1) the employee suffered intentional discrimination because of [religion];
>
> (2) the discrimination was pervasive and regular;
>
> (3) the discrimination detrimentally affected the plaintiff;
>
> (4) the discrimination would detrimentally affect a reasonable

> person of the same [religion] in that position; and
> (5) the existence of respondeat superior liability.

Abramson v. William Paterson College of NJ, 260 F.3d 265, 272 (3d Cir. 2001). In determining whether an environment is hostile and abusive, the United States Supreme Court has directed the lower courts to: ""look[ ] at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). "A recurring point in these opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998) (internal citation omitted).

Here, Mr. Mariotti has failed to allege pervasive and regular discrimination. While the comments directed at him by MBP officers and others were insensitive and perhaps offensive, they were not frequent or sever. A handful of teasing and crude remarks over more than ten years does not establish an abusive work environment. Even if some comments were allegedly made with more frequency, e.g. referring to Mr. Mariotti as "Reverend Bob," the United States Supreme Court has clearly held that teasing and offhand comments

are insufficient to make out a hostile work environment claim.

III. Mr. Mariotti's State Law Claims

Having determined it will dismiss Mr. Mariotti's federal claims, the Court will not exercise supplemental jurisdiction over his remaining state law claims. 28 U.S.C. § 1367(c)(3).

CONCLUSION

The Court will grant MBP's motion to dismiss (Doc. 22) because Mr. Mariotti was not an employee under Title VII; has not stated a claim for hostile work environment; and the Court will not exercise supplemental jurisdiction over his state law claims. An appropriate order follows.

7/8/11
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT A. MARIOTTI, SR.,

Plaintiff,

MARIOTTI BUILDING PRODUCTS, INC.,

Defendant.

CIVIL ACTION NO. 3:11-CV-737

(JUDGE CAPUTO)

ORDER

NOW, this 8th day of July, 2011, **IT IS HEREBY ORDERED** that MBP's motion to dismiss Mr. Mariotti's amended complaint is **GRANTED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

[ENTERED MAY 30, 2013]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-3148

ROBERT A. MARIOTTI, SR.,
Appellant

v.

MARIOTTI BUILDING PRODUCTS, INC.

SUR PETITION FOR REHEARING

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR. , VANASKIE, SHWARTZ, and VAN ANTWERPEN*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: May 30, 2013

Smw/cc: Clifford B. Cohn, Esq.
Jeffrey J. Malak, Esq.
Thomas H. Roberts, Esq.
Daniel T. Brier, Esq.
Donna A. Walsh, Esq.

---

*Vote limited to Panel Rehearing.