February 2012

Falling Through the Cracks: Race and Corporate Law Firms

Leonard M. Baynes

Follow this and additional works at: http://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.stjohns.edu/lawreview/vol77/iss4/6

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.
FALLING THROUGH THE CRACKS: RACE AND CORPORATE LAW FIRMS

LEONARD M. BAYNES†

"In 1989, during an interview, a white partner at Baker & MacKenzie asked a black female applicant for her high school grades and demanded to know how she would respond if called a 'black b... or n...’"1

INTRODUCTION

Businesses historically have had to rely on their partnership colleagues and agents to get their work done.2 Correspondence often took weeks and sometimes longer to reach its destination.3 Only the individual working in distant markets had the knowledge and contacts to modify contractual arrangements to reflect those local conditions.4 As a consequence, the choice of agent and partner was a crucial decision.5 Because of the delay

† Professor of Law, St. John's University School of Law, Jamaica, New York. B.S., New York University; J.D.-M.B.A., Columbia University. This Article is part of a symposium to commemorate the inaugural conference of the St. John's University School of Law Ronald H. Brown Center for Civil Rights and Economic Development and the Northeast People of Color Legal Scholarship Conference: The Intersection of Race, Corporate Law and Economic Development. I want to thank my colleague Michael A. Perino for his generous comments to an earlier draft of this Article. I especially want to thank my research assistants, Robert Gruszecki, Justin M. Rowe, and Romeo Y. Ybanez, for their help with this project.

1 Daniel G. Lugo, Don't Believe the Hype: Affirmative Action in Large Law Firms, 11 LAW & INEQ. 615, 626 n.48 (1993). As a consequence of this incident, several law schools suspended Baker & MacKenzie from interviewing on their campuses. See Rita Henley Jensen, Minorities Didn't Share in Firm Growth, NAT'L L.J., Feb. 19, 1990, at 1 (discussing corporate law firms' failure to "recruit, retain and promote minority lawyers").


3 See id. at 38.

4 See id.

5 See id.
in communication, good faith, fair dealing, loyalty, and honesty were often more valuable than ability. Businesses sought these qualities by hiring family members or close friends. Nepotism reigned.

Today, diversity and merit are ostensibly the most important factors in hiring decisions. The hiring of agents and the selection of partners based on diversity and merit leads to a culturally diverse mix of individuals working side-by-side. In this diverse environment, good faith, fair dealing, loyalty, and honesty are even more important to the success of these relationships than they were in the past. Why? Many Americans still have few contacts with people of different racial backgrounds. Many Americans still attend schools and live in neighborhoods that are almost completely segregated. Consequently, the work environment is often the place where individuals encounter diversity, often for the first time. Furthermore, although the workplace may be integrated, it is often hierarchically segregated; people of color are in support or other low level jobs, and whites hold the most senior managerial positions. Given past racial animus, housing segregation, and the continued segregation of most workplaces in the United States, it is paramount that individuals treat each other in the best of faith.

Title VII of the Civil Rights Act outlaws race discrimination in employment, and section 1981 prohibits discrimination in the making of contracts. However, these statutes are interpreted on the basis of perpetrator ideology, i.e., discrimination is aberrant, caused by a few bad actors, and the racial minority is a victim. These considerations make the prosecution of these cases very difficult because no one wants to be judged a discriminator. This Article advocates that courts use contract law concepts of good

---

6 See id.
7 See id.
8 See id.
faith and fair dealing and partnership law concepts of fiduciary
duty as alternative means of addressing discrimination against
minority law firm associates and partners. The use of these
concepts will provide another avenue of recovery for
discriminated-against lawyers of color. Under these theories,
the courts need not be locked into existing Title VII and section
1981 ideology requiring proof of intentional discrimination as a
\textit{sine qua non} of discrimination. Of course, courts will still
require some proof that race is a factor in a wrongful
termination, but they will have much more discretion in deciding
what behavior violates notions of good faith and fair dealing. In
addition, there is a great deal of psychic benefit in knowing that
these corporate and business law concepts embrace
nondiscrimination principles. Implementing these concepts into
the workplace will promote real equality and help courts move
past the Title VII and section 1981 perpetrator ideology so that
real good faith and fair dealing will occur in the workplace.

In Part I, this Article explores the history faced by minority
lawyers in the United States and presents an overview of some
of the problems that exist today for minority associates in
corporate law firms. Part II considers how minority associates in
law firms can use common law concepts of good faith and fair
dealing as alternative avenues for recovery for employment
discrimination. Part III examines whether law firm partners are
considered employees for the purpose of Title VII lawsuits. If
construed as employees, these individuals can bring suit under
Title VII. If not so construed, these individuals have fewer
options to remedy the discrimination by the law firm. Courts
tend to make the determination of whether Title VII is
applicable and whether that individual is a partner or employee
on a case-by-case basis. This uncertainty leaves the minority
partners protected only by section 1981, and they then have less
protection from discriminatory treatment than minority
associates. Part III also suggests that the fiduciary obligations
of good faith and fair dealing existing between and among
partners can protect minority law partners from discriminatory
treatment.
I.  RACE AND THE LEGAL PROFESSION

In the recent past, African Americans were precluded from attending law schools and were prohibited from entering into partnership agreements. However, a few black pioneers made impressive achievements. The first African American lawyer was Macon B. Allen, who was admitted to the state bar of Maine in 1844. In 1923, Blanche E. Braxton, an African American woman from Massachusetts, was the first woman of color admitted to practice in the United States. From approximately 1912 to 1950, the American Bar Association prohibited African Americans from joining. From 1940 to 1950, it is estimated that the number of African American lawyers fell from 1,952 to 1,450. We can only be certain that law schools started to refrain from discriminating against African American applicants in 1964 when the Association of American Law Schools certified that none of its members excluded African Americans on the basis of their race.

---

11 See, e.g., Sweatt v. Painter, 339 U.S. 629, 631 (1950) (evaluating the University of Texas's decision to reject the plaintiff's application solely because he was African American). The Supreme Court held that "the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School." Id. at 636.

12 See Butler v. Texas, 111 S.W. 146, 148-49 (Tex. Crim. App. 1908) (Davidson, J., dissenting) (advocating that the court should have disregarded the testimony of the two parties as to their subjective intent to enter into a partnership agreement). As the judge saw it, no African American man would dare argue that he was the equal of a white man, and no white man could conceive of a situation where a black man would be his equal. Id. at 148; see also Russell L. Jones, Affirmative Action: Should We or Shouldn't We?, 23 S.U. L. REV. 133, 135 (1996) (noting that before the passage of the Civil War Amendments, African Americans did not have the right to contract or to seek employment).


14 See id. at 111.

15 See George B. Shepherd, No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools, 53 J. LEGAL EDUC. 103, 109 (2003) (stating that ABA actually excluded African Americans from membership until 1943, although noting that the ABA inadvertently admitted three African Americans in 1914); Interview by Nina Totenberg with Dennis Archer, incoming President of the American Bar Association, National Public Radio (Aug. 11, 2003); see also J. Cunyon Gordon, Painting By Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table," 71 FORDHAM L. REV. 1257, 1273-75 (2003) (discussing the history of the ABA and membership of African Americans).

16 Shepherd, supra note 15, at 113.

17 Id. at 109.
In 1970, it is estimated that only 4,200 African American lawyers were in practice.\textsuperscript{18} Many of the early pioneers in the legal profession pursued careers in civil rights litigation;\textsuperscript{19} as for others, they were often unable to practice law because jobs in the field were unavailable to them.\textsuperscript{20} For example, in the late 1960s certain corporate law firms told African American attorney Vincent Cohen that they “[didn’t] hire Negroes” and that their “clients wouldn’t feel confident being represented by a black lawyer.”\textsuperscript{21} In the 1960s, only three African Americans worked in large New York corporate law firms.\textsuperscript{22} Even Justice Clarence Thomas has remarked that after graduating from Yale Law School in 1974, none of the major corporate law firms in Atlanta would hire him.\textsuperscript{23} Instead, his first job was assistant attorney general for the State of Missouri.\textsuperscript{24}

Now lawyers of color have more options, and more are pursuing corporate law careers.\textsuperscript{25} Very few lawyers of color, however, are in practice. In fact, African Americans constitute a smaller percentage in the legal profession as compared to almost every other profession, including physicians.\textsuperscript{26} Of the one million lawyers in the United States in 2000, only 5.4% were African American;\textsuperscript{27} only 3.9% of lawyers nationwide were


\textsuperscript{19} David B. Wilkins, \textit{Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers}, 45 Stan. L. Rev. 1981, 1982 (1993) (noting that even lawyers who were not civil rights attorneys fought against racial injustice).

\textsuperscript{20} See, e.g., Smith, supra note 13, at 11.

\textsuperscript{21} Michael King, \textit{Ambition on Trial}, BLACK ENTERPRISE, Feb. 1990, at 132.


\textsuperscript{24} See id. at 62–64 (stating that Justice Thomas preferred to be a litigator in private practice).

\textsuperscript{25} See Tollett, supra note 18, at 337.

\textsuperscript{26} See Shepherd, supra note 15, at 103.

Latinos/Latinas;\textsuperscript{28} in 1998 only 3.9\% of lawyers nationwide were Asian-American,\textsuperscript{29} and only 0.3\% nationwide were Native American.\textsuperscript{30} Although national and state bar associations have promoted increased diversity at corporate law firms,\textsuperscript{31} the percentages of people of color that actually work for corporate law firms is still small.\textsuperscript{32}

Justice Powell, in his concurring opinion in \textit{Hishon v. King \& Spalding}, recognized that race should not matter in law firm decisions to hire and promote lawyers. He specifically stated:

\begin{quote}
[I]t is now widely recognized—as it should be—that in fact neither race nor sex is relevant. The qualities of mind, capacity to reason logically, ability to work under pressure, leadership, and the like are unrelated to race or sex. This is demonstrated by the success of women and minorities in law schools, in the practice of law, on the bench, and in positions of community, state, and national leadership. Law firms—and, of course, society—are better for these changes.\textsuperscript{33}
\end{quote}

Despite Justice Powell's rather sanguine exhortation in 1984, many African American and white lawyers are somewhat dubious of law firms' efforts to diversify, and many believe that it smacks of tokenism.\textsuperscript{34} Moreover, some lawyers of color who work in corporate law firms still have remarkably different

\begin{itemize}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{30} See \textit{id}.
\item \textsuperscript{32} See Ann Davis, \textit{Big Jump in Minority Associates, but...}, \textbf{NAT'L L.J.}, April 29, 1996, at A1 (estimating that African Americans represented 2.4 percent of lawyers in corporate law firms and only one percent of partners); 4 Report of the N.Y. State Judicial Commission on Minorities, \textit{Legal Profession, Nonjudicial Officers, Employees and Minority Contractors} 27 (1991) (estimating that in 1989 African Americans constituted approximately two percent of the attorneys in corporate law firms); see also Elizabeth Chambliss, American Bar Ass'n Commission on Racial and Ethic Diversity in the Profession, \textit{Miles to Go 2000: Progress of Minorities in the Legal Profession}, at 6 (2000).
\item \textsuperscript{33} Hishon v. King \& Spalding, 467 U.S. 69, 81 (1984) (Powell, J., concurring).
\end{itemize}
experiences than their white counterparts. For instance, in the 1990s, Cleary, Gottlieb, Steen & Hamilton (hereinafter "Cleary") established a "critical mass" of minority associates: thirty African Americans, fourteen Latinos(as), and twenty-four Asian Americans. Most of the African American associates hired during this period, however, left the firm. Unfortunately, this problem is not confined to Cleary. By the third year, most associates of color leave corporate law firms; whereas, forty percent of associates in general leave during the same time frame. In 2000, the National Law Journal reported that in the 250 largest law firms, African Americans constituted 3.9% of the associates and 1.4% of the partners. In 2000, all minorities added together constituted 13.2% of the associates and 3.8% of the partners in corporate law firms.

