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Price Waterhouse v. Hopkins

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PRICE WATERHOUSE v. HOPKINS

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Price Waterhouse v. Hopkins[1] is generally considered to be the one employment decision of the 1988-89 Term which is favorable to plaintiffs. The case provides helpful authority to employees claiming discrimination in "pretext"[2] cases. In "mixed-motive"[3] cases, the Court ruled the burden of persuasion shifts from employee to employer.[4] This article focuses on the potential effect of the decision on subsequent employment discrimination cases. The first section is comprised of a general overview of the principles stated in *Price Waterhouse* that will be important to future plaintiffs. The second section discusses the unanswered questions left by the *Price Waterhouse* analysis; and the final section illustrates, by reference to the case on remand, the nature of the burden once it has shifted.

I. GENERAL OVERVIEW

Price Waterhouse states several principles of general importance to employment discrimination plaintiffs. First, the "critical inquiry"

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1. 109 S. Ct. 1775 (1989).

2. A pretext case, analyzed under the framework set forth in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), occurs where an adverse employment decision stems from a single source, *i.e.*, where "*either* a legitimate *or* an illegitimate set of considerations led to the challenged decision." *Price Waterhouse*, 109 S. Ct. at 1789 (Brennan, J., plurality opinion) (emphasis in original). The question asked by *Burdine*, in determining whether the plaintiff has met her burden of persuasion, is whether the illegitimate discriminatory reason is the true motivation rather than the legitimate reason asserted by the employer. *Id.* at 1788-89. *See generally Burdine*, 450 U.S. at 252-56.

3. A mixed-motive case, like *Price Waterhouse*, occurs when both legitimate and illegitimate considerations play a part in the challenged decision. *Price Waterhouse*, 109 S. Ct. at 1788 (Brennan, J., plurality opinion). In considering Hopkins' bid for partnership, Price Waterhouse legitimately took into account her problems with interpersonal relations, but illegitimately considered that she should take "a course at charm school . . . [and] walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 1782.

4. *Price Waterhouse* holds that where a plaintiff shows that an illegitimate discriminatory factor played a motivating or substantial part in an adverse decision, the burden of persuasion shifts to the employer to prove that it would have made the same decision in the absence of the unlawful motive. *Id.* at 1790.

commanded by title VII's "because of"[5] language is whether the discriminatory motive was a factor in the employment decision *"at the moment it was made."*[6] Thus, a plaintiff does not have to "identify the precise causal role played by legitimate and illegitimate motivations . . . ."[7] Further, a plaintiff who fails to satisfy the fact-finder through direct evidence that an impermissible factor influenced the decision may still prevail under the circumstantial *Burdine* analysis by showing the employer's asserted reason is pretextual.[8] Conversely, a mixed-motive analysis provides a plaintiff a way to recover even if she is not able to convince the fact-finder of pretext, as long as she presents sufficient credible evidence of an illegal factor's influence.[9] Once such evidence of reliance on illegal factors is presented, the plaintiff is not required to establish the negative proposition that she would not have been adversely treated had she been a man.[10] Finally, the *Price Waterhouse* opinion focuses on the effect that discriminatory remarks and attitudes, displayed by decisionmakers and nondecisionmakers alike, have on the final employment decision.[11]

II. UNANSWERED QUESTIONS

Price Waterhouse leaves unresolved three major issues that have always challenged plaintiffs in proving employment discrimination. First, what type of evidence must the plaintiff provide to the court to show that her employer relied on an impermissible, illegal factor in reaching the contested decision, thereby shifting the burden of persuasion to the defendant? In other words, what will be necessary to establish a mixed-

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5. 42 U.S.C. § 2000e-2(a) (1988) ("It shall be . . . unlawful . . . for an employer . . . to discriminate against any individual . . . *because of* such individual's race, color, religion, sex or national origin . . . .") (emphasis added).

6. *Price Waterhouse*, 109 S. Ct. at 1785 (Brennan, J., plurality opinion) (emphasis in original).

7. *Id.* at 1786.

8. *Id.* at 1788, 1789 n.12; *id.* at 1805 (O'Connor, J., concurring). In *Burdine*, the Court held that even after a plaintiff has made out a prima facie case of discrimination under title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. *Burdine*, 450 U.S. at 254.

