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Hishon v. King & (and) Spalding: Discrimination in Professional Partnerships

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HISHON V. KING & SPALDING: DISCRIMINATION IN PROFESSIONAL PARTNERSHIPS

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INTRODUCTION

In May 1984, the Supreme Court held that Title VII[1] of the Civil Rights Act of 1964 prohibited law firms from discriminating against women and minorities when extending offers of partnership to associates employed by the firm.[2] The ramifications of this decision, *Hishon v. King & Spalding*, will not only affect law firm partnerships but also extend to brokerage houses, accounting and architectural firms, and all other business entities that operate as partnerships or professional corporations. Although, at present, the scope of the decision is unclear, it eventually will be drawn into focus as the courts set the limitations, if any, on civil rights laws governing other aspects of firm management.

I. HISTORICAL NON-PARTICIPATION OF WOMEN AND MINORITIES IN LAW FIRMS

The Court's opinion does not address the limited participation of women and minorities in the legal profession. The historical absence of women and minorities in law firms must be discussed in order to fully understand the remedies which may be formulated to cure the problem.

Hishon's brief to the Supreme Court discussed at length the historical non-participation of women in the legal profession.[3] To illustrate this point, the brief stated that Harvard Law School did not admit women until 1950, Notre Dame Law School, not until 1969, and Washington and Lee Law School, not until 1972.[4] Other statistical data

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1. 42 U.S.C. §§ 2000e-2000e17 (1982). Title VII states in pertinent part:

> It shall be an unlawful employment practice for an employer. . .[t]o 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.

Id. at § 2000e-2(a)(1).

2. Hishon v. King & Spalding, 104 S. Ct. 2229 (1984).

3. Brief for Petitioner at 18-24, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984) [hereinafter cited as Brief for Petitioner].

4. C. EPSTEIN, *Women in Law* 50 (1981). Dean Griswold's comments on the admission of women to Harvard Law School were:

> Women have made a place for themselves in the law, and we now have many women serving with distinction on the bench and at the bar. Women have come a long way since they were first admitted to membership in the American Bar Association in 1918.
>
> Opportunities for women in the law still are limited, however, and the Faculty is well aware that many able men are turned away from our doors every

emphasized that from 1965 to 1980 the number of women graduating from law schools in the United States increased from 367 to 10,754.[5] By 1981, approximately 35% of the students in the nation's law schools were women.[6] A 1982 survey by the *National Law Journal* of 151 large law firms employing approximately 5% of the lawyers in the United States found that thirty-two of those firms had no women partners, 106 had no black partners, and 133 had no Hispanic partners.[7] By 1983, 37.7% of the 127,000 law students were women and 9.3% were members of a minority.[8] Considering the increasing numbers of women and minorities graduating from law schools, the lack of partnerships offered to these two groups may no longer be justified by the lack of qualified candidates.

Future court decisions will, of course, focus upon the facts relating to the particular partnership or professional corporation whose practices are being challenged. Nevertheless, the historical non-participation of women and minorities in a variety of professions cannot be ignored. Particularly for partnerships and professional corporations that have failed to make any apparent effort to alter the white male make-up of their enterprises, it seems likely that the historical data will have significant weight in formulating remedies. If the historical underrepresentation of women and minorities as partners in the nation's law firms continues, these groups will find no incentive to enter the legal profession and past gains will be jeopardized.[9]

II. THE COURT'S DECISION IN *HISHON V. KING & SPALDING*

A. *Facts*

In 1972, following her graduation from Columbia University Law School, Elizabeth A. Hishon accepted an offer of employment with the Atlanta law firm of King & Spalding. She was the second female lawyer hired by the firm in its almost one hundred year history.[10] Hishon alleged in her complaint that she and other new lawyers became associates

year. It is our expectation that we will admit only a small number of unusually qualified women students for the present, at least.

9 HARV. L. REC. No. 2 (Oct. 11, 1949), as cited in 79 HARV. L. REC. No. 3 (Oct. 12, 1984). In the fall of 1983, 33.8% (554 of 1,639) of the undergraduate law students at Harvard Law School were women. Of the graduate and special students, 24.8% (42 of 169) were women. A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 28 (1984).

5. Brief for Petitioner at 20.

6. *Id.*

7. *Id.* at 22 (citing Flaherty, *Women and Minorities: The Gains*, NAT'L L.J., Dec. 20, 1982 at 1, 8-11).

8. A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 70-72 (1984).

9. Brief Amicus Curiae for American Assoc. of Univ. Women at 16-17, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984).

