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Are Partners in Law Firms Protected by Antidiscrimination Laws in the United States?

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The short answer, in my opinion, based on my own review of applicable law, is that partners, not engaged in management, are in fact protected by Title VII of the Civil Rights Law of 1964. The question, put slightly differently, is whether laws prohibiting discriminatory employment practices, based on, among other things, age, sex, race, religion or sexual orientation apply to law firm partners who are removed from their firm or whose employment status is changed can assert a Title VII claim (assuming discharge is alleged to be based on being a member of these protected classes) or are they precluded from doing so because they are owners, hence, employers, not employees. Such anti-discriminatory protections are inapplicable, since virtually all law firm partners are simply employees at will.

Title VII of the Civil Rights Law of 1964 prohibits *employers* from discriminating against *employees* on a variety of grounds, including gender, age, race, religion and other protected classes.

Are partners in law firms employers or employees? If they are employers, Title VII would not apply.

A recent of series of diverse proceedings suggests completely opposite, inconsistent, contradictory and perhaps irreconcilable conclusions. These facially incompatible results are, in my opinion, actually easily reconcilable. The two lines of proceedings, involve Title VII claims brought by older partners forced in to retirement and who have alleged statutorily prohibited discrimination on account of age. These proceedings resulted in finding that Title VII does apply; in other words, these retirees are employees, neither owners nor employers. The contrary result involved a sex discrimination claim brought by an ousted female partner who claimed that discrimination on account of gender was the cause for her removal from the firm. The sex discrimination claim brought by this partners was dismissed by an appellate court which found that she was an owner, an employer, not an employee and that Title VII did *not* apply in her circumstance.

Discrimination on Account of Age

The Federal Equal Employment Commission, charged with enforcing Title VII, consistently recognizes that mere law firm partners are *employees* and indeed subject to Title VII protection regarding age discrimination claims. Applying Title VII with regard to age discrimination issues, the EEOC first sued Sidley Austin in 2007 for imposing mandatory retirement policies, with the case being disposed of by Sidley's paying, in settlement with the EEOC, $27,500,000 for this practice. Kelley Drye most recently came under the EEOC's cross hairs and in short order Kelley Drye, similarly capitulated, dropping its mandatory retirement policy, which a variety of other firms quickly following suit.

The EEOC announced that it will continue filing similar cases against law firms with mandatory retirement policies as well as against law firms which attempt to circumvent the issue by de-equitizing senior partners.

Noteworthy also are recommendations made three years ago by the American Bar Association and the New York Bar Associations that such mandatory retirement policies be eliminated.

I have discussed the issues of mandatory age-based law firm partnership retirements and the wisdom of these practices elsewhere.

Discrimination on Account of Gender

A recent case entitled *Kirleis v Dickie, McCamey* seems to have an inapposite result. In *Kirleis,* an ousted female partner sued her firm alleging her removal was predicated on gender discrimination. The United States Third Circuit Court of Appeals found her to be an *employer* and therefore not subject to Title VII protection.

Similarly, two United States Supreme Court cases, *Price Waterhouse v Hopkins* (1988) and *Hishon v King & Spalding* (1984) involved claims by women that they were not admitted to the partnership of the accounting firm and law firm, respectively, on the grounds of alleged unlawful gender discrimination. The two partnerships argued, *inter alia,* that associates were employees and partnership admissions were not employment decisions, but rather changing the status of the claimants from employee to employer, and therefore Title VII did not apply. The Supreme Court gave short shrift to these arguments and found essentially that change of status from associate to junior partner was simply a promotion to an elevated state of employment, not ownership and therefore simply a different status of *employee.* In short, being promoted to partnership was simply a promotion of employment status, not a change to ownership status.

Are These Two Lines of Cases Reconcilable? I certainly believe so.

