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Title VII & The Civil Rights Act of 1991: What Professional Firms Should Know

[W]hatever affects the condition of women, their habits and their opinions, has great political importance in my eyes.¹

I. INTRODUCTION

The employment practices of professional firms may be on a collision course with the law. Section 107 of the Civil Rights Act of 1991 declares that an unlawful employment practice is established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."² Although innocuous at first blush, this passage essentially abolishes³ an employer's "mixed motive" defense⁴ and increases the likelihood that more professional firms will be sued for discriminatory hiring and promotion decisions.

Interestingly, this change occurs at a time when the legal profession is projected to experience little or no growth during the 1990s.⁵ Making the situation more complex is that since 1986, sixty-two percent of entering first year law students are either female or minority students.⁶ Thousands of minority and female associates who graduated from law schools in the mid-1980s are currently being or soon will be considered for partnership—an institution long dominated by white males.⁷

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Vol. II, 209 (H. Reeve trans., 1945).

2. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. at 1075 (adding subsection (m) to 42 U.S.C. § 2000e-2 (1988)) (emphasis added).

3. If an employer demonstrates that it would have made the same decision absent the impermissible discrimination, it will still be liable. However, such evidence may limit the plaintiff's award. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(b), 105 Stat. at 1075.

4. See *infra* note 40 and accompanying text.

5. Steven Brill, *The Law Business in the Year 2000*, AM. LAWYER, June 1989, at 6.

6. Hattie-Jo P. Mullins, *Women and the Law: Will Real Life Catch Up to T.V.?*, MS., June 1987 at 64, quoting 1986 U.S. Labor Department statistics.

7. According to a 1988 survey "more than 90 percent of the partners in the nation's largest law firms are white males." Doreen Weisenhaus, *Still a Long Way*

This article is not intended to critique the law, but rather to provide an overview of recent caselaw regarding discrimination in the partnership selection process. It also suggests policies and procedures professional firms should implement to limit Title VII liability.

II. TITLE VII AND THE GENESIS OF DISCRIMINATORY SUITS AGAINST PROFESSIONAL FIRMS

Title VII of the Civil Rights Act of 1964, as amended in 1972, declares:

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or 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.⁸

On more than one occasion, the United States Supreme Court has emphasized that the "central statutory purposes" of Title VII are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."⁹ Despite these lofty goals, for nearly twenty years employment law under Title VII dealt almost exclusively "with the problems of providing equal opportunity for employees who work with their hands rather than with people, paper or ideas."¹⁰ As a result, many professional firms assumed Title VII did not apply to their decisions about whom to make a partner.

to Go for Women, Minorities, NAT'L L.J., Feb. 8, 1988, at 1, 48-53.

Only 25 years ago, women were recognized as second class citizens in the legal profession: "Women, no matter what their ethnic or racial affiliations, usually have greater difficulty than men in establishing themselves as lawyers. Clients tend to shun them, and employers, if they will hire any women for lawyer positions usually keep them in less responsible and less important jobs." QUINTINE JOHNSTONE & DAN HOPSON, JR., *LAWYERS AND THEIR WORK* 19 (1967).

8. 42 U.S.C. § 2000e-2(a) (1988).

9. *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264-65 (1989) (O'Connor, J., concurring).

For a brief discussion of the legislative history of Title VII of the 1964 Civil Rights Act, see Mark S. Brodin, *The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

10. Andrea R. Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 46 (1979).

However, the 1984 Supreme Court decision *Hishon v. King & Spalding*¹¹ made clear that Title VII applied to partnership admission decisions and that the opportunity to be considered for partnership is a "privilege of employment."¹² Despite earlier indications that a law firm's partnership decisions fell under the aegis of Title VII,¹³ *Hishon* sent shockwaves throughout the legal community.¹⁴

A. *Hishon v. King & Spalding*¹⁵

1. *Facts*

Elizabeth Hishon was a seven-year associate with the large Atlanta law firm of King & Spalding, a general partnership under Georgia law. In 1980, King & Spalding had fifty partners and employed fifty associate attorneys. No woman had ever been a partner.¹⁶ As was customary at the end of an associate's sixth year, King & Spalding considered whether to admit Hishon to the partnership in May 1978. The firm rejected Hishon's application. One year later, the firm again refused to admit Hishon to the partnership.¹⁷ Consistent with the firm's "up or out" policy, Hishon was notified to begin seeking employment elsewhere.¹⁸

Hishon subsequently filed a claim with the Equal Employment Opportunity Commission, claiming that King &

11. 467 U.S. 69 (1984).

12. *Id.* at 77.

13. Before the Supreme Court decided *Hishon*, at least 3 federal district courts specifically addressed Title VII's application to the legal profession. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977) (holding that an associate attorney's allegation of firm's discrimination and unlawful termination and refusal to make him a partner are actionable under Title VII); EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974) (holding that the professional nature of defendant law firm does not exempt it from Title VII suit by associate attorneys); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974) (holding that female student not hired by large law firm may bring class action suit under Title VII for discriminatory hiring practices on behalf of all similarly situated women).

14. Rowland L. Young, *Law Firm Partnership Decisions Subject to Title VII*, 70 A.B.A. J. 108 (1984); W. Connolly, *Admission to Partnership Subject to Title VII*, N.Y.L.J., June 8, 1984, at 1, col. 1.; Arthur J. Marziale, Jr., Note, *Hishon v. King & Spalding: Implications for the Private Partnership*, 14 CAP. U. L. REV. 151 (1984).

15. 467 U.S. 69 (1984).

16. *Id.* at 71.

17. *Id.* at 72.

18. 678 F.2d at 1024.

