FIRM COUNSEL PROJECT

IN-PERSON DISCUSSION ROUNDTABLE
APRIL 2009

"LAW FIRMS ARE BUSINESSES TOO"

THE ROLE OF FIRM COUNSEL IN MANAGEMENT DECISIONS AND INTERNAL EMPLOYMENT PRACTICES
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A. Introduction


C. Benders v. Bellows & Bellows, slip op., Nos. 06-1487 & 06-2716 (7th Cir., Feb. 12, 2008) (also available at 515 F.3d 757)

INTRODUCTION

Many lawyers who serve the firm counsel function for their law firms are ethics experts, but law firms need legal advice about more than just ethics issues and the law of lawyering. Should all of that advice come from outside counsel for the firm? If not, and for many firms the answer to that question is certainly no, what is the role of firm counsel with respect to advice and guidance regarding law firm decision making?

In light of the growing risks associated with liability for law firms as to their employment practices and management decisions, how can firm counsel best bring to bear their risk management and loss prevention expertise to help their firms avoid bad outcomes, claims, lawsuits, and the like?

Those questions, and many others, are ripe for discussion during this set of roundtable events.

To foster that discussion, these materials contain a three-part hypothetical entitled — “Troubles at Smart & Savage.”

The Smart & Savage hypothetical was created by the Attorneys’ Liability Assurance Society, Inc., A Risk Retention Group. An organization that many of you know simply as ALAS. This hypothetical was presented and discussed at the ALAS AGM in June 2008 in Vancouver. The Firm Counsel Project thanks ALAS for graciously granting the FCP permission to include this hypothetical in the attendee materials for this set of roundtables.

These materials also include two federal court decisions exploring situations in which law firms have found themselves in the cross-hairs on issues related to employment practices and management decisions.

In addition to the hypothetical and the federal court decisions included in these materials, you might also take a look at a recent article published in The National Law Journal entitled “How do firms lay off lawyers? Very carefully.” A printer-friendly version of which can be found at: http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202428380135
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“Troubles at Smart & Savage”

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II. Troubles at Smart & Savage

A. Chapter One: The Disgruntled Associate

Janet Davis is an African-American litigation associate who has been at Smart & Savage for seven years. Janet is a few years older than most of her class because she began her career as a trial specialist with the U.S. Equal Employment Opportunity Commission. That experience helped her land the Smart & Savage job despite only slightly above average law school grades. In the last three years, Janet has handled a number of small to medium-sized employment discrimination claims against firm clients, mostly with good results but with a few surprising losses. She is aggressive and can be abrasive, especially with firm staff. Her reputation among litigation partners is that she can competently handle small cases that are not too complex.

After considering the associates who were up for partnership, the Litigation Department partners voted by a slim margin not to recommend Janet. Some partners who supported her cited the fact that several nonlitigation partners had come to rely on Janet to service their clients, but Janet’s detractors felt that her abrasive personality, her lack of litigation judgment, and her failure to develop any business of her own made her unqualified for elevation to the partnership.

Janet has just learned of the Litigation Department’s decision. Six other litigators in her class—all men—are being recommended. Janet was told by Litigation Department Chair Peter Sanders that she was not recommended for advancement because the litigation partners rated her legal analytical ability as below the firm’s expectations for partners. In line with the firm’s personnel policies, all performance reviews of Janet’s work that are more than two years old have been destroyed, as has the Litigation Department memo summarizing the partners’ views on Janet.

Janet visits her mentor, long-time partner Kevin Capp. Janet tells Kevin what Sanders told her, and explains how unfair the Litigation Department’s decision is. Janet has actually tried a number of cases, while several of her classmates who were recommended have not. They have worked mostly on megacases for heavy hitter litigation partners, but none has first-chaired a trial. Janet tells Kevin that this is the third time in four years that the firm has passed over experienced women associates for partnership, while routinely advancing male associates with less experience. Janet notes that almost all of her performance reviews—on which she has kept careful notes every year—have been “above average,” with a few “outstanding” ratings. In seven years, no partner has ever rated her “average” or below. She says that when she asked Peter Sanders to give her examples of where her legal analytical ability was deficient, he could not do so. Instead, he recited vague generalities attributed to several anonymous litigation partners.

Kevin sympathizes with Janet, and tries to be helpful. He tells her not to take the decision personally. Kevin says there are a few older litigation partners—the “war horses” like Sanders—who still have not adjusted to the idea of women litigators. But things are changing, and Kevin advises Janet to stick around for next year’s evaluations. Janet becomes increasingly agitated by Kevin’s comments. She complains that one reason she is not inclined to stay at the firm is the way older partners without large books of business—like Kevin—are “pushed around.” When Kevin asks Janet what she means, she tells him that all of the associates know that his points have been significantly cut recently. “It’s so typical,” she says angrily. “They reward the finders, and penalize the minders who keep the clients happy and the grinders who actually do the work. I don’t want to play that game.”
Two weeks later Janet tenders her resignation from Smart & Savage, announcing her plan to join a boutique employment litigation firm specializing in plaintiffs’ race and sex discrimination cases. At the same time, the firm receives a letter from a well-known plaintiffs’ employment discrimination lawyer stating that Janet is set to file a race and gender discrimination case against the firm, and enclosing a draft complaint. The draft complaint contains statements allegedly made by Capp, including his characterization of some of his partners as “war horses.” Janet’s lawyer says, however, that Janet is willing to forgo litigation and settle her claims for $7.5 million. Damages are calculated based on the $500,000 average annual compensation for income and equity partners of Smart & Savage. He also says that Janet is considering “going public” with her charges of race and sex discrimination and will “name names” of the partners involved in “destroying her career.”

The firm quickly responds by offering Janet a guarantee that she will be advanced to partner the following year if she will drop her claims and rejoin the firm. Janet, through her lawyer, rejects the offer and files suit. The case is set for mediation in two months.

B. Chapter Two: The Disaffected Partner

When Peter Sanders asks Kevin Capp about his alleged comments to Janet Davis, as set forth in her draft complaint, Sanders gets more than he expected. Kevin is a 56-year-old partner who has been with the firm for 25 years. His specialty is environmental law. Although his practice used to be robust, with significant corporate clients, large billings, and enough work to keep four to five associates fully occupied, his practice has declined dramatically over the last decade. For many years, Kevin was head of Smart & Savage’s environmental practice group, and also served several terms on the firm’s management committee and the professional personnel committee. Recently, however, he was replaced as environmental group chair by Larry Lynch. Lynch joined the firm when the entire environmental practice group from Robinson, Ludwig & Healy (RLH) moved to Smart & Savage. Over the next three years, the value of points for equity partners and the firm’s profits per equity partner increased by 25%. During that same three-year period, however, the firm’s compensation committee sharply reduced Kevin’s partnership points, and his annual income declined from about $700,000 to $400,000, well below the firm’s per partner average.

