3-30-1990

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

United States District Court for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S POST-TRIAL BRIEF ON RELIEF ISSUES

I. THE COURT OF APPEALS' DECISION ON CONSTRUCTIVE DISCHARGE AND OTHER RELIEF ISSUES IS STILL THE LAW OF THE CASE

Thrice during the relief phase trial of this case the Court indicated to the parties that it wanted their briefs to address the status of the Court of Appeals' ruling on constructive discharge, Hopkins v. Price Waterhouse, 825 F.2d 458, 472-73, including dissent n.1. See Tr. 10-11, 94-95, 366-367. 1/ This is the key issue at the remedy stage of this case. Assuming liability, plaintiff is entitled to relief if she was constructively discharged. The law of the case is that she was.

Plaintiff's position is that the Court of Appeals' decision on relief issues was unaffected by the Supreme Court's remand and therefore remains the law of the case. Specifically, it is the law of the case that

> Price Waterhouse's decision to deny Hopkins partnership status, . . . coupled with the OGS's failure to renominate her, would have been viewed by any reasonable senior manager in her position as a

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1/ Unless otherwise indicated, transcript references in this brief are to the transcript of the relief phase trial held on February 28 and March 1, 1990.

career-ending action. Accordingly, it amounted to a constructive discharge.

Id., 825 F.2d at 473. The Court of Appeals also directed this Court to determine the back pay plaintiff was entitled to receive for the period between denial of partnership and plaintiff's resignation from Price Waterhouse. Id. Moreover, at three different points in its opinion, the majority -- with Judge Williams' concurrence -- indicated that it viewed an offer of partnership as the appropriate prospective relief and assumed that this Court would have ordered that relief if it had found a constructive discharge. 2/

Procedural Background

In its "Petition for Rehearing and Suggestion for Rehearing En Banc" to the Court of Appeals, Price Waterhouse attacked the Court's constructive discharge ruling. However, after rehearing was denied, the firm did not seek Supreme Court review of that ruling. The plurality opinion in the Supreme Court noted that "Price Waterhouse does not challenge the Court of Appeals' conclusion that the refusal to repropose [Hopkins] for partnership amounted to a constructive

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2/ See 825 F.2d at 464: "Having concluded that Hopkins was a victim of sexual discrimination, the trial judge went on to find that she was nevertheless not entitled to an order directing the firm to make her a partner."

Id. at 464-465: "Accordingly, the [trial] court denied her both backpay from the date of her resignation and a decree requiring that she be invited to join Price Waterhouse as a partner."

Id. at 472 "With respect to post[r]esignation damages, the District Court found that Hopkins had failed to demonstrate that she had been constructively discharged and therefore was ineligible both for backpay subsequent to the date of her resignation and an order directing that she be made a partner."

(Underscoring added.)

discharge." Price Waterhouse v. Hopkins, 109 S.Ct. 1275, 1281 n.1 (1989). And in its concluding paragraph and judgment, the plurality reversed "the Court of Appeals' judgment against Price Waterhouse on liability" and remanded the case to that Court for further proceedings. Id. at 1795 (underscoring added). This was the judgment in which Justices White and O'Connor concurred. Id. at 1795, 1796.

The mandate of the Supreme Court reversed the judgment of the Court of Appeals and remanded the case to that Court "for further proceedings in conformity with the opinion of this Court." The Court of Appeals then vacated its own 1987 mandate, vacated this Court's judgment, and remanded the case to this Court for further proceedings. 3/

Discussion

The Supreme Court took pains not to decide, disapprove or even discuss the Court of Appeals' ruling on constructive discharge. Contrast Johnson v. Board of Education of the City of Chicago, 457 U.S. 52 (1982), where the Court vacated a Seventh Circuit judgment altogether in order to insure that "the doctrine of the law of the case does not constrain either the District Court, or should an appeal subsequently be taken, the Court of Appeals." Id. at 54-55. Since the mandate of the Supreme Court "is controlling only as to matters within its compass on the remand, a lower court is free as to other issues." Quern v. Jordan, 440 U.S. 332, 347 n.18

3/ We recognize that we earlier mistakenly said the Court of Appeals had vacated its 1987 opinion (Plaintiff's Pretrial Brief on Remedy at 5). That is not so; only the mandate was vacated.

