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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-7099

District Court Civil Action No. 84-3040

ANN B. HOPKINS,

Appellee,

v.

PRICE WATERHOUSE,

Appellant.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties And Amici

The following parties appeared in this matter in the District Court below:

1. Price Waterhouse, a partnership.

2. Ann B. Hopkins.

The above-listed parties are parties to this action on appeal. There were no intervenors or amici in the court below.

B. Rulings Under Review

The rulings under review in this appeal are contained in the Remedial Order and Final Judgment of the United States District Court for the District of Columbia entered on May 25, 1990 by District Judge Gerhard A. Gesell, which is unreported and reproduced in the Appendix, at 252-53, and in the Findings of Fact and Conclusions of Law on Remand and accompanying Order entered by Judge Gesell on May 14, 1990, which also are unreported and reproduced in the Appendix, at 218-51.

C. Related Cases

This case was previously before this Court in *Hopkins* v. *Price Waterhouse*, Nos. 85-6052 & 85-6097 (consolidated). This Court's August 4, 1987 opinion is reported at 825 F.2d 458. The District Court's 1985 Memorandum and Order in *Hopkins* v. *Price Waterhouse*, No. 84-3040 are reported at 618 F. Supp. 1109. This case also was before the Supreme Court of the United States on writ of certiorari, *Price Waterhouse* v. *Hopkins*, No. 87-1167, and the Supreme Court's May 1, 1989 decision is reported at 109 S. Ct. 1775.

A related case brought by plaintiff under the District of Columbia Human Rights Act, D.C. Code § 1-2501, *et. seq.*, is pending in the Superior Court of the District of Columbia (Civ. Division), styled *Hopkins* v. *Price Waterhouse*, No. 3469-84.

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BRIEF FOR APPELLANT

PERTINENT STATUTES

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, are reproduced in the Addendum to this Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erroneously concluded that Price Waterhouse failed to establish by a preponderance of the evidence that it would have postponed for one year a decision regarding plaintiff's partnership candidacy regardless of her sex.

2. Whether the District Court was required by the law of the case doctrine to determine that plaintiff was constructively discharged by Price Waterhouse when she was not reproposed for partner notwithstanding its finding that plaintiff's own intentional unreasonable conduct had itself removed any possibility that she would be reproposed.

3. Whether the courts are authorized to compel the creation of a professional partnership as a remedy under Title VII of the Civil Rights Act of 1964.

4. Whether the District Court abused its discretion in ordering Price Waterhouse to make plaintiff a partner under the circumstances of this case.

5. Whether, even if Price Waterhouse is liable to plaintiff under Title VII, plaintiff is entitled to any damages in light of her own unreasonable conduct that prevented her from becoming a Price Waterhouse partner and her failure to seek comparable employment elsewhere.

JURISDICTION

This Court's jurisdiction is based upon 28 U.S.C. § 1291. The District Court's jurisdiction was based upon 42 U.S.C. § 2000e-5(f).

STATEMENT OF THE CASE

A. Nature of the Case and Procedural History

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Defendant Price Waterhouse is a national professional partnership engaged in accounting, auditing, tax, and management consulting. Plaintiff Ann B. Hopkins was a Price Waterhouse employee whose 1982-83 candidacy for partnership in the firm was deferred for further consideration the following year. She was not reproposed the following year and subsequently resigned from the firm. She contends that the 1983 deferral of her candidacy was influenced by considerations of sex. She filed this action seeking admission to the partnership, back pay and attorney's fees.

After a nonjury trial in 1985, *Hopkins* v. *Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985), the District Court found that plaintiff had problems with her "interpersonal skills" that provided a legitimate, nonpretextual basis for deferring plaintiff's partnership candidacy " 'to afford time to demonstrate that she has the personal and leadership qualities required of a partner.' " *Id.* at 1113. The court also found, however, that Price Waterhouse had permitted an unquantified level of "unconscious" sexual stereotyping to play an "undefined role" in its partner selection process. *Id.* at 1118. The court held that "once a plaintiff proves that sex discrimination played a role in the employment decision, the plaintiff is entitled to relief unless the employer has demonstrated by clear and convincing evidence that the decision would have been the same absent discrimination . . . . Price Waterhouse has not done so." *Id.* at 1120 (citations omitted).

The District Court found that although a flawed process may have contributed to the initial decision to defer plaintiff's partnership candidacy, the decision not to repropose her for partner the following year was not discriminatory. 618 F. Supp. at 1114-15. It also found that her subsequent resignation from the firm was voluntary and did not constitute a constructive discharge. *Id.* at 1121.

Because she had not been constructively discharged, the District Court determined that plaintiff was "not entitled to an order that she be made partner" or "to any monetary relief for the period subsequent to her resignation." *Id.* at 1121.

Both parties appealed. In August 1987, a divided panel of this Court affirmed the District Court's decision as to liability. The Court held that

> both plaintiff's personality and the sexually stereotyped reactions to her personality were significant factors in the firm's decision to hold her candidacy. Because Price Waterhouse could not demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor, however, the District Court properly found for Hopkins on the question of liability.

Hopkins v. *Price Waterhouse*, 825 F.2d 458, 471-72 (D.C. Cir. 1987).[1]

Plaintiff had not appealed and the Court of Appeals did not disturb the District Court's conclusion that Price Waterhouse did not discriminate against plaintiff when it decided not to repropose her for partner. However, the Court found that plaintiff had been constructively discharged because the decision to defer her candidacy in 1983 "coupled with the . . . failure to renominate her, would have been viewed by any reasonable senior manager in her position as a career-ending action." 825 F.2d at 473. The Court remanded the case for the determination of "appropriate damages and relief." *Id.*

The Supreme Court granted Price Waterhouse's petition for certiorari. On May 1, 1989, the Court reversed this Court's judgment of liability against Price Waterhouse. *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989). The Court held that both this Court and the District Court had erred in deciding that in a case where both permissible

[1] Judge Williams dissented from the panel's holding affirming liability, observing that "the record here provided no causal connection between Hopkins' fate and [sexual] stereotyping . . . . " 825 F.2d at 474.

and impermissible factors had contributed to an employment decision, a defendant could escape liability only by proving by clear and convincing evidence that it would have made the same decision irrespective of gender. The Court ruled that this showing need only be made by a preponderance of the evidence and remanded the case so that a determination could be made whether Price Waterhouse's "proof was preponderant." *Id.* at 1793.

There was no additional evidence related to liability.

Upon remand and after additional evidence, briefing and argument, the District Court ruled that Price Waterhouse "ha[d] not met its burden" under the preponderance of the evidence standard and therefore was liable under Title VII for its 1983 decision deferring plaintiff's partnership candidacy for one year. *Findings of Fact and Conclusions of Law on Remand* ("*Findings*"), App. at 228. The court reiterated its original finding that the decision not to repropose plaintiff for partnership the following year was not discriminatory and expressly articulated that that decision was the result of plaintiff's own "unreasonable intentional conduct." *Id.* at 240. Nonetheless, the District Court concluded that it had no choice but to accept as the law of the case the previous conclusion by the Court of Appeals that plaintiff had been constructively discharged when she was not reproposed. *Id.* at 231.

In determining the appropriate remedy, the court below ordered Price Waterhouse to admit plaintiff to its partnership as of July 1, 1990, *id.* at 233, 236-37, and awarded back pay for the period July 1, 1984 through June 30, 1990 in the amount of $371,175 and reasonable attorney's fees. App. at 252-53.

On June 21, 1990, Price Waterhouse timely filed its Notice of Appeal and Motion for Stay in the District Court. The District Court denied a stay on June 25, 1990, "except as to attorney fees." This Court granted Price Waterhouse's request for a stay of the partnership order and back pay award and expedited the appeal.

