IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

RAYMOND B. YATES, M.D., P.C. :

PROFIT SHARING PLAN, AND :

RAYMOND B. YATES, TRUSTEE, :

Petitioners :

V. : No. 02-458

WILLIAM T. HENDON, TRUSTEE. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, January 13, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:20 a.m.

APPEARANCES:

JAMES A. HOLIFIELD, ESQ., Knoxville, Tennessee; on behalf of the Petitioners.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

C. MARK TROUTMAN, ESQ., LaFollette, Tennessee; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:20 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-458, Raymond Yates v. William T. Hendon.

Mr. Holifield.

ORAL ARGUMENT OF JAMES A. HOLIFIELD

ON BEHALF OF THE PETITIONERS

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

Petitioners believe that a sole owner may be a participant in an employee benefit plan if another common law employee participates in such plan, regardless of whether that corporation or entity transacts business as a sole proprietorship, partnership, or corporation. This belief is based on a plain reading of ERISA, the plan language in question here, the statutory scheme of ERISA, the DOL regulations and the policy considerations beside -- excuse me -- behind such regulations.

When ERISA was passed, it incorporated the term employee. This Court dealt with that term in Nationwide v. Darden and held that the term employee includes a common law employee. And -- and the term participant in a plan says if you're an employee with a right to a benefit, then you've met the definition of participant. In just looking at these two terms alone, Yates was a participant

in this plan and it's the petitioners' position as such he had the rights to enforce the rights of ERISA.

If you further read, the terms of the plan in and of itself support this. This was an IRS prototype plan and the plan allowed for sole owners, sole proprietors, partnerships, or even incorporated entities to participate as sole owners in the plan if they covered other common law employees.

On top of this, if you look at the ERISA statutory schemes, when ERISA was passed, title I addressed many different concerns. As I've already explained the definition of employee and participant specifically include the person such as Yates as allowing him to participate because he is an employee.

Furthermore, if you look at, for instance, ERISA section 1103(b), that provision excludes as an exclusion for certain aspects to the trust requirements of ERISA. One of those specific exclusions if -- is that some or all employees are employees as defined in the Internal Revenue Code, and a specific reference is made to 26 U.S.C. 401(c)(1). And so you -- you see a pattern here that the IRS Code and the ERISA law being congruent in its administration of plans and a specific reference to a definition of working employers that includes self-employed individuals, partnerships, and -- and people such

as that.

When ERISA was passed, title II of ERISA specifically dealt with changes to the tax code. It dealt with specifically amendments to code section 401. Since --

QUESTION: Mr. Holifield, I'm curious whether if -- if we were to agree with you that the petitioner could be considered an employee under ERISA, do we have to then go on and address the rest of this rather complicated question on the alienation issue and so forth, or would we remand on that?

MR. HOLIFIELD: Your Honor --

QUESTION: It wasn't dealt with below, was it?

MR. HOLIFIELD: No, it wasn't, Your Honor. And it -- it's -- certainly I could make an argument here that Patterson and Guidry is controlling on that matter of anti-alienation, but that issue wasn't the particular issue --

QUESTION: No.

MR. HOLIFIELD: -- raised in this Court, and -- and not addressed in the lower courts.

QUESTION: What is the -- what is that issue? Because I saw some -- I'm not sure that we're talking about the same issue. What is the issue that you say wasn't addressed?

MR. HOLIFIELD: The issue that was not addressed in the lower courts is there is the maybe potential conflict with the Bankruptcy Code as far as preference laws and the ERISA anti-alienation provision.

QUESTION: In other words, this $50,000 wasn't put back until the eve of bankruptcy so even if -- even if we agreed with you that Yates can be an employee, this $50,000 still might constitute an unlawful preference.

MR. HOLIFIELD: Your Honor, it -- it might. There's certainly language, I believe, in the Sixth Circuit opinion and the district court opinion that they both held that had -- certainly indicated it would be dicta that had Yates been declared a participant in the plan, they would have enforced the anti-alienation provisions, but there was no specific holding on that point.

QUESTION: And even if there was, that's not before us.

