Case Brief: *Lemon v. Myers Bigel, P.A.*[*]

INTRODUCTION

While Title VII[1] and 42 U.S.C. § 1981 both provide causes of action for employment discrimination, their respective paths to recovery are distinct and limited. Title VII limits its antidiscrimination and antiretaliation provisions to employees and the terms and conditions of employment.[2] Comparatively, § 1981 only provides recovery for substantial interference with the right to contract, requiring courts to locate such a contractual benefit and relationship.[3] Accordingly, a hypothetical illustrating the weak points of each provision would involve a situation of race-based discrimination in which an individual is a quasi employee whose employer provides an ambiguous contractual benefit. In *Lemon v. Myers Bigel*,[4] the Fourth Circuit confronted these facts when a law firm denied short-term leave to an equity partner.[5] The Fourth Circuit dismissed the claim, rejecting substantial evidence of racial animus and highlighting the shortcomings of these antidiscrimination provisions.[6]

HISTORY & CONTEXT

Title VII of the Civil Rights Act of 1964[7] prohibits employer discrimination against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"[8] or with respect to an employee's opposition to an employment practice made unlawful under Title VII.[9] An "employee" is "an individual employed by an employer."[10] The Supreme Court has elaborated on this definition, directing courts to evaluate the common law element of control under agency principles to determine the presence of an employer-employee

1. 42 U.S.C. §§ 2000e-2(a), 2000e-3(a).
2. *See id.*
3. 42 U.S.C. § 1981; Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649–50 (4th Cir. 2002).
4. 985 F.3d 392 (4th Cir. 2021).
5. *See id.* at 394.
6. *Id.* at 398–400.
7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).
8. 42 U.S.C. § 2000e-2(a).
9. *Id.* § 2000e-3(a).
10. *Id.* § 2000e(f).

relationship.[11] In *Clackamas Gastroenterology Associates v. Wells*,[12] the Court identified six relevant factors:

> [1] Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
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> [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.[13]

The factors emphasize the degree of control the employer exerts over the employee.

Section 1981 of the Civil Rights Act of 1866[14] prohibits racially discriminatory interference with the right "to make and enforce contracts."[15] In the employment context, the contractual rights at issue arise out of an employment contract, and a successful claim requires proof of a discriminatory denial of employment benefits.[16] The plaintiff must show, among other things, that (1) the plaintiff was eligible to receive a benefit otherwise provided to other employees and (2) "the plaintiff was not provided [the benefit] under circumstances giving rise to an inference of discrimination."[17]

11. Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 449–50 (2003).

12. 538 U.S. 440.

13. *Id.* at 449–50 ("[E]ach of the following six factors is relevant to the inquiry whether a shareholder-director is an employee."). These factors are "non-exhaustive"; "[c]ourts are responsible for merging . . . [them] into a judgment that embraces all the circumstances presented in a particular case." Lemon v. Myers Bigel, P.A., 985 F.3d 392, 396 (4th Cir. 2021).

14. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended in scattered sections of 42 U.S.C.).

15. *See* 42 U.S.C. § 1981(a).

16. *See id.* § 1981(b)

17. Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649–50 (4th Cir. 2002).

FACTS OF THE CASE

In *Lemon v. Myers Bigel*, an equity partner, Shawna Lemon, brought Title VII and § 1981 claims against her law firm employer, Myers Bigel ("MB").[18] Lemon made partner in 2007, and thereafter owned an equivalent share in the firm as all other partners.[19] Further, as a member of the board of directors, she also possessed equal voting power as her fellow board members.[20] Lemon also served on the Board's Management Committee as an MB officer.[21] Lemon's employment agreement from her time as an associate was "never formally superseded"; however, "the Board [had] voted, while Lemon was a partner, to strip from the shareholder agreement all references to shareholders as MB 'employees.'"[22]

In 2016, an outside attorney investigated gender discrimination in the firm due to complaints from several female attorneys and employees.[23] Although Lemon had requested permission to view the findings, the request was denied.[24] Subsequently, Lemon hired an attorney.[25] When the Board discovered Lemon's actions, "relationships between Lemon and several of MB's other partners soured."[26] After a Board discussion on the gender discrimination investigation, one partner "allegedly remarked to another that Lemon 'played the [B]lack card too much.'"[27] Later that year, Lemon applied for short-term leave, stating that she qualified for the leave "through her own health condition" and through other qualifying events that her family experienced.[28] Although the Board knew of her specific qualifications, Lemon declined to identify the specific qualifications in court.[29] The Board was "unsympathetic"; a full board vote rejected the request 17–3.[30]

Lemon asserted that this procedure was "a stark departure from the customary handling of short-term leave applications filed by white attorneys,

18. *Lemon*, 985 F.3d at 394.

19. *Id.*

20. *Id.*

21. *Id.* As an officer, Lemon held the positions of vice president and secretary. *Id.*

22. *Id.*

23. *Id.* As indicated in the appellant's brief, "During Spring 2016, several female attorneys/employees at MB asserted complaints about gender discrimination, including a hostile work environment because of gender." Brief of Appellant at 6–7, *Lemon*, 985 F.3d 392 (No. 19-1380). In response to these complaints, "MB hired attorney Kevin S. Joyner ('Joyner') of the Ogletree Deakins law firm to investigate and advise it concerning these claims of gender discrimination." *See id.* at 7.

24. *Lemon*, 985 F.3d at 394. "This denial blocked Lemon's ability to analyze the report and prepare a response based on her personal knowledge of aspects of the investigation. This truncated Lemon's ability to influence the organization." Brief of Appellant, *supra* note 23, at 43.

25. *Lemon*, 985 F.3d at 394.

26. *Id.* at 394–95.

27. *Id.* at 395.

28. *Id.*

29. *Id.* at 395.

30. *Id.*

whose requests were allegedly 'ministerially confirm[ed]' by the Management Committee."[31] One partner spoke of "'punish[ing]' Lemon for 'bad behavior.'"[32] Lemon also asserted that the Management Committee had "openly discussed racial and gender discrimination and its retaliatory actions against Lemon."[33]

"Overcome by what she characterized as the 'extraordinary stress [and] humiliation' of her workplace environment, Lemon resigned."[34] Lemon brought claims for race discrimination under Title VII and § 1981.[35] On MB's motion to dismiss for failure to state a claim, the district court dismissed the Title VII claim because Lemon did not allege facts showing that she was an "employee" of MB.[36] It similarly dismissed her § 1981 claim because the facts as alleged did not create a "plausible inference" that MB's decisions were motived by race.[37] Lemon appealed to the Fourth Circuit.[38]

LEGAL ISSUES AND OUTCOME

On appeal, Judge Wilkinson, writing for the majority, affirmed the lower court's decision and dismissed Lemon's claims.[39] The Fourth Circuit held that Lemon was not an "employee" under Title VII and that Lemon failed to plausibly allege her short-term leave eligibility under § 1981.[40] The court applied the *Clackamas* factors[41] in its Title VII analysis, while it focused on the lack of a tangible contractual benefit in its § 1981 analysis.[42]

Applying the *Clackamas* factors, the Fourth Circuit determined that every factor weighed against concluding that Lemon was an "employee."[43] Lemon was "a full member of the Board with equal voting power," "had as much control over the 'rules and regulations' governing the work at MB . . . as any other," and Lemon could be fired only pursuant to a shareholder vote.[44] She was not salaried and shared in the profits and losses of the firm.[45] Moreover, "[t]he organization's 'supervis[ion]' of her work was for quality-control purposes only and, ultimately, purely advisory in nature."[46] Finally, she "reported" to no one

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 394.
36. *Id.* at 395.
37. *Id.*
38. *Id.* at 392.
39. *Id.* at 394.
40. *Id.* at 398–400.
41. Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 449–50 (2003).
42. *Lemon*, 985 F.3d at 398–400.
43. *Id.* at 397–98.
44. *Id.* (satisfying factors one and four).
45. *Id.* at 397 (satisfying factor six).
46. *Id.* at 398 (satisfying factor two).

and was outranked by no one.[47] While Lemon argued that her shareholder agreement did not formally supersede her employment agreement, the court rejected this argument, reasoning that even in the absence of formally superseding the employment agreement, "the Board subsequently voted to amend the shareholder agreement, removing every reference to a signatory as an MB 'employee.'"[48]

The court's § 1981 analysis mechanically rejected Lemon's claims for relief. The court did not recognize an interference with Lemon's right to make and enforce contracts, reasoning that (1) "the plaintiff was [in]eligible to receive the benefit" and (2) the "defendant's denial of the benefit [did not] give[] rise to an inference of discrimination."[49] First, the court highlighted Lemon's lack of specificity as to why her short-term leave application was rejected, along with the fact that "another Board member openly denied that Lemon was qualified for leave."[50] Second, the court determined that Lemon failed to show that "her race was the but for cause of the Board's denial."[51] Although Lemon was denied leave while other similarly situated white partners were not, the Fourth Circuit reasoned that "such an allegation indicates only that [Lemon] was treated differently, not that she was treated differently *because* of her race."[52] The court rejected the significance of Lemon's evidence "that one shareholder complained about her 'play[ing] the [B]lack card' too often," discounting the statement since "[it] was made approximately four months prior to the Board vote denying Lemon short-term leave" and "Lemon [had] failed to allege any facts linking these two events."[53]

In sum, the Fourth Circuit dismissed Lemon's Title VII and § 1981 claims, affirming the district court's ruling.[54] In closing, the court noted that it "was left with a sparse set of pleadings, incapable of stating a plausible claim."[55]

