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Title VII Discrimination Actions: Applicable or Inapplicable to the Partnership Decision? Hishon v. King & Spalding

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Title VII Discrimination Actions: Applicable or Inapplicable to the Partnership Decision? Hishon v. King & Spalding 678 F.2d 1022 (11th Cir. 1982).

I. Background and Factual Information

An underlying premise of a partnership is that it is a strictly voluntary association between two or more persons for a business purpose.[1] The concept that a partnership can be forced against its will to accept another individual into the organization as a partner is repugnant to the underlying premise of voluntariness of association.[2] One purpose of Title VII of The Civil Rights Act of 1964[3] is to prohibit discrimination on the basis of sex and to place men and women on an equal footing.[4] In order for this equal footing to exist, an individual's capabilities can be the only criteria used to determine whether or not an employee is entitled to a position.[5] In the past, the outer limits of Title VII have been liberally construed in the broadest possible terms so as to encompass the entire working environment, including the professional fields of law and medicine.[6]

Herein lies the perplexing problem with which the court in *Hishon v. King & Spalding*[7] was confronted. The partner's interest in voluntary association had to be weighed and balanced against the government's interest in the elimination of employment discrimination on the basis of sex. The court had to decide whether or not Title VII was applicable to the decision made by a professional partnership not to elevate an associate to partner status.[8]

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[1]A partnership is defined as "a *voluntary* contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them" (emphasis added). Black's Law Dictionary 1009 (rev. 5th ed. 1979); *See also,* Burr v. Greeland, 356 S.W.2d 370, 376 (Tex. Cir. Appl. 1962).

[2]Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *cert. granted,* 103 S. Ct. 813 (1983).

[3]Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

[4]Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225 (9th Cir. 1971).

[5]*Id.*

[6]EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975); *See also,* Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977).

[7]678 F.2d 1022 (11th Cir. 1982), *cert. granted,* 103 S. Ct. 813 (1983).

[8]*Id.* at 1024.

King & Spalding is a professional partnership located in Atlanta, Georgia, established for the purpose of practicing law.[9] The partnership is a relatively large law firm consisting of approximately fifty partners and fifty associates. In 1972, Elizabeth Anderson Hishon was hired as an associate with the firm. The firm had an "up or out" policy in which all associates were considered for partnership after approximately six years of service with the firm. Under this policy, an associate would either receive an invitation to join the firm as a partner or would be asked to secure employment elsewhere.

In May of 1978, six years after Ms. Hishon was hired, a partnership meeting was held to consider the elevation of various associates to the position of partner. Although other male associates were invited to join the partnership, Ms. Hishon and two other male associates were notified that they should seek employment elsewhere. Upon Ms. Hishon's request, the partnership reconsidered her status with the firm in the partnership meeting of May 1979, but again decided not to extend her an invitation to join the partnership. As a result, she left the firm on December 31, 1979.

Ms. Hishon filed a sex discrimination claim with the Equal Employment Opportunity Commission which issued a Notice of a Right to Sue, whereupon Ms. Hishon filed a three count complaint in the United States District Court for the Northern District of Georgia.[10] In the first count, Ms. Hishon alleged that the partnership decision had discriminated against her on the basis of her sex in violation of Title VII.[11] In the second count, she alleged a violation of the Equal Pay Act.[12] The third count was founded upon a breach of contract theory.[13] The district court only considered the alleged sex discrimination charge and granted King & Spalding's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).[14] The plaintiff then appealed the decision to the United States Court of Appeals for the Eleventh Circuit and in so doing agreed to limit the appeal to the threshold jurisdictional issue of whether Title VII is applicable to the partnership decision.[15] The second and third counts of the original

[9]A synopsis of the facts are presented. A complete presentation of the facts including useful background information regarding correspondence among opposing counsel and the court can be found in the Eleventh Circuit's opinion. *Id.*

[10]*Id.*

[11]42 U.S.C. § 2000e-2(a) (1976). The actual text of this statute is as follows:

> (a) It shall be an unlawful employment practice for an employer —
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> (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
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> (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.*

[12]29 U.S.C. § 206(d)(1) (1976).

[13]678 F.2d at 1025.

