

Who Is A Law Firm "Partner" In A Suit For Discrimination?

BY ROY SIMON

Most associates at a law firm want to make partner. But when it comes to employment discrimination lawsuits against large law firms (including suits for sexual harassment or a hostile environment), lawyers on both sides of the suit may want to be considered "employees," not "partners." Why? On the plaintiffs' side, lawyers want to be "employees" because only employees (not partners) have the right to sue a law firm for employment discrimination. On the defendants' side, only partners (not employees) can be held liable for employment discrimination. Thus, when a large law firm is sued for employment discrimination, we may see the strange spectacle of lawyers who hold the title "partner" arguing - on both sides of the case - that they are really only associates, "contract partners," or some other species of employee - anything but "partner."

Smaller Firms and the Fifteen Employee Minimum

On the other hand, when relatively small law firms (i.e., those that have fewer than fifteen employees) are sued for discrimination, the plaintiffs may argue that some of the supposed "partners" are really just "employees" for purposes of the federal antidiscrimination laws. Why? Because most of the federal employment discrimination laws do not apply to entities with fewer than fifteen employees. A firm with five partners and fourteen employees (including both associates and non-lawyer employees) cannot be sued under Title VII, the ADA, or the ADEA. However, counting some of the "partners" in a small firm as statutory "employees" can change the count of "employees" and bring an entity within the reach of the federal laws.

In *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) (Posner, J.), an age discrimination case that has been widely covered in the press, the EEOC successfully argued that many of the older "partners" that Sidley & Austin had demoted were really "employees." This article will discuss the EEOC's case against Sidley Austin Brown & Wood and its huge implications - but, first, some background.

For the first two decades after the Civil Rights Act of 1964 became law, it was unclear whether a partnership could be held liable for employment discrimination under Title VII. In 1979, however, a former female associate at King & Spalding sued the law firm under Title VII, alleging that it had discriminated against her based on her gender when it decided not to make her a partner. The law firm moved to dismiss on grounds that Title VII did not apply to partnerships. The district court granted the motion and the Eleventh Circuit affirmed, but in the landmark case of *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the United States Supreme Court reversed. The Court held that: (1) a benefit such as partnership that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion even though it is not required by express or implied contract; (2) if consideration for partnership status was a term, condition or privilege of an associate's employment, then partnership

consideration could not be based on factors prohibited by Title VII; and (3) applying Title VII to partnerships would not infringe on First Amendment rights of expression or association. Since the decision in *Hishon v. King & Spalding*, suits against law firms for employment discrimination have become commonplace - and costly. One of the best known employment cases against a law firm is *Weeks v. Baker & McKenzie*, 1994 WL 636488 (Cal. Super. Sept. 30, 1994). In that case, a California jury socked law firm giant Baker & McKenzie and its former partner Martin Greenstein with a verdict exceeding \$7 million - compensatory damages of \$50,000, plus punitive damages of \$225,000 against the former partner, plus punitive damages of \$6,900,000 against the law firm itself. The suit arose when a secretary who had been fired after working at Baker & McKenzie for less than three months sued the firm and Greenstein for sexual harassment under California's Fair Employment and Housing Act. Her suit revealed that secretaries, administrators, and associates at Baker & McKenzie had been accusing Greenstein of blatant sexual harassment for years, and that the law firm had shown a shocking disregard for the complaints. The trial court reduced the punitive damages against Baker & McKenzie itself to a more "reasonable" \$3.5 million, which the court said was enough to "light a fire" under Baker & McKenzie and "accomplish the purpose of deterrence." The court also awarded substantial attorney fees to the plaintiff. *See*, 1994 WL 774633 (Cal. Superior Ct. Nov. 28, 1994). Interestingly, the plaintiff had originally asked for only \$3.5 million in punitive damages but the jury was so angry at what it heard that it awarded nearly twice what the plaintiff asked in punitives.

On appeal, after the appellate court recounted in detail both Greenstein's long history of sexual harassment and the firm's conscious disregard of the many complaints about Greenstein, the court affirmed the \$3.5 million punitive damages judgment against Baker & McKenzie and approved an award of nearly \$1 million in attorney fees to plaintiff. *See*, *Weeks v. Baker & McKenzie*, 63 Cal. App.4th 1128 (1st Dist. 1998). And heaven only knows how much Baker & McKenzie spent in law firm time in investigating and litigating the case and in attorney fees to pay its own outside counsel.

The Baker & McKenzie case remains the biggest sex discrimination judgment against a law firm, but it is far from the only one. Several New York law firms have been sued for sex discrimination in recent years.