(1979); Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939). While the Court of Appeals vacated its own mandate, its opinion on constructive discharge remains the law of the case and therefore must be respected by this Court.

"[T]he law of the case . . . when used to express the duty of a lower court to follow what has been decided by a higher court at an earlier stage of the case applies to everything decided, either expressly or by necessary implication." City of Cleveland, Ohio v. Federal Power Commission, 561 F.2d 344, 398 (D.C. Cir. 1977), quoting Munro v. Post, 102 F.2d 686, 688 (2d Cir. 1939). While the doctrine does not apply to findings that are "integral" to a vacated judgment of the higher court, Dorsey v. Continental Cas. Co., 730 F.2d 675, 678 (1st Cir. 1984), it otherwise "invokes the rule that findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or in a later appeal." Id.

In this case the Supreme Court disapproved some of the findings and conclusions of the Court of Appeals on liability and reversed the appellate court's judgment on liability. But it carefully left undisturbed the Court of Appeals' findings and conclusions on relief. These findings and conclusions were vacated by neither the Supreme Court nor the Court of Appeals and remain the law of the case if judgment is again entered for plaintiff.

Moreover, there are strong reasons to foresee that the Court of Appeals would adhere to its prior decision on relief and none to foresee a different result should this case again be appealed to that Court. We now discuss those reasons.

1. There Are No New Facts Relating to the Constructive Discharge Issue. There has been no new evidence on the constructive discharge issue. Therefore, one of the few accepted reasons to reconsider a decision that would otherwise be the law of the case, namely, that "the evidence in a subsequent trial was substantially different," Halperin v. Kissinger, 807 F.2d 180, 195 (D.C.Cir.), quoting White v. Murtha, 377 F.2d 428, 431-432 (5th Cir. 1967), is inapplicable here.

2. The Court of Appeals Declined Rehearing on This Issue and There Is No Intervening Controlling Authority to the Contrary. A future application to the Court of Appeals to reconsider the constructive discharge would be no more than an out-of-time request for a second rehearing, with no intervening change in the law to justify such an action. Our Court of Appeals has strongly disapproved the use of subsequent appeals to reargue its earlier rulings:

> Moreover, we take this opportunity to emphasize that this court will not, absent truly "exceptional circumstances," Laffey II, 642 F.2d at 585, look favorably on arguments against the law of the case which fall only under the "manifest injustice" rubric. We do not intend to allow this avenue of attack on the law of the case to become an auxiliary vehicle for the repetition of arguments previously advanced, without success, in appellate briefs, petitions for rehearing, and petitions for certiorari.

Laffey v. Northwest Airlines, Inc. (Laffey III), 740 F.2d 1071, 1082-1083 (D.C. Cir. 1984) (footnote omitted). Compare Johnson v. Bechtel Associates Professional Corp., 801 F.2d 412, 416 (D.C.Cir. 1986), disapproving invocation of the Court's inherent power to recall its mandate at any time, for good cause, as a means to grant a "late rehearing."

Indeed, the Court of Appeals' adherence to the law of the case in subsequent appeals has been so strong that it has even refused to disturb earlier rulings which it recognized were erroneous. See Webster v. Sun Co. Inc., 790 F.2d 157, 161 (D.C.Cir. 1986); and Laffey v. Northwest Airlines Inc. (Laffey II), 642 F.2d 578, where the Court recognized that its earlier interpretation of the Equal Pay Act in Laffey I, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978), was in error. Nonetheless, in Laffey II the Court declined to reconsider that interpretation:

> An appellate court also is normally bound by the law of the case it established on a prior appeal, and for a very sound reason. If justice is to be served, there must at some point be an end to litigation; on that account, the power to recall mandates should be exercised sparingly. To warrant divergence from the law of the case, a court must not only be convinced that its earlier decision was erroneous, it must also be satisfied that adherence to the law of the case will work a grave injustice. In the litigation before us, we perceive no exceptional circumstances which would justify overriding the strong policy of repose normally accorded past decisions. Our prior interpretation of the Equal Pay Act admittedly was overinclusive -- a defect that for posterity we later cure in this opinion -- but that is as much as can be said. If error without more sufficed to render a decision forever vulnerable to reopening, the law of the case doctrine would lose all meaning. Here, as in another context the First Circuit once said, "we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari. There must be an end to dispute."

Laffey II, 642 F.2d at 585 (footnotes omitted).