In *Kirleis,* the plaintiff was heavily involved in firm management. The court, finding no Title VII violation, relied on, among other cases, an earlier Supreme Court decision, *Clackemas v Wells* (2003), which established the litmus test of employee v employer status as simply a "master-servant" assessment, in which the employer has the right to hire and fire and make policy decisions; while the employee is subject to the direction of firm management. Hence, the court concluded that Ms. Kirleis' active role in management lead to the ineluctable conclusion that she was a master-- an employer, with other partners essentially subservient to her and other members of management.

The simple facts is that partnership agreements notwithstanding, all partners in law firms, save for management, are employees at will. In fact in the last thirty months, virtually every law firm in the United States with 100 or more lawyers fired partners. Yes, fired partners. Virtually no formal partnership votes were taken, despite partnership agreements ostensibly requiring such votes. Rather, a firm's management group quietly made the decision to terminate a partner, or otherwise change his or her status (equity to non-equity, for example). The decision was quietly communicated to the terminated partner and in almost all cases, that was pretty much the end of it.

Every partner in every law firm is well aware of the indisputable fact that law firm partners are simply employees at will. Admission to partnership no longer results in life long tenure. Typically, law firm partnership agreements require a super majority vote for the ouster of a partner. However, in real life, when management directs a partner to leave the firm, the partner almost always quietly starts a job search. Partners who are shown the door by management, despite the purported protections of the partnership agreement, recognize the inevitable: If he or she demands the rights accorded in the partnership agreement, the ultimate result is pre-ordained: (1) the partnership will not buck management, for fear that they will be seen as not being "team players" and thereby put their own tenures (or compensation) in jeopardy; (2) the partner demanding his or her contractual rights will quickly receive a sharp diminution in his or her compensation and (3) the fact that the partnership is voting on the issue will likely be a matter of public record, making the inevitable job hunt exceedingly difficult. Most partners quietly asked to leave by management have the maturity, wisdom and grace to either step quietly in to the sunset, generally seeking alternative employment. Those few partners who prefer to display their lawyerly predilection for bravado by filing lawsuits (which are, of course, matters of public record and wonderful grist for legal tabloids and the blogosphere), simply create an indelible stain on their reputation; they are seen by future prospective employers as trouble makers and pariahs. These partner litigants effectively acknowledge publicly that their prior firm found them lacking and wanting; virtually no responsible law firm has the appetite to ingest another law firm's discards.

Every partner --indeed any professional seeking alternative employment -- is *always* asked why he or she is leaving his or her former firm. This question has been asked by every reader of this piece. An implausible response always results in serious doubt by a prospective employer as to whether risk should be taken in bringing such a candidate in to the fold. The public knowledge that a partner was tossed out the door, announced by either litigation or essentially a public beheading, leaves no room for a comfortable or reassuring response and poses incredibly difficult, indeed, virtually impossible barriers to overcome.

Similarly, in recent months, more senior partners have, in recent months,

A Little Bit of History

In 1987, the national law firm of Finley Kumble (of which I was a partner) dissolved and filed for bankruptcy. At the time of filing, the firm had in excess of $90,000,000 in debt, for which the partners were jointly and severally liable. The firm's management committee, the primary negotiators with the creditors, simply took the position that the debt should be divided among the partners *parri passu*. A significant number of "partners" argued to the court that they were simply employees, not partners, not involved in management and were subject to decisions and *diktats* of management. These non-management partners called themselves "mushroom partners," people who were left in the dark and fed muck. That argument carried the day. The court found that the two classes of "partners" should in fact be treated materially differently, with management bearing the lion's share of the firm's debt.

In the 23 years since the Finley Kumble bankruptcy, the term "mushroom partners" (a term I frankly coined) has become a commonly understood term of art in every subsequent law firm dissolution, part of the argot of the proceeding; in each such proceeding "mushroom partners" are, quite properly, universally recognized as simply being employees, bearing less liability in cases in which partners are compelled to dip in to their own pockets and contribute to pay creditors' claims.

In all events, the lawyer in me compels me to state the obvious: Facts and circumstances always vary. Firms ousting partners should carefully conduct their own research of applicable law or seek the advice of counsel and should not rely on the opinions expressed in this writing.