In 2001, for example, two female associates at Bois Schiller filed an EEOC complaint alleging that the firm was violating Title VII by maintaining two tracks - a nonpartnership track for female associates, and a partnership track exclusively for male associates. The two women later sued the law firm in the Southern District of New York, but they had weak claims (one had actually sought a nonpartnership track job through a headhunter, and both had left the firm for personal reasons after working there for less than a year), so they settled for only \$37,500 each. The EEOC kept investigating after the private settlement, though, and eventually determined that Bois Schiller had indeed discriminated against female lawyers regarding compensation and the terms of employment, in violation of Title VII. *See Anthony Lin, EEOC Finding: Boies' Law Firm Discriminated*, N.Y.L.J. Aug. 12, 2003.

In *Sier v. Jacobs, Persinger & Parker*, 714 N.Y.S.2d 283 (1st Dept. 2001), the defendant law firm didn't get off so cheaply. A 39-year-old male partner at Jacobs, Persinger named Scott Shepard had made unwanted verbal and physical sexual advances toward a 24-year-old first-year female associate at the firm. When the firm eventually told the young woman that she was going to be terminated, Shepard told her not to worry because "You'll take care of me and I'll take care of you." Disgusted with Shepard's crass and unprofessional behavior, the associate sued the firm for a hostile work environment. After a bench trial, the trial court awarded her \$250,000 in damages for emotional distress and \$50,000 in punitive damages.

On appeal, the First Department affirmed, except that it reduced the award for emotional distress damages to \$200,000.

Even a single incident, without any direct verbal encounters or physical touching, can create a hostile environment. In 2001, the law firm of Weitz & Luxenberg agreed to pay \$175,000 to settle a hostile environment lawsuit filed by a former female employee after someone caused an image of actress Pamela Anderson engaging in sex to appear on the employee's computer screen. (The settlement amount was supposed to be confidential, but it became public when the plaintiff moved to enforce the settlement after Weitz & Luxenberg had asked the plaintiff for repeated extensions of the payment deadline.) See *Today's News Update*, N.Y.L.J. Aug. 2, 2001.

Coudert Brothers had an even more costly experience. In the early 1990's, a female associate in the firm's Tokyo office took maternity leave. Less than two weeks after she returned to work, the firm told her to leave the Tokyo office, but the firm did not suggest any other Coudert Brothers office to which she could transfer - it suggested only that she could return briefly to the New York office while she looked for a job at another firm. That wasn't a very attractive possibility because her husband was a lawyer at Milbank Tweed's Tokyo office. The female associate sued Coudert Brothers, and eventually, the matter went to trial in New York County Supreme Court in Manhattan. At trial, several witnesses said they had heard the former managing partner of Coudert's Tokyo office, Charles Stevens, say that women who go on maternity leave do not return to work with the same commitment to their jobs. A few minutes before closing arguments were set to begin, the parties announced a settlement. The settlement amount was protected by a confidentiality order, but was reported to be between \$500,000 and \$750,000 - and the settlement money was not covered by the firm's insurance. Nevertheless, the settlement apparently spared the firm from an even harsher fate - in post trial interviews, all six jurors said they believed that the firm had discriminated against the associate and that her damages were between \$1.5 million and \$2 million. See, Edward Adams, *Coudert Settles Gender Discrimination Suit*, N.Y.L.J. Aug. 8, 1996.

Discipline and sanctions, too

Employment discrimination suits aren't just costly. Under DR 1102(A)(6), unlawful discrimination is also usually a disciplinary offense. Specifically, DR 1102 (A) provides that it is professional misconduct for a lawyer or law firm to:

- (6) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation....

The rule also provides that a grievance alleging unprofessional conduct based on unlawful discrimination may not be filed with a grievance committee until a complaint alleging the underlying discrimination has first been brought before an appropriate tribunal. A disciplinary complaint can be filed against the lawyer even if the plaintiff filing the discrimination claim eventually loses, but if the plaintiff wins and the defendant's right to judicial or appellate review has been exhausted, a tribunal's "finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding." I could not find any cases in which lawyers have been disciplined for employment discrimination based on DR 1102(A)(6), but in at least one case, *Matter of Gilberg*, 194 A.D.2d 262 (4th Dep't. 1993), a lawyer was disciplined for making unwanted sexual

advances to secretaries in his law office. This was found to be conduct that adversely reflected on his "fitness to practice law."

Unlawful discrimination can also be the basis for a court to impose sanctions on an attorney. *See, e.g., Principe v. Assay Partners*, 154 Misc.2d 702, 586 N.Y.S.2d 182 (N.Y. County Sup. Ct. 1992) (attorney representing party at deposition was sanctioned \$1,000 for repeatedly and disparagingly referring to the female attorney taking the deposition as "little lady" or "little girl").

