# The Burger Court Opinion Writing Database

## *Hishon v. King & Spalding*

467 U.S. 69 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University




To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: DEC 28 19

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 82-940

ELIZABETH ANDERSON HISHON, PETITIONER *v.*
KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the District Court properly dismissed a Title VII complaint alleging that a law partnership employed petitioner as an associate with the express representation that she would receive nondiscriminatory consideration for partnership and that this promise was breached when the partnership discriminated against her in refusing to make her a partner.

I

A

In 1972 petitioner Elizabeth Anderson Hishon accepted a position as an associate with respondent, a large Atlanta law firm established as a general partnership. When this suit was filed in 1980, the firm had more than 50 partners and employed approximately 50 additional attorneys as associates. Up to that time, no woman had ever been a partner at the firm.

In May 1978 the partnership considered and rejected Hishon for admission to the partnership; one year later, the partners again declined to invite Hishon to become a part-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 30, 1983

Re: 82-940 - Hishon v. King & Spalding

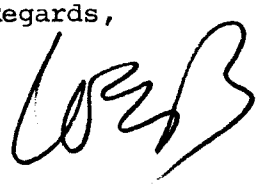
MEMORANDUM TO THE CONFERENCE:

There seems to be a considerable feeling that the case should not turn on the contract, as in my first circulation.

In light of this, I will try my hand at another run.

Happy New Year.

Regards,



To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

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2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 82-940

ELIZABETH ANDERSON HISHON, PETITIONER
*v.* KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether the District Court properly dismissed a Title VII complaint alleging that a law partnership discriminated against petitioner, a woman lawyer employed as an associate, when it failed to invite her to become a partner.

I

A

In 1972 petitioner Elizabeth Anderson Hishon accepted a position as an associate with respondent, a large Atlanta law firm established as a general partnership. When this suit was filed in 1980, the firm had more than 50 partners and employed approximately 50 attorneys as associates. Up to that time, no woman had ever served as a partner at the firm.

Petitioner alleges that the prospect of partnership was an important factor in her initial decision to accept employment with respondent. She alleges that respondent used the possibility of ultimate partnership as a recruiting device to induce petitioner and other young lawyers to become associates at the firm. According to the complaint, respondent represented that advancement to partnership after five or six years was "a matter of course" for associates "who receive[d] satisfactory evaluations" and that associates were promoted

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 7, 1984

Personal

Re: 82-840 - Hishon v. King & Spalding

Dear Lewis:

Re your note of 5/5, I think it may be too late to "clarify" the "shovel" matter. Of course, such a contract is terminable at will, but I'm sure there would be strong views that even that terminability would be subject to Title VII limits.

I am willing to try, but it may be we should leave well enough alone.

Regards,

WEB

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 17, 1984

82-940 - Hishon v. King & Spalding

MEMORANDUM TO THE CONFERENCE:

I have a slight stylistic change that I overlooked sending out. The second sentence, first full paragraph on page 4 (line 8) was amended to read:

> "In the context of Title VII, the contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace." (underlined part is new.)

Absent dissent, this will come down as scheduled Tuesday.

Regards,

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1984

MEMORANDUM TO THE CONFERENCE:

RE: Case held for Hishon v. King & Spalding: 82-1699 - Oakland Scavenger Co. v. ~~Bonilla~~ 82-940

Oakland Scavenger Co. v. Bonilla, No. 82-1699, is the only case held for Hishon v. King & Spalding, No. ~~82-960~~. I do not think that a GVR in light of Hishon is called for. Nor do I think that the case is certworthy.

Petitioner is a corporation engaged in the business of collecting garbage. It restricts its shareholders to employees of the company who are blood relatives or close friends of existing shareholders. Stock may not be transferred without approval of the board of directors. The corporation was organized in 1920 by a family of Northern Italian immigrants, and no person not of Italian ancestry has ever owned shares in the corporation.

Petitioner initially employed only its shareholders, but now about one-fourth of the company's 500 employees are shareholders. Nonshareholders serve only in nonmanagerial positions. Shareholders also may serve in nonmanagerial positions, but when they do they are given preferred jobs as well as a premium hourly rate and extra daily work hours. When preferred jobs cannot be filled by shareholders, nonshareholders are eligible for those jobs on a strict seniority basis.