B. Statement of the Facts

Price Waterhouse provides services to corporate and government agency clients throughout the United States. 825 F.2d at 461. Despite its size, 900 partners in over 90 offices, *Findings*, App. at 235, it "has consistently sought to maintain the traditional characteristics of a professional partnership both in its management and partnership selection practices." 618 F. Supp. at 1111; *Findings*, App. at 221, 234.

Partnership selection is a conscientious process undertaken by the partners through the firm's governing Policy Board and its Admission Committee. It involves lengthy written and oral evaluations, analysis and discussion based upon "well-identified written criteria." *Findings*, App. at 221. The court below found that twice as many candidates are rejected or deferred each year as are accepted on first consideration. *Id.* at 221-23.

Among the considerations that form an "important part of Price Waterhouse's written partnership evaluation criteria," 618 F. Supp. at 1114, is the candidate's conduct toward colleagues and subordinates. The District Court found that a deficiency in this regard was "a legitimate, nondiscriminatory reason for refusing to admit a candidate to partnership." *Id.* Because relationships among personnel affects morale, attrition, and the capacity of the firm to function with efficiency, the court below agreed that "Price Waterhouse had every reason and legal right to come down hard on abrasive conduct in men or women seeking partnership." *Id.* at 1120.

The admissions process in 1982-83 revealed serious deficiencies in plaintiff's interpersonal relationships. Nearly two-thirds of the thirty-two partners that submitted written comments on plaintiff had objections to her conduct. *See* App. at 37-49. A recurrent theme was that plaintiff was "extremely overbearing," "arrogant and self-centered," "universally disliked by the staff," and presented a "risk that she may abuse authority." *Id.* at 37, 39, 43. Plaintiff received more "no" votes than 85 of the other

87 candidates in 1983 (618 F. Supp. at 1116) and "more negative comments than any other candidate that year." *Findings*, App. at 222.[2]

The Chairman of the firm's Admissions Committee testified:

> We did . . . talk with the partners throughout the whole admissions process that knew Ann Hopkins best. We spoke with the partners who had dealt with her on a day to day basis, partners who had known her casually and there was a basic underlying pervasive theme in all of our discussions and the responses that came through the partner canvas that she . . . had difficulty dealing with staff, relating to both the partners, the peers within the [Office of Government Services] group and the peers in other offices she visited and she had difficulty in relating and leading and developing staff that worked for her . . . [I]t was not an isolated comment, but it was a pervasive theme that . . . ran through a substantial number of partners that had contact with her.

Findings, App. at 222-23. The firm's Senior Partner and Chairman of the Policy Board testified on remand that "the partners generally believe that Ann had a problem in interpersonal skills and that as a result she was evaluated evenhandedly." App. at 210.

The "Admissions Committee wavered between rejecting [plaintiff's] candidacy outright or placing her on hold, but ultimately chose the hold option." *Findings*, App. at 223. The Policy Board adopted the Admissions Committee's rec-

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[2] Plaintiff was the only woman candidate in 1982-83. As of July 1984 Price Waterhouse had seven women partners. 618 F. Supp. at 1112. The District Court rejected plaintiff's claim that "the small number of women partners at Price Waterhouse indicates discrimination," *id.* at 1116, concluding that "[w]omen have only recently entered the accounting and related fields in large numbers and there is evidence that many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms." *Id.*; *see also* 825 F.2d at 464 n.2.

ommendation that plaintiff be held " 'at least a year to afford time to demonstrate that she has the personal and leadership qualities required of a partner.' " 618 F. Supp. at 1113. Price Waterhouse regularly held over candidates, male and female, "because of concerns about their interpersonal skills . . . . " *Id.* at 1116.

The "hold" decision provided plaintiff a legitimate and fair opportunity to become a Price Waterhouse partner:

> [T]here is little reason to believe the hold was a cynical gesture; 16 of the 19 candidates placed on hold with Ms. Hopkins in 1983 made partner in 1984, and in her case the decision to hold her over appears to have been a considered business decision that her talent justified giving her candidacy another look. It is clear from the record that she was given a genuine chance to demonstrate her ability to overcome her differences in interpersonal relationships.

Findings, App. at 241-42.

The District Court found that plaintiff's "conduct provided ample justification" for the complaints that resulted in the deferral of plaintiff's candidacy. 618 F. Supp. at 1114. However, the court also concluded that some of the comments about her may have been "tainted by unarticulated, unconscious assumptions related to sex." *Id.* at 1118. Plaintiff's expert witness testified that women engaged in assertive behavior may be judged more critically than males. While this witness "could not pinpoint the degree to which stereotyping had influenced the selection process" and was unable to state whether any "particular reaction was determined by the operation of sex stereotypes," *id.* at 1117, the court found that "stereotyping played an undefined role in blocking plaintiff's admission to partnership in this instance." *Id.* at 1118.

After being informed of the decision in March 1983 that her partnership candidacy would be held over, plaintiff undermined her chances for a Price Waterhouse partnership. One partner who switched from a "hold" to oppo-

sition did so because he found plaintiff "disagreeable to work with and had reservations about her technical skills and dedication to the firm." *Id.* at 1114. The District Court found "no proof that his position was animated by animosity toward her sex." *Id.*

An important ally of plaintiff's and a key partner in plaintiff's office and department switched to opposition because of the following incident:

> Soon after the hold decision, in April 1983, Ms. Hopkins arranged a luncheon date with an OGS [Office of Government Services] partner, Donald Epelbaum. The evidence is strong that, at that luncheon, Ms. Hopkins misstated the substance of a meeting, held a few days earlier, between herself and Joseph E. Connor, the Chairman and Senior Partner of Price Waterhouse, regarding her partnership prospects. Ms. Hopkins misleadingly implied that Mr. Connor had disparaged certain partners who opposed her candidacy and that he had warned of the adverse consequences his partners might experience for opposing her the next year. Mr. Epelbaum felt immediately that Ms. Hopkins had misrepresented Mr. Connor's position, because he knew it was not Mr. Connor's style to attempt to manipulate partnership decisions and to disparage his partners to a non-partner employee. . . . Ms. Hopkins' misrepresentation of Mr. Connor's views was a key factor influencing Mr. Epelbaum to withdraw his previously strong support of Ms. Hopkins.

Findings, App. at 240-41. The District Court found Mr. Epelbaum "to be a credible witness and accept[ed] his account of these events." 618 F. Supp. at 1114.

As a direct consequence of plaintiff's conduct after the hold decision, she was not reproposed for partner. The District Court found that the decision not to repropose her was not discriminatory. 618 F. Supp. at 1115. After remand, the District added that it was plaintiff's "unreasonable intentional conduct" that was the cause of the "nondiscriminatory decision not to repropose . . . ." *Find-*

ings, App. at 240-41. Plaintiff's "own intentional conduct materially prevented a fair test of her performance during the hold period and . . . she herself created a condition which removed any possibility that she would be accepted as partner after the hold." *Id.* at 242.

After she left Price Waterhouse in January 1984, plaintiff "failed to make a reasonable effort to obtain similar employment . . . when opportunities elsewhere clearly existed." *Id.* at 243. Although there was "a significant demand both locally and nationwide for management consultants at Big Eight and other accounting firms, management consulting firms, and within large businesses," *id.*, plaintiff "failed to make a reasonable, conscientious effort to work at her calling at a level available to her which would satisfy her duty to mitigate damages." *Id.* at 243-44.

