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Casenotes: Title VII — Employment Discrimination — Title VII Provides Claim for Law Firm Associate Alleging Sex Discrimination in Partnership Selection. Hishon v. King & Spalding, 104 S. Ct. 2229 (1984)

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TITLE VII — EMPLOYMENT DISCRIMINATION — TITLE VII PROVIDES CLAIM FOR LAW FIRM ASSOCIATE ALLEGING SEX DISCRIMINATION IN PARTNERSHIP SELECTION. *Hishon v. King & Spalding*, 104 S. Ct. 2229 (1984).

After graduating from law school in 1972, a female attorney was employed as an associate[1] by a large Atlanta law firm.[2] In 1979, when the firm failed to select her for partner,[3] she filed a charge with the Equal Employment Opportunity Commission[4] alleging that the firm had discriminated against her on the basis of sex in violation of Title VII of the Civil Rights Act.[5] The Commission issued a notice of right to sue, and the attorney brought an action against the firm in the United States District Court for the Northern District of Georgia.[6] The district court dismissed the suit for lack of subject matter jurisdiction,[7] holding that

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1. Appellant's Petition for Writ of Certiorari at 4, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984). The female attorney graduated from Columbia University with honors. When hired in 1972, she was the second female lawyer employed by the law firm. The only woman previously hired had been a permanent associate for 44 years. *Id.*
2. Hishon v. King & Spalding, 104 S. Ct. 2229, 2232 (1984). The law firm is organized as a general partnership under Georgia law. In 1980 when the female attorney filed suit the firm had approximately 50 active partners, and about 50 associates. *Id.*
3. Hishon v. King & Spalding, 678 F.2d 1022, 1024 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984). An associate's employment is terminated if the associate is not elected to become a partner in accordance with the firm's "up or out" policy. *Id.*
4. Hishon v. King & Spalding, 104 S. Ct. 2229, 2232 (1984). 42 U.S.C. § 2000e-5(b), (e) (1982) requires that a party must first file a charge with the Equal Employment Opportunity Commission within 180 days of the violation as a condition precedent to Title VII litigation. *See generally* A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 49.30-.32 (1983) (discussing the procedural requirements for an individual filing a private suit under Title VII).
5. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1982). 42 U.S.C. § 2000e-2(a) 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.

   The Act defines an "employer" as any "person" engaged in an industry affecting commerce and who has 15 or more employees. *Id.* § 2000e(b). Partnerships are included in the definition of "person." *Id.* § 2000e(a).
6. Hishon v. King & Spalding, 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga. 1980), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984).
7. *Id.* at 1307. Granting a motion to dismiss is proper only when the federal court lacks subject matter jurisdiction over the action. FED. R. CIV. P. (12)(b)(1). A motion to dismiss could have been made under FED. R. CIV. P. 12(b)(6), for failure to state a claim upon which relief can be granted. This would have required the court to examine the law and determine whether it could provide relief in the female attorney's situation. *See generally* 5 C. WRIGHT & S. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1350, 1356 (1969) (explaining the purpose and proper application of

partnership selection was not within the "scope" of Title VII.[8] The district court reasoned that a discrimination suit against a partnership would conflict with the partnership's constitutional right to freedom of association.[9] The Court of Appeals for the Eleventh Circuit affirmed the decision,[10] concluding that in the absence of a clear congressional mandate Title VII should not infringe on "matters of voluntary association" such as legal partnerships.[11] An unanimous Supreme Court reversed.[12] It held that in the female attorney's case, the opportunity to become partner was a "term, condition, or privilege" of her employment as an associate; Title VII therefore provided her with a cognizable claim.[13]

Courts have broadly interpreted Title VII to prohibit discrimination in employment opportunities on the basis of race, religion, sex, and national origin.[14] Early judicial efforts at enforcing Title VII were aimed primarily at lower level jobs.[15] The legislative history indicates, however,

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the above discussed motions and cautioning against confusing a motion under Rule 12(b)(1) with a motion under Rule 12(b)(6)).