10. The first woman hired by King & Spalding was an honor graduate of the University of Georgia and was employed as an associate in 1944. She was not elevated to the partnership until 1977—thirty-three years after joining the firm. She was the firm's only permanent associate and during that time more than 50 men hired after her were promoted into the partnership. Brief for Petitioner at 21.

with the understanding that they would be considered for partnership on a fair and non-discriminatory basis after five or six years of satisfactory performance.[11] Hishon alleged that she was told that as long as an associate's work was consistently evaluated by the firm as satisfactory, elevation to partner was just a "matter of course."[12] Finally, Ms. Hishon alleged that her annual evaluations were satisfactory and she was never told her work was "unsatisfactory or that she had failed to perform professionally at the expected level to become a partner in the firm."[13] Ms. Hishon was rejected for partnership and subsequently discharged from the firm pursuant to the firm's "up or out" policy. She sued King & Spalding for sex-based discrimination under Title VII. Ms. Hishon sought back pay and compensation for loss of future earnings in lieu of reinstatement and promotion to partnership.[14]

In its answer, King & Spalding alleged that invitations to join a partnership were not an employment practice subject to Title VII.[15] Further, they denied any assurances that Ms. Hishon would become a partner and specifically alleged she was told "of her shortcomings in dealing with clients' business and her inability and unwillingness to develop professional and personal relationships which would make her a full and complete lawyer."[16]

The district court dismissed Ms. Hishon's complaint on the ground that Title VII was inapplicable to the selection of partners by a partnership.[17] A divided panel for the court of appeals affirmed.[18] The Supreme Court granted certiorari[19] to determine whether it was proper to dismiss a Title VII complaint "alleging that a law partnership discriminated against petitioner, a woman lawyer employed as an associate, when it failed to invite her to become a partner."[20] The Supreme Court reversed the lower courts' decisions and held that Ms. Hishon had stated a claim upon which relief could be granted. Upon remand, the case was settled.

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11. Joint Appendix at 8-9, Hishon Complaint, ¶ 8(b), Hishon v. King & Spalding, 104 S. Ct. 2229 (1984).

12. *Id.* at 9, ¶ 8(d).

13. *Id.* at 10, ¶ 11. Because this case was before the Court following a motion to dismiss under FED. R. CIV. P. 12, the Court accepted all of Ms. Hishon's allegations as true. 104 S. Ct. at 2233. Thus, the Court had no occasion to provide the lower courts with any guidance in evaluating the highly subjective criteria involved in partnership decisions.

14. *Id.* at ¶¶ 19, 22, 25. Ms. Hishon also prayed for reasonable attorneys' fees, costs and expenses, and a permanent injunction against further discrimination.

15. Joint Appendix at 27, King & Spalding Answer, Fourth Defense, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984).

16. *Id.* at 33, King & Spalding Answer ¶ 12.

17. 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980). Because the court held that Title VII did not apply to partnerships, Hishon's complaint did not invoke the court's subject matter jurisdiction and was dismissed pursuant to FED. R. CIV. PRO. 12(b)(1). *Id.* at 1307.

18. 678 F.2d 1022 (11th Cir. 1982).

19. 459 U.S. 1169 (1983).

20. 104 S. Ct. at 2232. Before *Hishon*, one court had held that partnership consideration matters were subject to Title VII's prohibitions on national origin and religious discrimination, focusing upon partnerships as an "employment opportunity." Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977).

B. *The Opinion*

The central issue facing the Court was whether consideration for partnership is one of the "terms, conditions or privileges of employment" governed by Title VII. Title VII applies to partnerships[21] but requires a minimum of fifteen employees.[22] King & Spalding met this threshold requirement.

The Court characterized an associate's opportunity to become a partner at King & Spalding as one of the terms, conditions, or privileges of employment governed by Title VII.[23] Hishon alleged that she was induced to join the firm by a promise of consideration for partnership after she served an apprenticeship as an associate.[24] This promise, if established at trial, was a benefit provided in the employment contract. In the alternative, Hishon alleged that, absent a contractual obligation, consideration for partnership was a privilege of the employment relationship that was offered to the associates at King & Spalding.[25] The Court held that contractual benefits and non-contractual privileges may not be "doled out in a discriminatory fashion."[26]

The Court's analytical framework is not new. The cases have long required employers to make all terms, conditions, or privileges of employment available to all employees without regard to race, sex, or national origin.[27] What is new is the Court's broad definition of "privileges" of employment. Admission to partnership in a large law firm is a highly subjective process, only partially dependent upon pure

21. The definition of "person" under Title VII includes partnerships. 42 U.S.C. § 2000e(a).

22. An "employer" is any person with 15 or more employees in 20 or more calendar weeks in the current or preceding year. 42 U.S.C. § 2000e(b).

23. 104 S. Ct. at 2233-34.

24. *Id.* at 2232.

25. *Id.* at 2234-35. *See also* White, *Women in the Law*, 65 MICH. L. REV. 1051, 1106 (1967) ("the prospect of . . . partnership and the added compensation which it is expected to bring can offset other detriments of a job, such as compensation, low beginning pay or undesirable working conditions . . . [so as to] classify the opportunity to compete for a partnership position as one of the 'privileges' of employment of which the Act speaks").

26. 104 S. Ct. at 2234.