9. *Price Waterhouse*, 109 S. Ct. at 1788-89 (Brennan, J., plurality opinion).

10. Rather, it is the employer's duty to establish that plaintiff would have been treated the same regardless of the factors in the decision. *Id.* at 1789.

11. Remarks of nondecisionmakers, which Justice O'Connor would not consider to be direct evidence, may be shown to have played a critical role in the making of a decision and to have influenced decisionmakers. *Id.* at 1791, 1794. *See also id.* at 1804 (O'Connor, J., concurring).

motive case? After *Price Waterhouse*, plaintiffs will most likely be required to prove the existence of impermissible factors by direct evidence.[12] Such evidence will be subject to a narrow definition as Justice O'Connor's concurrence shows.[13] From her opinion one can begin to determine what evidence will *not* be considered direct: stray remarks in the workplace, statements by nondecisionmakers, statements by decisionmakers unrelated to the decisionmaking process and expert testimony that sex-stereotyping influenced the process.[14] Circuit courts[15] as well as district courts[16] have already restricted the concept of direct evidence. If the discriminatory remarks made in the workplace do not rise to the level of direct evidence, however, these remarks may still be considered as evidence that discriminatory factors played a role in the employer's final decision.[17]

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12. Justice O'Connor specifically required direct evidence as a threshold for shifting the burden. *Id.* at 1804 (O'Connor, J., concurring). *See* Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990); Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1313 n.2 (7th Cir. 1989) (direct evidence that an impermissible factor influenced the decision is necessary to apply the *Price Waterhouse* analysis); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 315 (6th Cir. 1989).

The plurality declined to limit possible ways to prove that sex stereotyping played a motivating role, or to decide what facts would establish plaintiff's case, thus leaving open the question of whether something less than direct evidence would be sufficient. *Price Waterhouse*, 109 S. Ct. at 1791 (Brennan, J., plurality opinion). The plurality's opinion did require, however, that a plaintiff show the employer "actually relied on her gender in making its decision." *Id.* The evidence before the Court was direct, consisting of sex-stereotyped comments made by partners about Ms. Hopkins which were considered by defendant's decisionmakers. This was not "discrimination in the air" but was "discrimination brought to the ground and visited upon" Hopkins. *Id.*

13. *Id.* at 1804-05 (O'Connor, J., concurring).

14. *Id.* at 1804-05. *Compare* Pierce-Tudela v. City of Minneapolis, 52 Fair Empl. Prac. Cas. (BNA) 1065, 1071 (D. Minn. 1990) *with* Sobel v. Leeds Northrup Co., 1989 U.S. Dist. LEXIS 12272, 9-10 (N.D. Ill.).

15. *See, e.g.*, Young v. City of Houston, Tex., 906 F.2d 177, 182 (5th Cir. 1990) (employer's references to "white tokens" and "white faggots" are stray remarks insufficient to shift burden to employer); Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990) (dean's statement that quotas would have to be imposed to get more women on faculty was not direct evidence of discriminatory animus); Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 569-70 (7th Cir. 1989) (evidence of statements must show that discriminatory intent is related to the specific employment decision at issue, and the discriminatory remarks must be shown to have played a part in the decision).

16. *See, e.g.*, Dunning v. National Indus., 51 Fair Empl. Prac. Cas. (BNA) 1475, 1478-79 n.6 (M.D. Ala. 1989) (remarks must show more than callousness or indifference; they must show intent to treat differently). *Cf.* Halbrook v. Reichhold Chems., Inc., 735 F. Supp. 121, 125 (S.D.N.Y. 1990) (employer's statements found to constitute direct evidence).

17. *Price Waterhouse*, 109 S. Ct. at 1791 (Brennan, J., plurality opinion).

