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Civil Action No. 84-3040 Plaintiff's Reply on Remand

United States District Court for the District of Columbia

1/24/90

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANN B. HOPKINS Plaintiff, v. PRICE WATERHOUSE Defendant.	)	Civil Action No. 84-3040 (Gesell, J.)

PLAINTIFF'S REPLY ON REMEDY

Plaintiff seeks an order requiring defendant to offer her admission to the firm. Defendant questions this Court's authority to enter such an order and alternatively contends that such relief should not be granted for equitable reasons. Defendant's arguments on these points, as well as on the issues of front pay and mitigation, are unpersuasive. This Court has the power and the duty to fashion complete relief in this case. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Lander v. Lujan, 888 F.2d 153 (D.C. Cir. 1989).

I. THERE ARE NO LEGAL BARRIERS TO AN ORDER THAT PLAINTIFF BE OFFERED PARTNERSHIP

This Court unquestionably has the authority to require Price Waterhouse to offer plaintiff admission to the firm. The notion that this relief might be unavailable at common law is irrelevant, since Congress enacted Title VII exactly because the common law did not adequately address the problem of discrimination in employment. Over 20 years ago the Fifth Circuit rejected the argument that "Title VII must be strictly

construed because it is in derogation of the common law," observing:

> Whatever efficacy that old bromide may have in other areas of law, it is clearly inapplicable to the socially remedial statute involved here.

Georgia Power Co. v. EEOC, 412 F.2d 462, 466 n.6 (5th Cir. 1969).

Justice Powell's concurrence in Hishon v. King & Spalding, 467 U.S. 69 (1989), simply set forth his view that Title VII does not cover the relationships among partners of a firm. Id. at 79. Justice Powell did not suggest that Federal courts lacked authority to require admission to a firm in the first instance to one denied admission because of race or sex. Nor is there any such suggestion in the opinion for the Court.

Price Waterhouse is a huge firm, with so many partners (about 900) in so many different offices (90-100) that they wear name tags to identify themselves to one another at the firm's annual meeting. See 1990 Connor Dep. 10-11, 56; the original of this deposition is being filed with the Court. Price Waterhouse is, quite literally, a large farflung commercial enterprise, national in scope and tied into an even larger worldwide network through common shareholding in an offshore firm, Price Waterhouse World Firm Ltd. 1/

1/ Mr. Connor is now Chairman of the World Firm. All Price Waterhouse (U.S.) partners must be shareholders in the World Firm, which binds together a Price Waterhouse World Organization that now includes about 2600 partners in 26 operating firms throughout the world. See 1990 Connor Dep. 5-7, 15.

Price Waterhouse's size, its profitmaking character, and its open-ended membership undermine defendant's arguments based on freedom of association. The Supreme Court has repeatedly rejected such contentions even when made by nonprofit organizations which were principally established for social and community betterment purposes, when their size and business-related features brought them within the regulatory ambit of state and local antidiscrimination laws that applied to their membership and guest policies. New York State Club Association v. City of New York, ____ U.S. ____, 108 S.Ct. 2225 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, ____ U.S. ____, 107 S.Ct. 1940 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1987). In Roberts, the Court pointedly contrasted the intimacy, personal attachment, and selectivity of family relationships with "an association lacking these qualities -- such as a large business enterprise," noting that the latter type of organization "seems remote from the concerns giving rise to the constitutional protection of expressive association." Id. 468 U.S. at 620. It is clear on this record, moreover, what the main associational interests of Price Waterhouse partners in one another are:

> Q. Now, I take it that you have some partners, fairly senior ones at that, who are quite hard to work for or with at times; isn't that so?
>
> A. Maybe occasionally they put me in that category. Sure. There are demanding people in this firm just as in other business.
>
> Q. And from the viewpoint of a person who is in another office at least in Price Waterhouse, the primary concerns about the partner in Office A, about a partner in Office B, that he or she doesn't work

with much, is whether that person is a productive contributing partner to the growth and the prestige of the firm; is that correct?

A. Absolutely.

1985 Connor Dep. 53.

Admission to membership in Price Waterhouse is not qualitatively different than admission to membership in labor organizations, which Title VII courts have repeatedly ordered. See, for example, Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. United Assn. of Journeymen etc., Local 24, et al., 364 F.Supp. 808 (D.N.J. 1973). Hishon v. King & Spalding, 467 U.S. 69 (1984), established that admission of an employee to partnership in a professional firm much smaller and less dispersed than Price Waterhouse is within the reach of Title VII. See also Price Waterhouse v. Hopkins, 109 S.Ct. at 1781 n.1. If that is so, make-whole relief must surely include an order that an employee who was unlawfully denied such admission be offered what was wrongly withheld.