MR. HOLIFIELD: Yes, Your Honor.

QUESTION: We -- theoretically we could agree with you that he's a participant and so forth but still say send it back for the bankruptcy issue.

MR. HOLIFIELD: That is within the prerogative of this Court, Your Honor.

When title II was enacted, it was enacted with

the -- an understanding that in 1942 the Revenue Act of -- was passed that allowed shareholder employees to participate in a plan. In 1962, Self-Employed Individuals Tax Retirement Act was passed and that allowed sole proprietors or partnerships to form a Keogh plan in which -- and whether they could participate in a plan that only covered themselves or allowed it if it covered other employees.

ERISA was passed in '74, and it was passed with an understanding that these tax code provisions were there. When Congress was amending title II of ERISA to amend the tax code, it did not change any of these definitions. It clearly allowed these sole owners, these working owners, if you'll let me call them that, to participate in these plans and had Congress wanted to exclude them, they could have. They knew how to exclude people.

QUESTION: Does it have to be a working owner? Could it be someone who just owns shares and doesn't work in the business?

MR. HOLIFIELD: Possibly, Your Honor. Yes. I mean, that is -- very rare does that occur. Typically you may see that in a group health plan, but not typically in a retirement plan. You may see those types of things, but there's nothing to prevent that.

QUESTION: That -- that would be pretty far afield from the word employee. I mean, one could be -- for example, did -- did Yates -- he was a -- a working owner.

MR. HOLIFIELD: Yes, Your Honor.

QUESTION: Was -- were FICA and FUTA taxes paid for his labor?

MR. HOLIFIELD: Yes, Your Honor. In the terms of -- I think the record is critical on this that he's a common law employee. The retirement plan in and of itself defined compensation as W-2 compensation, which means FICA and FUTA, as you're inquiring, was withheld. And so as a W-2 employee, the monies that were contributed to this plan were based on a percentage of his W-2 compensation. So from a common law standpoint, just pure corporate law, he was an employee of that corporation who was handed a W-2 as an employee of the Yates P.C., and it was based on that compensation that his contributions were made to the plan.

In title IV of ERISA, there's an exclusion for plans maintained solely for substantial owners. And the point I'm making, whether you look at title I, title II, or title IV, you see references to sole owners being in there or not -- possible ways they could be excluded, but none of them that would prevent them from participating in

plans such as this.

And I think if you look at that, as well as look at the DOL regulatory scheme that has come out of this, the DOL opinion letters report this conclusion, be that 79-08A which is in the record at J.A. -- the joint appendix at 271 and 273, the opinion letter 99-04A at 274a and 283a. You see an information letter that's actually is part of UNUM Providence brief at appendix 1, and that's a letter from Robert Dole to Susan Hoffman. Each of these is where the DOL has opined an opinion that people that are working owners can be a participant in an employee benefit plan. And so I think the case law on that point is pretty clear.

And I think where the confusion comes into play is this definition of employee benefit plan in a reg that has been misread by, I believe, two circuits on that point. And I think just a plain reading of the reg in and of itself shows that working owners were intended to be included in these plans if they had another participant in the plan. And --

QUESTION: Here there were a couple of other --

MR. HOLIFIELD: Yes, Your Honor.

QUESTION: -- plan participants at all times?

MR. HOLIFIELD: Yes, Your Honor. The stipulation of facts point that -- that there were always

other participants in the plan besides the working owner since these plans were formed in 1989.

And so just for the policy reasons behind that is I think the preambles to the reg further shed light about the definition of employee benefit plan. And what the Department of Labor was weighing here was do you really want to have working owners that are the sole owners, sole participants of the plan, have to comply with the ERISA burdens. In other words, is there a need to tell the working owner, even though there's no one else in the plan, you need to give yourself a summary plan description? You need to file an annual tax return reporting about the plan. You need to communicate COBRA rights for a health plan to yourself. Presumably if you created that plan, you are in a situation that you are aware of the benefits of the plan. But as soon as you have one other employee, then there's a necessity for you to communicate those rights and benefits and explain the terms of the plan.