27. The starting point was McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court set forth the basic framework for analyzing questions of disparate treatment—the plaintiff must first present a prima facie case of discrimination. This is done by showing: 1) the claimant was a member of a protected class; 2) the claimant applied for and was qualified for a job the employer had available; 3) the claimant, though qualified, was rejected; and, 4) the employer continued to seek to fill the job. *Id.* at 802. The employer must then "articulate some legitimate non-discriminatory reason for the employee's rejection." *Id.* At this point, the burden shifts to the employee who must show that the articulated reason is a mere pretext. *Id.* at 804. Cases arising on a motion to dismiss, as *Hishon*, only deal with the first step in the analysis; whether a prima facie case has been alleged and whether defenses have been raised. Defenses include the inapplicability of Title VII (raised here by King & Spalding) or other defenses not addressed to the merits of the particular plaintiff's claims. Questions as to burden of proof have been litigated extensively. *See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The basic framework set forth in *McDonnell Douglas* has remained and is used, without reference, in *Hishon*.

legal skill.[28] The "privilege" of "consideration for partnership" is not comparable to the move from apprentice to journeyman, or a promotion to another non-management position or a first line supervisor's position. Generally, only a fraction of new associates remain with a firm to become partner. When this is coupled with the burgeoning exceptions to the employment-at-will doctrine, the potential implications for all employers become inestimable.[29]

Employers are free to provide or withdraw particular employment benefits absent some express or implied contract.[30] However, although a particular benefit may not be a right of employment, it may qualify as a "privilege" of employment subject to the requirements of Title VII.[31]

The Court emphasized the allegations in Ms. Hishon's complaint supporting the conclusion that "the opportunity to become a partner was part and parcel of an associate's status as an employee at [King & Spalding]."[32] These allegations included the following: (1) associates could regularly be expected to be considered for partnership while lawyers outside the firm were not routinely considered; (2) the prospect for ultimate partnership was used to induce young lawyers to begin working at King & Spalding; and (3) associates' employment was terminated if they were not elected to the partnership.[33] The Court concluded that these allegations, if proved at trial, would be sufficient to establish that partnership consideration was a privilege of employment and must occur without regard to sex.[34]

The Court rejected the arguments of King & Spalding in fairly short order. The first and strongest argument advanced by King & Spalding was that the issue of consideration for partnership was beyond the purview of Title VII because elevation to partnership involves a change in status from an "employee" to an "employer." The Court accepted for the sake of argument that "a partnership invitation is not itself an offer of employment,"[35] but concluded that Title VII applies nevertheless. The Court stated:

> The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition

28. *See generally* Lynch, *How Law Firms Select Partners*, 70 A.B.A.J. 65 (Oct. 1984) (law firms select partners through a process that weighs objective and subjective factors).

29. In footnote six of *Hishon*, Chief Justice Burger implies that Ms. Hishon's employment contract might have "afford[ed] a basis for an implied condition that the ultimate decision would be fairly made on the merits." *Hishon*, 104 S. Ct. at 2233 n.6. The third count of Ms. Hishon's complaint alleged breach of contract under Georgia law, pleading pendent jurisdiction over that claim. Joint Appendix at 7, 16-17, Hishon Complaint ¶¶ 3, 23-25, *Hishon*, 104 S. Ct. at 2229 (1984). State employment-at-will exceptions are beyond the scope of this article. Such state law claims may offer a fertile field for litigation of these issues.

30. 104 S. Ct. at 2234.

31. *Id.* "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 2234-35.

35. *Id.* at 2235.

> or privilege *of* employment. It is also of no consequence that employment as an associate necessarily ends when an associate becomes a partner. A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship.[36]

The second argument raised by King & Spalding was that Title VII categorically preempts partnership decisions from review. There is no direct support for this in the legislative history, and the Court refused to find such a broad exception.[37]

King & Spalding's third argument was that applying Title VII to partnership decisions would infringe upon the constitutional rights of expression or association of the King & Spalding partners. The Court acknowledged the distinctive role of lawyers in society, but rejected the notion that invidious private discrimination could be given affirmative constitutional protection.[38]

Justice Powell filed a separate concurrence. He stated that the relationship among partners was not subject to Title VII and that the Court's decision "should not be read as extending Title VII to the management of a law firm by its partners."[39] In footnote three of his concurrence, he includes such factors as participation in profits or other compensation, work assignments, bar association, civic or political activities, acceptance of new clients and a number of other matters as law firm management issues not subject to Title VII.[40]

Before discussing the issues left unresolved by *Hishon*, it is important to underscore the undisputed scope of the decision. It must be remembered that Title VII applies not only to sex discrimination, but also to discrimination on the basis of race, color, religion, and national origin.[41] Additionally, the fact that a law firm, accounting firm, architectural firm, brokerage house, medical practice group, or other entity may be organized as a professional corporation rather than a partnership is unlikely to be of any significance.[42] If a member of a protected class can plead and prove that he or she received promises such as those described by the Court, variations in business organization will not, and should not, alter the result.[43] Thus, any group of professionals with fifteen or more nonpartner employees must make its decision to promote an employee to partner[44] without regard to race, color, religion, sex, or national origin.[45]

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36. *Id.* (emphasis in original).

37. *Id.* "When Congress wanted to grant an employer complete immunity, it expressly did so." *Id.*

38. *Id.*

39. *Id.* at 2236.

40. *Id.* at n.3.

