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Expanding partnership liability

In light of a recent ruling, partners are able to bring FEHA retaliation claims against their employer

Gay Crosthwait Grunfeld and Elizabeth Avery

Labor and Employment Law

A California court of appeal recently created a small but important loophole in the long-enforced presumption that partners do not enjoy protections under workplace anti-discrimination statutes. In *Fitzsimons v. California Emergency Physicians Medical Group*, 12 C.D.O.S. 5298, the First District Court of Appeal held that under the Fair Employment and Housing Act, a partner may assert a retaliation claim against her partnership for opposing the sexual harassment of an employee. Because she is not technically an employee of the partnership, a partner cannot sue for retaliation after reporting her own harassment, but the court allowed Fitzsimons' claim because she complained about the harassment of the firm's employees.

The *Fitzsimons* exception for such retaliation claims is the latest in a series of cracks in the traditional doctrine that protected partnerships from individual partners' claims of discrimination. Because anti-discrimination statutes, like the FEHA and Title VII of the Civil Rights Act of 1964, restrict the behavior of "employers," partnerships have long been able to evade liability to their partners, who share in the ownership and control of a firm as an employer.

Over several decades, court decisions gradually eroded defenses to employment discrimination claims based on the partnership structure. The first significant blow was inflicted when the U.S. Supreme Court unanimously held that partnerships are not categorically exempt from Title VII scrutiny, allowing discrimination claims by associates denied promotion to partnership. *Hishon v. King & Spalding*, 467 U.S. 69 (1984). The court was not persuaded by arguments that the intimate nature of a partnership should exclude it from the reach of Title VII. Since *Hishon*, the cracks in the partnership armor have deepened, especially as large companies titled partnerships increasingly lack traditional, close-knit characteristics.

ONLY TRUE PARTNERS ARE UNABLE TO SUE

In the landmark but now hoary case, *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928), Benjamin Cardozo envisioned partnerships as embracing "the punctilio of an honor the most sensitive" and requiring a "duty of the finest loyalty." Cardozo's vision of partners' "undivided loyalty" to each other has slowly fragmented. Today, even top partners sometimes assert themselves as victims, as illustrated by the fraud suit recently filed in San Francisco Superior Court by former Dewey & LeBoeuf partner Henry Bunsow against the leaders of that now-bankrupt law firm. *Bunsow v. Davis*, CGC-12-521540.

The conventional partnership structure has evolved as intimate firms have grown into mammoth enterprises. Such expansion changes the power dynamics of intrafirm relationships, decreasing familiarity between the junior and senior partners, while simultaneously increasing the gap between their salaries. As a result, the foundational tenets of the partnership structure, including loyalty, collegiality and equality, have fallen away. In the large-firm environment, junior partners are treated more like employees than true partners. These lower-level partners accurately perceive themselves as employees when subject to discrimination, harassment or retaliation — such as alleged in the recently filed case of *Pao v. Kleiner Perkins Caufield & Byers*, CGC-12-520719, in S.F. Superior Court. Because courts recognize this reality, it is now easier for these "partners" to assert claims for unfair workplace practices.

In *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003), the Supreme Court assessed whether the shareholder-directors of a small professional corporation qualified as employers or employees. The court adopted a totality-of-the-circumstances analysis of the employment relationship, focusing especially on the degree of control the shareholder-director wielded over the organization and its workforce. If rather than exercising control, a shareholder-director is subject to the firm's control, then

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Gay Crosthwait Grunfeld is a partner at Rosen Bien Galvan & Grunfeld in San Francisco where she focuses her practice on complex civil litigation, with an emphasis on civil rights, employment, business and attorney fees cases. Elizabeth Avery (Harvard Law School) is a summer associate with the firm.

he is appropriately categorized as an employee. Although the holding did not specifically address partnerships, the court noted in *dicta* that some partners in large businesses may in fact "qualify as 'employees' because control is concentrated in a small number of managing partners." The "mere fact" that a person is labeled a partner should not decide whether he is an employee.