And that seems to be a pretty reasonable reading of what the DOL was trying to balance here. In their preambles, they even said, one, there's no reason to protect any abuse here, and secondly, that's not a good use of our resources to administer sole owner/sole participant plans. And given that background, I think

that's how that reg should be read.

QUESTION: How does it come in? I'm -- I'm -- just if you could clarify. This is a little --

MR. HOLIFIELD: Sure.

QUESTION: -- complicated in my mind.

But basically -- so we have all the characteristics of a plan. Now, you have to start first by saying that Dr. Yates is an employee of the corporation called Raymond Yates, P.C. And then it's not a plan, however, because he's -- wait a minute. It's not a plan unless -- if there are no employees.

MR. HOLIFIELD: Yes, Your Honor.

QUESTION: And an owner is not an employee for that purpose.

MR. HOLIFIELD: Correct.

QUESTION: And so we look to see. There is another one, and therefore, what section 25103.3 took away under (b) -- under (c) it gave back under (b).

MR. HOLIFIELD: Yes, Your Honor.

QUESTION: Or it gave back because there was somebody else.

MR. HOLIFIELD: Yes.

QUESTION: But step one of that, we had to say that he was an employee of the corporation.

MR. HOLIFIELD: Yes, Your Honor.

QUESTION: And where does step one come from?

MR. HOLIFIELD: Well, step one is just based on common law and the work -- and that is what this Court held in Darden. If you look at that, that --

QUESTION: Okay. So we have to say -- we have to find -- we have to first find that he is an employee and, in fact, these regs don't give a definition of that.

MR. HOLIFIELD: Exactly.

QUESTION: So we have to appeal to the common law to say he's -- he's an employee under common law principles of the corporation.

MR. HOLIFIELD: Yes, Your Honor.

QUESTION: Then (b) says -- (c) says he isn't one for purposes of ERISA, and (b) says that really wrecks the whole thing unless there's somebody else.

MR. HOLIFIELD: Correct.

QUESTION: And that's how it works.

MR. HOLIFIELD: Exactly, Your Honor.

QUESTION: Okay.

MR. HOLIFIELD: And I think if you look at -- what the -- the holding in the Sixth Circuit, I really think it really creates some policy problems for employee benefit plans that are -- are pretty significant. For instance, the holding was that there is an employee benefit plan here which -- with the issue you just raised.

And then it said, but there's not a participant -- Yates is not a participant in that plan. So you have this -- I don't know what you call it because he's been under one plan document since the passage of the plan, since it was enacted, and so now there's a presumption that this aspect of the plan is governed under State law, even though there's never been a provision provided such as that. The plan document is the same plan. And you could very easily get fiduciaries in a situation like this having inconsistent State law claims versus Federal claims. You could end up having situations that really make no sense.

And one of the -- the primary purposes of ERISA was to avoid the very issue that that would cause and that is they wanted a uniform administrative scheme for all of the States and now there will be, you know, 50 States having different regulatory provisions regarding these plans, plus the Federal regulations. And what if they don't co-exist in consistent remedies?

And so I think for those reasons, petitioner is asking that Yates be declared a participant in this plan and remand that for further proceedings.

If you have no further questions, I'll reserve the rest of my time.

QUESTION: Very well, Mr. Holifield. Is it Holifield or Holifield?

MR. HOLIFIELD: Holifield.

QUESTION: Holifield. Mr. Holifield.

Mr. Roberts, we'll hear from you.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

Hundreds of thousands of shareholders, partners, and sole proprietors who work for the businesses they own are currently covered by benefit plans that also cover other employees. All of those different types of working owners are participants subject to the rights and remedies of ERISA, just like the other employees in the plans. And that's clear from the text of ERISA which contains several partial exemptions, which Mr. Holifield referred to some of, for certain plans that cover working owners, and those exemptions presuppose that working owners may be ERISA participants.

In addition, working owners have long been eligible to participate, along with other employees, in pension plans qualifying for favorable tax treatment. And ERISA was intended to harmonize with those tax provisions and it didn't revoke the ability of working owners to participate in tax qualified plans.