Spalding had violated Title VII by discriminating against her on the basis of sex. Hishon alleged that the firm promised promotion to partnership as “a matter of course” for associates who received satisfactory evaluations as a recruiting device.¹⁹ Hishon claimed that these promises were a key factor in her decision to join King & Spalding.²⁰ Hishon sought backpay and compensatory damages if her claim for reinstatement and elevation to partnership failed.²¹

2. Procedural History

The federal district court dismissed Hishon’s complaint for lack of subject matter jurisdiction, reasoning that Title VII did not apply to partnership selection decisions.²² The Court of Appeals for the Eleventh Circuit affirmed,²³ and the United States Supreme Court reversed in a unanimous decision written by Chief Justice Burger.²⁴

3. Court’s analysis

As an initial matter, the Supreme Court ruled that “[o]nce a contractual relationship is established, the provisions of Title VII attach.”²⁵ The Court held that consideration for partnership may properly be a “term, condition, or privilege of employment” if “the evidence at trial establishes that the parties contracted to have [Hishon] considered for partnership.”²⁶ Since a contract for employment may be either express or implied, the contractual relationship between Hishon and King & Spalding did not preclude liability under Title VII.²⁷

The Supreme Court also ruled that an aggrieved employee does not necessarily have to prove that the alleged “term, condition, or privilege of employment” is specifically contained in the contract itself. An employer may provide its employees with so many “benefits” that the benefit comes to be viewed as a

19. 467 U.S. at 71-72.

20. *Id.*

21. *Id.*

22. *Hishon v. King & Spalding*, 25 *Empl. Prac. Dec. (CCH)* para. 31,703, at 20,062, 20,064 (N.D. Ga. 1980).

23. *Hishon v. King & Spalding*, 678 F.2d 1022, 1026 (11th Cir. 1982), *cert. granted*, 459 U.S. 1169 (1983).

24. 467 U.S. at 69.

25. *Id.* at 74.

26. *Id.* at 75.

27. *Id.*

privilege: “[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract not to provide the benefit at all.”²⁸

In short, the Court ruled that regardless of whether or not a formal employment contract exists, an employee may make out a Title VII claim if the alleged discrimination involved a “benefit” of employment which had come to be viewed as an essential part of the employment relationship. In demonstrating that consideration for partnership was “part and parcel” of the employment relationship, the Supreme Court emphasized that King & Spalding’s associates “regularly expected to be considered for partnership”; that “lawyers outside the firm were not routinely considered” for partnership; and that King & Spalding “explicitly used the prospect of ultimate partnership to induce young lawyers to join the firm.”²⁹ Significantly, the Court made clear that the firm’s “up or out” policy demonstrated that the opportunity for partnership was an essential part of employment at King & Spalding: associates are “terminated if they are not elected to become partners.”³⁰

As part of its analysis, the Court evaluated King & Spalding’s main argument³¹ that elevation to partnership is a change in status from an “employee” to “employer” and that an offer to become an “employer” is not itself an offer of employment. The Court responded that:

The benefit a plaintiff is denied need not *be* employment to fall within Title VII’s protection; it need only be a term, condition or privilege *of* employment Accordingly, nothing in the change of status that advancement to partnership might

28. *Id.*

29. *Id.* at 76.

30. *Id.*

31. The Court rejected, with very little elaboration, King & Spalding’s ancillary argument that partnerships are exempt from Title VII scrutiny. The Court reasoned that “nothing in the statute or legislative history . . . support[s] such a *per se* exemption. When Congress wanted to grant an employer complete immunity, it expressly did so.” 467 U.S. at 77.

Similarly, the Court rejected King & Spalding’s argument that imposing liability for partnership selection decisions infringes on the constitutional rights of expression or association. The Court cited *Norwood v. Harrison*, 413 U.S. 455, 470 (1973), for the proposition that “[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but is has never been accorded affirmative constitutional protections.” 467 U.S. at 78.

entail means that partnership consideration falls outside the terms of the statute³²

4. *Powell's Concurrence*

Despite the self-proclaimed narrowness of the Court's holding,³³ Justice Powell, former president of the American Bar Association, wrote to "make clear . . . that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners."³⁴ Justice Powell also pointed out that the relationship among law partners and the dynamics of intra-partnership decision-making differ fundamentally from the traditional employer-employee relationship.³⁵ Law firms may not unlawfully discriminate during the admissions process, but law firms should be able to make "judgmental and sensitive decisions" which "embrace a wide range of subjects."³⁶

B. *What Hishon Means*

The impact of *Hishon* is twofold. First, Title VII protections apply to partnership admission decisions. Second, plaintiffs can pursue sex discrimination claims against professional partnerships.

III. HARBINGER OF REFORM: *Price Waterhouse v. Hopkins*³⁷

Since *Hishon*, no Supreme Court ruling has specifically addressed the denial of partnership status in a private law firm.³⁸ Although *Hishon* means that sex discrimination claims against law firms are legally tenable under Title VII, *Hishon*

32. *Id.* at 77.

33. *See id.* at 77-78 n.10, where C.J. Burger emphasizes the Court's "narrow holding."

34. *Id.* at 79.

35. *Id.* at 79-81.

36. *Id.* Powell listed such "subjects", including "profits and other types of compensation; work assignments, approval of commitments in bar association, civic, or political activities; questions of billing; acceptance of new clients; questions of conflicts of interest; retirement programs; and expansion policies." *Id.* at 79-80 n.3.

37. 490 U.S. 228 (1989).

38. However, at least one lower court opinion since *Hishon* has considered a large Philadelphia law firm's sexual discriminatory practices. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990); *see infra* text accompanying notes 115-21.

did not provide any specific guidance about the *type* of sex discrimination that could support a successful Title VII claim. The next Supreme Court decision that grappled with sex discrimination in a professional firm's partnership selection process was *Price Waterhouse v. Hopkins*,³⁹ a "mixed motive" case,⁴⁰ which served as a catalyst for major Congressional reform of Title VII.⁴¹

A. *Price Waterhouse v. Hopkins*

1. *Facts*

Ann Hopkins, a senior manager at Price Waterhouse's Office of Government Services in Washington D.C., was proposed as a candidate for partnership in 1982, after working five years with the firm. Of the eighty-eight persons considered for partnership that year, Hopkins was the only woman.⁴² Forty-seven candidates were admitted as partners; twenty-one were rejected; and twenty, including Hopkins, were "held for reconsideration" the following year.⁴³ Thirty-two Price Waterhouse partners evaluated Hopkins' candidacy. Thirteen favored admission, eight voted against partnership, eight did not know her well enough to form an opinion, and three recommended that her candidacy be placed on hold.⁴⁴

Hopkins' positive evaluations stressed her "deft touch," "strong character, independence and integrity" and characterized her as "an outstanding professional." One evaluator commented that she was "extremely competent [and] intelligent" and another that she was "strong and forthright, very productive, energetic, and creative."⁴⁵

Virtually all the partners' negative comments focused on Hopkins' interpersonal skills, including the perception that she was sometimes "overly aggressive, unduly harsh, difficult to work with, and impatient with the staff."⁴⁶ One partner de-

39. 490 U.S. 228 (1989).