Discipline and sanctions for discrimination, of course, can be imposed against a lawyer whether the person the lawyer harasses or otherwise discriminates against is a "partner" or an "employee" of the law firm. I mention discipline and sanctions here only for the sake of completeness. Likewise, both partners and employees have the right to sue another lawyer in the office for the common law tort of sexual harassment - employee status is no defense there. But only a person who is an "employee" within the meaning of an applicable federal employment discrimination statute can sue in federal court for employment discrimination under the federal antidiscrimination laws. Most of those federal laws - including Title VII, the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA") - protect only "employees," not employers (i.e., not "partners"). Thus, a law firm ordinarily does not violate federal employment discrimination laws by discriminating against a "partner" or "shareholder" in the firm. Consequently, it is vital for a law firm to know who is a "partner" that cannot sue for employment discrimination under federal law and who is just an "employee" that can sue. I now turn to that question.

(An exception to the generalizations above is 42 U.S.C. § 1981, which prohibits race discrimination in contracting and does not require fifteen employees. Thus, a law firm partner who suffers race discrimination at the hands of the partnership may file discrimination charges based on § 1981. Also, state and municipal antidiscrimination laws often differ significantly from federal antidiscrimination laws. Accordingly, this article does not discuss discrimination suits brought under state or municipal laws or under § 1981.)

When is a "partner" really an "employee"?

Law firms dispense titles, but the federal employment discrimination statutes dispense justice, and justice does not depend on mere labels. Thus, a nominal "partner" at a law firm may be deemed an "employee" if the person meets the common law definition of an "employee." The larger the number of people at a law firm who are "employees" within the meaning of the federal antidiscrimination laws, the larger the number of people who can potentially sue the law firm for unlawful employment discrimination, and the greater the chances that even small law firms will meet the threshold of fifteen statutory "employees" and thereby fall within the coverage of those laws. Thus, determining who is a "partner" and who is an "employee" is crucial to understanding a law firm's potential liability to suit under the federal anti-discrimination laws.

How can a law firm (or a court) tell a "partner" from an "employee"? In the recent case of *Clackamas Gastroenterology Associates P.C. v. Wells*, 538 U.S. 440 (2003), the United State Supreme Court set out a six factor test for determining whether a person in a professional organization should be counted as an "employee" for purposes of determining whether the organization is large enough to be sued under the federal employment discrimination laws. The suit arose when a medical clinic terminated a bookkeeper

named Deborah Anne Wells. She filed suit alleging that the medical clinic had violated the Americans with Disabilities Act of 1990 (the "ADA") when it terminated her employment. The medical clinic, which was organized as a professional corporation, moved for summary judgment, asserting that it was not covered by the ADA because it did not have 15 or more employees. Ms. Wells, however, argued that the four physician shareholders who owned the professional corporation and constituted its board of directors should be counted as "employees" for ADA purposes. The district court concluded that the physicians were more analogous to "partners" in a partnership than to shareholders in a corporation, and were therefore not employees under the ADA. But the Ninth Circuit reversed, finding no reason to let a professional corporation reap the tax and civil liability advantages of its corporate status and then argue that it is like a partnership in order to avoid employment discrimination liability.

The Supreme Court agreed with the Ninth Circuit and held that a person with the title "director" or "shareholder" in a professional organization may nevertheless be considered an "employee" for purposes of the Americans with Disabilities Act if the person meets the EEOC's six factor test for defining an "employee." The EEOC's six factors, all of which reflect the EEOC's focus on the common law touchstone of "control," are as follows:

(1) "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;" (2) "Whether and, if so, to what extent the organization supervises the individual's work;" (3) "Whether the individual reports to someone higher in the organization;" (4) "Whether and, if so, to what extent the individual is able to influence the organization;" (5) "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;" and (6) "Whether the individual shares in the profits, losses, and liabilities of the organization." The Supreme Court thus adopted the EEOC's "control" approach. Specifically addressing the question of professional partnerships, the Supreme Court said: "Today there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners."

Back To EEOC vs. Sidley

The application of the *Clackamas* factors to law firm partnerships is being tested now in *Equal Employment Opportunity Commission v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) (Posner, J.). That case arose when Chicago based Sidley & Austin (as it was called before it merged with New York's Brown & Wood) decided in 1999 to demote thirty two of its less productive "equity partners" (half of whom were in their late 50's or early 60's) to positions as "counsel" or "senior counsel" The demotions constituted adverse personnel action within the meaning of the antidiscrimination laws. None of the demoted partners filed a formal complaint but - based on a tip from a confidential government informer from within Sidley - the EEOC sua sponte began investigating to determine whether the demotions violated the Age Discrimination in Employment Act ("ADEA").