3. The Constructive Discharge Decision Was In Line With Prior Case Law In This Circuit. It is a reasonable inference that the Court of Appeals declined to rehear en banc the panel's unanimous constructive discharge decision in this case because

that decision was in line with its prior decision in Clark v. Marsh, 665 F.2d 1168 (D.C.Cir. 1981). The Court of Appeals in this case merely applied the principles of Clark v. Marsh to a specialized situation, i.e., the all-but-final rejection for partner of a "partner track" employee in a professional firm where the customary practice in such situations was for the employee to leave, the classic "up or out." The career path here was relatively unique, although in reality hardly different from the practice of enforced departure presented in Hishon v. King & Spalding, 467 U.S. 69 (1984). Moreover, apart from the fact that departure after rejection is inherent in this professional setting, plaintiff had also made known from the outset that her eligibility to become a partner was an "absolute prerequisite" for her joining Price Waterhouse. Hopkins v. Price Waterhouse, 825 F.2d at 472.

Defendant's practice means that a decision not to propose or consider a professional employee for partner is likely to be career-ending in two senses. First, almost by definition there are no prospects for becoming a partner. Second, if the employee ignores the custom and stays on, a likely result is that firm members will resent this break with past practice and the employee's work situation will actually deteriorate.

There is no reason to think that appellate reexamination of the constructive discharge decision in this case would occur or, if it did, would lead to a different result. Hence it must be accepted as fact that plaintiff's departure from Price Waterhouse

was a constructive discharge, and that plaintiff is therefore entitled to relief.

II. PLAINTIFF SHOULD BE ADMITTED TO PARTNERSHIP [4/]

Assuming liability, plaintiff is due full relief. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Lander v. Lujan, 888 F.2d 153 (D.C. Cir. 1989).

The most serious discretionary issue on relief is whether plaintiff should be admitted to partnership. We believe that she should be. First, lesser relief would not only be incomplete; it would also be doomed to fail. Thus, although defendant has suggested that it would be sufficient to give plaintiff a new, fair opportunity for consideration, Mr. Connor's testimony made it clear that the die would be cast against her, as the Court noted at trial [Tr. 329-30]. Second, defendant has simply not shown how plaintiff's entry into a large firm, in which her particular specialty is booming, would cause any specific problems or disruption. Certainly some partners would be initially unhappy, but a "discrimination remedy cannot turn on the employer's preferences." Lander v. Lujan, 888 F.2d at 158. And there is nothing in the record to suggest that any partners could not work professionally with plaintiff, or she with them.

Admission to partnership should be the presumptive remedy in this case. See, e.g., Cassino v. Reichold Chemicals, Inc., 817

4/ Many of the issues herein are addressed in more detail in plaintiff's pretrial briefs.

F.2d 1338, 1346 (9th Cir. 1987), cert. denied, 108 S.Ct. 785 (1988) (observing that "reinstatement is the preferred remedy" in ADEA cases). Defendant has not shown why plaintiff's admission as a partner would be inappropriate. She should be admitted.

Plaintiff is also entitled to back pay. Dr. Tryon's computation is reasonable, especially as it is grounded largely on stipulated facts [Pl.Ex. A14-A15]. We agree that plaintiff had a duty to mitigate after she left Price Waterhouse. She did so. The burden is on defendant to prove inadequate mitigation, see Floca v. Homcare Health Services, 845 F.2d 108, 111 (5th Cir. 1988), and defendant has not done so here. See Proposed Finding 5. As a legal matter, it is reasonable for someone to mitigate by setting up her own business, Carden v. Westinghouse Electric Corp., 850 F.2d 996, 1005 (3d Cir. 1988), and as a practical matter this was a recognized avenue for former Price Waterhouse employees. See Proposed Finding 5(b). Moreover, defendant has not shown that plaintiff could have become a partner in another Big 8 firm, and no other type of firm was identified having compensation even approaching that possible at Price Waterhouse. See Proposed Finding 5(c).