Coverage of working owners also furthers ERISA's purposes of ensuring that employee benefit plans are governed by a single set of regulations, of encouraging plan creation, and of protecting plan participants. So there's no question that the other non-owner employees that are covered by plans that also cover working owners are participants subject to the rights and remedies of ERISA.

And if the working owners in those plans were not also ERISA participants, they would be subject to different regulations and have different rights and remedies than other employees in the same plan. They might even be prohibited from being covered by the plans at all, and that result would place the coverage provisions of title I of ERISA at war with the tax provisions governing pension plans and with the insurance provisions of title IV of ERISA, both of which cover plans in which working owners participate along with other employees.

QUESTION: Mr. Roberts --

QUESTION: But what if --

QUESTION: -- what -- what is the consequence of the Sixth Circuit decision on the tax side of this plan? They said for the -- the retirement portion, it can't be an ERISA -- ERISA plan, but would -- would the tax

benefits be lost as well?

MR. ROBERTS: No. The -- the -- it's clear and it's accepted in the opinions below that it is a qualified plan for -- for tax purposes. But it -- there's a strong possibility that if -- if the working owner, Dr. Yates, is not an ERISA participant under title I of ERISA, that title I would prohibit him from being in the plan at all, which would be a very anomalous situation because the tax code is encouraging him to be in the plan along with other employees. And title I of ERISA would be prohibiting what the tax code encourages, and if it were a defined benefit plan, which this one doesn't happen to be, it would in fact be insured also under title IV of ERISA which insures plans in which working owners participate along with other employees.

And in addition, allowing working owners to participate along with other employees, as I was alluding to before, advances ERISA's purpose of encouraging employee benefit plans because the ability to participate themselves gives working owners an incentive to establish plans for other workers. It also could create economies of scale in plan administration and investment and it encourages owners to monitor the plans to ensure that they're well managed and that they're well funded.

So for all of those reasons, the Department of

Labor has issued the advisory opinion stating that owners can be participants in ERISA plans. The IRS and the PBGC share that view, and it's entitled to substantial weight.

The -- the reason that the court of appeals reached the contrary conclusion is it misread the regulation that Justice Breyer was discussing with Mr. Holifield earlier.

QUESTION: You're -- you're not saying it's entitled to Chevron deference, just substantial weight?

MR. ROBERTS: Yes. Skidmore deference, Your Honor, on the interpretive letter, although --

QUESTION: Do we need deference?

MR. ROBERTS: No. We don't think you need any deference, Your Honor.

The one point that --

QUESTION: Well, I don't know why it isn't Chevron, but I mean, what he's referring to is the argument about the mysterious meaning of Mead, which if you'd like to go into it, fine.

MR. ROBERTS: I -- I have no desire for --

QUESTION: I just want to know what the Government's position is in this. As I understand it, it is not Chevron. You're just -- Skidmore.

MR. ROBERTS: We're not asking -- we're not asking for Chevron deference. As the Chief Justice

pointed out, we think that it's --

QUESTION: I want to know -- I don't care what you're asking for. You do not think it's entitled to Chevron deference. Is that right?

MR. ROBERTS: We read Mead to say ordinarily -- particularly since in Christianson, the Court was confronting an opinion letter from the Department of Labor, I would hesitate to suggest that an opinion letter from the Department of Labor here and a statute that is, as far as I can tell, no different in how it treats opinion letters, would be entitled to greater deference than --

QUESTION: Well, you have Udall v. Tallman, if you want to go into it --

MR. ROBERTS: Well --

QUESTION: -- where it's interpreting its own regs.

MR. ROBERTS: That's a different -- yes. Yes, Your Honor. On the question -- on the question of the Secretary's interpretation of her regulation as to limit the definition of employee to only the regulation itself and to not extend to the statute, on that point the Secretary's interpretation of her own regulation is controlling. That would be Udall, Auer v. Robbins, which is also a Labor Department case. And I think there's no

question about that as well.