[14]*Id.* The district court, in holding Title VII inapplicable to partnership decisions, dismissed the case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

[15]*Id.* at 1025 n.4.

complaint were informally withdrawn by the plaintiff in her brief and subsequently dismissed without prejudice.[16] Thus, the only issue which the court of appeals had to consider was whether or not Title VII was applicable to the partnership decision.[17]

The Eleventh Circuit Court of Appeals held that Title VII was not applicable to a decision made by the partnership not to promote an associate to partner status.[18] This casenote attempts a critical analysis of the relevant law and the rationale used by the court in reaching this decision. It will further point out some potentially serious implications which could arise in the future since the Supreme Court of the United States has agreed to decide this issue later this year.[19]

A court should refuse to grant a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(1) and should decide the issue on the merits of the case unless there is no doubt that the plaintiff would be unable to prove any facts which would entitle her to relief.[20] Since Title VII is remedial in nature, it must be liberally construed in its broadest sense in order to effectuate its purpose.[21] When analyzing the *Hishon* court's rationale, both of these concepts must be kept in mind. The *Hishon* court, however, found that even under such a broad and liberal reading, Title VII was not applicable to partnership decisions and matters of voluntary association.[22]

Ms. Hishon proposed three theories under which jurisdiction could be based upon Title VII.[23] Under the first theory, the plaintiff urged the court to find that the partners at King & Spalding were analogous to employees of a corporation. Under the second theory, she contended that the partnership invitation was a term, condition or privilege of employment and an opportunity for employment, all protected by Title VII. Third, Ms. Hishon urged the court to find that her termination of employment was an unlawful discharge in violation of Title VII.

II. King & Spalding — Partnership or Corporation

Under Ms. Hishon's first theory of jurisdiction, she urged the court to find that the partnership was in reality a corporation in which the partners

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[16] *Id.* at 1025 n.5.

[17] *Id.*

[18] *Id.*

[19] The history of *Hishon* is as follows: Hishon v. King & 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).

[20] 678 F.2d at 1026. *See also,* McClain v. Real Estate Board of New Orleans, Inc. 444 U.S. 232 (1980); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Conley v. Gibson, 355 U.S. 41 (1957).

[21] Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971). *See also,* Note, *Relative Qualifications and the Prima Facie Case in Title VII Litigation,* 82 Colum. L. Rev. 553 (1982).

[22] 678 F.2d at 1026.

[23] *Id.*

Akron Law Review, Vol. 17 [1984], Iss. 1, Art. 8

were mere employees. The elevation from associate to partner could then be considered a promotion. Sex discrimination in promoting is prohibited by Title VII.[24]

Ms. Hishon first attempted to convince the court that a partnership had "an established institutional identity independent of it's individual partners"[25] and that this independent institutional identity was in reality a corporation.[26] She argued that King & Spalding, by having formally composed a detailed partnership agreement in writing, had in effect incorporated the partnership into a corporation.[27] The court found little merit in either of these contentions since under Georgia law a partnership was a legally recognized institution and could be created either by parol or written contract.[28]

The appellant then unsuccessfully attempted to convince the court that the term "employee" was synonymous to the term "partner" for Title VII purposes.[29] In support of her contention, she cited as authority a United States Supreme Court case in which the Court held that various members of a cooperative who were subject to termination for producing inferior products or disobeying regulations were deemed to be "employees" with the meaning of the Fair Labor Standards Act.[30] Whether or not an individual is an employee for Title VII purposes is a question of federal law which is to be determined by a four part test which takes into consideration (1) the language of the statute itself; (2) the legislative history; (3) federal case law; and (4) the circumstances surrounding the case.[31]

As to the statutory language of Title VII, the court in *Hishon* did not find the language to be very helpful. The court cited the Act as defining the word "employee" simply as "an individual employed by an employer."[32] However,

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[24]*Id., See also* Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973).

[25]Bellis v. United States, 417 U.S. 85, 95 (1974).

[26]678 F.2d at 1026.

[27]*Id.*

[28]GA. CODE ANN. § 75-101 (Supp. 1982). The text of the statute is as follows: "A partnership may be created either by written or parol contract, or it may arise from a joint ownership, use, and emjoyment of the profits of undivided property, real or personal."

[29]678 F.2d at 1026.

[30]Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961).

[31]Calderon v. Martin County, 639 F.2d 271, 273 (5th Cir. 1981).

[32]The relevant sections and definitions of Title VII are as follows:

42 U.S.C. § 2000e(a) (1976). "The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, *partnerships,* associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers." (emphasis added).

