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Is Price Waterhouse A Help to Victims of Sex Discrimination

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ANALYSIS

Is *Price Waterhouse* A Help to Victims of Sex Discrimination?

Given disarray among the justices, a stable precedent will not emerge until it is decided what proof will be required of defendants to show the same result would have occurred absent discrimination.

BY N. THOMPSON POWERS

The Supreme Court's May 1 decision in *Price Waterhouse v. Hopkins* is good news for employment-discrimination plaintiffs generally, although it reversed the favorable judgment the plaintiff received in the lower courts. In that case, the Court held that Ann Hopkins did not have to prove she would have been promoted to partnership in the accounting firm but for sex discrimination. She could prevail if she established that discrimination was a "motivating part" or "substantial factor" in the firm's decision and if Price Waterhouse failed to prove by a preponderance of the evidence that it would have made the same decision in the absence of discrimination.

Just how good the *Price Waterhouse* news is for plaintiffs is still unclear for at least two reasons: First, two of the six justices who supported the decision refused to join in the opinion of the other four and separately expressed serious disagreement with that opinion. Second, the practical effect of shifting the burden of "but for" causation to the defendants in "mixed motives" cases—cases where both legitimate and illegitimate reasons led to the employment decision—remains to be seen. The evidence plaintiffs must show to prove that discrimination played a significant part in the employer's action will of course be important, but the kind and amount of proof defendants must present to establish that the result would have been the same if there had been no discrimination may be even more critical.

Early in the plurality opinion, Justice William Brennan Jr. stated that in this case, "as often happens, the truth lies somewhere in between" the parties' claims as to their respective burdens of proof. Indeed, given the disarray among the justices, "truth," in the form of a stable precedent on this issue, may also lie somewhere "in between" the four opinions the justices expressed in this case.

The case came before the Supreme Court after both the District Court and the U.S. Court of Appeals for the D.C. Circuit found that Price Waterhouse had discriminated against Hopkins under Title VII of the Civil Rights Act, first in deferring her consideration for partnership and then in not reconsidering her.

Sexual Stereotyping

Judge Gerhard Gesell, who tried the case, ruled in Hopkins' favor on the issue of liability. His decision was based in part on a determination that the all-male group of partners who performed her evaluation reflected unconscious "sexual stereotyping" in criticizing her interpersonal skills. This meant that to some extent the men were more critical of assertive behavior in women than in men because they regarded it as unfeminine.

Judge Gesell also determined that Price Waterhouse's process for partnership evaluation gave "substantial" weight to the stereotyping comments made about Hopkins and that the partnership had failed to address the "conspicuous" problem of sexual stereotyping in its evaluation process.

Judge Gesell concluded that each of these factors "might have been innocent alone," but they combined to produce discrimination. Having found that discrimination played a role in blocking the plaintiff's election to partnership (although he could not say that she would have been elected but for such discrimination), Judge Gesell declared that she was entitled to relief unless Price Waterhouse demonstrated by "clear and convincing evidence [which it had not done] that the decision would have been the same absent discrimination."

On appeal, a divided panel of the D.C. Circuit affirmed Judge Gesell's findings that sexual stereotyping had played a role in Price Waterhouse's evaluation of the plaintiff and that this constituted unlawful discrimination. The majority also declared that Price Waterhouse could have escaped liability only by showing through clear and convincing evidence that discrimination was *not* the determinative factor in the plaintiff's non-election to partnership. The partnership, the appeals court stated, had not made such a showing.

Justice Brennan's plurality opinion, joined by Justices Thurgood Marshall, Harry Blackmun, and John Paul Stevens, upheld key parts of the lower courts' findings. Justice Brennan recognized that Title VII incorporates both prohibitions against sex, race, and certain other types of discrimination in employment decision-making and the need for employers to be free to decide the qualities and characteristics they will consider in these decisions. From this, he reasoned that the prohibition on discrimination "because of" sex, race, and the like is not limited to situations in which discrimination is shown to be the determinative cause in a decision, but also includes situations in which discrimination was a factor or was relied on when the challenged decision was made. To give effect to Title VII's other aspects—preservation of the employer's remaining freedom of choice—Justice Brennan also concluded that an employer "shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision."

Mixed-Motive Situations

Justice Brennan then declared that placing this burden on employers was not inconsistent with such prior decisions as *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in which the employer did not have to prove that its stated explanation for the challenged employment decision was the true reason for its action. The difference, Brennan concluded, was that while *Price Waterhouse* raised such pretext issues, it also presented a situation in which the challenged action was the product of both legitimate and illegitimate reasons. In such mixed-motive situations, Justice Brennan said, the plaintiff retained the burden to show that discrimination "played a part" in the action and, if she carried that burden, the employer had a burden that could be considered an affirmative defense—to prove it would have taken the same action if discrimination had not been present. Justice Brennan noted that his analysis was consistent with such prior decisions as *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977) that involved mixed-motives situations.

Justice Brennan also stated that "in most cases, the employer should be able to present objective evidence as to its probable decision" absent discrimination. He pointed out that in mixed-motives cases an employer cannot prevail by offering legitimate and sufficient reasons that did not motivate it at the time of its decision.