One point I did want to make is that we would urge the Court to make clear in its opinion that all types of working owners, not just those that are common law employees, are -- are eligible to be participants under ERISA. And the reason for that is that there's confusion on that in the courts of appeals and the very reasons -- same reasons that justify the conclusion that sole shareholders can be ERISA participants also justify the conclusion that sole proprietors and partners who are not common law employees, if they are working for the businesses, may be ERISA participants.

QUESTION: You -- you keep stressing working for the businesses. What -- what is your answer to the question I asked Mr. Holifield about suppose you have a single shareholder, 100 percent owner, but that doesn't work in the business.

MR. ROBERTS: As a general matter, I think that person could not be covered as a -- a participant. The person might be designated by a participant as a -- as a beneficiary or in certain circumstances designated by the plan as a beneficiary in connection with a participant in the plan who was an -- an employee. But the definition of employee for ERISA is the same definition as under 401 of the Internal Revenue Code which is common law employees

plus self-employed individuals who are people that are providing personal services to the business and getting earned income. Responds to Your Honor.

If there are no further questions, we would ask that the judgment of the court of appeals be reversed and remanded.

QUESTION: If -- I just have one question. If -- if we follow your suggestion for the writing of the opinion, how do you suggest we explain and cite Clackamas County?

MR. ROBERTS: Well, in -- in Clackamas, the Court followed the same approach that the Court followed in Darden. And the first step in that approach is to look to the statute.

QUESTION: Look at the statute.

MR. ROBERTS: And so we would say Clackamas just doesn't come in because you look to the statute. The statute makes clear that all the types of working owners can be covered, Your Honor.

QUESTION: Thank you, Mr. Roberts.

Mr. Troutman, we'll hear from you.

ORAL ARGUMENT OF C. MARK TROUTMAN

ON BEHALF OF THE RESPONDENT

MR. TROUTMAN: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

Justice Breyer, we -- we address this issue at the very level that you -- you talked about, that first common law level, and we think an important distinction should be made in this case that this case is not about working owners. This case is about one working shareholder, a sole shareholder. And we think that makes a substantial difference when you get down to the basics of an organization and -- and you look at the fiduciary duties a president, a director has to a corporation and you look at the fact that when you have one shareholder, there's one person that that duty is enforceable by, and that's the same person that it applies to.

On the other hand, in this -- in this Court's opinion in Clackamas, you had four shareholders, and no matter what their interests were, those shareholders all had fiduciary rights and expectations between themselves and all had the right to enforce those fiduciary obligations amongst them. So there is some element of control that those other shareholders have when -- when you try to separate one down.

But here, at its basic level, Dr. Yates is controlled by no one. So when you start talking about common law applications of master/servant and control, there's no one else to apply it to. He answers to no one in this corporation. So we think --

QUESTION: I mean, for what purpose? If you -- suppose I set up a corporation. I'm the sole shareholder and I enter into an employment agreement they pay me $1,000 a month and I'm called the president, chief cook and bottle washer, and employee. Now, am I not an employee under the common law? The common law, say, for purposes of tort, is there not respondeat superior so that someone who sues me can get to the assets of the corporation for purposes of liability --

MR. TROUTMAN: There -- there is.

QUESTION: -- of any kind? Is there any difference whether I happen to be the sole shareholder or not?

MR. TROUTMAN: Well, we think there is a difference --

QUESTION: Which -- what is it?

MR. TROUTMAN: -- in this case because --

QUESTION: No, no. What is not in this case. What is it in general?

MR. TROUTMAN: Well, in general you're -- you're correct that -- that you would be --

QUESTION: All right. If I'm correct in general, then what is it about this --

MR. TROUTMAN: Okay. In this case and in the Clackamas case, the Court looked at what the common law

considers an employee. And we think when you apply common law concepts of control in a master/servant relationship and when you get down to breaking down and applying the elements that are referenced in the Darden case, that all of these -- all of these elements, when you're applying them to Dr. Yates, will indicate that as sole shareholder he is more considered an employer than he is an employee.

QUESTION: When you talk about control, Mr. Troutman, you're talking about two different people basically. How much control does one have over the other. Here there is only one.