8. Hishon v. King & Spalding, 24 Fair Empl. Prac. Cas. (BNA) 1303, 1306 (N.D. Ga. 1980), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984).
9. Hishon v. King & Spalding, 24 Fair Empl. Prac. Cas. (BNA) 1303, 1304-05 (N.D. Ga. 1980) (the court acknowledged that it may have erred in reaching its conclusion), *aff'd*, 678 F.2d 1022 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984). The court stated:

> 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 qualitities [sic] into the union — some beauty, some money, and some character — so also in professional partnerships, new matters 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 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 the enforcement of shotgun weddings.

Id.

10. Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984).
11. *Id.* at 1026.
12. Hishon v. King & Spalding, 104 S. Ct. 2229 (1984).
13. *Id.* at 2236. The case was remanded to provide the attorney with "her day in court." *Id.* For the pertinent text of Title VII, see *supra* note 5.
14. *See, e.g.*, County of Washington v. Gunther, 452 U.S. 161, 178 (1981) (Title VII intended to be broadly inclusive); Franks v. Bowman Trans. Co., 424 U.S. 747, 753 (1976) (Congress intended to prohibit all practices in whatever form that create inequality in employment opportunity); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (Title VII must be given the broadest possible interpretation); EEOC v. Rinella & Rinella, 401 F. Supp. 175, 182 (N.D. Ill. 1975) (the remedial nature of Title VII requires a flexible construction of the statute for jurisdictional purposes).
15. *See, e.g.*, Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (discriminatory practices found in a discretionary transfer system from hourly to salaried production line positions); Bowie v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir.

that Congress intended Title VII to apply to professional occupations.[16] Thus, when claims of discrimination in higher level jobs met with hostility,[17] Congress amended Title VII to clarify its intent and broaden Title VII's scope.[18] Congress explicitly extended the protection of Title VII to professional situations, including academic institutions and government employment.[19] Indeed, when an amendment to exclude hospitals and their staffs was proposed, Senator Javits stated that the amendment would strip professionals of a remedy for employment discrimination contrary to Congress's intent.[20] The proposal was defeated.[21]

Despite the expansive interpretation of Title VII taken by Congress, several courts continued to limit the statute's application in professional employment.[22] One method courts used was to require the existence of

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1969) (weight-lifting restrictions on women plant workers were not bona fide occupational qualifications justifying a bifurcated seniority system); Weeks v. Southern Bell Tel. Co., 408 F.2d 228 (5th Cir. 1969) (employer had the burden of proving that denying a woman a switchman's position was nondiscriminatory). *See generally* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 949-50 (1982) (discussing the history of Title VII).

16. *See* Amicus Curiae Brief at 17, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984) (United States and EEOC supporting reversal) (citing H.R. REP. NO. 914 (pt. 2), 88th Cong., 1st Sess. 29 (1963) (separate views of Rep. McCulloch and others envisioning that Title VII would apply to "teachers, doctors, lawyers, scientists, and engineers")).
17. *See, e.g.*, Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972) (per curiam) (upholding validity of test used for promotion to police officer without examining its discriminatory effect), *cert. denied*, 412 U.S. 909 (1973); Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972) (examining apprenticeship and testing program's impact on promotional opportunities for black employees); Chance v. Board of Examiners, 330 F. Supp. 203 (S.D. N.Y. 1971) (examining the fairness and validity of testing procedures for supervisory positions that had a discriminatory effect on blacks and Puerto Ricans), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).
18. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964) (expressly excluded "the United States, . . . or a state or political subdivision thereof . . . ." The hiring practices of municipalities, police departments, and state schools, among others, were therefore exempt. In 1972, the Act was amended to cover academic institutions and public employment. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 3, 11, 86 Stat. 103, 103-04, 111 (codified at 42 U.S.C. §§ 2000e-1, 16 (1982)); *see also* Bartholet, *supra* note 15, at 980; H.R. REP. NO. 238, 92nd Cong., 1st Sess. 4, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2140-41 (House Report Statement of Purposes expressed concern that women are continually relegated to lesser positions despite the enactment of Title VII in 1964).
19. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 3, 11, 86 Stat. 103, 103-04, 111 (codified at 42 U.S.C. § 2000e-1, 16 (1982)).
20. 118 Cong. Rec. 3802 (1972).

