APPLICATION OF TITLE VII TO LAW FIRM PARTNERSHIP DECISIONS -- POTENTIAL EFFECT ON YOUR FIRM

BY

CHARLES R. CHURCH*

Charles R. Church is an attorney who devotes most of his efforts to human rights issues: detention, torture, the facility at Guantanamo Bay, habeas corpus, etc.
His website is: www.churchlawllc.com
Email him at: charleschurchllc@gmail.com

Title VII of the Civil Rights Act of 1964[1] doubtless is the most important law proscribing discrimination by private employers.[2] Many attorneys are aware that the United States Supreme Court recently determined to some degree the applicability of this statute to law firm employment decisions, although most probably have not read the opinion and thoughtfully considered its impact upon their firms. Since the Court squarely brought within the ambit of Title VII the most important personnel decision a law firm can make -- who shall be invited to become a partner -- firms should understand the scope and implications of the ruling and adopt measures to protect against meritless claims. This article intends to contribute to this understanding and to suggest some of these measures.

(a) The Case

Hishon v. King & Spaulding, ___ U.S. ___, 104 S.Ct. 2229, __ L.Ed.2d.__ (1984) concerned the well-known Atlanta firm and the action by a female associate who was not offered partner

---

* Mr. Church is a member of Goldberg, Mufson & Church, P.A. in West Orange, New Jersey and actively practices in the employment law area.

1. 42 U.S.C. 2000e, et seq.

2. The statute prohibits employment discrimination because of race, color, religion, sex or national origin. 42 U.S.C. 2000e-2.

status. She brought suit, alleging that partnership was denied because of her female sex, and the trial court dismissed, holding that Title VII did not apply to the situation. In doing so, the court extravagantly sought to analogise between partnership and marriage, opining with notable illogic:

> to use ... Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.

King & Spaulding argued on appeal that elevation to partner changes the lawyer's status from employee to employer, so the law is not relevant. The Supreme Court without difficulty turned to language in the statute that facially applies, even granting the factual element in defendant's argument. After all, Title VII renders it unlawful to:

> otherwise ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment ...3

Whether consideration for partnership has been agreed upon when the lawyer is hired or simply is a benefit normally conferred upon the firm's associates, the Court unanimously reasoned, this consideration is a term, condition or privilege of employment and may not be withheld because of the lawyer's sex or other forbidden attribute.

---

3. 42 U.S.C. 2000e-2(a)(1).

In actuality, this decision has provoked more excitement than would seem warranted. Certainly, it should not have surprised practitioners of employment law. Law firms clearly are "employers"[4] of associates, so that all decisions substantially affecting the relationship -- whether concerning salary, responsibilities, and training or the opportunity to become a partner -- should be governed by the substantive provisions of Title VII.

Even if this were not so, at least in New Jersey the same proscriptions have long been imposed by state law. Our Law Against Discrimination[5] facially applies, and this statute forbids employment discrimination based on a larger set of personal

---

4. Under 42 U.S.C. 2000e(b), "employer" basically means a person who has employees. "Person" includes partnerships and corporations. 42 U.S.C. 2000e(a).

5. N.J.S.A. 10:5-1, et seq. Here "employer" is deemed to include "persons", and "persons" includes partnerships and corporations. N.J.S.A. 10:5-5(e) and (a).

   The Law Against Discrimination continues to fill a gap which arises from the employee numerosity and impact-on-commerce requirements in Title VII. More precisely, under the federal statute "employer" means a person:

   (a) engaged in an industry affecting commerce;

   (b) who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year.

   42 U.S.C. 2000e(b). "Industry affecting commerce" means any activity in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce. 42 U.S.C. 2000e(h).

characteristics.[6] Moreover, the right to acquire property protected by Article I, Paragraph 1 of our own Constitution provides the basis for an employment discrimination claim against private employers,[7] and nothing in the constitutional provision would seem to warrant excluding law firms from its application.

Nonetheless, the longstanding applicability of employment discrimination proscriptions to law firms might well surprise many attorneys, since discrimination claims against their firms probably have been very rare. Where associates feel mistreated, they are likely to fear that bringing action would destroy their remaining hope for partnership. Even where the disaffected attorney has moved to another firm, the closeness of the legal community and the notoriety that would result serves to deter all but the most courageous.

