

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 RAYMOND B. YATES, M D. , P. C. :
4 PROFIT SHARING PLAN, AND :
5 RAYMOND B. YATES, TRUSTEE, :
6 Petitioners :
7 V. : No. 02-458
8 WILLIAM T. HENDON, TRUSTEE. :
9 - - - - -X
10 Washington, D. C.
11 Tuesday, January 13, 2004
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:20 a.m.
15 APPEARANCES:
16 JAMES A. HOLIFIELD, ESQ., Knoxville, Tennessee; on behalf
17 of the Petitioners.
18 MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D. C. ; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioners.
22 C. MARK TROUTMAN, ESQ., LaFollette, Tennessee; on behalf
23 of the Respondent.
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7	as amicus curiae, supporting the Petitioners	14
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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

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

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

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

15 Furthermore, if you look at, for instance, ERISA
16 section 1103(b), that provision excludes as an exclusion
17 for certain aspects to the trust requirements of ERISA.
18 One of those specific exclusions if -- is that some or all
19 employees are employees as defined in the Internal Revenue
20 Code, and a specific reference is made to 26 U.S.C.
21 401(c)(1). And so you -- you see a pattern here that the
22 IRS Code and the ERISA law being congruent in its
23 administration of plans and a specific reference to a
24 definition of working employers that includes self-
25 employed individuals, partnerships, and -- and people such

1 as that.

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

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

12 MR. HOLIFIELD: Your Honor --

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

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

19 QUESTION: No.

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

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

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

5 QUESTION: In other words, this \$50,000 wasn't
6 put back until the eve of bankruptcy so even if -- even if
7 we agreed with you that Yates can be an employee, this
8 \$50,000 still might constitute an unlawful preference.

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

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

19 MR. HOLIFIELD: Yes, Your Honor.

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

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

25 When title II was enacted, it was enacted with

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

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

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

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

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

5 MR. HOLIFIELD: Yes, Your Honor.

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

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

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

1 plans such as this.

2 And I think if you look at that, as well as look
3 at the DOL regulatory scheme that has come out of this,
4 the DOL opinion letters report this conclusion, be that
5 79-08A which is in the record at J.A. -- the joint
6 appendix at 271 and 273, the opinion letter 99-04A at 274a
7 and 283a. You see an information letter that's actually
8 is part of UNUM Providence brief at appendix 1, and that's
9 a letter from Robert Dole to Susan Hoffman. Each of these
10 is where the DOL has opined an opinion that people that
11 are working owners can be a participant in an employee
12 benefit plan. And so I think the case law on that point
13 is pretty clear.

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

21 QUESTION: Here there were a couple of other --

22 MR. HOLIFIELD: Yes, Your Honor.

23 QUESTION: -- plan participants at all times?

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

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

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

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

1 that's how that reg should be read.

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

4 MR. HOLIFIELD: Sure.

5 QUESTION: -- complicated in my mind.

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

12 MR. HOLIFIELD: Yes, Your Honor.

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

15 MR. HOLIFIELD: Correct.

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

19 MR. HOLIFIELD: Yes, Your Honor.

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

22 MR. HOLIFIELD: Yes.

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

25 MR. HOLIFIELD: Yes, Your Honor.

1 QUESTION: And where does step one come from?

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

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

8 MR. HOLIFIELD: Exactly.

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

12 MR. HOLIFIELD: Yes, Your Honor.

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

16 MR. HOLIFIELD: Correct.

17 QUESTION: And that's how it works.

18 MR. HOLIFIELD: Exactly, Your Honor.

19 QUESTION: Okay.

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

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

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

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

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

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

1 MR. HOLIFIELD: Holifield.

2 QUESTION: Holifield. Mr. Holifield.

3 Mr. Roberts, we'll hear from you.

4 ORAL ARGUMENT OF MATTHEW D. ROBERTS

5 ON BEHALF OF THE UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

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

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

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

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

20 QUESTION: Mr. Roberts --

21 QUESTION: But what if --

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

1 benefits be lost as well?

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

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

25 So for all of those reasons, the Department of

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

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

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

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

12 QUESTION: Do we need deference?

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

15 The one point that --

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

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

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

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

1 pointed out, we think that it's --

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

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

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

15 MR. ROBERTS: Well --

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

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

1 question about that as well.

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

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

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

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

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

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

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

15 QUESTION: Look at the statute.

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

20 QUESTION: Thank you, Mr. Roberts.

21 Mr. Troutman, we'll hear from you.

22 ORAL ARGUMENT OF C. MARK TROUTMAN

23 ON BEHALF OF THE RESPONDENT

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

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

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

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

1 QUESTION: I mean, for what purpose? If you --
2 suppose I set up a corporation. I'm the sole shareholder
3 and I enter into an employment agreement they pay me
4 \$1,000 a month and I'm called the president, chief cook
5 and bottle washer, and employee. Now, am I not an
6 employee under the common law? The common law, say, for
7 purposes of tort, is there not respondeat superior so that
8 someone who sues me can get to the assets of the
9 corporation for purposes of liability --

10 MR. TROUTMAN: There -- there is.

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

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

16 QUESTION: Which -- what is it?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 perhaps --

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

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

6 QUESTION: Hadn't borrowed any money.

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

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

10 QUESTION: He'd still be something I assume.

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

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

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

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

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

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

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

7 QUESTION: Whether or not he borrowed money.

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

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

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

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

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

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

5 QUESTION: What -- what about partners?

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

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

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

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

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

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

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

10 MR. TROUTMAN: No, it doesn't.

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

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

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

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

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

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

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

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

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

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

1 thought ERISA is to protect employees --

2 MR. TROUTMAN: That's correct.

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

4 MR. TROUTMAN: That's correct.

5 QUESTION: All right? So we put some of them in

6 the program, and then ERISA says, and by the way, if you

7 have a program like that, the owner can participate in it

8 too just like an employee. So that seems to be the

9 purpose, to make sure you have some employees, and then if

10 you do, you let the owners and the executives, everybody

11 else involved can become as participants if they're

12 members or former members of the organization at least.

13 So if that's the purpose, how does this defeat the

14 purpose? There are some other members and he wants to

15 participate.

16 MR. TROUTMAN: If the -- we submit that what

17 this doctor -- what Dr. Yates is here as a sole

18 shareholder is more akin to an employer than an employee

19 and that when you start combining his interests with those

20 of other employees, that you start to muddy the purpose of

21 the congressional intent --

22 QUESTION: No, no, no. I'm just talking in

23 terms of purposes. If you're talking in terms of

24 language, what they say is, A, the common law would have

25 considered him an employee of the corporation. B, we have

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

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

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

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

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

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

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

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

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

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

1 repayment of the debt not Dr. Yates --

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

4 MR. TROUTMAN: Yes. Yes, Your Honor.

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

10 QUESTION: Thank you, Mr. Troutman.

11 Mr. Holifield, you have 7 minutes remaining.

12 REBUTTAL ARGUMENT OF JAMES A. HOLIFIELD

13 ON BEHALF OF THE PETITIONERS

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

1 certain aspects. And so I would point that out.

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

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

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Holifield.

21 The case is submitted.

22 (Whereupon, at 11:59 a.m., the case in the
23 above-entitled matter was submitted.)
24
25