Is Price Waterhouse A Help to Victims of Sex Discrimination

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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 recom‐

ing her. 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 expressive behavior in women than in men because they regarded it as feminine.

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 discrimination and other types of discrimination in employment decision-making and the need for employers to be free from discriminatory policies and practices that 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, 459 U.S. 248 (1982), 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 prior decisions as Mount Healthy City School District v. Doyle, 429 U.S. 274 (1977) that involved mixed-motive situations.

Justice Brennan also stated that "in most cases, the employer should be able to present objective evidence as to its probable reasons for an absent discrimination. He pointed out that in mixed-motive cases an employer cannot prevail by offering legiti‐

mate 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, but for such 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 the "[e]xceptions to the general rule that the plaintiff must prove her case by a preponderance of the evidence..." He noted that "[t]he exceptions to this standard... are ordinarily recognized only when the government... is required to prove... a more stringent standard than the person seeking to establish the... burden of proof..."

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As with sex harassment, heightened awareness of the problem should contribute to its elimination. Yet the objective is to secure unbiased decision-making not simply to eliminate the expression of bias.

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 on her race or sex group—assuming the employer can not justify its use of the challenged practices. 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 the 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-judge 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 subsequent hold that the "preponderance of the evidence" standard enunciated 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 latter 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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