When the attorney has been denied partnership, the circumstances can be quite different. The significant monetary disincentive to pressing a claim arising from persistent hopes of partnership no longer exists. Indeed, unless an equally lucrative partnership opportunity is discovered promptly elsewhere, the

---

6. N.J.S.A. 10:5-12 forbids discrimination because of race, creed, color, national origin, ancestry, age, marital status, sex, or atypical hereditary cellular blood trait, or because of liability for service in the Armed Forces or nationality. N.J.S.A. 10:5-4.1 extends protection to the handicapped.

7. Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978) applied the provision to a sex discrimination claim, and our courts might be expected to extend the decision to race and other forms of discrimination, should the need arise. Surely, nothing in the state constitutional provision suggests limiting its prohibitions to sex discrimination only.

disincentive turns into a sizeable incentive to taking action, which can induce lawyers to risk notoriety in the profession. In short, if the former firm's arbitrary decision dashed the chance for a lucrative partnership, the resulting loss can be substantial -- why not try to redress this wrong?

Because of these shifting incentives where partnership has been lost, and since Hishon removes any doubt on the application of Title VII to consideration for partnership,[8] the decision might increase sharply the number of claims asserted. This is the reason both for its importance and its stimulation of interest. This likely increase in claims and the very substantial sums which might be at stake should motivate the wise practitioner to understand the impact and limitations of Hishon.

(b) The Scope and Effect of Hishon

Most importantly, while Hishon dealt with a sex discrimination claim, of course Title VII also forbids discrimination on the basis of race, color, religion or national origin.[9] There are various other respects in which the decision sweeps more broadly than its facts, claims and the profession of the parties involved. Other employers of professionals, such as accounting and architectural firms, should anticipate the same result, should

---

8. There has been no such decision for the Law Against Discrimination. Because of the parallel language and purposes of the two statutes and our state courts' frequent borrowing from federal case law where similar statutes are involved, Hishon can be expected to have a similar impact on discrimination claims under state law.

9. 42 U.S.C. 2000e-2.

a suit be brought by an employee disappointed by the lack of partnership offer.

The Hishon decision also has direct impact on aspects of law firm life not specifically addressed by its plaintiff. Once it is granted that Title VII governs consideration for partnership, application of the statute to closely related areas flows naturally. While firms may have standard points in attorneys' careers for first judging whether partnership is merited, actual offers of partnership do not necessarily come at a single career point for all. Some associates are deemed to have matured more quickly than others. Nothing in Title VII mandates that partnership offers must occur a uniform number of years into every lawyer's career, but disparities must arise from non-discriminatory considerations.

It follows that the types of assignments, client contact, levels of responsibility and all other aspects of an associate's experience which serve to equip the attorney for partnership status should be distributed equally, or that differences must not flow from discrimination.

There are, however, important respects in which the decision will have a narrower impact than might be imagined. Arrangements among law partners to govern firm policies, division of profits and the like usually are achieved after careful and delicate logrolling, and those imagining the "parade of horribles" which might flow from the application of employment discrimination prohibitions to the process can take comfort from the case.

Justice Powell in his concurring opinion set forth his understanding that the decision:

> does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee -- including that between the partnership and its associates.

Nothing in the Court's opinion squarely contradicts this view, and this limitation might well endure in the case law.

Justice Powell's concurrence, though less explicitly, also noted another likely development that will serve to ameliorate the anxieties of those who already are partners. Deciding whether to offer partnership often is possible only after a thorough examination and weighing of complex factors, many of which are intangible. Subjecting this delicate and difficult decision-making process to judicial review might alone be an unappealing prospect for many, but doing so in a context where discriminatory motive (or its absence) most likely will be discerned through inference from indirect evidence surely would compound their distaste. They simply would see too great a possiblity for error in the review process.

The concurring opinion points to the deference courts customarily have granted to judgments by universities concerning the qualifications of professors, especially those being considered for tenure.[10] Because Hishon came to the Court on defen-

---

10. Justice Powell cited Lieberman v. Gant, 630 F.2d 60, 67-68 (2d Cir. 1980); Kunda v. Muhlenburg College, 621 F.2d 532, 547-48 (3d Cir. 1980).

dant's motion to dismiss, Justice Powell correctly concluded that the question of deference to the law firm's decision was not presented. He clearly means to hint, however, that courts should grant this leeway.

