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11/3/89

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANN B. HOPKINS,)	
)	
<u>Plaintiff,</u>)	Civil Action No. 84-3040
)	(GAG)
vs.)	
)	
PRICE WATERHOUSE,)	
)	
<u>Defendant.</u>)	
_____)	

DEFENDANT'S BRIEF ON REMAND

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DEFENDANT'S BRIEF ON REMAND

INTRODUCTION

This case is on remand for "further proceedings" after reversal by the Supreme Court of the United States of the August 4, 1987 judgment of the Court of Appeals for the District of Columbia Circuit against Price Waterhouse.^{1/}

This Court previously found that impermissible factors had played an "undefined" role in the deferral in 1983 by Price Waterhouse of a decision on plaintiff's candidacy for admission to partnership. As determined by the Supreme Court, the issue on remand is whether, irrespective of those factors, plaintiff's "considerable problems dealing with staff and peers"^{2/} would have led to the same decision on the Hopkins

^{1/} Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1795 (1989); Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987).

^{2/} 618 F. Supp. 1109, 1120 (D.D.C. 1985).

partnership candidacy.^{3/} Price Waterhouse submits that the record, including this Court's earlier express findings, establishes by a preponderance of the evidence that plaintiff's candidacy for partnership would have been deferred regardless of her gender. Therefore, on the existing record, judgment should be entered for defendant and against plaintiff on the question of liability.

I

HISTORY OF PREVIOUS PROCEEDINGS
AND BASIS FOR REMAND

This is an action by plaintiff, Ann B. Hopkins, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. Plaintiff alleges that her 1982 candidacy for admission to the Price Waterhouse partnership was "held for reconsideration the following year" because of her sex.^{4/} Plaintiff seeks back pay and an order that she be made a partner in the Price Waterhouse firm.

This Court rendered its initial decision in this case in September of 1985 after a four and one-half day court trial.

^{3/} This Court also previously found that the decision not to repropose plaintiff for partner in 1983 was not tainted by any consideration of her sex. Id. at 1115. That finding was not appealed. Therefore, that decision is no longer an issue in this case.

^{4/} 109 S. Ct. at 1778.

Although the Court found that defendant Price Waterhouse had a legitimate, non-pretextual basis, unrelated to the plaintiff's sex, for its decision regarding the Hopkins partnership, it also found that improper sexual stereotyping had played an intangible role in the decisionmaking process. Although the Court found that plaintiff had not established that she would have been elected partner in the absence of that flaw in the Price Waterhouse process, the Court held that she was not required to do so: "Once a plaintiff proves that sex discrimination played a role in an employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination."^{5/} The Court concluded that Price Waterhouse had not proven by clear and convincing evidence that the decision deferring the Hopkins candidacy would have been the same regardless of her sex and judgment was rendered for plaintiff on liability.

The Court of Appeals affirmed this Court's decision as to liability:

[b]ecause Price Waterhouse could not demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor, . . . the District Court properly found for Hopkins on the question of liability.

825 F.2d at 472.

^{5/} 618 F. Supp. at 1120.

The Supreme Court reversed the "judgment against Price Waterhouse on liability and remand[ed] the case. . . for further proceedings. . . ." 109 S. Ct. at 1795.

The Justices of the Supreme Court were unable to produce a single opinion to articulate the basis for the Court's judgment. A plurality of four Justices explained that although plaintiff's interpersonal relationships "doomed her bid for partnership" (*id.* at 1782), the decision to "hold" plaintiff's candidacy was a product of both permissible and impermissible considerations. Therefore, Price Waterhouse would be liable unless "it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding [Ann Hopkins]." *Id.* at 1786. In other words, according to the plurality opinion, Price Waterhouse may not be held liable for the Hopkins decision if it demonstrated that it was motivated by a "legitimate reason" which, "standing alone, would have induced it to make the same decision." *Id.* at 1792.

