ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-940

TITLE ELIZABETH ANDERSON HISHON, Petitioner v. KING AND SPALDING

PLACE Washington, D. C.

DATE October 31, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

ELIZABETH ANDERSON HISHON,
Petitioner
v. No. 82-940
KING AND SPALDING

Washington, D.C.

Monday, October 31, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:02 p.m.

APPEARANCES:

EMMIT J. BONDURANT, II, ESQ., Atlanta, Georgia; on behalf of the Petitioner.

PAUL M. BATOR, ESQ., Office of the Solictor General, Department of Justice, Washington, D.C.; as amicus curiae.

CHARLES MORGAN, JR., ESQ., Washington, D.C.; on behalf of the Respondent.

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C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in Hishon against King and Spalding.

Mr. Bondurant, you may proceed whenever you are ready.

ORAL ARGUMENT OF EMMET J. BONDURANT, II, ESQ.

ON BEHALF OF THE PETITIONER

MR. BONDURANT: Mr. Chief Justice, and may it please the Court:

Next summer we will observe the 20th anniversary of the 1964 Civil Rights Act. It is ironic that after almost 19 years of the existence of that Act we are before this Court to discuss the question of whether or not that Act applies to sex discrimination in the private practice of law in the most highly compensated, and outside the judiciary, the most prestigious positions of the legal profession.

QUESTION: High compensated as compared to the judiciary?

(Laughter)

MR. BONDURANT: Yes. I think I said most highly compensated, and outside of the judiciary, most prestigious, Your Honor.

QUESTION: I see.

QUESTION: A slight question as to where you put

the comma, isn't it?

(Laughter)

MR. BONDURANT: I don't think the Court was misinformed as to the intent.

The lower courts in this case held that because the Respondent was organized as a commonlaw partnership, acts of discrimination, which the complaint alleges, were practiced by that firm in the selection of partners were outside the coverage of the Act.

Thus, even though the complaint specifically alleged, and the lower courts accepted it as true, as, of course, they must for purposes of ruling upon a motion to dismiss, that the firm engaged, pursuant to a 100-year pattern and practice, of discrimination against women in the selection of partners. The lower courts nevertheless ruled that that discrimination was outside the coverage of Title VII and that Title VII afforded the Petitioner no remedy for that discrimination.

An analysis of this case must begin, of course, with the statutory language of the Act. There is no question in this case that King & Spalding is not an employer or a person covered by the Act. That is undisputed. It is plainly a firm engaged in the practice of law in the course of interstate commerce with 15 or more employees and with offices in two cities.

Nor is there is question in this case as to whether or not Ms. Hishon, an associate for almost eight years with the firm, was an employee of the firm. She plainly was an employee as an associate.

The question in this case rather is whether or not the particular acts of sex discrimination which the complaint alleges were practiced by King & Spalding, admittedly an employer, against Ms. Hishon, admittedly an employee covered by the Act, were themselves unlawful employment practices covered by Section 703 of the Act.

We believe that the answers to these questions are in the affirmative.

First, let me point out by stating that the Petitioner agrees with the position taken by the Solicitor General that it is really not essential in this case to reach of the broader question of whether or not the partnership relationship; that is the relationship between an individual partner and the institution itself is an employment relationship.

For reasons that we have set forth in the brief, we think an affirmative answer to that question is indicated in this and other cases. However, this case can be decided on the narrower ground, that in her particular position as an associate of the law firm, the opportunity to be considered for partnership on a fair, equal, and

non-discriminatory basis was both a term, condition, and privilege of her employment and employment opportunity, both of which were explicitly within the protection of Section 703 of the Act and were, when the firm practiced sexual discrimination in making those decisions, were unlawful employment practices within the meaning of the Act.

The complaint clearly and specifically alleged that the firm held out and represented to the Petitioner and to all other associates whom it sought to recruit, the opportunity for fair, non-discriminatory consideration for partnership after completion of five or six years' employment with the firm and hard and satisfactory work during that period.

QUESTION: Did they all become partners?

MR. BONDURANT: No, Your Honor, they all did not become partners. But, the firm held out to the Petitioner and to other associates the opportunity to be so considered and by holding out that opportunity the terms, conditions, and privileges of her employment included the opportunity for fair, non-discriminatory consideration for partnership.

When that was denied her, and that is what the complaint alleges, that she was not given fair, non-discriminatory consideration for partnership, the firm

committed an unlawful employment practice covered by Section 703, which is --

QUESTION: But, you would still be here if the ultimate decision was that based on sex or race?

MR. BONDURANT: That is correct, Your Honor.

QUESTION: So, consideration isn't what you are really talking about I don't suppose. You can consider all you want to, but if the bottom line is you don't get into this partnership because of your sex, you would still be here making the argument, but you would have to say that the selection of a partner may not be based on that.

MR. BONDURANT: That is correct. And, the process of selection --

QUESTION: You are using too many words then. You may not select partners based on sex or race.

MR. BONDURANT: Certainly from among associates, that is true. We also believe that that is true if one were considering partners from the outside, but that is not this case.

This case is strengthened by the fact that the express representations of non-discriminatory consideration were made and it is the opportunity for advancement which every associate possesses in his or her capacity as an employee of the firm which is and becomes both an employment opportunity and a term, condition, or

privilege of employment.

It does not make a difference that the position of partnership is or is not itself within the coverage of the Act, for in the labor cases, this Court has recognized, as have the lower courts, that where a federal statute applies, as in the labor cases, and is violated, it, does not make a difference that the opportunity for promotion is being withheld for an unlawful reason under one of those statutes, even though the the position to which the employee would have been promoted was entirely outside the coverage of the Act.