II. THERE ARE NO EQUITABLE REASONS TO DENY PLAINTIFF SUCH RELIEF

The fulcrum of this case is Price Waterhouse's decision in March 1983 to place Ann Hopkins on hold rather than admit her directly to partnership, as was done for many of her male cohorts. This Court's original liability determination rested solely on defendant's March 1983 hold decision; the Court of Appeals focused only on it in affirming this Court's finding of liability and in remanding the case for entry of full relief; and the Supreme Court as well concentrated exclusively on the March

1983 hold decision. Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1781 n.1 (1989) ("[w]e are concerned today only with Price Waterhouse's decision to place Hopkins' candidacy on hold").

The Supreme Court agreed with the Court of Appeals that the question of proper relief is reached only if the defendant has first been held liable. 109 S.Ct. 1775, 1783, 1787-1788 n. 10 and accompanying text (1989). Hence the necessary predicate to discussion of relief is the assumption that defendant has been found to have violated Title VII in denying plaintiff admission to partnership and putting her on hold in March 1983. But for this violation, plaintiff would have been made a partner.

Nonetheless, defendant devotes much of its brief "on remedial issues" to arguments that later events which would never have occurred (or would have been immaterial) if plaintiff had been elected to partnership should be retroactively applied to deny her partnership now. Specifically, defendant argues at length in Part 1.b of its brief that a conversation which occurred after March 1983 between plaintiff and Price Waterhouse partner Donald Epelbaum -- and which would never have taken place if she had been offered partnership originally -- justifies denying her partnership now. Defendant's contention that Mr. Epelbaum's sense of personal grievance toward plaintiff should now be deemed sufficient ground to deny her an order that she be offered partnership in the exercise of the Court's equitable powers is fanciful. If this were an implied claim that a single partner at Price Waterhouse can block a candidate for admission to the firm, the record would refute it. See Tr. 259-262, 273-

274, 280 (Ziegler); 1985 Connor Dep. 259-262. However, it is not even that. It is, in effect, a claim that Mr. Epelbaum could secure plaintiff's "mandatory withdrawal" (i.e., expulsion from partnership), after her admission because he was offended by her behavior toward him. In fact, only two Price Waterhouse partners have ever been expelled for reasons other than health, conviction of a crime, or loss of licensure. One of these was for less-than-competent performance, and the other was for making inappropriate charges to the firm; neither was for deficient interpersonal skills. 1990 Connor Dep. 22-23.

Defendant's claim that the decision of plaintiff's office not to renominate her for partnership in August 1983 is a "superseding cause" justifying the denial of back pay after that date is even more fanciful. See Def. Br. 15-16, text and note 16. The necessary predicate of that claim is that plaintiff was properly placed on "hold" four months earlier, whereas the necessary predicate of any discussion of relief is exactly the opposite.

Defendant also suggests that all plaintiff lost in March 1983 was "fair consideration" as a partner candidate, so all she should be given is a nondiscriminatory re-run of the admission process. 2/ Plaintiff certainly was not considered fairly; that much is clear from the Supreme Court's affirmance of this Court's

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2/ How this could be accomplished today, seven years later, is not explained. See Brown v. Trustees of Boston University, 51 FEP Cases 815, 836 (1st Cir. 1989) (requiring that plaintiff be awarded tenure rather than just being "subjected to a non-discriminatory tenure decision").

factual determinations. But a finding of liability means that the unfairness cost her admission to the firm. Given that, full relief should include what was denied.

III. IF THE COURT WERE TO ORDER FRONT PAY INSTEAD OF ADMISSION TO PARTNERSHIP, THAT RELIEF MUST ALSO MAKE PLAINTIFF WHOLE UNDER SETTLED PRINCIPLES

Assuming that for some unique reason plaintiff's denial of partnership should not be remedied by an order requiring her admission, then monetary relief in the form of front pay is required. Even at common law, a successful plaintiff is not denied relief altogether if a court declines to order specific performance; instead he gets money damages. 3/ As we have shown, apart from the preference for placement rather than damages, the same principle applies under Federal EEO statutes, including cases cited by defendant which denied reinstatement. See Cassino v. Reichold Chemicals Inc., 817 F.2d 1338, 1346 (9th Cir. 1987), cert. denied, 108 S.Ct. 785 (1988) ("an award of future damages or 'front pay' in lieu of reinstatement furthers the remedial goals of the ADEA by returning the aggrieved party to the economic situation he would have enjoyed but for the defendant's illegal conduct"); EEOC v. Kallir, Phillips, Ross, Inc., 420 F.Supp. 919, 927 (S.D.N.Y. 1976), aff'd, 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977). See also Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-29 (2d Cir. 1984) (ADEA);

3/ See Corbin on Contracts, Vol. 5A (1964), § 1136 at 96 ("[d]amages, restitution and specific enforcement are merely three remedies within the court's power to give; and it awards the one that seems most effective to do full justice . . .").

Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980) (Title VII).

There is nothing novel about compensating an individual for diminished earning capacity over the course of a career. This is a familiar feature of relief in tort cases in which a physical injury caused by a defendant makes it unlikely that an individual will henceforth receive what otherwise would have been earned during his working life. In Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983), a case arising under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 904, the Supreme Court devoted most of its opinion to explaining just how such a remedy should be computed. The principles set forth are of general applicability. See Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1976).