40. "Mixed motive" cases arise when an employer considers both illegitimate factors (such as an individual's race, sex, religion, or national origin) *and* legitimate factors (such as incompetence, misconduct, or poor qualifications or experience). *Mount Healthy Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-85 (1977).

41. See *infra* text accompanying notes 69-78.

42. 490 U.S. at 233.

43. *Id.*

44. *Id.*

45. *Id.* at 234.

46. *Id.* at 234-35.

scribed her as “macho” and another opined that she “overcompensated for being a woman.” A third evaluator recommended “a course at charm school,” while another partner advised that her chances for partnership would be improved the next year if Hopkins would “walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴⁷

Before Hopkins’ candidacy could be re-evaluated the next year, Price Waterhouse advised Hopkins that she would not be reconsidered for partnership.⁴⁸ Hopkins resigned and brought a Title VII claim against Price Waterhouse.

2. *Procedural History*

The district court found that Price Waterhouse had refused to promote Hopkins for both legitimate and illegitimate reasons.⁴⁹ The district court held Price Waterhouse liable, but declined to order backpay and re-instatement.⁵⁰ The U.S. Court of Appeals for the District of Columbia affirmed the district court’s decision on liability, but reversed on relief.⁵¹ The Supreme Court reversed in a plurality opinion by Justice Brennan joined by Justices Marshall, Blackmun, and Stevens.⁵²

3. *Court’s Analysis and Holding*

a. Brennan’s Plurality. The Court found no error in the district court’s factual finding that Price Waterhouse used sex stereotyping in declining to promote Hopkins to partnership. The plurality held that

[O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid . . . liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.⁵³

47. *Id.* at 235.

48. *Id.* at 233 n.1.

49. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1114-20 (D.D.C. 1985). The legitimate reasons included her harsh treatment of staff and the perceived defects in her interpersonal skills. The illegitimate reasons were partners’ comments based on gender stereotypes.

50. *Id.* at 1122.

51. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 473 (D.C. Cir. 1987).

52. 490 U.S. at 258.

53. *Id.* at 244-45.

In addition, the Supreme Court reversed the Court of Appeals because it had incorrectly applied the "clear and convincing evidence" standard to Price Waterhouse's claim that it would have made the same decision without the discriminatory evaluations.⁵⁴ Rather, the correct standard was "preponderance of the evidence,"⁵⁵ the conventional standard employed in civil litigation under Title VII.⁵⁶ The plurality also suggested the employer could satisfy this evidentiary burden with "objective evidence."⁵⁷

In short, the plurality held that if an employer refuses to hire or promote an employee based on both illegitimate, discriminatory motives *and* legitimate, nondiscriminatory motives, the employer will not be liable if it can demonstrate by a "preponderance of the evidence" that it would have made the same decision absent the discriminatory motive.⁵⁸

b. Concurring Opinions. Justice White agreed that the proper standard is preponderance of the evidence, but took exception to the plurality's requirement that the employer submit objective evidence.⁵⁹ Rather, White suggested that an employer's own credible testimony would suffice.⁶⁰

Justice O'Connor wrote a separate opinion concurring in the judgment, but disagreed with the plurality's conclusions about the substantive requirement of causation under the statute.⁶¹

54. *Id.* at 254-55.

55. *Id.* at 253.

56. *Id.*

57. *Id.* at 252.

58. *Id.* at 244-45.

59. *Id.* at 260.

60. *Id.* at 261. The plurality commented that this suggestion was "baffling." *Id.* at 252 n.14.

61. *Id.* at 261. For an excellent discussion of the different standards of causation espoused in *Price Waterhouse*, see Mark C. Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495 (1990).

c. *Dissenting Opinion.* Justice Kennedy, along with Chief Justice Rehnquist and Justice Scalia, dissented, questioning the plurality's causation standard and burden of proof formulation.⁶²

4. *Further Proceedings on Remand*

On remand to the district court, Judge Gesell offered both parties the opportunity to introduce new evidence on the issue of liability.⁶³ Both sides chose to have the district court determine liability based on the evidence already presented.⁶⁴ Applying the preponderance of the evidence standard, Judge Gesell ruled that he was not persuaded that Price Waterhouse would have rejected Hopkins' candidacy for partnership had Hopkins not been a woman.⁶⁵ Judge Gesell ordered Price Waterhouse to elevate Hopkins to partnership status and award backpay and attorneys fees. The Court of Appeals affirmed.⁶⁶

B. *Response to Price Waterhouse*

Price Waterhouse generated calls from legal commentators, civil rights advocates, the plaintiff's bar,⁶⁷ and politicians who sought "congressional action" to reverse the effects of the Supreme Court's perceived indifference to civil rights.⁶⁸

62. 490 U.S. at 280-81.

63. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1204 (D.D.C. 1990).

64. *Id.* at 1204.

65. *Id.* at 1206-07.

66. *Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990).

67. *Price Waterhouse* will expand the zone of caution [for the plaintiff's bar in taking Title VII cases] and, correspondingly, expand the areas in which unconscious attitudes or even conscious prejudice operate. The plaintiff's counsel will have to determine not only whether there is evidence of discrimination but also whether the plaintiff's record is such that the employer might prevail because of the "same decision principle" . . . [Plaintiff's] counsel will become more cautious, and only those plaintiffs who have both evidence of discrimination and a good work record are likely to find representation.

Alfred W. Blumrosen, *Society in Transition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1050 (1990).

68. See generally William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990). Another commentator wrote "[R]ecent Supreme Court decisions [including *Price Waterhouse*] . . . signal the perception of some Justices that the harshest forms of discrimination have been substantially eliminated and that the doctrines should now be reshaped to allow employers more leeway." Blumrosen, *su-*

1. Congressional Response

In late 1989, Congressman Augustus F. Hawkins (D-Cal.) introduced House Bill 4000⁶⁹ and Senator Edward M. Kennedy (D-Mass.) introduced a similar bill in the Senate⁷⁰ to create the "Omnibus Civil Rights Act of 1990." The bill's stated purpose was to overturn five Supreme Court decisions⁷¹—all from the Court's 1989 term—which were seen by the bill's proponents as weakening important employment discrimination protections under Title VII of the 1964 Civil Rights Act.⁷² The bill was also meant to increase the remedies available to victims of employment discrimination and harassment.⁷³

2. Opposition and Conciliation

Private employers and the Bush administration vigorously opposed the bill.⁷⁴ President Bush vetoed what he had previously branded a "quota bill."⁷⁵ However, congressional support for a civil rights bill did not subside. Under political pressure,⁷⁶ President Bush lent support for a compromise bill engi-

pra note 67, at 1061.

