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Civil Rights: Law Partners as Employees for Title VII Purposes?

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safeguards must be incorporated into the statute to assure protection of the motorists' constitutional right to tort action. In evaluating the constitutionality of a deductible limit or a reduced percentage of recovery, the court should better balance the need to guarantee compensation against the desire to reduce duplicate coverage. The statutory threshold should be broadened to guarantee court access by allowing suits to collect intangible damages for severe, non-permanent injuries.

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CIVIL RIGHTS: LAW PARTNERS AS EMPLOYEES FOR TITLE VII PURPOSES?

Hishon v. King & Spalding,
678 F.2d 1022 (11th Cir. 1982),
cert. granted, 51 U.S.L.W. 3544 (Jan. 24, 1983) (No. 82-940).

Appellant filed a Title VII[1] action against a large Atlanta law firm,[2] alleging sex discrimination in its refusal to invite her to partnership in the firm.[3] The district court dismissed for lack of subject-matter jurisdiction,[4] reasoning that an application of Title VII to partnership decisions would conflict with the firm's constitutional right to freedom of association.[5] The

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D.C.A. 1982) (the appellate court reversed a trial court ruling that no-fault was unconstitutional on the basis of FLA. CONST. art. I, § 21).

65. While the innocent victim's substitute remedies may not equate with the waived tort remedies, the exchange of rights analysis must include the benefits to a motorist as a potential defendant. *See* Pinnick v. Cleary, 360 Mass. 1, 22-23, 271 N.E.2d 592, 606 (1971). While drivers surrender certain tort actions, they receive in exchange immunity from specified damage claims. *See, e.g.,* Gentile v. Altermatt, 169 Conn. 267, 293, 363 A.2d 1, 15 (1975) (noting benefits of no-fault included prompt payment of monetary losses and immunity from negligence); *Lasky,* 296 So. 2d at 14 (in approving no-fault the court addressed the benefits of immunity and compensation); *Pinnick,* 360 Mass. at 22-23, 271 N.E.2d at 606 (considering the advantages of payment for losses and immunity from tort action).

1. Civil Rights Act of 1964, §§ 701-18, *codified at* 42 U.S.C. § 2000e to e-17 (1976 & Supp. II 1978). 42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . .

2. The appellee firm consists of approximately 50 partners and employs approximately 50 associate attorneys, along with other support personnel. 678 F.2d 1022, 1028 (11th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3544 (Jan. 24, 1983) (No. 82-940).

3. Hishon had been an associate attorney with the firm for six years when the firm first considered her for partnership. Under the firm's "up or out" policy, if an associate was not invited to become a partner after six years, the associate was allowed to remain with the firm only for such reasonable period as necessary to secure other employment. *Id.* at 1024.

4. *Id. See also* FED. R. CIV. P. 12(b)(1).

5. 24 Fair Empl. Prac. Cas. 1303 (N.D. Ga. 1980). The court said that "while the right

Eleventh Circuit affirmed and HELD, partners are voluntary members, not employees, of partnerships which precludes the application of Title VII to all partnership decisions.[6]

Commentators predict increased federal equal employment opportunity litigation involving charges of professional level employment discrimination.[7] Future actions will undoubtedly focus on professional businesses organized as partnerships,[8] such as lawyers,[9] accountants and physicians.[10] Title VII explicitly includes partnerships in its definition of employers,[11] thereby providing for Title VII suits by employees of partnerships.[12] The difficulty in applying Title VII to partner selection stems from the Act's silence and the courts' confusion in deciding whether a partner is an employee of a partner-

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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." *Id.* at 1306. *But see* Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 (S.D.N.Y. 1977) ("The court's decision to apply Title VII in [a case dealing with promotion of an associate attorney to a partnership position] does not infringe upon any . . . freedom of association of the members of defendant law firm.").

6. 678 F.2d at 1028-29. The court determined that the meaning of "employment opportunities" should not be extended to include partnership decisions. *Id.*

7. *See, e.g.*, Bardeen, *The Legal Profession: A New Target for Title VII?*, 55 CAL. ST. B.J. 360, 365 (1980) ("Title VII litigation, with the legal profession as the target, is on the upswing."); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 45 (1979).

