Partnership decisions and discrimination

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AND
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by
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The Nature of a Partnership

The definition of a partnership in 48 states is "...an association of two or more persons to carry on as co-owners a business for profit."¹ In a partnership engaged in an industry affecting commerce which has fifteen or more employees, Title VII of the Civil Rights Act of 1964² prohibits discrimination regarding hire, discharge, compensation, terms, conditions, or privileges of employment on the basis of an employee's race, color, religion, sex, or national origin.³ In Hishon v. King & Spalding⁴, the Supreme Court recently addressed the issue whether a law firm's decision to deny promotion of an associate(employee) to partnership status is subject to scrutiny pursuant to Title VII.

Most law firms by custom decide whether to promote their associates to partner after a set period of years of employment. This partnership decision is often based upon the associate's satisfactory work, ability to procure clients, prominence in the legal community, congeniality within the firm, among other criteria. Because a partner is by definition a co-owner and not an employee of the partnership, and because a partnership is traditionally created through voluntary association⁵, the courts had been reluctant to analyze the methods used to select new owner-employees.⁶ At least one commentator has argued that the courts have unjustifiably failed to enforce Title VII with respect to upper level jobs, and that the courts use different standards to examine and

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validate selection systems for upper level jobs.8

The Hishon Case

Background

Elizabeth Hishon accepted a position as an associate at the Atlanta law firm of King & Spalding in 1972. The firm, organized as a general partnership, was then composed of approximately fifty partners, fifty associates and more than fifty other clerical and paralegal employees. Ms. Hishon, pursuant to the normal course of events at King & Spalding, was considered for partnership at the end of her sixth year of employment as an associate with the firm, in May of 1978. She was not invited to join the partnership and in accordance with the firm's "up or out" policy, she was extended a reasonable period of time to secure other employment prior to termination.

Ms. Hishon applied for reconsideration eight months after the negative decision, but was again denied partnership at the firm's May, 1979 meeting. She left the firm's employ on December 31, 1979. Ms. Hishon filed a timely sex discrimination claim with the Equal Employment Opportunity Commission on November 19, 1979, alleging, inter alia, that the respondent firm discriminated against her in its decision to deny her a partnership position.9

The District Court

The Equal Employment Opportunity Commission issued a Notice of Right to Sue within ten days, which right Ms. Hishon asserted in district court within the requisite ninety-day period. Her complaint alleged sex discrimination with respect to the firm's decision not to make her a partner, a violation of the Equal Pay Act10 and a breach of contract.11 The district court dismissed Hishon's complaint. Analogizing the professional partnership to a business marriage, the court reasoned that applying Title VII to coerce an unwanted partnership would too closely resemble a statute for the enforcement of shotgun weddings.12

The Court of Appeals

The Court of Appeals for the Eleventh Circuit affirmed the decision of the district court to dismiss Ms. Hishon's complaint. The court concluded that Title VII does not apply to decisions concerning partnership because partners are not "employees" under Title VII13 because the opportunity to be considered for promotion to partner is neither a "term, condition or privilege of employment" protected by section 703(a)(1) of Title VII nor an "employment opportunity" pro-
tected by section 703(a)(2). In response to plaintiff's argument that she was denied "employment opportunities" by the firm's denial of partnership, by the frozen pay rate awarded her for the period subsequent to partnership denial, and by the termination of her employment due to the firm's "up or out" policy, the Eleventh Circuit ruled that the termination was a result of the partnership decision and thus lost its separate identity as a cause of action under Title VII. The court further stated that the plaintiff "assumed the risk" that a negative decision concerning promotion to partnership would set in motion the termination procedure.