Evan Davis, a Cleary partner, blamed the departure of many of the African American associates on "the prejudice of low expectations," the type of "subconscious prejudice [that] affects

---


36 See generally Grutter v. Bollinger, 123 S. Ct. 2325, 2332 (2003); Gratz v. Bollinger, 123 S. Ct. 2411, 2425 (2003) (acknowledging the importance of a "critical mass" of minority individuals to encourage and make comfortable those that enter a previously homogenous environment).

37 Alan Jenkins, Losing the Race, AM. LAW., Oct. 2001, at 91. Cleary's commitment to diversity might have been attributed to a 1989 article written by Steven Brill in American Lawyer with the headline: "Boycott Cleary, Gottlieb!" See Steven Brill, Boycott Cleary, Gottlieb!, AM. LAW., Sept. 1989, at 3. But see Ricardo Castro, Letters, Just Gossip, AM. LAW., Dec. 2001, at 16-17 (noting that he accepted the offer to work at Cleary after the 1989 article and was not met by attorneys wearing "white hoods").

38 Jenkins, supra note 37, at 92 (indicating that no black associates hired during this period were left). But see Aric Press, In-House at The American Lawyer, AM. LAW., Dec. 2001, at 13 (quoting letter from Alan Jenkins, which highlighted a factual error in the original story and noted that in fact four black associates who were hired during this time period remain at the firm).

39 An American Bar Association Report observed that "minority advancement in law firms . . . is stalled." Jenkins, supra note 37, at 92 (quoting Elizabeth Chambliss, American Bar Ass'n, Miles to Go 2000: Progress of Minorities in the Legal Profession (2000)).

40 Id.; see also Wilkins & Gulati, supra note 22, at 564.

41 Gordon, supra note 15, at 1262 n.22 (identifying a 2000 NALP study).

42 Brian Zabcik, Measuring Up (and Down), MINORITY L.J. (2002).

43 Id.
people of color.”

Former Cleary attorney Rosyln Powell described the problem this way: “Senior associates felt that their views were ignored. You get lousy work assignments, then they say that everything you do is wrong [or they say that] you can’t write.” Moreover, Professor Denise Morgan stated that “[t]here [were] some associates who were taken under people’s wings more easily, and I think they were more often white.” Another former black Cleary associate stated that “[Cleary] assume[s] blacks are interested in pro bono, but not corporate transactions. There’s this view that we’re not really interested in corporate work.”

Others focused on Cleary’s management structure as the problem. It had “no formal departments” but instead was “organized around informal groups of partners and associates who focus on specific areas of practice such as mergers and acquisitions, tax, intellectual property, or litigation. It also lack[ed] formal practice groups or centralized staffing of projects . . . .” Some reported that the informality resulted in the formation of racial cliques that kept African American associates from receiving good work assignments.

For most of

---

44 Jenkins, supra note 37, at 92.
45 Id. at 92–93.
46 Id. at 94; see also Wilkins & Gulati, supra note 22, at 568 (noting that a survey of African American Harvard law school graduates showed that less than 40% indicated that “a partner had taken interest in their work or their career”); King, supra note 21, at 136 (quoting African American attorney Pat Irvin then a partner at Milbank Tweed Hadley & McCloy who credited her success to her mentors); Pedro E. Ponce, For Minorities, Recruitment Isn’t Everything: Verdict Against Katten Muchin Implores Firms To Consider How They Treat Minority Hires, LEGAL TIMES, April 1, 1996, at S32 (noting that minority associates are less likely to have mentors in the law firms).
47 Jenkins, supra note 37, at 93. At least one former black Cleary associate, Alfred Perry, had a different opinion. Id. at 94. He denied that Cleary “employed a double standard or subtly discriminated against any minority group.” Id. Instead, he blamed those who left by stating that “few, if any, of the black lawyers who came through Cleary have had the single-minded desire to be a partner.” Id. But see James Walker & Denise Morgan, Letters, Not Just Cleary’s Problem, AM. LAw., Jan. 2002, at 13 (responding that Mr. Perry’s contention misses the point because “many African American attorneys who accept positions in large firms quickly decide that they have no wish to become a partner because they are made keenly aware that they are unlikely to fit into the club”).
48 Jenkins, supra note 37, at 95.
49 Id. Alfred Perry disagreed, stating, “They don’t care who you are . . . [i]f you give them flawless work, you’ve got it. . . . If you go in there and walk the walk and talk the talk and work your ass off, you’ll have the same chance as your white
the African American associates, the coup de grace was Cleary's failure to invite senior African American associate Lynn Dummett into the partnership ranks. After the partnership meeting deciding Ms. Dummett's fate, rumors spread that racist comments were made at the meeting. After that fateful decision, many African American associates saw Ms. Dummett's partnership denial as a signal that the firm was uninterested in diversifying its partnership ranks.

Cleary's experiences are not unique among corporate law firms. Some scholars suggest that African American and other minority lawyers are particularly disadvantaged by the corporate law firm structure. The whole associate-to-partner process is akin to a tournament. Becoming a partner requires either "proving yourself as a sharp litigator" by winning path-breaking cases or proving yourself as "a keen negotiator" helping clients "acquire companies and sell divisions at the right price." As an associate becomes more senior, it is important for her to also bring in business. For people of color, business development is a challenge because they often lack the necessary business contacts. Moreover, since African Americans and Latinos(as) on average have lower incomes and net worth than their white demographic counterparts, business development is less likely to occur through family members and friends.

Law firms generally hire a large number of undifferentiated associates and pay them a great deal of money. In hiring, the firms rely on the traditional criteria of grades, law review membership, and clerkships, which are also likely to limit the number of minority associates actually hired. This process

---

50 Id. at 96.
51 Id.
52 Id. at 602–04.
53 Wilkins & Gulati, supra note 22, at 498–501.
54 Id. at 602–04.
55 King, supra note 21, at 134.
56 See id.
58 Wilkins & Gulati, supra note 22, at 549–54.
59 Id. at 504.
allows firms to have relatively low “monitoring costs” because they hire individuals who can “perform routine tasks” with relatively little supervision. Nonetheless, the traditional hiring criteria often ignore the most important factor of being a good lawyer: judgment. Most of the associates often receive uninspiring and almost ministerial work in the beginning of their careers. African American associates often believe that they are “judged more harshly when they make mistakes than their white contemporaries.” Special training is reserved for a very small cadre of associates who are ultimately groomed for partnerships. The firm lacks the resources or the interest in training all the associates to become partners. As a consequence, the firm allows attrition to separate the “wheat from the chaff.” This process most likely will disadvantage associates of color; they are less likely to be “insinuate[d] into the fabric of the firm” so as to rise to the partnership level. These lawyers are most likely stuck “like cartoon characters to the sticky floor.” As a result of this process, many minority associates will continue to “fall[] between the cracks.”

As the United States becomes more racially diverse, corporate law firms are likely to increase the number and percentages of people of color in the ranks of associates and partners. Moreover, the corporate law firms have also received pressure to diversify from local governments, from bar associations, and from corporate clients who have policies to

60 Id. at 518; see also id. at 518–25 (discussing theories on how to increase the efficiency of employees).
61 Id. at 549; see also id. at 539, 549–50 (explaining employer hiring objectives).
62 Id. at 524–26.
63 Id. at 536–37.
64 Id. at 571.
65 Id. at 541–42 (analogizing to the “royal jelly” that some worker bees get that transforms them into the “queen bee”); see also Devon W. Carbado & Mitu Gulati, Conversations at Work, 79 OR. L. REV. 103, 122–23 (2000) (dividing the different work-related tasks into the following categories: (1) “advancement tasks”; and (2) “citizenship tasks”).
66 See Matthew 3:12 (King James).
67 Gordon, supra note 15, at 1267.
68 Id. at 1268.
70 See generally King, supra note 21, at 132.
71 American Bar Association, supra note 31 (explaining ways to make law firms
secure services from diverse vendors. As these organizations become more diverse, the likelihood of racial discrimination is likely to increase. This Article analyzes the established law dealing with Title VII and section 1981 as applied to minority associates and partners and suggests an expansive reading of agency and partnership law to provide relief for minority associates and partners when the partnership acts in a discriminatory manner.

II. RACE AND CORPORATE LAW ASSOCIATES

A. Title VII

Associates in major law firms are considered “employees,” and the partnership is considered an “employer” under Title VII. In Hishon v. King & Spalding, a law firm denied an associate an invitation to become partner. The Supreme Court stated that “once a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship.” The Court found that “[t]he contractual relationship of employment triggers the provision of Title VII governing ‘terms, conditions, or provisions of

[72] See generally Johnnie L. Roberts, The Race to the Top, NEWSWEEK, Jan. 28, 2002, at 44 (highlighting three African Americans who recently became CEOs of Fortune 500 companies—Richard Parsons, AOL Time Warner, Kenneth Chenault, American Express, and Stanley O’Neal, Merrill Lynch, and these individuals may be able to influence which law firms provide service to their corporations).


[76] Id. at 74.
employment.’" Ultimately, the Court decided that the associate's cause of action stated a claim upon which relief could be granted and rejected defendant law firm's argument that Title VII failed to apply because the partnership invitation is not itself an offer of employment. The Court held:

The benefit a plaintiff is denied need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment. It is also of no consequence that employment as an associate necessarily ends when an associate becomes a partner. A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship.

If discrimination takes place, then an associate can pursue a Title VII claim for discriminatory treatment, including the denial of partnership.

Section 1981 provides another ground for suit by discriminated-against associates. It is a statute that was adopted shortly after the Civil War that provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Courts have interpreted section 1981 as entitling African American and other racial minorities to equal opportunity in

---

77 Id.
78 Id. at 77–79.
79 Id. at 77.
80 Id. at 77–78. When a law firm has a mixed motive—discriminatory and nondiscriminatory—in deciding an associate's fate, it makes the legal analysis more complicated. See Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that when mixed motives exist, the burden based on a preponderance of the evidence shifted to the defendant to show that it would have made the same decision in the absence of the gender stereotypes present in its decision making). But see 42 U.S.C. § 2000e-5 (2000) (overturning the Supreme Court ruling in Price Waterhouse).
82 See Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (finding that Arab Americans have a claim under § 1981 because they have historically been considered a different race); see also Gonzalez v. Stanford Applied Eng'g, Inc., 597 F.2d 1298, 1300 (9th Cir. 1979) (per curiam) (permitting discrimination against
employment. 83 Like Title VII, a section 1981 claim requires that a plaintiff establish by a preponderance of the evidence that the defendant intentionally discriminated against plaintiff in making employment decisions. 84 In 1989, the Supreme Court restricted section 1981 so that the statute prohibited discrimination only as to the initial formation of the contract and to conduct impairing the right to enforce contract obligations. 85 In 1991, Congress amended section 1981 to afford protection to employees in “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” 86 Despite this amendment, section 1981 shares with Title VII the perpetrator ideology. 87

Two very important discrimination cases caused corporate heads to spin. In the first case, Andargachew Zelleke, a cum laude graduate of Harvard Law School, who was of Ethiopian ancestry, 88 alleged that while working at White & Case, senior associate, Donald Ries, made racially derogatory comments against him. 89 At the time of the suit, White & Case had three