Ironically, Justice Brennan, whose *Price Waterhouse* opinion became a lightning rod of criticism, wrote, during the 1989 term, that Congress' assertiveness in overruling Supreme Court decisions demonstrates its willingness "to overturn this Court's mistaken interpretations of Civil Rights Statutes." *Patterson v. McLean Credit Union*, 491 U.S. 164, 200-01 n.9 (1989) (Brennan, J., concurring in part and dissenting in part).

For an interesting overview of Congressional attempts to overrule various Supreme Court civil rights decisions from the mid-1980s, see Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 740-43 (1991).

69. H.R. 4000, 101st Cong., 2d Sess. (1989). A similar bill was also introduced by Congressman Campbell (D-Cal.). H.R. 3455, 101st Cong., 2d Sess. (1989).

70. S. 2104, 101st Cong., 2d Sess. (1989).

71. *Id.* The five Supreme Court decisions included *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Wards Cove Packing v. Atonion*, 490 U.S. 642 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

72. DAVID A. CATHCART & MARK SNYDEZMAN, *American Law Institute & American Bar Association, THE CIVIL RIGHTS ACT OF 1991* 13 (1992).

73. *Id.*

74. Employers were troubled that the bill went beyond "restoring prior federal civil rights laws and proposed a new remedial scheme including jury trials, possible compensatory and punitive damages for intentional discrimination claims under Title VII, and changes in the 'business necessity' defense frequently invoked in disparate impact cases." *Id.*

75. Commerce Clearing House, Inc., *CIVIL RIGHTS ACT OF 1991: LAW AND EXPLANATION* 3-4 (1991).

76. By October 1991 President Bush reportedly began softening his position and

neered by Senator John Danforth (R-Mo.) and Senator Kennedy. With the President's approbation, the bill passed easily through Congress.⁷⁷ On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991.⁷⁸

IV. CONGRESS REVERSES THE SUPREME COURT

A pertinent provision of the Civil Rights Act of 1991, is Section 107: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."⁷⁹

This provision, as intended, abrogates *Price Waterhouse's* essential holding. No longer will an employer escape liability if it can prove that it would have made the same decision absent discriminatory motives.⁸⁰ However, the "same decision" doctrine remains relevant in the remedial phase of the mixed-motive litigation. If the employer successfully argues that it would have made the same decision without discrimination, the employer will not be required to reinstate the plaintiff, grant backpay or pay compensatory or punitive damages. However, courts may still order declaratory and injunctive relief and

backing away from the "quota bill" label. One legal periodical reported that

[a] heightened public awareness of sexual harassment evolving from the confirmation hearings of Supreme Court nominee Clarence Thomas, and the rise of David Duke, the former Ku Klux Klan leader who became a Republican gubernatorial candidate in Louisiana, are two factors thought to have caused Bush's sudden shift on civil rights legislation.

Julia C. Ross, *New Civil Rights Act*, 78 A.B.A. J. 85 (1992).

77. The Senate passed the bill 73-22. 137 CONG. REC. S15,967-68 (daily ed. Nov. 5, 1991); The vote in the House of Representatives was 381-38. 137 CONG. REC. H9557-58 (daily ed. Nov. 7, 1991).

78. Ross, *supra* note 76, at 85.

79. 42 U.S.C.A. §2000e-2(m) (West Supp. 1992).

80. This new rule for mixed motive cases makes Title VII litigation unique from other areas of employment law. For example, an employer can avoid liability under the National Labor Relations Act, codified at 29 U.S.C. §§ 151-169 (1988), by showing that an employee who alleges that he was discharged in part because of his union membership or activities would have been discharged for another, legitimate reason. *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983).

Similarly, for claims under 42 U.S.C. § 1983 (1988), an employer can escape liability for allegedly violating an employee's First Amendment free speech rights, if the employer can show that it would have reached the same decision absent the illegitimate motivation. *Mount Healthy Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

award attorney's fees and costs, even if the employer makes a "same decision" showing.⁸¹

A. *Limits on Liability*

One of the central compromises⁸² of the 1991 Civil Rights Act is the provision that limits possible awards in job discrimination suits according to the size of the defendant employer: \$50,000 for employers with 15-100 employees; \$100,000 for employers with 101-200 employees; \$200,000 for employers with 201-500 employees; and \$300,000 for those with more than 500 employees.⁸³ These liability award caps⁸⁴ apply in cases involving discrimination based on sex, religion, and disability, but not to racial minorities. Victims of racial discrimination may receive unlimited compensatory and punitive damages under the Civil Rights Act of 1866.⁸⁵

Firms with fourteen or fewer employees are exempt from Title VII liability.⁸⁶ The number of employees is based on the number of persons employed by an employer in each of twenty weeks during the current or preceding calendar year.⁸⁷ Presumably, the twenty weeks do not need to be consecutive. Under *Hishon*, associates who expect to be considered for partnership as part of their employment contract are "employees."⁸⁸ However, it is unclear whether partners are considered "employees."⁸⁹ Since sixty percent of the nation's attorneys prac-

81. CATHCART & SNYDEZMAN, *supra* note 72, at 14.

82. *Id.* at 25.

83. Section 102, Civil Rights Act of 1991, now codified at 42 U.S.C.A. § 1981-a(b)(3) (West Supp. 1992).

84. These liability caps apply to "each complaining party." *Id.* "Complaining party" is defined as "the Equal Employment Opportunity Commission, The Attorney General, or a person who may bring a cause of action or proceeding" under Title VII. 42 U.S.C.A. § 1981-a(d)(1)(A) (West Supp. 1992). As explained by legal commentators

The EEOC, as part of its enforcement efforts, often brings suit on behalf of several complainants in the same action. A literal reading of the Act indicates that the EEOC would be limited in such suits to the single statutory cap on damages, regardless of how many persons it was representing. Courts can expect the EEOC to oppose this plain language reading as contrary to congressional purpose.