    > [O]ne of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and drawers of water; that only blue collar jobs and ditchdigging jobs are reserved for them; and that . . . they cannot ascend the higher rungs in professional and other life.

    Id.
21. *Id.*
22. *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229, 1232 (2d Cir. 1974) (education and faculty appointments at the university level are probably the least suited for federal supervision); Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224, 370-75

a common law employer-employee relationship[23] as a prerequisite to applying the statute.[24] For example, in *Tyler v. Vickery*[25] the Fifth Circuit used this limitation in dismissing a class action discrimination suit filed on behalf of all black applicants who had failed the Georgia bar examination.[26] The bar applicants argued that the testing procedures violated the Title VII standards governing employment testing.[27] The court held that Title VII did not apply because the bar examiners were not "employers" or an "employment agency."[28]

Some courts similarly limited the application of Title VII in partnership cases. By narrowly defining who was an "employee" under the statute, a question was raised as to whether a partner could be considered an employee of a partnership. Title VII itself provides little assistance in this determination; it defines, somewhat circuitously, an "employee" as an "individual employed by an employer."[29] The Seventh Circuit, in *Burke v. Friedman*,[30] considered this issue when it affirmed the dismissal of a discrimination case against an accounting firm.[31] The plaintiff, an associate with the firm, had charged that the defendant partnership discriminated against her in the conditions of her employment and in her wrongful discharge.[32] The court held, however, that traditional partnership principles[33] would preclude a finding that a partner was an "employee" for Title VII purposes.[34] This determination enabled the

(N.D. Tex. 1980) (validation standards should be relaxed for upper level bank jobs); Cussler v. University of Md., 430 F. Supp. 602, 605-06 (D. Md. 1977) (court professed its lack of expertise to apply Title VII in this context); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 158 (D. Mass. 1975) (a different standard was applied — plaintiffs could prevail only upon a showing of intentional bias or no rational basis for selection policy).

23. Title VII does not provide a definition for the employer-employee relationship. This allows for a liberal construction to better effectuate the statute's purpose to eradicate the evils of employment discrimination. Some courts use the "economic-realities" test. *See* Armbruster v. Quinn, 711 F.2d 1332, 1336, 1340-41 (6th Cir. 1983); Sibley Memorial Hospital v. Wilson, 488 F.2d 1338, 1340-42 (D.C. Cir. 1973). Others have adopted the common "right to control" test. *See* Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979).
24. *See* Comment, *Applicability of Title VII to the Partnership Selection Process*, 34 MERCER L. REV. 1579, 1579-80 (1983).
25. 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976).
26. *Id.*
27. *Id.* at 1095.
28. *Id.* at 1096 (42 U.S.C. § 2000e is limited to an "employer," "employment agency," or "labor organization"); *accord* Kyles v. Calcasieu Parish Sheriff's Dep't, 395 F. Supp. 1307, 1310 (W.D. La. 1975).
29. 42 U.S.C. § 2000e(f) (1982).
30. 556 F.2d 867 (7th Cir. 1977).
31. *Id.* at 868.
32. *Id.*
33. A partnership is the result of a voluntary association of two or more persons. UNIF. PARTNERSHIP ACT § 6, 6 U.L.A. 22 (1969). Section 6 of the Act defines "partnership" as an "association of two or more persons to carry on as *co-owners* [of] a business for profit." *Id.* (Emphasis added.)
34. 556 F.2d at 869 ("we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business").