Thus, in this case, the complaint specifically alleged that she possessed in her position as an employee the opportunity to be considered and be promoted to a partner, that it was an opportunity for advancement, that it was withheld on the basis of sex, and, therefore, is plainly within the literal language of Section 703 of the Act.

QUESTION: So, if you win on that basis, if, in hiring associates, the law firm says that we will make our selection of partners unrestricted by the terms and conditions of Title VII, would that get them off the hook?

MR. BONDURANT: No, Your Honor, it would not. If the firm --

QUESTION: Well then, it isn't a term and

condition of employment.

MR. BONDURANT: I disagree with Your Honor. I think the firm will be covered by Section 703.

QUESTION: So, it is a legal term.

MR. BONDURANT: I am not sure what Your Honor means by that.

QUESTION: Well, I mean it is imposed by the operation of law, not by contract.

MR. BONDURANT: It is imposed by the operation of law, it is reinforced, whereas in this instance, the complaint alleges that the firm explicity held out as an inducement fair, non-discriminatory consideration for partnership after five or six years of employment.

In our view, it would not make a difference if the firm had been silent; that is if the firm's business practices are such that the firm regularly reviews its associates and evaluates them for promotion to partnership and does so on a basis that is prohibited by Title VII, that would violated Title VII even if the firm were silent in terms of representations it makes to an associate.

QUESTION: Mr. Bondurant, what part does the representation by the firm play over and above what the law otherwise requires?

MR. BONDURANT: Your Honor, it plays no part other than reinforcing the notion.

QUESTION: Well, if it plays no part, how can it reinforce?

MR. BONDURANT: Well, let me put it in this sense. We believe that if the firm were silent that it would nevertheless be covered under Section 703. That is that the opportunity for advancement which one possesses as an associate adheres in the relationship and that where a firm regularly promotes associates to partnership from that relationship, that that is an opportunity of the employment and an implicit term, condition, privilege of employment that could not be withheld on the basis of sex.

That case, we believe, becomes even stronger, where to induce one to enter into the relationship in the first instance, the firm holds out the opportunity for nondiscriminatory consideration for employment after five or six years.

If you were employed by a law firm and the law firm said to you, we make no representations to you whatsoever as to non-discriminatory employment, but nevertheless, the practice is to review and evaluate associates as they progress and to select from among those associates those who will be allowed to advance in the partnership and the remainder to be terminated by the firm, we believe that is a term, condition, and privilege of employment.

QUESTION: Supposing -- Do they still have that 15-employee limit in Title VII where people employing less than 15 aren't covered by it?

MR. BONDURANT: The 15 or fewer emloyee limit excludes business establishments with fewer than that number of employees.

QUESTION: Supposing a firm with 15 or fewer employees made a representation that we are an equal opportunity employer and we follow all the guidelines of the EEOC, would that be actionable under Title VII even though they had less than 15 employees?

MR. BONDURANT: No, Your Honor, it would be actionable, if at all, under state law, because Title VII explicitly excludes coverage from employers with fewer than 15 employees.

QUESTION: Mr. Bondurant, let's assume that the Petitioner had been admitted to partnership in King & Spalding and two or three years after young partners of the same rough age and experience were up for promotion within the firm, be entitled to a greater percentage of participation, would your position be the same?

MR. BONDURANT: Your Honor, let me answer it in two ways. First, that is not our case.

QUESTION: I know that.

MR. BONDURANT: This question is a denial of the

admission to partnership itself and whether it is actionable under Title VII.

Secondly, under the broader theory which we advocate, it is our view that that would be covered by Title VII.

The question under Title VII is whether or not the relationship between a lawyer practicing with a firm and the firm itself is an entity, is an employment relationship; that is does it have the principal attributes of employment as a matter of economic reality, it is not a formalistic relationship, and, therefore, if, for the sake of a hypothetical, after three years as a member of the partnership the firm should simply vote to reduce a female or black partner's earnings to zero as a method of excluding them from the partnership, having being compelled to admit them in the first instance under an order of the court. It is our view that that would be independently actionable under Title VII.

QUESTION: You have touched on two or three factual situations. Your answer is, with respect to any change in status within a partnership down through the years, any partner may claim discrimination on the basis of sex or race?

MR. BONDURANT: Well, not quite any partner. The partner must first be within the protective group.

QUESTION: Don't go quite so fast. What is the answer to my question?

MR. BONDURANT: Pardon me. If the partner were in the protective group of persons covered by Title VII, if the partner believed that there was a causal connection between the decision made by the institution itself affecting compensation, terms, or other conditions of employment, it would be actionable under Title VII in our view.

QUESTION: You are saying that a partner is an employee of the firm always?

MR. BONDURANT: We are saying that for purposes of Title VII the relationship between a partner and a law firm has sufficient attributes of --

QUESTION: Can't you just answer that question? We are dealing with the issue of whether or not Title VII applies. It only applies if an individual is an employee. Now, is it your position that a partner, once a partner, always is a employee for purposes of Title VII?

MR. BONDURANT: For purposes of Title VII, the answer is yes.

QUESTION: Yes.

QUESTION: And, every year when participation is reconsidered the firm would be confronted with this sort of a litigation?

MR. BONDURANT: The only consequences, Justice Powell, of applying Title VII to either the admission decisions of partnership or the compensation decisions of partnership are to outlaw prohibited forms of discrimination. It is our view that that is not going to create a great disruption within partnerships, it is not going to diminish the quality of the legal profession, nor is it going to diminish in any way --

QUESTION: What has that got to do with this case?