CATHCART & SNYDEZMAN, *supra* note 72, at 25.

85. 42 U.S.C. § 1981 (1988).

86. 42 U.S.C.A. § 1981-a(b)(3) (West Supp. 1992).

87. *Id.*

88. See *supra* text accompanying notes 25-32.

89. See Susan Wubbenhorst, Note, *Law Partnership Decisions: Title VII Ap-*

tice in firms with fewer than 5 partners,⁹⁰ (and presumably have fewer than fifteen total support personnel) the majority of firms in the U.S. are probably exempt from Title VII liability. However, since the law is ambiguous in this area, prudent firms with fifteen or more employees (including partners) should obviously comply with Title VII.

B. Impact on Employers and Employees

1. A Plaintiff's Boon?

Just as legal commentators and analysts predicted that *Price Waterhouse* would stymie discrimination suits,⁹¹ Section 107's enactment has generated antithetical projections: "Perhaps more than any other section of the Act, Section 107 has the greatest potential for increasing Title VII litigation. The most fertile ground for such suits are hiring and promotion decisions for executive and professional employment."⁹²

This prediction may be apt for a number of reasons. First, executive and professional decisions involve both objective and subjective components. The selection of intimate business associates,⁹³ for whom one may be personally liable, necessarily requires the subjective evaluation of such traits as competence, skills, personal interests, integrity, personality, motivation, and

plies—Will It Make A Difference?, 53 UMKC L. REV. 468, 478-79 (1985).

90. *The Legal Profession Survey: The Rule of Lawyers*, THE ECONOMIST, July 18, 1992, at supp. 5.

91. See Blumrosen, *supra* note 67.

92. CATHCART & SNYDEZMAN, *supra* note 72, at 29.

93. Interestingly, the trial court in *Hishon* compared partnership selection decisions to marriage:

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 qualities into the union—some beauty, some money, and some character—so also in a professional partnerships, new mates 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, 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.

Hishon v. King & Spalding, *supra* note 22, at 20,062.

the ability to work with others. Even *Hishon* recognized that partnership decisions raise concerns about privacy and freedom of association.⁹⁴

Second, these types of professional decisions frequently include observations and evaluations by supervisors and fellow employees. As *Price Waterhouse* illustrates, individuals frequently express opinions in stereotypical terms.⁹⁵ Since these potentially tainted individual views are incorporated into the firm or business' larger decision making process, Section 107's "motivating factor" formula has potentially profound consequences for professional partnership decisions.

Third, because of Section 107, upset or disappointed employees have increased incentive to examine business records, evaluations, and forms seeking to uncover any impermissible reference to them that might have improperly affected the selection process. Formerly, an employer could escape liability if impermissible criteria were present or even considered; the employer merely needed to show that the forbidden consideration was not a determining factor.⁹⁶ Now, plaintiffs and civil rights plaintiffs attorneys (many of whom are retained on a contingency fee)⁹⁷ will have the incentive to proceed with Title VII suits, since the existence of even one impermissible consideration may subject the employer to a minimum of attorney's fees and costs. Liberal discovery rules⁹⁸ as well as the plaintiff's relatively light burden of going forward⁹⁹ seem certain to encourage Title VII litigation.

94. 467 U.S. at 78. See generally Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282 (1977). This pre-*Hishon* note discusses the inherent tensions between a law firm's desire to decide when and with whom it chooses to do business and society's general desire to eliminate discrimination in the workplace.

95. 490 U.S. at 232-37; see *supra* text accompanying notes 46-47.

96. See *supra* text accompanying note 53.

97. See Blumrosen, *supra* note 67, at 1050.

98. FED. R. CIV. P. 26(b), which applies to all forms of discovery, provides generally that the parties may "obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action"

99. Section 107 retains the *Price Waterhouse* balancing paradigm. Consequently, after a plaintiff makes out a showing that an illegal consideration may have motivated the defendant's decision, the burden of persuasion shifts to the defendant to show that legitimate business considerations would have justified the decision. The presence of discriminatory memoranda, evaluations or decision-making documents will probably fulfill the plaintiff's initial burden.

2. *Employer's Defenses*

Perhaps the most immediate and obvious effect section 107 will have on employers' defenses and litigation strategies is that employers will redouble efforts to prevail on the "no discrimination" defense. Under *Price Waterhouse*, defendants, in effect, were given a second chance to avoid liability by invoking the "same decision" defense, even though enough evidence existed to demonstrate that a discriminatory motive existed.¹⁰⁰ As a result, defendants had less incentive to settle before trial. However, since Section 107 abolishes the "same decision" defense, defendants will probably be more amenable to pre-trial settlement offers and the nuisance value of employee suits will increase.

In addition, employers will argue that Section 107's "a motivating factor" language says nothing about the weight to be placed on the illegitimate employment consideration. On one hand, Section 107 might be read to mean that the presence of a discriminatory motive gives rise to an inference that an illegitimate factor influenced the decision. Conversely, defendants might argue that the word "motivating," which modifies "factor," presupposes that the alleged discriminatory consideration was more than an incidental part of the challenged decision-making process. For support, defendants might emphasize that five Justices in *Price Waterhouse* suggested, in varying contexts, that an illegitimate motive should be a "substantial factor" in the decision.¹⁰¹ If courts embrace these arguments, the plaintiff must demonstrate more than the mere fact that discrimination might have entered into the employer's decision making process.

100. See 490 U.S. at 246 (wherein Justice Brennan writes "the employer's burden [of persuasion] is most appropriately deemed an *affirmative defense*" (emphasis added)).

101. In dissent, Justice Kennedy wrote:

I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and *substantial* evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision.

490 U.S. 228, 280 (1989) (Kennedy, J., dissenting).

In any event, if Section 107 provides defendants with any wiggle room, it will probably be found in the still less-than-clear "motivating factor" language. Considering the relative newness of mixed motive litigation under Title VII, employers—especially professional firms and partnerships—will do well to improve the partnership decision making process.

V. PARTNERSHIP CRITERIA IN PROFESSIONAL FIRMS AND POTENTIAL PITFALLS

Obviously, Section 107 and its probable effects should encourage professional firms to select partners with greater caution and formality. In addition, it is important to point out that employers still retain considerable discretion in evaluating partnership applications and may rely on objective and subjective criteria. Although these criteria are discussed below in the context of partnership selection in law firms, this article's caveats and suggestions apply to all professional firms.

