1-24-1990

# Civil Action No. 84-3040 Defendant's Pre-Trial Reply Brief on Remedial Issues

United States District Court for the District of Columbia

1/24/90

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ANN B. HOPKINS,<br><br>Plaintiff,<br><br>v.<br><br>PRICE WATERHOUSE,<br><br>Defendant. | ) | Civil Action No. 84-3040 (GAG) |

DEFENDANT'S PRE-TRIAL
REPLY BRIEF ON REMEDIAL ISSUES

Plaintiff's argues that her "career objective was to become a partner at Price Waterhouse," that she still "wants and is entitled to become a Price Waterhouse partner," that no other available position can substitute for a Price Waterhouse partnership and that therefore this Court should take the unprecedented and extraordinary step of invoking Title VII's remedial provisions to force Price Waterhouse to accept her as a partner, or, alternatively, to pay her as a partner for life. Plaintiff's Pretrial Brief on Remedy (Pl. Br.) at 1-2. However, as discussed below, plaintiff offers neither factual nor legal support for her request for admission as a partner or its monetary equivalent.

1. Plaintiff Has Not Demonstrated That An Order Directing That She Be Made Partner Is Authorized.

Plaintiff principally relies on the "make whole" remedial goal of Title VII to support her argument that the Court is authorized to order Price Waterhouse to make her a Price Waterhouse partner. See, e.g., Pl. Br. at 3-4, 8 & n.3. Plaintiff's argument, however, is premised on a number of erroneous assumptions.

First, plaintiff's position simply begs the question. She assumes that the "'most complete relief possible'"[1/] under Title VII includes admission into a private partnership and then proceeds to rationalize her claim to such relief under traditional Title VII cases involving discretionary reinstatement and promotion of employees into new employment positions. Plaintiff assiduously avoids the real legal issue presented by this case: whether Title VII's equal employment provisions empower courts to create nonemployment relationships such as partnerships. That is a proposition she has not established.

Second, plaintiff repeatedly suggests in the first section of her brief that, assuming Price Waterhouse has violated Title VII, the only way to make her "whole" is to

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1/ Pl. Br. at 3 (quoting Lander v. Lujan, 888 F.2d 153, 156 (D.C. Cir. 1989)) (other citations omitted).

grant her a partnership position in the Price Waterhouse firm. Pl. Br. at 3, 4, 7, 8 & n.3. However, in section II of her brief she acknowledges that monetary relief would be a legally acceptable alternative. Pl. Br. at 8. Indeed, the principle that courts should make Title VII plaintiffs "whole" by returning them to the position in which they would have been absent a Title VII violation, Pl. Br. at 3, is no more than a restatement of the common law of contract damages. See Restatement (Second) of Contracts § 347 & comment a (1981) ("Contract damages. . . are intended to give [the injured party] the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed."). Contrary to plaintiff's assertions, monetary relief, subject to rules concerning mitigation of damages, will adequately vindicate the "make whole" remedial goal of Title VII in partnership cases.

Third, plaintiff contends that the Supreme Court's decision in Hishon v. King & Spalding, 467 U.S. 69 (1984), inexorably leads to the conclusion that an order directing Price Waterhouse to admit plaintiff as a partner is a permissible remedy in this case. Pl. Br. at 4. But plaintiff greatly exaggerates the breadth of the Supreme Court's holding in Hishon.

In reaching the conclusion that "in appropriate circumstances partnership consideration may qualify as a term,

condition or privilege of a person's employment," 467 U.S. at 78 n. 10 (emphasis added), the Court in Hishon recognized that, as a jurisdictional matter, Title VII extends only to "certain aspects" of employment relationships. See, e.g., id. at 74. Neither the holding nor rationale of Hishon suggests that district courts are authorized to create or otherwise regulate a "relationship among partners." See id. at 79-80 (Powell, J., concurring). And as plaintiff recognizes (Pl. Br. at 4), the plaintiff in Hishon did not seek admission as a partner; therefore, the issue whether that remedy is statutorily or constitutionally authorized was not before the Court in that case.[2/] See 467 U.S. at 72 (plaintiff "sought. . . compensatory damages 'in lieu of reinstatement and promotion to partnership.' This, of course, negates any claim for specific performance of the contract alleged.").

