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No Lipstick, No Partnership?

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FASCINATING legal cases, full of interesting characters and personal conflict, are sometimes settled because of arcane legal principles, involving, for example, the burden of proof—if and when it shifts—and the standards of proof required in different kinds of cases. One such case was dealt with by the Supreme Court this week. The plaintiff was Ann Hopkins, an accountant who claimed she was denied a partnership in the firm of Price Waterhouse by reason of sex discrimination. Mrs. Hopkins was the only female considered for partnership in 1983, and though she had brought in more business than any of the other 87 candidates that year, she was passed over. Citing evidence of "sex stereotyping"—she had been told to wear makeup and jewelry, to have her hair styled and to go to charm school—she sued and won in the trial and appellate courts.

On Monday the Supreme Court reversed this judgment and sent the case back for further hearings. The lower courts, the justices ruled, had used the strict "clear and convincing evidence" standard of proof, when they should have used a weaker yardstick allowing proof by a "preponderance of the evidence." Nevertheless, civil rights groups claimed a victory because even in reversing, the court adopted a rule on the burden of proof that makes it much easier for plaintiffs to win employment discrimination cases. A plaintiff, Justice Brennan wrote for the plurality, has the first burden of showing that discrimination was a "motivating factor" in the adverse decision, but at that point the burden of proof shifts to the employer, who must demonstrate that the decision would have been the same even without the discriminatory factor. In this particular case, Price Waterhouse must now show, by a preponderance of the evidence, that it would have made the same decision about Mrs. Hopkins' partnership if her gender were not a factor at all. Attorneys for the partnership believe they can meet that burden, but it may be difficult.

If the three justices who dissented in this case had prevailed, the effectiveness of this civil rights law would have been greatly diminished. How would Mrs. Hopkins have proved a negative—i.e., that there was no persuasive reason for denying her partnership other than sex discrimination? The employer is the only party with complete information on what factors were considered by decision-makers. It is only right that the employer have the responsibility of explaining and justifying its suspect decision.

None of this means that people cannot be fired or denied promotions for cause. If an employee is unproductive, slovenly, rude to clients, disruptive or lazy, for example, employers can certainly apply sanctions. But it should be clear by now, 25 years after the passage of antidiscrimination laws, that an applicant cannot be refused a job because he is black, or denied a promotion because he is over 50 or kept out of a partnership because she does or doesn't wear earrings and eyeliner.

Paraguay's Passage