41. 42 U.S.C. § 2000e-2(a) (1982).

42. *Contra* Panker & Davin, *Law Partnership Decisions after* Hishon v. King & Spalding, 30 PRAC. LAW., July 15, 1984, at 27, 29-30.

43. EEOC v. Dowd & Dowd, 736 F.2d 1177 (7th Cir. 1984).

44. The term "partner" is used throughout to include members of a partnership and shareholders in a professional corporation.

45. Technically this overstates the *Hishon* holding. A prospective employer would be

III. KEY ISSUES UNRESOLVED BY *HISHON*

The remaining issues to be resolved by the courts are whether partnerships with fewer than fifteen employees will be affected by the *Hishon* ruling and whether management decisions other than decisions regarding elevation to partner will be precluded from review as suggested in Justice Powell's concurring opinion. A third unresolved issue is the type of remedies available to litigants in a *Hishon* type dispute.

A. *Size of Firms Affected by* Hishon

Title VII expressly regulates entities having fifteen or more employees.[46] At the time the *Hishon* suit was filed, King & Spalding employed over fifty partners, approximately fifty associates, plus an unstated number of staff people. Clearly, the Court was dealing with a large organization that easily satisfied the threshold requirement of Title VII. In addition, the Court rejected King & Spalding's argument that subjecting questions of partnership to Title VII prohibitions would infringe on the firm's right of association.[47] The Court refused to provide "affirmative constitutional protections" to discriminatory employment practices masquerading as an exercise of freedom of association.[48] In so doing, the court prevented other organizations from justifying discriminatory practices on the basis of the right to associate.[49] Consequently, all entities within the purview of Title VII are within the mandate of *Hishon*.

1. Partners Counted as Employees or Employers Under Title VII

The *Hishon* Court did not address whether partners in a particular organization should be counted as employees for Title VII purposes. The Court stated "even if respondent is correct that a partnership invitation is not itself an offer of employment" Title VII is still applicable.[50] The Seventh Circuit Court of Appeals has held that shareholders (partners) in a professional corporation should not be considered employees.[51] Consequently, the defendant law firm in that case had fewer than fifteen employees and was outside the purview of Title VII. By treating

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free to refuse to state, and in fact could specifically negate, promises regarding consideration for partnership and progress within the firm. As a practical matter, however, one would expect that representations such as those highlighted by the Supreme Court will continue to be made on a regular basis. Failure to do that could have a significant impact upon a firm's ability to recruit new professional employees.

46. *See supra* note 22.

47. 104 S. Ct. at 2235.

48. *Id.*

49. For a later Supreme Court decision rejecting freedom of association as justification for discriminatory policies toward the admission of women in male-only organizations, see Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) (discussed *infra* notes 62-72 and accompanying text).

50. 104 S. Ct. at 2235.

51. EEOC v. Dowd & Dowd, 736 F.2d 1177 (7th Cir. 1984). *See also* Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) (partners in accounting firm held not to be "employees" under Title VII).

an offer of partnership as an offer of employment both the issue of counting partners as employees and the available remedies will be affected.

The issue of whether partners are counted as employees under Title VII is important in light of the fact that many state civil rights statutes often have lower jurisdictional requirements than Title VII.[52] Most state civil rights statutes encompass the protections of Title VII, and many also prohibit discrimination on the basis of age and handicap.[53] The issue thus becomes whether there is some minimal size partnership or professional corporation which the courts may choose as a matter of policy not to regulate, or alternatively, to narrowly prescribe remedies available to claimants against small enterprises.

The brief filed with the Supreme Court on behalf of King & Spalding emphasizes the unique ethical and practical aspects of lawyer advocacy. Arguments presented include contentions that "lawyers are entitled to the highest degree of associational freedom," that "the independence of the bar is essential," and that applying Title VII to partnership decisions "necessarily would intrude on lawyer-client confidentiality."[54] Justice Powell's concurrence implicitly adopts these notions, although to a lesser degree, stating that "[t]he relationship among law partners differs markedly from that between employer and employee."[55]

In contrast, petitioner argued that law partnerships, at least those the size of King & Spalding, are "big business" and should be regulated

52. Of the states constituting the Tenth Circuit, Colorado, Kansas, New Mexico, and Wyoming have statutes prohibiting discrimination by employers with fewer than fifteen employees. *See* COLO. REV. STAT. § 24-34-401(3) (two or more employees); KAN. STAT. ANN. § 44-1002(b) (four or more employees); N.M. STAT. ANN. § 28-1-2(B) (four or more employees); WYO. STAT. § 27-9-102 (two or more employees). *But see* OKLA. STAT. ANN. § 25-1301 (fifteen or more employees); UTAH CODE ANN. § 34-35-2(5) (twenty-five or more employees).