Consistent with her conduct at Price Waterhouse, plaintiff continued to be her own worst enemy:

> It appears from the evidence that she over-emphasized her status in her own mind and chose work accordingly—first taking the risks of a new business venture and then turning to the relatively noncompetitive atmosphere of government service. She was simply not interested in the private sector except as a principal [partner] and found no immediate or guaranteed partnership available among those who had more remunerative work to offer in her field. So long as partnership eventually remained somewhat conjectural, she was not interested. Vindication dominated her thinking and kept her earnings below what she could have earned by reasonable effort in her field.

Findings, App. at 244.

Plaintiff made virtually no effort to seek a position leading to a partnership at another major accounting firm and her conduct continued to undermine her career prospects. For example, she abruptly walked out of a meeting with

a partner of a "Big Eight" firm who was willing to discuss a senior manager level position on a " 'relatively fast track' " toward partnership because the proposal did not offer an instant partnership. *Id.* at 245.

Plaintiff "never formally applied for a management consulting job at any firm," did "not send her resume" to prospective employers, made "almost no effort to work with executive search firms," "rejected at least two offers of employment with smaller firms," and "made no genuine try" to find a comparable position. *Id.* at 245-46.

Instead of seeking out positions that were or would lead to employment comparable financially and otherwise to a Price Waterhouse partnership, plaintiff went into business for herself and, a few years later, for personal reasons, she abandoned her business and went to work for the World Bank, where she now earns approximately $92,000 per annum. She could have found work that paid substantially more but, "[f]or whatever reason, she simply chose not to seek such a position." *Id.* at 247.

SUMMARY OF ARGUMENT

The court below made four significant errors that require reversal.

1. It was clearly erroneous to conclude that Price Waterhouse had not proven by a preponderance of the evidence that the Hopkins partnership candidacy would have been deferred regardless of plaintiff's sex. The evidence was direct, widespread, consistent, and largely uncontradicted that plaintiff was abusive to subordinates and generally unpleasant to her peers. Those comments reflected a genuine and material deficiency in an area that was a legitimate criterion in the written Price Waterhouse partnership selection standards. And the partners took the logical, reasonable and customary step for a candidate in these circumstances: They held her over for another year to give her an opportunity to overcome her difficulties. However, her temperament continued to frustrate her chances for advancement, destroying her opportunity to be reproposed for partner.

Neither the plaintiff nor the trial court even attempted to weigh the mountain of gender-neutral criticisms of plaintiff's interpersonal relationships against the few comments that may arguably have been the product of sexual stereotyping. In fact, the analytical approach urged upon and accepted by the court below did not involve weighing the evidence at all. Instead, the court held that because some of the comments about plaintiff may have reflected stereotyping, all of them were presumptively invalid in the absence of further explanation by the partners submitting those comments or by expert testimony to the effect that facially gender-neutral comments were indeed gender-neutral. By this convenient but entirely irrational process, all the criticisms of plaintiff's "conduct" that the District Court had once found to have provided "ample justification" for the deferral of her partnership candidacy were simply erased from the equation.

This approach elevated speculation above actual evidence. On the one side, there was serious and substantial criticism of plaintiff's manner, incontrovertible evidence that male candidates with similar problems were perceived and treated similarly, and a continuing pattern of impulsive, aggressive, thoughtless behavior. The vast majority of the criticisms of plaintiff did not mention her sex and made no reference to any subject that could even arguably be said to reflect sexual stereotyping. On the other side, plaintiff presented literally nothing except the generalized testimony of her expert that virtually any comment that characterized plaintiff as abrasive, abusive or excessively aggressive was suspect. But even plaintiff's expert could not label most of the criticisms of plaintiff as demonstrably tainted by stereotyping.

Plaintiff's expert may have been enough to establish that some unquantified measure of impermissible considerations had been allowed to seep into the partnership selection process and shift the burden of proof to Price Waterhouse. But surely the trial court had the legal duty not to disregard the painstaking decisionmaking process that Price

Waterhouse did apply and the host of unchallenged individual critical comments and evidence of equal treatment of other candidates that it did produce. Had the court below not simply neutralized all the concerns about plaintiff's personality, it would have had no choice but to conclude that plaintiff's candidacy, regardless of her gender, would have been deferred.

2. An egregious miscarriage of justice will result if this Court does not correct the District Court's erroneous conclusion that it had virtually no choice but to award plaintiff a partnership and back pay because of this Court's previous statement "that Ms. Hopkins was constructively discharged when [the decision was made] not to repropose her [for partner.]" *Findings*, App. at 231. The District Court had squarely held after the first trial that the decision not to repropose plaintiff for partnership was not connected with her sex, and was not discriminatory. Plaintiff did not even appeal that finding. On remand, the District Court reiterated in clear and unmistakable terms that after the deferral, plaintiff was given a "genuine chance" to overcome her difficulties and to become a Price Waterhouse partner. Plaintiff alone destroyed that opportunity, "materially prevented a fair test of her performance," and "removed any possibility" that she would be made partner.

The decision by the Court of Appeals that the hold decision, "coupled with" the failure to repropose plaintiff for partner, constituted a constructive discharge was therefore based on an incomplete or erroneous reading of the trial court's analysis of the decision not to repropose. Furthermore, the holdover process was an accepted and acceptable Price Waterhouse means of correcting perceived deficiencies, not a death knell to a candidate's partnership hopes as the Court of Appeals erroneously concluded.

The law of the case doctrine did not compel the District Court to accept the Court of Appeals' constructive discharge decision because it was part of an opinion that was vacated and not binding on the District Court. Moreover,

for her when she, herself, was the principal impediment to the attainment of that goal.

Finally, if this Court determines that Price Waterhouse is liable to plaintiff under Title VII, but agrees that plaintiff is not entitled to a Price Waterhouse partnership, plaintiff's recovery should be limited to attorney's fees and back pay for a limited period. In light of her failure to mitigate damages and even to seek a comparable position after leaving Price Waterhouse, she is entitled to no more.

ARGUMENT

I

PRICE WATERHOUSE ESTABLISHED THAT IT WOULD HAVE DEFERRED PLAINTIFF'S PARTNERSHIP CANDIDACY REGARDLESS OF HER GENDER

The District Court erroneously concluded that Price Waterhouse had not established by a preponderance of the evidence that plaintiff's partnership candidacy would have been deferred regardless of her gender. The evidence was substantial and manifestly preponderant that any candidate who had presented the record amassed by plaintiff would have been deferred wholly independent of any other consideration. The Court below failed to weigh the evidence; had it done so, Price Waterhouse would have prevailed, and properly should prevail, on liability.

Price Waterhouse acknowledges that to the extent the District Court properly reviewed and weighed the evidence, any challenge to the decision below will be rejected unless that decision was clearly erroneous. *See, e.g., Anderson* v. *City of Bessemer*, 470 U.S. 564 (1985). Although it is a difficult standard, this Court has not hesitated to overturn district court decisions when the clearly erroneous standard has been met. *See, e.g., Palmer* v. *Baker*, 52 Fair. Empl. Prac. Cases (BNA) 1458, 1461-62 (D.C. Cir. 1990).

The clearly erroneous standard is considerably less formidable, however, when a trial court has not actually re-

viewed and evaluated the evidence, *see Underwood* v. *District of Columbia Armory Bd.*, 816 F.2d 769, 775-76 (D.C. Cir. 1987) (reversing factual finding where district court appeared not to have weighed substantial evidence at all), or has committed a legal error in the process of doing so. *Case* v. *Morrisette*, 475 F.2d 1300, 1307-08 (D.C. Cir. 1973) (questions of law "do not find shelter in the 'clearly erroneous' requirement" and a "finding is 'clearly erroneous'. . . if it was induced by an erroneous application of the law"). In this case the District Court simply nullified all of the evidence on one side of the evidentiary equation. Thus, the District Court's judgment of liability against Price Waterhouse must be reversed because its process was erroneous as a matter of law. Alternatively, because the District Court failed to give sufficient weight to Price Waterhouse's evidence as a result of a thin and inadequate generic challenge to that evidence by plaintiff, its judgment of liability was manifestly and clearly erroneous.