Kevin advises Sanders that he had, in fact, told Janet Davis that Smart & Savage has a problem with women. Moreover, he tells Sanders that the firm also has a problem with people over 50 years old and that he considers himself to be a victim of age discrimination. Kevin informs Sanders that he has submitted a letter to Tom Taylor, the firm’s managing partner, complaining about age discrimination, breach of the firm’s partnership agreement, and breach of an oral agreement to protect his points if the RLH group joined the firm. In support of his accusations, Kevin alleged that while discussing the possible acquisition of the RLH environmental group, Taylor had assured Kevin that his standing in the firm would not be adversely affected by the group’s arrival. However, as it turned out, Kevin was replaced as environmental group chair by Lynch, who is 42, and his points were reduced by more than 50% over three years. Kevin said these changes were evidence of both age discrimination and breach of the firm’s partnership agreement, which prohibits reduction of a partner’s points by more than 50% without management committee approval, which was never sought or obtained in his case.

In addition to the decrease in his points, Kevin also noted in his letter to Taylor, and repeats in his meeting with Sanders, several firm actions that he asserted were intended to force
him to retire or leave the firm because of his age. These acts included reassigning his long-time secretary to Lynch, discontinuing the subsidy for his 20-year membership in his country club, and forcing him to move to a smaller, interior office.

In his letter to Taylor, Kevin had threatened to expose alleged misconduct by members of the firm’s management committee if his concerns were not properly addressed. Examples of the alleged misconduct included an affair between two married members of the management committee, another affair between a married management committee member and his secretary in violation of firm personnel policies, and the participation of several management committee members and the corporate practice group chair in a lucrative investment opportunity with a client that was not made available to the firm, as required by the partnership agreement. Kevin tells Sanders that although he wrote Taylor more than two weeks ago, neither Taylor nor anyone else has responded to his letter.

Within a week after his meeting with Sanders, still having received no response from Taylor, Kevin resigns from Smart & Savage. Shortly thereafter he files a demand for arbitration as required by the firm’s partnership agreement. The demand alleges that Kevin had been constructively discharged by the firm due to his age, in violation of both the federal Age Discrimination in Employment Act and a partnership agreement provision requiring a vote of 75% of the partners to remove a fellow partner. In his demand, Kevin seeks $1 million for lost compensation over the last three years. In addition, he seeks $8.4 million for lost future compensation, claiming that, but for the firm’s wrongful conduct, he would have worked another 12 years, with an income of at least $700,000 per year.

C. Chapter Three: The Damaged Competitor

The departure of Larry Lynch and the entire environmental practice group was a blow from which the RLH law firm never recovered. The environmental group had been the firm’s largest and most profitable practice group in what was then a 36-lawyer firm. The remaining 24 lawyers quickly concluded that the loss of 12 environmental lawyers, important clients, and significant revenue was too much for the firm to recover from, and voted to dissolve the firm. The dissolution process turned ugly when it became apparent that RLH’s liabilities greatly exceeded its assets. RLH was forced to file bankruptcy, and a trustee was appointed to protect the interests of RLH’s creditors.

As the potential personal liability of the remaining RLH partners became apparent, the ugliness of the dissolution process turned to bitterness, and particularly to blame directed at Lynch. He was viewed by those left behind as the ringleader of the environmental group’s departure, and Smart & Savage, where the environmental group landed, was viewed as “aiders and abettors” of Lynch’s breach of fiduciary duty to his former RLH partners. After some lobbying by Lynch’s former RLH partners, the bankruptcy trustee filed several separate claims related to the RLH dissolution and bankruptcy.

Against Lynch and the other defecting RLH partners, the trustee asserted claims for breach of fiduciary duty; improper solicitation of RLH clients, lawyers, and staff employees before departure from the firm; and misuse of confidential RLH financial and client information, including billing, collection, and compensation data. Against Smart & Savage, the trustee asserted claims for aiding and abetting Lynch’s and the other defecting RLH partners’ breaches
of fiduciary duty to RLH, tortious interference with RLH’s client and employee relationships and business expectancies, and privacy violations.

As evidence, the trustee pointed to e-mails sent to clients by Lynch and members of his group while still at RLH informing the clients of the still unannounced plan to join Smart & Savage, and seeking commitments that the clients would transfer their business. The e-mails state that the environmental group needed these advance commitments to satisfy Smart & Savage’s management. Other e-mails show exchanges between Lynch and RLH associates, paralegals, and staff telling them the terms of their future employment at Smart & Savage, and assuring them that the Smart & Savage management was looking forward to their arrival.

The trustee seeks $10 million on the theory that Smart & Savage’s wrongful actions led to the demise of RLH. As it turns out, $10 million also happens to be the amount needed by RLH to pay its creditors without Lynch’s former RLH partners having to make any further monetary contributions.
C
In the
United States Court of Appeals
For the Seventh Circuit

Nos. 06-1487 & 06-2716
EVELYN BENDERS,  
Plaintiff-Appellant,  
v.  
BELLOWS AND BELLOWS,  
Defendant-Appellee.

Appeals from the United States District Court  
for the Northern District of Illinois, Eastern Division.  
Nos. 04 C 7326 & 06 C 324—Samuel Der-Yeghiayan, Judge.

Argued October 22, 2007—Decided February 12, 2008

Before EASTERBROOK, Chief Judge, and KANNE and  
EVANS, Circuit Judges.

EVANS, Circuit Judge. The plaintiff, Evelyn Benders,  
alleges that she was fired in April 2004 in retaliation  
for filing an age and race discrimination claim with the  
Equal Employment Opportunity Commission (EEOC)  
and for threatening to report a dispute about her em-  
ployment status to the IRS. The defendant law firm,  
Bellows and Bellows, P.C. (B&B),  

1 According to an Internet directory, Lawyers.com, Bellows and  
Bellows, P.C. is a “Boutique Chicago law firm concentrating  
(continued...)
terminated Benders' employment in May 2003, well before she engaged in any protected activities. The twist in this case is that B&B's decision to fire Benders was communicated to her in rather uncertain terms by the firm's owner and president, Joel Bellows, who, despite his marriage to Laurel Bellows (the other "B" of B&B), had a romantic relationship with Benders during the first several years of her employment.

Notwithstanding these and other complexities, the district court found, as a matter of law, that B&B fired Benders on the earlier date. Consequently, the court granted B&B's motion for summary judgment on all three counts in the complaint. *Benders v. Bellows and Bellows*, No. 04 C 7326, 2006 WL 208713 (N.D. Ill. Jan. 24, 2006). The case is now before us on Benders' appeal.

As we must, we accept Ms. Benders' allegations as true at this stage of the proceedings. As so viewed, the facts are that B&B hired Benders, an African-American woman now in her fifties, as a legal secretary in 1996 and promoted her to the position of office administrator about a year later. In that position, Benders took charge of the firm's computer system, invoicing, and personnel matters, including the hiring, firing, and training of employees. Benders, during all this time, did not have an employment contract with B&B.

Shortly after starting at the firm, Benders and Mr. Bellows began a romantic relationship, which ended

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1 (...) continued
in corporate and employment law, including litigation, negotiat-
ing and counseling."