MR. BONDURANT: The question of compensation at some later point. In our view, Mr. Chief Justice, it is not this case. This case is whether or not Ms. Hishon claiming -- that is an associate in the first instance --

QUESTION: Well, is it relevant whether your view of the case or your friend's view of the case would enhance or do otherwise to a particular law firm or to law firms generally? Is that relevant?

MR. BONDURANT: Your Honor, it is not relevant other than it is a broad policy consideration to reinforce the applicability of Title VII to law firms. Lawyers, after all, as our adversaries point out, occupy a rather unique position within the community, but it is that position, we suggest, which advocates for and not against coverage of Title VII. It is more important that excluded

minorities progress within the legal profession than in any other capacity, because lawyers are in a unique position to influence the course of events in ways that businessmen, bankers, corporate vice presidents, and other people, all of whom are covered by Title VII, do not have the same capacity.

QUESTION: Mr. Bondurant, would you concede that judgments are made with respect to a variety of qualifications when the partnership decision is made?

MR. BONDURANT: Absolutely.

QUESTION: And, many of those judgments are subjective.

MR. BONDURANT: I would also concede they are subjective just as they are in the question of whom an ordinary business enterprise would employ for a particular position, particularly one of higher than a menial capacity.

QUESTION: So, it is possible a firm may need somebody to do damage suit litigation and if an individual in competition with that associate was very good at corporate law, would those factors be considered?

MR. BONDURANT: As long as none of the prohibitive factors covered by Title VII were factors in the decision, the firm is free to provide and apply subjective criteria in determining who to admit to

partnership and how to award those who it has admitted to partnership.

But, it is our view that sex is not one of those factors which affects that decision-making process and that Congress has specifically proscribed that as a factor.

QUESTION: And, one more question. Suppose a law firm needed a new tax partner and the word got around and half a dozen people, established tax lawyers applied. I am talking now not of an associateship, but a partnership, would Title VII apply?

MR. BONDURANT: Your Honor, under the broader argument which we make, we would take the position that it does apply, but the Court need not go far as to decide that question in this case.

QUESTION: Well, I asked you whether it would apply and you answered yes.

MR. BONDURANT: The answer is yes. The considerations may be subjective. The proof problems for the lawyer claiming that because he was Jewish he was turned down as tax partner in a large firm may be difficult, but they are not insurmountable and they do not take the claim outside the coverage of Title VII.

I will reserve the remainder of my time for rebuttal unless there are further questions from the

Court.

CHIEF JUSTICE BURGER: MR. Bator?

ORAL ARGUMENT OF PAUL M. BATOR, ESQ.

AS AMICUS CURIAE

MR. BATOR: Mr. Chief Justice, and may it please the Court:

The government's submission in this case is quite straightforward and we ask the Court in this case not to decide the difficult questions as to whether and what extent partners may ever themselves be regarded as employees of a partnership. On that question the government has not taken a position.

We feel that whatever view one takes on that question, Ms. Hishon's complaint in this case stated a good cause of action under Title VII, because Title VII clearly and sharply provides that women employees may not be treated worse than male employees, the statutory language that there may not be discrimination with respect to the terms, conditions, or privileges of employment.

Now, as an associate, Ms. Hishon and the other associates of the firm were concededly employees and her complaint alleges that she was treated worse than the male employees with respect to a central element of the employment relationship, one that is absolutely critical to every young lawyer at a large firm like King &

Spalding.

QUESTION: Mr. Bator, I hate to interrupt you so early, but it would help me if you could tell me -- Perhaps this is not a fair questions -- Does Title VII apply to the faculty of a law school?

MR. BATOR: Yes, sir.

QUESTION: And, what about the tenure decision? Does it apply to that?

MR. BATOR: The lower courts have unanimously held and the government's position has been that the tenure decision is covered by Title VII.

QUESTION: Are there cases so holding?

MR. BATOR: There are cases.

QUESTION: Are they cited in your brief? I just haven't --

MR. BATOR: They are cited and in the Second and the Third Circuit. There are cases so holding or at least so assuming. There are questions that, of course, go into the question whether on the particular facts --

QUESTION: Does that apply all the way up the line to associate professor, to full professor, to chair professor?

MR. BATOR: Yes, sir.

MR. QUESTION: To the dean?

MR. BATOR: Yes.

If a law firm excluded women for consideration for dean of a law school, I believe that Title VII would be violated.

QUESTION: What about the very bottom of a law firm? How about hiring?

MR. BATOR: I believe that it is universally conceded that in hiring associates a law firm may not exclude. In fact, one of the peculiarities in the position that Mr. Morgan has before this Court is that he says at the hiring level, where you are bringing in associates, you cannot exclude women, but, in effect, he says, you can hire them for a different and discrimination-against slot; that is for a lesser consideration when you get to the partnership turn.

As I understand the position of Mr. Morgan and the Respondent in this case, it is that the law firm is wholly free to adopt an explicit role. For instance, that women will be considered for partnership after ten years, but men will be considered after six years. He says that --

QUESTION: What about lateral entry to partnerships?

MR. BATOR: Directly into the partnership? That is the question, Your Honor, that the government --

QUESTION: It is withholding a position?

MR. BATOR: It has not taken a position.

QUESTION: Mr. Bator, is there anything in the legislative history of Title VII to indicate that Congress intended to insulate decisions regarding the selection of partners from Title VII's provision?

MR. BATOR: Selection of partners from the outside.

QUESTION: Right. Or --

QUESTION: From the inside.

QUESTION: -- from the inside, either way.