The evidence was substantial and consistent that plaintiff's interpersonal skills generated complaints throughout her career at Price Waterhouse that were wholly unrelated to her gender. The Price Waterhouse partnership selection process, described *supra* at 5, was thorough and punctilious. It produced a widespread outpouring of negative comments and "no" votes. As the District Court held, "the firm's practice of giving 'no' votes great weight treated male and female candidates in the same way." 618 F. Supp. at 1116.

The vast majority of the negative comments regarding plaintiff's "considerable problems dealing with staff and peers," *id.* at 1120, had nothing to with gender and were never identified by plaintiff, her expert witness, the District Court, the Court of Appeals, or the Supreme Court as containing any language that revealed sexual stereotyping. For example, one partner commented that plaintiff is "just plain rough on people. Our staff did not enjoy working for her. There is a risk that she may abuse authority." App. at 43. Another partner noted that plaintiff

"can be abrasive, unduly harsh, difficult to work with [and], as a result, causes significant turmoil." *Id.* at 42.[3]

The record is replete with numerous similar gender-neutral expressions of concern over plaintiff's difficult relations with subordinates, peers, and with partners.[4] These comments were elicited independently from different partners in different offices based upon a variety of experiences with plaintiff at different points in her career at the firm. They were never shown to have been influenced by each other or related in any way other than their uniform and intense focus upon plaintiff's mistreatment of colleagues and subordinates.

Plaintiff's peers and subordinates, who were not even alleged to have been affected by any sexual stereotyping in the partnership selection process, were equally forceful about the difficulties involved in working with and for

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[3] These two partners were called as witnesses by Price Waterhouse during the 1985 trial and they testified as to the factual bases and nondiscriminatory motivations for their comments. App. at 126-34; *id.* at 147-69. The District Court's blanket statement on remand that none of "those partners making negative comments [have] been presented for appraisal of the motivations underlying their comments," *Findings*, App. at 227, simply overlooked this testimony and is incorrect.

[4] *See* App. at 43 ("Staff does not like working for her."); *id.* at 44 ("On occasion, she'll forget herself [and] lose sensitivity for staff."); *id.* at 41 ("very abrasive in her dealings with staff."); *id.* at 40 ("caused a complete alienation of the staff . . . [and] a fear that they would have to work with Ann if we won the project."); *id.* at 39 ("is universally disliked by the staff and . . . does not possess the interpersonal skills or personal attributes that are critical"); *id.* at 37 ("tended to alienate the staff in that she was extremely overbearing"); *id.* ("can also be abrasive in dealing with staff members"); *id.* (projected "arrogance [and] self-centered attitude"); *id.* at 41 ("rather unpleasant"); *id.* at 39 ("interpersonal relationships are extremely poor"); *id.* at 43 ("still has a few rough spots which need to be corrected"); *id.* ("needs a chance to demonstrate people skills"); *id.* at 38 ("I believe Ann does *not* possess the leadership qualities we desire in our ptrs.").

plaintiff,[5] and even female staff members who testified on plaintiff's behalf pointed out that "her hard driving style might be regarded as 'controversial' and that it required 'diplomacy, patience, and guts' to work with her." 618 F. Supp. at 1114 & n. 5 (quoting Tr. 423, 434).

Plaintiff herself testified that she was "abrasive" and "hard driving" (App. at 60-62) in dealing with staff. Price Waterhouse also introduced "contemporaneous records of counseling sessions conducted well before the plaintiff was proposed for partnership [that] indicate that the partners found her too assertive, overly critical of others, [and] impatient with her staff . . . . " 618 F. Supp. at 1114 & n.4; App. at 16-36. "At the time, plaintiff indicated that she agreed with many of these criticisms." *Id.*

Price Waterhouse partnership "candidates are regularly held because of concerns about their interpersonal skills . . . . " 618 F. Supp. at 1116. Male candidates who were as highly regarded as plaintiff in the area of technical skills, business generation, and dedication to the firm were either placed on hold or rejected outright because of interpersonal skills problems equivalent to or even less pronounced than plaintiff's. *See, e.g.*, Def. Ex. 64; App. at 121-22.[6] Thus, for example, a male candidate who was held

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[5] For example, one consultant employed by Price Waterhouse described plaintiff's manner as "abrupt" and insensitive" (App. at 136) and testified that "it was tough dealing with Ann and I don't think I've had that type of same tough experience prior to or after" working with plaintiff. *Id.* at 144. There also was evidence that plaintiff manifested a "condescending attitude[ ]" toward staff assigned to her projects. *Id.* at 133. Working for her was "demeaning at times" (*id.* at 136) and one consultant testified that he felt Hopkins "looked down upon" him. *Id.* at 137. One individual actually quit the firm in part because he could not tolerate working with plaintiff (*id.* at 76-77), citing an incident in which plaintiff had screamed obscenities at him for 45 minutes. *Id.* at 76.

[6] Price Waterhouse appended to its Brief on Remand a summary of the files contained in Def. Ex. 64 of several male candidates whose profiles were similar to plaintiff's. *See* App. at 172-91. This is seemingly precisely the kind of "objective evidence" that the Supreme Court

in high esteem by virtually every Price Waterhouse partner with whom he had worked was "held" because he had a "history of being tough and dogmatic to the point of causing problems with staff and clients." App. at 172.

Historical evidence established that Price Waterhouse treated male and female candidates with deficient interpersonal skills equally. Plaintiff was unable to undermine or refute this evidence. After reviewing the records of the 135 candidates (App. at 58-59) elected to the partnership during the three-year period 1982-84,[7] plaintiff could point to only two candidates admitted in the face of material criticism of their interpersonal skills. 618 F. Supp. at 1115 & n.6. The District Court found that "Price Waterhouse had legitimate, nondiscriminatory reasons for distinguishing between plaintiff" and those two partners. *Id.* at 1115.

The decision of Price Waterhouse at issue in this case was only a one-year *deferral* of the Hopkins partnership candidacy. Twenty-one of the candidates in plaintiff's partnership class were rejected outright. 825 F.2d at 462. The Admissions Committee "wavered," *Findings*, App. at 223, but ultimately chose the hold alternative. The District Court found that the deferral was intended in good faith to provide her with a "genuine chance to demonstrate her ability to overcome her differences in interpersonal relationships." *Id.* at 242. Most candidates held over each year make partner the following year. *See id.* at 241-42. Making plaintiff a partner or rejecting her outright would have

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contemplated should be considered in determining whether the firm had met its burden on the "same decision" issue. *See* 109 S. Ct. at 1791; *compare NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 396-97, 404 (1983) (when the "transgressions that purportedly would have . . . prompted [the] discharge were commonplace, and no transgressor had ever before received any kind of discipline," employer failed to meet burden of showing discharge would have occurred absent antiunion animus).

[7] "Price Waterhouse made every document generated by [its] admission process on candidates proposed for admission in 1982, 1983 and 1984 available to the plaintiff during the course of discovery in this case." 618 F. Supp. at 1112.

been substantially irrevocable. A deferral, however, was not permanent and it is not difficult to understand how even materially lesser doubts about plaintiff's capacity to control her own behavior would have justified a "hold" decision.