Justice White's concurring opinion declared that Price Waterhouse was entitled to prevail if it could prove by a preponderance of the evidence that "'it would have reached the same decision. . . in the absence of'" an unlawful motive. *Id.* at 1795 (citation omitted). Justice O'Connor's concurring opinion stated that Price Waterhouse would not be liable if it could show by a preponderance of the evidence "that it would have reached the same decision. . . absent consideration of. . . gender." *Id.* at 1796.

All of the Justices rejected the principle that Price Waterhouse had the burden of proving by "clear and convincing" evidence that its legitimate reason for the Hopkins decision would have produced the same result even if the improper factors were removed from the equation. The plurality and the two concurring Justices agreed that the law required only that Price Waterhouse meet its burden by a "preponderance" of the evidence. The case was remanded so "that that determination can be made." Id. at 1793.

II

PROCEEDINGS ON REMAND

From the foregoing, it is apparent that this Court's responsibility on remand is essentially twofold:

1. To Determine Liability

Price Waterhouse has no liability to Ann Hopkins if her partnership candidacy would have been deferred for reconsideration regardless of her gender. While this Court was not previously persuaded that Price Waterhouse had proven by clear and convincing evidence that its decision would have been the same, this Court did not determine that Price Waterhouse had not proved that fact by a preponderance of the evidence. Indeed, despite the finding of intangible flaws in the process,

the Court concluded that plaintiff had not proved that "she would have been elected to partnership if the Policy Board's decision had not been tainted. . . ." 618 F. Supp. at 1120.

Price Waterhouse contends that the existing record amply demonstrates that Ann Hopkins, regardless of her sex, would not have become a partner in 1982-83 and that the Court should enter judgment for Price Waterhouse on liability. This point will be addressed in part A of the following segment of this brief.

2. If Necessary, To Determine the Appropriate Remedy

If the Court were to conclude that Price Waterhouse has not established by a preponderance of the evidence that the Hopkins partnership candidacy would have been deferred regardless of her sex, then the Court would have to consider the appropriate remedy. That issue will be discussed only briefly in part B of this brief because consideration of an appropriate remedy would not be necessary if the Court decides in favor of Price Waterhouse on the question of liability.

A. Liability

1. Price Waterhouse's Evidentiary Burden On The "Same Decision" Issue Is Substantially Less Than The "Clear and Convincing" Burden Previously Imposed.

This Court and the Court of Appeals previously viewed Price Waterhouse's burden on the "same decision" issue as one that could be discharged only by "clear and convincing" evidence. That standard of proof has been variously described by the Court of Appeals for the District of Columbia Circuit as "extraordinary and difficult,"^{6/} "a very high burden,"^{7/} "quite substantial,"^{8/} and "much higher than 'mere preponderance of the evidence.'"^{9/} The Supreme Court referred to it in this case as a "heavy burden." 109 S. Ct. at 1783. Up to this point in this litigation, the Court has determined only that the evidence that the deferral of plaintiff's candidacy would have occurred regardless of her gender was not sufficient to overcome this "extraordinary and difficult" obstacle.

6/ Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983).

7/ Milton v. Weinberger, 696 F.2d 94, 99 n.14 (D.C. Cir. 1982).

8/ Trout v. Lehman, 702 F.2d 1094, 1107 (D.C. Cir. 1983), vacated on other grounds, 465 U.S. 1056 (1984).

9/ Collins Securities Corp. v. Securities and Exchange Commission, 562 F.2d 820, 824 (D.C. Cir. 1977).

In contrast, the preponderance of the evidence standard has been described as the "rock bottom at the fact-finding level of civil litigation."^{10/} Preponderance of the evidence simply requires that a party prove that a fact is more likely true than not true. According to standard jury instructions:

[T]he party with this burden of proof need prove no more than a preponderance. So long as . . . the scales tip, however slightly, in favor of the party with this burden of proof -- that what the party claims is more likely true than not true -- then that element will have been proved by a preponderance of evidence.