2 The "case" we refer to here (06-1487) is Benders' three-count claim in which she is represented by counsel. We will discuss Benders' *pro se* appeal from the district court's dismissal of her related sex discrimination case (06-2716) separately, at the end of this opinion.
about 5 years later. From time to time during this period, 
Mr. Bellows helped Benders financially, issuing her 
checks, drawn on the firm, to purchase various personal 
items. B&B maintained a record of the monies given to 
Benders, which she considered gifts, not loans or income. 
B&B, on the other hand, claims that these monies 
were not gifts. It issued 1099 IRS forms to Benders for 
2002 and 2003 reflecting that these payments were 
income.

In May 2003, Mr. Bellows had a private conversa-
tion with Benders in which he told her that his wife 
and another principal of the firm, Nick Iavarone, were 
“campaigning to get [Benders] out” and that she should 
begin to look for other employment. Benders alleges 
that Mr. Bellows assured her that she would remain 
employed with the firm until she found “the right job.” 
Benders suspected that the real reason for her future 
departure was that B&B did not want an older black 
woman around after it moved into its new offices. Accord-
ing to the firm, however, the decision to fire Benders 
was made because Mrs. Bellows did not believe Benders 
was competent as office administrator. B&B maintains 
that Mr. Bellows offered to keep Benders on the payroll 
as an act of generosity until she found another job.

Benders claims that, a few weeks later, Mr. Bellows 
told her that the firm had hired a “moving consultant,” 
who would “share some of the responsibilities” with 
Benders, but that “no one would be the wiser.” In 
July 2003, Cinthia LeGrand, a white woman approxi-
mately 10 years younger than Benders, began her em-
ployment at B&B. After LeGrand’s arrival, Benders’ duties 
at the firm generally diminished. According to Benders, 
however, at times, her responsibilities would “come back,” 
caus ing her to question her role at B&B. B&B concedes 
that it never stripped Benders of her title as office admin-
istrator, nor did it ever reduce her then-current salary
until her last day at the firm, about 9 months after LeGrand started.

In December 2003, Mr. Bellows approached Benders and proposed that, instead of making a contribution to the firm’s 401(k) plan on her behalf for 2003, he would assume responsibility for a civil judgment entered against Benders regarding her student loans. Mr. Bellows allegedly explained to Benders that, to effectuate this arrangement, he would have to reclassify her as an independent contractor for the last few weeks of 2003. Benders admits that she agreed to forego the payment, but only on the condition that she be returned to employee status by mid-January 2004. From that point on, however, Benders’ paychecks bore the notation, “independent contractor.” Despite the change in status, B&B concedes that it continued to deduct federal taxes from Benders’ paycheck.

In February 2004, in response to her complaints, Mr. Bellows told Benders that he was going to put her back on the payroll long enough for her to collect unemployment, for approximately 5 weeks, and then she would have to leave the firm. But Benders’ paychecks remained the same. Benders was never asked to sign an independent contractor agreement, which she knew to be the firm’s practice.

Later that month, Benders filed a claim with the Illinois EEOC, alleging race and age discrimination in connection with her apparent demotion and B&B’s hiring of LeGrand. Her charge appended e-mails written by Mr. Bellows. One of the e-mails referred to Benders as “Seabiscuit” who “should have been put down” long ago. In another e-mail, Mr. Bellows said that African-American members of his staff were making Benders’ employment situation “a racial thing.” After Benders filed the charge, she claims that Mr. Bellows became increasingly hostile towards her and made her working conditions difficult.
According to B&B, however, it was Benders who caused problems. The firm claims that she became disruptive and insubordinate, did not actively seek other employment, deliberately caused problems for LeGrand, and did not perform certain duties.

On April 12, 2004, B&B filed its position statement with the EEOC. Benders alleges that, 3 days later, Mr. Bellows approached her and told her that because she had filed an "awful EEOC charge," he would not consider paying her severance. B&B denies that Mr. Bellows made any such statement.

On April 14, 2004, after receiving another "independent contractor" paycheck, Benders reminded Mr. Bellows that she planned to refinance her home and needed her pay stub to reflect her current status as an employee. Mr. Bellows replied in an e-mail that he "had thought that [Benders] [was] being paid as an employee until recently" and promised to issue her a corrected check. He changed his mind, however, because Mrs. Bellows would not allow it. Four days later, Benders sent Mr. Bellows an e-mail telling him that she intended to file a formal complaint with the IRS, requesting that the agency make a determination of her employment status.3

Finally, on April 20, 2004, Mr. Bellows told Benders to leave the firm. According to B&B, Benders was asked to leave because a day earlier she had become hostile with Mrs. Bellows. Mrs. Bellows subsequently told her husband that she would not come to the office until Benders was fired. B&B claims that Mr. Bellows told Benders she was "causing too much of a distraction."

3 Benders ultimately did file a complaint with the IRS in July 2004.
Benders denies ever having an altercation with Mrs. Bellows and maintains she was accused of "causing too many problems" at the firm. Benders filed a retaliatory discharge claim with the EEOC and subsequently received a right-to-sue letter.

In November 2004, Benders filed this suit in district court, alleging three counts: (1) a claim of retaliation for filing an EEOC charge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; (2) a claim of interference with the attainment of a benefit under § 510 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140 et seq.; and (3) a claim of retaliatory discharge under Illinois common law. B&B eventually moved for summary judgment and, as we noted, the district court granted the motion.

We review a grant of summary judgment de novo. Perez v. Illinois, 488 F.3d 773, 776 (7th Cir. 2007). Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We draw all reasonable inferences from the evidence in the light most favorable to the nonmoving party. Perez, 488 F.3d at 776.

We first examine whether the district court correctly found as a matter of law that B&B decided to fire Benders in May 2003. As we stated earlier, this determination was central to the court's decision to dismiss all three claims.

The district court held that no reasonable trier of fact could find other than that B&B decided to terminate Benders' employment in 2003 primarily based on the following "undisputed" facts: (1) in May 2003, Mr. Bellows told Benders that her employment was being "terminated" and that she should begin looking for another job;
(2) Benders’ replacement, LeGrand, was hired shortly thereafter; and (3) Benders stated that her job had been "eliminated" in a January 2004 EEOC questionnaire. We disagree with this conclusion.

First, Benders did not concede that her employment was "terminated" in May 2003. The record shows that she admitted to the language Mr. Bellows used, but not to the fact that her employment had actually been terminated. Her response to a proposed finding of fact is illustrative: "Contested that the Firm decided to ‘terminate’ Benders in 2003. Benders was only told that she should begin looking for another job, not that she was terminated." (Emphasis added.) On the contrary, Benders testified that, while she may have been demoted in 2003, she was actually fired on April 20, 2004, 2 months after she filed a claim with the EEOC and 2 days after threatening to report certain conduct to the IRS. Thus, the fact that Benders’ employment was “terminated” in May 2003 was far from undisputed.

Second, Benders did not admit that she was “replaced” by LeGrand in June 2003. Benders agreed that LeGrand was hired by the firm in June 2003 and that she took over some of Benders’ responsibilities. However, Benders also testified that she continued working at the firm until April 2004 doing many of her usual duties, and it was unclear what her role was. Benders’ response to a proposed finding of fact is helpful: “Contested. Benders stated that [my] role diminished. But it still became—it was still fuzzy because at times it would come back... so it never really stopped.” Again, the fact that Benders had been replaced in the summer of 2003 was disputed.