Second, how great a role must the impermissible factors play in an adverse decision so that the burden of persuasion is then shifted to the employer? Although the plurality opinion leaves open the possibility that something less than "but for" causation may establish liability,[18] it remains clear that the impermissible factor must do more than simply "taint" the decision.[19] The proposition that the impermissible factor must in fact make a difference in the outcome is certainly stronger after *Price Waterhouse*. For example, the court stated in *Brown v. Trustees of Boston University*[20] that "a 'tainted' decision is not necessarily one that would have been different 'but for' the taint."[21]

Price Waterhouse offers two formulations to test the extent to which an adverse decision must in fact be influenced by an impermissible factor in order to shift the burden. The first, stated by the plurality, is whether the impermissible reason was a "motivating" factor; that is, was the impermissible factor one reason out of several upon which the employer relied.[22] The second formulation, adopted by the concurrence, is whether

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18. Justice Brennan read the words "because of" in title VII as not meaning "solely because of" and not obligating "a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations"; she is only obligated to prove "that the employer relied upon sex-based considerations in coming to its decision." *Id.* at 1786. Although this rejects a requirement that the plaintiffs prove "but for" causation, Brennan's analysis implicitly adopts "but for" as a final determinant of liability since the employer must eventually prove that the illegitimate motive was *not* the "but for" cause of its decision. *Id.* at 1788 n.11, 1790. Justice O'Connor, concurring, *id.* at 1807, and Justice Kennedy, dissenting, *id.* at 1807, however, read "because of" to mean "but for." *Cf.* Brown v. Trustees of Boston Univ., 891 F.2d 337, 352 n.13 (1st Cir. 1989) (the court raised, but did not consider, whether *Price Waterhouse* permits a pretext plaintiff to prevail by proving "something less than 'but for' causation"); Visser v. Packer Eng'g Assoc., Inc., 50 Fair Empl. Prac. Cas. (BNA) 803, 805 (N.D. Ill. 1989) (the court described plaintiff's burden as having to show the improper factor was a substantial motivation for the decision but not having to show "but for" causation); Coleman v. Manufacturers Hanover Corp., 1989 U.S. Dist. LEXIS 13537, 4 (E.D. Pa.) (the court agreed that *Price Waterhouse* "casts serious doubt on the application of any 'but for' causation test in employment cases").

19. *See Price Waterhouse*, 109 S. Ct. at 1786 (Brennan, J., plurality opinion); *id.* at 1804 (O'Connor, J., concurring).

20. 891 F.2d 337 (1st Cir. 1989).

21. *Id.* at 353 (footnote omitted).

22. *Price Waterhouse*, 109 S. Ct. at 1787-88 (Brennan, J., plurality opinion). "In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Id.* at 1790 (footnote omitted).

the impermissible factor was a "substantial" one in the final decision.[23] Similar to the prior differing judicial interpretations of the standard of causation for title VII liability,[24] the Justices disagreed within the opinions about whether these two formulations are really different.[25] Subsequent cases continue to use the differing descriptions of the motivation needed to shift the burden.[26]

Third, what evidence must an employer, in order to avoid liability, produce to show that the same decision would have been reached even

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23. *Id.* at 1794 (White, J., concurring); *id.* at 1804 (O'Connor, J., concurring). Once the plaintiff has come forward with direct evidence that an illegitimate motive played "a significant, though unquantifiable, role," she has justified shifting the burden of persuasion to the employer. *Id.* at 1802 (quoting Hopkins v. Price Waterhouse, 825 F.2d 458, 461 (D.C. Cir. 1987)).

> At this point Ann Hopkins had taken her proof as far as it could go. . . . It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them them [sic] make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid.

Id. (emphasis in original). Requiring the plaintiff additionally "to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions." *Id.* at 1803 (emphasis in original) (citation omitted).

24. *Id.* at 1784 n.2 (Brennan, J., plurality opinion).

25. Justice Brennan did not see these as meaningfully different standards, *id.* at 1790 n.13, while Justice O'Connor said it was obvious that her proposed standard differed "substantially" as a result of her analysis of the meaning of the statutory words "because of." *Id.* at 1805 (O'Connor, J., concurring).