3 L. Sand, J. Siffert, J. Sexton & J. Thorpe, Modern Federal Jury Instructions, ¶ 73.01 (1989).

This Court has already determined that the preponderance of the evidence in this case does not establish that Ann Hopkins would have made partner had impermissible considerations been absent from the decisionmaking process:

Because plaintiff had considerable problems dealing with staff and peers, the Court cannot say she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually biased evaluations.

618 F. Supp. at 1120.

^{10/} Charlton v. Federal Trade Commission, 543 F.2d 903, 907 (D.C. Cir. 1976).

Thus, the Court has already determined that the evidence at trial did not tip the scales in plaintiff's favor on this issue. Unless the evidence was perfectly balanced on the "same decision" question, the evidentiary scales must a fortiori be tipped in Price Waterhouse's favor. Therefore, without any further review of the evidence, the Court may proceed to determine that Price Waterhouse met its burden on that issue by a preponderance of the evidence. However, if further review of the existing record is necessary, the Court will find ample additional evidence to support the conclusion that the Hopkins partnership candidacy would have been deferred regardless of her gender.

2. The Existing Record Demonstrates By A Preponderance Of The Evidence That Price Waterhouse Would Have Deferred Ann Hopkins' 1982 Candidacy For Partnership Regardless Of Her Sex.

The Court has already reached and announced certain findings of fact that are or should be dispositive of the issue before this Court on remand. These findings^{11/} include the following:

^{11/} These and additional Proposed Findings of Fact are being filed concurrently herewith.

a. Price Waterhouse routinely required that successful partnership applicants demonstrate the ability to relate properly with colleagues and subordinates within the Price Waterhouse partnership.

- (i) "Price Waterhouse has consistently sought to maintain the traditional characteristics of a professional partnership both in its management and partnership selection practices." 618 F. Supp. at 1111.
- (ii) "[Price Waterhouse] has consistently placed a high premium on candidates' ability to deal with subordinates and peers on an interpersonal basis and to promote cordial relations within a firm which is necessarily dependent on team effort." Id. at 1116.
- (iii) "The interpersonal skills of prospective partners was properly an important part of Price Waterhouse's written partnership evaluation criteria. Inability to get along with staff or peers is a legitimate, nondiscriminatory reason for refusing to admit a candidate to partnership." Id. at 1114.

(iv) "[C]andidates [are] regularly held because of concerns about their interpersonal skills." Id. at 1116 (emphasis added).

b. Plaintiff had severe shortcomings in her ability to relate professionally to colleagues and subordinates within the Price Waterhouse organization.

(i) "[P]laintiff had considerable problems dealing with staff and peers. . . ." Id. at 1120.

(ii) "Even supporters of the plaintiff viewed her style as somewhat offensive and detrimental to her effectiveness as a manager." Id.

(iii) "Staff members who testified on the plaintiff's behalf indicated that. . . it required 'diplomacy, patience and guts' to work with [plaintiff]." Id. at 1114.

(iv) "Supporters and opponents of her candidacy indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." Id. at 1113.

c. Price Waterhouse's decision to hold plaintiff's candidacy for admission to the partnership for reconsideration the following year was supported by legitimate non-pretextual considerations unrelated to her sex.

- (i) "It is clear that the complaints about plaintiff's interpersonal skills were not fabricated as a pretext for discrimination. . . ." Id. at 1114.
- (ii) "Plaintiff's conduct provided ample justification for the complaints that formed the basis of [Price Waterhouse's] decision." Id.
- (iii) Plaintiff received "more 'no' votes than all but two of the 88 candidates [in 1982]. These no votes and negative comments. . . effectively placed the plaintiff toward the bottom of the candidate pool. Regardless of its wisdom, the firm's practice of giving 'no' votes great weight treated male and female candidates in the same way." Id. at 1116.

d. Price Waterhouse had legitimate, nondiscriminatory reasons to distinguish between plaintiff and the successful male candidates with whom she compared herself.