---

84 Id. at 268–69; see also Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047 (5th Cir. 1996).
85 Patterson v. McLean Credit Union, 491 U.S. 164, 188–89 (1989) (holding that racial harassment in workplace employment was not actionable under § 1981).
87 Discriminated-against individuals are more likely to keep quiet, rarely bring anti-discrimination cases against the partnerships, and find another job for fear that bringing such a claim may lead to reprisals and the loss of opportunities for their career. See Ramona L. Paetzold & Rafael Gely, Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling? 31 HOUS. L. REV. 1517, 1528-43 (1995) (noting that both sides worry about the impact on their reputation and as a consequence the parties usually enter confidential settlements); Wilkins & Gulati, supra note 22, at 589–90 (stating that anti-discrimination cases are infrequently brought and seldom successful); Jenkins, supra note 37, at 93 (mentioning that, ironically, none of the former Cleary associates allowed their pictures to be taken for the article and others refused to be quoted on the record because they were fearful of the impact of the story on their professional careers).
88 Mr. Zelleke’s father was Ethiopian and his mother was white. See Thom Weidlich, White & Case Sued, NAT’L L. J., Jul. 19, 1993, at 2
89 Amy Stevens & Benjamin A. Holden, How Bigotry Charges Rocked White & Case, WALL ST. J., Aug. 19, 1994, B1 (describing an employment discrimination suit brought against White & Case); see also Weidlich, supra note 88 at 2 (same).
Latino(a) partners but no African American partners. It also had only eight African American associates but sixteen Latino(a) ones. These comments allegedly consisted of the following statements: (1) Mr. Zelleke was only admitted to Harvard because of affirmative action; (2) Mr. Zelleke was a “black prince”; and (3) Mr. Zelleke “is so stupid because he is half-black.” Mr. Ries denied making the derogatory statements; however, other associates allegedly confirmed the charges. Mr. Zelleke also alleged that other White & Case lawyers referred to African American lawyers as “n..., “jigaboos,” and “spear chuckers.”

Given Mr. Zelleke’s biracial background, White & Case attorneys allegedly were confused over his racial identity. The executive partner of the Los Angeles office wrote: “In the first place, Andy Zelleke’s skin is not black.” Obviously demonstrating his ire and frustration over the lawsuit and the race identity issues generally, White & Case’s then-Chairman stated: “We hire Mexican lawyers. Are they black? I don't know whether they're black or not. Some of them have very dark skin. Do I care? I don't care.” This confusion over Mr. Zelleke’s racial identity seems disingenuous and misses the point. First, Mr. Zelleke requested that the law firm list him as black in its EEO records. Second, his coloring has more objectively been described as “caramel,” which is sufficiently dark for him to be racialized. Lastly, despite how he described himself or appeared, he apparently faced discrimination because of his black identity. Ultimately, White & Case and Mr. Zelleke agreed

---

90 Weidlich, supra note 88.
91 Id.
92 Stevens & Holden, supra note 89.
93 Id.
94 Id. (alleging that the story was concocted because bad blood existed between the partner alleged to have made these statements and another lawyer who was bypassed for partner).
95 Id.
96 Id.
97 Id.
98 See BARRETT, supra note 69, at 131 (describing Zelleke as “caramel-skinned”).
to a $505,000 negotiated judgment to resolve the lawsuit.\textsuperscript{100} It was reputedly "the first race-discrimination lawsuit by an attorney to result in a formal judgment against a major firm."\textsuperscript{101}

In the second case, Lawrence Mungin, an African American, Harvard-educated bankruptcy associate, sued his former law firm, Katten Muchin & Zavis, alleging that they racially discriminated against him.\textsuperscript{102} The jury awarded Mr. Mungin $2.5 million in damages, including punitive damages of $1.5 million.\textsuperscript{103} The \textit{Washington Post} reported that the award was the largest discrimination judgment against a law firm.\textsuperscript{104}

At the time of Mr. Mungin's employment, the firm had only four African American attorneys out of 350 attorneys nationwide, and Mr. Mungin was the only African American attorney in the Washington, D.C. office.\textsuperscript{105} Mr. Mungin alleged that the law firm discriminated against him by paying him less than other lawyers in his entering class, by failing to provide him with quality assignments, and by failing to consider him for partner.\textsuperscript{106} As several of the department's partners left the firm, Mr. Mungin's status became more precarious.\textsuperscript{107} The law firm told him that "he had to handle first-year associate work," even though he was a seventh-year associate.\textsuperscript{108} Additionally, the firm lowered his billing rate from $185 to $125 per hour.\textsuperscript{109} In his seventh year, the firm failed to officially review his performance.\textsuperscript{110} One partner, however, did evaluate him, stating:

Much of Larry's time is consumed by routine tasks, such as drafting status letters to our client. Occasionally we receive a

\begin{enumerate}
\item\textsuperscript{100} Stevens & Holden, supra note 89, at B1.
\item\textsuperscript{101} Id.; see also Sidebar: News of the Profession, NAT'L L.J., July 25, 1994, at A5 (noting that Mr. Zelleke's attorney asserted that White & Case "took one look at that melting-pot jury we'd impaneled and they turned tail").
\item\textsuperscript{102} Jan Crawford Greenburg, Jury's Award in Bias Case Draws Ire of Chicago Firm, CHI. TRIB., Mar. 28, 1996, at 1.
\item\textsuperscript{103} Id.
\item\textsuperscript{104} Saundra Torry, Discrimination Award Shakes Up the Big Firms, WASH. POST, Apr. 1, 1996, at F7.
\item\textsuperscript{105} Ponce, supra note 46.
\item\textsuperscript{106} Id. at 532–33; see also Kelley Holland, Fair Play at the Firm?, BUS. WK., Apr. 8, 1996, at 43.
\item\textsuperscript{107} Ponce, supra note 46.
\item\textsuperscript{108} Id.
\item\textsuperscript{109} Id.
\item\textsuperscript{110} Emily Barker, Invisible Man, AM. LAW., May 1996, at 65.
\end{enumerate}
challenging assignment from AIG [a large client], which Larry accomplishes with great skill. AIG is a very difficult client and Larry's ongoing efforts to coordinate with me have made a potentially troublesome situation, relatively easy. I do not believe that, for the most part, AIG offers challenging work to Larry. Larry nonetheless accomplishes the tasks for AIG with a helpful attitude and a willingness to tackle the unique problems this client presents.111

Katten's head partner found this evaluation lauded Mr. Mungin's "affability," not his technical expertise and discounted the evaluation because he did not respect the partner who wrote it.112 Mr. Mungin was humiliated by the evaluation, and when asked to read it from the witness stand, he cried.113

The firm allegedly gave Mr. Mungin the choice of either being terminated from the D.C. office or moving to the Chicago or New York office.114 Because the firm failed to guarantee quality assignments or entry into partnership, Mr. Mungin refused to move to Chicago or New York.115 As a consequence, the firm terminated his position in the D.C. office, and he brought a race discrimination suit against the firm.116 A jury found the law firm liable to Mr. Mungin for "(1) race-based constructive discharge; and (2) racially discriminatory treatment with respect to (a) Mungin's starting salary, (b) his 1994 salary, (c) his work assignments, and (d) his consideration for partnership."117 Katten Muchin & Zavis was shocked by the verdict, telling reporters that it did not "discriminate against Mr. Mungin"118 and filed an appeal.

In a highly unusual decision, the D.C. Circuit reversed and remanded the jury verdict.119 At the hearing, although Mr. Mungin's qualifications were not challenged by defense counsel

---

112 Id.
113 Barker, supra note 110.
114 Ponce, supra note 46.
115 Id.
116 Some partners in the firm also allegedly engaged in sex discrimination and sexual harassment of women lawyers and staff. BARRETT, supra note 69, at 54. These claims were privately settled. Id.
117 Mungin, 116 F.3d at 1550.
118 Barker, supra note 110.
119 Mungin, 116 F.3d at 1558; see also BARRETT, supra note 69, at 271–76.
at the lower court or on appeal, Judge Randolph, *sua sponte* asked about Mr. Mungin's grades at Harvard\(^{120}\) and whether he had been fired from his previous law firms.\(^{121}\) It seems that Judge Randolph engaged in the same stereotypes about African American attorneys that some of the partners in Katten Muchin had.\(^{122}\) So it should come as no surprise that the D.C. Circuit, by a 2-1 vote, found that no reasonable jury could find for Mr. Mungin and reversed the jury verdict.\(^{123}\) The court specifically found that Mungin's starting salary was lower than others because the firm treated the salaries of lateral hires, like Mr. Mungin, differently than "homegrown associates."\(^{124}\) Moreover, the court found that Mr. Mungin did not meet his burden of persuasion because he failed to introduce any evidence comparing his starting salary to that of other lateral hires.\(^{125}\) As for Mr. Mungin's 1994 salary being discriminatorily low, the court also found that he failed to show an effective comparison between his salary and that of others similarly situated.\(^{126}\) In fact, the court noted that Mr. Mungin's 1994 salary was almost identical to the firm's average salary for the D.C. office.\(^{127}\) As to work assignments being assigned discriminatorily, the court observed that Mr. Mungin pointed to only one complex bankruptcy assignment that was rerouted from the D.C. office to Chicago.\(^{128}\) The court found that a "single instance" was woefully "insufficient" and "'second-guess[ed] the] employer's personnel decision absent demonstrably discriminatory motive.'"\(^{129}\) As to the firm's failure to consider Mr. Mungin for partnership, the D.C. Circuit found that the firm's D.C. office

\(^{120}\) Barrett, *supra* note 69, at 265–66.

\(^{121}\) *Id.* at 267–68.

\(^{122}\) *See generally id.* at 265–68.

\(^{123}\) *Mungin*, 116 F.3d at 1558.

\(^{124}\) *Id.* at 1554.

\(^{125}\) *Id.*

\(^{126}\) *Id.* at 1554–55.

\(^{127}\) *Id.*

\(^{128}\) *Id.* at 1556. Paul Barrett points out that the record evidenced at least three rerouted assignments from the D.C. office to the Chicago office that Mr. Mungin could have worked on. *See Barrett, supra* note 69, at 268, 272–75 (noting also that the firm that successfully represented Mr. Mungin at trial imploded at the time of the appeal and was unprepared in its representation of Mr. Mungin).

\(^{129}\) *Mungin*, 116 F.3d at 1556 (quoting Fischbach v. Dist. of Columbia Dep't of Corrs., 86 F.3d 1180, 1183 (D.C. Cir. 1996) (quoting Milton v. Weinberger, 696 F.2d 94, 100 (D.C. Cir. 1982))).
had insufficient bankruptcy assignments to provide Mr. Mungin with "sophisticated bankruptcy experience." This lack of experience precluded his consideration for partnership. Lastly, the court held that the firm did not constructively discharge Mr. Mungin because no discriminatory acts took place making "working conditions intolerable and [driving] the employee out."" The Mungin case shows the difficulty in bringing and winning these kinds of cases. First, proving discrimination is difficult because the plaintiff often has the burden to prove that the employer intended to discriminate. Because no overt discrimination or specific evidence of racist language was introduced into evidence, it was very difficult for Mr. Mungin to succeed on appeal, despite the verdict of an empathetic district court jury. The burden of proving intentional discrimination is often Herculean and ignores the many circumstances in which the decision maker exercises "unconscious racism" or pure ambivalence. Because overt discrimination is abhorrent to currently prevailing American mores, those who hold such odious views may be more covert in practicing their discrimination. Individuals or business entities tagged with the label of "discriminator" fight very hard to remove that label. For instance, in Mungin, the partnership vehemently denied that it discriminated against Mr. Mungin, even though one former partner obviously stereotyped minority associates. He anonymously stated:

Anyone who spends any time in the profession would know there are lots of minorities, African-Americans especially, who are running around with Harvard and Yale degrees who are not qualified in any sense. They have been solicited and tutored

---

130 Id. at 1557.
131 Id.
132 Id. at 1558 (quoting Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981) (internal citations and modifications omitted)).
133 Almost all the newspaper articles that discussed the case pointed out that the trial jury was comprised of seven African Americans and one white. See Barker, supra note 110; Greenburg, supra note 102; Torry, supra note 104.
135 Barker, supra note 110.
and polished up and sent out to the profession and they're not up to grade, for whatever reason.  