53. *See, e.g.*, COLO. REV. STAT. § 24-34-402 (prohibiting discrimination based on handicap, race, color, creed, sex, national origin, or ancestry); KAN. STAT. ANN. § 44-1009 (prohibiting discrimination based on race, religion, color, sex, physical handicap, national origin, or ancestry); N.M. STAT. ANN. § 28-1-7 (prohibiting discrimination based on race, age, religion, color, national origin, ancestry, sex, or physical or mental handicap); OKLA. STAT. ANN. § 25-1302 (prohibiting discrimination based on race, color, religion, sex, national origin, or handicap); UTAH CODE ANN. § 34-35-6 (prohibiting discrimination based on race, color, sex, age, religion, ancestry, national origin, or handicap); WYO. STAT. § 27-9-105 (prohibiting discrimination based on age, sex, race, color, creed, national origin, or ancestry). Colorado has a misdemeanor statute prohibiting age discrimination against persons between the ages of 18 and 60. COLO. REV. STAT. § 8-2-116. One judge has interpreted this statute as allowing an implied right of private action. Rawson v. Sears Roebuck & Co., 530 F. Supp. 776 (D. Colo. 1982) (Kane, J.). Colorado appellate courts have yet to address the issue. *But see* Silverstein v. Sisters of Charity of Leavenworth Health Services Corp., 38 Colo. App. 286, 559 P.2d 716 (1976) (no civil action for damages for violating state statute prohibiting employment discrimination against physically handicapped), *rev'd in part on other grounds*, 43 Colo. App. 446, 614 P.2d 891 (1980). *Accord* Holter v. Moore & Co., 681 P.2d 962, 965 (Colo. App. 1984) ("Where a statute creates legal duties and provides a particular means of enforcement, the designated remedy is exclusive and courts are without authority to impose others.").

54. Brief for Respondents at 17, 21, 24, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984) [hereinafter cited as Brief for Respondents].

55. 104 S. Ct. at 2236.

as such.[56] Arguments advanced by petitioner included the claim that whether someone is designated a "partner" or "employee" of the firm should be of no moment; the focus should be upon the economic realities of the arrangement.[57] Further, petitioner argued that a law partnership the size of King & Spalding is a separate entity which should be considered the "employer" of a partner for Title VII purposes and that having an "ownership" interest in firm assets or being paid from "profits" should not alter the primary view of the arrangement as one of employment.[58] The Court did not need to address these arguments because King & Spalding met the threshold employee requirement regardless of the number of partners. These arguments undoubtedly will be repeated in future cases.

The broad policy question remains: Will *Hishon* extend to partnerships with fewer than fifteen employees? One indication as to the direction the Court may take to answer this question is the interpretation of section 1981 of the Civil Rights Act.[59] Section 1981 contains no jurisdictional size requirement. While discussing the ramifications of this federal anti-discrimination statute, one commentator has stated:

> It is unlikely, however, that § 1981 would be construed to cover extremely small and personal private employment relationships such as baby sitters and live-in caretakers. The Supreme Court, while hinting that 'truly private' associations would be exempt from coverage under §§ 1981 and 1982, has consistently skirted the issue.[60]

At some point, federal courts, and probably state courts, will be required to determine the extent to which smaller business relationships might be exempted from regulation by the discrimination laws.

2. Jurisdictional Size Requirements Under State Law

A key factor in determining whether a partnership containing fewer than fifteen employees will be subject to anti-discrimination prohibitions may be whether the regulator is proceeding under federal or state law. The reason is two-fold: first, many states require fewer than fifteen em-

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56. Brief for Petitioners at 15-18. Petitioners noted that in 1980, King & Spalding had more total lawyers (102) than 98% of all businesses had employees in the United States. Counting only the 50-plus associate lawyers, King & Spalding still had more employees than 77% of the businesses in the United States subject to Title VII. *Id.* at 17-18.

57. *Id.* at 27-30.

58. *Id.* at 31-41.

59. 42 U.S.C. § 1981 (1982). This section provides equal rights under the law and states in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by White citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

Id.

60. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 n.11 (2d Ed. 1983).

ployees under their own civil rights statutes;[61] and second, the federal courts seem willing to allow the states broad latitude in regulating economic relationships. The decision of the Supreme Court in *Roberts v. United States Jaycees*,[62] decided one month after *Hishon*, is instructive in this regard.

The *Jaycees* case involved the issue of whether the Minnesota Human Rights Act could be applied to strike down the males-only membership provisions of the United States Jaycees' bylaws. The Court, in striking down these provisions, categorized freedom of association cases as involving either "intimate association" or "expressive association."[63] The Court dichotomized the right of association as comprising the right of each individual to keep certain personal relationships free from governmental interference, and the right of all individuals to organize into groups for political, economic, religious, and social purposes. Relationships entitled to constitutional protection as intimate associations involve primarily family matters such as marriage, contraception, and childrearing.[64]

The right to associate for expressive purposes is no more absolute[65] than the expressed first amendment freedoms of speech, press, and assembly. The freedom of group life is always subject to some degree of regulation in the public interest. An infringement on associational interests "unrelated to the suppression of ideas" which serves a compelling state interest and "cannot be achieved through means significantly less restrictive of associational freedoms" is allowable.[66] The *Jaycees* Court cited *Hishon* as an example of the failure to establish "any serious burdens on the male members' freedom of expressive association."[67]

Applying the majority's approach, it seems unlikely that a private law firm of any size could make a constitutional challenge to state statutes regulating its employment or partnership practices. Thus, regardless of whether Section 1981 might be construed as inapplicable to "extremely small" business relationships, state law is unlikely to be overturned on federal constitutional grounds for regulating such arrangements.