(i) "The contemporaneous records generated by the partnership selection procedure demonstrate that Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself." Id. at 1115.

(ii) "The Court finds that the plaintiff has not provided sufficient proof to demonstrate disparate treatment based on these candidates." Id. at 1115 n.6.

The foregoing findings already made by the Court make it inescapably clear that interpersonal relationships constitute an important and legitimate partnership consideration at Price Waterhouse and that this standard was applied by Price Waterhouse equally to men and women. It is equally undeniable that Ann Hopkins had substantial problems with interpersonal relationships. Thus, defendant's evaluation of plaintiff's relationships with others was legitimate, serious, and well-founded in fact. The plaintiff was perceived

by partners and staff members alike to be abrasive, overly critical of others and intolerant with her staff and her colleagues. Even the plaintiff "agreed with many of these criticisms." 618 F. Supp. at 1114. In summary, there is no room to dispute that plaintiff, regardless of considerations of gender, failed a central and appropriate Price Waterhouse partnership test.

It is important to the Court's evaluation of the Hopkins partnership decision to keep the context in focus. The Price Waterhouse decision under review was not a rejection of Ann Hopkins' candidacy for partnership. It was not a final decision eliminating her opportunity to advance to partner. In fact, the decision under review was a decision against foreclosing options by denying her a partnership. The only Price Waterhouse decision before this Court was the one that avoided sounding a death knell to her partnership ambitions. It gave her another opportunity to address the legitimate and self-acknowledged objections that had been raised in an area of established and appropriate concern to Price Waterhouse.

It is evident from these facts that a preponderance of the evidence admitted at trial demonstrates that regardless of plaintiff's gender, the most her record warranted in 1983 was a decision to defer her candidacy to permit further growth and re-evaluation. The decision to hold the Hopkins candidacy was logical, supported by ample evidence and, on scrutiny, a fair and reasonable course for the Price Waterhouse partnership to

select at the time and on the record as it existed in 1983 irrespective of her sex.

Price Waterhouse viewed a decision to admit a candidate to the partnership as similar to a grant of tenure. Tr. at 345-47. A favorable partnership decision was one that could be undone only with the greatest difficulty.^{12/} Accordingly, the Firm's Policy Board exercised caution and "regularly held" even highly qualified candidates who, as this Court found with respect to plaintiff, had "considerable problems dealing with staff and peers."^{13/} Indeed, the record contains examples of male candidates who were as highly regarded as plaintiff in the areas of technical skills, business generation, and dedication to the Firm, but who were either placed on hold or rejected outright because of interpersonal problems equivalent to or even less pronounced

^{12/} Tr. at 345-47. As Mr. Coffey stated:

We have a partnership that is such that once one becomes a partner it takes 75 percent of the partners' own votes to have the partner excluded from the partnership, so in a sense we have a kindred situation in Price Waterhouse. One of the great risks of admitting partners to our firm is that, one, they're less supervised and secondly, they are more tenured and therefore people that have a likelihood of potential of abusing authority can cause serious longterm problems for the firm.

^{13/} During the period 1980-84, thirty-three candidates were held or refused admission for reasons concerning their interpersonal skills. Sixteen were admitted in later years. Def. Ex. 64 & Def. Ex. 69.

than plaintiff's. See Def. Ex. 64. The Appendix filed concurrently with this brief summarizes the records of several such candidates.