Unfortunately, these comments were unexpressed at Mr. Mungin's trial; they may have made a difference in the outcome of his case. Moreover, Mr. Sergi, the head Chicago partner, had reservations about Mr. Mungin's resume because he had been at three law firms in six years. He wondered why he had moved around so much. Under most circumstances, this is a legitimate question, but the partners could have relieved their anxiety by asking for references. Given the law firm's poor history of minority hiring, it raises a larger question of whether the firm was just overly suspicious of black resumes.

These stereotypes about lawyers of color may not be so unusual. Professors Carbado and Gulati suggest that white workers may use a shortcut motivated by statistical judgments to judge African American workers as "lazy, untrustworthy, disloyal . . . angry . . . and difficult to communicate with." But like so many other Title VII and section 1981 plaintiffs, Mr. Mungin lacked redress for his claims because even though stereotypes and disparities apparently existed, intent was next to impossible to prove. Mr. Mungin's outcome was like many other Title VII and section 1981 plaintiffs who have tended to have less successful outcomes than plaintiffs in civil law suits.

As seen in the next section, this Article advocates that the concepts of good faith and fair dealing be incorporated in law firm relationships. Therefore, associates like Mr. Mungin would not have to bring discrimination claims with all the inherent problems of proving intent.

136 BARRETT, supra note 69, at 55 (noting that this view is not necessarily unusual among white lawyers); see also David J. Garrow, The Hidden Wound, WASH. MONTHLY, Mar. 1, 1999, at 46 (reviewing Paul Barrett's book THE GOOD BLACK and noting that many large law firms "behave thoughtlessly and callously toward young lawyers" and that Mr. Mungin's treatment was not necessarily racist).

137 Id.


139 Id.

B. Expanding Notions of Good Faith and Fair Dealing

An associate in a law firm is an agent or employee working on behalf of a principal or employer, the law firm. Because an associate is usually hired for no set term, she invariably would be considered an employee-at-will. The common law rule allowed the employer to terminate such employees at any time for no reason.\textsuperscript{141} Disregarding the power imbalance between employees and employers, the common law rule justified the employment-at-will doctrine on the mutuality of the promise, i.e. both parties could terminate the agreement at any time.\textsuperscript{142} Sometimes courts made exceptions for whistleblowers terminated by their employers because they have reported some malfeasance or misfeasance.\textsuperscript{143} In addition, from an economic perspective, employment-at-will relationships benefit the employer because it does not have to justify the termination of an employee.\textsuperscript{144} These terminations are quick with no fuss.

Sometimes courts, however, will imply an omitted term into a contract because “the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations.”\textsuperscript{145} Every contract has an implied-in-law covenant of good faith and fair dealing.\textsuperscript{146} In hiring a lawyer in a law firm, an implied understanding exists that “both [the associate] and the firm” in conducting the practice will “do so in compliance with the prevailing rules of


\textsuperscript{144} Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 928 (Cal. Ct. App. 1981) (acknowledging concerns about “the legitimate exercise of managerial discretion”).

\textsuperscript{145} LAWRENCE A. CUNNINGHAM ET AL., 3 CORBIN ON CONTRACTS § 570, at 51 (2001 Supp.).

\textsuperscript{146} RESTATEMENT (SECOND) OF CONTRACTS § 205; CUNNINGHAM ET AL., supra note 145, § 541, at 95, 97.
conduct and ethical standards of the profession."\textsuperscript{147} In Wieder v. Skala, an associate in a law firm alleged that he was terminated after insisting that the firm report a fellow associate for attorney misconduct.\textsuperscript{148} Departing from its usual parsimoniousness on this issue,\textsuperscript{149} the New York Court of Appeals held:

Intrinsic to [the lawyer] relationship, of course, was the unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession. Insisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship.\textsuperscript{150}

Other state courts have more expansively modified the common law employment-at-will doctrine and afforded employees a cause of action for wrongful discharge.\textsuperscript{151} However, Wieder stands for the proposition that law firms and lawyers are special and have a higher duty to obey the law than other individuals. Moreover, by limiting its holding to include solely these specific aspects of the lawyer ethical rules,\textsuperscript{152} the court limited the expansion of the implied covenant to include the

\textsuperscript{148} Id. at 631, 609 N.E.2d at 105, 593 N.Y.S.2d at 753.
\textsuperscript{150} Wieder, 80 N.Y.2d at 637–38, 609 N.E.2d at 109–10, 593 N.Y.S.2d at 756–57.
\textsuperscript{152} Wieder, 80 N.Y.2d at 637–38, 609 N.E.2d at 109–10, 593 N.Y.S.2d at 756–57.
other lawyer ethical rules specifically germane to nondiscrimination.\textsuperscript{153}

The supreme courts of Arizona, Oklahoma, and Delaware have expansively defined the good faith and public policy exceptions of at-will employments. In \textit{Wagenseller v. Scottsdale Memorial Hospital}, the plaintiff, a nurse, alleged that the quality of her relationship with her supervisor changed after attending a camping trip in which she refused to participate in certain ribald activities involving public nudity.\textsuperscript{154} Once back from the camping trip, the nurse’s supervisor allegedly harassed her.\textsuperscript{155} The hospital terminated her after she refused to resign.\textsuperscript{156} Plaintiff claimed that she was terminated for reasons that violated public policy.\textsuperscript{157} The court noted that two general exceptions exist to the employment-at-will doctrine: (1) “’public policy’ exception, which permits recovery upon a finding that the employer’s conduct undermined some important public policy;” and (2) “an implied-in-law covenant of ‘good faith and fair dealing.’”\textsuperscript{158}

The court acknowledged that the “public policy exception” prohibits terminations of employees when such termination violates a “statute,” a “public policy,” or is “motivated by bad faith or malice” or “retaliation.”\textsuperscript{159} The court observed that public policy consideration would be found in the “state’s constitution and statutes, [which] embody the public conscience of the people.”\textsuperscript{160} The court noted that “[s]omething ‘against public policy’ is something that the [l]egislature has forbidden.”\textsuperscript{161} Given that public indecency laws proscribed the

\textsuperscript{153} \textit{MODEL RULES OF PROF’L CONDUCT} R. 8.4 cmt. 2–3 (2003) (barring race discrimination by lawyers).
\textsuperscript{154} 710 P.2d 1025, 1029 (Ariz. 1985).
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.} at 1031. The court also noted a third exception to the at-will employment doctrine: “an implied-in-fact promise of employment for a specific duration . . . including assurances of job security in company personnel manuals or memoranda.” \textit{Id.} The court found that a dispute of fact existed on this issue and that the trial court should not have granted summary judgment. \textit{Id.} at 1037–38.
\textsuperscript{159} \textit{Id.} at 1031–32.
\textsuperscript{160} \textit{Id.} at 1033.
\textsuperscript{161} \textit{Id.} (quoting \textit{Lucas v. Brown & Root, Inc.}, 736 F.2d 1202, 1205 (8th Cir. 1984)).
offensive behavior, the court found that the plaintiff's termination was against public policy. \^162

*Wagenseller* recognized an implied-in-law covenant of good faith and fair dealing in employment-at-will contracts\^163 but refused to interpret this covenant as outlawing terminations without cause.\^164 Instead, the court limited the covenant to circumstances involving the employer's provision of "necessary working conditions" or an attempt by the employer to avoid the payment of benefits already earned by the employee.\^165 This Article does not necessarily advocate that courts adhere to a cause requirement on employment-at-will terminations. In the context of allegations of racial discrimination, however, employers that have a justified reason for terminating a minority employee would have a better case if they articulated a nondiscriminatory reason. Businesses need to be mindful of this fact because, as seen below, several courts have found that discrimination violates public policy and creates an exception to the employment-at-will doctrine.

In *Tate v. Browning-Ferris*, an African-American male brought suit against his former employer, charging that his employment termination was wrongful because it was predicated on his race.\^166 The former employer sought to have the pendent state law claim based on the covenant of good faith and fair dealing dismissed.\^167 The Oklahoma Supreme Court acknowledged that it "adopted the public-policy tort exception to the termination-at-will doctrine."\^168 The court found that the public policy exception encompassed employment discharges based on race discrimination, specifically stating:

\^162 Id. at 1035. Some courts have interpreted the discharge of an employee without cause as violating an implied covenant of good faith and fair dealing. See, e.g., Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).

\^163 Wagenseller, 710 P.2d at 1040.

\^164 Id.


\^166 833 P.2d 1218, 1221 (Okla. 1992).

\^167 Id.

\^168 Id. at 1225.
[T]here can be no doubt at this point in time that racial discrimination in the workplace clearly contravenes the public policy declared by the Act, we give today a categorically affirmative answer to the question whether a racially motivated discharge or one in retaliation for filing a racial discrimination complaint offends a clear mandate of “public policy”….

Moreover, the court found that the state statute governing anti-discrimination did not preclude plaintiff's cause of action for wrongful discharge.

Discrimination is impermissible under the implied covenant of good faith and fair dealing exception to the at-will employment doctrine. In *Schuster v. Derocili*, plaintiff alleged that her supervisor made sexual advances toward her, and when she refused, the employer terminated her at-will employment. The Delaware Supreme Court recognized that the good faith and fair dealing exception to the at-will employment doctrine included terminations that violated public policy. The court held:

> [W]e do today, for the first time, decide that a person may assert a cause of action for breach of an implied covenant of good faith based upon a termination alleged to have resulted from a refusal to condone sexual advances. This private cause of action flows directly from Delaware's clear and firmly rooted public policy to deter, prevent and punish sexual harassment in the workplace.

Although the *Schuster* case dealt with sexual harassment, its broad sweep of incorporating anti-discrimination principles should also cover race discrimination.

Courts should take a more expansive view of the law of wrongful discharge to include those discharges based on race discrimination.

---

169 Id. (citation omitted).
170 Id. at 1230 (finding no legislative intent to supplant whole field); accord Rojo v. Kliger, 801 P.2d 373, 383 (Cal. 1990) (holding that state common law claims were not precluded by California anti-discrimination statute). *But see* Polson v. Davis, 895 F.2d 705, 709–10 (10th Cir. 1990) (rejecting use of race discrimination as a public policy exception to at-will employment contracts because anti-discrimination statutes provided an available remedy).
171 775 A.2d 1029, 1031 (Del. 2001).
172 Id. at 1035. *But see* Guz v. Bechtel Nat'1, Inc., 8 P.3d 1089 (Cal. 2000). In *Guz*, plaintiff failed to connect his wrongful discharge claim with his age discrimination claim and, as a consequence, the court dismissed his wrongful discharge claim as being insubstantial. Id. at 1123–24.
173 *Schuster*, 775 A.2d at 1036.
discrimination. The use of these exceptions to the at-will employment doctrine will provide another avenue of recovery for discriminated-against lawyers of color. Society conceptualizes Title VII and section 1981 claims “as singularly egregious acts of racism perpetrated by bad actors who intend to inflict the subordinating consequences of their actions.” Under good faith and fair dealing concepts, courts need not totally conform to traditional Title VII and section 1981 ideology. Instead, courts need not require proof of intentional discrimination as a sine qua non. The courts will still require some proof that race was a factor in a wrongful termination. They will have much more discretion, however, in deciding how much violates notions of good faith and fair dealing.

