September 2010
Volume 13 Issue 1
www.mpmagazine.com

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Partner protection

Title VII of the 1964 US Civil Rights Law prohibits employers from discriminating against employees on a variety of grounds, including gender, age, race, religion and other protected classes. But, are partners in law firms employers or employees? If they are employers, Title VII would not apply. A recent series of proceedings suggests completely opposite, inconsistent, contradictory and irreconcilable conclusions.

Age discrimination

The Federal Equal Employment Opportunity Commission (EEOC), charged with enforcing Title VII, consistently recognises that law firm partners are *employees* and indeed subject to Title VII protection regarding age discrimination claims.

Applying Title VII, which bars age discrimination, the EEOC first sued Sidley Austin in 2007 for imposing mandatory retirement policies, with the case being disposed of by Sidley paying US$27.5 million for this practice.

Kelley Drye most recently came under the EEOC's radar and similarly capitulated, dropping its mandatory retirement policy. A variety of other firms followed suit.

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

Gender discrimination

Recently, an inapposite decision seems to have been made in *Kirleis v Dickie, McCamey*. An ousted female partner sued her firm, alleging her removal was predicated on gender discrimination. The intermediate appellate court found her to be an *employer* and therefore not subject to Title VII protection.

Similarly, two 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 partnerships on the grounds of unlawful gender discrimination. The two firms argued, *inter alia,* that associates were employees and that partnership admissions were not employment decisions but rather a change of status 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 *Kirleis*, the plaintiff was heavily involved in the firm's management. The court, finding no Title VII violation, relied on an earlier Supreme Court decision, *Clackemas v Wells* (2003), which established the litmus test of employee vs 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.

The court concluded that Kirleis' active role in management led to the ineluctable conclusion that she was a 'master' – an employer, with other partners essentially subservient to both her and other members of management.

Reality check

The simple fact is, partnership agreements notwithstanding, all partners in law firms, except for management, are employees at will. Typically, law firm partnership agreements require a super-majority vote to oust a partner. However, in real life, when management directs a partner to leave the firm, he quietly starts a search for another job.

A partner who is shown the door, despite the purported protections of the partnership agreement, recognises the inevitable: if he 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 not be seen as team players and thereby put their own tenures in jeopardy;
2. the partner demanding his contractual rights will quickly receive a sharp diminution in his 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.

Mushroom partners

In 1987, national law firm Finley Kumble (of which I was a partner) dissolved and filed for bankruptcy. At the time of filing, the firm had in excess of US$90m 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, as they were not involved in the firm's management and were subject to the decisions of senior partners. 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' (which I coined) has become a commonly-understood term of art in law firm dissolutions. In such proceedings, 'mushroom partners' are, quite properly, recognised as being simply employees. mp

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