The Court in Hishon rejected the argument that the First Amendment affirmatively protected the right to engage in "'invidious private discrimination.'" 467 U.S. at 78 (citation omitted). However, Price Waterhouse has made no such First Amendment claim. Price Waterhouse does not contend that Title VII's application to the partnership consideration process

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2/ Furthermore, the district court in Hishon had granted the defendant's motion to dismiss for lack of subject matter jurisdiction. 467 U.S. at 72-73 & n.2. Thus, due to the procedural posture of the Hishon case, it simply did not present issues relating to remedy. See id. at 80 n.4 (Powell, J., concurring).

violates the First Amemdment, or that partnerships have a constitutional right to treat employees considered for partner unfairly or inequitably because of their sex. Price Waterhouse contends only that since "legitimate, nondiscriminatory"[3/] concerns regarding plaintiff's "conduct" played a significant role in the 1983 decision to defer plaintiff's partnership candidacy, and in light of the collegial, private nature of the Price Waterhouse partnership, the First Amendment requires that the least intrusive remedial alternative available be chosen.[4/] Compare Chicago Teachers Union v. Hudson, 475 U.S. 292, 303 & n.11 (1986) ("the fact that [associational rights] are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement").

Finally, plaintiff acknowledges that "[t]his is the first partnership case to go to the merits," but maintains that "the remedial issues are no different in principle or in difficulty from those in other cases already decided." Pl. Br. at 6. But the cases relied upon by plaintiff are different in kind than the case at bar. Although, as plaintiff correctly observes, academic tenure decisions may result in a "lifetime"

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3/ Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1115 (D.D.C. 1985).

4/ The right recognized in Hishon can be vindicated through means far less intrusive than admission of plaintiff as a partner. If the Court finds liability, it could order Price Waterhouse to consider plaintiff "for partnership. . . on a 'fair and equal basis.'" 467 U.S. at 74 n.6.

relationship between a professor and a university, reinstatement and promotion of a professor to a tenured position creates no more than a long-term employment relationship. Indeed, in 1972 Congress specifically amended Title VII, without remedial qualification, to eliminate the statutory exemption for educational institutions, in part to eradicate discrimination in tenure decisions and to ensure that women and minorities were promoted to tenured academic employment positions on a nondiscriminatory basis. See University of Pennsylvania v. EEOC, U.S. No. 88-493, slip op. at 6, 58 U.S.L.W. 4093, 4096 (Jan. 9, 1990).[5/] Such clear evidence of Congress' intent is manifestly absent with respect to the remedial authority of courts to order firms to bestow partnership status on former employees.

Moreover, "[c]ourts have quite rarely awarded tenure as a remedy for unlawful discrimination. . . ." Brown v. Trustees of Boston University, 51 Fair Emp. Prac. Cas. (BNA)

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5/ Plaintiff states that the Supreme Court in the University of Pennsylvania case "forcefully rejected the idea that partnerships enjoy special status under Title VII." Pl. Br. at 5. Plaintiff makes far too much out of a single sentence in the Court's opinion in that case. The Court, in dicta, simply suggested that partnerships, like universities, are not entitled to a special privilege to withhold partnership candidate review materials from production in response to an EEOC subpoena. Given that the Hishon decision makes the partnership consideration process subject to Title VII scrutiny, this should come as no surprise.

815, 835 (1st Cir. 1989).[6/] And those few cases, relied upon by plaintiff, are inapposite.