Neither Title VII nor section 1981 cases are able to address “systemic conditions of subordination” or low-level microaggressions. The contractual duty of good faith and fair dealing may provide additional protections to minority associates against this subordination. An associate like Mr. Mungin, the only African American in the D.C. office of his law firm, was not treated fairly by his law firm because he was excluded from quality work in his practice area. Mr. Mungin would have an additional cause of action under the doctrine of good faith and fair dealing that would not require proof that the law firm intended to discriminate against him. The principal is required to conduct herself in a manner that does not demean or harm the reputation of the agent. For instance, the language allegedly used to describe Mr. Zelleke “demeaned” him. Use of this language by law firm personnel violated the law firm’s contract by creating a racially hostile environment, demeaning Mr. Zelleke.

Lastly, nondiscrimination principles would meet the two current contractual theories behind good faith. Some

---

175 Houh, supra note 165, at 1076.
176 See id.
commentators have described good faith as "the absence of bad faith." Acts of bad faith are described as an "evasion of the spirit of the bargain." Alternatively, contractual discretion is interpreted in terms of good faith and whether it is within the "justified expectations of the . . . part[ies]." Both of these theories mandate that nondiscrimination principles be incorporated in at-will employment relationships. Given the enactment of civil rights laws and the onset of the civil rights struggle of the 1960s, individuals expect that civilized society will treat them fairly and not discriminate against them because of their race. That is the spirit of every contract and the expectations of all parties thereto. Adding nondiscrimination principles to employment-at-will contracts is no change from, and in fact is grounded in, pre-existing contract theory prohibiting bad faith transactions. In addition, there is a great deal of psychic benefit to know that wrongful discharges also include discriminatory terminations.

Given the limitations of Title VII and section 1981 lawsuits, plaintiffs in discrimination suits will have another avenue of recovery to ensure that they are made whole. Including discrimination as a wrongful termination will promote real equality and may help courts move past the Title VII and section 1981 perpetrator ideology so that real good faith and fair dealing will occur. It may cause law firms to continue to conform to nondiscrimination principles. As seen in the next section, these contract provisions of good faith and fair dealing can also be incorporated into the partnership contract.

III. RACE AND LAW FIRM PARTNERSHIPS

A partnership is "an association of two or more persons to carry on as co-owners a business for profit." It was the standard legal form of business organizations until the mid-1800s. Each partner generally has equal power to manage the

---

180 Restatement (Second) of Contracts § 205 cmt. d.
181 See id. § 205 cmt. a.
183 Chandler, supra note 2, at 36.
affairs of the partnership. Each partner generally shares in the profits, losses, and liabilities of the partnership. It is a contractual relationship whose general principals can be modified by written agreements.

Many large corporate law firms operate as partnership entities. Although law firms are doing much better in the number of associates of color, they have a very small number of minority partners. These firms often are very powerful; their members are appointed to prestigious judgeships and other government positions. Members of these large firms earn handsome salaries and are considered to be at the pinnacle of the legal profession. For all these reasons, it is important to have a cadre of minority lawyers sharing in this aspect of the legal profession. Minority group members are slowly joining the ranks of partner in the major law firms. Interestingly, many of the African American partners worked in non-law firm environments before becoming partners, probably because of the unpredictability of the “tournament process” in joining the partnership ranks. These partners probably sought initial employment opportunities where they thought that they would recieve the best training.

---

186 CHANDLER, supra note 2, at 36.
189 Gordon, supra note 15, at 1262 (noting that “partners’ careers [have] included service at the highest levels of the judiciary, the government and industry”); Shepherd, supra note 15, at 103 (noting that a “law degree is a prerequisite for many positions of economic advantage and political power”).
191 See Grutter v. Bollinger, 123 S. Ct. 2325, 2340 (2003) (writing for the majority Justice O’Connor noted the importance of having diversity at all levels of society).
192 Wilkins & Gulati, supra note 22, at 581 (survey results indicated that before African Americans became partner, thirty-seven percent worked in government, twenty-eight percent worked in-house, and eleven percent worked in academia).
Minority partners are joining the partnership ranks now that the nature of these law partnerships has changed. In the past, a law partnership was more of a sinecure. Now, partners must remain productive and bring in business to retain their positions. In fact 82.7% of partners polled were of the opinion that the practice of law has worsened. One-third of partners polled did not expect to remain at the law firm until retirement. Most were insecure about their positions.

In addition, more firms have established at least a two-tier partnership in which some partners share in the equity and profits of the firm, and others merely receive salaries. A small insular management committee often manages these firms, and this committee often has the power through the guillotine method to terminate a partner for no reason at anytime. This method has been described as an involuntary severance that is an immediate termination by partnership vote without notice or hearing. Despite many minority partners' efforts to bypass the tournament-like environment before being elevated to partner, it would not surprise me if the experiences of the minority law partners were similar to those of the minority law associates in which they may leave the partnership after a few years. The partnership management policies coupled with a tough environment are likely to result in discrimination suits by minority partners.

Sometimes the partnership agreement refers disputes to arbitration. At the time of Mr. Mungin's lawsuit, Katten

---

193 Barrett, supra note 69, at 36.
196 Id.
197 Id.
198 Hillman, supra note 188, at 397 (noting the ambiguity of different kinds of partnerships).
200 Id.
201 See Williams v. Katten Muchin & Zavis, 837 F. Supp. 1430, 1433, 1443 (N. D. Ill. 1993) (holding that partnership agreement which required the arbitration of all claims is enforceable as applied to Title VII and § 1981 claims).
Muchin & Zavis also faced another discrimination lawsuit filed by African American income partner Elaine Williams. She alleged that she was ordered to clean a conference room, was told that some of the firm's secretaries refused to work for women or African American attorneys, and was told by a white male partner walking in the hall that “he wanted ‘to f... her.’” Although not finding any evidence of discrimination, an arbitration panel did find that the firm retaliated against her by eliminating her medical benefits after she filed suit. As seen below, discriminated-against partners have very few options. They can bring a Title VII cause of action only under very limited circumstances; they can bring a section 1981 cause of action, and they may have very limited claims that the law firm’s partnership agreement is unfair.

A. Title VII and Law Partnerships

Title VII bars employment discrimination. It provides that an “employee” is “an individual employed by an employer.” An employer is defined as “a person engaged in an industry affecting commerce who has fifteen or more employees.” A partnership can be an employer. So if the partnership discriminates against its employees, employees would have a valid cause of action under Title VII. The statute fails, however, to address its applicability to situations in which the partnership discriminates against partners.

In *Hishon v. King & Spalding*, Justice Powell, in a concurring opinion, agreed that associates were employees of a partnership but stated that he wrote separately 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 relationship among partners be characterized as an “employment” relationship to which Title VII would apply. The relationship among law partners differs

---

202 **BARRETT, supra** note 69, at 56–58.
203 *Id.*
204 *Id.* at 285.
206 *Id.* § 2000e(f).
207 *Id.* § 2000e(b).
208 *Id.* § 2000e(a).
markedly from that between employer and employee—including that between the partnership and its associates.\textsuperscript{209}

Justice Powell acknowledged that his admonitions were inapplicable to firms that use the partnership nomenclature to avoid the strictures of Title VII.\textsuperscript{210} The Equal Employment Opportunities Commission (EEOC) has taken its cue from Justice Powell and stated that “[if a person] is subject to the organization’s control, s/he is an employee” protected by Title VII of the Civil Rights Act;\textsuperscript{211} however, a person’s title does not automatically make her a partner as opposed to an employee.\textsuperscript{212} In making this determination, the EEOC would carefully examine the factual circumstances of the work relationship to “determine whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization’s control.”\textsuperscript{213}

“If . . . subject to the organization’s control,” the individual is an employee.\textsuperscript{214} In making its determination, the EEOC would examine the following factors: (1) “[w]hether the organization can hire or fire the individual or set the rules and regulations of the individual’s work”;\textsuperscript{215} (2) “[w]hether . . . the organization supervises the individual’s work”;\textsuperscript{216} (3) “[w]hether the individual reports to someone higher in the organization”;\textsuperscript{217} (4) “[w]hether . . . the individual is able to influence the organization”;\textsuperscript{218} (5) “[w]hether the parties intended that the individual be an employee, as expressed in written agreements

\textsuperscript{209} Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring); accord EEOC Decision No. 85-4, 1985 EEOC LEXIS 3, at *4 (Mar. 18, 1985) (holding that none of the partners were employees and because the firm had fewer than the requisite fifteen or more employees as required by 42 U.S.C. § 2000e(b), Title VII was inapplicable to the firm).

\textsuperscript{210} Hishon, 467 U.S. at 79 n.2 (Powell, J., concurring).


\textsuperscript{212} Id.

\textsuperscript{213} Id.

\textsuperscript{214} Id.

\textsuperscript{215} Id.

\textsuperscript{216} Id.

\textsuperscript{217} Id.

\textsuperscript{218} Id.
or contracts”;219 and (6) “[w]hether the individual shares in profits, losses, and liabilities of the organization.”220

In its 1998 Compliance Manual, the EEOC noted that in small partnerships, each partner is likely to have an equal voice in the business and manage all of its aspects.221 In contrast, in a large partnership, each partner is less involved in the firm’s overall management and generally delegates control to a management committee, while retaining ultimate authority.222 Although the 1998 Compliance Manual was superseded by the 2003 version, these distinctions between firm size still exist today, and the EEOC, in analyzing these differences, will probably still determine whether the individual has any real or significant control in the partnership or merely ratifies decisions of the managing partners.223

B. The Cases

When partners sue partnerships under the anti-discrimination laws, the courts have to make a factual inquiry to determine whether the partner is really a partner or is in fact an employee. Interestingly, much of the analysis seems to follow the Uniform Partnership Act (UPA) and Revised Uniform Partnership Act (RUPA) provisions outlining the factual circumstances necessary in determining whether a business relationship is in fact a partnership.224 At first, the courts refused to accept that a partner could be construed as an employee under Title VII.225 As discussed below, most of the cases that have analyzed whether a partner is an employee under the anti-discrimination laws are situated in the gender or

219 Id.
220 Id. The EEOC rules are almost identical to the statutory rules in determining whether a partnership exists. See UNIF. P'SHIP ACT §§ 6, 7 (1914); REV. UNIF. P'SHIP ACT § 202 (1997).
222 Id.
223 Id.
224 UNIF. P'SHIP ACT § 7; REV. UNIF. P'SHIP ACT § 202(c).
225 See, e.g., Burke v. Friedman, 556 F.2d 867, 869–70 (7th Cir. 1977) (holding that individual partners could not be counted as employees to meet the fifteen-employee Title VII threshold).
age discrimination arenas; they do not allege race
discrimination. This could be because of the small number of
minority partners. In addition, many of the cases have dealt
with industries other than the law, such as accounting. This
could result from the concern that lawyers have in protecting
their professional reputation and the recognition that litigation
creates a permanent record accessible by future employers or
partnerships.