defendant partnership to fall within the exemption excluding employers with "less than fifteen employees"[35] from application of Title VII. An interpretation such as this also prevents an associate's advancement to a partnership position from being considered an "employment opportunity" covered by Title VII: If partners are not employees, discrimination in the selection of a partner would not be discrimination with respect to a potential "employment" relationship and, accordingly, would not violate the mandates of Title VII.[36]

In other circumstances, however, courts have been less antagonistic toward the application of Title VII to partnerships. For example, most courts have had little difficulty finding that an *associate* is an "employee" under the statute.[37] The court in *EEOC v. Rinella & Rinella*[38] rejected the defendant's contention that because of the independence of its associate attorneys, their status was more like that of independent contractors than that of "employees." In its holding, the court made it clear that the professional nature of a law partnership was not a bar to the jurisdiction of Title VII.[39] Similarly, courts have found that for Title VII purposes, the scope of discovery in cases alleging discrimination in law partnerships is to be as comprehensive as in other discrimination cases.[40]

A significant ruling on the application of Title VII to the partnership selection process is *Lucido v. Cravath, Swaine & Moore*.[41] There, the plaintiff, an Italian Catholic attorney, alleged that he was denied promotion to partnership because of his "national origin or religion or both."[42] This discrimination purportedly was manifested in terms of his assignments, work opportunities, and the firm's failure to make him partner.[43] The court denied the defendant law firm's motions to dismiss the case, determining that the statutory language of Title VII was to be given the broadest possible scope.[44] The court reasoned that the opportunity to be

35. 42 U.S.C. § 2000e(b) (1982).

36. *See* Hishon v. King & Spalding, 678 F.2d 1022, 1028 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984).

37. *See, e.g.*, Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977); Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975); EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975).

38. 401 F. Supp. 175 (N.D. Ill. 1975).

39. *Id.* at 180.

40. *See* Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1100-01 (2d Cir. 1974) (adopting a broad scope approach to discovery in Title VII). *But see* Hishon v. King & Spalding, 678 F.2d 1022, 1025-26 (11th Cir. 1982) (court, concerned about the privacy of the parties, found that discovery requests might intrude on attorney-client confidentiality), *rev'd*, 104 S. Ct. 2229 (1984). *See generally* Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282, 307 (1977) (privacy concerns and the highly subjective criteria involved are not unique to the selection of partners).

41. 425 F. Supp. 123 (S.D.N.Y. 1977).

42. *Id.* at 127.

43. *Id.*

44. *Id.* at 126. For cases broadly construing Title VII, see *supra* note 14.

considered for a job that is not included within the protection of Title VII — that is, a partner in a law firm — was not a bar to the statute's application if that opportunity was a "term, condition, or privilege" of the plaintiff's current employment.[45] The court then held that the promise of considering petitioner for partnership *was* a "term, condition, or privilege" of his employment.[46] As to the defendant's argument that the application of Title VII infringed upon the partnership's first amendment freedom of association rights, the court found that these rights were limited to political, social, and economic goals, which were not affected by the decision.[47] Finally, regarding the subjective nature of judgments inherent in the partnership selection process, the court stated that Title VII only limits consideration of factors it declares unlawful — "race, color, religion, sex, or national origin" — and still allows for discretionary decisionmaking in the choice of a partner.[48]

The *Hishon* trial court and the Court of Appeals for the Eleventh Circuit declined to follow the reasoning in *Lucido* and similar cases interpreting Title VII.[49] The circuit court rejected the argument, raised in *Lucido*, that the opportunity to be admitted to partnership was a term, condition, or privilege of employment as an associate.[50] In reference to the female attorney's argument comparing corporations to large partnerships, the court stated that it did not "presume to exalt form over substance," but, in this case, the form was the substance.[51] The court concluded that the requisite congressional intent was lacking to justify application of Title VII to the voluntary association of a business partnership. The court was therefore unwilling to categorize partnership selection as a promotion,[52] and dismissed the associate's claims.[53]