Finally, there was direct testimony in 1985 from the Chairman of the firm's Admissions Committee and the Chairman and Senior Partner of the firm. They both testified unequivocally that it was plaintiff's actual conduct in dealing with staff and peers, not sex stereotyping or "discrimination in any way,"[8] that led to the decision to place plaintiff's candidacy on hold. As Justice White explained in his concurring opinion in this case:

> In a mixed motive case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action.

109 S. Ct. at 1796 (White, J., concurring in the judgment).

Other than recalling the same witnesses that testified at the first trial to repeat their testimony and recite once again that their criticisms of plaintiff's conduct was not motivated by sexual stereotyping, Price Waterhouse could have done little more to satisfy its burden of proof.

The Supreme Court's mandate directed the District Court to reweigh the evidence under the preponderance of the evidence standard—"the rock bottom at the fact-finding level of civil litigation." *Charlton* v. *Federal Trade Commission*, 543 F.2d 903, 907 (D.C. Cir. 1976). Preponderance of the evidence simply requires that a party prove

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[8] *See, e.g.*, App., 72-73; *id.* at 91-112; *id.* at 210. A partner who was a member of both the Admissions Committee and the Policy Board also testified to the nondiscriminatory basis of the decision. *Id.* at 121.

that a fact is more likely true than not. *See* 3 L. Sand, J. Siffert, S. Reiss, J. Sexton & J. Thorpe, *Modern Federal Jury Instructions* ¶ 73.01 (1990).

The District Court had already found that the factors described above, including plaintiff's "conduct," provided "ample justification for the . . . decision" to defer plaintiff's partnership candidacy. 618 F. Supp. at 1114.[9] Plaintiff, on the other hand, was able to point to only a few of the comments[10] as even arguably gender-related. Her expert felt that any criticism of plaintiff was illegitimate, but could not isolate any particular reaction as affected by stereotyping. *Id.* at 1117. The District Court itself found it "impossible" to identify any particular negative reaction as being motivated by plaintiff's sex. *Id.* at 1118.

Plaintiff did not want the evidence weighed on remand and developed the argument that it was "impossible" to weigh the evidence because the existence of sex stereotyping in the process acted to disqualify all the comments. *See, e.g.*, Pl. Br. on Remand at 2-11. Any negative reaction to plaintiff had to reflect stereotypical responses to an aggressive woman.

The District Court apparently accepted this theory. Rather than reweighing the evidence under a "less exacting standard" of proof (*Findings*, App. at 219), the District Court reopened the issue whether *any* of the firm's concerns regarding plaintiff's interpersonal skills were in fact legitimate and nondiscriminatory. *See, e.g., id.* at 226-27 & n.6. It concluded that it could not engage in an evaluation of the evidence because Price Waterhouse had "failed to separate out those comments tainted by sexism

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[9] The District Court simply walked away from this finding by observing that it was included in the portion of the court's opinion having to do with whether the objections to plaintiff were fabricated and not in the portion of the opinion having to do with sex stereotyping. *Findings*, App. at 227 n.6. However, the genuine complaints about plaintiff's conduct were no less compelling because of the District Court's decision about where to discuss them in its opinion.

[10] *See* 825 F.2d at 463.

from those free of sexism," *id.* at 227, and because Price Waterhouse had not "identif[ied] each sexually stereotyped negative comment." *Id.* at 226. Thus, on remand the District Court did not analyze, evaluate, or weigh the evidence at all.[11]

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[11] The District Court faulted Price Waterhouse for not producing additional evidence "in light of the lowered burden of proof," *Findings*, App. at 220, particularly "to enable it to differentiate between all sexually stereotyped comments and comments not influenced by stereotyping." *Id.* at 226. However, the plaintiff contended that the issue on remand was the same as in the first case, only the standard of proof had been changed, and "emphatically" opposed reopening the record on liability. Tr. of Oct. 3, 1989 Hearing at 1-3. The Supreme Court stated that a remand would permit the trial court to "determine whether Price Waterhouse *had proved*" that it would have put the plaintiff's candidacy on hold regardless of her gender. 109 S. Ct. at 1793 (plurality opinion) (emphasis added); *id.* at 1806 (O'Connor, J., concurring in the judgment) ("On remand, the District Court should determine whether Price Waterhouse *has shown* by a preponderance of the evidence that if gender had not not been a part of the process" it would have made the same decision). Thus, it is by no means clear that it would not have been an abuse of discretion to reopen the evidence on this issue on remand.

The Supreme Court also implied that subjective evidence in the form of the employer's own testimony would be suspect. *Id.* at 1791 & n.14 (plurality opinion). And the Justices expressed considerable skepticism regarding the need for or value of expert testimony to tell a court whether comments reflect sex stereotyping. *Id.* at 1793 ("[i]t takes no special training" to recognize sex stereotyping); *see id.* at 1805 (O'Connor, J., concurring in the judgment) ("in my view testimony such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden"); *id.* at 1813 n.5 (Kennedy, J., dissenting) ("Today's opinions cannot be read as requiring factfinders to credit testimony based on this type of analysis."). As demonstrated in the text above, the evidence in the record consisted of strong criticisms of plaintiff's conduct by partners, colleagues, and subordinates, objective evidence of equal treatment of male candidates with similar problems and characteristics, a continuing pattern of conduct by plaintiff that persisted even after the deferral of her candidacy and after she left Price Waterhouse, and direct testimony of partners in the firm that their concerns were addressed to plaintiff's conduct and not her sex. The record established that plaintiff suffered from deficiencies in her interpersonal skills that warranted, and would have led to, the hold decision irrespective of her gender.

The District Court's approach was manifestly erroneous and unfair, and cannot be reconciled with the Supreme Court's mandate in this case. Price Waterhouse did *not* have the burden on remand of proving that its concern with plaintiff's interpersonal skills was nondiscriminatory—the firm had already established "that Hopkins' interpersonal problems were a legitimate concern," 109 S. Ct. at 1792, and the sole issue on remand was whether this legitimate concern "standing alone, would have induced it to make the same decision." *Id.* There was a preponderance of gender-neutral negative comments as well as multiple additional factors, including direct testimony from key firm decisionmakers, that demonstrated that Price Waterhouse's "probable decision in the absence of an impermissible motive," *id.* at 1791, would have been to place the Hopkins candidacy on hold. The District Court, however, allowed the speculation of plaintiff's expert to trump hard evidence and to disqualify as tainted every criticism of plaintiff's "conduct" that in the first trial it had found to have been legitimate, understandable and ample. Because some expressions of objections to plaintiff's conduct may have been improper, the District Court threw the baby out with the bath water.

The District Court's rationale creates a peculiar Catch 22 for a defendant accused of gender bias. Every criticism of abusive conduct by a woman becomes *ipso facto* an example of judging a woman more critically "because aggressive conduct is viewed as a masculine characteristic." 618 F. Supp. at 1118. Thus, no such comment can be proven to be legitimate because every such comment can be characterized as "unarticulated, unconscious assumptions related to sex." *Id.* In this world, a woman who is disagreeable and abusive to subordinates cannot be held accountable for such behavior.

II

THE DECISION NOT TO REPROPOSE PLAINTIFF FOR PARTNER DID NOT RESULT IN A CONSTRUCTIVE DISCHARGE

In considering an appropriate remedy, the District Court found itself facing a perplexing conundrum. The District Court knew, and had twice expressly found, that while sexual stereotyping may arguably have been a factor in Price Waterhouse's initial decision to defer consideration of plaintiff's partnership candidacy, discrimination had *not* been responsible for plaintiff's ultimate failure to make partner. That goal was put out of her reach by the deliberate and unreasonable conduct of the plaintiff herself. But the Court of Appeals had inexplicably "coupled" (825 F.2d at 473) the hold decision with the failure to repropose, even though the former was found to have been tainted by discrimination and the latter was not, and had held that the two events taken together constituted a constructive discharge. *Id.* If this was the law of the case, and beyond the District Court's ability to modify, then the District Court felt that it had no alternative but to award plaintiff a partnership even though the plaintiff herself had created the condition that "removed any possibility" that she could be partner.

