1980 WL 342
United States District Court; N.D. Georgia, Atlanta Division.

Elizabeth Anderson Hishon, Plaintiff
v.
King & Spaulding, Defendant.

Civil Action No. C80-326A
|
November 28, 1980

Opinion

EDENFIELD, D.J.

***1** Plaintiff in this action seeks relief for alleged sex discrimination because she was not elevated to partnership in the defendant law firm. The case is before the court on defendant's motion to dismiss on the ground that in selecting partners the defendant is not subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, and, more immediately, on plaintiff's prayer for further discovery as to the question of coverage under the Act. Both parties have filed voluminous briefs nominally addressed to the discovery question but which explore the whole coverage issue from almost every conceivable angle. The court is therefore now prepared to rule on both motions.

In her briefs on coverage plaintiff does not contend that Title VII applies to all law partnerships in selecting new partners. What she does contend is that this particular partnership, because of its age, its size, and the provisions of its partnership agreement, is not in substance a partnership at all but more nearly resembles a giant corporation, operating under a trade name (both of the partners for whom it was named having died long ago) and having a virtually perpetual existence as a separate institution quite apart from its individual members. For this reason she says new and junior partners (at least) are nothing more than employees and hence amenable to Title VII.

The defendant in its brief admits that as a partnership King and Spalding has an existence apart from its individual members but says, first, that partners are not "employees" within the meaning of Title VII and, second, that admission to partnership is not a "term, condition or privilege of employment," to which that Act relates.

In the view of the court these contentions raise two legal questions: (1) Could Congress, under the Constitution, subject voluntary partnerships to Title VII; and (2) If so, did they intend to do so in enacting that chapter? In the opinion which follows the court will consider the answer to both questions, but its final conclusion will rest on the answer to question (2).

In 1964 in his concurring opinion in *Bell v. Maryland,* 378 U.S. 226, 313 (1964), and in distinguishing discrimination in places of public accommodation, Mr. Justice Goldberg said:

> Prejudices and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and *business partners* solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

(Emphasis added.)

Admittedly, the kaleidoscope of civil rights has changed greatly since 1964, but until this very hour, so far as the court can find, private clubs and associations–social, business and otherwise–still enjoy this same constitutional protection and immunity or "freedom of association", some of them in fact being created for and dedicated to the protection and advancement of only one race or one sex; *e.g.,* the NAACP, the International Ladies' Garment Workers' Union, and the National League of Women Voters. *See NAACP v. Alabama,* 357 U.S. 449 (1958). Admittedly, many of these voluntary associations have abolished discrimination and accept members of both sexes and all races. So have many private clubs and so have many law partnerships, but they have done so voluntarily and not because of any recognition that the law requires it.

***2** Undeniably, a private professional partnership is a voluntary association. The requirements of "voluntariness" and "association" are both part of any dictionary definition of the word "partnership" itself. Plaintiff's emphasis on the composition and internal arrangements of this particular partnership cannot alter this inescapable conclusion. King and Spalding is a partnership, created and perpetuated as such and subject to the partnership laws of Georgia and the United States. The legal characterization of what an entity is, of course, is purely a question of state law, and anyone denying that King and Spalding is a partnership would be laughed out of any court in Georgia, as well as the Internal Revenue Service, where it files partnership returns.

[*Discovery*]

These observations effectively dispose of plaintiff's prayers for further discovery. In the further discovery sought plaintiff seeks to inquire into such matters as the amount of capital contribution required of the defendant's new parnters, the amount of the firm's surplus and the interest of the various partners therein, the division of partnership points among each class of partners, and the amount of income derived therefrom by each. The answers to these questions would very likely make interesting reading to many people in Atlanta, to the members of the Atlanta bar, and to other competitors of King and Spalding, including both counsel in this case, but in the view this court entertains of this case they could make no difference in its outcome and consequently the information sought is simply none of plaintiff's business. The prayer for further discovery is therefore DENIED.

The Supreme Court has, of course, fully recognized "freedom of association." Unfortunately, however, it has not dealt with the subject in the context of business and commercial partnerships, except for the comments of Mr. Justice Goldberg in *Bell v. Maryland, supra.* In *NAACP v. Alabama, supra,* at 460, Justice Harland for the majority, and after recognizing such freedom as a constitutional right, did say:

> Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

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 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, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.

***3** It is also interesting that it is in connection with marriage that the Supreme Court next mentioned "freedom of association." In *Griswold v. Connecticut,* 381 U.S. 479 (1965), it said:

> This law [relating to contraceptives], however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation. ... In NAACP v. Alabama we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. ... The right of "association" like the right of belief is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means....
>
> We deal with a right of privacy older than the Bill of Rights–older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as

any involved in our prior decisions.

[*Intention of Congress*]

It is against this background then that we must next address the question whether Congress, by the language used, intended to include the formation of partnerships, and the admission of new members to them, under Title VII in the first place. On this subject the language of the law is completely silent or ambiguous. The Act speaks only in terms of employment relationships and prohibits discrimination with respect to "compensation, terms, conditions or privileges of employment" and prohibits actions which would adversely affect one's "status as an employee." The word "employment" is not defined, "employee" is defined only as one "employed by an employer." "Employer" is likewise not defined except that in the legislative history it is said the word was to be given its "common dictionary meaning, except as qualified by the Act." Several cases have held that under Title VII employment" meant the same thing it did at common law.

In this confusion the reported precedents help a little, but not much. In *Burke v. Friedman* [14 EPD P 7629], 556 F.2d 867 (7th Cir. 1977), the Seventh Circuit held (headnote 2):

> Partners cannot be regarded as employees rather than as employers who own and manage operation of business and, hence, cannot be included as employees for obtaining necessary subject matter jurisdiction under statute authorizing a discriminatory employment suit against an employer engaged in an industry affecting commerce who have 15 or more "employees" for each working day in each of 20 or more calendar weeks in current or preceding calendar years. Civil Rights Act of 1964, § 701(b) as amended 42 U.S.C.A. § 2000e(b).

In the body of the opinion the court also said:
***4** [S]ection 6 of the Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." Partners manage and control the business and share in the profits and losses. [Citations.] In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business.

At 869. Admittedly, although this case did involve the rights of partners inter se, it did not involve or discuss the case of an associate employee who complains of being denied partnership status.

The case of *Lucido v. Cravath, Swaine & Moore* [13 EPD P 11,432], 425 F.Supp. 123 (S.D. N.Y. 1977), cited by plaintiff, can be distinguished on several grounds: In the first place, the first and main complaint of plaintiff there was that he was discharged *as an associate* because of his race and religion. This, of course, made out a Title VII claim by itself; but here, that is not what plaintiff complains of. She does not seek damages or reinstatement for being discharged as an associate;[1] her complaint is that she was not made a partner. It is true that in divisions [7] and [8] of that opinion the district judge goes on to say that denial of promotion to partnership might itself be a Title VII violation. But having already found a violation for firing the associate, the court had to deny the motion to dismiss in any event and these remarks appear to be dictum. In the same portions of the opinion the court attempts to dispose of the freedom of association defense by asserting that such right is limited to social and fraternal organizations, not businesses. In the first place, not one of the Supreme Court cases cited as authority for that proposition either states or supports the distinction sought to be drawn; none of them dealt with either partnerships or Title VII but with schools and school books. Finally, and with all respect, this court is not bound by the opinion of that court anyway.

***5** The author of *Lucido,* in reaching his conclusion, also relies on the acceptable proposition that Title VII applies to the promotion of one covered by the Act to a higher position which is not covered. But in applying the rule, the author erred, in the opinion of this court, because he confuses the process of promotion with the process of election. When a law firm associate becomes a partner he is not *promoted* to partnership, he is *elected* to partnership. The difference, this court thinks, should be obvious. A promising young lawyer who is elected to

partnership is comparable to a promising young engineer working for the Chevrolet Division of General Motors who is elected to the board of directors of that corporation. This comparison, it apt, goes far toward resolving this case; this for the reason that the legislative history of Title VII clearly shows that the chapter was not intended to apply to the election of corporate directors.[2]