MR. TROUTMAN: That's correct, Your Honor, and that's why we think that when you have sole shareholders and when you -- and when you're dealing with trying to apply a control to only one, it's almost an anomaly. And -- and --

QUESTION: Well, but you -- you think then that a sole shareholder for that reason cannot be an employee?

MR. TROUTMAN: We think that for purposes of ERISA, when ERISA is trying to determine whether a person is an employee and an employer and where we're not given much guidance by the statute, we don't think these -- number one, we don't think these other statutory provisions give us guidance with a sole shareholder. And we think a distinction should be made within this category

of working owners between sole proprietors and -- and sole shareholders. And so while in -- in the common law context in general, an employee may constitute or consist of an -- of a sole shareholder, when -- when you're trying to separate that person out under ERISA and plug that person into one of those definitions under ERISA --

QUESTION: Why does it have to be one definition? Certainly Yates is an employer, but why can't he also be an employee? Why -- am I right that you seem to think it's got to be one or the other? It can't be both?

MR. TROUTMAN: We think under Darden -- yes, Justice Ginsburg. We think under Darden that when you apply the factors that are listed in the Darden case, the control, the -- the providing of the instrumentalities, the right to direct the work of other employees, we think that that results in this instance with the sole shareholder of classifying him as an employer, not an employee.

QUESTION: Well, he is an employer. There's no question about that. But why can't he be an employee for this purpose just as he is for taxes on workers like Social Security and unemployment compensation?

MR. TROUTMAN: Well, I -- I guess under that -- under that scenario then we would need to look at perhaps

what the employer -- how the -- how the particular person is acting under the plan. And if -- if we're talking about is he taking money out of his paycheck and deducting -- and contributing under ERISA, perhaps he's an employee. Is, on the other hand, he -- exercising his -- his investment decisions as trustee, does he then come under the definition of employer as someone acting on his behalf?

Or in this instance, we have the -- we have the debt that existed for -- for many years and contrary to the specific terms of the plan, that debt was not repaid by a specific --

QUESTION: But that's an issue that everyone agrees is open, that even -- even if he's classified as an employee, the creditors may have priority over the plan with respect to that $50,000.

MR. TROUTMAN: Yes, I agree with that, but what I was going -- what I was -- what I was leading to was that when he failed to make those quarterly deductions that are required by the plan, he -- that more couches him in terms of an employer because he's the -- he's got his employer hat on, in other words, because he's the one that would control what deductions come out of employees' pay or not. And -- and we think that's the very heart of this -- this case. And so if he's acting in that capacity,

perhaps --

QUESTION: If he hadn't -- if he hadn't loaned any money from the plan, then he would be an employee?

MR. TROUTMAN: If he hadn't loaned any money in the plan --

QUESTION: Hadn't borrowed any money.

MR. TROUTMAN: Borrowed any money. We wouldn't be here because it would have been --

QUESTION: No, no. But no. But --

QUESTION: He'd still be something I assume.

QUESTION: That -- that's true, but we're -- we're asking what his status is.

MR. TROUTMAN: I understand. But now, there's also -- we also make the point that perhaps there can be participation under the plan, but that doesn't necessarily elevate him to this protected status as a participant. Under the Internal Revenue provisions, he is permitted to participate under this plan, but the IRS -- I mean, the -- ERISA distinguishes between an employer and an employee in those -- in those definitions. So --

QUESTION: I didn't get your answer to Justice Ginsburg's question. Had -- had he not borrowed the money, would he -- would he have been employee?

MR. TROUTMAN: He could have possibly been an employee insofar as -- if -- if under Justice Ginsburg's

scenario, you look at the activities of the individual under a specific set of circumstances.

QUESTION: Would he be a participant in the plan lawfully under ERISA?

MR. TROUTMAN: We don't think so. We think that he --

QUESTION: Whether or not he borrowed money.

MR. TROUTMAN: Whether or not he borrowed money. Our position is that he may have been able to participate under the plan under the Internal Revenue --

QUESTION: But you do concede that the Department of Labor views it differently.

MR. TROUTMAN: The Department of Labor does view it differently.