In order to unscramble and analyze properly the events leading up to the District Court's dilemma, it is necessary first to review briefly what happened to plaintiff at Price Waterhouse. As the District Court perceived it, a flaw in the process that reviewed plaintiff's partnership candidacy in the 1982-83 fiscal year contributed to the decision to defer her candidacy for reconsideration the next fiscal year. But holding a candidate for further consideration to the next year was quite routine and most deferred candidates made it successfully the next year:

> A holdover was shown to be part of the process by which the firm attempted to correct or minimize a perceived deficiency. Indeed, 16 of the 19 candidates

> put on hold along with Ms. Hopkins in 1983 made partner the next year.

Findings, App. at 231 n.8. Thus, even if the hold decision had been discriminatory, plaintiff was given a genuine, good faith, nondiscriminatory opportunity to be a Price Waterhouse partner. However, plaintiff was not reproposed for partner during the 1983-1984 cycle because she alienated her supporters and took herself out of the running. Once she was not reproposed, her chances for a Price Waterhouse partnership became slight, and, although she was invited to stay on as a senior manager, she resigned in January of 1984.

The District Court did not see these events as a constructive discharge because it did not feel that defendant had driven plaintiff to quit by making her working conditions intolerable. However, the Court of Appeals saw it differently. Redefining the law of constructive discharge, the court focused on the fact that plaintiff's ambition was to be a Price Waterhouse partner and that after she was not reproposed, it had become " 'very unlikely' " that she would ever become one. 825 F.2d at 472. The Court of Appeals assumed that it was "the customary and nearly unanimous practice" at Price Waterhouse and at other firms for senior managers who have been passed over for partnership to resign. Thus, according to the Court of Appeals, because plaintiff had been pushed into a dead-end, her departure was not voluntary and its circumstances constituted a constructive discharge.

The problem with the Court of Appeals decision is the presumption, contrary to the direct and unappealed finding below, that the decision not to repropose was part of the discriminatory process. If it had been, plaintiff may indeed have been stalled in reaching her career objective as a result of discrimination and a constructive discharge finding might have been understandable. However, only the deferral decision was, even arguably, discriminatory. At that point, plaintiff had a viable chance to make partner and, as the District Court found, it most certainly was *not*

the custom of senior managers to leave after having been "held." In fact, most of them stayed and made partner the following year. Therefore, at the point of the deferral decision, there was no colorable argument that plaintiff had been constructively discharged. She was a viable candidate with a legitimate chance to succeed.

At this point, plaintiff pulled the plug on her own career. She, not Price Waterhouse, caused herself not to be reproposed. Under these circumstances, a conclusion that there had been a constructive discharge is plainly contrary to the facts and law.

The plaintiff argued below, and the District Court agreed, that since Price Waterhouse did not "appeal" the Court of Appeals' constructive discharge decision, it is the law of the case and, whether wrong or not, was binding on the court. But that is not correct.

After the Supreme Court reversed the judgment against Price Waterhouse on liability, this Court issued an order vacating both its August 4, 1987 "mandate" and the judgment of the District Court and remanded the case to the District Court for "further proceedings." App. at 171. In this Circuit, the "mandate" of the Court of Appeals "consist[s] of . . . the Court's opinion and judgment." *City of Cleveland* v. *Federal Power Commission*, 561 F.2d 344, 347 n.25 (D.C. Cir. 1977).[12] Thus, when this Court vacated its mandate, it automatically and necessarily vacated its August 4, 1987 opinion in this case, and necessarily stripped the opinion of any precedential effect at later stages of the proceedings. *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n.12 (1975).[13]

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[12] "This Circuit does not utilize a formal document called a mandate. Rather the Clerk issues a certified copy of the judgment and the opinion . . . of the Court in lieu of mandate. *The rules and the Court's orders refer to that document as 'the mandate.'* " Handbook of Practice and Internal Procedures, XII (2) (D.C. Cir. Aug. 1, 1987) (emphasis added). *See* App. at 170.

[13] Prior to the 1990 trial on remand, and even during that trial, plaintiff conceded that this Court had vacated its 1987 opinion: "We

Moreover, even if, as the District Court found, this Court did not intend to vacate its earlier opinion, "the doctrine of the law of the case 'is not an inexorable command that rigidly binds a court to its former decisions but rather is an expression of good sense and wise judicial practice.' " *Melong* v. *Micronesian Claims Commission*, 643 F.2d 10, 17 (D.C. Cir. 1980) (citation omitted); *see Safir* v. *Dole*, 718 F.2d 475, 481 n.3 (D.C. Cir. 1983) ("Application of the doctrine is in any event discretionary"), *cert. denied*, 467 U.S. 1206 (1984). This Court has recognized that where "adherence to the law of the case will work a grave injustice," *Laffey* v. *Northwest Airlines, Inc.*, 642 F.2d 578, 585 (D.C. Cir. 1980), or " 'the [previous] decision was clearly erroneous," *Melong*, 643 F.2d at 17 (citation omitted), a departure from the law of the case is justified and appropriate. *See also Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983).

This is such a case. The District Court's second opinion has made clear that it was plaintiff's own "unreasonable intentional conduct" that " 'locked [her] into a position from which she could apparently obtain no relief,' " 825 F.2d at 472 (quoting *Clark* v. *Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981)), not any discriminatory conduct on the part of Price Waterhouse. Therefore, it is not legally or factually correct that plaintiff was constructively discharged when the partners of Price Waterhouse decided not to repropose plaintiff for partner. Since the District Court's partnership order is substantially predicated upon its assumption that this Court's constructive discharge ruling left it no choice but to order partnership in this case, that assumption should be set aside and the issue of the appropriate remedy should be reconsidered.

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recognize that [the Court of Appeals'] opinion was vacated following the Supreme Court's decision . . . ." Pl. Pretrial Br. On Remedy, at 5 (Jan. 17, 1990). *See also* 1990 Tr. at 86 ("we think that [the Court of Appeals' decision] had be[en] vacated.").

III

TITLE VII DOES NOT EMPOWER COURTS TO COMPEL PARTNERSHIP AS A REMEDY

The question whether federal courts have authority under Title VII to compel individuals to form a partnership is an issue of first impression. Indeed, no federal court has ever created a partnership to remedy a Title VII violation. However, the court below inexplicably determined that its authority to create a partnership was "firmly established" by the Supreme Court's decision in *Hishon* v. *King & Spalding*, 467 U.S. 69 (1984). But the plaintiff in *Hishon* did not seek a partnership. Therefore, the issue was not before the Court. *Id.* at 72. The "narrow holding" (*id.* at 78 n.10) in *Hishon* that "in appropriate circumstances partnership consideration may qualify as a term, condition, or privilege of a person's employment" for purposes of Title VII does not establish the power of courts under Title VII to create professional partnership relationships.

Title VII expressly applies only to "employment" arrangements and makes "reinstatement or hiring of *employees*" an available remedy. 42 U.S.C. § 2000e-5(g) (emphasis added). There is nothing in Title VII to suggest that it was intended to authorize courts to transform simple employment relationships into partnerships, or to order individuals to become partners once their employment relationship has been terminated.