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45. *Lucido*, 425 F. Supp. at 128; *accord* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 188 (1973). In *Golden State Bottling*, the Court observed: "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." *Id.* at 188 (quoting NLRB v. Bell Aircraft Corp., 206 F.2d 235, 237 (2d Cir. 1953)).
46. *Lucido*, 425 F. Supp. at 128-29.
47. *Id.* at 129.
48. *Id.*
49. *Hishon*, 24 Fair Empl. Prac. Cas. (BNA) 1303, 1305-06 (N.D. Ga. 1980), *aff'd*, 678 F.2d 1022, 1029 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984).
50. *Id.* at 1029. The court also did not "quarrel with the premise that an 'opportunity' can include promotion to a position beyond that of an 'employee' covered by Title VII." The court concluded, however, that the discussion of these issues in *Lucido* was dicta. *Id.*
51. *Id.* at 1028. One theory advanced by the female attorney was that a partnership was similar to a corporation and, like corporations, should be viewed as an entity separate from its individual members. The court rejected this theory, finding "a clear distinction between employees of a corporation and partners of a law firm." *Id. But cf.* Bellis v. United States, 417 U.S. 85 (1974) (for purposes of fifth amendment, partnership has an independent identity, so that partner could not invoke the privilege for partnership records).
52. Hishon v. King & Spalding, 678 F.2d 1022, 1028 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984).

In *Hishon v. King & Spalding*,[54] the Supreme Court found the associate to have various cognizable claims under Title VII.[55] First, the Court explained that in a Title VII context an employment contract may arise quite informally.[56] Once a contract was established, any promise by the firm to consider the female associate for partnership became a "term, condition, or privilege" of her employment as an associate.[57] In the event of such a promise Title VII prohibits the law firm from making partnership decisions in a discriminatory manner.[58] The Court also found that even absent an employment contract, the opportunity to be considered for partnership was a "benefit" or "privilege" of the associate's employment.[59] Once the firm voluntarily offered to provide that "benefit," it could not then be "doled out in a discriminatory fashion."[60] The Court thus reasoned that partnership selection, whether considered a "term," "condition," "privilege," or "benefit" of an associate's employment, is subject to Title VII's requirements.

Moreover, whether promotion to partner was viewed as a contractual provision of employment or a noncontractual "privilege," the Court stated that the firm's "up or out policy" directly affected the attorney's status *as an employee*.[61] The Court found support for this in an associate's expectation of being considered for partnership at the end of the associate's "apprenticeship," combined with the termination that follows upon not being chosen. Additionally, lawyers outside the firm are not so routinely considered for partnership.[62] These factors, the Court held, led inexorably to the conclusion that partnership consideration was a "term, condition, or privilege" of an associate's employment at the law firm.[63]

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53. *Id.* at 1026, 1027. *But see* County of Washington v. Gunther, 452 U.S. 161, 178 (1981) (federal courts must "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate"). As to the attorney's claim that under the firm's "up or out" policy her failure to make partner constituted a discharge, thereby causing her situation to fall within Title VII, the court stated that the argument was an "attempted entry through the proverbial back door." 678 F.2d at 1029. This issue was the basis of Judge Tjoflat's dissent. *Id.* at 1030 (Tjoflat J., dissenting) ("when the partnership decision inextricably and inevitably *is* a decision whether to terminate employment . . . Title VII applies").
54. 104 S. Ct. 2229 (1984).
55. *Id.* at 2236.
56. *Id.* at 2233. "[A]n informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace." *Id.*
57. *Id.* The Court noted that Title VII also may be "relevant in the absence of an existing employment relationship," however, not with respect to the "terms, conditions, or privileges" provision focused on in the case at hand. *Id.* at 2233 n.5.
58. *Id.* at 2234 (decision must be made without regard to sex).
59. Such "benefits" are those aspects of employment that form the relationship between the employer and its employees. *Id.* (citing Allied Chem. & Alkali Workers v. Pittsburg Plate Glass Co., 404 U.S. 157, 178 (1971)).
60. Hishon v. King & Spalding, 104 S. Ct. 2229, 2234 (1984).
61. *Id.* "[T]he importance of the partnership decision to a lawyer's status as an associate is underscored by the allegation that associates' employment is terminated if they are not elected to become partners." *Id.*
62. *Id.*
63. *Id.*

