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Up or Out and Into The Supreme Court: A Forecast for *Hishon v. King and Spalding*

The author presents an extensive analysis of Title VII in an effort to forecast the forthcoming Supreme Court decision of Hishon v. King and Spalding. Included are the issues presented to the Court, the legislative history of Title VII, the Eleventh Circuit Court of Appeals' decision, and a historical inquiry of the applicable decisions of the Burger Court. Although the outcome of the case has yet to be decided, the author's informed prediction will guide commentaries in the future.

I. INTRODUCTION

In 1972, Elizabeth Hishon graduated from Columbia Law School with honors¹ and joined the prestigious Atlanta law firm of King and Spalding.² Seven-and-one-half years later Ms. Hishon was discharged from her position as the result of the firm's decision not to invite her into the partnership. King and Spalding follows a policy of "up or out." That is to say, if an associate is not invited into the partnership after six years, that associate must seek new employment. Ms. Hishon filed a claim with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964³ charging that her termination and the de-

1. II MARTINDALE-HUBBELL, LAW DIRECTORY 556, 1762B (1984).

2. King and Spalding is a large Atlanta law firm which operates as a general partnership. The partnership consists of approximately 60 active lawyers and employs approximately 60 additional lawyers as associates. The firm was founded in 1885, and has employed Griffen Bell, former U.S. Attorney General, Charles Kirbo, key consultant to President Carter, and Jack Weston, President Carter's White House Chief of Staff. *Id.* at 1728B-1735B.

3. Title VII of the 1964 Civil Rights Act has been codified in 42 U.S.C. § 2000e-2000e-17 (1976 & Supp. V 1981). 42 U.S.C. § 2000e-2(a) (1976) states:

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.

Id. To file a claim under Title VII, a private party must first file a charge with the Equal Employment Opportunity Commission (EEOC) (or a charge may be filed on the party's behalf). 42 U.S.C. §§ 2000e-4, 2000e-5(b) (1976). A commissioner of the EEOC may also file a charge. *Id.* at §§ 2000e-4(b), 2000e-5(b) (1976). The

nial of partnership were the result of the firm's discrimination on the basis of gender.⁴ The EEOC issued a Notice of Right to Sue and a complaint was filed in district court.⁵ The district court dismissed the case for lack of subject matter jurisdiction and the dismissal was upheld by the Court of Appeals for the Eleventh Circuit.⁶ The lower courts concluded that Title VII is not so broad as to include partnership decisions.⁷ A writ of certiorari was granted by the Supreme Court on January 24, 1983.

Although gender discrimination in the legal profession is not the overt issue to be decided, there is little doubt that the final determination of the applicability of Title VII to partnership decisions will significantly affect women and other minority attorneys.⁸ As testimony to the potential impact of the decision, several amicus curiae briefs have been filed, including briefs by the Women's Bar Associations of Illinois and New York, the Solicitor General on behalf of the United States, and the Equal Employment Opportunity Commission.

In an effort to forecast the forthcoming Supreme Court decision, the author's analysis of the *Hishon v. King and Spalding* action will include an historical perspective of Title VII, a dissection of the Eleventh Circuit Court's opinion suggesting those issues that will be most persuasive, and an analysis of the legislative history used by the court. A prediction will also be presented by the author. This prediction will take into account all of these factors, as well as some features of the Burger Court which may influence the decision.

II. FACTS

When Elizabeth Hishon received an associate position with King and Spalding, the firm anticipated that partnership status

EEOC is then mandated to investigate the charge and it may inquire into any matter arising from a reasonable investigation of the charge. *See* EEOC v. Bailey Co., 563 F.2d 439, 446 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978). After making a determination of reasonable cause the commission must attempt to initiate voluntary compliance before initiating a law suit. 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1) (1976). Subpoenas may be issued, *id.* at § 2000e-9 (citing 29 U.S.C. § 161 (1976)); client files may be taken and examined, 42 U.S.C. § 2000e-8(a); and clients may be called to testify about the lawyer in question, *id.* at § 2000e-9 (citing 29 U.S.C. § 161 (1976)).

4. *Hishon v. King and Spalding*, 678 F.2d 1022, 1024-25 (11th Cir. 1982).

5. *Id.* at 1025.

6. *Hishon v. King and Spalding*, 24 Fair Empl. Prac. Cas. (BNA) 1303, 1307 (N.D. Ga. 1980), *aff'd*, 678 F.2d 1022 (11th Cir. 1982). *See infra* notes 13-22 and accompanying text.

7. 678 F.2d at 1028.

8. Amicus Curiae Brief for the Women's Bar Associations of Illinois and New York at 2, *Hishon v. King and Spalding*, 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

could be achieved within six years.⁹ If an associate was not promoted, it was understood that he or she could remain with the firm until another position was secured elsewhere.¹⁰ In May 1978, Hishon became eligible for partner status, but she was not invited into the partnership. She asked the partners to reconsider their decision; but when they did not, she left the firm.¹¹

After she received permission from the EEOC to file suit, Hishon filed a complaint in district court alleging three causes of action.¹² Count one alleged numerous violations of Title VII,¹³ count two alleged a violation of the Equal Pay Act,¹⁴ and count three alleged a breach of contract.¹⁵ King and Spalding filed a motion to dismiss on the ground that a partnership selection decision is not subject to Title VII restrictions.¹⁶ The district court agreed with King and Spalding and dismissed the case for lack of subject matter jurisdiction. It specifically held that a partnership decision is protected by the constitutional right of freedom of as-

9. 678 F.2d at 1024.

10. *Id.*

11. *Id.*

12. *Id.* at 1024-25.

13. Hishon alleged that the firm violated Title VII as follows:

(1) refusing to promote her to partner on or after May 25, 1979; (2) freezing her salary on or after Jan. 1, 1979; (3) discharging her as an employee as of Dec. 31, 1979 and drawing a settlement offer in retaliation of her filing a claim with the Equal Employment Opportunity Commission; (4) discriminating against her in work assignments during her term as an associate; (5) refusing to evaluate her performance in the same manner as the firm evaluated the performance of the firm's male associates.

Comment, *Applicability of Title VII to the Partnership Selection Process*, 34 *MERCER L. REV.* 1579, 1582 n.24 (1983) (citing plaintiff's complaint at 6-7, *Hishon v. King and Spalding*, 24 *Fair Empl. Prac. Cas. (BNA)* 1303 (N.D. Ga. 1980), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983)).

14. 29 U.S.C. § 206(d)(1) (1976) provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, [t]hat an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Id. (emphasis in original).

15. 678 F.2d at 1025.

16. 24 *Fair Empl. Prac. Cas.* at 1303.

sociation.¹⁷ The court analogized the professional partnership to a marriage¹⁸ and further stated it was unable to find any clear, congressional intent to apply Title VII to partnership decisions.¹⁹

The Court of Appeals for the Eleventh Circuit affirmed the district court's decision.²⁰ Although the district court considered only the jurisdictional issue of Title VII,²¹ Hishon proposed three bases upon which the court should have found jurisdiction:

- (1) partners at King and Spalding are equivalent to "employees" of a corporation thereby establishing the employment context for Title VII's application;
- (2) elevation to partnership is an "employment opportunity" or a "term condition or privilege of employment" protected by Title VII; and
- (3) termination of employment as a result of failure to make partner falls within the ambit of an unlawful discharge prohibited by Title VII.²²

III. HISTORY

A. Title VII — Broad and Narrow

The roots of Title VII are embedded in a nineteen-year history in which literally hundreds of cases have attempted to clarify and interpret its provisions. For the purposes of this analysis, this section will focus on the interpretation of which groups or classes of people have historically been encompassed by the statute. An examination of this part of the history of Title VII will most likely be viewed by the Supreme Court in the context of its recent conclusion that "Title VII is a *broad* remedial measure, designed to 'assure equality of employment opportunities.'"²³ Further, the

17. *Id.* at 1306-07.

18. The district court's analogy was expressed in the following manner:

In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a "business marriage" for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring out not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for enforcement of shotgun weddings.