A. Title VII Does Not Authorize Partnership As A Remedy

"As in all cases involving statutory interpretation," the Court must "look first to the language of the statute itself." *Hughey* v. *United States*, 110 S. Ct. 1979, 1982 (1990); *e.g.*, *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624 (U.S. June 21, 1990); *Moore* v. *District of Columbia*, No. 88-7003, slip op. at 5-7 (D.C. Cir. May 9, 1990) (*en banc*). The plain language of Title VII makes clear that Congress did not intend to authorize the courts

to create partnerships to remedy employment discrimination.

Title VII prohibits "unlawful employment practices for an employer." 42 U.S.C. § 2000e-2. Section 2000e(b) defines an "employer" as a "person . . . who has fifteen or more employees" and § 2000e(a) defines the term person to include "partnerships." Section 2000e(f) defines an employee as "an individual employed by an employer." The statute's remedial section provides, in pertinent part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, *reinstatement or hiring of employees*, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (emphasis added). Title VII speaks only of orders that require the "hiring, reinstatement, or promotion of an individual *as an employee* . . . ." *Id.* (emphasis added) A partnership may be an employer because Title VII expressly says so, but a partner is not an employee because a partner is not "an individual employed by an employer."

As Justice Powell observed in a concurring opinion in *Hishon* "[t]he relationship among . . . partners differs markedly from that between employer and employee." 467 U.S. at 79-80 (footnote omitted). A partnership is a voluntary and intentional "association of two or more persons to carry on as co-owners a business for profit." Unif. Partnership Act § 6 and *official comment*, 6 U.L.A. 22 (1969).[14]

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[14] " 'A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses.' " *Burke* v. *Friedman*, 556 F.2d 867, 869 (7th Cir. 1977) (quoting *Commissioner* v. *Tower*, 327 U.S. 280, 286 (1946)).

The "essence of the partnership is the common conduct of a shared enterprise." *Hishon*, 467 U.S. at 79-80 (Powell, J., concurring).

On the other hand, an " 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, . . . means someone who works for another for hire. . . . 'Employees' work for wages and salaries under direct supervision.' " *Allied Chemical & Alkali Workers Local Union 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (1971) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947)) (emphasis deleted).[15]

This Court is " 'bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used.' " *St. Agnes Hospital* v. *Sullivan*, No. 89-5144, slip op. at 7 (D.C. Cir. June 19, 1990) (quoting *INS* v. *Cordoza-Fonseca*, 480 U.S. 421, 431 (1987)). Congress authorized the courts to reinstate, hire, or promote employees, as employees, into employment positions.[16] It did not empower the judicial creation of partnerships.

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[15] In *Pittsburgh Plate Glass*, the Court concluded that Congress did not intend "the term 'employee' . . . to be stretched beyond its plain meaning embracing only those who work for hire," and held that retirees are not "employees" for purposes of the National Labor Relations Act ("NLRA"). The Court in *Hishon* relied upon *Pittsburgh Plate Glass*, noting that the "meaning of [the NLRA's] analogous language sheds light on the Title VII provision at issue here." 467 U.S. at 76 & n.7. Because "nothing in the legislative history of [Title VII] explicitly addresses the definition of employee," *Wheeler* v. *Main Hurdman*, 825 F.2d 257, 263 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987), the Court's approach in *Pittsburgh Plate Glass* is especially instructive in this case.

[16] Section 2000e-5(g) also states that a court may order "any other equitable relief as the court deems appropriate." However, "[i]n light of the principle of *ejusdem generis*—that a general statutory term should be understood in light of the specific terms that surround it—the catch-all phrase should not be read to introduce" partnership into the Title VII remedial scheme. *Hughey*, 110 S. Ct. at 1984; *see, e.g.*, *Federal Maritime Commission* v. *Seatrain Lines Inc.*, 411 U.S. 726, 734 (1973) (holding that "catch-all provision" is "to be read as bringing within a statute categories similar in type to those specifically enumerated"),

A contrary reading of the statute would be illogical. Justice Powell in *Hishon* pointedly emphasized that "the Court's opinion should not be read as extending Title VII to the management of a . . . firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment relationship to which Title VII would apply." 467 U.S. at 79. Thus, "[t]o date, courts have shown no disposition to extend [Title VII] to general partners." *Wheeler* v. *Main Hurdman*, 825 F.2d 257, 263 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987). For example, in *Wheeler*, the court noted that the "requirement that [Title VII] cover only employment situations suggests that Congress perceived a need to limit the application of [the] statute," *id.* at 276, and concluded that Title VII does not apply to the relationship among partners.[17] It is submitted that, if Title VII does not apply to the relationship among partners, it cannot reasonably be interpreted to authorize the courts to order individuals to create and enter into a partnership relationship and to supervise that relationship thereafter.

The history and purposes of Title VII do not suggest otherwise. Although the legislative history of the statute speaks in broad terms about the "wide discretion" to fashion equitable remedies vested in the district courts, the drafters of the statute did not mention partnership or other specific relief unrelated to employment as a remedial alternative.[18]

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aff'g, 460 F.2d 932 (D.C. Cir. 1972). The specific, express statutory language necessarily restricts the jurisdiction of the courts to equitable relief relating to employment relationships.

[17] *See also Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977) (rejecting argument that "partners can be regarded as employees rather than as employers who own and manage the operation of the business" under Title VII.); EEOC No. Dec. 85-4 (Mar. 18, 1985) (partners who are "not employed by the partnership," but "rather . . . are the co-owners who control and manage the business" cannot "be considered employee[s] under Title VII"). Plaintiff has conceded that Title VII does not apply to the relationship among partners. Appellee's Opp. to Mot. for Stay at 5 n.3.

[18] *See, e.g., Section-by-Section Analysis of H.R. 1746, The Equal Em-*

Title VII seeks to "make persons whole for injuries [of an economic character] suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). However, ordering that an employee be transformed into a partner, rather than reinstated as an employee and reconsidered for partnership, "catapult[s] [the employee] into a better position than [she] would have enjoyed in the absence of discrimination." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 234 (1982). Moreover, the " 'general rule' " expressed in *Albemarle* that " '[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed,' " 422 U.S. at 418-19, is no more than the traditional rule of contract damages,[19] and the award of monetary relief fully redresses any "economic injury" caused by discriminatory conduct. *See id.* at 417-19.

The District Court seemed to feel that the size and diversity of Price Waterhouse diminished its interest in judicial selection of its partners. *Findings*, App. at 234-35. However, the size of a particular partnership does not convert partners into employees. *See Wheeler*, 825 F.2d at 273. Had Congress intended to create a definitional distinction based upon the number of partners in a firm, it undoubtedly would have done so expressly, as it did when it defined the term "employer" on the basis of the number of its employees. 42 U.S.C. § 2000e(b).

Finally, courts of equity historically have refused to decree the creation of partnerships because of the necessarily personal relationship between co-owners of a joint business enterprise and the inherent difficulties of monitoring a

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ployment Opportunity Act of 1972, 118 Cong. Rec. 7166, 7168 (1972); H.R. Rep. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Admin. News 2391, 2405 (section-by-section analysis).

[19] *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.").

partnership decree.[20] Title VII should not be read to eliminate implicitly the common law prohibition against compelling partnership in equity. *See, e.g., Copeland* v. *Martinez*, 603 F.2d 981, 989 & n.54 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

B. The Court Should Interpret The Statute to Avoid Constitutional Infirmities

Even if this Court were to be persuaded that Title VII could be construed to authorize the judicial creation of partnerships, the Court should avoid such a construction because it would raise serious constitutional questions under the First and Fourteenth Amendments. It is a " 'well-established principle that statutes will be interpreted to avoid constitutional difficulties.' " *Webster* v. *Reproductive Health Services*, 109 S. Ct 3040, 3054 (1989).