Third, Benders’ statements in the EEOC questionnaire are more complex than B&B acknowledges. Benders admitted writing "Demotion; Job elimination" in the space asking for "issues." However, she also wrote,
“TOLD to look for employment.” These statements are not inconsistent with her understanding that, while her role had diminished somewhat, and she may have been demoted, B&B did not decide to fire her until April 2004. The attempt here to justify summary judgment on “undisputed” facts is not convincing.

Academic tenure cases likewise do not support a resolution of this dispute on summary judgment. In cases such as Delaware State College v. Ricks, 449 U.S. 250 (1980), Chardon v. Fernandez, 454 U.S. 6 (1981), and Lever v. Northwestern University, 979 F.2d 552 (7th Cir. 1992), courts have concluded that “termination of employment . . . is a delayed, but inevitable, consequence of the denial of tenure.” Ricks, 449 U.S. at 257-58. Although that line of cases primarily deals with limitations questions (which are not at issue here), it is tempting to apply their discussions to this case. After all, the facts of Ricks and its progeny concern an initial decision (to deny tenure), which was communicated to the employee and subsequently followed by a period of continued employment. There, the courts found that the earlier decision was the important one, noting that “[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.” Id. at 257. Thus, B&B might argue that a similar sequence of events occurred here: it made an initial decision (to fire Benders), gave the employee notice, and finally terminated her employment at a later date. Accordingly, Benders’ ultimate dismissal in 2004 was a “delayed, but inevitable, consequence” of B&B’s 2003 decision, which is the relevant date of termination.

We think that the Ricks line of cases is distinguishable. First, in those cases, the decision to deny tenure was made after a designated number of years, by a specific committee, with the employee’s knowledge, and usually according to procedures outlined in a faculty handbook.
See, e.g., Lever, 979 F.2d at 554. Nothing even coming close to a formal process was alleged in this case. Second, in the academic tenure case, the tenure decision was communicated to the employee in no uncertain terms, usually in a letter. See, e.g., id. at 553. Here, we have only a private conversation between Mr. Bellows and Benders (and, we repeat, the two allegedly had a 5-year intimate relationship), the content of which is vague and disputed. Finally, in the Ricks line of cases, the employee who was denied tenure was usually offered a subsequent one-year “terminal” contract, with explicit notice that employment would end upon its expiration. Benders, however, was given no contract or even an end date. She was finally told to leave on a seemingly random day, 11 months after her initial conversation with Mr. Bellows, and before she found another job. We do not mean to imply that every termination must include all of these ingredients, but the absence of any formal process or clear evidence of a decision to terminate makes the academic tenure cases inapposite to a case like ours on summary judgment.

We conclude that the record paints an indeterminate picture of the significance of the May 2003 conversation. Whether Benders was fired on that date is a material issue of fact to be decided by a jury. Thus, it was error to grant summary judgment on that basis. We now turn to an individual assessment of Benders’ three claims.

Benders’ first count alleges a claim of retaliation under Title VII for filing an EEOC charge. See 42 U.S.C. § 2000e-3(a). A plaintiff can establish a prima facie case of unlawful retaliation via the direct or the indirect method of proof. Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640, 644 (7th Cir. 2002). Benders elects the former. Thus, to survive summary judgment, she must present direct evidence that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment
action; and (3) there is a causal connection between the two. *Luckie v. Ameritech Corp.*, 389 F.3d 708, 714 (7th Cir. 2004). Because direct evidence—which essentially requires an admission by the employer—is rare, we also consider circumstantial evidence from which the fact finder could infer intentional discrimination. *Mannie v. Potter*, 394 F.3d 977, 983 (7th Cir. 2005). Benders’ obstacle on summary judgment is the third element, causation.

B&B argues that Benders cannot establish causation as a matter of law pursuant to *Clark County School District v. Breeden*, 532 U.S. 268 (2001). In that case, the Court held that “[e]mployers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitely determined, is no evidence whatever of causality.” *Id.* at 272. There, the employer’s evidence that it intended to transfer the employee prior to learning of the lawsuit was not at issue, and the employee was transferred within about a month of the decision. *Id.* In *Cichon v. Exelon Generation Co.*, we applied *Clark County* to a case where the evidence showed that the decision to discharge an employee was made a day before the employer learned of the lawsuit, and the employee was removed less than a month later. *Cichon*, 401 F.3d 803, 811 (7th Cir. 2005). However, because we already found that there is a genuine issue of material fact as to when B&B decided to fire Benders, reliance on *Clark County* and *Cichon*, at this point, is premature.

B&B nevertheless asserts that Benders brought forth no direct or circumstantial evidence of causation. We disagree. Benders testified that on April 15, 2004, just 3 days after B&B filed its response with the EEOC, Mr. Bellows approached her and referred to the “awful EEOC charge” that she filed 2 months earlier. Benders was fired 5 days after that, before she found other em-
ployment, raising an inference that she was fired in retaliation for filing the charge. See Culver v. Gorman & Co., 416 F.3d 540, 546 (7th Cir. 2005) (discussing the significance of “suspicious timing”). Mr. Bellows denied ever speaking to Benders about the EEOC charge, but this only creates a factual dispute to be resolved at trial. Viewed in the light most favorable to Benders, the evidence raises an inference of a causal connection between her complaints of discrimination and her termination.

Because Benders presented evidence establishing a prima facie case of retaliation, her Title VII claim must be tried unless B&B presents unrebutted evidence that Benders would have been fired absent her allegations of discrimination. Stone, 281 F.3d at 644. Summary judgment is only appropriate if there is no material issue of fact as to whether B&B’s explanation is pretext for retaliation. Hudson v. Chicago Transit Auth., 375 F.3d 552, 559 (7th Cir. 2004). Benders can avoid summary judgment by pointing to specific facts that cast doubt upon B&B’s explanation. Culver, 416 F.3d at 547.

B&B advances several noninvidious reasons for terminating Benders: she failed to perform certain duties; she was disruptive and insubordinate; and she got into a hostile altercation with Mrs. Bellows. B&B produced e-mails allegedly evidencing Benders’ poor performance. Rather than demonstrating Benders’ incompetence, however, the e-mails show a general environment of distrust and dysfunction at the firm, where many employees—including Benders herself—were confused about her role and responsibilities. B&B also offered affidavits from employees verifying Benders’ purported insubordination. However, Benders’ testimony disputes the credibility of these affidavits and maintains that it was Mr. Bellows who made her working conditions difficult after she filed the EEOC charge. Finally, B&B offered affidavits confirming the alleged confrontation between
Mrs. Bellows and Benders. Again, Benders testified that she recalled no such altercation. Whether this confrontation took place and whether Benders underperformed in her duties are factual questions bearing on the issue of pretext. Thus, summary judgment is inappropriate on Benders' first claim.

Benders' second count alleges a claim of interference with the attainment of a benefit under § 510 of ERISA. That section states:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140. Section 510 protects the employment relationship giving rise to an individual's pension rights. McGath v. Auto-Body N. Shore, Inc., 7 F.3d 665, 669 (7th Cir. 1993). In addition to termination, § 510 also applies to situations where an employer reclassifies an employee as an independent contractor, see, e.g., Berger v. AXA Network LLC, 459 F.3d 804, 806 (7th Cir. 2006), as long as the employer had "the specific intent to deprive an employee of his plan rights." Isbell v. Allstate Ins. Co., 418 F.3d 788, 796 (7th Cir. 2005).

