6-5-1989

Wrestling With Bias

Daniel Seligman

KEEPING UP

Accountants' preferences in sex, Sandinistas on welfare, the unknown liberal, and other matters.

BY DANIEL SELIGMAN

WRESTLING WITH BIAS

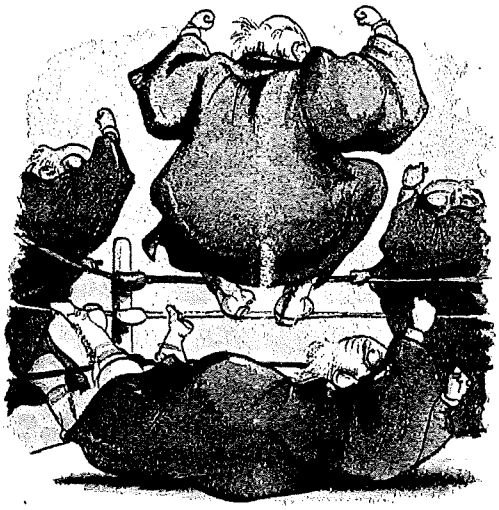
■ As expected, the media reacted affirmatively to the Supreme Court decision in *Price Waterhouse* v. *Hopkins*. They *always* approve when the decision makes it easier to claim bias. They said this one was a "balanced, sensible judgment" (New York *Times*) giving femmes an "important new edge in job discrimination suits" (Los Angeles *Times*). More rhapsodic was the *Newsday* columnist whose slant was foreshadowed by this headline: "High Court Gives Bimboism Forces Solid Thrashing."

Our own view is that the opinion is about as sensible as tag-team wrestling. What the decision really demonstrates is the infinite capacity of the judicial system to complexify the law of discrimination. The Supremes statedly took this case because the appellate level was all confused about the law. The one thing you can say for sure about their handiwork is that it has not reduced the world supply of confusion.

The case, you will recall, concerned a Price Waterhouse lady who failed to make partner. It was agreed by everybody that, although talented, Ann Hopkins was abrasive and hard to work with; it was also agreed—a little too rapidly, in our own opinion—that the firm's decision against her reflected a certain amount of impermissible sexist thinking. Sexist thinking was, as usual, defined in this case as "stereotypical" thinking about women, which, also as usual, turned out to involve the highly suspect belief that the sexes might be different along various temperamental and personal dimensions, a perspective that somehow got to be against the law when you weren't looking. In fact, the record in this case does not show that Price Waterhouse preferred one gender over the other. What it did prefer was feminine women over masculine women—a bias that Congress never had the nerve to outlaw and is certainly not mentioned in the Civil Rights Act.

But, of course, the Supremes were assuming that Price Waterhouse *had* shown impermissible bias. The question they aimed to clarify was this: What does the Civil Rights Act require in such "mixed motive" cases, wherein decisions against the employee are held to reflect both prejudice and legitimate concerns?

REPORTER ASSOCIATE *Patty de Llosa*



Responding to the question, the High Court produced four different answers:

■ First, there was a four-man liberal plurality (Brennan, Marshall, Blackmun, Stevens) that said if the decision was even slightly tainted by sex bias—if "gender played a part"—then the burden is on the company to show by a preponderance of the evidence that it would have reached the same decision absent the bias.

■ Then there were two centrists (O'Connor and White), who partly agreed with these rules but added a large caveat: The plaintiff must show the sex bias was a "substantial factor" in the decision against her.

■ White also had an odd wrinkle all his own: While the company must prove it had legitimate reasons for turning down the woman, it should be able to do so without a lot of "objective evidence," merely by "credibly" testifying on its reasons.

■ Then there were the conservatives (Rehnquist, Scalia, Kennedy), who said, in effect, hey, what's going on here? Why should employers bear the burden of proof? Whatever mixture of motives the case presents, the plaintiff still has to prove that but for her sex, she would have got the job. If she can't prove that, she has no case. This view is plainly too simple to prevail. Some even call it bimboism.

THE FUNGIBILITY FOLLIES

■ Under American law, you are ineligible for public assistance if you have as little as $1,000 in financial assets. Although occasionally denounced as excessively hard-nosed, the requirement is all too logical. The purpose of public assistance is to help you obtain life's necessities—not to help you save. But since money is fungible, any assistance you get while retaining your own funds is, in effect, enabling you to save.

This whole train of thought leaped into consciousness the other day when we picked up the paper and morosely read that the Bush Administration is proposing a bit of public assistance for the Soviet Union. It would take the form of subsidies, apparently worth $15 million or so, to reduce the price of wheat sold to the Russians. The decision seems to have several strands to it, one of which is old reliable farm-bloc politics. In addition, however, some Bushmen seem to feel that the present Soviet leadership, whose perestroika they support, is stone cold dead in the market and needs help for its desolate civilian economy.

But wait: The Politburo is plainly not down to its last kopek. Soviet defense spending, as noted here a fortnight ago, is still rising by 3% in real terms (vs. a planned U.S. decline of 1%). The Russians still send an avalanche of military aid to their assort-

ONLY IN AMERICA (Cont'd)

■ *An affirmative-action program at the* Columbia Law Review *that goes far beyond similar plans at other student legal publications . . . will set aside up to five extra places on its enlarged staff of 40. In selecting those students, preference will be given to gay, handicapped, and poor applicants, as well as women and members of minority groups . . .*

Although other law reviews have such programs, the Columbia plan is the broadest because it reaches beyond race, the editors said . . .

Michael Beeman, editor in chief of the Columbia Law Review *and the major proponent of the affirmative action plan, said it was meant to rectify years of exclusion of minorities and others . . .*

Mr. Beeman said that he did not have a firm count of the number of homosexuals at the law school or . . . conclusive evidence of past discrimination.

—From a news report in the New York *Times*.

ILLUSTRATIONS BY MICHAEL WITTE