Justice O'Connor in her *Jaycees* concurrence defines the Jaycees organization as a commercial enterprise subject to minimal constitutional protection.[68] She states:

> It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective

61. *See supra* note 52 and accompanying text.
62. 104 S. Ct. 3244 (1984).
63. *Id.* at 3249-50.
64. *Id.* at 3250.
65. *Id.* at 3252.
66. *Id.* at 3252 (citations omitted).
67. *Id.* at 3254.
68. *Id.* at 3258.

> voice that otherwise would be heard. An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy . . . .[69]

Justice O'Connor recognized that the first amendment protects some, but not all lawyering activity.[70] The practice of law for commercial ends is not accorded such protection.[71] "[N]o First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association."[72] Few lawyers are likely to argue that the primary reason for their organization is expression of ideas on matters of public affairs.

It seems highly unlikely that any federal constitutional prohibitions would limit a state's efforts to prohibit discriminatory practices in law firms or other commercial enterprises. Likewise, one would not anticipate that efforts to apply existing federal legislation to those practices would run afoul of the Constitution. Questions of size should do little to prevent an organization from having allegedly discriminatory practices scrutinized. As discussed below, however, size could have a significant impact on issues as to remedies.

B. *Impact on Internal Management Decisions*

Justice Powell's *Hishon* concurrence clearly states his view that once admitted to a partnership, a member of a protected class has no claim under Title VII for discriminatory decisionmaking in compensation, assignment of work, and a variety of other matters.[73] This concurrence poses what potentially will be the most difficult issue to arise from *Hishon*; will courts interfere with operating decisions, and if so, to what extent.

A recent survey has found that the largest law firm in the country has 704 lawyers, including 428 associates, and that 202 firms have 100 or more lawyers.[74] While the survey does include legal assistants employed by those firms it does not include staff members. Accounting and brokerage firms are frequently at least as large. It is difficult to argue that each professional's interests in preserving his independence should allow him to operate his businesses using discriminatory criteria, particularly in organizations of this magnitude.

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69. *Id.* at 3259.

70. *Id.* at 3260. "Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* (citations omitted).

71. *Id.* at 3260-61. "As a commercial enterprise, the law firm [of King & Spalding] could claim no First Amendment immunity from employment discrimination laws. . . ." *Id.*

72. *Id.*

73. 104 S. Ct. at 2236. By implication, this rationale could also be applied to 42 U.S.C. § 1981 and age discrimination.

74. Tarr, *The NLJ 250*, NAT'L L.J., Sept. 24, 1984 at 9 (special supplement). The survey listed King & Spalding as the 108th largest law firm in the United States with 145 total lawyers, 80 of them associates. *Id.* at 12.

Individuals in a business organization of 100 or more professionals may not even see each other for days. They may never have to work closely with a majority of their co-workers during their careers, depending upon their particular specialties and the organization of the business. Certainly partners will be deeply interested in the integrity of the prospective partner, the economic value to the firm of the prospective partner, and the skill, expertise and leadership abilities of the prospective partner.[75] The partnership admission process, while involving a review of some objective data such as time with the firm and production of income, also encompasses a number of intangible factors such as personal integrity and loyalty to the firm.[76] Nonetheless, the notion that business organizations of this magnitude have some associational right to exclude individuals on the basis of their membership in a class protected by Title VII has been rejected by the Supreme Court and should be rejected by society as a whole.

Whether the courts will adopt Justice Powell's approach is uncertain. Given the intangibles involved in compensation, case assignment, and overall assessment of any particular partner's value to a business organization, any effort to invalidate such decisions must proceed with care. It should be apparent that fashioning a remedy will be difficult; however, courts have not viewed that as a basis for denying relief.

Courts have looked to the economic realities of a work setting in resolving other issues of discrimination. In a thorough discussion of the law under Title VII, the Third Circuit[77] recently applied the hybrid "right to control/economic realities" test of Title VII[78] to an age discrimination claim to determine whether plaintiffs were employees for the purposes of the Age Discrimination in Employment Act.[79] The court noted that this test looks at the economic realities of the business, "but focuses upon the employer's right to control the employee as the most important factor in determining employee status."[80] This test combines the common law principles of agency—the right of the employer to control the employee—and the "degree of economic dependence" of the employees on the business itself.[81] The court noted

75. For one lawyer's perspective on these issues, see Lynch, *supra* note 31.

76. *Id.* at 65-66.

77. *See* E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983).

78. Two different standards developed to determine an individual's status as an employee. First, the "right to control" test, which was based on the common law principles of agency, determined the status of employees by the degree of control over the individual exercised by the employer. An individual was held to be an employee if the employer determined not only what work was to be performed but also how it was to be performed. Second, the "economic realities" test developed as a result of the limited nature of the common law test. It recognized other factors, such as opportunities for profit and loss and investment in facilities, as important when determining whether an individual was an employee for purposes of social legislation. A narrower hybrid test, combining the common law "right to control" standard and the "economic realities" standard, was applied to determine status for purposes of Title VII. For a more complete discussion of the development of these tests, see *id.* at 36-38.