For example, in Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980), the Third Circuit pointedly emphasized that the district court "did not award [plaintiff] tenure," id. at 549 (emphasis in original), but rather gave her the opportunity to obtain the only necessary qualification for tenure that she lacked (a masters degree). Similarly, in Brown v. Trustees of Boston University, supra, 51 Fair Emp. Prac. Cas. at 835-37, the court affirmed a tenure order but emphasized that plaintiff's "near unanimous endorsement by colleagues. . . suggest[s] strongly that there are no issues of collegiality or the like which might make the granting of tenure inappropriate." Id. at 837 (emphasis added). Brown is therefore clearly distinguishable from this case -- plaintiff has been found to have had serious and "considerable" collegiality problems both before and after the 1983 hold

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6/ Courts cases have refused to grant tenure as often as they have ordered it. See, e.g., Fields v. Clark Univeristy, 40 Fair Emp. Prac. Cas. (BNA) 670, 672 (D. Mass. 1986) ("Because the record raises substantial questions as to the plaintiff's capacity as a teacher, I hesitate to impose her services upon the university for the rest of her working life. What she is entitled to, in my opinion, is the opportunity to have the issue of her tenure determined on the merits without being discriminated against on the basis of sex."), vacated on other grounds, 817 F.2d 931 (1st Cir. 1987); see also Gurmankin v. Costanzo, 626 F.2d 1115, 1125-26 (3d Cir. 1980), cert. denied, 450 U.S. 923 (1981).

decision at issue in this litigation.[7/] See, e.g., Defendant's Pre-Trial Brief On Remedial Issues ("Def. Br.") at 9-14.

Plaintiff's reliance (Pl. Br. at 3-4, 7-8) on Lander v. Lujan, 888 F.2d 153 (D.C. Cir. 1989), is similarly misplaced. The reinstatement and promotion of a federal civil service employee falls squarely within the jurisdictional strictures of Title VII. And compelling a federal or state governmental entity to rehire an employee simply does not involve an intrusion into a private association and therefore does not implicate associational rights protected by the First Amendment.

2. Plaintiff Has Failed To Demonstrate That The Court Should Exercise Equitable Discretion To Make Her A Partner.

As Price Waterhouse demonstrated in its initial brief on remedial issues (Def. Br. at 9-14), even if the Court has authority to make plaintiff a partner, such relief would be inappropriate because of the interpersonal skills deficiencies that plaintiff manifested at Price Waterhouse. Moreover, Price Waterhouse has argued that plaintiff's conduct after the 1983

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7/ The other tenure case cited by plaintiff, Ford v. Nicks, 741 F.2d 858 (6th Cir. 1984), cert. denied, 469 U.S. 1216 (1985), is also distinguishable. In that case, the court voiced serious reservations over intruding unduly into the tenure process but, because state law made tenure automatic after five years teaching experience at a university, the court affirmed the trial court's tenure order.

hold decision -- in particular, her misrepresentations to a partner in her practice group -- precludes the remedy of partnership admission. Def. Br. at 9.

Plaintiff ignores these issues. She suggests (Pl. Br. at 9-10) that the only impediment to this Court's ordering her admission as a partner is "ill will" caused by this litigation.[8/] However, plaintiff's self-acknowledged interpersonal skills deficiencies were manifested long before plaintiff filed this lawsuit. It is this aspect of the case, coupled with the sensitive nature of a partnership position, that makes specific relief particularly inappropriate. See, e.g., McIntosh v. James Truck Lines, 767 F.2d 433, 435 & n.1 (8th Cir. 1985) (plaintiff's own problems precluded reinstatement).