Id. at 1304-05.

19. *Id.* at 1304.

20. 678 F.2d at 1030.

21. In a letter dated January 18, 1982, counsel for King and Spalding informed the court that all parties had expressly agreed with the district court to limit its ruling to the threshold jurisdictional issue. *Id.* at 1025 n.4.

22. *Id.* at 1026.

23. *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (quoting *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 800 (1973) (emphasis added)).

Act was designed to bar not only overt employment discrimination, "but also practices that are fair in form, but discriminatory in operation."²⁴ "Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group."²⁵

In spite of the Court's interpretation of a broad base, Title VII and other antidiscrimination legislation explicitly exempt certain "intimate relationships" from regulation.²⁶ This congressional concern for intimacy falls into two basic types of exemptions. The first precludes application where less than a minimum number of employees, patrons, boarders, or neighbors are involved.²⁷ The

24. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). *Griggs* is a seminal case dealing with disparate impact under Title VII. The Duke Power Company required employees to have a high school diploma or a passing grade on two professionally prepared aptitude tests in order to be promoted from the labor department. While these requirements applied equally to black and white employees, they barred employment opportunities to a disproportionate number of blacks. While there was no racial purpose or invidious intent, the Court held the requirements were invalid because they had a disparate impact and were not shown to be related to job performance.

25. *Teamsters v. United States*, 431 U.S. 324, 349 (1977). This case dealt with the applicability of Title VII to seniority systems. The Court considered the limited question of whether the seniority system was instituted or maintained contrary to the purposes of the Civil Rights Act of 1964. The Court found that it had been maintained free of any illegal purpose and established a totality of the circumstances test.

26. A detailed analysis of the congressional concern for intimacy in Title VII, Title II, and Title VIII is discussed in Comment, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282, 308-12 (1977).

27. 42 U.S.C. § 2000e(b) (1976) states that 15 or more employees are necessary in order to qualify as an employer under Title VII. 42 U.S.C. § 2000a(b)(1) (1976) exempts "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." 42 U.S.C. § 3603(b)(2) (1976) exempts "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." While 42 U.S.C. § 2000a(b)(1) and 42 U.S.C. § 3603(b)(2) are not part of Title VII, they do indicate an interest of Congress in preserving the intimate relationship as exempt from government interference. As one commentator has pointed out:

Since Congress has not expressly provided that the partnership selection process is to come under Title VII, section 1981, or section 1982, congressional intent to exempt certain intimate relationships from regulation, as expressed in Title VII as well as other legislation, must be considered in determining whether partnership intimacy precludes application of antidiscrimination legislation.

Comment, *supra* note 26, at 308.

second relates to private membership clubs.²⁸ One explanation for these exemptions has been that employers with too few employees would not be "affecting commerce" sufficiently to allow regulation under the commerce clause, and that some compromise figure was necessary to effect cloture since some senators filibustering the legislation opposed universal coverage, but were willing to allow passage of the Act if its reach was limited.²⁹

B. *Blue Collar/White Collar Application*

The focus of Title VII application, at least in its early days, attempted to combat discrimination in lower level jobs. These jobs represented the bulk of employment opportunities.³⁰ In 1972 Congress sought to amend Title VII in order to clarify its intent to include white collar or upper level positions, and also to speak specifically to the issue of gender discrimination. The 1972 expansion of Title VII included academic institutions and public as well as private employment.³¹ The House Report statement of purpose that prefaces the 1972 amendments related the concern that women are continually relegated to lesser positions despite the enactment of Title VII in 1964.³²

It has been asserted that "many courts [still] appear reluctant to apply comparable standards [of Title VII] to upper level jobs that have increasingly become the focus of litigation."³³ While there is no legal basis for distinguishing between upper and lower level selection methods, there is evidence that the courts tend to show greater deference to upper level employers.³⁴ This has been particularly evident in the cases involving academic institutions. The Second Circuit has gone so far as to characterize the policy as "anti-interventionist," rendering "colleges and universities virtually immune to charges of employment bias, at least when the bias is not expressed overtly."³⁵ Clearly this doctrine is inconsistent with the 1972 amendments to Title VII that specifically re-

28. 42 U.S.C. § 2000e(b)(2) (1976).

29. Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 624-25 (1969).

30. Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 949 (1982).

31. The Equal Employment Opportunity Act of 1972 is codified in 42 U.S.C. § 2000e-17 (1976).

32. H.R. REP. NO. 328, 92d Cong., 1st Sess. 4, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2140.

33. Bartholet, *supra* note 30, at 947.

34. *Id.* See *Townsend v. Nassau County Medical Center*, 558 F.2d 117, 120 (2d Cir. 1977); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972); *Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 224, 370, 375 (N.D. Tex. 1980).

35. *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1153 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

moved the exemption for academic institutions. Yet the doctrine persists.³⁶

Two additional significant patterns have been traced in the courts' treatment of upper level discrimination cases. First, the courts in lower level cases have traditionally been willing to assess candidate's qualifications in order to resolve claims of discrimination.³⁷ By contrast, the courts in the upper level cases frequently profess a lack of expertise and will not attempt to assess the candidate's qualifications.³⁸ Furthermore, discovery has also been denied in many of these cases, therefore making meaningful assessment impossible.³⁹

Second, while the courts have liberally certified class actions in lower level cases, they have been reluctant to do so for the upper level.⁴⁰ Frequently, it is held that the class is too small. Another favored argument is that the upper level employment decision is made on the basis of individual assessment, thus making class treatment inappropriate.⁴¹

This trend should, however, be accompanied with the consideration that during the next decade there will be increased focus by government enforcement agencies and private plaintiffs on perceived problems in the employment of minorities and women in white collar and professional positions.⁴²

36. See generally Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473 (1980).

37. In *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), the court examined the qualifications of blacks and Puerto Ricans seeking supervisory jobs on a construction project. Even though the employers claimed the need for subjective evaluation, the court determined that the candidates were qualified.

38. See *Cussler v. University of Maryland*, 430 F. Supp. 602, 605-06 (D. Md. 1977); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1371 (W.D. Pa. 1977).

39. Courts have denied access to information regarding the qualifications of other candidates or in discovering votes of named defendants in reappointment cases. See *Lieberman v. Grant*, 630 F.2d 60 (2d Cir. 1980); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); Note, *Employment Discrimination Suits by Professionals: Should the Reinstatement Remedy be Granted?*, 39 U. PITT. L. REV. 103 (1977).

40. See *Bartholet*, *supra* note 30, at 963.

41. *Id.* at 963, 964.

42. Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45 (1979). The author bases her assertion on the fact that the Office of Federal Contract Compliance Program's Affirmative Action Guidelines indicate the requirement that government contractors direct special attention to the underutilization of women and minorities at the white collar and professional level in their affirmative action goal setting.

Case law fashioned to deal with the problems of providing equal employment opportunity for employees who work with their hands rather than with people, paper, or ideas cannot be applied without alteration or adjustment to employment practices at the white collar and professional levels. The problems of selecting and evaluating workers whose success depends upon such intangibles as salesmanship or innovation necessarily are very different from the problems of selecting assembly line workers or craftsmen. They require different procedures and are deserving of a different standard of judicial evaluation.⁴³

C. Title VII and Lawyers

The application of Title VII to associate lawyers as employees and law firms as employers has been made clear by the courts.⁴⁴ An employer, as defined by 42 U.S.C. § 2000e, is an entity engaged in commerce with 15 or more employees, and an employee is an individual employed by an employer.

Nonetheless, only a few cases involving legal employers have been reported.⁴⁵ An explanation for this might be:

due to the fact that attorney victims of illegal discrimination may have more career options open to them than a professional or executive employee of a large corporation. Attorneys may also be more reluctant to attempt to force themselves upon the fairly small group of attorneys who make up the average law firm.⁴⁶

An additional problem that has arisen in cases involving the legal profession is in the area of discovery. The courts have generally applied the "broad scope" standard adopted in *Kohn v. Royall, Koegel and Wells*,⁴⁷ requiring discovery in cases involving discrimination in the legal profession to be the same as in other discrimination cases. The courts have, however, "exhibited an

43. *Id.* at 46.