Justice Brennan concluded, however, that the employer is not required to prove by clear and convincing evidence that it would have made the same decision absent discrimination. Instead, it need only make such a showing by a preponderance of the evidence. As support for this conclusion, Justice Brennan pointed out that "[c]onventional rules of civil litigation generally apply to Title VII cases," that "one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." He noted that "[e]xceptions to this standard . . . are ordinarily recognized only when the government seeks to take . . . action more dramatic than entering an award of . . . conventional relief against an individual."

Justices Byron White and Sandra Day O'Connor concurred separately in the Court's judgement. White's opinion was short. He agreed with the plurality that the Court's decision in this case did not "require modification" of its holdings in *Burdine* and *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). But he emphasized that *Mount Healthy* provided the proper approach to mixed-motives cases and considered it unnecessary to go beyond that decision—as Justice Brennan had—in reaching the issue of whether the case involved the use of "but for" causation or created an "affirmative defense" for employers. He also disagreed with the plurality's analysis that an employer should generally be able to present objective evidence as to the decision it would have made absent discrimination. Justice White said that credible testimony on that subject should be "ample proof."

Justice O'Connor's concurrence was much longer. She agreed with the plurality and Justice White that the plaintiff had produced sufficient evidence in this case to shift the burden of persuasion to the employer and that, to satisfy its burden, the employer would have to show by a preponderance of the evidence that it would have reached the same decision in the absence of discrimination. But she emphasized that the burden of persuasion should only shift to the employer when the plaintiff had produced "evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable fact finder could draw an inference that the decision was made" because of "the plaintiffs protected status." And O'Connor agreed with the dissenters, that the Court's decision in *Price Waterhouse* was "at least a change in direction from some of our prior precendents."

Justice Anthony Kennedy's dissent, joined by Chief Justice William Rehnquist and Justice Antonin Scalia, declared that the Court's decision was a "manipulation" of complex evidentiary rules in employment-discrimination cases in a way that was certain to result in confusion. The dissent also sought to minimize the decision's scope by construing it as a shift in the burden of persuasion to the employer "only where a plaintiff proves by direct

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evidence that an unlawful motive was a substantial factor actually relied on in making the decision."

Heightened Awareness

Although the practical significance of the *Price Waterhouse* decision will depend on the definition given to the respective burdens of proofs plaintiffs and defendants will shoulder in mixed-motives cases, the ruling should force employers to be more careful and vigorous in promoting unbiased decision-making and in identifying and rejecting bias when it is expressed. As with sex harassment, heightened awareness of the problem should contribute significantly to its elimination. Yet the objective is to secure unbiased decision-making not simply to eliminate the expression of bias. Unless that is kept in mind, prejudice may be hidden in less candid evaluations and counseling.

Together with the Court's decision last term in *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. __ (1988), *Price Waterhouse* will also undoubtedly complicate trials of Title VII cases involving subjective decision-making. In *Watson*, the Supreme Court held that subjective decision-making could be challenged under disparate impact as well as disparate treatment analysis. Under disparate impact analysis, a plaintiff can prevail if she shows that one or more aspects of an employer's practice have adversely affected her and have a statistically significant adverse impact on her race or sex group—assuming the employer can not justify its use of the challenged practices.

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Now, as a result of *Price Waterhouse*, plaintiffs may pursue as many as three lines of attack on subjective decision-making: First, disparate impact when there is sufficient statistical evidence of adverse impact to support it. Second, *Burdine*-type disparate treatment in which the employer's justification will be challenged. Third, mixed motivation when discrimination can be shown to have been a substantial factor in the decision.

The *Price Waterhouse* opinions also provide a further indication of the reservations that both Justices Kennedy and O'Connor have about affirmative action. In his dissent, Justice Kennedy stated that consistency in the allocation of burdens of proof in Title VII cases would demand that those challenging the validity of affirmative-action plans no longer bear the burden of proving that they were illegal. Justice O'Connor agreed. This could be a critical shift that makes it more difficult for employers to defend affirmative-action plans. Justice O'Connor and Justice Kennedy's predecessor, Justice Lewis Powell Jr., were part of the six-justice majority that reaffirmed the lawfulness of employer-adopted affirmative-action plans when the Court last considered that issue in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

Finally, it remains to be seen whether the Court will subsequently hold that the "preponderance of the evidence" standard ennunciated in *Price Waterhouse* applies not only when the employer is seeking to escape liability in mixed-motives cases, but also when it is seeking to avoid providing relief to individual members of a class found to have been discriminated against. Most of plurality opinion's rationale for applying this standard in *Price Waterhouse* seems equally applicable in such cases. Moreover, as stated by Justice O'Connor in her concurring opinion, a plaintiff who has shown that discrimination was a substantial factor in an adverse action taken against her has proven more than has been proven about the individual members of a successful class action. In such cases, it may therefore seem incongruous to apply a heavier burden to employers in the later type of cases than in the former.

When the Court addresses the issue of which burden of proof to apply to determine whether individual members of a class should receive relief, it should consider whether imposing a preponderance of the evidence or a clear and convincing evidence burden is more consistent with the directive in §706(g) that individual relief should not be provided under Title VII when the adverse action was taken "for any reason other than discrimination."

Price Waterhouse is an important decision in the still-evolving field of employment-discrimination law. Its ultimate significance cannot be determined, however, until the questions it raises or leaves unresolved are answered.

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