1. Cases Finding That a Partner Is Not an Employee

a. Wheeler v. Hurdman

In Wheeler v. Hurdman, plaintiff, a certified public
accountant, sued claiming that the partnership engaged in
illegal gender and age discrimination by expelling her from the
partnership.\textsuperscript{226} The partnership moved to dismiss plaintiff's
complaint on the basis that she was not an employee protected
by various anti-discrimination statutes.\textsuperscript{227} The district court
found that, although a partner, the plaintiff satisfied the
employee requirements of the anti-discrimination statutes.\textsuperscript{228}
The Court of Appeals for the Tenth Circuit reversed, stating that
once the plaintiff became a partner, she received the following
rights and responsibilities:

- Election to the partnership and execution of the Firm's
  partnership agreement; change in compensation from salary to
  a share of the Firm's profits, paid by draw and an allocation of
  profits based on points; a contribution to capital; establishment
  of a capital account; unlimited personal liability for the debts
  and obligations of the partnership; rights under the partnership
  agreement to vote . . . .\textsuperscript{229}

As partner, she also could be terminated either by “(1) a
unanimous vote of the firm's policy board, or (2) an affirmative
vote of no less than 75% of the members of the firm's advisory
board, or (3) an affirmative vote of no less than 75% of all
partners casting votes.”\textsuperscript{230} Although a “bona fide and general

\textsuperscript{226} 825 F.2d 257, 258 (10th Cir. 1987).
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 260.
\textsuperscript{230} Id. at 261.
partner" of the firm, the plaintiff argued that the "economic reality" of her position was that of an employee.\textsuperscript{231} She asserted that the managing partner had ultimate and unlimited power to terminate partners, that the partnership is a large firm with centralized management making it actually a corporation, and that her contributions to firm capital were inconsequential.\textsuperscript{232}

The Tenth Circuit rejected the defendant’s contention that the "economic realities test is categorically inapplicable to partnerships" but noted the difficulty of applying it to partnerships.\textsuperscript{233} The court "reject[ed] as incomplete the version" of the economic realities test employed by plaintiff and the EEOC in this case.\textsuperscript{234} The court was concerned that the test would encompass virtually every partnership in the United States because "practical reasons" usually exist for the domination of one partner in work assignments, "billing," "share of profits," and "supervision of work."\textsuperscript{235} This test derived from independent contractor analysis, which may involve "domination" of one party by another; whereas, with partners, the domination of one partner may result from choice.\textsuperscript{236} The partners may have abdicated their rights pursuant to agreement.\textsuperscript{237} Moreover, the court found that the "economic realities test" overlooked the economic reality of partnerships.\textsuperscript{238} Unlike employment relationships, partners assume a great deal of personal liability for the acts of other partners.\textsuperscript{239} The court stated: "There may be many aspects of a partner’s work environment in a partnership which are indistinguishable from that of a corporate employee. But in general the total bundle of partnership characteristics sufficiently differentiates between

\begin{itemize}
\item \textsuperscript{231} Id.
\item \textsuperscript{232} Id. at 261–62.
\item \textsuperscript{233} Id. at 271–72.
\item \textsuperscript{234} Id. at 273, 275.
\item \textsuperscript{235} Id. at 273.
\item \textsuperscript{236} Id. at 271–73.
\item \textsuperscript{237} Id. at 274.
\item \textsuperscript{238} Id. at 274–75.
\item \textsuperscript{239} Id. at 274. This analysis raises interesting questions involving the status of limited liability partners. Since these "partners" do not share in the liabilities of the law firm, then pursuant to the \textit{Wheeler} decision, they would be construed as employees, not partners.
\end{itemize}
the two to remove general partners from the statutory term 'employee.'"

The court held that the plaintiff was a partner, not an employee, because she participated in the firm's profits and losses, was liable for the misfeasance or malfeasance of the firm or other partners, had voting rights pursuant to the partnership agreement, and had capital investments in the firm. The court categorically held that "bona fide general partners are not employees under the Anti-discrimination Acts" and as a general partner, plaintiff was specifically not covered.


In Rhoads v. Jones Financial Cos., plaintiff, a general partner, sued her former partners, alleging that her termination was discriminatorily based on her age and gender. The district court acknowledged that it had to investigate the true nature of plaintiff's relationship with the firm. It found that plaintiff "possessed numerous indicia of partner status": she (1) shared in profits and losses, (2) "possessed meaningful voting rights," and (3) possessed "a virtually unlimited right to examine the books and records of the partnership." The court found that plaintiff's voting rights were meaningful because as a general partner, she was able to vote on the "retention of the managing partner, members of the executive committee, and other general partners." It also found that the firm called the plaintiff a "partner," that she made a financial contribution to the firm, that she shared in the firm's profits and losses, and that although the firm had a strong managing partner structure, the general partners ultimately "retained the exclusive right to manage the firm." Thus, the court held that plaintiff was not an employee under the anti-discrimination laws.

---

240 Id. at 276.
241 Id.
242 Id. at 277.
243 957 F. Supp 1102, 1103 (E.D. Mo. 1997), aff'd, 131 F.3d 144 (8th Cir. 1997).
244 Id. at 1107.
245 Id.
246 Id. at 1107–08.
247 Id. at 1110.
2. A Case Finding That a Partner Is an Employee: Simpson v. Ernst & Young

In Simpson v. Ernst & Young, plaintiff, a managing partner of an accounting firm's Cincinnati office, sued his former partners alleging that he was discriminatorily terminated because of his age.\textsuperscript{248} At issue was whether the plaintiff was a partner or an employee.\textsuperscript{249} The firm paid the plaintiff an annual salary.\textsuperscript{250} Although the plaintiff had the right to vote on certain major matters, he could not vote on membership of the firm's management committee.\textsuperscript{251} In addition, the plaintiff lacked the right to examine the firm's financial records,\textsuperscript{252} and a supervisor annually reviewed plaintiff's job performance.\textsuperscript{253} The Court of Appeals for the Sixth Circuit upheld the trial court's findings that the plaintiff was an employee, not a partner.\textsuperscript{254} The trial court found that the plaintiff never made a true capital contribution with the firm.\textsuperscript{255} The court viewed the plaintiff's capital account as a "paper transaction" because he did not invest "one cent of his own money."\textsuperscript{256} Instead, the firm arranged a bank loan for the plaintiff and paid the interest on the loan for him.\textsuperscript{257} Plaintiff "made no payments on the principal."\textsuperscript{258} The trial court found that plaintiff had no share in the firm's profits;\textsuperscript{259} instead, he received an annual salary.\textsuperscript{260} The trial court found that plaintiff had no right to examine the records of the firm\textsuperscript{261} and had no rights to vote for management committee membership, admission of new partners, termination of

\textsuperscript{248} 100 F.3d 436, 438-41 (6th Cir. 1996).
\textsuperscript{249} Id. at 441.
\textsuperscript{250} Simpson v. Ernst & Young, 850 F. Supp. 648, 651 (S.D. Ohio 1994).
\textsuperscript{251} Id. at 652.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Simpson, 100 F.3d at 441; accord Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867 (9th Cir. 1996) (holding that "partner" is most likely an employee under the California Fair Employment and Housing Act because she had little control over and limited access to the partnership).
\textsuperscript{255} Simpson, 850 F. Supp. at 660.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Id.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Id. at 661.
partners, or partnership compensation.\textsuperscript{262} Plaintiff had little management authority; he could not “hire, fire or transfer even clerical workers within or without his department.”\textsuperscript{263} He was also subject to annual performance reviews.\textsuperscript{264} Lastly, as to sharing firm losses, the court noted that this factor is a significant aspect of a partnership, but the court questioned the provision’s equity and enforceability, given the absence of any other indicia of partnership in plaintiff’s case.\textsuperscript{265} In affirming the trial court’s decision, the Sixth Circuit found the firm deliberately designed the structure of their newly merged firm to be an “intentionally ambiguous business structure calculated to divest Simpson and others similarly situated of all indicia of meaningful partnership participation.”\textsuperscript{266}

3. A Case Finding that Not Enough Information Was Presented To Determine Whether an Individual Was a Partner or Employee: EEOC v. Sidley Austin Brown & Wood

In EEOC v. Sidley Austin Brown & Wood, a law firm “demoted thirty-two of its equity partners to ‘counsel’ or ‘senior counsel.’”\textsuperscript{267} To determine whether the demotions violated the Age Discrimination in Employment Act, the EEOC opened an investigation.\textsuperscript{268} The EEOC sought a subpoena duces tecum for information relating to the discrimination and the demoted partners’ actual status in the firm.\textsuperscript{269} The law firm provided information as to the partners’ status, but none as to the discrimination.\textsuperscript{270} The EEOC asked the district court to enforce the subpoena. The court ordered the firm to disclose the information, and the firm appealed.\textsuperscript{271}

\textsuperscript{262} Id.
\textsuperscript{263} Id. at 662.
\textsuperscript{264} Id.
\textsuperscript{265} Id. at 663.
\textsuperscript{266} Simpson v. Ernst & Young, 100 F.3d 436, 441 (6th Cir. 1996); see also Rosenblatt v. Bivona & Cohen, 969 F. Supp. 207, 215 (S.D.N.Y. 1997) (precluding defendant’s “classification as a non-employee partner” because both parties agreed that plaintiff’s employment was at-will).
\textsuperscript{267} 315 F.3d 696, 698 (7th Cir. 2002).
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} Id. at 699.
Writing for the Court of Appeals for the Seventh Circuit, Judge Posner found that “[t]he firm is controlled by a self-perpetuating executive committee. Partners who [were] not members of the committee ha[d] some powers delegated to them,” but were not authorized to elect the members of the executive committee. Instead, the executive committee elected its own members. As to partners’ status, the court noted that they were at the mercy of the executive committee, which could terminate, promote, demote, raise pay, and lower pay. Judge Posner pointed out that the parties failed to raise the issue “why some or all members of partnerships should for purposes of the federal antidiscrimination laws be deemed employers and so placed outside the protection of these laws.”

Although acknowledging that the firm had complied with the state partnership laws, Judge Posner found that “classification [as a partner] under state law is not dispositive of their status under federal antidiscrimination law.” Although the demoted partners shared in firm profits, the court noted that sometimes employee compensation is derived from profits as well. Similarly the court recognized that although the demoted partners owned some of the firm’s capital, sometimes executive-level employees also own capital.

According to Judge Posner, the “most partneresque feature” of the demoted “partners’ relation to the firm [was] their personal liability for the firm’s debts.” The court noted that a split in the circuit courts existed as to whether the sharing in partnership liabilities was the “sine qua non of partnership[s].” Given the different interpretations of the

---

272 Id.
273 Id. at 699, 703.
274 Id. at 703.
275 Id. at 699.
276 Id. at 701.
277 Id. at 702.
278 Id. at 703.
279 Id.
280 Id.
281 Id. The court cites to Wheeler v. Hurdman, 825 F.2d 257, 274–75 (10th Cir. 1987), for the proposition that partnership liability is the sine non qua for establishing partnership status and to Simpson v. Ernst & Young, 100 F.3d 436, 441–42 (6th Cir. 1996), for the converse.
282 Sidley Austin Brown & Wood, 315 F.3d at 703 (recognizing that sharing partnership liabilities was an important feature, but maybe not the “sine qua non”
importance of liability for partnership debts, the court acknowledged that it was important to determine whether a partner was an employee under the statute.\textsuperscript{283} The Seventh Circuit refused to rule that the demoted partners were employees, indicating that such a decision was premature.\textsuperscript{284} Instead, the Seventh Circuit vacated the district court's order and remanded the case, requiring the firm to supply all requested information dealing with the demoted partners' status.\textsuperscript{285} Upon completion of the submissions, the district court was required to make a determination whether the demoted partners are "arguably covered by" the Age Discrimination in Employment Act.\textsuperscript{286}

C. Analysis

Scouring the factual circumstances, judges make a deep inquiry into whether a partner is actually an employee. This inquiry often involves a philosophical decision by judges by determining, on a case-by-case basis, how much control the individual partner has in her firm. Some judges and courts view some large partnership arrangements in which each individual partner has very little control as normal and still a partnership. Ignoring other factors, some judges view the sharing in firm liabilities almost as a touchstone in resolving this factual inquiry. Other judges recognize that the factors that make a partnership under partnership law should not necessarily be consonant with those under anti-discrimination law. This uncertainty makes the bringing of these claims by minority partners particularly perilous. First, if the "partner" is really a partner with sufficient control over the firm's operations and shares in the firm's profits and losses, Title VII would not cover racial discrimination against that partner. If the "partner" is like most partners and has little control over operations, but

\textsuperscript{283} Id. at 704.