44. In *EEOC v. Rinella and Rinella*, 401 F. Supp. 175 (N.D. Ill. 1975), the court rejected an argument that associates in the firm were actually independent contractors. The court reported that the professions were not exempt from Title VII coverage, and that associates of small law firms could be considered employees regardless of their independence and authority. *See also* *Lucido v. Cravath, Swaine and Moore*, *infra* note 49 and accompanying text; *Kohn v. Royall, Koegel and Wells*, *infra* note 47 and accompanying text; *Blank v. Sullivan and Cromwell*, *infra* note 47 and accompanying text.

45. Olmsted, *Law as a Business: The Impact of Title VII on the Legal "Industry"*, 10 VA. L. REV. 479, 482 (1976).

46. *Id.* at 482.

47. 496 F.2d 1094 (2d Cir. 1974). This was one of the first allegations of law firm discrimination. A female law student alleged discrimination and attempted to certify a plaintiff class of all women who were qualified for legal positions at the defendant law firm who had been, or would be, denied employment because of their gender. The firm opposed the motion on the basis that the hiring of a lawyer is a highly elective and subjective process. The court stated that the common question for both professional and non-professional employment is not whether one individual is better qualified than another, but whether he or she is considered less qualified because of discrimination forbidden by Title VII. *Accord* *Blank v. Sullivan and Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975).

unusual degree of concern about the privacy of the parties"⁴⁸ and any disclosure that would injure professional or personal reputations. In *Lucido v. Cravath, Swaine and Moore*, the potential for libelous statements regarding allegations of ethnic bigotry, lack of intelligence, laziness, and unethical practice led the court to conclude that "although none of the information was confidential business information, there was sufficient potential injury to personal and professional reputations to warrant a protective order."⁴⁹ Concern for the attorney-client privilege has also been protected. As one commentator has prophesied:

The issue of confidentiality of client records and communications has not yet arisen in any reported cases. However, it will almost certainly arise when cases involving discharge or failure to promote go to trial. The courts have only begun to grapple with some of these issues in the discovery cases. Discrimination is rarely proved directly.⁵⁰

What is clear is that the general purpose of Title VII has been

48. Bardeen, *The Legal Profession: A New Target for Title VII?*, 55 CAL. ST. B.J. 360, 361 (1980). It is King and Spalding's contention that Title VII should not apply to the legal field and that the extension of Title VII to the law firm partnership decision will require an intrusion on lawyer-client confidentiality and pose insurmountable remedial problems. Brief for Respondent at 24, *Hishon v. King and Spalding*, 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

49. 425 F. Supp. 123 (S.D.N.Y. 1977). *Lucido* is a lawyer who was employed by the law firm of Cravath, Swaine and Moore as an associate. He claimed that he was terminated from the firm as a result of his national origin, or religion, or both. The court found a cause of action under Title VII of the Civil Rights Act of 1964 on the basis of discrimination. *Lucido* had specifically alleged that he was discriminated against on the basis of his national origin and/or religion in terms of his work assignments, training, and opportunities, as well as the failure to make him a partner. He stated that it had been made clear to him that the partnership decision would be based solely on his own efforts and ability and that the opportunity to be promoted within the firm was a "term, condition or privilege of employment" within the meaning of Title VII. The law firm defended on the same grounds as King and Spalding, claiming a constitutional right of privacy. The court stated that application of Title VII did not infringe upon any first amendment rights, because first amendment rights do not attach to a commercial, profit-making business organization and that:

[t]he discretionary, subjective judgment that necessarily goes into the Cravath partnership promotion process as described in the complaint and the application to that process of N.Y. Partnership Law § 40(7) allowing the unanimous consent of the partners for selection of a new partner, are not limited by application of Title VII except to preclude factors of race, color, religion, sex or national origin from being considered in this promotion process.

Id. at 129. This approach to the partnership decision is essentially the one adopted by the Solicitor General in his brief on the *Hishon* matter. See *infra* note 94 and accompanying text.

50. See Bardeen, *supra* note 48, at 362.

acknowledged by the courts to be applicable to the professions, including the legal profession. Now the refinement of that application must be determined by resolving the more complex issues such as those evidenced in *Hishon v. King and Spalding*. Any indication as to the standard the Supreme Court will apply is gleaned from the trend to use Title VII as a broad remedial measure and the seemingly higher standard of proof required in upper level job discrimination cases.⁵¹

IV. ANALYSIS

A. *The Anatomy of a Partnership: Hishon's Argument*

1. Partner/Employee

Hishon is attempting to establish that the partners of King and Spalding are equivalent to "employees" of a corporation thereby establishing the employment context for Title VII's application.⁵² In order to prove this, Hishon asserts: (1) that King and Spalding's partnership is more akin to a corporation possessing a separate and distinct identity; and (2) that its partners are more like employees than owners.⁵³

If a corporate structure is found, Hishon argues, the partnership decision would be nothing more than a simple promotion.⁵⁴ Hishon cites *Bellis v. United States*, in which the Court applied the entity theory of corporations to a three-man law firm.⁵⁵ If this entity theory is accepted by the Court, the conclusion would follow that the large law partnership has an institutional identity separate from that of its individual partners and may be considered the "employer" of a partner for Title VII purposes. In *Bellis*, the Supreme Court stated that: "Wall Street law firms . . . are often large, impersonal, highly structured enterprises of essentially perpetual duration" and that even small law firms have "an established institutional identity independent of its individual

51. See *supra* notes 30-33 and accompanying text.

52. 678 F.2d at 1026.

53. *Id.* See Comment, *supra* note 26, at 286-92.

54. 678 F.2d at 1026 n.7.

55. *Id.* at 1026 (citing *Bellis v. United States*, 417 U.S. 85 (1974)). The issue in *Bellis* concerned whether a partner in a small law firm may invoke his personal privilege to justify his refusal to comply with a subpoena which required production of the partnership's financial records. The Court held that the fifth amendment privilege against self-incrimination was not available because the partnership had an institutional identity. The privilege was limited to protecting only the natural individual through his own testimony or personal records. While this case deals only with the fifth amendment privilege, it is argued that it applies to Title VII cases since it suggests that the availability of constitutional or statutory protections should not turn merely on the *form* of a business organization. *Id.*

partners."⁵⁶ One holding of *Bellis* is that partnerships should be treated on a parity with corporations.⁵⁷ The Eleventh Circuit denied the applicability of *Bellis* in Hishon's case on the basis that "[f]or many purposes, such as fifth amendment protection, this 'separate identity' will yield results similar to those for corporations, but not for Title VII purposes."⁵⁸ The court's conclusion is unsupported by argument and must therefore be read along with the court's ultimate reliance on the trial court's determination that a partnership is a "voluntary association."⁵⁹ King and Spalding dispel the effect of *Bellis* in its brief to the Supreme Court by distinguishing it on its facts and asserting that the issue of partnership was *not* an important part of the case.⁶⁰

The second part of the argument seeks to establish that a partner is an employee. If a partner is considered an employee, discrimination in regard to advancement to partnership becomes discrimination with respect to a potential employment relationship, thus unlawful under Title VII. The Eleventh Circuit relied on the Seventh Circuit's interpretation of the partner as employee in *Burke v. Friedman*.⁶¹ In that case, the court was attempting to determine whether someone who is already a partner should be

56. 417 U.S. at 93-95.

57. *Id.* at 101. "Taken broadly, *Bellis* suggests that the availability of constitutional or statutory protections should not turn merely on the form of the business organization." Comment, *supra* note 26, at 290.

58. 678 F.2d at 1026.

59. *Id.* at 1024, 1028. The court concludes its attempt to determine a distinction between employees of a corporation and partners of a law firm by stating:

In making this distinction, we do not presume to exalt form over substance. In this instance, however, the form *is* the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. *The very essence of a partnership is the voluntary joinder of all partners with each other.*

Id. at 1028 (emphasis added).