Respondents--Negro and Spanish-surnamed nonshareholder employees of petitioner--are plaintiffs in a suit alleging violations of Title VII and/or §1981 on three theories: (1) that members of respondents' class are discriminated against when nonshareholders are chosen for the preferred positions that shareholders are unable to fill; (2) that the job, wage, and hour preference for shareholders acts to the detriment of minority employees, none of whom are shareholders; and (3) that the restriction on who may own stock in the company discriminates against minorities by preventing them from buying into petitioner. The DC dismissed under FRCP 12(b)(6). It held that the stock restriction does not violate §1981 because petitioner

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 28, 1983

No. 82-940

Hishon v. King & Spalding

Dear Chief:

While I agree with your result in this case, I am troubled by several features of your opinion. As you point out, "petitioner's second theory of liability supports her allegations." Op. at 5. Accordingly, I do not see the need for the extensive dictum on pages 5 and 6 regarding her first theory. Your opinion also demonstrates that the discussion on page 8 of respondent's First Amendment theory is also unnecessary. In addition, I believe respondent's argument on this point is clearly wrong. See, e.g., Runyon v. McCrary, 427 U.S. 160, 176 (1976). See also Bob Jones University v. United States. Finally, I am dubious of the opinion's "contract" approach to Title VII. I doubt that it accurately characterizes "petitioner's second theory of liability" or that it reflects a fair interpretation of the statute's protections.

For these reasons, I am afraid I cannot join your opinion and will therefore probably write separately.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

Hishon v. King & Spalding, No. 82-940

JUSTICE BRENNAN, concurring in the judgment.

In my view, this case can and should be resolved on a different ground than that relied upon by the Court. With all respect, therefore, I cannot join the Court's opinion and concur only in the judgment.

I

As the Court notes, the relevant portions of Title VII, 42 U.S.C. §2000e-(a), provide:

> "(a) 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, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ...."

Petitioner's narrowest submission,[1] and that advanced by the

[1]Petitioner offers three other theories to support her claim for relief under Title VII. First, she argues that, in light of King & Spalding's partnership agreement and the economic realities of modern law firm practice, respondent's partners are "employees" within the meaning of 42 U.S.C. §2000e-2(a)(1) and therefore respondent's failure to make petitioner a partner constitutes a discriminatory "refus[al] to hire" in violation of the statute. Second, petitioner claims that, under the firm's "up or out" policy, respondent's refusal to invite her into the partnership effectively amounted to a discriminatory "discharge" under §2000a-2(a)(1). Finally, petitioner and the Equal Employment Opportunity Commission, appearing as amicus, contend that discrimination in the selection of associates for partnership violates §2000e-2(a)(2), which makes it "an unlawful employment practice for an employer -- ... to limit, segregate, or classify his employees or applicants for employment in any way

Footnote continued on next page.

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 12/30/83

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 82-940

ELIZABETH ANDERSON HISHON, PETITIONER *v.* KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1984]

JUSTICE BRENNAN, concurring in the judgment.

In my view, this case can and should be resolved on a different ground than that relied upon by the Court. With all respect, therefore, I cannot join the Court's opinion and concur only in the judgment.

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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: 1-5-84



**1st DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 82-940

ELIZABETH ANDERSON HISHON, PETITIONER *v.* KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[January ——, 1984]

JUSTICE BRENNAN, concurring in the judgment.

In my view, this case can and should be resolved on a different ground than that relied upon by the Court. With all respect, therefore, I cannot join the Court's opinion and concur only in the judgment.

I

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> "(a) 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, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 2, 1984

No. 82-940

Hishon v. King & Spalding

Dear Chief,

Please join me.

Sincerely,

WJB

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1984

Re: Hishon v. King & Spalding, No. 82-940

Dear Chief:

This will confirm that I withdraw my separate opinion in the above.

Sincerely,

W.J.B.,Jr.

The Chief Justice
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 4, 1984

Re: 82-940 - Hishon v. King & Spaulding

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Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 29, 1983

Re: No. 82-940 - Hishon v. King & Spalding

Dear Chief:

I await further writings.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 4, 1984

Re: No. 82-940-Hishon v. King & Spalding

Dear Bill:

Please join me in your opinion concurring in the judgment.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 9, 1984

Re: No. 82-940-Hishon v. King & Spalding

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 7, 1984

Re: No. 82-940, Hishon v. King and Spalding

Dear Chief:

Please join me in your recirculation of May 2.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

January 2, 1984

82-940 Hishon v. King & Spalding

Dear Chief:

I am generally with you in this case. In view of questions raised by other Justices, I make the following suggestion:

Of course a federal court cannot exercise jurisdiction over a state contract action absent diversity, and Title VII - in and of itself - does not confer such jurisdiction. The following reasoning may support your desire to write narrowly. We must accept, on a motion to dismiss, that King & Spalding contractually promised Hishon "fair and equal" treatment with respect to partnership, and thereby removed itself from the class of partnerships whose associational rights arguably would be violated if Title VII were applied to the partnership decision. We could assume that it was the intention of Congress to respect the traditional rights of association that have characterized law partnerships for centuries. Title VII still could be construed to apply to Hishon's case because King & Spalding is no longer in the class of protected associations - at least with respect to Hishon in view of the alleged express agreement made with her.

Although not articulated exactly as I have, Hishon brought this suit under Title VII, the courts and counsel have viewed it as a Title VII case, and it seems to me that on the assumptions above stated this reasoning is sound. Whether you could get a Court may be another matter.