Benders maintains that B&B violated § 510 in two ways: (1) by reclassifying her as an independent contractor in December 2003 and refusing to reinstate her as an employee to avoid making a contribution to her 401(k) account; and (2) by terminating her employment in April 2004 because of her disagreement with her status as an independent contractor and her attempts to regain her status as an employee. Contrary to the district court's conclusion, this issue does not directly
depend on when Benders was fired. As Mr. Bellows acknowledged in his affidavit, whatever B&B decided in May, Benders would have been a “qualifying employee”—and thus eligible for the December 2003 contribution—if not for her change in status. B&B cannot reasonably dispute this fact because it argues that Benders knowingly accepted payment of a default judgment instead of a contribution to her 401(k) account. For such a quid pro quo to have occurred, Benders must have been entitled to the benefit to begin with. The issue boils down to whether Benders consented to the arrangement, thus negating the “specific intent” necessary to find B&B liable.

B&B first argues that there is no direct or circumstantial evidence that it intended to deprive Benders of a benefit. Again, B&B’s argument is that Benders agreed to forego the 401(k) contribution in exchange for payment of her student loan judgment. However, Benders refuted this argument by testifying that she only agreed to remain an independent contractor for a few weeks, not indefinitely. As evidence, Benders produced e-mails in which she accused Mr. Bellows of reneging on his promise, to which Mr. Bellows responded that he would reinstate her as an employee. Indeed, in his affidavit, Mr. Bellows admitted to twice agreeing to restore Benders’ status but later changing his mind. Furthermore, Benders ultimately was told to leave the firm 2 days after informing Mr. Bellows of her intent to file a claim with the IRS regarding her status. Thus, Benders offered some evidence that B&B intended to interfere with her attainment of a benefit when, despite her complaints, Mr. Bellows broke his promise and dismissed her.

B&B also maintains that it did not have the requisite intent to violate § 510 because it had no economic incentive to take the allegedly adverse action. See Little v. Cox’s Supermarkets, 71 F.3d 637, 644 (7th Cir. 1995) (finding that a potential saving of $216 could not be viewed as a
motivating factor in the employee’s discharge). We think there is no doubt that this contention is true. Paying off the student loan judgment greatly exceeded any contribution Benders would have received if she had remained an employee. Consequently, there is no material issue of fact regarding whether B&B intended to profit from keeping Benders classified as an independent contractor for part of 2003. Also, since Benders was fired, at the latest in April 2004, a 401(k) contribution for that year would not have been made. In that regard, it appears to be undisputed that none of B&B’s employees received a 401(k) contribution in 2004.

Finally, given the reality of the sticky situation at B&B—where amour was hot and heavy in the air—it’s more than a bit unrealistic to think that the firm shoved Benders out the door so it could save a few bucks by dodging a 401(k) contribution to a pension plan. Summary judgment was properly granted to B&B on Benders’ ERISA claim.

Benders’ third and final count alleges a claim of retaliatory discharge under Illinois common law in connection with her threat to notify the IRS of her employment status situation. As an exception to the at-will employment rule, a retaliatory discharge claim may succeed if an employee shows: (1) that she was discharged (2) in retaliation for her activities (3) in contravention of a clearly mandated public policy. McGrath v. CCC Info. Servs., Inc., 731 N.E.2d 384, 388 (Ill. App. Ct. 2000). Illinois courts have held that the “clear mandate of public policy” standard is met in the context of workers’ compensation claims and whistleblowing. Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd., 277 F.3d 936, 941 (7th Cir. 2002). When whistleblowing, the employee need not be correct about the unlawfulness of the conduct, as long as she held a good-faith belief. Id. The public policy requirement is not met when “only private interests are
at stake." *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 879 (III. 1981). The issue here is whether Benders' claim fails for this reason.4

B&B argues that the Illinois appellate court's decision in *McGrath* supports its position that Benders' dispute with the firm was purely private. There, the court rejected the employee's claim that violations of the state's Wage Payment and Collection Act formed the predicate for a retaliatory discharge suit. *McGrath*, 731 N.E.2d at 391. The court explained that a dispute over the employee's conditional stock options and calculation of bonus is economic in nature and therefore not actionable. However, in that case, the state statute only concerned the forfeiture of employee benefits. *Id.* at 390. Here, the federal laws governing the classification of workers as employees or independent contractors for tax purposes concern more than workers' economic interests. They affect the tax revenues collected by the federal government, the compliance with which, B&B does not dispute, is a matter of public concern. *See Brandon*, 277 F.3d at 942 (citing cases where violations of federal law have given rise to valid retaliatory discharge claims under Illinois law).

B&B also maintains that because Benders did not suspect tax fraud *per se* at the time she threatened to report the matter to the IRS, her claim is barred. We disagree. Illinois courts frame the inquiry as whether only private interests are "at stake," focusing on the employer's allegedly wrongful conduct. *See, e.g., Palmateer*, 421 N.E.2d at 879. B&B cites no cases requiring the

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4 B&B also argued that Benders did not demonstrate that the firm's proffered reasons for firing her were pretext. However, as we discussed in the context of her Title VII claim, Benders adequately rebutted B&B's evidence on this issue.
employee to fully grasp the legal issues implicated by the employer's wrongdoing. Instead, Illinois case law holds that a "purely personal and private dispute" is not actionable. McGrath, 731 N.E.2d at 392. Benders' e-mail informing B&B of her intent to contact the IRS put the firm on notice of potential tax violations. Mr. Bellows acknowledged that he understood at the time that B&B might incur tax liability, if Benders' classification was incorrect. While Benders clearly had an economic interest in reporting the matter, the evidence shows that she also held a good-faith belief that what B&B was doing was not lawful. That, coupled with the fact that there was arguably some "public interest" implicated by B&B's conduct, is enough to overcome summary judgment.

Now that we have concluded that the district court erred in awarding summary judgment on two of the three counts in Benders' initial suit (Benders I), we turn to her second case, filed pro se (Benders II), where she alleges sex discrimination in violation of Title VII. Benders first tried to advance this claim in 2005, when she moved to file a third amended complaint to her original action. The district court denied that motion as untimely. Benders then filed a new complaint, raising the same sex discrimination claim, which the district court dismissed for failure to state a claim. 5

Our review is de novo. DeWalt v. Carter, 224 F.3d 607, 611 (7th Cir. 2000). We take Benders' factual allegations

5 Of course, the claim in Benders II was also dismissable as violative of the rule against splitting causes of actions—all of Benders' claims against B&B growing out of her employment there should have been in a single suit. That point was not pressed by B&B in the district court, so we won't consider it here. That's no-harm, no-foul for B&B here because, as we will conclude, the claim in Benders II will not be coming back alive.
as true and draw all reasonable inferences in her favor. *Id.* Although a *pro se* complaint is to be liberally construed, *Talley v. Lane*, 13 F.3d 1031, 1033 (7th Cir. 1994), a plaintiff can plead herself out of court by alleging facts that show she is not entitled to a judgment. *Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 79 (7th Cir. 1992).

Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex[,]" 42 U.S.C. § 2000e-2(a)(1). Benders' complaint alleges that she was fired because Mr. Bellows did not want his wife to learn about their affair. Essentially, Benders complains of being discriminated against not because of her sex, but because of her consensual sexual relationship with Mr. Bellows. We agree that these allegations are insufficient to support a cause of action for sex discrimination. See *Kahn v. Objective Solutions, Int'l*, 86 F. Supp. 2d 377, 380 (S.D.N.Y. 2000) (collecting cases finding that a voluntary, romantic relationship cannot form the basis of a sex discrimination suit under Title VII); see also *Huebschen v. Dept of Health and Soc. Servs.*, 716 F.2d 1167, 1172 (7th Cir. 1983) (reaching a similar conclusion in an analogous § 1983 equal protection case).

Nor are the alleged facts sufficient to state a claim of sexual harassment based on a hostile work environment. A plaintiff claiming a hostile work environment must establish the following elements: (1) she was subject to unwelcome sexual harassment; (2) the harassment was

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6 Benders now argues that the sex was not consensual, but this statement is inconsistent with her complaint.

7 The same standards for proving intentional discrimination apply to Title VII and § 1983 equal protection claims. *Williams v. Seniff*, 342 F.3d 774, 788 n.13 (7th Cir. 2003).
based on sex; (3) the harassment had the effect of unreasonably interfering with her work performance in creating an intimidating, hostile, or offensive working environment that seriously affected her psychological well-being; and (4) there is a basis for employer liability. *Robinson v. Sappington*, 351 F.3d 317, 328-29 (7th Cir. 2003).

In her complaint, Benders does not allege that Mr. Bellows’ initial sexual advances toward her had a negative effect on her work performance. Rather, she admits that she performed well, was promoted, and received pay raises during their 5-year affair. Benders also concedes that the break-up was “amicable” and that thereafter she and Mr. Bellows became “friends.” Her accusations concerning a hostile work environment consist of conclusory statements pertaining to nonsexual conduct by Mr. Bellows a year later, after he told her to find another job. Benders alleges that Mr. Bellows’ motivation behind getting her to leave was to hide their romantic relationship from his wife. Thus, we see again that Benders’ complaint centers not around her sex, but her consensual sexual relationship with Mr. Bellows. This, as we discussed, is an insufficient basis for a Title VII claim.

For these reasons, we AFFIRM the grant of summary judgment to B&B on the ERISA count in case 06-1487 but REVERSE the grant of summary judgment on the other two claims in that case and REMAND for further proceedings consistent with this opinion. Finally, because we agree that Benders’ second complaint fails to state a claim, we AFFIRM the judgment of dismissal in *Benders II*, case 06-2716.
Nos. 06-1487 & 06-2716

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALYSON J. KIRLEIS,                  )
    Plaintiff                     )
                          )      Civil Action No. 06-1495
v.                           )
DICKIE, McCAMEY & CHICOLTE, PC  )
    Defendant.                   )

MEMORANDUM ORDER

Gary L. Lancaster,


Defendant has filed a motion to dismiss for lack of subject matter jurisdiction. In the alternative, defendant argues that should the court decide it has jurisdiction, it should compel the parties to arbitrate these claims.
For the reasons set forth below, defendant's motion will be denied.

I. BACKGROUND

Plaintiff is an attorney who has been working for defendant, a law firm, since 1988. Plaintiff was a summer law clerk during the summer of 1987 and an associate attorney from 1988 to 1997. Effective 1998, she was made a Class B shareholder and on 2001, she became a Class A shareholder.

Plaintiff filed charges of sex discrimination, hostile work environment and retaliation with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Relations Commission ("PHRC") on October 19, 2006. Plaintiff then filed suit on December 18, 2006 alleging that the method of establishing her annual compensation was not applied to similarly situated male attorneys who were performing the same, or less work, than plaintiff. Plaintiff further alleges that defendant has a separate and lower employment track for female attorneys who have taken maternity leave and/or have children. Plaintiff also contends that defendant has a pattern and practice of discriminating against women because of their sex in the terms and conditions of their employment, including paying lower wages to women, assigning women to lower quality cases, and/or assigning women to roles secondary to male attorneys on cases.
Plaintiff also alleges that defendant maintains a hostile work environment towards women.

Defendant disputes plaintiff's allegations.

II. STANDARD OF REVIEW

When a court considers a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), it must first determine whether the defendant is making a facial or factual jurisdictional attack. In a facial jurisdictional challenge, where the defendant asserts that the allegations of the complaint are insufficient to establish jurisdiction, the court must consider all reasonable inferences in favor of the non-moving party. Mortensen v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 (3d. Cir. 1977). In a factual jurisdictional attack, where the defendant argues that the court lacks jurisdiction based on evidence outside the pleadings, the standard of review is very different. "Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Mortensen, 549 F.2d at 891. Thus, when presented with a factual 12(b)(1) motion, the court may consider evidence outside the pleadings, id., and need only accept the plaintiff's uncontroverted allegations as true. Cedars-Sinai Med. Ctr. v.

The parties agree that this is a factual attack on the court’s jurisdiction. Plaintiff has the burden of persuading the court it has jurisdiction. Gould Electronics, Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000). Of course, the standard for surviving a Rule 12(b)(1) motion is lower than for a summary judgment motion under Rule 12(b)(6). "A claim may be dismissed under 12(b)(1) only if it clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial." Id. (internal citations omitted.)

III. Motion to Dismiss

Defendant has moved to dismiss the complaint on the ground that plaintiff is not an employee under the applicable statutes, and therefore, this Court does not have jurisdiction to hear plaintiff’s claims.

Plaintiff alleges that despite her title of shareholder, she is defendant’s employee and is covered under the applicable statutes.

Plaintiff has brought her claims under Title VII, FLSA and PHRA. In order for plaintiff to state a claim under these statutes, she must be an “employee.” See 42 U.S.C. § 2000e(f); 29
U.S.C. § 203(e); 43 P.S. § 954(b). Therefore, in order for the court to have jurisdiction, we must first determine whether plaintiff is an employee or an employer. See EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 698 (7th Cir. 2002).

Because this is a factual challenge to jurisdiction, we may consider information beyond the pleadings. Gould Electronics, Inc. v. United States, 220 F.3d 169, 177 (3d Cir. 2000). Defendant has submitted a number of exhibits and affidavits in support of its motion to dismiss. We have also considered plaintiff's exhibits and affidavits, as well as defendant's reply brief. Pursuant to the guidance of the Court of Appeals for the Third Circuit in Gould, we will determine the jurisdictional challenge by weighing the evidence presented.