The Court, in deciding that any possible discriminatory effects were linked to an associate's status as an employee, found it unnecessary to determine whether an offer of partnership was itself an offer of employment. Because the benefit a plaintiff is denied need not be employment to fall within Title VII's protection,[64] it did not matter that the benefit would accrue after one's employment in a position was terminated.[65] Accordingly, the Court held that any change in status that partnership might entail does not preclude the protection of Title VII.[66]

Furthermore, the Court found nothing in the legislative history of Title VII to support the law firm's argument that Congress intended to exempt law partnerships from application of Title VII.[67] Instead, the Court held that upon weighing the interests of Title VII against a partnership's freedom of association rights, Title VII must prevail when a conflict occurs.[68] The Court therefore concluded that Title VII provided the female associate with a cause of action upon which she had a right to prove her allegations.[69]

In a concurring opinion,[70] Justice Powell narrowly construed the scope of the majority opinion. He indicated that it was limited in application to an associate as an employee and to a partnership in its role as an employer.[71] He emphasized that management decisions and other traditional partnership activities are not subject to Title VII scrutiny.[72] He acknowledged that constitutional rights of association may be limited in the face of "invidious private discrimination,"[73] but found the issue in

64. *Id.* at 2235.
65. Citing a recent Supreme Court decision, Arizona Governing Comm. for Tax Deferred Annuity & Conferred Compensation Plans v. Norris, 103 S. Ct. 3492 (1983), the Court compared the partnership benefit to pensions, which qualify as terms, conditions, or privileges of employment, after employment terminates. 104 S. Ct. at 2235; *cf.* NLRB v. Bell Aircraft Corp., 206 F.2d 235, 237 (2d Cir. 1953) (employee's "prospects for promotion [are] among the conditions of his employment").
66. *Hishon*, 104 S. Ct. at 2235 (citing Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977); *see supra* note 45 and accompanying text.
67. 104 S. Ct. at 2235 & nn.10-11. The Court found nothing to support a *per se* exemption. "When Congress wanted to grant an employer complete immunity, it expressly did so." *Id*; *accord* County of Washington v. Gunther, 452 U.S. 161, 178 (1981).
68. *Hishon*, 104 S. Ct. at 2235. The Court remarked: " '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.' " *Id.* (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973)); *see also* Runyon v. McCrary, 427 U.S. 160, 178 (1976) (freedom to associate does not make either the association or its members immune from reasonable governmental regulation), *cited with approval in Hishon*, 104 S. Ct. at 2235-36. Moreover, the *Hishon* Court stated that respondent did not show how its lawyering activities would be inhibited by the requirement that it consider petitioner for partner on her merits. *Id.* at 2235.
69. *Hishon*, 104 S. Ct. at 2236.
70. *Id.* at 2236-37 (Powell, J., concurring).
71. *Id.* at 2236 (Powell, J., concurring).
72. *Id.* at 2236 & n.3 (Powell, J., concurring).
73. *Id.* at 2236 n.4 (Powell, J., concurring).

this case limited to contractual obligations voluntarily assumed by the partnership.[74] Constitutional rights of association were therefore not implicated. Powell inferred, however, that in a similar case, on its merits, some deference to constitutional rights of association might be appropriate.[75]

The decision in *Hishon v. King & Spalding* reaffirms the Court's position that Title VII is a broad remedial measure, intended to prohibit all practices that create inequality in employment opportunity.[76] Yet, because *Hishon* was not a decision on the merits, the Court did not examine all the issues surrounding Title VII's application to partnership selection.[77] Nor did the Court specifically define freedom of association rights in the context of businesses and partnerships. It did make it clear, however, that those rights may not be asserted to avoid the constraints of Title VII.