QUESTION: Shouldn't that have some weight in our interpretation?

MR. TROUTMAN: We think under the Harris County case that is entitled to the respect to the extent that it is persuasive. But again, the -- the labor regulations refer to this broad class of working owners, and we think that there is a substantial difference between sole proprietors, sole shareholders, and these other classifications, for instance, the General Motors line employee who gets stock as part of his pension plan. We don't think that -- you know, because he's not able to

control his job, he's still at the mercy of -- of management. We don't think that -- that stock ownership, no matter how fractional, gives him any -- any rights to control or act as --

QUESTION: What -- what about partners?

MR. TROUTMAN: Partners would be the same way we think because obviously you're going to have more than one person if it's a partnership. But a partner, you know, owes other fiduciary duties and an individual partner is always subject to a fiduciary duty to his other partners.

QUESTION: A partner -- say, there are two partners. They could be both employees and employers of the business.

MR. TROUTMAN: No. We think -- well, no. Yes, we would agree that if there's two or more, that that distinguishes the situation from this case where you have one sole person involved. So, yes, partners could be employees and deemed participants under -- under ERISA.

QUESTION: But you don't just have one person involved. Isn't it correct you have a corporation which is a person and you have a human person? So there are really two people involved.

MR. TROUTMAN: You do, but you only have -- but that -- that corporation, that legal fictional entity, can only act through a human person, and there's only one

human person to act. Dr. Yates, as president or director, owes those fiduciary duties to the corporation, but as sole shareholder, you know, in essence they're owed to him. So he -- there's no way to enforce those back.

QUESTION: Well, the -- you know, you're -- if -- you can't be appealing to the common law then if -- if we're going to get the meaning of employee from the common law. The common law doesn't pierce the corporate veil like that.

MR. TROUTMAN: No, it doesn't.

QUESTION: You establish a corporation and there's the corporation and there's the employee. And the fact that the employee happens to be a shareholder of the corporation would have no relevance at common law.

MR. TROUTMAN: That's right. We're appealing --

QUESTION: So you're arguing something apart from common law, something based on what? Based on the -- the purposes of ERISA?

MR. TROUTMAN: Yes, based on the purposes of ERISA and based on this Court's opinion in the Clackamas case where -- where it looked beyond the corporate structure of the -- of the four shareholders there. And -- and in the -- in the footnote it specifically said that -- of course, we had the EEOC guidelines of control and -- and all the others, but -- but the Court went beyond the

corporate veil there to say that these four shareholders under the common law may more likely be classified as employers than employee, at least under the ADA.

QUESTION: But -- but that was because the statute was, we thought in Clackamas, silent on the point, and the Government's argument is that the statute is controlling here.

MR. TROUTMAN: The Government is arguing that the statute is different in the -- from both Darden and Clackamas in that it indicates that employees may -- or that working owners may participate. Our response to that is two things.

One, when you break it down to sole shareholders and go back to the purposes of ERISA, you know, the owners of the -- employers were not who ERISA -- Congress was trying to protect. It was the employees.

Secondly, when you look at other provisions like the definition of an employer that says someone working on his -- on behalf of the employee -- when you look at sections 1052, 1053 of ERISA that clearly seem to distinguish between an employer and employee, we submit there are other inferences that may be drawn that perhaps the same person cannot function in two different capacities under ERISA.

QUESTION: I mean, I don't understand what -- I

thought ERISA is to protect employees --

MR. TROUTMAN: That's correct.

QUESTION: -- let's say, other than the owner.

MR. TROUTMAN: That's correct.

QUESTION: All right? So we put some of them in the program, and then ERISA says, and by the way, if you have a program like that, the owner can participate in it too just like an employee. So that seems to be the purpose, to make sure you have some employees, and then if you do, you let the owners and the executives, everybody else involved can become as participants if they're members or former members of the organization at least. So if that's the purpose, how does this defeat the purpose? There are some other members and he wants to participate.