As Justice Powell recognized in *Hishon*, "impediments to the exercise of one's right to choose one's associates can violate the right of freedom of association protected by the First and Fourteenth Amendments." 467 U.S. at 80 n.4. Indeed, the Supreme Court "has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984); *Board of Directors of Rotary*

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[20] *See, e.g., Infusaid Corp.* v. *Intermedics Infusaid, Inc.*, 739 F.2d 661, 668-69 (1st Cir. 1984) ("few principles are more fundamental to our jurisprudence than the general prohibition against specific performance of personal service contracts . . . and there is a strong presumption against specific performance of a . . . partnership"). *Accord Karrick* v. *Hannaman*, 168 U.S. 328, 335 (1897) (a court "will seldom, if ever, specifically compel . . . performance of a [partnership contract], the contract of partnership being of an essentially personal character"); *Virginia Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, 550-51 (1937) ("Equity will not decree the execution of a partnership agreement since it cannot compel the parties to remain partners"); *Hyer* v. *Richmond Traction Co.*, 168 U.S. 471, 482 (1897) ("it would seem like a contradiction to force antagonistic parties to form a partnership").

Club, International v. *Rotary Club*, 481 U.S. 537, 545 (1987) ("freedom to enter into and carry on certain intimate or private relationships is a fundamental element of the liberty protected by the Bill of Rights"). The Court also has "recognized that the right to engage in activities protected by the First Amendment implies 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.' " *Rotary Club*, 481 U.S. at 548.

These two closely related aspects of associational freedom—freedom of intimate association and freedom of expressive association, respectively—are both implicated directly by the District Court's partnership decree: "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts*, 468 U.S. at 623.

Professional partnerships, which, like Price Waterhouse, are highly selective, personal, and intimate, are entitled to consideration under constitutional protections from undue governmental intrusion.[21] The choice of a partner is far more personal and permanent a commitment than the "choice of one's fellow employees," *Roberts*, 468 U.S. at 620, and an interpretation of Title VII that treats as in-

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[21] The size of a partnership does not, in and of itself dissipate these qualities. The District Court found that Price Waterhouse had consistently striven "to maintain the traditional characteristics of a professional partnership." 618 F. Supp. at 1111. Moreover, a partner need not know intimately every one of his or her partners to share common goals, risks, standards, ambitions and loyalties. Price Waterhouse partners consider partner status to have an intrinsic special value quite apart from any purely commercial concerns. *E.g.*, App. at 169 (the Senior Partner of the firm would never "demean his partners to a senior manager. He holds that bond too high."); *id.* at 130. The District Court's position that Price Waterhouse "lacks the intimacy and interdependence of smaller concerns, so concerns about freedom of association have little force," *Findings*, App. at 235, suggests incorrectly that members of large organizations are ineligible for protection of their associational freedoms. That is not the law. *Cf. NAACP* v. *Alabama*, 357 U.S. 449 (1958).

terchangeable the creation of partnerships and the relationship between employers and employees calls into question the constitutional validity of the statute's remedial provisions. The text of Title VII unambiguously "admits of a less problematic construction." *Public Citizen* v. *Department of Justice*, 109 S. Ct. 2558, 2567 (1989). This Court should adopt it to avoid these serious constitutional difficulties.

IV

THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING PARTNERSHIP IN THIS CASE

Even if it had the authority to do so in an appropriate case, the District Court committed reversible error when it ordered Price Waterhouse to admit plaintiff as a partner under the peculiar facts of this case. The court created a "strained partnership relationship," *Findings*, App. at 237, based upon the "ill-defined" theory of sex stereotyping, *id.* at 249, despite evidence from most of the partners who evaluated plaintiff that she did not pass a legitimate Price Waterhouse criterion for partnership, and notwithstanding that her own "unreasonable intentional" conduct deprived her of "any possibility" of making partner when she was given a fair and unbiased opportunity to make partner. *Id.* at 240-41. Ordering a partnership under such circumstances cannot reasonably be characterized as an appropriate exercise of equitable discretion under Title VII, even if the statute authorizes such relief.

It would be particularly inappropriate to force Price Waterhouse partners to accept into a professional and collegial partnership someone who suffered from an "[i]nability to get along with staff or peers." 618 F. Supp. at 1114. Indeed, the courts often refuse to order reinstatement in cases in which, due to interpersonal dynamics, that remedy will result in disruption of sensitive relationships, friction, or antagonism.[22]

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[22] *See, e.g., Cassino* v. *Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347

Plaintiff abused and subverted her legitimate opportunity to make partner by engaging in counter-productive and self-destructive conduct. It would be ironic and unjust for the courts to create for her the remedy that her own conduct placed beyond her reach. Moreover, her deliberate refusal to seek employment that would have led to a comparable partnership in another firm also disqualifies her from seeking from the courts that which she could have obtained on her own had she not violated her legal duty to mitigate her damages.

V

PLAINTIFF'S RELIEF, IF ANY, MUST BE LIMITED TO ATTORNEY'S FEES AND BACK PAY FOR A LIMITED PERIOD

If this Court determines that Price Waterhouse is liable, but agrees that plaintiff is not entitled to a Price Waterhouse partnership, plaintiff's relief must be limited to attorney's fees and back pay for a limited period. Plaintiff had a legal duty to mitigate her damages. She failed even to make the slightest effort to obtain a position among the plethora of comparable opportunities available to her. She did not do any of the things that the law would have required. Therefore, her monetary relief must be limited to back pay for the period between the time of the deferral of her partnership candidacy and when she could have attained a similar position had she made reasonable efforts to do so. *See Sangster* v. *United AirLines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981) (failure to mitigate cuts off right to back pay).

(9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988); *McIntosh* v. *Jones Truck Lines, Inc.*, 767 F.2d 433, 435 & n.1 (8th Cir. 1985); *EEOC* v. *Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976)(refusing to reinstate executive because the position required a "close working relationship between plaintiff and top executives of defendant"), *aff'd without opinion*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); *Hyland* v. *Kenner Products Co.*, 13 Fair Empl. Prac. Cas. (BNA) 1309, 1321 (S.D. Ohio 1976) (rejecting reinstatement of executive because, "a person in an executive or management position must have the complete confidence of others in management").

Plaintiff's refusal to make reasonable efforts to mitigate her damages forecloses the availability of "front pay" to compensate for any future losses. *Dominic* v. *Consolidated Edison Co.*, 822 F.2d 1249, 1257-58 (2d Cir. 1987) (failure to mitigate precludes the availability of front pay); *Hansard* v. *Pepsi Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 110 S. Ct. 129 (1989). "[F]ront pay is intended to be temporary in nature," *Cassino*, 817 F.2d at 1347, and "the plaintiff's duty to mitigate [damages] must serve as a control on front pay damage awards." *Id.* Plaintiff's relief, if any, should be restricted to damages for the period ending when she would have made partner at Price Waterhouse had she not made that impossible or, at most, for the two or three years that it would have taken her to make partner or attain the equivalent position at another firm.

CONCLUSION

Plaintiff's conduct as a Price Waterhouse employee, including her propensity to abuse authority and intimidate subordinates, standing alone, would have resulted in a decision to defer her partnership candidacy in 1983. Price Waterhouse has invariably denied or deferred partnership for men and women under these circumstances. Therefore, the judgment of liability against Price Waterhouse should be reversed. However, if the Court does find that Price Waterhouse is liable to plaintiff, she is not entitled under the law or the facts of this case to a partnership and she should recover no more than back pay for the period between the time of the deferral of her partnership candidacy and the date when she could have become a partner had she not prevented it by her own conduct or attained a position similar to a Price Waterhouse partnership had she taken reasonable steps to do so.

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Respectfully submitted,

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