Perhaps the most apparent issue left unresolved is whether a partner may be considered an "employee" for Title VII purposes.[78] As it stands, in the case of a law firm associate denied an offer of partnership, the scope of Title VII has been extended to protect only those associates employed in a partnership career track. The Court, however, chose not to decide whether becoming a partner is itself an employment opportunity.[79] Thus, the holding is too narrow for application either to a firm's lateral selection of partners or to the allocation of assignments and privileges among partners.[80]

Notwithstanding the limited nature of the opinion, the immediate effect of *Hishon* may be far-reaching. Title VII prohibits discrimination based not only on "sex," but also based on "race, color, religion, or national origin."[81] The "terms, conditions, and privileges" of an associate's position include possibilities not considered in *Hishon*, such as work as-

74. *Id.* at 2236 (Powell, J., concurring).

75. *See id.* at 2237 n.4 (Powell, J., concurring).

76. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976).

77. Other issues include problems foreseeably arising in discovery requests regarding questions of confidentiality and attorney-client privileges. *But see* Bellis v. United States, 417 U.S. 85 (1974) (regarding partner's fifth amendment privilege during a discovery request, the Court held that an entity is not immunized from statutory or constitutional limitations by its choice of organization). *See generally* Note, *supra* note 40.

78. One argument presented by the female attorney in her complaint was that the law partnership was a separate legal entity from its partners and, therefore, should be considered the "employer" of the partners. *See* Appellant's Petition for Writ of Certiorari at 12-13, Hishon v. King & Spalding, 104 S. Ct. 2229 (1984). This argument was rejected by the court of appeals, *Hishon*, 678 F.2d 1022, 1026 (11th Cir. 1982), *rev'd*, 104 S. Ct. 2229 (1984), and, according to Justice Powell, "[t]he reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply." 104 S. Ct. at 2236 (Powell, J., concurring).

79. *Hishon*, 104 S. Ct. at 2235.

80. *Hishon*, 104 S. Ct. at 2236 (Powell, J., concurring).

81. *See supra* note 5.

signments, evaluation processes, and delays in partnership consideration. In addition, although a partnership still has the discretion to choose new partners among qualified candidates, it must be prepared to show that the decision is not based on unlawful criteria.[82] Because of the highly subjective criteria used in personnel selection, however, it is also likely that the courts will require plaintiffs to introduce direct evidence of discrimination, and to demonstrate that the employee in the past had been evaluated favorably in terms of legitimate subjective criteria.[83]

As more women, blacks, and other disadvantaged classes continue to enter the practice of law, *Hishon*'s effect may be, at long last, to increase the number of partnerships offered to those who are qualified, without regard to race, color, religion, sex, or national origin. If greater numbers of associates are females, the percentage of women who become partners should increase. Had the Court ruled any other way, professional groups could avoid equal employment legislation simply by their choice of organization.[84] Instead, the Court maintained its commitment to equal protection. As stated by Justice Powell in his concurrence, "[l]aw firms — and, of course, society — are better for these changes."[85]

Marjorie H. Wax

82. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (even if Title VII applied to partnership decisions, "the employer has discretion to choose among equally qualified candidates [or to choose the most qualified], provided the decision is not based upon unlawful criteria").

83. *See generally* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982); Note, *supra* note 40, at 303-07 (discussing the effects of Title VII on an employer's use of subjective criteria in promotion decisions).

84. As stated by one commentator, "the partnership form of organization should not furnish a shield to avoid compliance with Title VII." Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457, 476 (1980).

85. Hishon v. King & Spalding, 104 S. Ct. 2229, 2237 (1984) (Powell, J., concurring).