A. *Objective Factors*

Objective factors are rarely attacked as discriminatory since most involve empirical criteria and, in theory, apply to all partnership candidates equally. Listed below are four objective factors that typically weigh heavily in a partnership's admission decision.¹⁰²

1. "Put-In Time"

So that partners can make an informed, well-reasoned evaluation of the associate attorney's abilities, law firms should require that the associate be part of the firm for at least a minimum period. Although five years used to be considered the norm,¹⁰³ more firms—especially in larger metropolitan areas and with complex practices—are lengthening the minimum period to as long as ten years.¹⁰⁴ Each firm should have a "put-in time" policy if for no other reason than to prevent the appearance of favoritism and caprice in its decision making.

102. See William F. Lynch II, *How Law Firms Select Partners*, 70 A.B.A. J. 65 (1984); see also Deborah Graham, *Gaston Snow Charts New Waters with Flexible Two-Tier Approach*, OF COUNSEL, April 6, 1987, at 4-10, explaining a large Boston firm's partnership selection criteria.

103. Lynch, *supra* note 102, at 65.

104. Brill, *supra* note 5, at 6.

2. *Economic value to the firm*

An associate must be profitable. Usually this means that an associate must have a high number of billable hours,¹⁰⁵ which generate revenue for the firm. A rule of thumb used by some firms is that associates must generate three times their salary to be "profitable."¹⁰⁶

3. *Rainmaking skills*

Associates must be able to generate business or have the potential to develop business for the firm.¹⁰⁷ A lawyer who does not "kill more than he eats" will probably not be considered seriously for partnership.¹⁰⁸ Few firms can afford partners who do not keep themselves busy and create work for other attorneys, paralegals or legal assistants.

4. *Caseload and complexity*

An associate must be an effective case manager and demonstrate the ability to handle cases that are large and complex

105. Increasingly, law firms are focusing less on billable hours and more on "collectibles." "Collectibles" are fees which the law firm realizes from an attorney's billings. Obviously, this "bottom line" approach emphasizes what the associate's work means to the firm and helps a firm distinguish hard-working associates from profitable ones. Interview with Ezra Tom Clark, Jr., President E. T. Clark, Inc. (a management consulting firm to the legal profession), in Salt Lake City, Utah (Nov. 2, 1992).

106. In these firms, one-third of an associate's revenues covers her salary; one-third covers her overhead; and one-third goes to the firm as "profits." Interview with Ezra Tom Clark, Jr., *supra* note 105.

107. Interestingly, many law schools are offering courses to help students focus on clients' needs and promote "rainmaking skills." Julie Savarino, *Rainmaking Joins the Curriculum*, NAT'L L.J. July 20, 1992, at 29, col. 4.

108. See Kathleen Donovan, Note, *Women Associates' Advancement to Partner Status in Private Law Firms*, 4 GEO. J. LEGAL ETHICS 135 (1990):

[A] reason often given for the discrepancy of the number of women associates and the number of women partners is lack of "rainmaking." Women in general have problems generating new clients for their firms

Lack of access to an "old boy network" is an element of the inability to make rain. Private, men-only clubs seem to perpetuate women lawyers' difficulty in attracting clients by denying them exposure to the business constituents male members are afforded.

by the firm's standards.¹⁰⁹ In effect, an associate must demonstrate the ability to perform at or near partnership level.

B. Subjective Criteria

Subjective criteria are just as important as objective criteria.¹¹⁰ Subjective considerations include personal integrity, loyalty to the firm, interpersonal skills, and the ability to work well with others. They also include a person's interests, hobbies and activities that are beneficial to the firm and community, leadership qualities (as demonstrated in civic, church, political, alumni, and bar activities), personal habits, personal appearance, temperament, and physical stamina.¹¹¹

1. Problems with evaluating subjective factors

Each of these valid considerations, if abused, is fodder for Title VII litigation. Law firms must apply these subjective criteria without regard to sex.¹¹² A firm may not assume that some qualities or characteristics are desirable for one sex but not the other.¹¹³ For example, in *Price Waterhouse*, partners unexcusably criticized Ms. Hopkins because she did not act, talk, and walk like a woman and did not wear jewelry or cosmetics.¹¹⁴ These comments demonstrate that improper stereotypes influenced the partners and that Price Waterhouse had different promotion criteria and expectations for women, even

109. For example, in *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 758 F. Supp. 303, 304-05 (E.D. Pa. 1991), some partners attacked the plaintiff's candidacy because the female plaintiff was assigned relatively simple cases "that were small by Wolf, Block standards" which did not require "more than 500 hours" per year. Most male associates "worked on major matters for which they logged at least 600 hours per year." *Ezold* reveals that law firms do consider the complexity of the matters handled by an associate and that law firms may engage in discriminatory behavior if gender influences work assignments. See *infra* text accompanying notes 115-21.

110. Lynch, *supra* note 102, at 65.

111. *Id.* at 66-67.

112. "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *County of Washington v. Gunther*, 452 U.S. 161, 180 (1981) (quoting *Los Angeles Dept of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

113. "[S]tandards [should be] shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images." *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215-16 (8th Cir. 1985).

114. See *supra* text accompanying note 47.

though men and women candidates for partnership had essentially the same employment duties and responsibilities.

Similarly, in *Ezold v. Wolf, Block, Schorr & Solis-Cohen*,¹¹⁵ a prestigious Philadelphia law firm denied a female associate, Nancy Ezold, a partnership position despite an overall "good" performance rating.¹¹⁶ In evaluating her candidacy, the district court compared Ezold's evaluations with those of several male associates who were admitted to the partnership.¹¹⁷ The writing and legal skills of one admitted male candidate were described as "acceptable," "dense and mediocre" and "bare bones adequacy."¹¹⁸ While some male candidates were criticized for lacking sufficient assertiveness, Ezold was evaluated negatively for being "very demanding" and "too assertive."¹¹⁹ Not surprisingly, the trial court found that "gender was a determining factor in the failure of the firm to promote [Ezold] to partnership"¹²⁰ because Schorr, Block appeared to have weighed "assertiveness," a valid subjective criterion, differently for men and women.¹²¹

2. Impermissible Sex-based Assumptions

Law firms must carefully avoid hiring or promotion decisions based on stereotypes and sex-based assumptions. In a telling passage from *Price Waterhouse*, which remains unaffected by Section 107 of the 1991 Civil Rights Act,¹²² Justice Brennan wrote "[W]hile an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ [bona fide occupational qualification]), it is free to decide against a woman for other reasons."¹²³

In other words, labelling a type of employment "a man's job" or a "woman's job" is illegal except in very narrow circum-

115. 751 F. Supp. 1175 (E.D. Pa. 1990).