MR. TROUTMAN: If the -- we submit that what this doctor -- what Dr. Yates is here as a sole shareholder is more akin to an employer than an employee and that when you start combining his interests with those of other employees, that you start to muddy the purpose of the congressional intent --

QUESTION: No, no, no. I'm just talking in terms of purposes. If you're talking in terms of language, what they say is, A, the common law would have considered him an employee of the corporation. B, we have

the tax code which says -- doesn't happen to throw him in as a member or former member. It says he's a participant because it says he's an employee. We have the Pension Benefit Guaranty code which again refers to him as an employee, and then we have the language of the reg itself which says he's not deemed an employee for purposes of this section, words which wouldn't have been necessary if he fell -- didn't fall within it in the first place. And then it says, for purposes of this section, which certainly suggests that it could mean just purposes of this section, otherwise he's in it. And just to top it, we have that's what the Labor Department thinks.

All right. Now, that seems like a pretty good set of considerations.

MR. TROUTMAN: I understand. I -- I would say that under title IV, Justice Breyer, also the same language is there: for purposes of this section. Then it defines a substantial owner. So we submit the same limiting language that's in the CFR is also in the provisions of title IV, and -- and as the petitioner correctly points out in their brief, title IV does not apply here.

So we think the policies of ERISA are -- are furthered when you separate the two and you -- you know, where Congress has intended to -- to protect employees,

and we think when the other provisions of the statute are examined, that -- that this one person cannot occupy these two positions of employer and employee.

QUESTION: But as far as the tax exempt part of the plan, that's okay. You agree with -- I think I asked Mr. Roberts that question.

MR. TROUTMAN: You did, Justice Ginsburg, and we don't think there's any tax effect here by this decision.

QUESTION: On the point that would be left over for remand, that is in any event, this was a -- was an unlawful preference, was that something that you raised below?

MR. TROUTMAN: We did. In fact, Your Honor, that was the very first thing we raised and that was the first issue we focused on and the -- the bankruptcy court instead chose this issue to rule on and pretermitted the determination of the other issue. We focused on the exception under statutory section 1144, that ERISA is not intended to preempt other Federal laws. That decision was not reached by the bankruptcy court.

And we -- we also thought it important -- we're not going after Dr. Yates' interest as an employee in this plan. The -- the defendants are the plan administrator and the trustee. Under the Bankruptcy Code, our cause of action is against the recipient, the plan, for the

repayment of the debt not Dr. Yates --

QUESTION: You want the $50,000 that he paid back into the plan.

MR. TROUTMAN: Yes. Yes, Your Honor.

So for those reasons, we think that -- that Clackamas did not limit us to looking at the corporate structure, and we think that ERISA is considered to employees. And we think the lower courts correctly ruled so.

QUESTION: Thank you, Mr. Troutman.

Mr. Holifield, you have 7 minutes remaining.

REBUTTAL ARGUMENT OF JAMES A. HOLIFIELD

ON BEHALF OF THE PETITIONERS

MR. HOLIFIELD: Your Honor, I would just -- just point out just a couple quick points here, and that is, there's nothing in ERISA that prevents a person from being or playing or acting in multiple roles. That was contemplated all throughout ERISA and it's in the briefs. Matter of fact, there's nothing preventing Yates PC from being the trustee, the plan administrator, the plan sponsor, and having all those roles. This Court in Varity v. Howe dealt with an individual in one speech who was part of the time held to be the employer, part of the time held to be a fiduciary communicating benefits in the same speech. So those roles can happen simultaneously in

certain aspects. And so I would point that out.

And the other thing is -- is the term employer. There's nothing preventing a person being an employer and an employee. In fact, the definition of employer says anyone acting as an employer, a person acting as an employer, and the definition of persons specifically includes individual, partnerships, joint ventures, corporations, unincorporated organizations, associations, employee organizations, mutual companies, this -- this huge laundry list of entities, including down to a single person. So I'd argue that I don't think there's a question about a person being an employer and even if you assumed Yates was a sole proprietor and still being able to participate in this plan based on the other regulatory provisions and statutes of ERISA.

And for those reasons, we'd ask that you reverse the decision of the Sixth Circuit and remand it for further proceedings.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Holifield.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)