Nonetheless, plaintiff argues that "admitting plaintiff to partnership flows naturally from a finding of liability. . . ." Pl. Br. at 1-2. In describing this "natural

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8/ In Anderson v. Group Hospitalization, Inc., 820 F.2d 465 (D.C. Cir. 1987), the Court of Appeals observed that "ill will is a frequent by-product of employment discrimination litigation and, standing alone," did not deprive a secretary/clerk from being reinstated and promoted to a sales position. Id. at 473 (emphasis added). See Pl. Br. at 9. Compare EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), aff'd without opinion, 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977) (noting that litigation hostility alone is generally not a sufficient reason to deny reinstatement, but distinguishing "assembly line or clerical worker" positions from high level executive positions and refusing to reinstate an executive plaintiff because litigation had undermined mutual trust and confidence of plaintiff and defendant).

flow," plaintiff contends that, if the Court finds Price Waterhouse liable to plaintiff, it has concluded that discriminatory factors were a "but for" cause of the deferral of plaintiff's partnership candidacy, and that this "mean[s] that discrimination based on sex was the reason plaintiff was placed on hold. . . ." Therefore, according to plaintiff, the "natural remedy" is to require admission of plaintiff as a partner. Pl. Br. at 3.

Plaintiff's suggestion that a liability finding means that sex discrimination was the sole cause of the 1983 decision to place plaintiff's partnership candidacy on hold is flatly incorrect. Indeed, the Supreme Court's plurality opinion explicitly recognized that "mixed motive" cases like this one by definition involve multiple causal factors. See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1785 (1989). Although the liability framework adopted by the plurality might warrant requiring the defendant to show the absence of "but for" causation to avoid liability, see id. at 1790, a liability finding means nothing more than that a discriminatory factor was one of the causes of the challenged employment decision.[9/] See W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser & Keeton On Torts § 41, at 266 (5th ed. 1984) ("instructions to the jury that they must find the defendant's

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9/ In other words, it simply means that the defendant has failed to prove that the decision would have been the same in the absence of discrimination. Id.

conduct to be 'the sole cause' or 'the dominant cause' of the injury are rightly condemed as misleading"); F. Harper, F. James & O. Gray, The Law of Torts § 20.2, at 91 (2d ed. 1986) ("Clearly this is not a quest for a sole cause . . . it is enough that defendant's negligence be a cause in fact of the harm.") (emphasis in original).[10/]

Price Waterhouse submits that the record in this case demonstrates that plaintiff's "considerable problems dealing with staff and peers," 618 F. Supp. at 1114, standing alone, would have led Price Waterhouse to make the same decision to defer her partnership candidacy. If this Court agrees, then Price Waterhouse is not liable under Title VII. However, even if the Court finds against Price Waterhouse on the issue of liability, that does not alter the fact that plaintiff's self-acknowledged interpersonal skills deficiencies were and continue to be a serious and substantial impediment to her becoming a partner at Price Waterhouse.

3. Plaintiff's Claims for Monetary Relief Are Grossly Inflated.

The issue in this case is whether Price Waterhouse's decision in 1983 to defer plaintiff's partnership candidacy for

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10/ The "but for" causation principle is drawn from common tort law doctrine, which generally regards it is as only a threshold predicate to a determination of liability. See 109 S. Ct. at 1807 (Kennedy, J., dissenting). A tort plaintiff not only must prove that the defendant's conduct was one of the "but for" causal factors, but also that it was the proximate cause of the plaintiff's injury. Id.

one year violated Title VII. This Court has previously found that the decision of plaintiff's practice group not to repropose plaintiff for partner the next year was nondiscriminatory and, indeed, was a result of plaintiff's own conduct. See 618 F. Supp. at 1115. Plaintiff did not appeal these findings.

Plaintiff's claims for monetary relief for the period July 1, 1983 "to her life expectancy in 2025" must therefore be rejected. A finding of liability would mean, at most, that impermissible discriminatory conduct in 1983 contributed to a one-year delay of plaintiff's partnership candidacy. Her monetary relief should therefore be limited to back pay for the period July 1, 1983 to June 30, 1984. See Def. Br. at 15-23.

Plaintiff has, for obvious reasons, based her damage calculations on the assumption that the 1983 decision to place her candidacy on hold was a rejection of her candidacy that ended her chance to become a Price Waterhouse partner. However, even assuming arguendo that this is true -- which it is not -- plaintiff's request for monetary relief must fail.