60. Brief for Respondent, *supra* note 48, at 65-66. King and Spalding point out that *Bellis* involved a grand jury subpoena for partnership records that were held in a representative capacity. It is their argument that it was the organizational character of the records and the representative aspects of *Bellis*' possession of them that was important. *Id.*

61. 556 F.2d 867 (7th Cir. 1977). Barbara Burke brought suit charging the accounting firm partners of Friedman, Eisenstein, Raemer, and Schwartz with discriminating against her in the terms and conditions of her employment and discharging her on the basis of her gender. In order to decide the applicability of Title VII, it was necessary for the court to determine whether the partners were employees. If the partners were found to be employees, they would have the requisite number of 15 or more to satisfy the criteria of an industry affecting commerce. The court concluded that partners cannot be regarded as employees; rather, they are employers who own and manage the operation of a business. The

counted as an employee for purposes of satisfying the minimum size test of Title VII.⁶² The Seventh Circuit applied the common law aggregate theory of partnership, which asserts that a partnership has no "separate identity."⁶³

One theory holds that a proper application of the aggregate or entity concepts may be determined by the size of the firm.⁶⁴ Although the Eleventh Circuit does not address the issue of application of the aggregate or entity theories, the *Burke* court, on which it relies, concluded that "based on the facts of this particular case . . . partners [in a small firm] are not employees [of the firm]."⁶⁵ Hishon could logically argue that the *Burke* court would hold that the entity theory *should* be applied to King and Spalding based on its large size (one hundred lawyers, more than fifty other employees in secretarial, paralegal, and clerical positions, and the maintenance of offices in two cities).

Whether a partner may be treated as an employee might also be determined on the basis of whether the statuses of partner and employee are mutually exclusive.⁶⁶ King and Spalding contends that under an aggregate theory of partnership, the individual partners have no separate identity. "[T]he partnership can be an employer only if its members are employers. The theory suggests that as employers, partners cannot also be employees, implying that the employment relationship necessary to trigger Title VII does not exist."⁶⁷

Hishon relies on *Goldberg v. Whitaker House Cooperative, Inc.*⁶⁸ in her argument that there exists no mutual exclusivity.

court applied the common dictionary meaning of the word employer and as a result failed to find subject matter jurisdiction. *Id.* at 868-70.

62. *Id.* at 868.

63. *Id.* at 869.

64. Amicus Curiae Brief of the Women's Bar Association of Illinois and New York, *supra* note 8, at 16. In defining the entity theory of partnership, Professor A. Bromberg writes:

A two- or three-man firm, informally run by the partners in their own names with little or no help, and with a good deal of casual use of individual assets for firm business (or firm funds for personal affairs) does not look much like an entity in fact. By contrast, no corporation is more entity-like than a large law [firm] or accounting firm which has been going for generations, often under the name of someone long since dead, with dozens or hundreds of partners (of whom only a handful, as managing partners or as executive committee, make major decisions), and perhaps as many offices and more employees. These extremes suggest one reason why no consistent theory has evolved: some partnerships are much more like entities than others.

A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP 19-20 (1968).

65. 556 F.2d at 870.

66. Comment, *supra* note 26, at 286.

67. *Id.* at 287.

68. 366 U.S. 28 (1961). The members of the cooperative manufactured what the cooperative desired and could be expelled for substandard work. The question

The Supreme Court in that case held that “[t]here is nothing inherently inconsistent between the coexistence between a proprietary and an employment relationship.”⁶⁹ Hishon also argues that the economic reality of the relationship between a lawyer and a large firm is primarily one of employment;⁷⁰ the professional duties of a lawyer in a large firm are essentially the same whether the lawyer is a “partner” or an “associate.” A partner, Hishon asserts, is in reality a “profit sharing” employee.⁷¹

The Eleventh Circuit Court concurs with Hishon’s view that there is no mutual exclusivity. Once again, however, Judge Fay resolves the issue without supportive argument stating that “[t]his lack of exclusivity . . . does not render the term ‘partner’ equivalent to the term ‘employee’ for the purposes of Title VII.”⁷²

2. Employee and Partner: Definition by Precedent

In order to determine whether the broad scope of Title VII’s definition of “employee”⁷³ applies in *Hishon*, the Supreme Court must first ascertain whether members of a partnership are employees. To accomplish this end, the Court must examine the same language and its interpretation in previous Supreme Court holdings that have analyzed the nature of partnership and employee. This theory of the Supreme Court’s approach to interpretation of statutory language is based on the Court’s remand that “it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other Federal courts and that it expected its enactment to be interpreted in conformity with them.”⁷⁴ In other words, since Congress so broadly applied the

before the Court was whether the cooperative was an “employer” and its members “employees” within the meaning of the Fair Labor Standards Act of 1938. The Court found that the cooperative was an “employer,” its members “employees,” and, therefore, the cooperative was subject to the minimum-wage and record-keeping provisions of the Act.

69. *Id.* at 32.

70. Brief for Petitioner at 13-14, *Hishon v. King and Spalding*, 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980), *aff’d*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

71. See *Goldberg*, 366 U.S. at 31.

72. 678 F.2d at 1027. The court applied common sense when it stated that “[i]t would be unrealistic to assume a person cannot maintain a proprietary interest and simultaneously work in the business.” *Id.*

73. 42 U.S.C. § 2000e(f) (1976) defines employee as “an individual employed by an employer.”

74. *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979).

word “employee,” the Court will need to examine its own meaningful precedent in order to glean the congressional intent.

B. Employee and Partnership: Definition by Precedent

Congress used the same broad definition of “employee” in Title VII as it did in the National Labor Relations Act,⁷⁵ the Social Security Act,⁷⁶ and the Fair Labor Standards Act.⁷⁷ For each of these acts, the Supreme Court has already interpreted the word “employee”. In *NLRB v. Hearst Publications*, the Court spoke of the National Labor Relations Act and reasoned that:

[T]he broad language of the Act’s definitions, which in terms reject conventional limitations on such conceptions as “employee,” “employer” and “labor dispute,” leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.⁷⁸

Goldberg v. Whitaker House Cooperative, which Hishon used to support her argument that a proprietor *is* an employee, was decided only three years prior to the passage of Title VII, and was used in interpretation of the Fair Labor Standards Act.⁷⁹

In *United States v. Silk*,⁸⁰ the Court established an “economic reality” test⁸¹ for determining who is an employee.⁸² Workers who loaded and unloaded railroad coal cars were characterized as in-

75. 29 U.S.C. §§ 151-166 (1976) (enacted in 1935).

76. 42 U.S.C. § 301 (1976) (enacted in 1935).

77. 29 U.S.C. §§ 201-219 (1976) (enacted in 1938).

78. 322 U.S. 111, 129 (1944).

79. See *supra* note 64 and accompanying text.

80. 331 U.S. 704 (1947).

81. The distinction between the traditional approach and the “economic reality” test is defined as follows:

There are two ways of looking at the employee concept. The conventional way is to think of the employee category as a fixed and immutable one, for all times and for all purposes; under this approach, it is assumed that all modern legislation based on the employment relation intended to adopt in toto the case law of master and servant, which, for vicarious tort liability purposes, had already built up an elaborate set of precedents covering most combinations of facts The newer way of looking at the concept . . . is to say that, just as the “servant” concept was tailored to fit a particular purpose—the definition of the scope of a master’s vicarious tort liability—so the term “employee” when used in social and labor legislation should be interpreted in the light of the purpose of the legislation. That is, if the need being met by the legislation is regulation of collective bargaining, the term “employee” may well include all workers for whom such bargaining is normal and appropriate; and if the evil aimed at by the legislation is insecurity confronting workers who may undergo temporary unemployment, the term “employee” should include workers who, as a matter of economic reality, are subject to the hazard.