Letters to you from three of our colleagues have suggested it is unnecessary to discuss the status of a partnership if we hold that associate lawyers may be employees within the meaning of Title VII. But I would not agree - at least as presently advised - that a law firm invariably is an employer of associate lawyers. I think we should say

this, much as you have. We took this case to determine the extent to which a law firm is subject to Title VII. For me, this question should be decided on a case-by-case basis depending on what commitments were made at the time of employment.

We resolve little or nothing if we limit our opinion as others have suggested.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 4, 1984

82-940 Hishon v. King & Spalding

Dear Chief:

Please join me.

I probably will write a brief concurring opinion.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Fill

May 5, 1984

82-940 Hishon v. King & Spalding

Dear Chief:

When I sent you a join note, I had intended mentioning the second sentence in the first full paragraph on p. 4 where you make the point that a contract need not be written. The sentence also says:

> "An informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a work place."

I would think it is necessary to add a footnote that recognizes qualifications of this sweeping language. The statute of frauds still exists in many states. Also, it is important to make clear, I think, that your "shovel" example would create only a contract subject to termination at any time at the will of either party with or without cause.

I am sure you share my reluctance broadly to invite Title VII suits. We see enough complaints that merely initiate a law suit in the hope that use of discovery will find some basis in fact for the suit.

Sincerely,

The Chief Justice

lfp/ss

05/15

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: MAY 16 1984

Recirculated: _____



**1st DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 82-940

ELIZABETH ANDERSON HISHON, PETITIONER
*v.* KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

JUSTICE POWELL, concurring.

I join the Court's opinion holding that petitioner's complaint alleges a violation of Title VII and that the motion to dismiss should not have been granted. Petitioner's complaint avers that the law firm violated its promise that she would be considered for partnership on a "fair and equal basis" within the time span that associates generally are so considered.[1] Petitioner is entitled to the opportunity to prove these averments.

I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its as-

[1] Law firms normally require a period of associateship as a prerequisite to being eligible to "make" partner. This need not be an inflexible period, as firms may vary from the norm and admit to partnership earlier than, or subsequent to, the customary period of service. Also, as the complaint recognizes, many firms make annual evaluations of the performances of associates, and usually are free to terminate employment on the basis of these evaluations.

May 17, 1984

82-940 Hishon v. King & Spalding

Dear Chief:

I have made stylistic changes as indicated in the enclosed draft that I have sent to the printer.

I will circulate this, but wanted you to see the changes.

Incidentally, I hope you have taken a second look at the sentence in your opinion describing how "contracts" may be made. It could have a far-reaching effect in §1983 cases.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: MAY 18 1984

Recirculated: _____



**2nd DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 82-940

ELIZABETH ANDERSON HISHON, PETITIONER
*v.* KING & SPALDING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

JUSTICE POWELL, concurring.

I join the Court's opinion holding that petitioner's complaint alleges a violation of Title VII and that the motion to dismiss should not have been granted. Petitioner's complaint avers that the law firm violated its promise that she would be considered for partnership on a "fair and equal basis" within the time span that associates generally are so considered.[1] Petitioner is entitled to the opportunity to prove these averments.

I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its as-

[1] Law firms normally require a period of associateship as a prerequisite to being eligible to "make" partner. This need not be an inflexible period, as firms may vary from the norm and admit to partnership earlier than, or subsequent to, the customary period of service. Also, as the complaint recognizes, many firms make annual evaluations of the performances of associates, and usually are free to terminate employment on the basis of these evaluations.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 7, 1984

Re: No. 82-940 Hishon v. King & Spalding

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 30, 1983

Re: 82-940 - Hishon v. Spalding & King

Dear Chief:

If I understand your proposed draft opinion, there could be no recovery under Title VII apart from the alleged contractual theory. If this analysis is correct, I wonder if there is federal jurisdiction to award recovery on a breach of contract theory inasmuch as the parties are both citizens of the same State.

I had thought the Conference had decided that Title VII did provide a remedy in a case in which it was alleged that male employees were eligible for partnership but female employees were not. If that theory is accepted, I think Bill Brennan is correct in suggesting that there is no need to express an opinion on the partnership theory discussed at pp. 2-6, or, it would seem to me, on the theory that you reject in footnote 8 on p. 7.

As presently advised, I therefore expect to wait for further writing.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 3, 1984

Re: 82-940 - Hishon v. King & Spalding

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 2, 1984

Re: 82-940 - Hishon v. Spalding & King

Dear Chief:

Please join me.

Respectfully,

John

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 3, 1984

No. 82-940 Hishon v. King & Spalding

Dear Chief,

I will wait for your revised opinion in this case. I still think the opinion should recognize a recovery under Title VII rather than on simply the contract theory.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 2, 1984

Re: No. 82-940 Hishon v. King & Spalding

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference