6-28-1990

No. 90-7099 Reply to Opposition to Emergency Motion for Stay - Preliminary Statement

United States court of appeals for the District of Columbia Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANN B. HOPKINS,	)	
	)	
Appellee,	)	No. 90-7099
	)	
v.	)	
	)	
PRICE WATERHOUSE,	)	
	)	
Appellant.	)	
	)	

REPLY TO OPPOSITION TO
EMERGENCY MOTION FOR STAY

PRELIMINARY STATEMENT

Appellant seeks no more than preservation of the status quo during its appeal -- maintenance of the respective positions of the parties that have existed throughout this litigation. Appellee responds with the untenable position that "nothing irrevocable will happen on July 1, 1990 if the judgment below is not stayed." Opposition ("Opp."), at 2. On the contrary, if Price Waterhouse is forced to make appellee a partner on that date, she will have the duties, responsibilities, functions and impact of a Price Waterhouse partner from that moment forward. Virtually every action, reaction and inaction by Ann Hopkins as a Price Waterhouse partner will have some kind of indelible impact on the firm, its partners, its staff, its clients and its reputation. No subsequent ruling by this Court will be able to erase the history of appellee's tenure as a Price Waterhouse partner.

There are very potent reasons, well known to the judges of this Court, why courts of equity have for centuries been loathe to create and to supervise the creation and continuation of personal, professional or artistic relationships. All those factors weigh heavily against forcing a partner on Price Waterhouse prior to the exhaustion of its appeal.

Appellee's assertion that there are "no difficult legal questions" presented by this appeal borders on the frivolous. No federal court, ever, has ordered the creation of a partnership in a Title VII case. Whether Congress has created the potential for such a remedy is a highly debatable question[1/] and the court below acknowledged that it was a difficult issue of first impression. This Court should not undermine its ability to resolve that question by allowing the trial court's order to create the relationship before the appeal can be considered.

1/ See, e.g., Note, Tenure and Partnership as Title VII Remedies, 94 Harv. L. Rev. 457 (1980) (discussing the debate over whether tenure and partnership should be awarded as remedies); Leading Cases of the 1983 Term, 98 Harv. L. Rev. 87 (1984) (discussing the potential problems of judicially imposed discrimination remedies like hiring and reinstatement because of "[t]he existence of highly personal, voluntary relationships within a business association"); Davila, The Underrepresentation of Hispanic Attorneys in Corporate Law Firms, 39 Stan. L. Rev. 1403, 1427-28 (1987) (discussing the controversy surrounding judicial relief in employment discrimination cases involving upper level positions and judicial reluctance to force an undesirable relationship requiring close personal contact, exercise of professional judgment and voluntary association).

Appellee's arguments do not overcome the importance of preserving the status quo until this appeal can be considered on the merits.

1. Probability of Success on the Merits. Appellee inexplicably asserts that appeal of the District Court's extraordinary, unprecedented and unwarranted order requiring appellee's admission to the Price Waterhouse partnership "presents no legal question that can be described as serious, much less difficult," and that "prior decisions" either "settle[] or clearly embrace[]" the issue. Opp., at 2-3. Appellee does not and cannot cite any authority for such pronouncements. Indeed, appellee principally relies upon Hishon v. King & Spalding, 467 U.S. 69 (1984), but the plaintiff in Hishon did not seek admission as a partner. Therefore, the issue whether that remedy is statutorily or constitutionally authorized was not before the Court in Hishon.[2/] Moreover, although appellee concedes that "the Court's opinion in Hishon 'does not require that the relationship among partners be characterized as an employment relationship to which Title VII would apply,'" Opp., at 5 n.3 (quoting Hishon, 467 U.S. at 79 (Powell, J., concurring) (emphasis added by appellee)), she does not even attempt to

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2/ See 467 U.S. at 72 (plaintiff "sought . . . compensatory damages 'in lieu of reinstatement and promotion to partnership.' This, of course, negates any claim for speciic performance of the contract alleged."); id. at 72-73 n.2; id. at 80 n.4 (Powell, J., concurring).

address or explain how a statute that does not afford judicial authority to regulate partner relationships can possibly be interpreted to permit a judicial decree compelling the creation and continuation of a voluntary professional association.

Similarly, contrary to appellee's assertion, Opp., at 6-7, the 1987 decision of this Court in this case, see Hopkins v. Price Waterhouse, 825 F.2d 458, 472-73 (D.C. Cir. 1987), did not even remotely imply, let alone "unmistakably signal that this Court has no doubt" that partnership admission is an authorized Title VII remedy or an appropriate remedy under the facts of this case. Appellee's assertion in that regard is most misleading. The issue of partnership admission was not tried, briefed, or argued in the District Court in 1985, and was not a question presented for review in this Court or in the Supreme Court. Thus, this Court has not had the opportunity to deliberate and consider the merits of the indisputably important question whether Title VII's equal employment provisions empower courts to create nonemployment relationships such as partnerships, and, indeed, that question has not been resolved by any other federal court.

Other cases relied upon by appellee, Opp., at 5-6, are simply inapposite. Lander v. Lujan, 888 F.2d 153 (D.C. 1989), involved the reinstatement of a federal civil service employee to "essentially the same job" as he had previously held (id. at 158), a remedy that falls squarely within the jurisdictional strictures of Title VII. Brown v. Trustees of Boston

University, 891 F.2d 337 (1st Cir. 1990), cert. denied, 58 U.S.L.W. 3796 (June 19, 1990), affirmed an order compelling promotion of an "assistant professor" to "associate professor" with tenure. Such an order creates no more than a long-term employment relationship. Moreover, "[c]ourts have quite rarely awarded tenure as a remedy for unlawful discrimination . . .," Brown, 891 F.2d at 359, and have exercised great caution in doing so. Thus, the court in Brown emphasized that the plaintiff in that case had received "near unanimous endorsement by colleagues . . . [which] suggest[s] strongly that there are no issues of collegiality or the like which might make the granting of tenure inappropriate." Id. at 361 (emphasis added). Brown is therefore both legally and factually distinguishable from this case -- appellee has been found to have had "considerable problems dealing with staff and peers" at Price Waterhouse. 618 F. Supp. 1114, 1120 (D.D.C. 1985).

Other legal issues presented by this appeal are similarly difficult and unresolved. For example, the District Court determined that it was bound by the law of the case doctrine to a conclusion expressed in the previous Court of Appeals' decision with respect to whether appellee had been constructively discharged. But that remedial decision was bound up in a liability determination that was overturned by the Supreme Court and set out in an opinion by a panel of this Court that was vacated when this case was remanded to the District Court. And it was squarely and unavoidably tied to

the panel's erroneous reading of the District Court's factual findings. The District Court has now made it clear that while the initial decision to defer appellee's partnership candidacy may have been tainted with discrimination, the subsequent decision not to repropose her for partner, which made it impossible for her to become a partner and which was the basis of her decision to leave the firm, was the consequence of an unreasonable and intentional act by appellee and was not tainted in any way by discrimination. Under these circumstances, the constructive discharge holding, which is central to the partnership decree, is not the law of the case and cannot be affirmed on appeal.[3/]

2. Irreparable Injury. Appellee's arguments on the irreparable injury issue are without merit. She asserts that Price Waterhouse "[p]artners come and go constantly without judicial intervention," Opp., at 2, and "this occurs without trauma or serious injury to the ongoing firm." Opp., at 8. However, partners selected in the rigorous Price Waterhouse

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3/ Appellee's conclusory statement that the District Court's imposition of Title VII liability under the amorphous and ill-defined sex stereotyping theory is "unassailable" under the "clearly erroneous standard" (Opp., at 5) implies that it is impossible to meet that standard on appeal from a district court's Title VII judgment. This Court, however, has not hesitated to overturn district court rulings, where, as here, a district court has seriously misinterpreted the record. Compare Palmer v. Baker, 52 Fair Empl. Prac. Cas. (BNA) 1458, 1461 (D.C. Cir. May 11, 1990) (reversing district court's ruling that defendant had not violated Title VII because "district court's conclusion . . . was based on a clearly erroneous interpretation" of the evidence).

partnership selection process (618 F. Supp. at 1111-12) are not fungible. The issue is whether appellant will be irreparably injured by the forced, and, Price Waterhouse submits, erroneous, admission into the partnership of a candidate whose own "unreasonable, intentional conduct" (Motion, App. A, at 23) made it impossible for her to become a partner. In the absence of a stay, the partners of Price Waterhouse will have lost a substantial measure of the power to control admission to their partnership, to "place a high premium on candidates' ability to deal with subordinates and peers on an interpersonal basis" (618 F. Supp. at 1116), and to "come down hard on abrasive conduct in men or women seeking partnership." Id. at 1120. Even if Price Waterhouse prevails on appeal, the loss of those rights "unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) (the loss of associational freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury").