A. LARSON, *THE LAW OF WORKMEN’S COMPENSATION* § 43.41 (1973).

82. 331 U.S. at 713. The Court held that the employer-employee relationship was not to be determined solely by the idea of control, but rather whether the employee was as a matter of economic reality dependent upon the business to which he renders services. *Id.* See also *NLRB v. Hearst Publications*, 322 U.S. at 128-29.

dependent contractors under the common law, but are now considered employees for purposes of coverage within the Social Security Act.⁸³ The Court rationalized that the terms "employment" and "employee" should be construed in a light most favorable to conform with the purposes of the legislation.⁸⁴ One week after *Silk* was decided, the Court made a similar ruling applying the "economic reality" test in *Bartels v. Birmingham*.⁸⁵

The legal nature of a "partnership" was analyzed by the Court in *United States v. A. & P. Trucking Co.*⁸⁶ In an attempt to determine whether a partnership could be held for violation of an ICC regulation,⁸⁷ Justice Harlan, speaking for the majority, made rather significant statements that may properly be applied to the current Supreme Court interpretation of the intent of Title VII. "True, the common law made a distinction between a corporation and a partnership, deeming the latter not a separate entity for purposes of suit. *But the power of Congress to change the common-law rule is not to be doubted.*"⁸⁸ Endorsement in this case is for the entity theory of a partnership in support of *Hishon*, as well as the Court's authority to change a common law definition for the purposes of enforcing the objectives of a congressional statute.

83. See 331 U.S. at 714-18.

84. *Id.* at 711-12. The Social Securities Act of 1935 was enacted to combat the modern-life burdens resting on large numbers of people, especially the aged and unemployed. A strict interpretation of the terms of the Act would not comport with the legislative intent. *Id.* at 710-11.

85. 332 U.S. 126 (1947). This case was brought by the operators of public dance halls against the Collector of Internal Revenue to recover taxes paid under the Social Security Act. Recovery was dependent on whether the band leaders and members of the band were employees or whether they were independent contractors and, therefore, employers of the other members. The Court relied on *Silk* to determine that in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. As a result, the Court found that the band leaders were the employers in these cases.

86. 358 U.S. 121 (1958).

87. The specific issue in the case was whether a partnership may be prosecuted as an entity under section 222(a) of the Motor Carrier Act of 1935 for knowingly and wilfully violating certification requirements and motor carrier regulations of of the Interstate Commerce Commission, and under 18 U.S.C. § 835 for knowingly violating regulations for the safe transportation in interstate commerce of explosives and other dangerous articles. 358 U.S. at 121-22.

88. *Id.* at 124 (emphasis added).

C. Legislative Intent

The exploration of the intent of Congress in enacting Title VII will play an extensive and significant role in the Court's ultimate determination of *Hishon*. It is more salient to approach the question in terms of the purposes of the Act than to resolve the definition of employee, or whether the aggregate or entity theory of partnership should prevail.⁸⁹ The Eleventh Circuit disposed of intent with a cursory glance, stating "the legislative history reveals but a single remark. During the Senate Debate Senator Clark stated that the term 'employer' was 'intended to have its common dictionary meaning, except as expressly qualified by the Act.'"⁹⁰ This, however, should not satisfy the Supreme Court as a thorough analysis of legislative intent.

While the legislative history is rarely *the* determinative factor in statutory construction, it has been observed that no occasion for statutory construction now exists when the Court will not at least consider the legislative history.⁹¹ More precisely, Justice O'Connor has outlined a procedure for just such an inquiry. The construction must always begin with the language of the statute and, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."⁹² On another occasion, Justice O'Connor further analyzed that "[a]lthough the language of the statute is clear, any lingering doubt as to its proper construction may be resolved by examining the legislative history of the statute and by according due deference to the longstanding interpretation given the statute by agencies charged with its interpretation."⁹³

The plain meaning of Title VII is argued effectively and logically by the Solicitor General:

The plain language of Title VII prohibits employers — including law firms

89. See Comment, *supra* note 26, at 290.

90. 678 F.2d at 1027 (citing 110 CONG. REC. 7216 (1964)). Judge Fay indicated that the most appropriate test for defining the term "employee" could be discerned from the Fifth Circuit's decision in *Calderon v. Martin County*, 639 F.2d 271 (5th Cir. 1981), wherein the court stated "an employee under Title VII is a question of federal...law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *Id.* at 272-73. After accepting the four part *Calderon* test, the court subsequently denied that there was any value in the statutory language or legislative history of Title VII and ruled on the basis of *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) (holding that partners are not employees). 678 F.2d at 1027. See *supra* note 61 and accompanying text.

91. See generally Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

92. *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)).

93. *United States v. Clark*, 454 U.S. 555, 561 (1982). See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

— from treating male employees better than equally qualified female employees. Whatever the status of partners under Title VII, it is undisputed that a law firm's associates are its employees. Therefore, the terms of Title VII prohibit a law firm from discriminating among its associates on the basis of sex when it considers them for advancement, including advancement to partnership.⁹⁴

Further, it may be argued that within the plain meaning of 42 U.S.C. § 2000e-2(a), there is specific congressional intent to include the partnership decision.⁹⁵ The Act has only excluded private clubs (which qualify for tax exemption pursuant to section 501(c) of the Internal Revenue Code) and religious institutions. No profit-making business organizations were granted exclusions unless they contained less than 15 members.⁹⁶ Since other exceptions are explicitly indicated, the plain meaning of the Act must include the partnership decision.⁹⁷

In attempting to clarify to whom and under what conditions Title VII will apply, the Court will look beyond the plain meaning and examine the 1972 amendments to Title VII.⁹⁸ Congress clearly established that Title VII will apply to the selection of tenured positions, especially major faculty positions, in institutions of higher education.⁹⁹ The Solicitor General argues that:

Congress's [sic] willingness to remove an explicit exemption for a category of decisions—selections to tenured positions in a community of scholars and educators—that are surely as sensitive as a law firm's choice of partners rebuts the contention that the courts should create an exemp-

94. Brief for the United States and the EEOF in Amici Curiae at 4, *Hishon v. King and Spalding*, 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983) (supporting reversal).

95. 42 U.S.C. § 2000e-2(a) (1976). *See supra* note 4.

96. 42 U.S.C. § 2000e(b) (1976).

97. King and Spalding suggest that "[b]ecause a majority of the members of Congress were lawyers, their silence cannot be construed as reflecting an intention to include invitations to law partnerships within the scope of Title VII." Brief for Respondent, *supra* note 48, at 48.

98. Amicus Curiae Brief for the Women's Bar Associations, *supra* note 8, at 10.

99. 118 CONG. REC. 1992 (1972). Congress showed particular concern for applying Title VII to higher institutions. Senator Williams, floor manager with Senator Javits, made the following remarks:

The existence of discrimination in the employment practices of our Nation's educational institutions is well known, and has been adequately demonstrated by overwhelming statistical evidence as well as numerous complaints from groups and individuals. Minorities and women continue to be subject to blatant discrimination in these institutions. . . .

In institutions of higher education women are almost totally absent in the position of academic dean, and are grossly underrepresented in all other major faculty positions.

Id.

tion for partnerships that Congress never enacted.¹⁰⁰

At the time of the 1972 amendments, Congress also debated a proposal to exempt the employment of physicians and surgeons by public or private hospitals. As might be imagined, this gave rise to discussion regarding the intent of Title VII. Senator Javits, speaking as floor manager, summed up the majority argument when he stated:

[T]his amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them.

This would be most iniquitous. I simply cannot believe that in this year it would be seriously entertained as a possibility by way of exemption from this bill.¹⁰¹

The amendment was rejected.

A strong logical argument exists in that it is unlikely Congress intended the form of “partnership” (as opposed to corporation) to shield compliance with Title VII.

Law firms are essentially no different from other employers who have been ordered to end discriminatory practices and to hire and promote the victims of unlawful discrimination. The law firm will be ordered to accept as a partner only a plaintiff who can prove discrimination and who has established that he is qualified for the position. If the plaintiff can meet this burden of proof, then he should be awarded partnership.¹⁰²

The intent behind Title VII is clear. Title VII is a broad and sweeping statement against discrimination and it is improbable that a special enclave for law partnerships was desired.