8. The Uniform Partnership Act § 6(1) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." 6 U.L.A. 22 (1969).

9. Title VII has rarely been used in the legal profession. A brief survey reveals only the following cases: Frausto v. Legal Aid Society, 563 F.2d 1324 (9th Cir. 1977) (dismissal of Mexican-American attorney's suit alleging discriminatory hiring practices was supported by record of legitimate nonracial and nondiscriminatory reasons for his not being hired); Milton v. Bell Laboratories, 428 F. Supp. 502 (D.N.J. 1977) (research corporation's decision not to hire black attorney required close scrutiny to reveal possible masked racial bias, but decision here was not based on plaintiff's race); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977) (alleged discrimination during associate attorney's employment with large law firm and alleged unlawful termination in its refusal to elevate him to partnership are Title VII causes of action); EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975) (professional nature of law firm did not exempt it from Title VII discrimination suit by discharged secretary); Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y. 1973) (female law student not hired by a large New York law firm was entitled to bring a class action suit on behalf of all qualified women who had been or would be denied employment because of their sex), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

10. *See* H. HENN, LAW OF CORPORATIONS § 19, at 46 (2d ed. 1970) ("Numerically, there are more partnerships than business corporations [in the United States]" and "of practicing American attorneys, some one-third practice as partners in law partnerships [as of 1970]."). *See also* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981, 1, 184 (102d ed. 1981) (indicating that approximately 17% of all legal establishments operated as partnerships in 1977).

11. The Act defines an "employer" as any "person" engaged in an industry affecting commerce who has 15 or more employees. 42 U.S.C. § 2000e(b) (1976). Partnerships are included in the definition of "person." *Id.* § 2000e(a).

12. *See, e.g.*, Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977) (large law partnership qualified as an employer and an associate attorney as an employee within the meaning of the Act); EEOC v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975) (secretary at law firm alleging discrimination in employment entitled to Title VII protection).

ship.[13] An affirmative response to this question would provide Title VII protection to all aspects of the partner's employment status, including promotion to that position.[14]

The entity theory of partnership recognizes a partnership as a unit having rights and duties distinct from its individual members,[15] and provides a basis for characterizing partners as both members and employees of a partnership. In *Bellis v. United States*,[16] the Supreme Court applied the entity theory to a three-member law partnership to hold that an individual partner's fifth amendment privilege against self-incrimination did not shield the partnership's financial records from a grand jury. The Court noted that many powerful private partnerships are closer in size, structure, and impersonality to corporations than to voluntary associations.[17] The Court found that even the small law firm in *Bellis* had established an institutional identity independent of its individual partners.[18] Although *Bellis* involved a partner's fifth amendment privilege, the opinion suggests that a business' choice of organization should not immunize it from constitutional or statutory limitations.[19]

Federal case law provides other bases for determining that a partner is an "employee" for purposes of statutory protection. One test has been dubbed the

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13. *See* Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 MICH. L. REV. 282, 285-86 (1977). A related issue is whether advancement to partnership status is an employment opportunity for purposes of Title VII. In the instant case, appellant argued that elevation to partnership is thus protected. 678 F.2d at 1026. The court rejected this contention. *Id.* at 1028. The first court to rule on the application of Title VII to the law partner selection process answered this question affirmatively. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977). The *Lucido* court determined that the plaintiff's claims of discrimination with respect to work assignments, training, rotation and outside work opportunities constituted allegations of discrimination with respect to "terms, conditions or privileges of employment" and "employment opportunities." *Id.* at 127. The court in the instant case expressly disagreed with the *Lucido* court's holding that an opportunity to become a partner at Cravath was a "term, condition or privilege of employment" and an "employment opportunity." 678 F.2d at 1029.

14. The instant court noted that if partners are deemed employees of the partnership, rather than owners, an employment relationship might exist, rendering Title VII applicable to partnership decisions. *Id.* at 1026 n.7. *See generally* Note, *supra* note 13, at 286-92 (explaining application of "partner as employee" analysis to Title VII).

15. J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 3 (1968) [hereinafter cited as J. CRANE]. This theory is contrary to the aggregate theory, under which a partnership is merely the aggregate of its individual partners and has no identity, rights or duties apart from them. Common law traditionally treated partnerships as aggregates, however, the entity theory is predominant in civil law jurisdictions, codes and in judicial usage. *Id.* at 18-19.

16. 417 U.S. 85 (1974).

17. *Id.* at 93-94. *See also* J. CRANE, *supra* note 15, at 19-20: ("[N]o corporation is more entity-like than a large law or accounting firm which has been going for generations . . . with dozens or hundreds of partners (of whom only a handful, as managing partners or an executive committee, make major decisions.").

18. 417 U.S. at 96-97.