And every action by appellee as a Price Waterhouse partner will reflect in some measure on its partners and the partnership. Because an organization is large and because each of its partners might not know every other partner does not mean that it is less of a professional association with high standards for partnership admission and consistent principles for the selection of partners and relationships between partners, staff and clients. Any conduct by appellee towards subordinates or involving the work of the firm will be that of

a Price Waterhouse partner and will have a truly unchangeable and irreparable effect.

On the other hand, appellee's claims that she will be irreparably injured if a stay is granted are wholly unfounded. She asserts that she has "lost seven irreplaceable years of partnership," Opp., at 9, but as the District Court's decision makes clear, appellee wholly "failed to make a reasonable effort to find" a position comparable to a Price Waterhouse partnership, although "there were numerous opportunities open to her" for comparable positions. Motion, App. A, at 26-27. Appellee's suggestion that she sought and obtained the "best possible alternative employment," Opp. at 10, is flatly contradicted by the District Court's holding that appellee failed to mitigate. Having utterly failed even to seek a partnership elsewhere in a comparable firm, appellee cannot now contend that she will be substantially or irreparably harmed if she remains in her "absolutely superb" (1990 Tr. at 25) position at the World Bank during the pendency of appeal.

3. Public Interest. Appellee's assertions that an order maintaining the status quo would be contrary to the "public interest" because the District Court's decision has been "widely reported" in the media and because a stay might somehow be "disturbing" (Opp., at 11) to the public are fanciful. As appellant explained in its Motion, at 17-18, the fact that important and substantial public policy questions are involved in this case strongly supports a stay. If the status

quo is maintained while this Court considers the legal questions presented by this appeal, the Title VII policy of eradicating discrimination will not be harmed. Indeed, a reasoned decision by this Court can only serve to clarify the standards that govern employment relationships in the partnership setting. Appellee wants an interim partnership, but that relief will surely not serve the public interest if it is ultimately determined that she is not entitled to it. And it is surely not in the public interest to undermine the ability of a Title VII defendant to receive a full and complete judicial review of its legitimate, legal defenses.

4. Automatic Stay of the Money Judgment. Appellee conceded in the District Court that appellant is entitled to an automatic stay of the back pay portion of the judgment upon the posting of a bond. Pl. Opp. to Mot. for Stay, at 1. Her attempt to escape the plain meaning of Rule 62(d) of the Federal Rules of Civil Procedure by labeling the $371,175 back pay award "equitable" relief rather than "legal" damages cannot change the character of the back pay award, which is indisputably a "money judgment." See, e.g., Lightfoot v. Walker, 797 F.2d 505, 506 (7th Cir. 1986) (equitable order awarding attorney's fees in federal discrimination case constitutes money judgment and posting of bond "entitles the appellant to a stay of the judgment"). "Beyond question, Rule 62(d) entitles the appellant who files a satisfactory supersedeas bond to a stay of [a] money judgment as a matter of

right." Federal Prescription Service v. American Pharmaceutical Ass'n, 636 F.2d 755, 759 (D.C. Cir. 1980) (emphasis in original).[4/]

CONCLUSION

Appellee's own intentional conduct made it impossible for her to become a Price Waterhouse partner. When she left the firm she made no reasonable effort to mitigate her damages. She is not entitled to an interim Price Waterhouse partnership while important, difficult and unresolved legal issues are still before the courts.

Dated: June 28, 1990

Respectfully submitted,

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4/ Rule 62(d) has been interpreted to entitle an appellant to a stay as a matter of right even where an equitable order does not include a money judgment component. See Becker v. United States, 451 U.S. 1306, 1309 (Rehnquist, Circuit Justice) (taxpayer appealing order compelling it to turn over materials in response to tax summons entitled to automatic stay upon posting bond).

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Reply to Opposition to Emergency Motion for Stay to be served by hand delivery this 28th day of June 1990, upon James H. Heller, Esq., Kator, Scott & Heller, 1275 K Street, N.W., Suite 950, Washington, D.C. 20006.

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