Justice Powell makes no mention of two other factors which will enhance the understanding and perhaps even empathy which will be brought to bear in reviewing the partnership decision-making process. The overwhelming weight of authority holds that there is no right to a jury trial in Title VII cases.[11] Thus, the matter will not be determined by jurors who may be unfamiliar with the special difficulty surrounding the partnership decision and possibly even harbor resentments against professionals who are perceived as earning greater than average incomes. The federal judge who decides the matter, however, most likely spent years as a partner while practicing law, and can be expected to understand. Though it may not enormously comfort law firms, even where such a judge finds discrimination he might exercise discretion by denying injunctive relief to mandate partnership and awarding relief in another form.

(c) Recommendations to Law Firms

Employment law practitioners have long counseled their

---

11. See, e.g., Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975). In race discrimination cases, experienced counsel frequently will marry their Title VII cases to claims under 42 U.S.C. 1981 (for which courts frequently grant jury trials), hoping that the result will be a jury trial for both. At least one court has rejected this ploy, however. See Baker v. City of Detroit, 458 F.Supp. 379, 381 (E.D.Mich. 1978), aff'd, 704 F.2d 878 (6th Cir. 1980), cert. den., _____ U.S. _____, 104 S.Ct. 703, ___ L.Ed.2d____ (1984).

business clients about prophylactic measures for avoiding liabilities and even claims under the discrimination laws, and now attorneys themselves should heed this advice. Because of the likelihood that discrimination claims against them will increase, firms should scrutinize their professional personnel practices, not only for actual fairness but additionally for the ability to establish non-discriminatory treatment of associates, if necessary, in court or before an agency.

Some of this advice will be unpalatable to law firms accustomed to and most comfortable with informal relationships with their professional employees. Indeed, some of it accurately may be deemed to run counter to the genuine interests of associates. For example, in the case of an associate who does not progress so quickly but is believed to have promise, a firm very properly might desire to emphasize strengths during a performance review, even if this distorts the overall message. Complete candor, in these cases, is sacrificed to the perceived greater good in engendering self-confidence. Yet where this is done, the associate may have unrealistic notions about his performance, which could even translate into a claim that performance had never been criticized substantially, so that denial of partnership must have been discriminatory in some fashion.

Law firms should consider both realities -- self-protection and the well-being of its associates -- in deciding upon the practices to be adopted. These suggestions, then, should be read with a clear eye to common sense; but they should be considered.

1. The performance of associates should be reviewed annually or at shorter intervals. The evaluation should be based upon input from more than one partner, and should be set forth in writing. Ideally, from the perspective of self-protection, the associate should receive the written evaluation, but at least it should be reviewed with the person in detail. Especially after the first or second year, clear information should be provided on the possibility of becoming partner. This will serve both to avoid misunderstandings that could mature into claims and to afford the unachieving associate a fair opportunity to join another firm where he might thrive. If the person does move to another office before the denial of partnership, the potential discrimination claim based on the denial will have disappeared.

2. Periodically, the assignments, opportunities for client contact, and levels of responsibility of a firm's various associates should be reviewed thoughtfully. While flexible approaches for providing the best opportunitites for ultimate success to associates of differing abilities and maturation rates need not be discarded altogether, care should be exercised that differences in treatment are perceived as fair.

3. No law firm functions should inherently exclude or be abhorrent to any segment of the firm population because of its sex, race and the like. For example -- and an extreme example at that -- King & Spaulding during the pendency of Ms. Hishon's suit held a weekend outing, where (at least as reported by the Wall Street Journal) some lawyers thought it would be fun to stage a "wet T-shirt contest" for female summer associates. Though this

idea was not implemented, even the bathing suit contest that took its place is surprising. On a more likely level and as another example, firms should avoid situations where most males (partners and associates) gather for regular poker-playing sessions or golfing afternoons. Female associates justifiably may believe that the deprivation of these opportunities for developing relationships with partners may count against them when partnership decisions are made.

4. The most effective safeguard against discrimination claims, of course, is to have members of the minority already included as partners, or at least obviously content and doing well in the law firm. This, of course, is easier for larger law firms with more attorneys.

No doubt there are other useful practices; those suggested here are intended to be beneficial themselves, yet also to provoke consideration that leads to the development of others. To be effective, this consideration need only be perceptive, genuine and fair-minded.