19. The *Bellis* Court said, for example, that: "[I]t is inconceivable that a brokerage house with offices from coast to coast handling millions of dollars of investment transactions annually should be entitled to immunize its records from SEC scrutiny solely because it operates as a partnership rather than in the corporate form." *Id.* at 97. *See also* Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457, 476 (1980) ("[T]he partnership form of organization should not furnish a shield to avoid compliance with Title VII.").

"economic reality" test because it requires courts to define "employee" with reference to the purpose of the particular employment act in question and the economic relationship of the parties.[20] Courts most often apply this test when determining whether an individual is an employee or an independent contractor. Factors such as the extent of the employer's right to control the means and manner of the worker's performance, and the worker's opportunity to share in the business' profits and losses are considered.[21]

The economic reality test has been employed by courts interpreting various employment statutes[22] including Title VII,[23] but no court has applied it by name to the partnership context. However, in *Burke v. Friedman*,[24] the Seventh Circuit determined that the four partners in an accounting firm could not be regarded as employees of the partnership for Title VII purposes because they jointly managed, controlled, and shared in the profits and losses of the business.[25] Applying a similar analysis, one federal district court determined that a lack of financial interest in the business, along with an absence of managerial discretion or a share of the profits, was evidence of employee status entitled to Fair Labor Standards Act protection.[26] These cases use the economic reality test, although not by name, and support the proposition that it is the circumstances of employment, not the labels attached, that should be determinative in questions of statutory protection.[27]

The Fifth Circuit, in *Calderon v. Martin County*,[28] provided the most comprehensive test for determining the status of an employee under Title VII. The district court had dismissed a deputy sheriff's Title VII action, holding that he was not an employee for purposes of the Act.[29] The district court based its holding on decisions by Florida courts, for purposes other than Title VII, which held deputy sheriffs were "appointees" rather than employees.[30] The

20. This test is derived from the opinion of the Supreme Court in NLRB v. Hearst Publications, Inc., 322 U.S. 111, 129 (1944). There the Court determined that "newsboys" were employees under the National Labor Relations Act. *Id.* at 131-32.

21. Donovan v. Tehco, Inc., 642 F.2d 141, 143 (5th Cir. 1981); Spirides v. Reinhardt, 613 F.2d 826, 831-32 (D.C. Cir. 1979).

22. *See, e.g.*, Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (Fair Labor Standards Act); United States v. Silk, 331 U.S. 704, 713-14 (1947) (Social Security Act); NLRB v. Hearst Publications Inc., 322 U.S. 111, 129 (1944) (National Labor Relations Act).

23. *See, e.g.*, Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979).

24. 556 F.2d 867 (7th Cir. 1977).

25. *Id.* at 869.

26. Marshall v. R & M Erectors, Inc., 429 F. Supp. 771, 781 (Del. 1977). The employee in *Marshall* had been offered a partnership share in the construction business and thought he had already received a partnership share payment. The court nonetheless found him an "employee." *Id. See also* Peterson v. Eppler, 67 N.Y.S.2d 498 (N.Y. Sup. Ct. 1946) (party named as junior partner in accounting partnership agreement was actually an employee because of his lack of co-ownership and absence of management rights).

27. *See* Paone & Reis, *Effective Enforcement of Federal Nondiscrimination Provisions in the Hiring of Lawyers*, 40 S. CAL. L. REV. 615, 639-40 (1967) (suggesting that federal nondiscrimination protections should apply to those law firm partners who "are in fact employees, but . . . are labelled 'partners.' ").

28. 639 F.2d 271 (5th Cir. 1981).

29. *Id.* at 272.

30. *Id.* "Appointee" status meant sheriffs would come under the exemption specified in

Fifth Circuit reversed and remanded, holding that a plaintiff's employee status under Title VII is a question of federal law and is to be ascertained through consideration of four factors: the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand.[31]

The instant court addressed whether partners at appellee law firm were employees under Title VII.[32] The court rejected the entity theory early in its opinion[33] and declared the *Calderon* test to be the best framework for determining the employee status of partners.[34] Following the *Calderon* factors, the court first looked to the statutory language of the Act and found no guidance, as an employee is defined only as "an individual employed by an employer."[35] Likewise the court determined the legislative history was inconclusive.[36] Examining the third *Calderon* factor, existing federal case law, the court acknowledged the economic reality test used in other employment statute cases, but declined to apply it in the instant case.[37] The court chose instead to follow the traditional partnership principles espoused in *Burke*, stating that it shared the Seventh Circuit's reluctance to equate partners with employees.[38]

Finally, the court looked at the particular facts of the instant case, and found a clear indication that the partnership was a voluntary association of attorneys practicing law as joint venturers, and not an entity analogous to a corporation.[39] The court placed great emphasis on the fact that the partners owned the partnership and were thus not its employees under Title VII.[40] Therefore, the court was unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII.[41]

Title VII, 42 U.S.C. § 2000e(f) (1976) (providing that the term "employee" shall not include an appointee of a person elected to public office in any state or political subdivision).