MR. BATOR: There is nothing directly related to law firms. The legislative history is very clear since 1972 that a central concern of Congress was access of discrimination-against groups, women, and blacks in particular, to the higher professional, managerial, and elite positions of society. That issue was very centrally camped when an amendment was proposed that would have excluded from Title VII the choice of doctors to practice on the staff of hospitals. And, Congress rejected that amendment precisely on the ground that it is that kind of highly sensitive position as to which Congress was especially keen that discrimination should end.

Now, in that respect, to us it seems quite irrelevant whether partners themselves are associates. We are quite willing for the Court to assume for purposes of

this case that partners themselves are not employees, that they are owners, like stockholders. It is clear that if a corporation with ten stockholders wanted to find new stockholders and went out and sold stock to new stockholders that Title VII would to have anything to do with the case.

But, if that same corporation makes the ownership of stock part of a stock plan for employees, then it cannot ration that on sexual or racial grounds. It cannot say we will only admit men to the stock options plans.

In other words, ownership is not employment, but if ownership is distributed to the employees as a regular practice as one of the elements of employment, then Title VII cuts in and says you cannot do it on a racial or sexual ground.

QUESTION: Could you have -- I take it then the government would say the law firm couldn't take sex into consideration at all even for affirmative action purposes or for quota purposes.

MR. BATOR: In promoting or --

QUESTION: No, entry into the partnership.

MR. BATOR: Our argument is restricted to the proposition, Justice White, that insofar as admission to the partnership is a term, condition, and privilege of an

employment relationship. So, if there were no employment relationship theretofore --

QUESTION: No, I know, but I am talking about this case where there was an employment relationship and the law firm says, well, I think we ought to have six or eight lady partners but no more or we should have 20 or 30 but no more.

MR. BATOR: Your Honor, that, I guess would become then subject to the more general and obviously very sensitive question of whether rectifying previous discrimination, to what extent affirmative action or other plans would be a problem.

But, that, we think, would cut into the general background Title VII law as it applies to ordinary situations; that is there would be no special rule with respect to --

QUESTION: Would Title VII apply to a situation where a woman or any other person claiming the protection of the Act has pointed out that for the ten years that she had been in the firm she had never been assigned a case to argue in the courts of appeals or the Supreme Court and that was an area reserved for men -- that would be the claim -- and, in fact, the record would show that only men had been assigned those assignments. Would that be cognizable under the Act?

MR. BATOR: Yes. If she is an employee of the firm --

QUESTION: Wait a minute, a partner now.

MR. BATOR: She is now a partner.

QUESTION: We have gotten over the hump.

MR. BATOR: She is now a partner.

QUESTION: She is now a partner.

MR. BATOR: That is a question which I am unable to answer, Your Honor, because it would depend on this additional question, whether the partners themselves are employees.

I should put this qualification on that.

QUESTION: Your friend said the partners aren't employees.

MR. BATOR: We have not joined the Petitioner on that submission. The government is arguing this case on a narrower issue which relates entirely to the way in which King & Spalding treats its associates and we are saying for that purposes it is irrelevant whether the partners are themselves employees or owners or whether you pierce the partnership veil as it were.

Now, with respect to our submission --

QUESTION: May I just ask you another question?

MR. BATOR: Yes.

QUESTION: In the year 1983, with a third of the

students in the law schools of the United States, is this really a problem. And, I ask one supplemental question. If you are a partner in a law firm, you are very careful about selecting new partners because it affects your profits. In other words, you want the strongest possible person regardless of sex, color, or race. That may not have been true 20 or 30 years ago when people had lots of prejudices they don't have now, but I can't imagine a law firm deliberately discriminating against somebody if the firm made a judgment that the individual would increase the profits of the law firm.

MR. BATOR: Your Honor, this may be a decreasing problem, but when Congress acted, first in 1964, and in 1972, it was a very active problem, it was really a virulent problem. And, that is the time as of which that statute speaks.

So, the fact -- and to some extent that it is no longer a problem is itself maybe a product of Title VII in the background; that is to say that since everybody concedes that at the intake stage, when young associates are first hired, Title VII does apply. Of course, law firms have had to accustom themselves to overcoming these ancient prejudices and they have learned, we have all learned, as we have learned on faculty, that, in fact, the prejudice was simply inexcusable.

And, that really, I think, pushes me into what is my last point with respect to Mr. Morgan's submission.

CHIEF JUSTICE BURGER: You are now using your friend's time.

MR. BATOR: I think I will back off and leave my friend his time.

CHIEF JUSTICE BURGER: Very well.

MR. BATOR: Thank you.

CHIEF JUSTICE BURGER: Mr. Morgan?

ORAL ARGUMENT OF CHARLES MORGAN, JR., ESQ.

ON BEHALF OF THE RESPONDENT

MR. MORGAN: Mr. Chief Justice, and may it please the Court:

The Petitioner in brief particularly and here, discussing 20 years as of next year on the Civil Rights Act of 1964, has made a point of whether or not King & Spalding and lawyers are above the law and whether or not the case of Respondent would place them there. I submit that it wouldn't.

Of all of the professions in the United States and probably of all of the sundry people who perform services in our society, lawyers are the most regulated.

However, from time to time there are certain kinds of activities that lawyers find necessary for their work. For instance, the privileges that are granted with

respect to the attorney/client privilege, the fact that lawyers can state things in courts that are at least qualifiedly privileged and often have absolute immunity from liable.

QUESTION: I am not sure I grasp what you meant by the statement that they are the most regulated. Regulated -- Which regulation are you speaking of --

MR. MORGAN: Well, sir --

QUESTION: The structure of the bar or the potential of a particular court?

MR. MORGAN: The structure of the bar as well as the structure of sundry courts, that lawyers are a member of the bar over a period.