116. *Id.* at 1183.

117. *Id.* at 1184.

118. *Id.* at 1184, 1192.

119. *Id.* at 1189, 1192.

120. *Id.* at 1189.

121. "The defendant [law firm] is not entitled to apply its standards in a more 'severe' fashion to female associates." *Id.* at 1192.

122. Section 107 abolished the "same decision" defense promulgated by the *Price Waterhouse* plurality. See *supra* text accompanying note 2. Section 107 does not appear to affect the Equal Employment Opportunity Commission's sex discrimination guidelines.

123. 490 U.S. at 244.

stances where that consideration is a "bona fide occupational qualification."¹²⁴ Status as an actress or an actor is an example of a "BFOQ."¹²⁵

Even though it is inconceivable today that professional employment could be considered a "man's job," the EEOC's promulgations of what does not constitute a BFOQ illustrates sex-based assumptions law firms must avoid. For example, the assumption that women have a higher turnover rate than men is impermissible.¹²⁶ In addition, hiring or promotion decisions must not be influenced by the assumption that women are less capable or aggressive in promoting or marketing.¹²⁷ Professional firms may not consider a client's preferences,¹²⁸ a woman's marital status,¹²⁹ or the possibility of pregnancy.¹³⁰

3. *Impact on large and small firms*

To avoid possible Title VII litigation, law firms may de-emphasize subjective factors in determining partnership selection decisions. Rewarding associates who have demonstrated their economic worth to the firm eliminates many concerns about stereotyping and impermissible discrimination. In fact, many larger firms appear to be doing this for good reasons.¹³¹ First, in large firms with hundreds of lawyers scattered all across the world, a law firm's argument that a particular candidate does not fit the firm's "image" or "style"¹³² seems

124. See 29 C.F.R. § 1604.2(a)-(b) (1990).

125. *Id.*

126. 29 C.F.R. § 1604.2(a)(1)(i) (1990).

127. 29 C.F.R. § 1604.2(a)(ii) (1990).

128. 29 C.F.R. § 1604.2(a)(iii) (1990).

129. 29 C.F.R. § 1604.2(c) (1990).

130. *Id.*; see also *Barbano v. Madison County*, 922 F.2d 139 (2d Cir. 1990). In *Barbano* one member of a five-person Madison County Veteran's Affairs Committee asked a prospective female employee about "her plans on having a family and whether her husband would object to her transporting male veterans" as part of her employment duties. The Second Circuit concluded that all members present at the meeting, not just the committee member who asked the discriminatory questions, had discriminated against the plaintiff. *Id.* at 146.

131. Brill, *supra* note 5, at 5.

132. In *Ezold*, Ms. Ezold was told during interviews that "it would not be easy for her [at the firm] because she was a woman, was not from an Ivy League Law School, (Ms. Ezold [wa]s a graduate of Villanova Law School) and was not on Law Review." 751 F. Supp. 1175 (E.D. Pa. 1990). See also Lawrence Lederman, *Entering a World of Rules*, NAT'L. L.J., August 1989, (Special Student Edition) at 16-17, 21, where the author describes the difficulty of feeling comfortable in a prestigious New York City law firm in the 1960s because he had a lower middle class background, he did not attend an Ivy League school, and he did not have correct social

disingenuous.¹³³ Second, courts which have found partnerships liable for discrimination have examined the size of the firm and the prestige associated with partnership status. In *Price Waterhouse*, after remand from the Supreme Court, the trial court noted that Price Waterhouse had nine-hundred partners in ninety offices across the United States and that "only a small percentage of the partners [had] ever met [the plaintiff]."¹³⁴ The court also commented that "Price Waterhouse lacks the intimacy and interdependence of smaller partnerships, so concerns about freedom of association have little force."¹³⁵

However, in smaller and mid-sized firms where attorneys are expected to know each other and are likely to work together at least occasionally, legitimate subjective considerations mean more and should be given serious consideration. However, smaller law firms should not be lulled into thinking Title VII's reach does not apply to them. *Hishon* makes clear that Title VII applies to *all* law firms "large enough to be covered by Title VII."¹³⁶ Interestingly, smaller and mid-sized law firms, which need to evaluate partnership candidates more subjectively than their larger counterparts, are the firms least likely to take time to educate their personnel and create procedures and structures to avert Title VII trouble.

VI. POLICIES AND PROCEDURES TO LIMIT TITLE VII LIABILITY

Because the traditional criteria that professional firms use to select partners are more likely to result in Title VII litigation, prudent law firms should consider the following policies and procedures.

A. *Education*

One of the law's oldest maxims is "ignorance of the law is no excuse." Partners who evaluate candidates should know what Title VII says and understand Section 107's ramifications on partnership selection decisions. Partners must know that

aspirations.

133. Lynch, *supra* note 102, at 67.

134. 737 F. Supp. at 1210.

135. *Id.*

136. *Hishon*, 476 U.S. at 77-78, n.10. See *supra* text accompanying notes 82-83, discussing Title VII's non-application to firms with fewer than fifteen employees.

stereotyped evaluations, sex-based assumptions and characterizations are inappropriate and illegal.

Firms could convey this information and safeguard their procedures in several ways. First, circulate in-house memoranda detailing the status of the law and its application to partnership selection decisions. Second, discuss firm evaluation procedures and practices at firm meetings, retreats, or conferences. Third, attach instructions about the impropriety of stereotyped and gender specific comments on all of the firm's evaluation forms, including partnership evaluation forms *and* periodic associate evaluations. Fourth, choose one or several attorneys to review all written evaluations, eliminating forms or comments that contain discriminatory evaluations.