31. 639 F. 2d at 272-73.

32. 678 F.2d at 1026. Appellant presented the court with three theories upon which to grant jurisdiction under Title VII. First, partners at appellee law firm are "employees" within the scope of Title VII. Second, elevation to partnership is an "employment opportunity" or a "term, condition or privilege of employment" under Title VII. Finally, appellant contended that her termination under the firm's "up or out" policy was a wrongful discharge under the Act. *Id.* While the court found none of these arguments convincing, it focused primarily on appellant's first theory of partner as employee and its decision on it resolved the remaining theories as well.

33. *Id.*

34. *Id.* at 1027 n.9.

35. *Id.* at 1027.

36. The legislative history revealed only that "employee" was to have its common dictionary meaning. *Id.* (quoting from 110 CONG. REC. 7216 (1964) (statement of Sen. Joseph S. Clark)).

37. *Id.* at 1027 n.9.

38. *Id.* at 1028.

39. *Id.* The court cited the facts that the firm operated as a partnership under the laws of Georgia, filed tax returns as a partnership, was comprised of fifty active partners and employed approximately fifty associates along with other personnel, and had a lengthy and detailed partnership agreement. *Id.*

40. *Id.*

41. *Id.* The court also held that promotion to a partnership position was not an "employment opportunity" under the statute; and that termination of employment as a result of failure to make partner was not a "discharge" within the protective ambit of Title VII. *Id.* at

The court rejected the entity theory established in *Bellis*, conclusorily stating that although a partnership may be a separate entity for many purposes, Title VII is not one of them.[42] Later, the court examined the first *Calderon* factor and declared the Act's statutory language not helpful.[43] A more thorough examination of the Act, however, would have revealed Title VII's definition of "person" to include partnerships,[44] which evidences legislative intent to treat partnerships as entities.[45] Thus, the first *Calderon* factor leads to the use of the entity theory. That theory suggests partners may be employees of the partnership "entity."

The second *Calderon* test factor, the legislative history of Title VII, was also incompletely examined by the instant court. The court noted that little history exists;[46] but failed to look carefully at the purpose of the Act. *Calderon* mandates examination of the Act's history, which surely includes consideration of the Act's purpose. Both the intent and purpose of Title VII were to eliminate discrimination in employment wherever necessary,[47] including at the professional level.[48] Further, in reviewing existing federal case law pursuant to the third *Calderon* factor, the instant court overlooked the pattern in discrimination cases of broad statutory construction to effectuate the purposes of equal employment legislation.[49]

1028-29. Judge Tjoflat, in his dissent, disagreed with the latter holding. *Id.* at 1030 (Tjoflat, J., dissenting).

42. 678 F.2d at 1026. The court merely stated, "[f]or many purposes . . . this 'separate identity' will yield results similar to those for corporations, but not for Title VII purposes." *Id.*

43. *Id.* at 1027.

44. 42 U.S.C. § 2000e(a) (1976). *See supra* note 11.

45. J. CRANE, *supra* note 15, at 25 (the authors state that legislatures will treat partnerships as entities by defining operative words like "person" to include partnerships).

46. 678 F.2d at 1027. *See supra* note 36 and accompanying text.

47. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (federal courts are empowered to make victims of discrimination whole); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (liberal interpretation of Civil Rights Act is needed to effectuate congressional goals), *cert. denied*, 406 U.S. 957 (1972); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) ("It is . . . the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.").

48. *See* 118 CONG. REC., 92d Cong., 2d Sess. 3802 (1972) (Sen. Jacob K. Javits opposing an amendment that would have excluded hospital-employed physicians from Title VII coverage). *See also* EEOC v. Rinella & Rinella, 401 F. Supp. 175, 180 (N.D. Ill. 1975) ("The courts [have concluded] that, since the primary objective of Title VII is the elimination of the major social ills of job discrimination, discriminatory practices in professonal fields are not immune from attack.").

The need to prevent discriminatory employment practices is pronounced among the professions that have been traditionally inaccessible to women and members of racial or ethnic minority groups. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981 402 (102d ed. 1981) (women comprise 12.8% of the lawyers and judges in the United States, while blacks and other non-white minorities constitute 4.2%; women constitute 12.9% of physicians, dentists and related practitioners, while blacks and others comprise 8.2%; women comprise 36.2% of accountants, while blacks and others constitute only 8.2%).