For example, the first individual described in the Appendix had demonstrated skills as an auditor that were held in high esteem by virtually all the Price Waterhouse partners with whom he had worked. See Def. Ex. 64, Tab 24. The partners also noted, however, that he had "a history of being tough and dogmatic to the point of causing periodic problems in working with staff and clients." The member of the Admissions Committee responsible for summarizing this candidate's file explained:

The principal recurring negative appears to be a very high level of aggressiveness which sometimes tends to translate into dogmatism, a tendency not to consider the views of others, and a tendency to get himself in an adversary relationship unnecessarily. The severity of this matter has tended to diminish over the years but it is nevertheless present from his early senior days to the present. It is interesting that many different evaluators have noticed this negative trait including people without prior knowledge of [him]. . . .^{14/}

These concerns about this candidate's personality were similar to the concerns expressed about plaintiff. Both were

^{14/} As noted above, a more complete summary of this candidate's file as well as the files of several other male candidates whose profiles were similar to plaintiff's are set forth in the Appendix to this brief. The candidate described above was admitted to the partnership in 1984.

placed on hold as a result of their problems in their dealings with others, notwithstanding the fact that their other skills were recognized and valued.

The record before this Court thus proves that Price Waterhouse treated male and female candidates with deficient interpersonal skills equally. The plaintiff did not and could not prove otherwise. After reviewing the records of almost 135 candidates proposed during the three year period 1982-84, the plaintiff could point to only two candidates admitted in the face of material criticism of their interpersonal skills.^{15/} This Court found that the circumstances of those two candidates were fundamentally different from those presented by the plaintiff and that peculiar circumstances justified their admission to partnership despite their problems.^{16/}

^{15/} During the three years 1982 through 1984, Price Waterhouse elected 135 new partners through its partnership selection process. Def. Ex. 77. Plaintiff was provided in discovery the evaluative comments made by partners and by the Admissions Committee on each of these 135 partner candidates. The plaintiff's earlier pleadings and this Court's findings reflect that only two of these 135 successful candidates received material criticism of their interpersonal skills. Plaintiff's Post-Trial Brief at 20; 618 F. Supp. at 1115 & n.6.

^{16/}

The contemporaneous records. . . demonstrate that Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between the plaintiff and the male partners with whom she compares herself.

. . . [P]laintiff has identified two

[Footnote continued on next page]

As noted above, decisions to hold were common^{17/} and were not viewed as a rejection or a denial of partnership. Connor Dep. at 54. More often than not candidates who were held were eventually admitted to the Firm.^{18/} A decision to defer a final and irreversible decision to reject or admit is a rational, fair, and prudent manner in which to handle an otherwise qualified candidate with interpersonal skills problems. That was the course of the Hopkins candidacy and that was the course experienced by male candidates with similar problems. The decision was the same regardless of gender.

16/ [Footnote continued from previous page]

[successful] male candidates who were criticized for their interpersonal skills because they were perceived as being aggressive, overbearing, abrasive or crude. . . . [I]n both cases the Policy Board expressed substantial reservations about the candidates' interpersonal skills but ultimately made a "business decision" to admit the candidates because they had skills which the firm had a specific, special need and the firm feared that their talents might be lost if they were put on hold. In one case the Policy Board rejected a "hold" recommendation by the Admissions Committee because of business considerations. In addition, these candidates received fewer evaluations from partners recommending that they be denied partnership and the negative comments on these candidates were less intense than those directed at the plaintiff.

618 F. Supp. at 1115 (footnote omitted).

17/ "[C]andidates [are] regularly held because of concerns about their interpersonal skills." 618 F. Supp. at 1116.

18/ Eighty percent (sixteen out of twenty) of the candidates held in 1983 (plaintiff's year) were eventually admitted to the partnership. Def. Ex. 69.

B. Remedy

It provides context to the liability decision to observe that irrespective of the outcome of the "same decision" defense, plaintiff is not entitled to an order that Price Waterhouse make her a partner. Such an order would constitute an extraordinary remedy, well beyond the creation of a simple employment relationship, and an exercise of equitable powers not clearly available to the Court under these circumstances. It would directly, substantially and intimately affect the interests of individuals who plainly did not discriminate against plaintiff. It would be particularly inappropriate to force Price Waterhouse partners to accept into a professional and collegial partnership someone who suffered from an "[i]nability to get along with staff or peers." 618 F. Supp. at 1114. This Court, in the exercise of its equitable discretion, should not force onto this organization an individual who is an acknowledged disruptive and abrasive factor.