42 U.S.C. § 2000e(b) (1976). "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . ."

42 U.S.C. § 2000e(f) (1976). "The term 'employee' means an individual employed by an employer . . . ."

42 U.S.C. § 2000e(g) (1976). "The term 'commerce' means trade, traffic, commerce, transportation, transmission or communication among the several States . . . ."

if the plain language of the statute is examined, a different conclusion might be reached by utilizing the following analysis: The term person includes both individuals and partnerships. Since an employee is an individual employed by an employer and an individual is also a person, a partnership can be considered to be an employee of the employer. Likewise, since an employer is a person, an employer may also be classified as a partnership. Thus, broadly construing the statutes, the individual partners at King & Spalding could be considered to be employees employed by the partnership.

However, the *Hishon* court refused to seize upon the language used in *Lucido v. Cravath, Swaine & Moore*[33] which stated that the "language indicates a Congressional intent to define discrimination in the broadest possible terms and to include the entire scope of the working environment within the Act's protective ambit."[34] In *Lucido,* the plaintiff was an attorney employed by the defendant firm as an associate for over seven years. Lucido, like Hishon was promised an elevation to partner status upon satisfactory performance of his duties as an associate.[35] The firm also had an "up or out" policy under which the associate would have to seek employment elsewhere if not offered a partnership. Lucido was not offered a partnership and was asked to leave the firm. He filed a suit based on a Title VII discrimination action, contending that he was discriminated against because of his national origin (Italian) and his religion (Catholic). The court in *Lucido* unlike the *Hishon* court refused to dismiss the complaint and held that a cause of action was stated under the Civil Rights Act of 1964.[36]

Having found the statutory language of Title VII to be of no assistance, the *Hishon* court next studied the legislative history of Title VII but found it to be very sparse, consisting of only one remark by Senator Clark made during a Senate Debate. The Senator had stated that the term "employer" should have its common dictionary meaning.[37] In reality, the court refused to recognize other pieces of legislative history which indicated that it was the intent of Congress to eliminate job discrimination even in high level professional jobs.[38]

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42 U.S.C. § 2000e(h) (1976). "The term 'industry affecting commerce' means an activity, business, or industry in commerce . . . ."

[33]425 F. Supp. at 126.

[34]*Id. See also* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

[35]425 F. Supp. at 128. The fact pattern in *Lucido* is almost a mirror image of the fact pattern in *Hishon* but the *Hishon* court refused to accept the *Lucido* court's rationale.

[36]*Id.*

[37]110 CONG. REC. 7216 (1964). Webster defined "employer" as "one who employs, especially a person, business firm, etc. that hires one or more persons to work for wages or salary." WEBSTER'S NEW WORLD DICTIONARY 459 (1980).

[38]EEOC v. Rinella & Rinella, 401 F. Supp. 175, 179 (N.D. Ill. 1975); During Senate debates for a proposed amendment which would have made Title VII inapplicable to physicians employed by a hospital, Senator Williams spoke against the amendment as follows:

> As I stand here leading the debate on this measure, I try hard to think as a young person who has gone through that long, hard and expensive trail to be the graduate of a medical school, be he man or woman, black or white, or whatever national ancestry. I say that in this Nation, which

One of the strongest points of the *Hishon* court's argument and perhaps the most persuasive was presented in its discussion of existing federal case law. In *Burke v. Friedman,*[39] the plaintiff, an employee of the defendant accounting firm, filed a sex discrimination charge for unlawful dismissal under Title VII. The firm was organized as a partnership consisting of four partners and thirteen other employees. The court in *Burke* addressed the precise issue of whether a partner could be construed as an employee in order to invoke the protection of Title VII. If the partners could be considered employees then the total number of employees would be seventeen, two greater than the fifteen necessary to qualify the defendant firm as a person within the meaning of the Act.[40] The *Burke* court held that the partners could not be classified as employees and therefore the protection of Title VII could not be invoked.[41]

In determining whether or not an individual is an employee for Title VII purposes, the particular circumstances surrounding a case must be examined using "the economic realities test"[42] as set forth in *Spirides v. Reinhardt.*[43] In *Spirides,* the court had to make a determination of whether an individual was, as her written contract stated, an independent contractor instead of an employee. The court in *Spirides* held that the court should review "all the circumstances surrounding Spirides' work relationship"[44] and that the economic realities of the working relationship must be analyzed in light of the particular facts of each case.[45] In *Donovan v. Techco,*[46] Secretary of Labor Donovan filed a suit seeking an injunction to enjoin violations of the Fair Labor Standards Act. The court once again applied the economic realities test and reasoned that "the label attached to the relationship is dispositive only to the degree that it mirrors the economic reality of the relationship."[47] Hence, the court

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so badly needs doctors, it would be a terrible crime if because of ethnic background, sex, race or religion, the American people were denied the services of the new doctor.