Bar associations, first of all, do regulate lawyers. Lawyers are regulated on entry into the profession, all the way through it, and all the way out of it, often not as much as they shold be, but certainly more than other professions it seems to me. And, as such, it is not a question of are lawyers above the law, but it is a question of whether or not the Congress intented to cover them as to this law, and it is secondly a question as to what protections lawyers are granted by the society and by the law and by the Constitution in order to perform their necessary function in the society.

We submit to you that lawyers are entitled to

the highest degree of First Amendment associational freedom. We submit that and we think Congress understood that at the time it enacted the Civil Rights Act of 1964.

You will note in our briefs that we have discussed the existence of lawyers in Congress, the large number of them and the people involved in the passage of the Civil Rights Act of 1964, and the number of law partners in Congress, who didn't talk about lawyers and law partners, but did talk about doctors when they made their points that are made in briefs about professional coverage, and, the fact that the lawyers in Congress certainly had in their minds that they were lawyers.

Now, they wanted to eliminate, I believe, based on only one statement in the record, the 1963 statement by Congressman McCulloch. They wanted to eliminate discrimination in the employment of professionals.

Senator Javits and others discussed questions with respect to hospitals and the elimination of discrimination with respect to people being able to practice medicine in hospitals.

Congressman McCulloch mentioned law along withother professions in 1963 in a preliminary report.

When you turn to the year 1964, there is only one statement involving partnerships in the record of the debates which the New York Times termed so voluminous -- I

mean the weight of them was so gigantic. And, that one statement was made by Norris Cotton, Senator Cotton, and he was commenting on the fact -- He was speaking against the provision to lower the coverage of employees, who at that time, as I recall it, was 25.

When Senator Cotton was speaking, he said this would be so absurd. When you have that small an operation, it is almost like a partnership.

Now, that is it as far as the record is concerned. There is nothing in the Solicitor General's brief. There is nothing in the Petitioner's brief. There is no other intention of Congress to cover law partnerships.

QUESTION: What sort of a partnership do you suppose Senator Cotton was thinking of coming, as he did, from New Hampshire?

MR. MORGAN: Well, he came from New Hampshire, but he was also, as I recall it, the senior partner in a law firm in New Hampshire, Cotton, Tesreau -- I have forgotten the names. It is spelled out in the brief. I think he was thinking of that partnership to start with, his own, because he was, after all, a partner in a law firm at that time.

QUESTION: But, a lot of the partnership problems that you refer to in your brief, seems to me are

covered by the 15 employee requirement, you know, if you are talking about a small partnership.

QUESTION: Are there any 15 member law firms in New Hampshire?

(Laughter)

QUESTION: You know there are not, don't you?

MR. MORGAN: I thought there might be one, maybe two, but I certainly don't know. I haven't spent a lot of time in New Hampshire.

QUESTION: Mr. Morgan, you concede though, I guess, that the law partnership of over 15 associates is an employer of the associates within the meaning of Title VII, don't you?

MR. MORGAN: We have not taken a position to the contrary. We have not taking any position --

QUESTION: Well, I am asking you now. You surely agree that it is an employer under Title VII of the associates.

MR. MORGAN: It is an employer of associates under Title VII which poses certain problems for a portion of my case, for example.

QUESTION: All right.

MR. MORGAN: If King & Spalding, or any other law firm employs lawyers who then sues King & Spalding, there may be an invasion of the attorney/client privilege.

According to Petitioner, law partners and associates do the same thing, there is no difference between them. Therefore, why shouldn't a promotion system take place as though the law firm were a corporation? And, if that took place, it would be just kind of a stair-step progression from a GS-8 to a GS-15 to a GS-18 which must be a partner.

Now, their contention then is based upon the fact that the employees of the partnership -- Partnerships are clearly spelled out in the statute. There is hardly a way to take another position than the one I just took. It says partnerships are employers. It doesn't say they are employees. Certainly, if a partnership is an employer, it is very difficult to figure how partners would be employees.

QUESTION: Well, we don't have to decide that, do we?

MR. MORGAN: Well, I think when looking at congressional intention, you have to see at what Congress had in mind and Congress --

QUESTION: Well -- But, the Petitioner in this case says you don't have to decide that. All you have to do to decide this case is to decide whether the associate is an employee and, therefore, is fair consideration without regard to sex a term or a condition of that

employment?

MR. MORGAN: Well, in response to Justice White's question, he stated, of course, she would be here anyway going right into the firm.

Now, their position, both Petitioner -- One of Petitioner's three positions and the position of the Solictor General -- Their position is that terms, conditions, and privileges of employment, that that covers a promise to fairly consider an employee or a prospective employee at the time of hire and then six years later you are supposed to enforce it.

Now, let's see if that is what Congress had in mind, because, first of all, the rules of construction say that no words in the statute have surfaced, you have to consider the entire statute.

First, it is the Equal Employment Opportunities Act that creates an Equal Employment Opportunities Commission.

The Solicitor General states if there is either a pension plan or he was talking about a stock option plan with a corporation, that it would have to be treated equally for everybody and I agree with that.

But, in this particular instance, where you have terms, conditions, privileges of employment and you get into those words, you run squarely into the rest of the

congressional intention which is clearly stated in the following way: It says -- And, it defines people. When it gets to members, it is talking about labor organizations, not partnerships. When it gets to "it shall be an unlawful employment practice for an employer to discriminate," it then goes on "with respect to terms, conditions, or privileges of employment."

Now, remember, these outsiders they were talking about bringing into the firm and King & Spalding has many of those. That is in the record.