\textsuperscript{284} Id. at 707. Judge Easterbrook, in a concurring opinion, disagreed with the majority's suggestion that an individual could be a partner under normal agency principles, but an employee under federal anti-discrimination law. See id. at 709 (Easterbrook, J., concurring).

\textsuperscript{285} Id. at 707.

\textsuperscript{286} Id.
shares in profits, losses, and liabilities, some courts will deem her a partner, but others will not. The next section examines how section 1981 provides another ground for suit by partners who were victims of racial discrimination.

D. Section 1981 and Partnerships

Section 1981 provides: “All persons . . . shall have the same right . . . to make and enforce contracts, . . . as is enjoyed by white citizens . . . .”\textsuperscript{287} Unlike Title VII, under section 1981, courts do not have to determine whether an individual is an employee or partner. The most important thing for the court to determine is whether the plaintiff’s contract rights are impaired because of her race.\textsuperscript{288} Since the 1991 amendment to section 1981, courts explore whether discrimination occurred in the “benefits, privileges, terms, and conditions” of the partnership agreement. These terms and conditions could involve discrimination by (1) exclusion from important committees, (2) racial harassment, (3) lack of secretarial support, and (4) increased workload.\textsuperscript{289} Like Title VII, section 1981 requires that plaintiff establish by a preponderance of the evidence that defendant intentionally discriminated against plaintiff in making employment decisions.\textsuperscript{290} Section 1981 shares with Title VII a perpetrator ideology. Despite the perpetrator ideology inherent in Title VII, minority partners have only one fully actualized civil rights claim through section 1981; Title VII’s efficacy for minority partners is diluted by issues of the partner’s control, equity participation, and risk sharing. For discrimination against equity partners, they only have a section 1981 civil rights claim. The next section suggests that incorporating fiduciary good faith principals into partnership terminations will more adequately protect minority law firm partners.

\textsuperscript{288} See id. § 1981(b).
\textsuperscript{289} Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 878 (9th Cir. 1996).
\textsuperscript{290} See id. at 870; Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047–48 (5th Cir. 1996).
E. Expanding Notions of Fiduciary Duty in Partnership Expulsions

Most law firm partnerships should have detailed agreements outlining the methods for terminating a partner. Since a partner is a co-owner of the business, her expulsion is a "dramatic and severe event." Ostensibly, the expelled partner "consent[ed]" to the expulsion method and procedures in the partnership agreement. More firms are using the "guillotine" method of terminating partners. Pursuant to this method, a partner can be severed immediately for no reason. Partnership expulsions are appropriate remedies for partner "misconduct," "incompetence," or "lagging productivity." By quickly terminating these bad actors, the guillotine method of expulsion arguably helps law firms protect their reputation.

In the event of partner termination, partnership agreements generally provide for the continuation of the partnership and detail the settling of the terminated partner's account including the return of his initial capital contribution and his prorated share of the firm's profits, and the firm's property. The guillotine method is an efficient way to expel a co-owner; however, this method may lend itself to an abuse of power and inherent unfairness toward the expelled partner. If race is added to the picture, then the permissibility of these kinds of expulsions may inadvertently sanction race discrimination.

---

291 ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY § 5.3.3 (2d ed. Supp. 2003).
292 Id. § 5.3.1.
293 Id.
294 Id.
295 Id.; see also Larry E. Ribstein, Law Partner Expulsion, 55 BUS. LAW. 845, 847–49 (2000).
296 Ribstein, supra note 295, at 847–49 (noting that it allows a law firm to offer "quality assurance" of its individual members).
297 HILLMAN, supra note 291, § 5.3.3.
298 Ribstein, supra note 295, at 848 (noting that as long as the firm can terminate without proving wrongdoing, it avoids the often messy litigation that could ensue concerning whether cause was justified).
299 Id. at 849–52 (noting that law firms may expel a partner for the wrong reasons, but believes that other factors would prevent the law firm from wrongfully using this power).
1. The Statutes

Neither the UPA nor the RUPA "specify the substantive provisions that expulsion clauses should include." However, the UPA and RUPA view partnership departures differently. The UPA provides that a partnership is dissolved when a partner is expelled "from the business bona fide in accordance with such a power conferred by the agreement between the partners." The UPA defines "dissolution" as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business." In other words, dissolution occurs "when the partners cease to carry on the business together." Upon dissolution, the partnership is not terminated but continues until the winding up of partnership affairs is completed." During winding up, firm assets are converted into cash. "Termination is the point in time when all the partnership affairs have been wound up." Expulsion agreements discourage opportunistic dissolutions of the partnership by the majority of partners and opportunistic threats of dissolutions by a minority partner.

Under the RUPA, a partner can be expelled pursuant to the partnership agreement. A dissolution of a RUPA partnership does not occur merely because a partner leaves the partnership. If a partner dissociates from the firm, Article 7 of the RUPA allows for the parties to provide for a buyout provision in their partnership contracts. The different treatments occur because the UPA views the partnership as an aggregate of partners whereas the RUPA considers the partnership as an independent entity. Thus, under the RUPA, the expulsion of a partner only
results in that partner's disassociation from the partnership, not the dissolution of the partnership.\footnote{11}

Given that partners have good faith duties toward each other, the use of the term "bona fide" in the UPA provision for expulsions is unusual.\footnote{12} The RUPA lacks a specific good faith standard in its expulsion provisions;\footnote{13} however, the RUPA requires an overall standard of good faith and fair dealing between partners,\footnote{14} which is also applicable to a RUPA expulsion provision.\footnote{15} Moreover, the RUPA prohibits partnership agreements from eliminating the duty of loyalty\footnote{16} or the requirements of good faith and fair dealing between and among the partners.\footnote{17} If a partnership agreement includes a right to expel a partner, "its exercise must be consistent with the duty of good faith and fair dealing."\footnote{18}

The question arises as to what good faith may mean in the context of partnership expulsions. If one had to establish cause for an expulsion, the burden would limit the efficacy of the guillotine method\footnote{19} but would situate the expulsion in good faith. The partnership would be required to demonstrate grounds for the expulsion, making the decision less arbitrary and capricious. The deposed partner would have notice and might have grounds to challenge the cause. The UPA is virtually silent on this issue,\footnote{20} and the RUPA eliminates cause as a

---

\footnote{11} GREGORY, supra note 179, at 371.

\footnote{12} HILLMAN, supra note 291, § 5.3.4.

\footnote{13} Id.

\footnote{14} REV. UNIF. P'SHIP ACT § 404, 6 U.L.A. 143. But see Allan W. Vestal, Law Partner Expulsions, 55 WASH. & LEE L. REV. 1083, 1140 (1998) (noting that the RUPA has made the requirements of good faith and fair dealing a non-fiduciary obligation).

\footnote{15} 6 U.L.A. 143.

\footnote{16} REV. UNIF. P'SHIP ACT § 103(b)(3), 6 U.L.A. 73. But see Vestal, supra note 314, at 1141 (noting that RUPA has “narrow[ed] [the] definition of the duty of loyalty” to include “only a duty to account, a duty to refrain from adverse dealings, and a duty to refrain from competition”).

\footnote{17} REV UNIF. P'SHIP ACT § 103(b)(5), 6 U.L.A. 73.

\footnote{18} Vestal, supra note 314, at 1112.

\footnote{19} Comm. on Prof'l Responsibility, Unpartnering: An Overview of the Legal and Ethical Issues, 55 REC.ASS'N BAR CITY OF N.Y. 62, 63 (2000) (specifying the problems with a “for cause” requirement for partnership expulsions).

\footnote{20} HILLMAN, supra note 291, § 5.3.4.1.
requirement for good faith in partnership expulsions. In a few cases, the courts have applied good faith and fair dealing notions to expulsions of partners that were economically “predatory... to gain an undue advantage” or “motivated to thwart the exercise of partner rights.”

2. The Cases

a. Winston & Strawn v. Nosal

In *Winston & Strawn v. Nosal*, a partner received notice that the law firm was terminating him from the partnership because “his interest in building a two-pronged tax and international trade practice was incompatible with the interests and resources of the firm, and because he had engaged in ‘disturbing’ conduct.” The expelled partner alleged that the law firm terminated his position because he made several demands to see the firm’s books and records, which would have uncovered some of the other partners’ self-dealing. The firm refused to cooperate with the expelled partner’s request. Although the partnership agreement did not impose any requirements other than a majority vote for the termination of a

---

321 REV. UNIF. P'SHIP ACT § 601 cmt. 4, 6 U.L.A. 165 (stating that “[t]he expulsion can be with or without cause”).
322 HILLMAN, supra note 291, § 5.3.4.3.
323 Vestal, supra note 314, at 1113.
324 One case did not specifically involve a guillotine provision as part of the partnership agreement, but nonetheless in issuing its decision the court relied on fiduciary principals. In *Beasley v. Cadwalader, Wickersham & Taft*, a major law firm pursued “Project Right Size” to identify and eliminate less productive partners. No. CL-94-8646, 1996 WL 438777, at *2 (Fla. Cir. Ct. July 23, 1996), aff’d and rev’d in part, 728 So. 2d 253 (Fla. Dist. Ct. App. 1998). The firm attempted to terminate all the partners in the Florida office. *Id.* at *3. The purpose of this project was to increase “compensation to the remaining partners.” *Id.* at *2. One of the Florida partners sued. The court found that pursuant to the partnership agreement, the law firm lacked the power to expel a partner, and as a consequence, by closing the Florida office, the law firm wrongfully expelled the Florida partner. *Id.* at *3–5. Because the expulsion of the Florida partners “was done for the express purpose of producing greater profits for the remaining partners,” the court found that the expulsion was in contravention of the partners’ fiduciary duties to each other. *Id.* at *6.
326 *Id.* at 244.
327 *Id.* at 243.
328 *Id.*
partner, the court incorporated a duty of good faith and fair dealing into the partners' “execution of [their] discretion”\(^{329}\) and found the termination invalid.

b. Page v. Page

In \textit{Page v. Page}, two brothers entered into an oral partnership agreement in which each partner contributed “$43,000 for the purchase of land, machinery and linen needed to begin [a linen supply] business.”\(^{330}\) One brother served as managing partner, and the other was not active in the business.\(^{331}\) After losing approximately $62,000 over eight years of operation, the partnership was on the verge of making profits due to the expected increase in sales from the building of a nearby military base.\(^{332}\) Even though the financial circumstances seemed to be improving, the plaintiff sought to dissolve the partnership.\(^{333}\) Defendant argued that his brother acted in bad faith because he planned to use his superior financial position to acquire the whole business.\(^{334}\) Plaintiff owned a corporation that had a $47,000 demand note on the firm.\(^{335}\) Defendant feared that no one would buy the current business and when it was dissolved, he would receive “very little” for his investment.\(^{336}\) The court found that no implied agreement existed to continue the partnership\(^{337}\) but held “[a] partner may not dissolve a partnership to gain the benefits of the business for himself, unless he fully compensates his co-partner for his share of the prospective business opportunity.”\(^{338}\) The court basically incorporated good faith notions into the partners’ power to dissolve partnerships.\(^{339}\)

\(^{329}\) \textit{Id.} at 246.
\(^{331}\) \textit{Id.} at 44.
\(^{332}\) \textit{Id.} at 42, 44.
\(^{333}\) \textit{Id.} at 42.
\(^{334}\) \textit{Id.} at 44.
\(^{335}\) \textit{Id.}
\(^{336}\) \textit{Id.}
\(^{337}\) \textit{Id.} at 43.
\(^{338}\) \textit{Id.}
\(^{339}\) \textit{Id.} at 44–45.
c. Lawlis v. Kightlinger & Gray

In Lawlis v. Kightlinger & Gray, a law firm terminated an alcoholic partner through the guillotine method as provided for in the partnership agreement. The court found:

Where the remaining partners in a firm deem it necessary to expel a partner under a no cause expulsion clause in a partnership agreement freely negotiated and entered into, the expelling partners act in ‘good faith’ regardless of motivation if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled.

