4-25-1990

No. 84-3040 Plaintiff's Reply Brief on Relief Issues

United States District Court for the District of Columbia

4/25/90

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S REPLY BRIEF ON RELIEF ISSUES

I. Defendant's Brief Mostly Reargues Settled Questions Without Presenting Any New Reasons Why This Court Should Decide Them Differently Now

This reply need not and does not devote much space in answer to Parts I and II of "Defendant's Post-Trial Brief on Remedial Issues." Part I simply restates defendant's position on liability.

Part II seems to ask this Court to reaffirm its 1985 position on constructive discharge with no new facts to support that action and no basis for thinking that the Court of Appeals would alter its 1987 contrary view. A great deal of energy is spent by defendant ~~in~~ trying to demonstrate that the Court of Appeals' decision on constructive discharge is not technically "the law of this case," a point plaintiff addressed in her prior

brief. 1/ Defendant does not explain how its argument on law of the case, even if accepted, would change the virtual certainty that the Court of Appeals would refuse to reconsider, much less modify, its decision that plaintiff was constructively discharged. In effect, defendant asks this Court to embark on a quixotic quest.

Nor do we understand what is intended by Subpart II.E of defendant's brief. There defendant seems to suggest that this Court was wrong in holding that plaintiff's departure from Price Waterhouse would bar her from all relief for the period after her resignation, and that her resignation would merely affect the question of mitigation. If that is so, then the debate on

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1/ Defendant argues that the Court of Appeals' mandate is the same as its opinion, so that by vacating its original mandate the court also vacated its opinion. As a legal matter, however, an appellate court's opinion is distinct from its mandate, ~~with~~ the latter being the specific direction ~~that is~~ given to a lower court. The D.C. Circuit has noted the distinction. E.g., City of Cleveland v. Federal Power Commission, 561 F.2d 344, 346-47 n.25 ("[i]t has long been recognized that the court's opinion may be consulted to ascertain the intent of the mandate"). Typically the mandate is embodied ~~with~~in the opinion, and for that reason the rules provide that the appellate court's opinion ordinarily constitutes the mandate. The two are distinct, though, as the present case shows.

Here the D.C. Circuit's original mandate "affirm[ed] the District Court's liability determination and reverse[d] and remand[ed] the case for determination of appropriate damages and relief." Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987). In light of the Supreme Court's subsequent reversal on liability, the D.C. Circuit's mandate was no longer appropriate, and the court vacated it. But the opinion on unappealed issues relating to relief was still viable, and it was not vacated.

Defendant argues that this Court's ruling that the failure to repropose plaintiff was nondiscriminatory is also the law of the case. This may be so but does not aid defendant, since the Court of Appeals did not differ with that ruling ~~but~~ still found constructive discharge.

constructive discharge is an arid one, and the more fruitful discussion concerns the amount and character of relief plaintiff ought to receive if she should prevail on liability. These, we believe, are the only open issues left in any event, and we confine the balance of this reply to those issues.

II. There Is No Bar To The Relief Sought By Plaintiff

Defendant has not made any persuasive new arguments against granting plaintiff admission to partnership as the proper future relief. It again argues that Title VII does not provide for such relief but fails to explain how the decision in Hishon v. Spalding, 467 U.S. 69 (1989), can otherwise be given meaning since defendant also opposes "front earnings." Indeed, to the extent that defendant argues the imponderables and undesirability of front earnings, it indirectly reinforces the simplicity and viability of a partnership award. One kind of relief or the other is surely required by the principle that Title VII is intended to provide make-whole relief.

Defendant returns to the argument that plaintiff should have no relief beyond June 30, 1984 because she was not reproposed for admission to partnership. Defendant also argues that plaintiff's relief should be cut off then because she failed to mitigate damages.

The first of these arguments ignores the fact that both this Court and the Court of Appeals have already rejected its premise and have adopted the opposite proposition -- that if plaintiff was wrongly denied partnership in 1983, she is entitled to relief which

assumes that she would otherwise have become a partner in that year and would have continued to be a partner from that time forward.

Thus, this Court held in 1985 that, but for the unapproved attempt to bifurcate this case, the compensation plaintiff would have received as a partner between July 1, 1983 and January 17, 1984 would have been an appropriate subtrahend in calculating her monetary relief for that period:

> Because plaintiff has failed to prove a constructive discharge, she is not entitled to monetary relief for the period subsequent to her resignation. Clark v. Marsh, 665 F.2d at 1172. Nevertheless, plaintiff has satisfied her burden of proving discrimination under Title VII and established the predicate for an award of backpay from the date she would have been elected partner, July 1, 1983, until voluntary resignation on January 17, 1984. Backpay for these few months, limited to the difference between plaintiff's compensation as a senior manager during that period and what her compensation would have been if elected to partnership, might have been appropriate if proof had been presented. However, no evidence has been presented on what compensation plaintiff would have received if she had been elected partner.

Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1121 (D.C. 1109, 1121; emphasis added.

The Court of Appeals accepted this formulation of the backpay calculation as correct, Hopkins v. Price Waterhouse, 825 F.2d at 465; and, because it found that there was a constructive discharge, it ordered a remand to this Court for an award of backpay on this basis covering the post-resignation period as well. Id. at 473. The Supreme Court's decision on liability did not disturb these rulings on relief.

The necessary premise of these rulings is that plaintiff should have been made a partner in July 1983, so that the failure to repropose her later that year is immaterial. Defendant's attempt to reargue this point is not based on any intervening events or new evidence which would justify such a departure from the law of the case.

Defendant also suggests that factually plaintiff has not kept up her skills in management consulting sufficiently to warrant making her a partner in Price Waterhouse. It bases this argument entirely on Mr. Connor's almost-offhand view as the courtroom representative of Price Waterhouse that, "I think she probably is rusty now in the systems area. That's my judgment, you know. Just hearing it yesterday." Tr. 248. 2/

Defendant made no attempt to test plaintiff's "rustiness." It did not try to qualify Mr. Connor (a C.P.A. by training) as an expert. It did not call any of its Management Advisory Services partners to testify on this point. This argument clearly comes as a weak afterthought. Indeed, defense counsel quickly moved beyond it by asking Mr. Connor to assume "that she has kept up or she could bring herself up to speed quickly otherwise." Tr. 248. This Court has been given no factual basis for a contrary assumption.

2/ Again, transcript references are to the 1990 relief trial record unless otherwise noted.

III. Defendant Has Failed to Assume, Much Less Discharge, Its Burden to Prove Failure to Mitigate

Defendant offered proof that over 30 people have left Price Waterhouse and have became partners in other "Big 6" (formerly "Big 8") firms. Only four of these, however, had been rejected after being proposed for partnership at Price Waterhouse. Tr. 219. 3/ Defendant's witness on this point acknowledged that several career patterns are "typical" for senior managers leaving Price Waterhouse and that one of these is setting up one's own business -- as both plaintiff and her former husband had done. Tr. 217-218. Defendant belabors the point that plaintiff could have gotten herself on a partnership track in another firm, but the Court viewed partnership election as unpredictable. "[T]he partnership thing is just one of those things that eventually hit with some place, one person one time, and another person another time." Tr. 224. As noted below (n.3), the odds were very much against plaintiff's becoming a partner elsewhere after having been rejected at Price Waterhouse. Moreover, the firm offered most of these people who left it professional placement assistance, which it did not offer plaintiff. Tr. 14, 273, 301, 311.

3/ Defendant is wrong in asserting that over 30 of its former employees had become partners elsewhere after being rejected for partnership at Price Waterhouse (see defendant's brief at 29 and n.13). In fact, only four rejected candidates became partners in other firms (see DX A-7), while at least 100 had been rejected during the relevant time period. See Tr. 261-263, 355.

The evidence also showed that in the mid-1980's senior employee salaries were not as good at several of the other Big 6 firms as at Price Waterhouse. Tr. 185 (Beach-Deloitte & Touche); Tr. 195 (Gray - Coopers & Lybrand); Tr. 200-201 (Grimm - Ernst & Young); Tr. 205 (Wren - Arthur Andersen & Co). Indeed, those salaries were not materially better at three of the four other firms about which there was evidence than plaintiff's average self-employment earnings between 1984 and 1987, when she decided to seek a job at the World Bank. See PX A-15; Tr. 56, 60.

Defendant's suggestion that plaintiff could have become a partner in another firm is also refuted by its own placement expert, Mr. Redford. He even implied that individuals who had filed suits such as this one should go to the length of lying in order to conceal that from prospective employers and should continue to lie if they did get hired. His euphemism was "stretch their imaginations." Tr. 314-15. That kind of advice is impractical as well as deplorable.

Apart from suggesting that plaintiff might have become a partner in another Big 6 firm after several years as a senior employee, [4/] defendant has not offered any proof that plaintiff had career options that would have resulted in better compensation than her current position at the World Bank. Tr. 12. It was defendant's burden to do so, of course; it was not

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4/ This of course is merely a possibility. Nor is it clear that beginning partners at all of these firms earn more than plaintiff's current $92,500 compensation at the World Bank. See Tr. 186, 195. Arthur Andersen, which does pay more, gives its partners almost no retirement benefits. Tr. 268.

Certificate of Service

On April 25, 1990 plaintiff's Reply Brief on Relief Issues was hand delivered to:

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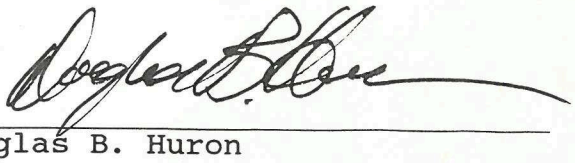

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