In the leading Supreme Court case addressing the employee/employer distinction, Clackamas Gastroenterology Associates, P.C. v. Wells, the Court held that a person's title is not enough to determine whether they are an employer or an employee of an entity for purposes of employment discrimination statutes. 538 U.S. 440, 450 (2003). The Court set forth factors that a court should evaluate to determine the plaintiff's status. Id. at 449-450. As such, we will evaluate the following factors:

1) Whether the organization can hire and fire plaintiff, or set rules and regulations of plaintiff's work;

2) Whether and to what extent does the organization supervise plaintiff's work;
3) Whether plaintiff reports to someone higher in the organization;

4) Whether and to what extent is plaintiff able to influence the organization;

5) Whether the parties intended plaintiff to be an employee as expressed in written agreements or contracts; and

6) Whether plaintiff shares in profits, losses, and liabilities of organization.

We note that a person’s title is not dispositive in this matter, but the court will look at an individual’s overall control of the entity. See Clackamas, 538 U.S. 440.

1. Can defendant hire and fire plaintiff, or set rules and regulations for plaintiff’s work?

Defendant initially hired plaintiff as an associate. However, defendant contends that plaintiff became an employer once she was elected as a shareholder. According to the By-laws provided by defendant, plaintiff, as a shareholder, can only be terminated by an official vote of three-fourths (3/4) of the shareholders. Plaintiff can speak and vote on the question of her own ouster, which is something associates are not allowed to do. Plaintiff is allowed to delegate work on any of her client’s cases and can supervise attorneys or paralegals that she chooses to delegate to. Further, plaintiff can, and does, set her own hours as dictated by her case demands.

Plaintiff, however, claims that decisions regarding promotions, demotions and terminations of attorneys who are
shareholders are made by a vote of all Class A shareholders only in theory. Plaintiff contends that in reality, defendant's Executive Committee has the real control over terminations by virtue of its power with regards to compensation and work assignment matters. Specifically, plaintiff alleges that when the Executive Committee wishes to terminate a shareholder attorney, they reduce the amount of work given to the attorney, resulting in reduced billed hours and profitability, which in turn results in lower compensation. The Executive Committee engages in this course of action to force an attorney to leave. The Executive Committee further controls plaintiff's work by imposing specific regulations, such as prohibiting plaintiff from speaking to people outside the firm, controlling the minimum and maximum number of hours that she is permitted to work, not allowing her to set the hourly rate charged to clients for her work, requiring that new clients be approved by the firm's Rate Committee, and by not allowing her to represent clients without prior approval. Plaintiff also cannot hire or fire attorneys or support staff. Finally, plaintiff does not have the authority to authorize overtime compensation for her own secretary.

Although defendant's arguments seem compelling, they do not address plaintiff's contention that the Executive Committee can force a shareholder from his or her position by controlling work assignments and compensation. We do agree with defendant that
rules governing firm members, such as requiring approval of all new clients, does not prove that plaintiff is an employee, because these rules apply to all firm members, including members of the Executive Committee. Nonetheless, because defendant did not address plaintiff’s argument that the Executive Committee has the power to force out shareholders by controlling their work assignments and compensation, we will credit plaintiff’s contentions. This factor therefore weighs in favor of finding that plaintiff is an employee.

2. Does defendant supervise plaintiff’s work, and if so, to what extent?

Defendant contends that plaintiff’s work is not supervised and any decisions regarding her cases are left to her professional judgment. Defendant concedes that plaintiff is supervised in her work with one major client, but contends that this is because this entity is not her client. If plaintiff brought in her own clients, she would not be supervised in her cases and would be free to delegate work.

Plaintiff contends that she is closely supervised in her job performance by members of the Executive Committee who assign her work. The majority of plaintiff’s work is in fact for one major client, who is the main client of defendant’s malpractice group. All work on those cases is directed by members of the Executive Committee. On these cases, plaintiff receives detailed
memoranda setting forth guidelines and rules for how to handle every aspect of each case.

We find that based on the evidence presented, defendant does supervise plaintiff’s work to a great degree. The fact that plaintiff works mainly for the major client of her practice group, does not negate the fact that her work is supervised. Based on defendant’s argument, it seems that if plaintiff brought in her own clients, she would have greater freedom in her work. The fact remains, however, that the close supervision weighs in favor of finding that plaintiff is an employee of defendant.

3. Does plaintiff report to someone higher or act independently?

Defendant contends that plaintiff does not report to someone higher in the firm, but that as a shareholder she is allowed to manage her own cases according to her professional judgment. While plaintiff must often follow certain firm rules, these rules apply to every member of the firm. According to defendant, the reason that certain matters are delegated to the Executive Committee is that shareholders cede some of their independence for the common good of the firm. However, as a shareholder, plaintiff could be nominated and elected to the Executive Committee and have further involvement in firm management.

Plaintiff contends that she does not act independently and reports to the Executive Committee. In addition to reporting to
members of the Executive Committee with regard with her work, she 
must seek approval before she is reimbursed and has no authority 
to sign checks, unlike members of the Executive Committee.

The court finds that this factor weighs in favor of finding 
plaintiff as an employee. Plaintiff has presented evidence 
showing that Executive Committee members have power that she does 
not have. As we have discussed above, her work is controlled by 
members of the Executive Committee. There is simply no evidence 
that plaintiff acts independently at the organization.

4. Is plaintiff able to influence the organization, and if 
so, to what extent?

Defendant states that plaintiff is able to attend, speak 
and vote at board meetings, as well as at the annual shareholders 
meeting. Plaintiff has exercised these rights and voted on 
several important matters, such as voting for and against future 
shareholders, and voting to elect members of the Executive 
Committee. Further, plaintiff is eligible to become a member of 
the Executive Committee if elected by her peers.

Plaintiff, however, contends that she has no role in making 
decisions on behalf of defendant and has no meaningful input or 
influence over the operation of the firm. Plaintiff contends that 
the role of shareholders at meetings is to "rubber stamp" 
decisions made by the Executive Committee. For example, decisions 
to merge with other firms have been presented to the shareholders 
after they had already been in place, and in some cases, after
offices had already opened. In spite of what is set forth in the By-Laws, it is plaintiff’s experience that shareholders are not allowed to attend Executive Committee meetings. As to compensation, the Executive Committee sets the compensation and shareholders have no information regarding compensation matters.

The Court finds that as a voting shareholder plaintiff has some ability to influence the organization. The title, however, is not the end of the inquiry. Defendant has not addressed plaintiff’s contentions that important matters have been presented for a vote to the shareholders after the transactions were completed. We also find it noteworthy that shareholders who are not members of the Executive Committee do not know how compensation is set. Because unequal pay is one of plaintiff’s main complaints, we cannot say that she has the ability to influence the organization in a meaningful way. As such, this factor weighs heavily in favor of finding that plaintiff is an employee.

5. Did the parties intend for plaintiff to be an employee as expressed in written agreements or contracts?

Defendant claims that it always intended to make shareholders employers of the firm. Defendant points to all the benefits that shareholders receive under the By-Laws as an indication of defendant’s intent to make shareholders employers.
Plaintiff, however, contends that she has always believed she was an employee of defendant and that she never even received a copy of the By-Laws prior to this litigation.

Clearly, the weighing of this factor is complicated by the fact that the only "contract" available for review is the By-Laws that plaintiff never received. As discussed below, defendant does not contend that it ever gave plaintiff a copy of the By-Laws. Because the parties have essentially presented their subjective belief that plaintiff is, or is not, an employer, this factor does not weigh in favor of either side.