The Supreme Court

The Supreme Court granted certiorari and reversed the Eleventh Circuit. The Supreme Court held that Ms. Hishon's complaint stated a claim cognizable under Title VII. The Court noted that the underlying employment relationship is contractual, and thus the "terms, conditions, or privileges of employment" include benefits that are part of an employment contract, including an alleged promise to consider an employee for partnership. Where an employee can prove that the parties contracted to have that employee considered for partnership, Title VII requires that the consideration be nondiscriminatory. Even though an employer would be able to eliminate a privilege attached to the employment relationship (e.g., the opportunity to be considered for partnership), where the "privilege" exists, it must be applied consistently with Title VII. If an associate can prove that a firm used the prospect of ultimate partnership to induce prospective associates to join the firm, this finding supports the determination that partnership consideration was a term, condition, or privilege of employment under Title VII.

Responding to King & Spalding's argument that the elevation to partnership entails a change in status from an "employee" to an "employer", the Supreme Court held that the benefit a plaintiff is denied need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment. The Court attributed no significance to the fact that employment as an associate necessarily ends when the associate becomes a partner, because a benefit (e.g., a pension benefit) need not accrue before a person's employment is completed, and yet the benefit would qualify as a term, condition or privilege. The Court cited Lucido v. Cravath, Swaine & Moore for the proposition that nothing in the change in status that advancement to partnership might entail means that partnership consideration falls outside the terms of the statute.
The Lucido Case

Plaintiff Lucido was a white Catholic male of Italian ancestry who brought suit against a large New York law partnership alleging that he was unlawfully discriminated against as an associate attorney and that his employment was unlawfully terminated because of his national origin or religion or both. The complaint alleged that Mr. Lucido was discriminated against with respect to work assignments, training, rotation and outside work opportunities as well as denied promotion to partner because of his national origin or religion or both.28 The district court ruled that the opportunity to become a partner at Cravath, Swaine & Moore was a "term, condition or privilege" of employment and an "employment opportunit[y]" within the meaning of Title VII.29 The court interpreted the language of Title VII, section 703(a) as indicating "a Congressional intent to define discrimination in the broadest possible terms and to include the entire scope of the working environment within the Act's protective ambit."30

The district court in Lucido analogized the case before it to a similar situation under the National Labor Relations Act31 where an employee who is protected by the National Labor Relations Act is denied a promotion to a supervisory position (which position would no longer provide the individual with National Labor Relations Act protection) because of discrimination in violation of the National Labor Relations Act. In National Labor Relations Board v. Bell Aircraft Corp.32 the Second Circuit found that such an employee was protected from discrimination in violation of the National Labor Relations Act because at the time that the discrimination took place, he was clearly a protected employee, and his prospects for promotion were among the conditions of his employment. The Supreme Court in Hishon noted that certain sections of Title VII were patterned after the National Labor Relations Act and thus the Court frequently refers to cases interpreting analogous language from the National Labor Relations Act.33

Discussion

The application of Title VII to partnership decisions is legally correct. The Supreme Court opinion in the Hishon case was well-reasoned and followed from the clear language of Title VII. Title VII contains no exception for professional level employment decisions.34 Partnerships are specifically included as "persons" subject to the strictures of Title VII.35 Despite the fact that the Uniform Partnership Act deems the partnership association to be a voluntary one,36 this statute, where adopted, may be modified by agreement of
the partners, and in any event, is a state statute which is pre-empted when in conflict with the federal anti-discrimination statute, Title VII.37

Because each partner is jointly and severally liable for wrongful acts of any partner who is acting in the ordinary course of partnership business or with the authority of his/her co-partners,38 the argument has been made that the courts should not impose an unwanted partner upon the other partners. The Hishon opinion does not dictate that partnerships must accept less qualified individuals for promotion because of that individual's race, color, religion, national origin or sex.39 The mandate of Title VII is that an employer is not free to consider an individual less qualified because of that person's race or sex, etc.40 In Kohn v. Royall, Koegel & Wells, a case involving the denial of summer employment to a law student by a law partnership, the court stated that "...although a law firm is undoubtedly free to make complex, subjective judgments as to how impressive an applicant is, it is not free to inject into the selection process the a priori assumption that, as a whole, women are less acceptable than men."41 The only impermissible reasons for disqualifying an employee from promotion to partnership are illegal, discriminatory reasons. If a lawyer is careless, or excessively pugnacious, or is otherwise lacking on his/her merits, these characteristics provide an appropriate basis for denial of partnership. A partnership would only be required to promote a qualified employee to partnership status which should not increase the exposure to liability of the existing partners.42