49. *See supra* note 47. The failure to recognize the existing case law establishing broad statutory construction to reach the Act's purpose is also a failure under the second *Calderon*

The court acknowledged the economic reality test in its review of existing case law but refused to follow it.[50] The court stated its preference for the *Calderon* test[51] but failed to realize that the tests are not mutually exclusive. This is particularly obvious since one factor in *Calderon* is existing federal case law, and existing federal case law supports the use of the economic reality test.[52] The economic reality test, like *Calderon*'s second factor, requires courts to look to the purpose of the Act.[53] The instant court abandoned the economic reality test in favor of the Seventh Circuit's reasoning based on partnership principles in *Burke*.[54] The *Burke* analysis in fact examined economic reality to determine employee status.[55]

The *Galderon* factors support, rather than preclude, using both the entity theory and the economic reality test. The fourth *Galderon* factor, the particular facts of each case, is functionally the economic reality test. These "facts", however, can be superficially examined. For example, the instant court noted that the law firm was a partnership by law, filed its tax returns as a partnership,[56] and was owned by the partners,[57] but it failed both to examine the realities of the large-firm organizational structure, and to evaluate the decisionmaking authority of the partners. In sum, the court based its decision upon partnership principles but did not look behind the label partnership to determine if the instant firm had the characteristics generally attributed to partnership.

This leaves an important question unanswered for courts faced with similar Title VII actions: whether the result should be different in a case with evidence that some partners are actually junior partners or partners in title only,[58] which is a common characteristic of large partnerships.[59] If the court had more

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factor to examine the legislative history or purpose of the Act. *See supra* text accompanying notes 48-50.

50. 678 F.2d at 1027 & n.9. *See supra* text accompanying note 37.

51. 678 F.2d at 1027.

52. The instant court recognized that the economic reality test had been applied in several cases dealing with employment statutes. *Id.* at 1027 n.9. The court cited to NLRB v. Hearst Publications Co., 322 U.S. 111 (1944) (construing term "employee" under NLRA) and Donovan v. Tehco, Inc., 642 F.2d 141 (5th Cir. 1981) (determining employee status for purposes of the Fair Labor Standards Act) as authority for the use of the test. 678 F.2d at 1027 n.9. The court further noted it has been applied in Title VII cases. *Id.*

53. *See supra* note 20 and accompanying text.

54. 678 F.2d at 1027.

55. *See supra* notes 22-25 and accompanying text.

56. *See supra* note 39.

57. 678 F.2d at 1028. An examination of a partner's ownership rights seems consistent with the economic reality test, as the equivalent of a worker's opportunity to share in the profits and losses of the business. Because some firms accord "partners" ownership rights but no decisionmaking, or management votes but no ownership rights, this factor should not be the sole determinant. *See supra* note 21 and accompanying text.

58. The opinion of the lower court in the instant case indicates that the plaintiff sought evidence relating to the division of partnership points and the income received by various partners in the appellee law firm, presumably to determine whether some partners were actually junior partners or partners in title only. The district court denied the plaintiff's requests, stating, "the information sought is simply none of plaintiff's business." 24 Fair Empl. Prac. Cas. at 1304.

59. *See* E. SMIGEL, THE WALL STREET LAWYER 156-60 (1964) (the author describes the

carefully examined the characteristics of this partnership, as required under the economic reality test, it could have set a clearer standard for other courts deciding whether a partner is an employee for Title VII purposes.

The court declared that it did not presume to exalt form over substance.[60] Allowing a law firm to evade equal employment legislation by its choice of organization, that is, its form, is not only a departure from precedent but a denial of the very substance of Title VII's equal employment opportunity for all.[61]

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differing status and responsibilities of "junior," "middle" and "senior" partners in large law firms). *Compare* Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms,* 1981 A.B.A. FOUND. RESEARCH J. 95, 118-26 (a more recent analysis of the structure of large law firms; dividing partners into categories of "finders, minders and grinders") *with* Paone & Reis, *supra* note 27 (suggesting that nondiscrimination protections should apply to those who are partners in title only).

60. 678 F.2d at 1028.

61. For a related view, see Olmstead, *Law as a Business: The Impact of Title VII on the Legal "Industry",* 10 VAL. U.L. REV. 479, 479 (1976) (suggesting that the opinion of lawyers that Title VII is inapplicable to the practice of law is actually responsible for much of the discrimination in legal employment).