B. Implement regular associate evaluations

Perhaps the best way to prevent Title VII lawsuits is to implement an evaluation system that provides associates with regular reviews and feedback. Such evaluations should be held at least once a year, and preferably more often.¹³⁷ A formal, written evaluation system allows the partnership to measure an employee's progress during regular interviews and eliminates ad-hoc, retrospective and vague evaluations. Periodic evaluations of associates should include comments regarding an associate's progress in meeting the firm's objective requirements and subjective standards.

Associates will also benefit from regular evaluations. Associates will know how the partnership feels about their performance and if their chances for partnership are realistic. Associates will be able to discuss and challenge their evaluations when they are given, rather than when their candidacies for partnership are rejected. Considering a plaintiff's relatively light burden under Title VII,¹³⁸ partnerships that keep regular, detailed, and discrimination-free evaluations will do much to prevent injurious litigation. Not coincidentally, the procedural history of *Hishon* reveals that no written evaluations were communicated to the aggrieved associate.

137. Paul Zarefsky, *How the Hishon Decision Will Affect Your Firm*, 70 A.B.A. J. 58, 61 (1984).

138. See *supra* notes 98-99.

C. "Objectify" subjective factors

To the extent possible, a law firm should "objectify" each valid subjective consideration. For example, a law firm might describe in written form the image that the firm wishes to project, and define how an associate is expected to behave with other attorneys, office personnel and clients. Detailed guidelines will help associates know what is expected and what the firm deems important.¹³⁹

However, law firms must realize that more is at stake than avoiding Title VII liability. In their quest to "objectify" subjective criteria, law firms should not stifle creativity and alienate talented associates with somewhat different backgrounds, lifestyles and interests. In fact, as the nation's economy becomes more "global" (i.e., "multi-cultural"), firms should encourage internal diversity if for no other reason than it makes good business sense. It is no secret that individuals with similar religious, ethnic, racial, and cultural backgrounds tend to do business with each other. Rather than discourage minority or female associates from breaking the firm mold, firms should promote diversity and encourage efforts to reach out to all sectors of the community. In short, law firms must balance their needs for internal homogeneity against the reality of business development in an increasingly heterogenous world.

D. Input by female and minority partners

If a firm is large enough to delegate its partnership selection decision to a committee, female and minority partners should be included.¹⁴⁰ Their inclusion will eliminate "subconscious bias" and demonstrate the firm's commitment to promoting qualified persons to partnership regardless of race or gender. Disappointed applicants will be less inclined to feel victimized by discrimination if they believe that a similarly situated person—with real input in the decision making process¹⁴¹—evaluated their candidacies. Firms may also consider

139. Attorneys may bristle at these suggestions, arguing that such "guidelines" undermine the professional elan of law firms. However, many law firms today resemble multinational corporations and large business with branch offices scattered across the country. If large law firms expect to limit their own liability, they must manage themselves internally like other large businesses.

140. Zarefsky, *supra* note 137, at 61.

141. If minority and female committee members have no real power, matters

establishing internal equal employment and opportunity committees to ensure that the firm's hiring goals and promotion practices comply with Title VII.¹⁴²

E. Tone-down recruiting promises:

In *Hishon*, the Supreme Court held that Title VII applies to law firms and ruled that if the evidence at trial established that the parties contracted to have the plaintiff considered for partnership, that promise was a term, condition, or privilege of employment.¹⁴³ The Court's ruling was unquestionably influenced by Ms. Hishon's apparent reliance on the defendant firm's representations that advancement to partnership was "a matter of course" for associates who received satisfactory evaluations.¹⁴⁴

As *Hishon* illustrates, the initial offer of employment, whether oral or written, may come back to haunt the firm. Consequently, law firms should re-evaluate what promises or inducements its recruiters make to would-be associates. Law firms probably do not need to tell prospective associates what most of them already know (i.e., partnership is not automatic), but law firms should not hint or suggest that partnership is a sure thing or respond less than candidly to such inquiries. This advice is especially relevant when firms extend offers of employment to lateral associates or third year law students who have not worked for, or been exposed to, the firm. These associates are less likely to know the firm's expectations and requirements for partnership and the likelihood that they will become partners in the future. In addition, law firms that are in the practice of retaining permanent associates should inform unaware candidates of this possibility and not overstate a typical associate's chances for partnership.

F. Consider alternatives to "up or out" promotion schemes

Law firms that do not conduct regular personal evaluations and have "up or out" promotion policies are vulnerable candidates for Title VII litigation. From an associate's perspective

will be made worse. Institutionalized window dressing and tokenism may result in situations where, paraphrasing the words of Federalist 10, the "cure is worse than the disease."

142. Zarefsky, *supra* note 137, at 61.

143. 467 U.S. at 76.

144. *Id.*

this situation presents the worst of both worlds: terminated employment and no formal, advance notification. Under such conditions, fired associates can hardly be expected to react with grace and docility.

Increasingly, law firms are allowing associates who do not make partner to stay on with the firm as "permanent associates."¹⁴⁵ With the consequences of non-partnership less drastic, potentially aggrieved associates are presumably less likely to sue their current employer. More importantly from the law firm's perspective, this makes economic sense: an associate's *raison d'être* is to make money for the firm. Since the firm has probably invested considerable time and money training the associate, bringing on a replacement associate with the attendant training costs does not always make economic sense.

In short, law firms which retain the "up or out" policy should commit themselves to regular and informative periodic evaluations of associates. Law firms should also consider implementing a "permanent associate" policy to alleviate the effects of non-partnership.

VII. CONCLUSION

Title VII claims against law firms for discrimination in the partner selection process will probably increase because of legal changes wrought by the 1991 Civil Rights Act and changing legal demographics. The 1991 Civil Rights Act abrogates an employer's "same decision" defense and imposes Title VII liability if the impermissible consideration was a "motivating factor" in the employer's decision to reject an employee's candidacy. These changes correspond with a marked increase in minorities and females entering the legal profession. Consequently, law firms must understand Title VII as amended and implement preventative policies and procedures. Specifically, firms should educate their partners about Title VII's requirements, evaluate associates regularly using written evaluations, inform associates about the firm's objective and subjective partnership criteria, seek input from minority and female firm members, tone-down recruiting promises, and consider alternatives to "up or

145. Zarefsky, *supra* note 137 at 58. See generally, Graham, *supra* note 102.

out" promotion schemes. Last, and perhaps most important, law firms must realize that a heterogenous law firm reflecting an increasingly diverse society may be in the firm's long-term economic self-interest.

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