There is no set way here as for that Swaine and Moore had of the Lucido case coming straight up where they took in nobody.

Now, with respect to this particular case, Petitioner would say you need go no further with respect to the ramifications of your decision. You need not even think about remedy because we do not want to be in the partnership, therefore, just consider it my way within this structure. It strikes me that is not the way the Court should do business. I think you have to think about the ramifications of it and what the true intention is.

Another phrase: "It shall be an unlawful employment practice," employment practice. It says that a person can't limit or segregate or classify his employees or applicants for employment in any way which would

deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.

Now, that is what Petitioner didn't like, was a status as employee.

QUESTION: May I ask you about the hypothetical question the Solicitor General gave? Supposing the firm had a rule that male associates are eligible for partnerships after six years and female associates are eligible for partnerships after ten years. Would that comply with the Act? What is your view of that?

MR. MORGAN: The Act is not applicable to partnerships, so consequently they could do that.

QUESTION: That would be a permissible disparate treatment on the basis of sex?

MR. MORGAN: It would be permissible as a -- It would be permissible as a disparate treatment if they just did that. Let me give you -- Let me strike an example.

QUESTION: If they write it out, that is the rule. When they come here they tell the women you will be eligible in ten years and they tell the male employees you will be eligible in six years.

MR. MORGAN: Put it in the employment booklet, just like is happening all over the country now as these job-right cases are developing under state law. Employers, some of them, except for those who are

frightened of doing it, are putting on the face of it, you should understand that you acquire no rights when you come here.

QUESTION: No. My hypothesis is that you acquire -- If you are a male, you acquire the right to be considered for a partnership after six years, if you are a female, you acquire that right after ten years. Now, why doesn't that fall right squarely within the language of the Act?

MR. MORGAN: If I lay it out when the associate is hired --

QUESTION: Right.

MR. MORGAN: -- and I tell the associate at the time of hire that later the associate will have to work here for ten years before the associate could become partner. Well, I think we are assuming something that not even, of course, the complaint says, but as far as the --

QUESTION: No, but your legal position, I think, has to say that in the eighth year the male and females are not being discriminated against -- are not being treated differently on account of sex.

MR. MORGAN: I am saying two things. One, if I say that outright as a partnership, I just tell folks, whether I tell them in writing or tell them orally and I just say, look, it takes eight years for women to be good

lawyers and six years for men to get to be good lawyers and then we are going to consider them.

The answer is did Congress desire to cover the partnership decision? My answer is no, not under Title VII. Might there be an actional square, sure. Could the action be brought, sure, but not under Title VII and the second answer.

If you take Justice Powell's statement about why in the world would a partner want to keep out someone whose is going to make them a profit, which happens to be the theme of Petitioner's case -- Petitioner says, good heavens, law firms are businesses and we are making all of this money all over the world and that is the central theme of law practice. If that is the case, then any law firm who would make such am averment of six and eight year differentials to employees at a law school in the United State from which they hire, would be laughed off the campus and would promptly go out of business.

QUESTION: Mr. Morgan, on this -- on carving out this exemption for law firms, with the number of law firm representatives in Congress, why didn't they spell it out if they intended to do it? One, they knew how to spell it out, and, two, they were lawyers.

Am I not correct that every member of the Judiciary Committee in the House is a lawyer?

MR. MORGAN: Yes.

QUESTION: They drafted this bill. How can you say they didn't mean to cover lawyers?

MR. MORGAN: Well, sir --

QUESTION: That is your position, isn't it?

MR. MORGAN: That is my position. It was so obvious and so apparent that three decisions of this Court surely would apply.

One of them is, of course, Catholic Bishop. Secondly -- A second decision that would apply would be Yeshiva, because they identify, and the third decision would Bell Aerospace.

You know, Congress can sit over there and they can't think of every crazy thing somebody is going to bring up and if they did, then they would write an exception in for that. But, in this particular instance, Congressman McCulloch, Chairman, himself a partner in a law firm, Congressman Seller who had been with a law firm previously and may have been at the time, but he was previously, and partners in law firms sitting there, some of them, could never even conceive that anyone was going to come and say, well, we are going to make partners under Title VII.

QUESTION: You mean out of all the partnerships that you can imagine, law partnerships were alone exempt

or are you suggesting that all kinds of partnerships were exempt?

MR. MORGAN: Well, I am suggesting that as far as Congress was concerned all of them were. There is higher protection to law firms than accountants and there were more lawyers -- I was talking about lawyers because lawyers were are in Congress --

QUESTION: So, your submission really is that no partnerships are covered by this insofar as entry is concerned into the partnership?

MR. MORGAN: Sure. There is no question about that in my mind. That is what Justice Goldberg wrote there within two or three days of the passage of the Act in his concurring opinion.

QUESTION: So, we should judge this case as though this were a partnership of engineers or --

MR. MORGAN: No, no.

QUESTION: Rather than lawyers. Can't we just forget it is lawyers?

MR. MORGAN: No, no, no.

(Laughter)

MR. MORGAN: If we forgot it was lawyers, we would be like Congress forgetting to write and exception.

QUESTION: I understood Justice White's question and your response has confused me. Are real estate

partnerships, banking partnerships, medical partnerships all in the same category under Title VII, whatever that category is?

MR. MORGAN: No, sir, but in most of those you do not -- Are they all in the same category, yes, sir.

QUESTION: I thought you answered me that no partnership was subject to Title VII in terms of entry.

MR. MORGAN: Yes, that is what -- Let me complete that. No partnership in terms of entry, however, that question is not before the Court. The question that is before the Court, because no constitutional question is implied with --

QUESTION: Your submission, as I understand it, would cover any partnership.