In fact, it is highly unlikely that plaintiff could have become a partner elsewhere. Price Waterhouse itself has never admitted as a partner someone who had been turned down by another Big 8 firm, and of the more than 100 candidates rejected by defendant for partnership from 1980 to 1987, only 4 later became partners at other Big 8 firms. For plaintiff, who had filed a suit against Price Waterhouse that received some publicity, the

odds would have been still longer. See Brewster v. Martin Marietta, 47 FEP 1276, 1282 (Mich. 1985)(one of factors making it unlikely for plaintiff to secure comparable employment was that it was "probably well known that she had filed a sex discrimination suit against her former employers"). See Proposed Finding 5(d). Ultimately, of course, plaintiff got a job at the World Bank paying more than $90,000 annually. This is an excellent position by any standard, and defendant has not shown that she could have done better.

Although there was much testimony on front pay, such compensation becomes an issue only if the Court declines to order defendant to invite plaintiff to become a partner. In that event, full relief requires that she be given monetary relief in lieu of partnership. See Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-29 (2d Cir. 1984). Dr. Tryon's testimony on front pay was not seriously challenged. See Proposed Finding 6. There are uncertainties, of course, but these are inevitable any time future losses are projected. They certainly do not provide a basis for withholding relief. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 546 (1983). See also Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946)("[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created").

III. PLAINTIFF'S PROPOSED DECREE IS REASONABLE AND IS NOT INTRUSIVE

The proposed decree is short and straightforward. The first five paragraphs provide that plaintiff is to be extended an offer of partnership effective July 1, 1990 -- the next regularly scheduled admission date for partners -- that back pay as computed by Dr. Tryon will be awarded, that plaintiff will be treated for all purposes as if she had been admitted on July 1, 1983, and that she will not be subjected to retaliation. Initially plaintiff will receive the average compensation given consulting partners in her class; thereafter her shares will be adjusted on the same basis as is done for other partners.

Paragraphs 6-9 address the issue of preventing sexual stereotyping from affecting the partnership admissions process. These provisions are designed to be minimally intrusive, to be largely self-policing and to build on what Price Waterhouse says it has already been doing since this Court's first decision in 1985. These provisions are being submitted in accordance with the Court's instructions at the close of the recent trial [Tr. 365-66].

Paragraph 6 is a general injunction. Paragraph 7 requires defendant to adopt a written policy barring sex discrimination in the admissions process and, in particular, cautioning against stereotyping. Mr. Connor's testimony suggests that Price Waterhouse may already have taken some steps in this regard [Tr. 254-55]. Paragraph 7 also requires, however, that defendant's policy provide that partners who act on stereotypes (or otherwise discriminate) may suffer reduction of future share allocations.

This is in line with Susan Fiske's testimony that incentives are needed to prevent stereotyping [Original Trial, March 28, 1985, transcript at 620-21].

Paragraph 8 requires the Policy Board to screen all comments made about women candidates, to look into those that may be reflective of stereotyping, and to discard such comments (as well as all negative remarks made by the same partner) unless it is clear that the comments were not the product of stereotyping. Again, it appears from Mr. Connor's testimony that Price Waterhouse has always undertaken a screening process along the lines proposed [Tr. 255].

Paragraphs 7 and 8 are intended to work in tandem -- the former to discourage stereotyping in the first instance, the latter to weed out any stereotyping that still manages to creep into the process. These provisions are self-policing and simply build on defendant's own initiatives. The one new feature is to add the possibility of discipline for partners who act on stereotypes or otherwise discriminate. This possibility alone may be sufficient to prevent stereotyping from affecting the admissions process.

Paragraph 9 requires defendant to maintain records relating to partnership admissions for five years. We are not proposing that any reports be filed with the Court, but we believe the records should be available for annual inspection by counsel for plaintiff.

Paragraph 10 relates to attorneys' fees and requires the parties to follow Local Rule 215. As noted in an earlier pleading, the parties hope it will be possible to resolve all fee issues without resort to the Court. In any event, Paragraph 10 requires the parties to report on the status of fee discussions within 30 days of the date of the decree.

CONCLUSION

The proposed decree gives plaintiff full relief but does not hamstring defendant. We ask that it be entered.

Respectfully submitted,

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Certificate of Service

On March 30, 1990 plaintiff's proposed findings of fact on relief, proposed decree and supporting brief were delivered to:

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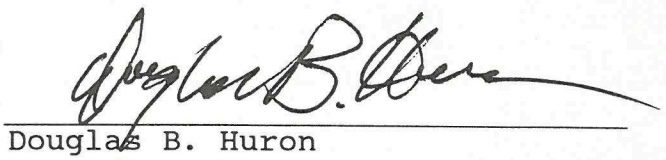

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