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IN PRACTICE

# CIVIL RIGHTS

# Law Firms: Beware of Discrimination

## You are not impervious to employee lawsuits based on gender discrimination and sexual harassment

**By Todd A. Palo**

Law firms throughout the nation have faced a recent wave of employment discrimination suits filed by present and former employees, under both federal and state statutes. In the current precarious economic climate, legal employers are finding that they are vulnerable to employment discrimination claims often filed in the wake of lay offs or failures to promote associates and staff.

Most notably, firms have recently faced gender-discrimination and hostile-work-environment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (Title VII), and various state discrimination laws. Therefore, firms should review discrimination and harassment policies with their employees and consult counsel before making any employment decisions that could lend credence to claims of sexual discrimination or sexual harassment. Moreover, legal professionals must remember they are not above the very employment discrimination laws they often seek to enforce.

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### Sex Discrimination in Partnership Advancement

Sex-based discrimination allegations related to law firm partnership advancement are not novel. One of the United States Supreme Court's landmark Title VII cases, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), held that the opportunity to be considered for partnership was a term, condition and privilege of an associate's employment which could not be doled out in a discriminatory fashion. Pursuant to Section 2000e-2(a)(1) of Title VII:

> [I]t shall be an unlawful employment practice for an employer […] to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment because of such individual's race, color, religion, sex, or national origin.

In light of the decision in *Hishon,* it is clear that Title VII requires firms to consider candidates for partnership without regard to the nominee's sex or other protected categories. However, legal employers have often been the targets of such allegations and continue to face sex discrimination claims related to partnership advancement and other incidents of employment.

For example, in *Laskis v. Osler, Hoskin & Harcourt LLP*, No. 11-0585 (S.D.N.Y. filed Jan. 28, 2011), a female associate filed suit alleging sex discrimination among other claims pursuant to Title VII after being terminated. The former associate claimed that a senior partner who was also a member of the firm's legal professional committee discriminated against her on the basis of sex. Specifically, she alleged that the partner told her at an annual review that he "didn't think she wanted to be partner" and she "must be more than a pretty face." The associate also alleged that the partner expressed to another associate that taking maternity leave would remove her from partnership track and that he "hate[d] working with women, because they just get pregnant and leave." The associate filed suit after purportedly suffering a salary freeze and termination in the period that followed her complaining about the alleged discriminatory conduct. The parties mutually agreed to dismiss the case with prejudice on April 6.

In *Kirleis v. Dickie, McCamey & Chilcote*, No. 06-01495 (W.D.Pa. filed Nov. 9, 2006), a female attorney filed suit for alleged sex discrimination pursuant to Title VII after a male partner al-

legedly expressed that "the 'gals' in the office would perform all work necessary to prepare the cases for trial for the male attorneys who would try the cases." The plaintiff also alleged that there was a separate and lower employment track for female attorneys who had taken maternity leave and that women were encouraged to relinquish their status as shareholders in the firm and work part-time to spend more time with their husbands. Summary judgment was granted for the defendant in October 2009 after three years of litigation. The decision was affirmed by the Third U.S. Circuit in August 2010.

### Sexual Harassment Claims

In addition to sex discrimination, sexual harassment is actionable under Section 2000e-2(a) of Title VII and various state statutes. Most attorneys are aware that there are two theoretically distinct forms of sexual harassment: quid pro quo and hostile work environment. The differences are not always clear, and they often occur together; for example, a supervising attorney or partner who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect the subordinate's job status if he or she does not comply.

Hostile-work-environment harassment may acquire characteristics of quid-pro-quo harassment if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct. A hostile work environment occurs when the conduct is unwelcome, based on sex, and is severe or pervasive enough to create an offensive or abusive working environment. Harassment may culminate in a retaliatory discharge if a victim tells the harasser or employer that he or she will no longer submit to the harassment, and is then fired in retaliation for this protest.

Most law firms recognize that they must inform and periodically remind employees of sexual harassment policies and should actively police sexually harassing behavior. Yet claims continue to arise alleging that firms and/or attorneys disregarded these laws.

For example, a female paralegal filed suit under Title VII in the pending case *Marshall v. Siegfried & Jensen,* No. 08-00923 (D.Utah filed Nov. 26, 2008), after being purportedly constructively discharged. She alleged that a founding member of the firm referred to women employees as "bitches," "whores" and "bleeders" and routinely stated, "it must be that time of month" when confronted with a female employee with whom he had a difference of opinion.

Legal employers must also be mindful that they are susceptible to atypical allegations of sexual harassment. For example, a terminated female associate filed suit for hostile work environment pursuant to Title VII in *Braude v. Maron, Marvel Bradley & Anderson, P.A.,* No. 09-00633 (D.Del filed Aug. 25, 2009) (the parties entered into a joint stipulation to dismiss the action with prejudice in April 2010). The associate alleged that a female partner made inappropriate remarks about the associate's appearance, pressured the associate to go to a sex-toy shop with her, and talked about how she enjoyed engaging in "foursomes."

In the pending matter *Eggleston v. Bisnar/Chase*, No. 30-2010-00404255 (Sup. Ct. Cal. Orange Cnty., filed Aug. 31, 2010), a male associate filed suit under California Government Code Section 12940(j)(1) alleging hostile work environment and sexual harassment after being purportedly pressured to talk about his feelings while sitting naked with other men, being forced to touch a wooden phallus, and engage in other sexually related activities at a seminar he was encouraged to attend by a firm partner.

### Reducing Exposure Liability

As these cases demonstrate, conduct that gives rise to allegations of sexual harassment and discrimination has not been eradicated from the legal profession. Discrimination and harassment policies alone remain insufficient to deter alleged misconduct and avoid potential firm liability. Rather, it appears vital that all employees, including partners, adhere to firm policies for those policies to be effective.

In addition, firms can implement the following recommendations to avoid or reduce liability for alleged sex-based discrimination and harassment claims:

- Review with and remind employees of prohibited conduct that commonly leads to sex-discrimination suits, including but not limited to gender stereotyping and favoritism;
- Work with qualified independent counsel to create objective and gender-neutral partnership advancement qualifications;
- Uniformly and objectively engage in partnership advancement evaluations (where possible, lend transparency to the process to avoid discrimination claims);
- Annually revise and republish law firm sexual-harassment policies. Firms especially must revise policies to address atypical sexual harassment and sexual harassment via social media platforms;
- Conduct intrafirm harassment training for all employees; and
- Create the option for employees to report harassment to a designated intermediary who will listen to and investigate complaints.

### Looking Forward

No profession is completely devoid of allegations of discriminatory employment practices, but common sense indicates that attorneys would be the best placed to understand and obey the laws prohibiting sex-based misconduct. During the recent economic downturn, legal employers have increasingly become the target of sex discrimination and sexual harassment allegations. While the legal profession is not immune to allegations of discriminatory employment practices, firms can protect themselves by taking the steps listed above and by consulting qualified counsel before making important employment decisions. ■