MR. MORGAN: I beg your pardon?

QUESTION: Your submission would cover any partnership for rationale for your position.

MR. MORGAN: Oh, no. I think -- In the first place, assuming that all business partnerships have a right of commercial association, then they would be covered and they would have a lower standard of constitutional rights with respect to what is done to them by the government through the EEOC, which would assume jurisdiction, than is a law firm which is an advocacy organization if there has ever been one. That is why law

partnerships are different from other partnerships and that is what is before the Court.

QUESTION: What cases from this Court support you in suggesting that lawyers have this very high claim to resist government regulations because they are advocates.

MR. MORGAN: No, no, that is not -- What we say is that law firms are advocacy organizations which handle litigation as was pointed out in NAACP in Button. In the Button case, we talked particularly, the Court did, about use of litigation to political ends. Law firms certainly are constantly petitioning Congress, petitioning for a redress of grievance in court or out of court, and doing those things that are clearly protected by the First Amendment. That is what we say about the advocacy rights of law firms.

As far as whether or not that gives them a higher standard of protection, surely it does when a question is asked in an interrogatory such as here by the Plaintiff, which could be asked in the EEOC, just in the case preceding.

QUESTION: Well, supposing that Congress is not trying to deter advocacy expressly, it is saying that law firms are going to be subject to minimum wage laws, maybe they have to bargain collectively with representatives of

their employees, they are subject to the Civil Rights Act. Now, I wouldn't think that any of those things raised and constitutional question whatever.

MR. MORGAN: Your Honor, as I recall, on the minimum wage, they would come off as a professional exemption, but --

QUESTION: Let's assume Congress decided to repeal a professional exemption.

MR. MORGAN: All right. As far as the purely business and economic aspects of law firms, to wit, Fair Labor Standards Act and the minimum wage laws, I think you are right.

QUESTION: But, we are not dealing with purely business -- You apparently feel there is some higher, loftier goal of law firm than making money. And, even, let's put in that higher, loftier goal. Why can't Congress do just what it wants to with respect to law firms with minimum wages, civil rights, collective bargaining?

MR. MORGAN: Because what it does is it takes in this particular instance and places an advocacy agency of the federal government overseeing the law firms.

The case you just heard before this case involving EEO-1 reports, in that particular case -- Law firms file them too. They don't file partners, you know,

numbers of partners as employees, they just file associates.

Now, the EEOC decides to go against a law firm. It has a subpoena power and it can subpoena the law firm's documents. In this particular case, King & Spalding's responses, as are contained in the record and the District Court, say she didn't get along with our clients in effect amongst other things and those are the reasons we didn't admit her.

Now, at that point, they asked an interrogatory question and the interrogatory question goes directly to the questions of what matters did you handle for clients, what matters did she have problems with, who do you represent?

QUESTION: That assumes that lawyers in their dealings would need confidentiality in a way that lots of other organizations don't. I dare say that Shell Oil, which was the party to the prior case, probably has a lot of papers they would like to keep from the government about hiring decisions in their top echelon, but I don't think they have had the affrontery or perhaps ambitious visions of their business yet to say that the Constitution prevents the government from dong it.

MR. MORGAN: I certainly hope not, but lawyers are different. Lawyers are essential to the enforcement

of the Constitution.

Let me give you some examples.

QUESTION: Mr. Morgan, now Congress knew full well how to write exemptions from Title VII and it put in three. And, you are asking us to just produce another one out of some abstract concept about lawyers. If Congress had intended to have this exemption, wouldn't it have said so?

MR. MORGAN: No, no. Congress did not exempt lawyers from their hiring policies. Congress --

QUESTION: That is precisely what we are talking about.

MR. MORGAN: Congress exempted partnerships as employees and partners as employees.

We raised the question of the First Amendment to come under Catholic Bishop and other cases to demonstrate a rule of construction with respect to the statute which says that the statute should not be interpreted in such a manner as would require a restriction of the constitutional liberties that do attach the law firms with respect to their duties and it doesn't matter whether it is a lease case with respect to Mr. Justice Stevens and Mr. Justice Brennan talking in terms of going across the country and lawyers almost having a due process property right and the right to practice and to hire lawyers being

involved in the representation they do. Just Brennan talking about the NAACP versus Button, that it was not the equal protection clause that mattered, it was this, like a firm of lawyers --

QUESTION: It is a little different. The NAACP was a non-profit corporation.

MR. MORGAN: But, you see --

QUESTION: And, your client is not a non-profit --

MR. MORGAN: I hope not.

(Laughter)

QUESTION: If it is, I was getting ready to say you are in bad shape.

(Laughter)

MR. MORGAN: If it is, nobody would want in.

Now, let me just mention to you from NAACP versus Button --

QUESTION: Excuse me. What differences does it make to your case and your arguments whether the proposition you are advancing applies to medical partnerships, real estate partnerships, and engineering partnerships? I thought your argument was that a partnership of any kind is a consensual arrangement and governmental power can't intrude into consensual relationships. And, I have understood that was about the

theme of the Fourth Circuit, was it not?

MR. MORGAN: Yes, sir, the Eleventh Circuit. That is our argument. Our argument goes beyond that because law firms are involved as First Amendment protected entities. That is the only reason we have brought in the First Amendment. We don't say the statute is unconstitutional in its application. You don't get to that under what we interpret.

QUESTION: You haven't mentioned the right of association which we have said is guaranteed by the First Amendment.