The court was wary of invalidating the guillotine method and specifically observed that “to hold otherwise, we would be engrafting a ‘for cause’ requirement upon this agreement when such was not the intent of the parties.” Although referring to good faith, the Lawlis court seemed to find good faith once the partnership agreement allowed for the expulsion and the provisions of the agreement were followed.

d. Bohatch v. Butler & Binion

In Bohatch v. Butler & Binion, a partner, Bohatch, reported to the law firm’s managing partner that one of the partners might be overcharging a client. The next day, the accused partner told Ms. Bohatch that the same client was dissatisfied with her work. The law firm investigated the allegations, found that the client was satisfied that the bills were reasonable, and terminated Ms. Bohatch. The court refused to recognize an anti-retaliation exception to the at-will nature of partnerships.

---

341 Id. at 437–38.
342 Id. at 442–43. Given the fact that the partnership severed the expelled partner over a six-month period, and not immediately, the court was of the opinion that the severance “demonstrate[d] a compassionate, not greedy, purpose.” Id. at 443.
343 Id.
344 977 S.W.2d 543, 544 (Tex. 1998).
345 Id.
346 Id. at 544–45.
347 See id. at 547. Most states seem to protect employees who report issues of safety or who are required to report safety violations. Elletta Sangrey Callahan &
F. Analysis

Of this small sample of cases, *Page* stands for the proposition that a partnership cannot freeze out a partner to enhance the partnership's economic interest. On the other hand, *Nosal* suggests that a partnership cannot expel a partner in an effort to thwart the exercise of a partner's rights under the partnership. *Lawlis* and *Bohatch* are both troubling because they seem to limit the good faith analysis in these expulsions. The facts of both cases provide important public policy concerns for extending good faith to limit partner expulsions. The *Lawlis* case begs the question under what circumstances should courts refrain from enforcing the partnership's guillotine method of severance. *Lawlis* involved an alcoholic partner who was terminated before it was determined that alcoholics were disabled pursuant to the Americans with Disabilities Act.\footnote{Although decided prior to the adoption of the Americans with Disabilities Act, the unanswered question in *Lawlis* is whether his copartners abused their power and discriminated against Lawlis despite his disability as an alcoholic. See U.S.C. § 12101 (2000); Pugh v. City of Attica, Indiana, 259 F.3d 619, 624, 626–27 (7th Cir. 2001) (city animal control officer brought suit); Casey’s General Stores, Inc. v. Blackford, 661 N.W. 2d 515, 517, 520 (Iowa 2003) (truck driver brought suit).} The case acknowledges that the partners have a fiduciary duty to each other even in partnership terminations but seems to limit its analysis to economic concerns. *Bohatch* also raises vital public policy concerns in which the court allows a law firm to expel a partner who was blowing the whistle.

If a partnership can terminate a partner for any reason at any time, such power lends itself to abuse. In the employment discrimination context, employers may use pretextual reasons to engage in invidious racial discrimination.\footnote{See generally Wexler v. White’s Furniture, Inc., 317 F.3d 564, 576–77 (6th Cir. 2003) (store manager brought age discrimination suit); Banks v. Potter, 253 F. Supp. 2d 335, 343 (D. Conn. 2003) (letter carrier brought race discrimination suit).} As law firms become more diverse, the potential for racially-motivated partnership severances increases, and courts need to be expansive in their analysis of fiduciary duties that partners owe each other.\footnote{But see Ribstein, supra note 295, at 879–80 (suggesting that employment discrimination laws apply another unnecessary “layer of scrutiny” on partnership} It is important to note that the partners have an

Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 119 (2000). Those employees who were merely reporting failures to follow company procedure were least protected. *Id.* at 120.
important fiduciary duty to each other. As Judge Cardozo recognized in *Meinhard v. Salmon*:

[C]opartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.\(^3\)

This Article advocates that the fiduciary duty between partners should incorporate nondiscrimination principles as a matter of public policy.\(^3\)\(^5\)\(^2\) Since a partnership arrangement is principally a contract, these fiduciary duties incorporate notions of good faith and fair dealing.\(^3\)\(^5\)\(^3\) In partnership expulsions, good faith and fair dealing should be incorporated in partners’ fiduciary duty to each other. It should include more than economic predation and thwarting the exercise of partnership expulsions and that marketplace factors would constrain the law firm from acting wrongfully.

\(^3\)\(^5\)\(^1\) 249 N.Y. 458, 463–64, 164 N.E. 545, 546 (1928) (citation omitted). *But see* Hillman, *supra* note 188, at 398 (noting that the fiduciary standard is “borrowed” and “ill-fitting” doctrine for partnership law).


\(^3\)\(^5\)\(^3\) See FLOYD R. MEchem, *Elements of the Law of Partnership* § 4 (2d ed. 1920). Compare Paula J. Dalley, *The Law of Partner Expulsions: Fiduciary Duty and Good Faith*, 21 CARDOZO L. REV. 181, 202–06 (1999), *with* Ribstein, *supra* note 295, at 869–70 (distinguishing good faith as applying solely to property and good faith to contracts). Professor Dalley distinguishes between partnership fiduciary duties and good faith and fair dealing in the following manner. When a partner deals with another partner as to the business of the partnership, those dealing are governed by fiduciary duties. In contrast, when parties deal with each other as individuals, then they are governed, not by fiduciary duties, but good faith and fair dealing. Given this analysis, Professor Dalley suggests that partnership expulsions should be regulated by good faith and fair dealing, not fiduciary duty, because these actions involve partnership relationships as individuals.
rights.\textsuperscript{354} As such, the analysis should also incorporate and reach the same conclusions "as the contractual duty of good faith and fairness."\textsuperscript{355} The cases of partner expulsions have generally not included very many people of color because so few are still partners in law firms. If the minority associates in these firms are experiencing discrimination, it would be no shock if the minority partners do too. Unfortunately, the right of action by these individuals is more limited than for associates. The expelled partner can bring a Title VII action if her position is construed not as a partner but as an employee. The court would have to make a detailed factual analysis to make this determination. The expelled partner can only bring a section 1981 civil rights claim. Thus, the expelled minority partner has fewer civil rights remedies than the terminated minority associate. Given the fact that we know that discrimination still lingers,\textsuperscript{356} it is even more important in the context of law firm partners to provide minority partners with a right of action when discrimination occurs. Discrimination should be a public policy exception to the guillotine method of partner expulsions.\textsuperscript{357} Incorporating nondiscriminatory principles into the fiduciary duty between and among partners in the context of partnership expulsions will remove the subordinating aspects of a racially motivated partnership expulsion.\textsuperscript{358} It will give the expelled partner certain rights and protect her from wrongdoing.

In adopting these fiduciary notions, the courts may not necessarily have to adopt the limited perpetrator ideology of


\textsuperscript{355} Vestal, supra note 314, at 1126.


\textsuperscript{357} Cf. Schuster v. Derocili, 775 A.2d 1029, 1039–40 (Del. 2001) (allowing contract cause of action grounded in good faith and fair dealing to proceed against allegations of retaliatory discharge after employee refused employer's sexual advances); Tate v. Browning-Ferris Inc., 833 P.2d 1218, 1223–25 (Okla. 1992); Dalley, supra note 354, at 202–06 (1999) (although stressing the importance of free terminability of business relations, acknowledging that the employment-at-will doctrine is inapposite to partnership agreements).

\textsuperscript{358} Cf. Houh, supra note 165, at 1085–88 (suggesting such approaches to address racially motivated terminations of employees-at-will).
Title VII and section 1981. In fact, the RUPA section 404 sets forth a lower standard for breach of the duty of loyalty than for breaches of the duty of care.\textsuperscript{359} Section 404(c) of the RUPA states: "[a] partner’s duty of care...is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law."\textsuperscript{360} In contrast, Section 404(b) of the RUPA states: "[a] partner’s duty of loyalty...is limited to the following:

a. to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of the partnership property, including the appropriation of a partnership opportunity;

b. to refrain from dealing with the partnership in the conduct or winding up of the partnership businesses as or on behalf of a party having an interest adverse to the partnership; and

c. to refrain competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.\textsuperscript{361}

Unlike section 404(c), section 404(b) fails to set forth any mental requirement for breach of the duty of loyalty. The absence of a scienter in the duty-of-loyalty provisions suggests that the drafters intended that simple negligence is enough to establish a breach of the duty of loyalty; this simple negligence standard comports with Justice Cardozo’s notion of duty of loyalty in \textit{Meinhard v. Salmon}.\textsuperscript{362}

Terminating a minority partner could be a breach of the duty of loyalty or the duty of care. The RUPA provides a partner’s "knowing violation of the law" would be a violation of the duty of care. Therefore, if the partnership knowingly

\textsuperscript{359} Rev. Unif. Partnership Act § 404 (b) and (c). In contrast, the UPA was less specific in its description of a partner’s fiduciary duty. It merely provided:

\textit{[e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the information, conduct, or liquidation of the partnership or from any use by him of its property.}

The UPA fails to differentiate specifically between a partner’s duty of loyalty and care.

\textsuperscript{360} Rev. Unif. Partnership Act §404(c) (emphasis added).

\textsuperscript{361} Id. § 404(b).

\textsuperscript{362} Meinhard, 249 N.Y. at 463–64.
discriminates against a partner of color by severing her from the partnership, the discriminating partners (and the partnership) would have violated their duty of care. But what if the termination of the partner does not rise to race discrimination under Title VII or section 1981? The partners and partnership would probably not have breached the duty of care under the RUPA section 404(c). But the termination could be a breach of the duty of loyalty. The RUPA provides that a partner shall refrain from dealing with a partner in the conduct or winding down of the partnership in a way that is adverse to the interest of the partnership. If the partnership terminates a minority partner, and the termination has an unintentional disparate impact, then the partners might be acting in a manner adverse to the partnership. The disparate treatment could occur when the law firm unintentionally failed to treat the minority partner in the same manner as the white partners in the referral of clients, participation in management committees, or fee-sharing arrangements.364

Lastly, as seen with associates, incorporating nondiscrimination principles in partnership expulsion provisions is consonant with underlying contract theory.365

CONCLUSION

Minority corporate law firm associates have had a difficult time. They are theoretically protected under Title VII and section 1981. The need to prove discriminatory intent, however, makes those cases difficult to win. Consequently, the common law concepts of good faith and fair dealing should be used more frequently to enhance an aggrieved party's chances of recovery. Similarly, minority partners who have been discriminatorily terminated can use fiduciary principals, incorporating good faith and fair dealing. This will allow the court to avoid the difficult factual determinations of whether an individual is a partner or employee and avoid statutes that require evidence of intent.

364 If there was sufficient cause for terminating the minority partner, the partnership would not have breached its duty of loyalty in terminating the minority partner.
365 See Summers, supra note 179, at 201–02; supra notes 178–81 and accompanying text.
This additional cause of action should discourage discriminatory terminations and help to make significant minority gains in the partnership ranks of the major corporate law firms.