This is exactly what this amendment would do. It would take from a doctor the protection that the Constitution gives him and would protect through this law. I think that it would be against all that this country holds itself up to be, in an area of one of our greatest needs. *Id. quoted in* 118 CONG. REC. 1647 (1972).

Senator Javits also expressed his opposition to the amendment:

Yet this 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 suregon 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. *Id. quoted in* 118 CONG. REC. 1463 (1972).

Accord, Bartholet, *Application of Title VII to Jobs in High Places,* 95 HARV. L. REV. 945 (1982); Note, *Title VII And Employment Discrimination in "Upper Level" Jobs,* 73 COLUM. L. REV. 1514 (1973).

[39]556 F.2d 867 (7th Cir. 1977).

[40]42 U.S.C. § 2000e(b) (1976).

[41]556 F.2d at 870.

[42]613 F.2d 826 (D.C. Cir. 1979).

[43]*Id.*

[44]*Id.* at 833.

[45]*Id.* at 831.

[46]642 F.2d 141 (5th Cir. 1981).

[47]*Id.* at 143.

considered the theory that an individual's status "must turn on the facts of each case"[48] and attempted to balance this with the concept that the definition of employee as used in Title VII was not restrictive.[49] The conclusion which the court in *Hishon* reached was that the partners were not employees under Title VII, but partners in a voluntary association formed to practice law.[50] The individual characteristics which the court considered included the detailed partnership agreement, the operation of the firm under Georgia law as a partnership and the fact that the firm filed income tax returns as a partnership.[51] The court, having refused to broadly interpret the definitions of the Act, turned to Ms. Hishon's second basis for jurisdiction.

III. Elevation to Partnership: Privilege of Employment or Employment Opportunity

Under her second theory for jurisdictional basis, Ms. Hishon contended that King & Spalding had promised her that she would be offered a partnership in return for performing satisfactorily as an associate.[52] She contended that this promise was a term, condition or privilege of employment and that denial of a promotion to a partner was in effect a denial of an employment opportunity,[53] all of which were protected by Title VII.[54] As authority, she cited four major cases, three of which can be easily distinguished from her case and consequently disposed of.[55] The fourth case was exactly on point[56] but the Eleventh Circuit absolutely rejected both its holding and rationale.

In *Golden State Bottling Co. v. NLRB,*[57] Golden State had discharged a truck driver who had been very active in union activities. The court found Golden State liable and ordered them to reinstate the driver with back pay, based on the amount that he would have received if he had been promoted from a driver to a distributor in accordance with company policy. In *NLRB v. Bell Aircraft Corp.,*[58] the court held that Melvin Finch, an employee and member of the union, had been discriminated against when he was refused a promotion to the position of assistant foreman. Finch had returned to work during a strike, whereupon the union filed charges against him pursuant to a strike settlement between Bell and the union which prohibited Bell from pro-

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[48]McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), *cert. denied,* 409 U.S. 896 (1972).

[49]*Id.* at 557.

[50]678 F.2d at 1028.

[51]*Id.*

[52]*Id.*

[53]*Id.*

[54]42 U.S.C. § 2000e-2(a) (1976).

[55]Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953).

[56]Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977).

[57]414 U.S. 168 (1973).