79. 29 U.S.C. § 623(a)(1) (1982).

80. 713 F.2d at 37 (citation omitted).

81. *Id.*

eleven other factors for consideration under this hybrid test, including the occupation of the individual, degree of supervision or control, manner of payment, method of terminating the relationship, annual leave afforded, and integration of the employee's work into the overall enterprise.[82] If this analysis is applied to professional partnerships, one would expect that at least some would be treated as employers with individual partners being treated as employees for Title VII purposes.

At some point, it would certainly seem that a law or other partnership could organize itself in such a way that its management decisions might be subject to Title VII. The larger the enterprise, and the fewer the individuals who are involved in the decisionmaking/management process, the stronger the argument for Title VII oversight becomes. These entities do not publish their partnership agreements or management manuals; it is thus not possible to make comparisons or generalizations as to management structures. To the extent management decisions are centralized and the latitude of individual partners reduced, as seems to occur in the larger organizations, the considerations would have a substantial impact on the vitality of Justice Powell's interpretation.

At the other end of the size spectrum, it must be asked whether state law or Section 1981 should be construed to require a partnership of two professionals with three professional and two non-professional employees to admit one of the professional employees into their partnership. It is difficult to assess in the abstract where such a line might be drawn. Few, if any, would attempt to justify discrimination. It does seem, however, that at some point the shared management arrangement of a law firm, accounting firm, or other enterprise becomes sufficiently small that serious questions must be answered before federal or state statutes are construed to restrict decisionmaking as to the admission of individuals into the ownership and operation of a small business.[83]

If Justice Powell's approach is ultimately followed by the courts, one would have to ask whether there would be any real significance to *Hishon* at all. Decisions relating to compensation, acceptance, and assignment of work, and approval of commitments in bar association, civic, or political activities, have a major impact upon the value of membership in a

82. *Id.*

83. This issue may prove to be more theoretical than real. Smaller law firms seem to be more ad hoc in their hiring and other practices than larger law firms. A firm which interviews applicants at a number of law schools during the "fall season" will be far more likely to do the bulk of its hiring at a particular time and in turn have more formalized practices in the progress to partnership. Failure to follow standard operating procedures may present a problem for the large firm in defending a claim of discrimination. A smaller firm which has fewer formalized policies or practices may be able to justify variations in approach more readily. Additionally, a smaller law or accounting firm will more closely approximate the collegial environment, alluded to by King & Spalding in their brief to the Supreme Court, and by Justice Powell in his concurrence. In such a setting it seems unlikely that a "bad marriage" would be entered into or continued for long, if there were serious conflicts or an obvious potential for them, whether based upon protected class status, personalities, political views, work habits, or anything else.

business partnership.[84] If one assumes that a partnership or professional corporation wishes to discriminate, then under the approach suggested by Justice Powell, all that would be necessary is to admit protected individuals into the business, give them nothing to do, and pay them nothing for it. It seems doubtful that courts would ignore the reality of such an egregious arrangement, or some other subtler effort at discrimination.

The better approach would be to continue following jurisdictional size requirements of the state or federal statute being applied. Depending upon the size of the particular partnership, it may be necessary to review "right to control/economic realities" questions as to firm operation to determine whether the organization has enough employees for jurisdiction to be asserted. If jurisdiction and liability are found, questions of control and economic realities should be reevaluated to determine what remedies may be appropriate.

C. *Rejection of Justice Powell's Concurrence*

The *Hishon* decision mandates no specific remedy if discrimination is proved.

One can fairly ask whether it is appropriate for a court to direct admission of an unwanted partner into a partnership rather than order a monetary remedy. There is no real basis in theory or in the statute for treating professionals' businesses differently from other enterprises. However, the practical problems of directing partnership admission with the myriad of future issues regarding compensation, client responsibility, and management of the operation, which may all present future problems requiring subsequent judicial action, certainly suggest a monetary remedy rather than injunctive relief. As described above, current case law provides a framework for regulating internal partnership decisions on these matters, depending upon how the partnership is organized and operated. There is no good rationale for carving out blanket, special exceptions from these rules for lawyers or other professionals. Nevertheless, one would expect that great care would be utilized before significantly altering management decisions. An individual's value to an enterprise cannot really be judged by a mechanical formula. Further, economic realities are such that not everyone makes it to partnership in any given organization.[85] Certain hard data such as hours worked and

84. These are the categories of decisions Justice Powell specifically stated he would not review. 104 S. Ct. at 2236 n.3.

85. One court has stated:

> [Plaintiff] is in no way different from hundreds of others who find that they have to make adjustments in life when the opening desired by them does not open. This situation is not confined to medical schools. Of a hypothetical twenty equally brilliant law school graduates in a law office, one is selected to become a partner. Extensive discovery would reveal that the other nineteen were almost equally well qualified. Fifty junior bank officers aspire to become a vice president—one is selected. And, of course, even judges are plagued by the difficulty of decision in selecting law clerks out of the many equally well qualified.