MR. MORGAN: We go into it in depth in brief. We do talk about it and when I go to that associational right, I go to the Button case and I go to Justice Brennan's words in there. And, it says the protections in Button would apply as fully to those who would arouse our society against the objectives of the Petitioner. Expression -- the Constitution protects expression and association without regard to race, creed, political affiliations, truth, popularity or even social utility of the ideas and beliefs.

MR. QUESTION: Does that apply to stockbrokerage partnership firms in New York?

MR. MORGAN: As far as partnership coverage of Title VII, yes, the same rule would apply to them. As far

as the rules that apply to lawyers, no.

QUESTION: So, they can exclude all women and all minorities?

MR. MORGAN: In their partnerships, yes.

QUESTION: In --

MR. MORGAN: In partnerships, yes, sir. If they are a partnership, they can do so.

QUESTION: What you want us to do is to write an exemption that Congress didn't write and then there would be people -- I won't say you -- but there will be some people who will say we are legislating. Is that what you want?

MR. MORGAN: Well, sir --

QUESTION: Do you want us to legislate?

MR. MORGAN: I think what we are talking about here in not you legislating it, but since there is not a word in the record of Congress that they desired to cover partnerships as anything other than employers --

QUESTION: Is there a word that says they didn't intend --

MR. MORGAN: Only one sentence that would indicate it and that is Senator Norris Cotton, and he comes close to saying, this is crazy folks, this would be as bad as --

QUESTION: You are not really saying there is

only one question. The Act itself doesn't exlcude lawyers, law firms, and these associates are employees and you concede the law firm is an employer. So, that -- We do need to go to legislative history, do we?

MR. MORGAN: It excludes partners as employees by including them as employers.

QUESTION: That may be so, but neither -- The government's position doesn't go to whether a parter is an employee. It is a much narrower ground that the associate is an employee and part of his terms of employment is fair consideration.

MR. MORGAN: I understand the government's argument.

QUESTION: Let me ask, what if it were perfectly clear on the face of the statute or the legislative history that Congress intended to cover law firms and intended to cover the admission of partners. Let's just suppose it was clear as a bell. Would you be here arguing it was unconstitutional?

MR. MORGAN: Yes, I would.

QUESTION: You would have to say that I would suppose.

(Laughter)

MR. MORGAN: I understand the problem with the phrase. It is not a popular thing to say, but let me tell

you why I think that. If you take Ferri versus Ackerman, which came out on the Criminal Justice Act of 1964, considered by the same Congress at the same time, their desire was to maintain the independence of lawyers from government.

Now, that desire happens to be something that you go under with with the EEOC, a government agency going after law firms which litigate against them.

And, I know, as some others do, that there are times and places in this world when a lawyer defending people, sometimes unpopular and sometimes unpopular causes, had best be able to select his own partners because if he can't or she can't, he is not going to be on the firing line defending the rights expressed by the highest Court and the highest ideals in our country.

CHIEF JUSTICE BURGER: Do you have anything further --

MR. BONDURANT: Yes, sir.

ORAL ARGUMENT OF EMMET J. BONDURANT, II, ESQ.

ON BEHALF OF THE PETITIONER -- Rebuttal

QUESTION: You haven't mentioned the right of association which we have given a very high place to in our opinions. Is the right of association impeded or infringed on in any way?

MR. BONDURANT: Not in this case, Your Honor.

QUESTION: People are compelled -- They are compelled by some legal process to take on a partner in a consensual relationship.

MR. BONDURANT: Your Honor, the aspect of the case is a consensual relationship is a red herring. The contract --

QUESTION: Wait a minute. You say the consensual aspect is a red herring?

MR. BONDURANT: Is a red herring. Take 42 USC 1981, the right to contract, which cannot be withheld on the basis of race under th 1871 Civil Rights Act. A contract is inherently consensual. There has been no question of Congress' power to override the consensual aspect of that in order to enforce a more important provisions of the Constitution.

Secondly, and perhaps even more fundamentally, this Court has never place value on the right to discriminate on invidious bases in either the admission of black children to white schools. The Court never thought that the white children had a right which overrode the rights of black children to the quality of education, to be free from that association.

The worker on the assembly line, the protestant had no right to exclude the Catholic or the Jew from working side by side on the assembly line.

And, in the law firm, the partner who is a male has no right to exclude the female from enjoying the same opportunities in the professions.

The First Amendment has never protected those rights. The only associational First Amendment protection this Court has ever recognized was the right to join together to assert other First Amendment rights and that simply is not implicated in this case.

Justice Powell mentioned the profit motive, that it is inconceivable in 1983 that one motivated by profit would turn down a competent partner.

The same argument could be made for every business enterprise in this country, that they would turn down a more qualified person if they were truly motivated by profit. But, your experience and mine has been that they have done it.

Profit was never the question. Congress laid that question to rest in the Civil Rights Act of 1964. It decided that profit motives and morale suasion were never effective in routing discrimination out.

The heart of the Atlanta Motel case, a motel that was within a stone's throw of both King & Spalding's office and my own, is a typical example. Why would a motel have empty rooms when it could rent rooms to blacks and turn down the profit opportunity which that presented?

It did and it defended that right all the way to this Court.

Congress decided, in passing the Civil Rights Act, that the profit motive was not sufficient to bring about the eradication of employment discrimination in this country.

Your Honor has asked about other partnerships. First, we do not believe that the investment partnerships are implicated by this case. The opportunity for two or three people to form a limited partnership to buy a piece of land in rural Georgia is not what is at issue in this case, because that is an opportunity to earn a return on capital investment.

Thank you very

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We will hear arguments next in McCain against Lybrand.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

ELIZABETH ANDERSON HISHON, Petitioner v. KING AND SPALDING

82-940

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Diane Hammond

(REPORTER)