D. Employment Opportunity or Not?

Section 703(a)(1) of Title VII makes it unlawful for “an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”¹⁰³ Elizabeth Hishon was under the impression that when she took an associate position with King and Spalding each associate would be fairly considered for partnership after five to six years of satisfactory employment with the firm.¹⁰⁴ Hishon alleges that King and Spalding, by making these representations, made “fair and equal consideration for

100. Brief for the United States and the EEOC as Amici Curiae (supporting reversal), *supra* note 94, at 17.

101. 118 CONG. REC. 3801-02 (1972).

102. Comment, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457, 476 (1980).

103. 42 U.S.C. § 2000(e)-2(a)(1) (1976). See *supra* note 4.

104. Brief for Petitioner, *supra* note 70, at 4.

partnership both an employment opportunity and a term, condition and privilege of her employment."¹⁰⁵ The Solicitor General argues that it is immaterial whether partners are employees. Where, as in this case, the opportunity to become a partner is a term, condition, or privilege of an associate's employment, Title VII is violated if that associate is denied the opportunity on the basis of one's gender.¹⁰⁶ The Eleventh Circuit Court dismissed this argument and the authority of *Golden State Bottling Co. v. NLRB*.¹⁰⁷ In *Golden State*, an employee was denied promotion, due to his union activities, to a supervisory position which was outside the NLRB coverage.¹⁰⁸ The Supreme Court in *Golden State* quoted the Second Circuit's decision in *NLRB v. Bell Aircraft* which stated: "The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against."¹⁰⁹ To this the Eleventh Circuit replied: "[W]e decline to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership."¹¹⁰ Thus, one returns to the question of what is a partnership?

If the Supreme Court has acknowledged that the "entity" and "employee" theories are applicable, Judge Fay's argument has no validity, and *Golden State* becomes a persuasive case on point. Even without determining the nature of a partnership, the logic of *Golden State* leads one to the conclusion that the relationship between Hishon and King and Spalding was one of employment and, therefore, Title VII is applicable. Neither the district court nor the court of appeals disputed this relationship.

The Eleventh Circuit also determined that the holding in *Lucido v. Cravath, Swaine and Moore*¹¹¹ did not apply. In

105. *Id.* at 42.

106. Brief for the United States and the EEOC in *Amici Curiae*, *supra* note 94, at 11.

107. 414 U.S. 168 (1973).

108. *Id.* at 171 n.1.

109. *Id.* at 188 (quoting *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 236-37 (2d Cir. 1953)).

110. 678 F.2d at 1028.

111. 425 F. Supp. 123 (S.D.N.Y. 1977).

Lucido,¹¹² a case factually similar to *Hishon*, the District Court for the Southern District of New York found that the promise of partnership was a “term, condition or privilege of employment, and an employment opportunity.”¹¹³ To the Eleventh Circuit, this terminology was deemed dicta since the court had already determined that the allegation of an unlawful discharge stated a claim for relief under Title VII.¹¹⁴ Judge Fay did not fully resolve this argument when he concluded that “[w]e do have serious concerns about any representations made to the appellant regarding her future consideration for partnership.”¹¹⁵ The court suggested that an action for breach of contract or misrepresentation would be a more appropriate vehicle for obtaining a legal remedy.¹¹⁶ The problem, however, is that the court failed to explain how an express representation for partnership could support a contract action without simultaneously being a “term, condition or privilege” of employment.

The Supreme Court may turn once again to legislative intent in order to resolve this argument. While neither Title VII itself nor its legislative history defines “compensation, terms, conditions, or privileges of employment,” it has been asserted that Congress meant, by “the obvious and cumulative breadth of the statutory phrase,” to “insulate against discrimination [in] all aspects and incidents of the employment relationship.”¹¹⁷

The Court might also analogize Title VII to the National Labor Relations Act¹¹⁸ which has examined these terms and concluded

112. *Id.* See *supra* note 45 and accompanying text.

113. 425 F. Supp. at 128.

114. 678 F.2d at 1029. (Despite the characterization as dicta, the court chose to disagree. The *Lucido* case has since been dismissed with prejudice. See *id.* at n.12.)

115. 678 F.2d at 1029.

116. *Id.*

117. Brief for the United States and the EEOC as Amici Curiae, *supra* note 94, at 8 (emphasis in original).

118. The Solicitor General asserts that in many respects the National Labor Relations Act, 29 U.S.C. § 158(d) (1976), was the model for Title VII. To support this, he points out that “Congress used the ‘terms and conditions’ language in Title VII for the same reason it used it in the NLRA — because it is impractical to test every aspect of the employment relationship that might come to be at issue.” Brief for the United States and the EEOC in Amici Curiae *supra* note 94, at 8 n.2.

Senator Muskie, in the 1964 debates involving Title VII, was pointed in his remarks that:

[Title VII] provides a series of guidelines which give clear indication of the *type* of practice that will be considered unlawful. For example, section 703(a) says that: . . .

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. . . . What more could be asked for in the way of guidelines, short of a complete itemization of every practice which could conceivably be a violation?

that they encompass everything that is "an aspect of the relationship between the employer and employees."¹¹⁹ Certainly the advancement to partner must be considered an aspect of the relationship between the associate and the law firm. After all, the continual evaluation of the associate's work is intended to facilitate the ultimate determination as to whether he or she will qualify as a partner. Therefore, the opportunity to become a partner defines the entire relationship between the firm and its employee.

E. "Up or Out" or Wrongful Discharge?

The Eleventh Circuit translated Hishon's position regarding the injustice of the "up or out" policy into an argument revolving around the denial of employment opportunities.¹²⁰ What Hishon argues, however, is more complex than the assertion of "up or out" as an unfair employment practice. From Hishon's perspective, the decision to refuse her admission to partnership was based on her gender. It was this discrimination that resulted in a freeze in her salary advancement and her ultimate discharge as an employee.¹²¹

The court's conclusion was that an associate "assumes the risk," as:

[p]rospective associates are apprised not only of their potential for partnership, but also of the consequences to be suffered following an unfavorable decision. Just as she accepted a representation made to her concerning partnership consideration, appellant likewise assumed the risk that an unfavorable decision would set in motion the termination procedure under the firm's "up or out" policy.¹²²

In light of Hishon's argument this does not seem relevant, nor does it address the issue of discrimination. Failing to deal with termination as the result of discrimination misses the essence of Hishon's assertion. The argument that the "up or out" policy was equally applied to males is also irrelevant.¹²³ Judge Fay remains

110 CONG. REC. S12618 (daily ed. June 4, 1964) (emphasis added).

In regards to the NLRA, the Court in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), stated that the NLRA is specifically written in general language and as a result "[i]t is thus evident that Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and the statutory duty to bargain." *Id.* at 495-96.

119. *Allied Chem. and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971) (citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 350 (1958)).

120. 678 F.2d at 1029.

121. Brief for Petitioner, *supra* note 70, at 47.

122. 678 F.2d at 1029-30.

123. Brief for Respondent, *supra* note 48, at 73.

inflexible on his argument that Title VII does not apply to partnership decisions; for him this argument is nothing more than the result of an unfavorable decision.¹²⁴

The Supreme Court may be more persuaded by Judge Tjoflat, the author of the dissent in this case. He fully understood and appreciated Hishon's argument. He found Title VII applicable to the discharge aspect of the argument, the logic being that there is an assumption, as a result of Hishon's allegation, that King and Spalding discriminated against her on the basis of gender.¹²⁵ When the partnership decision became one as to whether to terminate employment, Title VII affixed.¹²⁶ Judge Tjoflat agreed with the majority, however, that Title VII does not apply to "the discrete decision whether to take on a new partner."¹²⁷ This is Hishon's secondary argument, for she asserts that even if Title VII does not apply to the partnership decision she may assert a claim for wrongful discharge.¹²⁸ It is the least developed of her arguments, and the only one the entire court of appeals recognized.