When Sidley & Austin would not voluntarily produce all of the information the EEOC wanted, the EEOC issued a subpoena duces tecum to the firm, seeking a variety of documentation bearing on both coverage and discrimination. The reason for the inquiry about coverage, the EEOC explained, was that "the ADEA protects employees but not employers." Sidley & Austin fought the subpoena by arguing that each of the thirty two demoted lawyers had been genuine "partners" at the time of the demotions because "(a) his income included a share of the firm's profits, (b) he made a contribution to the capital of the firm, (c) he

was liable for the firm's debts, and (d) he had some administrative or managerial responsibilities" Thus, Sidley & Austin argued, each "equity partner" was an "employer" beyond the reach of the federal antidiscrimination law. The Seventh Circuit was not persuaded, however, because the structure of Sidley & Austin did not fit the traditional notions of partnership. The court described the structure of the law firm as follows:

The firm is controlled by a self-perpetuating executive committee. Partners who are not members of the committee have some powers delegated to them by it with respect to the hiring, firing, promotion, and compensation of their subordinates, but so far as their own status is concerned they are at the committee's mercy. It can fire them, promote them, demote them (as it did to the 32), raise their pay, lower their pay, and so forth. The only firm wide issue on which all partners have voted in the last quarter century was the merger with Brown & Wood and that vote took place after the EEOC began its investigation. Each of the 32 partners at the time of their demotion by the executive committee had a capital account with the firm, averaging about \$400,000. Under the firm's rules, each was liable for the firm's liabilities in proportion to his capital in the firm. Their income, however, was determined by the number of percentage points of the firm's overall profits that the executive committee assigned to each of them. Each served on one or more of the firm's committees, but all these committees are subject to control by the executive committee.

Given this structure, the Seventh Circuit held that the EEOC was entitled to discovery to determine whether the demoted Sidley & Austin "partners" were really "employees" for purposes of the federal antidiscrimination laws. Even if the demoted lawyers qualified in every respect as "partners" under state law, that was not dispositive for purposes of the *federal* employment discrimination laws.

On the other hand, the Seventh Circuit said, lawyers who truly are "partners" will apparently not be able to attack their fellow partners under the federal employment discrimination laws for management decisions that have a discriminatory motive or effect. Justice Powell had made this point in his concurring opinion in the seminal case of *Hishon v. King & Spalding*, 467 U.S. 69 (1984), which sought to limit the reach of the *Hishon* holding. Justice Powell's concurrence included the following paragraph:

I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The 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. The relationship among law partners differs markedly from that between employer and employee - including that between the partnership and its associates. The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement or consent among the partners.

The *Sidley* case has attracted tremendous attention, and rightly so. See, e.g., Leonard Bierman, So, You Want To Be A Partner At Sidley & Austin? 40 Hous. L. Rev. 969 (2003); Stephanie M. Greene & Christine Neylon O'Brien, *Partners and Shareholders As Covered Employees Under Federal Antidiscrimination Acts*, 40 Am. Bus. L.J. 781 (2003) (discussing *Sidley* in various places); David Hechler, *Sidley Being Investigated: Can Law Partners Be Considered "Employees"?*, National L. J., February 18, 2002. The matter is still ongoing, and

the ultimate outcome is certain to influence the way lawyers structure their partnerships and label their lawyers.

Conclusion: Labels are only on the surface

In *ALICE AND WONDERLAND*, Alice said, "A word means exactly what I want it to mean - nothing more, nothing less." But law firms do not have Alice's magical powers, and the subject of employment discrimination by a law firm has become more complex in recent years. "Partners" and "shareholders" may actually be "employees" for purposes of the federal employment discrimination laws under the pragmatic, multifactored test endorsed by the United States Supreme Court in *Clackamas*. Lawyers and law firms should therefore look beneath the surface of labels when making employment related decisions. Law firms need to be constantly aware that a lawyer called a "partner" or "shareholder" may sue the law firm for employment discrimination if the lawyer is treated like an "employee." Moreover, a law firm or other professional organization that thinks it has too few "employees" to be covered by the federal employment discrimination laws may well have enough employees if some of the "partners" or "shareholders" count as "employees" under the discrimination statutes. Whether a given person is a "partner" or an "employee" will depend on practical considerations about control captured in the Supreme Court's six factor test in *Clackamas*, not on mere titles.

An employment discrimination suit against a law firm can cost money, scare away clients, and harm efforts to recruit new lawyers. Because DR 1102(A)(6) prohibits law firms and their lawyers from engaging in unlawful discrimination, law firms already have an obligation under DR 1104(A) to make "reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules." Moreover, under DR 1104 (B), all lawyers in a firm with "management responsibility" or "direct supervisory authority over another lawyer" must make their own "reasonable efforts" to ensure that lawyers under their supervision conform to the disciplinary rules. If law firms and lawyers with management responsibility and supervisory authority take these duties seriously and respond quickly and aggressively to incidents of possible employment discrimination (especially alleged sexual harassment or a hostile environment), law firms will be able to ward off not only possible professional discipline but also the much greater threat of a meritorious employment discrimination suit against the firm. Now that the meaning of the title "partner" has become elastic and subject to debate, avoiding those suits is more important than ever.

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