[58]206 F.2d 235 (2d Cir. 1953).

moting Finch to a supervisory position.[59] The court held that "[a]t the time the discrimination took place, he was clearly a protected employee, and his prospects for promotion were among the conditions of his employment."[60] The *Hishon* court correctly concluded that "an 'opportunity' can include a promotion to a position beyond that of an 'employee' covered by Title VII."[61] But it once again refused to broadly construe and extend the term "employment opportunities" to include elevation to a partner on the grounds that it would encroach upon the basic premise that a partnership was a voluntary organization.[62] The court concluded that the scales of justice should tip in favor of the partners and that the interests of the employee were subservient to those of the partners. These interests can best be defined by the language used in *John Wiley & Sons, Inc. v. Livingston.*[63] After Wiley had merged with another corporate owner, the Supreme Court held that the new corporate employer had to arbitrate according to the collective bargaining agreement which was in effect when the entire company was owned by Wiley. The Court noted that "[t]he objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to re-arrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."[64]

The third case which the court had to distinguish from Ms. Hishon's situation was *Pettway v. American Case Iron Pipe.*[65] The defendant company was organized under the Eagan Plan. Under this plan the Board of Directors was responsible for the business policy of the company and was elected by the stockholders. The Board of Management conducted the general day-to-day business of the company and was elected by the Board of Directors. The Board of Operatives was elected by the employees themselves and served the function of providing a mode of communication between the employees and the Board of Management. When Eagan, the founder of the company, died he bequeathed all outstanding stock of the company to the members of the Board of Management and the Board of Operatives jointly and to their successors, to be held in trust for the present and future employees of the company. Since membership on the Board of Operatives was restricted to white males, the court found this policy to be a violation of Title VII and held that membership on the Board was a valuable term, condition or privilege of employment.[66] Keeping in mind that the Board of Directors was elected by the stockholders, it is

[59] *Id.*

[60] *Id.* at 237.

[61] 678 F.2d at 1028.

[62] *Id.*

[63] 376 U.S. 543 (1964).

[64] *Id.* at 549.

[65] 494 F.2d 211 (5th Cir. 1974).

[66] *Id.*

crucial to note that two members of the Board of Operatives had been elected directly to the Board of Directors.[67] Since the Board of Operatives held the stock in trust, the members could conceivably have the opportunity to control their own destiny by using their influence to get themselves elected to the Board of Directors. Although Ms. Hishon had made what appeared to be a very strong argument in favor of her position, the court held *Pettway* to be inapplicable because as it interpreted the case, "[t]he employees remained employees even while serving on the Board and never actually 'owned' the company in their individual capacities but acted 'in trust' for all present and future employees."[68]

Probably the strongest arguments in favor of Ms. Hishon's position can be expressed and found in the language of *Lucido v. Cravath, Swaine, & Moore.*[69] Lucido's fact situation and allegations were very similar to Ms. Hishon's situation. The court in *Lucido* first examined the definitions of employer and employee as defined in Title VII and construed the terms in the broadest possible sense, in accordance with congressional intent.[70] Lucido was found to be an employee and the defendant partnership an employer within the meaning of the Act. The court in *Lucido* correctly held that a cause of action brought under Title VII should not be dismissed under Rule 12(b) of The Federal Rules of Civil Procedure,[71] unless the plaintiff would not be entitled to recover even if everything he alleged were true.[72] Applying the above criteria, the *Lucido* court held that "the oppportunity to become a partner at Cravath was a 'term, condition or privilege of employment' and an 'employment opportunity' within the meaning of the Act."[73] However, the *Hishon* court did not expound on *Lucido* in any detail whatsoever and attempted to cast away *Lucido's* holding by classifying it as mere dicta.[74] In reality, however, what had occurred was simply a dispute between the circuits. As the *Hishon* court stated, "[i]n any event, we respectfully disagree with that court's statement. Decisions as to who will be partners are not within the protection of Title VII."[75]

IV. Lawful or Unlawful Termination

As her third theory for basing a claim, Ms. Hishon attempted to show that because she was asked to leave the firm, she was denied the employment opportunity of being promoted to partnership status.[76] Even though this argu-

[67] *Id.* at 266 n.158.
[68] 678 F.2d at 1029.
[69] 425 F. Supp. at 123.
[70] *Id.*
[71] Fed. R. Civ. P. 12.
[72] 425 F. Supp. at 125.
[73] *Id.* at 127.
[74] 678 F.2d at 1029.
[75] *Id.*
[76] *Id.*

ment has merit based on the rationale of *Lucido,* it was obvious that the Eleventh Circuit Court of Appeals would in no way allow Title VII to encroach upon "individuals' decisions to voluntarily associate in a business partnership."[77] Although it recognized that a cause of action could exist for an unlawful termination based on sexual discrimination, the Eleventh Circuit again refused to extend that concept to include the lost employment opportunity to become a partner.[78] In attempting to rationalize its decision, the court added that Ms. Hishon had knowledge at the time she accepted her position as an associate with the firm of not only the potential for partnership, but also the consequences of termination if a partnership invitation was not extended.[79] The court further suggested that in lieu of pursuing this action under a Title VII discrimination suit, she should consider an action based on breach of contract or fraud.[80] Hishon, however, had already agreed to limit her appeal only to the partnership issue and had withdrawn the second and third counts of the complaint, which included a breach of contract claim.[81]