The U.S. Court of Appeals for the Seventh Circuit was the first to decide what it takes to "pin the partner tail on the donkey." In considering whether some partners in a major law firm are more accurately categorized as employees, Judge Richard Posner focused on the purpose of federal antidiscrimination law. In a case involving whether mandatory retirement policies violate federal age discrimination law, the court concluded that the "economic realities" of each case must determine whether a partner in a large firm has enough control to fend off oppression. Finding "implicit in the ADEA's exemption for employers [the] recognition that partners ordinarily have adequate remedies under partnership laws to protect themselves against oppression (including age or other forms of invidious discrimination) by the partnership, their exposure to liability [for firm losses] can hardly be decisive." Posner decided the plaintiffs could qualify as employees, stressing the fact that all the power in the 500-partner firm was concentrated in a small, self-elected committee, of which plaintiffs were not members. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002).

A number of other circuits also have considered whether partners are in fact employees. For example, the Sixth Circuit held that a top-level accountant was not truly a partner because he lacked control and had no "meaningful attributes of a partner" other than liability for the firm's losses. *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996). The Ninth Circuit first addressed this issue in the context of a large medical group. The court held that it was possible for a partner — a physician in a 2,400-member partnership that concentrated voting power in a board of directors — to show that she was more akin to an employee for the purposes of her discrimination claims. *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859 (9th Cir. 1996).

TRUE PARTNERS MAY PURSUE RETALIATION CLAIMS

While many courts now agree that some persons characterized by their firms as partners may bring suit under workplace discrimination statutes, California has taken an additional step and applied the FEHA's retaliation protections — which are, on their face, intended only for employees — to true partners.

If *Fitzsimons* remains good law, true partners will be able to pursue similar retaliation claims under the FEHA. California partnerships should be careful to avoid any seemingly retaliatory action against even the most senior partners who make complaints arguably covered by FEHA.

The FEHA prohibits retaliation against any person who in good faith complains to her supervisors that her employer has discriminated against her. Therefore, a partner is protected from retaliation for complaints of discrimination as long as she reasonably believed that discrimination against her was banned by the FEHA. In other words, the partner must have believed she qualified as an employee under the FEHA for her to have made a good faith complaint of discrimination. For the reasons laid out in *Sidley* and *Strother*, a partner may have good reason to believe she is protected as an employee if her degree of control over the firm places her in the gray area between employer and employee, and thus, she can sue for retaliation even if a court later concludes that she is actually a partner-employer.

As noted, *Fitzsimons* expanded the category of those who may bring at least some retaliation claims to include true, control group partners. In *Fitzsimons*, a member of the board of directors of a large medical group asserted that she was terminated because she complained about the sexual harassment of several lower-level female employees. Although a jury determined that Fitzsimons was not an employee under the FEHA, which meant that she could not have sued for harassment, her retaliation claim nonetheless was permitted. The court interpreted §12940(h) of the FEHA as prohibiting a partnership from retaliating against "any person" — including a partner — for opposing the harassment of an employee. Acknowledging that the term "person" has multiple definitions within the FEHA, the court explained that allowing partners to complain about the harassment of employees without fear of retaliation furthers the act's purpose of preventing employee harassment.

If *Fitzsimons* remains good law, true partners will be able to pursue similar retaliation claims under the FEHA. California partnerships should be careful to avoid any seemingly retaliatory action against even the most senior partners who make complaints arguably covered by FEHA. Furthermore, given the U.S. Supreme Court's unanimous decision in *Thompson v. North American Stainless,* 131 S. Ct. 863 (2011), holding that third-parties may sue for retaliation under Title VII, there is reason to expect federal courts to continue broadening the category of those who can bring retaliation claims. With the traditional partnership armor increasingly eroded, partnerships are well-advised to ensure that their workplaces meet federal and state antidiscrimination standards, regardless of the nomenclature applied to those who work with or for the partnership.

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