Initially, the Supreme Court observed in Pfeifer that

> [t]he lost [income] stream's length cannot be known with certainty * * * Given the complexity of trying to make an exact calculation, litigants frequently follow the relatively simple course of assuming that the worker would have continued to work up until a specific date certain.
>
> Id. at 533-34.

In Pfeifer the parties assumed that the plaintiff would have worked until normal retirement age, or another 12 1/2 years. This is just what plaintiff assumes in the present case, i.e., that she would continue working as a partner at Price Waterhouse until she reached the firm's scheduled and normal retirement age of 60 (another 15 years). See 1990 Connor Dep. 67-68. In addition, the Court in Pfeifer stated that "fringe benefits . . .

should be included in an ideal evaluation of the worker's losses." Id. at 534. Defendant's most significant fringe benefit is a retirement plan, and plaintiff has included that in her analysis of future earnings loss.

The projection of lost income is of course an estimate; absolute precision is not required:

> [B]y its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream [of income] can never be predicted with complete confidence, any lump sum represents only a "rough and ready" effort to put the plaintiff in the position he would have been in had he not been injured.

Id. at 546.

We stress that front pay is an alternative remedy; it is not what plaintiff is entitled or what she seeks in the first instance. Admission to partner is the preferred relief for her individually and as a more general legal matter. See Cassino, 817 F.2d at 1346 ("reinstatement is the preferred remedy in these cases"). If plaintiff is not offered admission to the firm, however, she is entitled to full relief in the form of front pay, and there is nothing novel about her approach in calculating front pay here.

IV. DEFENDANT CANNOT SHOW THAT PLAINTIFF FAILED TO EXERCISE REASONABLE DILIGENCE IN MITIGATING HER INJURY

As has already been noted, mitigation is an issue as to which defendant bears the burden of proof. The proof will show, however, that plaintiff cannot be faulted for her past diligence. Specifically, it will show that Price Waterhouse itself has never admitted to partnership someone who had been denied partnership

in another "Big 8" firm, 1990 Connor Dep. 15-18; that neither defendant nor the placement consultant it now uses to assist leaving partners and managers has any record of such a firm as defendant (and its Big 8 counterparts) hiring, much less making partner, persons who have filed publicized discrimination complaints against their previous employers, 1990 Connor Dep. 18-19 and Redford Dep. 25-28; that Price Waterhouse never offered placement services to plaintiff, although it probably was using them in 1984 when she left the firm, 1990 Connor Dep. 50-53; that plaintiff's current position at the World Bank pays better than any job defendant can prove was available to her after she left Price Waterhouse; 4/ and that in the years immediately after she left Price Waterhouse and was self-employed plaintiff earned an average of nearly $57,000 per year, whereas her last salary at Price Waterhouse was about $65,000. Again, defendant will not be able to prove that plaintiff could have earned significantly more than she in fact earned or that her efforts lacked diligence.

It is also clear that plaintiff never took herself out of the labor market, e.g., stopped work altogether, returned to school, pursued a hobby; so defendant's claim that her failure to mitigate is a bar to recovery of any backpay is without legal basis. See Brady v. Thurston Motor Line, Inc., 753 F.2d 1269 (4th Cir. 1985). The most telling point is that when her consulting business began to falter, plaintiff obtained the job

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4/ As an American citizen, plaintiff passed through the needle's eye by obtaining that job; good jobs at the World Bank are extremely hard for American citizens to obtain.

she now holds, which pays substantially better than the $80,000-level typical senior manager salary today at Price Waterhouse. See 1990 Connor Dep. 14 .

Finally, we address briefly defendant's suggestion that plaintiff should have searched the nation for jobs comparable to her last one at Price Waterhouse. See Def. Br. 18. The evidence will show that she did look outside of Washington, but she was not under any duty to do so. See the cases cited at page 15 of plaintiff's original brief on relief. Her experience, expertise and best contacts were here. Her husband's business was here, her children's schools were here. These are reasons which Price Waterhouse itself accepts as valid grounds for its partners to refuse to move to other cities. Moreover, it is clear that defendant does not require its partners, or even its senior managers, to move, no matter how strongly it wishes they would do so. Frequently it offers economic incentives to encourage such moves, but when the carrot fails, there is no stick. There is, at worst, a possibility of smaller future increases in compensation. See 1990 Connor Dep. 38-49.

CONCLUSION

A finding of liability means that defendant violated Title VII when it placed plaintiff's partnership candidacy on hold in March 1983 and refused to offer her admission to the firm. Full relief should include an offer of partnership, which this Court has authority to require. Front pay is an alternative, less preferred remedy; but if that alternative is turned to, it, too,

must be relief which makes the plaintiff whole. Complete relief should in any event also include back pay and attorneys' fees.

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