F. Freedom of Association

The federal district court reduced the case to King and Spalding's assertion of a constitutional right to freedom of association and the right of privacy against the "doubtful and obscure" right of Hishon to receive the protection of Title VII.¹²⁹ While the Eleventh Circuit adopted the holding that a partnership is a voluntary association, it never addressed the constitutional issue. The specific constitutional bases that were asserted by King and Spalding consisted of the first amendment rights encompassing the right of freedom of association and the right of privacy. Such an argument is not based on express constitutional language and little

124. 678 F.2d at 1029. "While discrimination alone may have stated a cause of action under Title VII for an unlawful discharge . . . when the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions." *Id.*

125. *Id.* at 1030 (Tjoflat, J., dissenting).

126. *Id.*

127. *Id.*

128. 678 F.2d at 1029. *See also* Brief for Petitioner, *supra* note 70, at 49. This is the same argument that the court made in *Lucido*, 425 F. Supp. at 128, when it stated that even assuming that Title VII does not apply to the partnership decision, "the protection the Act affords to Lucido for the unlawful discrimination he allegedly suffered as an employee in not being selected for partner solely because he is an Italian Catholic would not be affected." *Id.* *See also* note 49 and accompanying text.

129. Comment, *Applicability of Title VII to the Partnership Selection Process*, 34 MERCER L. REV. 1579, 1580-81 (1983) (citing *Hishon v. King and Spalding*, 24 Fair Empl. Prac. Cas. (BNA) at 1306).

precedent exists on the matter.¹³⁰

King and Spalding analogized the right to freedom of commercial association to the right of commercial speech.¹³¹ It further asserted that such freedom may not be unreasonably regulated. To support King and Spalding's argument, the case of *Bell v. Maryland* was cited, in which the Supreme Court said "[I]t is the constitutional right of every person . . . to choose his social intimates and business partners solely on the basis of personal prejudices. . . . These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties."¹³²

Nonetheless, any examination by the Supreme Court of the potential constitutional issue involved will lead it to once again consider the intent behind the Act. Although the Court has acknowledged the freedom to send a child to a private school and to form or join a labor union, neither the private school nor the union has the right to discriminate.¹³³ Possibly, the "only associations that arguably can assert a right to discriminate based on considerations of privacy are the family and possibly the private club."¹³⁴

130. Comment, *supra* note 26, at 313.

131. Brief for Respondent, *supra* note 48, at 14.

132. 378 U.S. 226, 313 (1964) (Goldberg, J., concurring).

133. See *Runyon v. McCrary*, 427 U.S. 160 (1976); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94, 98 (1945). In *Runyon*, the Court interpreted 42 U.S.C. § 1981 which provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State...to make and enforce contracts...as is enjoyed by white citizens" and examined its application to private schools. The Court found that § 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are blacks. *Runyon*, 427 U.S. at 172-73. The Court analyzed both freedom of association and the right to privacy and concluded that:

[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.

Id. at 176 (emphasis in original).

In *Railway*, the Court applied section 43 of the New York Civil Rights Law which forbids denying entrance to a labor union by reason of "race, color or creed" and calls for "equal treatment in the designation of its members for employment, promotion or dismissal by an employer." 326 U.S. at 89. The Railway Mail Association limited its membership to persons of the caucasian race and American Indians. The Court found the policy in violation of the Act and ordered the union to allow other minorities to join and benefit from the union. *Id.* at 94.

134. Comment, *supra* note 26, at 316. Although there has been no explicit hold-

In light of the fact that the Court has recognized associational claims only in cases involving membership in political or social organizations,¹³⁵ the district court in *Lucido*¹³⁶ could not find any associational rights attached to a law firm. "Cases recognizing such First Amendment rights refer to fraternal or social organizations not business organizations. . . . Application of Title VII to this case does not prevent the partners from associating for political, social and economic goals."¹³⁷

What is most persuasive, however, is that even if first amendment rights are found and a compelling state interest is determined, the state interest would outweigh the associational rights which King and Spalding assert. The argument is that regardless of the commercial nature of partnerships, the advancement of civil rights and the improved status of women and minorities provide compelling and important state interests, and these interests are strong enough to overcome the associational rights of the partners.¹³⁸

V. A PREDICTION

An examination of the Burger Court reveals that while it is conservative,¹³⁹ it is at the same time highly independent.¹⁴⁰ Commentators who have attempted to categorize and derive statistics of the Court's voting patterns have found consistently divergent voting behavior.¹⁴¹ However, prior to Justice O'Connor's

ing by a court granting a constitutional right of private clubs to discriminate, there is dicta to this effect.

135. Comment, *supra* note 102, at 468. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-23, at 702 (1979), which recognizes membership in the group itself as a form of protected expression.

136. See *supra* note 49 and accompanying text.

137. 425 F. Supp. 123, 129 (S.D.N.Y. 1977). See *United States v. International Longshoremen's Ass'n*, 460 F.2d 497, 501 (4th Cir.), *cert denied*, 409 U.S. 1007 (1972).

138. See Comment, *supra* note 26, at 315-16. See also Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 482-85 (1974). Arguably, if the Court finds the right of privacy, either alone or in combination with the freedom of association applicable to a law partnership, it might be immunized from governmental interference.

139. Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891, 892, 935 (1981). Beginning in 1969, the Court made a dramatic swing to conservatism with five new Justices being appointed by 1975—of the liberal group that dominated the 1960's, only Justices Brennan and Marshall remained.

140. Estes, *A Review of Labor and Employment Law Decisions: United States Supreme Court, October 1979 Term*, 64 MARQ. L. REV. 1, 4 (1980). The author comments that when referring to the Supreme Court's decisions during the 1979 term that had an impact on labor and employment law, "[t]he labels of 'liberal' or 'conservative,' ill-defined as they are, do not fit comfortably when one views the group of decisions as a whole."

141. Professor Estes reviewed twenty-eight decisions that were issued by the

appointment:

[o]ne might note the obvious pattern that Justices Brennan, White, and Marshall vote together as do the Chief Justice and Justices Rehnquist, Stevens and Stewart. Justices Powell and Blackmun become the swing votes that alter the decisions in these cases. Beyond this superficial evaluation, further analysis is subject to serious attack.¹⁴²

Many commentators presumed that Justice O'Connor would generally align herself with the conservative members of the Court.¹⁴³ During her confirmation hearings, Justice O'Connor made it clear that she believed a judge's role is one of "interpreting and applying the law," and it was not the function of the judiciary to change the law because times or cultural mores have changed.¹⁴⁴ She has consistently approached statutory interpretation with a thorough examination of legislative intent.¹⁴⁵ We are assured of her approach in the Hishon matter as she has stated that the key to sorting out a Title VII statutory interpretation puzzle is:

to stress that our judicial role is simply to discern the intent of the 88th Congress in enacting Title VII of the Civil Rights Act of 1964, a statute covering only discrimination in employment. What we, if sitting as legislators, might consider wise legislative policy is irrelevant to our task.¹⁴⁶

The results of an investigation of legislative intent will be persuasively in favor of Hishon.¹⁴⁷ The plain meaning of Title VII appears to include the partnership decision;¹⁴⁸ the 1972 amendments

Court during the October 1979 term in the area of labor and employment law. Of those cases, six were decided by a five to four division of the Court, one was four to three, seven were six to three majority, four by a seven to two vote, and three by eight to one margins. *See id.* at 3-4. During the 1980-81 term the overall voting pattern based on the seventy cases that were decided was: twenty-one cases decided six to three, twelve five to four, twelve seven to two, sixteen nine to zero, and nine eight to one. Kelso, *Justice O'Connor Replaces Justice Stewart: What Effect on Constitutional Cases?*, 13 PAC. L.J. 259 (1982).

142. Estes, *supra* note 140, at 4.

143. Kelso, *supra* note 141, at 270. Kelso approaches the study of the impact O'Connor will make by an analysis of her background and a look at the pattern of votes as to how Justice Stewart voted in five to four decisions and a look back at five to four decisions in previous years where Stewart's vote with the majority was crucial to the outcome. It is his conclusion that it is legitimate to place O'Connor in the conservative camp and that "her presence on the Court will not change many of its decisions." *Id.* at 270-71.