Even a plaintiff who prevails on the issue of liability has no legal entitlement under Title VII to remedies such as backpay or admission to a partnership. The Court of Appeals for this Circuit has determined that "a plaintiff whose right to protection from discrimination has been violated still may be denied a full remedy." Milton v. Weinberger, 696 F.2d 94, 98-99 (D.C. Cir. 1982) (court's emphasis) (citing

Smith v. Secretary of Navy, 659 F.2d 1113, 1120 (D.C. Cir. 1981)). "[I]n Title VII cases 'the questions of statutory violation and appropriate statutory remedy are conceptually distinct.'" Johnson v. Brock, 810 F.2d 219, 223 (D.C. Cir. 1987) (quoting Smith v. Secretary of Navy, *supra*, at 1120).

The remedial phase of a Title VII case is an essentially equitable proceeding. There are no

automatic or mandatory remed[ies]. . . . The [statutory] scheme implicitly recognizes that there may be cases calling for one remedy but not another, and. . . these choices are, of course, left in the first instance to the district courts.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-16 (1975).

This Court's responsibility certainly does not extend beyond placing plaintiff into the position she would have occupied had the Price Waterhouse partnership process been found to be flawless. If so, plaintiff would have been in the position of a candidate evaluated without regard to her sex. That is the most favorable position to which she may be restored by any remedial order of this Court. Plaintiff is not entitled to be placed in a more favorable position than she would have occupied absent the perceived "taint" of sex stereotyping. In fact, Title VII specifically provides that a plaintiff cannot rely upon mere proof of some undefined "taint" in a multi-stage decisional process to achieve a more favorable position than she would have been in had there been no taint of

discrimination. See, e.g., Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (en banc); see also Mt. Healthy City School District v. Doyle, 429 U.S. 274, 285-86 (1977).

In similar cases, in which a plaintiff has been held to have established that discrimination had some elusive and unquantifiable connection with a promotion decision, but the employer had also established legitimate reasons to question the qualification of the plaintiff for the promotion in question, the plaintiff has been given no more than reconsideration for the promotion in a nondiscriminatory selection process. As in the instant litigation, many of those cases involved multi-stage decisional processes and promotions that included elements of tenure. See Gurmankin v. Costanzo, 626 F.2d 1115 (3d Cir. 1980), cert. denied, 450 U.S. 923 (1981); Pyo v. Stockton State College, 603 F. Supp. 1278 (D.N.J. 1985); Gemmell v. Meese, 655 F. Supp. 577 (E.D. Pa. 1986); Fields v. Clark University, 40 Fair Empl. Prac. Cas. 670 (D. Mass. 1986), rev'd, 817 F.2d 931 (1st Cir. 1987); see also Darnell v. City of Jasper, 730 F.2d 653, 656 (11th Cir. 1984) (plaintiff held entitled to participate in test that had been unlawfully denied, but not to be placed in position).

CONCLUSION

As the extensive findings already made by the Court demonstrate, and as is otherwise amply established by the record, Price Waterhouse had substantial legitimate reasons not to grant plaintiff a position of tenure in its professional partnership. Those reasons were more than adequate, standing alone, to justify deferring a decision on the Hopkins candidacy in 1983. The record shows that no male candidate would have been admitted to the Price Waterhouse partnership under comparable circumstances.

Price Waterhouse has established by a preponderance of the evidence that any deficiencies that may have existed in its partnership decisionmaking process in 1982 and 1983 do not provide the explanation for the decision that resulted in

holding the plaintiff's candidacy to a future date. That decision would have been the same regardless of her gender. This action should therefore now be dismissed.

DATED: November 3, 1989

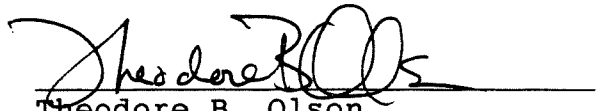
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