In addition to the concept of voluntary association among partners, the court's reluctance to extend the scope of Title VII to include the partnership decision can be explained by the lack of objective qualifications by which to judge the potential partner.[82] In essence, the court would be second-guessing the discretionary judgments of the partners.[83] Subjective factors such as sincerity, appearance, poise, and the ability to understand and articulate conceptual matters[84] are taken into account in the evaluation process. These factors depend on the "chemistry" between the partners and associates.[85] The district court in *Hishon* stated the same proposition in a different manner: "[I]n a very real sense a professional partnership is like a marriage . . . . To use or apply Title VII to coerce a mismatched or unwanted relationship too closely resembles a statute for the enforcement of shotgun weddings."[86] In addition to the above reasons why Title VII should be inapplicable to a partnership decision, many courts have come to realize that there are only a very limited number of positions open at the top level of many professional fields.[87] As the court in *Faro v. New York University* articulated, "[o]f a hypothetically twenty equally

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[77] *Id.* at 1028.

[78] *Id.* at 1029.

[79] *Id.*

[80] *Id.* The court expressed it's cognizance of how much significance is given to a partnership potential when a prospective associate is considering accepting a position at a given firm.

[81] *Id.* at 1025 n.5.

[82] Faro v. New York University, 502 F.2d 1229 (2d Cir. 1974); *Accord,* Olmstead, *Law as a Business: The Impact of Title VII on the Legal "Industry",* 10 VAL. U.L. REV. 479 (1976).

[83] *Id.*

[84] *Accord,* Bartholet, *Jobs in High Places,* 95 HARV. L. REV. 945, 996 (1982).

[85] *Id.*

[86] 24 Fair Empl. Prac. Cas. (BNA) 1303, 1305 (N.D. Ga. 1980).

[87] 502 F.2d 1229 (2d Cir. 1974).

brilliant law school graduates in a law office, one is selected to become a partner."[88]

The difficulty in ascertaining whether or not discrimination ever existed, the potential for a tremendous number of frivolous lawsuits and the concept of voluntary association are certainly considerations which the court must take into account when attempting to decide whether to extend the protective language of Title VII to include partnership decisions.

V. CONCLUSION

In the last year, among the nation's 151 largest law firms, the percentage of women lawyers increased from approximately fifteen to seventeen percent, while the percentage of women partners increased from approximately seven to eight percent.[89] Ms. Hishon has creatively been able to convince the United States Supreme Court to listen to her arguments.[90] There are conflicting opinions between the circuits and the stage is set for the Supreme Court to render a decision which could have an enormous effect upon the legal, engineering and accounting professions across the nation. If the Supreme Court chooses to interpret the statute in a narrow and restrictive manner as did the lower courts in *Hishon,* then this is certain to have an impact on the rapidly increasing number of women both contemplating a legal career and those already practicing. The result may very well be a change in the tide and a corresponding decrease in the number of very capable women entering the legal profession. On the other hand, if this Court of last resort chooses a broad and liberal interpretation of Title VII as did the *Lucido* court, then there is certain to be a tremendous impact on many law firms' policies of promotion and possibly even hiring. Partners may be hesitant to hire an attorney as an associate if the likely potential exists that a Title VII action may be brought against them in the future by an eager and aspiring young attorney striving to achieve one of the few positions at the top of the ladder. Partners and associates of firms throughout the country will certainly be anxiously awaiting the outcome of this issue.

GUS YOGMOUR, JR.

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[88] *Id.* at 1232.

[89] Wall Street Jouronal, Jan. 25, 1983, at 4, col. 2. *See also* Fossum, *Women In The Legal Profession: A Progress Report,* 67-4 WOMEN LAW. J. 1 (1981).

[90] 678 F.2d 1022 (11th Cir. 1982) *cert. granted,* 103 S. Ct. 813 (1983).