Nor does this case fall within the situation recently referred to by Judge Moye of this court,[3] where failure to promote or elect would destroy or jeopardize the future right of an employee to pursue his chosen life profession or occupation. On the contrary, just as a promising young engineer who is *not* elected to the board of General Motors remains just as much a promising young engineer as before, so when plaintiff was *not* elected to partnership she remained just as much a promising young lawyer as before, as evidenced by the fact that she promptly made a connection with another large Atlanta firm. Defendant's "up or out" policy with respect to associates (of which plaintiff complains) is exactly the same, in principle, as the case of a young singer who tries out for the Metropolitan Opera or of an athlete who tries out for the Olympic Team and is not accepted. He or she is still just as much a genius as before but will simply have to seek stardom elsewhere. Many find it. It is an interesting sidelight, in this connection, that both leading counsel in this case, certainly among Atlanta's best, were once promising young associates in the same prestigious Atlanta firm. One was elected to partnership; the other was not. It may be interesting to speculate why both were not elected, but neither would ever claim it was because of race, sex, age or religion. It is also irrelevant to this opinion, butis somewhat supportive, to note that since the filing of this action King and Spalding now has a female partner.

[*Dilemma*]

In the end, then, the court faces this dilemma: (1) If the court finds that the case is covered by Title VII the defendant's constitutional right to freedom of association is then thrown into head-on conflict with plaintiff's constitutional right not to suffer discrimination in the terms, conditions and privileges of her employment; (2) if the court construes the Act as not covering plaintiff's claim, then there is no constitutional problem and the court should dismiss the case for want of subject-matter jurisdiction. To the court, while the right of defendant to freedom of association seems clear, the coverage of the Act seems doubtful and obscure. The court is humbly aware that in reaching this conclusion it may have erred. In considering this possibility, the court considered a balancing process which would give effect to both constitutional rights by allowing the case to proceed but would require the plaintiff, in such rare instances, to show by clear and convincing proof that, irrespective of all other justifications claimed by defendant, naked discrimination was the sole and producing cause of plaintiff's rejection as a partner. The court, however, could find no hint of any authority for a trial court to so alter the burden of proof. All of these questions will have to be resolved by a higher authority, legislative or judicial. In the meantime, the court concludes that it has no subject-matter jurisdiction of plaintiff's claim and the case is, therefore,

***6** Dismissed.

All Citations

Not Reported in F.Supp., 1980 WL 342, 24 Fair Empl.Prac.Cas. (BNA) 1303, 25 Empl. Prac. Dec. P 31,703

Footnotes

1 An unsigned draft of this order was mailed to counsel on November 10, 1980, along with a letter inquiring whether counsel wished a further hearing or argument on the question of coverage. In a reply from plaintiff dated November 18 requesting no further hearing plaintiff, however, does point to what she claims to be a misstatement of her contentions. In this letter plaintiff says that, contrary to the statement in the opinion, she *does* also complain of her discharge as an associate.

Despite the tenacity of plaintiff, the logic behind this contention simply will not cut the mustard under the undisputed facts. Admittedly, it was the policy of defendant law firm against permanent associates and its "up or out" rule with respect to them which caused plaintiff to lose her job as an associate. These long-standing policies of

defendant have been uniformly applied by it over the years, for the most part agaist associates who were male only. Neither in her pleading, briefs nor arguments does plaintiff even whisper or suggest that such applications by defendant were in any way based on sex. The same provisions caused two males to leave at the same time as plaintiff, and plaintiff admits that, standing alone, these policies are not sexually discriminatory and were not discriminatorily applied by defendant. What she does say is that since her failure to make partner was in this case based on sex discrimination, and since this in turn triggered the "up or our" rule with respect to her, the "up or out" rule itself thereby becomes discriminatory in this instance. In other words, to make out discrimination under "up or out" she must first make out discrimination in denial of partnership. But having failed to establish her premise of actionable discrimination in denial of partnership, her second conclusion, based on that premise, cannot follow.

[2] 110 Cong. Rec. 7218 (1964).

[3] Naismith v. Professional Golfers Ass'n, 85 F.R.D. 552 (N.D.Ga. 1979).