6. **Does plaintiff share in profits, losses, and liabilities of the organization?**

Defendant asserts that every shareholder is required to make a capital contribution of $7,500 to the firm. According to defendant, every year, the shareholders divide the net profits based on the percentage share set each January. Shareholder's salaries may, and do, go up or down on any given year based on the firm's profits. A creditor could also attach plaintiff's capital contribution of $7,500 if defendant does not have the assets to pay for the obligation.

Plaintiff concedes that every shareholder is required to contribute $7,500 to the firm, but contends that shareholders never know what is their ownership percentage in the firm. The salaries of every employee, including shareholders, are secretly set by the Executive Committee. According to plaintiff, the
Executive Committee can set shareholder salaries and then award secret bonuses to a number of shareholders. Afterwards, they can attribute a percentage of the total salary as the profit-sharing for that year, thereby obliterating any true profit-sharing. Plaintiff further contends that the shareholder contribution is nominal and is meant to create the impression of an ownership stake in the firm. Plaintiff notes that the contribution bears no relation to defendant’s profits, pointing out that although billing has increased from $30 million to $53 million in the past five years, the nominal contribution of $7,500 remains the same.

As discussed above, the secrecy in which the Executive Committee sets all salaries and bonuses and decides the profit-sharing, shows that this small group of people has a great deal of control that plaintiff does not possess. Perhaps discovery will show that the Executive Committee follows a very clear, straightforward compensation process, with no bonus-manipulation of the profit-sharing system. However, because defendant does not address how these salaries are set, based on the evidence presented, the Court finds that this factor weighs heavily in favor of plaintiff.

As the Supreme Court has noted, "[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." Clackamas at 447. Plaintiff
has presented evidence that defendant has 63 shareholders but that control is in fact concentrated on the small number of members of the Executive Committee. Therefore, we hold that plaintiff is an employee covered by the applicable statutes. We note that although we have weighed the evidence presented, the standard of proof at this point is lower than the standard of proof required for summary judgment. Therefore, we deny defendant's motion to dismiss without prejudice to defendant's right to raise this issue after discovery, if appropriate.

IV. Arbitration

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [s]he has not agreed so to submit." AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986) (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)). Accordingly, "'whether or not [a party is] bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.'" Id. at 649 (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 547 (1964)).

The court, "when considering a motion to compel arbitration which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may

The parties agree that the court must look at Pennsylvania law to determine whether an agreement to arbitrate was made. It is well settled in Pennsylvania that where a party to a civil action seeks to compel arbitration, we must employ a two-part test to determine if arbitration is required. Keystone Technology Group, Inc. v. Kerr Group, Inc., 824 A.2d 1223, 1227 (Pa. Super. 2003) (internal citations omitted). First, we must determine whether a valid agreement to arbitrate exists. Id. Second, if we determine that such an agreement does exist, we must determine if the dispute involved is within the scope of the arbitration provision. Id. The scope of the arbitration is determined by the intention of the parties as ascertained in accordance with the rules governing contracts generally. Id. There must be a meeting of the minds in order for there to be a valid contract to arbitrate. See Quiles v. Financial Exchange Co., 879 A.2d 281, 285 (Pa. Super. 2005).

Plaintiff contends that she never agreed to arbitrate any claims against defendant. Plaintiff has filed an affidavit stating, among other things, the following:
15. I was never provided with a copy of the By-Laws of defendant DMC at the time that I was made a Class B shareholder or at anytime thereafter. In fact, I only saw the documents which Mr. Wiley purports to be DMC's By-Laws for the first time when I received Mr. Wiley's Affidavit in connection with this case, approximately 9 years after being made a Class B shareholder-employee and 19 years after commencing the practice of law with the firm.

16. I was never informed of the presence of the arbitration provision in the By-Laws which DMC is now seeking to enforce against me.

17. I never signed any agreement or document which refers to or incorporates the arbitration provision in the By-Laws.

18. I never agreed to arbitrate my claims against DMC.

Defendant contends that when plaintiff became a shareholder, she agreed to arbitrate all her claims against defendant. Defendant points to Article IX: Section 9.01 of the By-Laws, which states:

(a) GENERAL RULE: Any dispute arising under these By-Laws including disputes related to the right to indemnification, contribution or advancement of expenses as provided under these By-Laws, shall be decided only by arbitration in Pittsburgh, Pennsylvania, in accordance with the commercial arbitration rules of the American Arbitration Association, before a panel of three arbitrators...

(b) EFFECT: Any award entered by the arbitrators shall be final, binding and nonappealable and judgment may be entered thereon any party in accordance with applicable law in any court of competent jurisdiction...This arbitration shall be specifically enforceable.

Defendant contends that plaintiff exercised her rights as a shareholder under the By-Laws, and by exercising her rights, she accepted the terms of the By-Laws. Defendant further contends
that plaintiff should have known that the firm had By-Laws, and that she could have asked for a copy of the By-Laws and reviewed them, but chose not to do so. Therefore, according to defendant, plaintiff accepted to be bound by the By-Laws, including the arbitration provision. We disagree.

In order for there to be an agreement to arbitrate these claims, there must have been a meeting of the minds. Plaintiff provided a sworn affidavit stating that she never received a copy of the By-Laws. Defendant does not contend that it provided plaintiff with a copy of the By-Laws, or that it otherwise informed plaintiff that there was an arbitration clause in the By-Laws. Defendant’s argument boils down to its contention that plaintiff must have known that By-Laws existed, that she should have asked for a copy, and that by exercising her rights as a shareholder, she accepted the arbitration clause of the By-Laws.

An argument that plaintiff “must have known” or “should have asked” falls short of the standard required by Pennsylvania law that plaintiff actually agree to arbitrate her claims. In Quiles v. Financial Exchange, 879 A.2d 281 (Pa. Super. 2005), the plaintiff/employee actually signed a form acknowledging that she received the employee handbook, which set forth defendant’s arbitration requirement. The form itself mentioned that the company “had provisions related to arbitration.” The court credited plaintiff’s testimony that, in spite of her signature on
the acknowledgment form, she never received a copy of the employee handbook. In that case, although defendant published its arbitration process in employee handbooks and although plaintiff was aware that the company had arbitration provisions, the provisions "had no binding effect on employee-related actions if that policy [was] never actually communicated to an employee by ensuring that the handbooks [were] distributed to its employees." Quiles, 879 A.2d at 286. Likewise, in the instant case, the By-Laws were, undisputedly, not distributed to plaintiff. Therefore, defendant's motion to compel arbitration is denied.

V. CONCLUSION

Defendant's motion to dismiss, or in the alternative, to compel arbitration is denied. The appropriate order follows.
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALYSON J. KIRLEIS
Plaintiff,

v.

DICKIE, McCAMEY & CHICOLTE, PC
Defendant.

ORDER

Therefore, this 23rd day of July, 2007, IT IS HEREBY
ORDERED that Defendant’s Motion to Dismiss the Complaints of
Plaintiff, and If There Is Jurisdiction, to Compel Arbitration
[document #13] is DENIED.

BY THE COURT:

cc: All Counsel of Record