Plaintiff attempts to justify her claim for 42 years of compensation, including retirement benefits,[11/] by comparing her case to that of an age discrimination plaintiff

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11/ It should be noted that Price Waterhouse's partner retirement plans are unfunded and unvested. Thus, if a partner leaves the firm the day before reaching retirement age, that partner forfeits all future rights to retirement benefits.

who "has no reasonable prospect of obtaining future [comparable] employment elsewhere" before retirement. See Pl. Br. at 9-10. This analogy demonstrates the fundamental flaw in plaintiff's methodology: While arguably it might be reasonable and appropriate to award compensation until retirement age to an employee who, absent discrimination, otherwise would have retired in the near future, the same cannot be said for an employee, such as plaintiff, who voluntarily resigns from the employer two decades before her projected retirement date. See Davis v. Combustion Engineering, Inc., 742 F.2d 916, 923 (6th Cir. 1984) (distinguishing between a 41 year old employee and a 63 year old employee for purposes of awarding front pay "until such time as he qualifies for a pension").

In addition, plaintiff's failure to exercise reasonable diligence in seeking suitable employment after she resigned from Price Waterhouse significantly limits her asserted right to monetary relief. Plaintiff states that, after she voluntarily resigned from Price Waterhouse in 1984, she "reasonably believed that the only place she might be able to obtain an opportunity comparable to that available at Price Waterhouse. . . was with another Big 8 firm." Pl. Br. at 12. Not only was this assumption wholly unjustified and erroneous, but plaintiff by her own admission did little if anything to test its accuracy. Such conduct was unreasonable and does not satisfy the duty to mitigate. See Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259, 266-67 (N.D. Ala. 1982), aff'd, 726

F.2d 1543 (11th Cir. 1984) (back pay award reduced where claimant unreasonably assumed that efforts to obtain employment would be futile because of her pregnancy).

Furthermore, having assumed that the only "substantially equivalent" positions available existed at other "Big 8" accounting firms, plaintiff contacted only one such firm. Pl. Br. at 14; see, e.g., 1989 Hopkins Dep. at 205. Far from going to "heroic lengths" (Pl. Br. at 14), plaintiff hardly made any effort at all to obtain the kind of position that she perceived (incorrectly) to be the sole substitute for a Price Waterhouse partnership. Instead, plaintiff "almost as soon as she left defendant" (Pl. Br. at 13) decided to form her own consulting company, and in 1988, became an employee at the World Bank. Had plaintiff genuinely attempted to find a position similar to the one she sought at Price Waterhouse, and failed, plaintiff may well have been justified in "lowering her sights"[12/] to include self-employment or employment in a position with much lower earning potential than a Price Waterhouse partnership. Plaintiff, however, lowered her sights too quickly and too far. She clearly did not make a reasonable effort to obtain the kind of position that would have resulted in the monetary reward she now seeks from Price Waterhouse.

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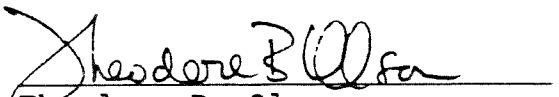
12/ See NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1320-21 (D.C. Cir. 1972).

4. Conclusion.

Plaintiff has failed to demonstrate that an order directing that she be made a Price Waterhouse partner is either authorized or appropriate. Her efforts to mitigate damages were unreasonable and insufficient as a matter of law. Therefore, plaintiff's relief, if she is entitled to any at all, must be limited to back pay for the period between the time of the deferral of her partnership candidacy in 1983 and the date when she could have attained a position similar to a Price Waterhouse partnership had she taken reasonable steps to obtain such a position.

Dated: January 24, 1990

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Defendant's Pre-Trial Reply Brief on Remedial Issues to be served by hand delivery this 24th day of January 1990, upon James H. Heller, Esq., Kator, Scott & Heller, 1275 K Street, N.W., Suite 950, Washington, D.C. 20006.

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