144. Wall St. J., Sept. 10, 1981, at 12, col. 2.

145. *See supra* notes 92-93 and accompanying text.

146. Arizona Governing Comm. v. Norris, 103 S. Ct. 3492, 3510-11 (1983) (O'Connor, J., concurring).

147. *See supra* notes 94, 101, 102 and accompanying text.

148. *See supra* note 95 and accompanying text.

confirm that intent.¹⁴⁹ Additionally, it is difficult to conceive that a partnership form, as opposed to a corporate structure, was intended to create a barrier to Title VII.

The belief that the Burger Court is swayed by legislative intent and interprets Title VII as a broadly encompassing statute with sweeping goals is confirmed in *Connecticut v. Teal*,¹⁵⁰ one of seven Title VII cases the Court has ruled upon since June of 1982. In *Teal*, four black employees were given provisional positions as supervisors, provided that each of them passed a written examination. When none passed the examination, they brought suit claiming they had been discriminated against in violation of Title VII by being required to pass the written examination in order to be considered for permanent positions. Before trial, promotions were made with the overall result that the promotions were more favorable to blacks than to whites. The plaintiffs continued their suit, however, on the basis that the written test was not job related and excluded blacks disproportionately. The district court dismissed the suit, explaining that the "bottom line figures" precluded application of Title VII. The circuit court reversed, stating that even though the "bottom line" showed an appropriate racial balance, there could still be a disparate effect and, therefore, employer liability under Title VII.¹⁵¹ The Court granted certiorari to determine the plaintiff's position under section 703(a)(2). The Court concluded that:

[t]he statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*. . . . When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment *opportunity*, "because of . . . race, color, religion, sex or national origin."¹⁵²

With regard to the *Hishon* case, the significance of the Court's opinion in *Teal* is its concern for denial of promotion of minorities which is equated to an employment opportunity. The Court was seeking to remove barriers that have in the past favored one group of employees over another. The Court relied on the intent of Title VII, as interpreted in *Griggs v. Duke Power Co.*, which

149. See *supra* note 98 and accompanying text.

150. 457 U.S. 440 (1982).

151. *Id.* at 2527-28.

152. *Id.* at 2531-32 (emphasis in original) (citation omitted). Section 703(a)(2) (which is codified as 42 U.S.C. § 2000e-2(a)(2) (1976)) provides that:

It shall be an unlawful employment practice for an employer... (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.

Id.

recognized that "in enacting Title VII, Congress required 'the removal of artificial arbitrary and unnecessary barriers to employment' and professional development that had been encountered by women and blacks as well as other minorities."¹⁵³ This interpretation of employment opportunity will likely influence the *Hishon* matter, and is yet another indication favoring a decision for Elizabeth Hishon.

Application of Title VII to the legal profession is not novel, but its impact on the partnership decision has never been challenged—or when it has, the courts have avoided the confrontation.¹⁵⁴ The Supreme Court's ruling in *Hishon* will most likely determine the issues that the plaintiff raises: (1) whether a partnership is an entity and its members employees, (2) whether the movement into partnership was an "employment opportunity" as defined by Section 703(a)(1) of Title VII, and (3) even if Title VII doesn't apply to the partnership decision, whether King and Spalding can discharge her from the firm as a result of an alleged discriminatory practice.

The Court may also look at the respondent's plea that its partners have first amendment rights which include the right of privacy and freedom of association allowing them to discriminately bring into the partnership whomever they please. Further, King and Spalding requested the Court to consider whether lawyers should be provided with a higher degree of associational freedom—free from private and governmental pressures. Based upon past patterns of analysis, however, the Court is more likely to begin its search for the answers in this case by a thorough examination of the legislative intent of Title VII.

However the Court completes its examination, it will most likely conclude that King and Spalding may have the freedom to select whom they wish to be a partner provided that it does not discriminate against that person on the basis of race, color, religion, gender, or national origin.

153. 457 U.S. at 447 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

154. In *Lucido*, 425 F. Supp. at 123, the court responded to the defendant's claim that Title VII did not extend to the relationship of "partners among themselves, and therefore cannot apply to the process whereby members of a law partnership invite an attorney to become their partner" by stating that the issues in the case did not require a finding as to whether Title VII applies to partners "inter se". *Id.* at 128. The court went on to find an employee-employer relationship between *Lucido* and the firm and consequently applied Title VII. See *supra* note 49.

VI. IMPACT

A decision favorable to Hishon may have considerable impact upon the opportunities for women and other minorities within the partnership structure.¹⁵⁵ On one hand, statistics have shown that fifteen years after the passage of Title VII in 1964, half of the nation's two hundred largest law firms still had never had women partners.¹⁵⁶ Yet, on the other hand, in 1965, 367 women received degrees from accredited law schools. Ten years later that number had increased twelve-fold to 4,415 and in 1980, the number reached 10,754.¹⁵⁷ The growth of partnership opportunities has clearly not been proportional to the increase in the number women attorneys.¹⁵⁸

Not only may there be an increased number of suits based on the Court's decision to close this gap in Title VII, but there may also be a restructuring of partnership selection methods in order to conform to Title VII specifications.¹⁵⁹ Some eventual imposition of Court-ordered guidance has been predictable based on the growing volume of Title VII litigation in the professions, even prior to the *Hishon* matter.¹⁶⁰

A representation to a law student that if he joins a law firm as

155. See Amicus Curiae Brief of the Women's Bar Associations of Illinois and New York, *supra* note 8, at 18-19, and Brief of Petitioner, *supra* note 70, at 18-23.

156. Comment, *supra* note 129, at 1579 (citing Epstein, *The Partnership Push*, Savvy 29, 35 (March 1980)). "In 1979, 15 years after the passage of Title VII, 90 of the 200 largest law firms in the United States, (including King and Spalding) had no women partners; 67 other firms had only one woman partner." *Id.*

157. Brief for Petitioner, *supra* note 70, at 20 (citing U.S. Bureau of Census, Statistical Abstract of the United States 1982-83, 168 Table 279 (103 ed. 1983)).

158. "Although Title VII has expanded the entry-level job opportunities for women as associates in law firms, the coveted upper echelon positions of 'partner' in many law firms remain closed to women or are available only on discriminatory terms to the exceptional 'Superwoman.'" Brief for Petitioner, *supra* note 70 at 22 (citing EPSTEIN, *WOMEN IN LAW* 53 (1981)). Reluctance to admit women to the upper ranks has been demonstrated in other professional fields as well. The Amicus Curiae Brief for the Women's Bar Associations of Illinois and New York, *supra* note 8, at 20 states:

There were about 7,000 partners nationwide in the Big 8 accounting firms in 1981. Wayne, *The Year of the Accountant*, New York Times, Business Section, Jan. 3, 1982. Of these 52 were women. The architectural firm of Skidmore, Owens and Merrill, with 1500 architects in 9 offices, admitted its first and only woman general partner in the firm's 46 year existence on October 1, 1982. Block, *Women Build Own Stature as Architects*, Lerner Booster, March 2, 1983 at 1. . . .

Id.

159. See Bartholet, *supra* note 30, at 1026. Professor Bartholet suggests that application of Title VII to the professions has not been effective because of the "tendency of those who are 'in' to perpetuate the systems that got them there." Bartholet further suggests that the only way to overcome subjectivity in the selection process is to establish a quota system, hiring from among those who meet minimum qualifications.

160. Waintroob, *supra* note 42, at 119. See also Olmsted, *supra* note 45.

an associate he will have the opportunity to become a partner is not an unusual inducement. On what basis may the firm determine that the associate is not qualified to become a partner? The impact of the Court's decision will determine to some degree the freedom that the partnership will have in making such a decision.

Should the Court affirm the lower courts' decisions, it seems a firm need only organize as a partnership in order to avoid the imposition of Title VII. Law firms, accounting practices, architectural firms, medical practices, mortgage banking practices, advertising agencies, and brokerage houses would all be included. Could this have been the intent of Title VII? It is up to the Supreme Court of the United States to tell us.

LINDA RANDLETT KOLLAR