The Hishon decision has a potentially broad impact on legal and other partnerships,43 and there are, at recent count, 1,380,000 partnerships in the United States.44 The applicability of Title VII to partnership decisions ensures that employers organized as partnerships will examine their promotion practices with the same rigor which has been applied to selection and promotion processes in lower level jobs. It will be no easy task for the courts to evaluate the objective and subjective criteria used to judge an employee's suitability for promotion to partnership, but if the Court had excluded such decisions from Title VII's protection, the accessibility to the higher rungs of the professional ladder could be greatly diminished by overt discrimination.

FOOTNOTES

1. UNIFORM PARTNERSHIP ACT § 6(1). The Uniform Partnership Act has been adopted in all states except Louisiana and Georgia.

3. Partnerships are specifically included in the definition of a "person" who employs fifteen or more "employees" in order to be subject to Title VII. 42 U.S.C. §2000e(a). Section 703(a) of the Act provides: It shall be an unlawful employment practice for an employer -
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a).


5. The discussion of partnerships in this paper will focus on law partnerships but the same principles apply with equal force to other professional partnerships. See Sattler, Can Partnerships Discriminate in Choosing Partners?, 1984 Legal Econ. 31; Leading Cases of the 1983 Term, 98 Harv. L. Rev. 87, 283 (1984). In discussing the potentially broad impact of the Hishon case, this article concludes that the applicability of Title VII to partnership decisions in professions other than law such as accounting or architecture will depend upon such factors as whether partnership consideration is an inducement to employment, whether such consideration is routine, and whether the firm maintains an "up or out" policy.; Tybor, What "Up or Out" Means to Women Lawyers, 69 A.B.A.J. 756, 758 (1983) predicting that the Supreme Court's decision in Hishon would also affect accounting firms, physicians, mortgage bankers and architects who rely on the partnership model.

6. See UNIFORM PARTNERSHIP ACT § 18 Rules Determining Rights and Duties of Partners
   The rights and duties of partners in relation to the partnership shall be determined, subject to any agreement between them by the following rules:
   ... (g) No person can become a member of a partnership without the consent of all the partners.


12. Id. at 1304-5.

13. 678 F.2d 1022, 1027 (11th Cir. 1982).

14. Id. at 1028.

15. Id. at 1029.

16. Id. at 1029-30.


19. Id. at 2236.


21. 104 S.Ct. at 2234.

22. Id.

23. Id. at 2234-35.

24. Id. at 2235.

25. Id.


27. 104 S.Ct. at 2235.


29. Id. at 128.

30. Id. at 126.


33. 104 S.Ct. 2229, at 2234, fn 8.
34. Tenure and Partnership as Title VII Remedies, supra note 7 at 460; and see EEOC v. Rinella & Rinella, 401 F.Supp. 175, 180 (N.D. Ill. 1975) (discussion of legislative history of Title VII supporting the court's assertion of jurisdiction in case involving sex discrimination in a law firm.)


36. Supra note 6.

37. See L. Tribe, AMERICAN CONSTITUTIONAL LAW §6-24 (1979); Tenure and Partnership as Title VII Remedies, supra note 7 at 476.

38. UNIFORM PARTNERSHIP ACT §§13, 15(a).

39. 104 S.Ct. 2229.


41. 59 F.R.D. 515, 521 (S.D.N.Y. 1973), appeal dismissed, 496 F. 2d 1094 (2nd Cir. 1974).

42. Tenure and Partnership as Title VII Remedies, supra note 7 at 475.

43. See note 5 supra.

44. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1984, at 532 table 887 (104th ed. 1984). Not all of these partnerships would be subject to Title VII jurisdiction because of the statutory requirement that the employer have fifteen or more employees. 42 U.S.C. § 2000e(b).