Faro v. New York Univ., 502 F.2d 1229, 1232 (2d Cir. 1974).

dollars of income generated through work performed and work generated by the individual can lead to tangible numbers. Other factors such as management of the business and participation in a wide range of professional and civic activities become quite difficult to assess. Firms, as well as individuals within firms, vary widely in valuing these matters. The Supreme Court has long taken the position that courts are not well suited to second-guess or modify business judgments,[86] and one would expect the courts to proceed with even greater care in this area. Where violations of the discrimination laws have occurred, the courts should act to remedy the violation as best they can. The subjective nature of these internal decisions mandates the utmost care in formulating a remedy.[87]

Remedies must obviously vary with the facts of the particular case. However, it is possible to suggest a potential framework for analysis in dealing with issues of relief.

As a broad statement of the law, Justice Powell's suggested blanket prohibition of review of internal partnership management decisions should be rejected. Courts in the past have not hesitated to review decisions of management where questions of discrimination are raised. Reviewing compensation or work assignment decisions, especially of partners, is certainly fraught with difficulty. Courts have evaluated these issues in assessing claims of discrimination by management employees against large corporations, and there is no logical basis for distinguishing lawyers in this setting from a large corporate employer. Of course, willingness to modify such management decisions should vary, depending upon whether the entity has 250 or more professionals as opposed to fifteen or twenty professionals, and the degree to which decisionmaking is centralized within a particular organization. Size and management structure should take on added importance in the setting of professional partnerships. Ultimately, however, these are questions for the equitable discretion of the court, not questions to resolve on the basis of a broad hands-off policy.

Any review of management decisions made by professional organizations will be difficult. This is true whether the decision involves evaluations of progress, admission to partnership, or operation of a partnership. Since the Supreme Court has initially determined that consideration for partnership is a proper subject for Title VII review, it

86. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Id.* at 568.

87. An apt analogy for the courts may prove to be teacher tenure cases. *See, e.g.*, Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984); Lynn v. Regents Univ. of Cal., 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982). Courts have approached University tenure cases with care, noting the multitude of subjective factors involved in such consideration. Tenure decisions are often made at a departmental level without either the competitive or economic factors potentially involved in a partnership decision. Ultimately, the range of subjective factors involved in a tenure decision or a partnership decision are probably comparable. A pivotal distinction for the tenure cases may well be the size difference between a single department at a university and a multi-state law firm.

seems likely that partnership management decisions, at least in larger enterprises, will also be reviewed. Outcome will vary depending upon the size of the firm and its management structure. The fewer the number of people who are involved in making a particular decision, the greater the likelihood that the decision will be the subject of judicial review. There is little basis in the cases for adopting Justice Powell's suggested blanket prohibition of review of internal partnership management decisions, particularly when to do so would allow those intending to discriminate to render *Hishon's* holding a nullity.

IV. Suggestions for Law Firm Management

Law firms must now take to heart the advice their labor lawyers have been giving clients for years—review and upgrade management policies and practices relating to hiring and promotion of professional employees. Recruiting practices should be reviewed to determine what kinds of things are being said and done in order to attract new associates. This could have an impact not only on defense of discrimination claims but also on possible claims for breach of implied contract and other theories which are exceptions to the employment-at-will doctrine.

Training and evaluation policies should also be examined. While evaluation criteria for professionals are more amorphous than for technical employees, efforts should be made both to formalize training and to develop plans which advise professional employees of their progress. This makes sense both in terms of Title VII compliance and in terms of the substantial economic investment firms make in their professional employees.

Serious consideration should be given to written reviews or evaluations. It is unclear from the record in *Hishon* exactly what messages, if any, were communicated to Ms. Hishon. It does not appear that any written evaluation was given Ms. Hishon. The young lawyer may not get the message which may well be conveyed in ambiguous, easily misinterpreted terms. Certainly, this is not an uncommon phenomenon.

Some might argue that a written evaluation is in some way contrary to the professional status of lawyers, accountants, brokers, or other individuals. Yet, if there is no written evaluation, it becomes very difficult to reconstruct what was said in the evaluation process. Additionally, a written evaluation has the advantage of forcing managers as well as professional employees to confront directly the progress toward partnership and the plusses and minuses of an individual's performance.

While for many years they were collegial, intimate groups, organizations of professionals are increasingly becoming large business enterprises. They should review and upgrade their employment practices, both because it is good management and because it will assist in defending claims of improper treatment. Failure to do so may rebound to their detriment in the event of discrimination or wrongful discharge litigation.

V. CONCLUSION

Professional partnerships and corporations are now subject to Title VII jurisdiction, at least to the extent of following nondiscriminatory criteria in making partnership admission decisions. It seems likely, as well, that judicial oversight will extend to internal partnership decisions in at least some of the larger organizations, depending upon the degree of centralization of management and the nature of the particular enterprise's decisionmaking processes.