POTENTIAL IMPACT

The Fourth Circuit's analysis highlights the shortcomings of Title VII and § 1981 claims. Other circuits also follow Judge Wilkinson's adopted definition of "employee" under Title VII.[56] Moreover, sister circuits have also declined to treat equity partners as "employees," suggesting that the Fourth Circuit's

47. *Id.* (satisfying factor three).
48. *Id.* (satisfying factor five).
49. *See id.* at 399–400.
50. *Id.* at 399.
51. *Id.*
52. *Id.* at 400.
53. *Id.*
54. *Id.*
55. *Id.*
56. The Fourth Circuit cites to several cases. *See* Solon v. Kaplan, 398 F.3d 629, 632–33 (7th Cir. 2005); Von Kaenel v. Armstrong Teasdale, LLP, 943 F.3d 1139, 1143–44 (8th Cir. 2019).

application of the rule is not unique.[57] Nevertheless, this definition seems unworkably narrow—and unrealistic. Law firm partnerships are not typically flat hierarchies at the partnership level: managing partners sit on top of the pyramid, followed by practice group leaders,[58] or even leaders of smaller teams.[59] Apart from management titles, some partners may carry greater management responsibilities due to their seniority within the firm or due to other external factors.[60] Even the *Lemon* court acknowledged that law firm dynamics are complex at the partnership level:

> [S]ome partners exert greater influence than others. Some form controlling factions. Others, despite their best efforts, are more often in the minority. There may be differences in the apportionment of partnership shares. These are the inescapable realities whenever people assemble in groups or elect to form organizations. But inevitable differences in personal influence do not negate a partner's basic standing in the firm. Nor would sifting through such differences provide any remotely workable standard for determining employer/employee status.[61]

The Fourth Circuit rejects this standard on the basis of workability but does not deny that such a reading of the statute is more realistic.

The Fourth Circuit's § 1981 analysis showcases additional limits in addressing race-based discrimination in the workplace. The Fourth Circuit summarily rejected Lemon's claim primarily because she failed to demonstrate that she was eligible for the "benefit" (the short-term leave).[62] Nevertheless, the circularity of this requirement becomes apparent in the Fourth Circuit's analysis: Lemon's rejected eligibility was treated as evidence of the absence of racial discrimination even though the rejection of the "benefit" was the entire basis for Lemon's claim. While it is true that the court could not fully analyze Lemon's potential eligibility because of Lemon's failure to disclose her specific

57. *See Solon*, 398 F.3d at 632–33; *Von Kaenel*, 943 F.3d at 1143–44.

58. *See Lead or Manage: What Should a Practice Leader Actually Do?*, THOMSON REUTERS (Sept. 13, 2016), https://www.thomsonreuters.com/en-us/posts/legal/practice-leader-actually-do/ [https://perma.cc/5BHK-QJZB].

59. *See, e.g.*, *Corporate*, MCGUIREWOODS, https://www.mcguirewoods.com/services/practices/corporate [https://perma.cc/V479-WKRS] (listing the team leaders within the firm's broader corporate practice).

60. *See, e.g.*, *About Us*, MCGUIREWOODS, https://www.mcguirewoods.com/about-us#tab-1-3-taburl [https://perma.cc/6MFQ-P829] (listing partners with membership on the Executive Committee and Board of Partnership); *About Us*, MAYER BROWN, https://www.mayerbrown.com/en/about-us/about?tab=Leadership [https://perma.cc/C258-JPJC] (listing partners with membership on the Management Committee and Partnership Board).

61. Lemon v. Myers Bigel, P.A., 985 F.3d 392, 398 & n.3 (4th Cir. 2021) (differentiating between nonequity partners, equity partners, and "of counsel" roles).

62. *Id.* at 399–400.

qualifications, the eligibility was determined by a board vote capable of conferring that "eligibility" (or of blocking eligibility due to racial animus).[63]

The Fourth Circuit's finding of a lack of animus is problematic for other reasons. Under a Rule 12(b)(6) standard of review, Lemon's allegation that one partner "allegedly remarked to another that Lemon 'played the [B]lack card too much'" suggests an inference of discrimination.[64] Applying the but-for test for racial animus,[65] it seems at least "plausible" that such a statement evidences racial animus underlying the voting procedures for determining eligibility. Nevertheless, the court's analysis stops at the "eligibility" requirement, finding that the very cause of Lemon's claim—her denial of benefit—was also sufficient to dismiss it.[66]

In sum, *Lemon v. Myers Bigel* demonstrates some limitations of Title VII and § 1981 in addressing race-based discrimination at the partnership level. Each asserted claim failed on relatively peripheral elements: first, that Lemon is not an "employee"; and second, that Lemon was not "eligible" for her benefit. The result is an opinion lacking any empathy for Lemon's concerning allegations of racial discrimination in the workplace.

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63. *See id.* at 399.
64. *Id.* at 395, 399.
65. *Id.* at 399.
66. *See id.* at 399–400.

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