26. There are several possibilities. A court can adopt the "substantial" test. *See* Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990); Veatch v. Northwestern Memorial Hosp., 730 F. Supp. 809, 816 (N.D. Ill. 1990); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 315 (6th Cir. 1989); Palmer v. Baker, 52 Fair Empl. Prac. Cas. (BNA) 1458, 1462 (D.C. Cir. 1990). It may adopt the "motivating" test by reading the concurrence as proposing the same test, as in Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1437 n.1 (9th Cir. 1990), and Thomas v. Digital Equip. Corp., 880 F.2d 1486, 1489 (1st Cir. 1989). It may hold that either a "motivating or substantial role" is enough to shift the burden, as in Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1568 (2d Cir. 1989); *see also* Kelly v. City of Leesville, 897 F.2d 172, 175 (5th Cir. 1990). It may adopt an unadorned "motivating factor" test, as in Zanders v. National R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990), and Nichols v. Acme Mkts., Inc., 712 F. Supp. 488, 493 (E.D. Pa. 1989). It may require a plaintiff to show only that the "employment decision at issue was based upon an impermissible factor." Randle v. LaSalle Telecommunications, Inc., 876 F.2d 563, 568 (7th Cir. 1989). Or it may require the plaintiff to prove only that "an employer considered a factor prohibited by Title VII" in its decision. Chaffin v. Rheem Mfg. Co., 904 F.2d 1269, 1274 (8th Cir. 1990).

without reliance on impermissible factors? *Price Waterhouse* holds that the employer need only prove that the same decision would have been reached by a preponderance of the evidence, and not by clear and convincing evidence as the plaintiff contended.[27] To this end, the employer's evidence must be objective, at least in part; the evidence must show that the same decision would have been made, not just that the same decision would have been justified.[28] Further, the evidence must show more than that a legitimate reason is present, but that such reason alone would have induced the decision.[29] Despite the suggestion to the contrary by Justice White,[30] the fact-finder should not give any special credence to the employer's argument on this issue, since the employer's testimony pertaining to the absence of an illegal motive has not previously been found to be credible.[31]

III. THE SHIFTED BURDEN

The proceedings on remand in *Hopkins v. Price Waterhouse*[32] show that when the burden of persuasion shifts to the employer, the employer will face problems of proof normally encountered by the plaintiff.[33] At trial, Ms. Hopkins had not been able to determine the precise effect stereotyping had in the decision.[34] "It was apparent from the testimony that disentangling stereotyping from fact is difficult. Stereotyping may be conscious or unconscious, and a negative fact may be expressed in words that imply stereotyping and yet may be wholly nondiscriminatory."[35] Price Waterhouse's burden to avoid liability, however, was precisely to disentangle the "subtle influence of sex upon a person's perceptions"[36] in order to "separate out those comments tainted by sexism from those free

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27. *Price Waterhouse*, 109 S. Ct. at 1792-93 (Brennan, J., plurality opinion); *id.* at 1795 (White, J., concurring); *id.* at 1796 (O'Connor, J., concurring).

28. *Id.* at 1791 (Brennan, J., plurality opinion).

29. *Id.* at 1791-92.

30. *Id.* at 1796 (White, J., concurring).

31. *Id.* at 1791 n.14 (Brennan, J., plurality opinion). Although the employer has not yet been proven a violator of title VII by a showing that an illegitimate criterion was a substantial factor in its decision, "neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination." *Id.* at 1798-99 (O'Connor, J., concurring).

32. 737 F. Supp. 1202 (D.D.C. 1990).

33. *Price Waterhouse*, 109 S. Ct. at 1792 (Brennan, J., plurality opinion).

34. *Hopkins*, 737 F. Supp. at 1206.

35. *Id.*

36. *Id.*

of sexism"[37] by addressing the "extent to which the perceptions of [plaintiff's] interpersonal skills were tainted by sexism."[38] Because the employer's conduct wrongly created the "risk that the interference of illegal and legal motives cannot be separated,"[39] the employer must take the "strong medicine of requiring [it] to bear the burden of persuasion on the issue of causation . . . ."[40]

On remand, however, Price Waterhouse was unable to prove that Ms. Hopkins' partnership candidacy would still have been put on hold even in the absence of sexually biased evaluations.[41] Similarly, Price Waterhouse neither identified sexually stereotyped comments[42] nor demonstrated what weight those comments had on the contested decision.[43] Further, Price Waterhouse did not provide guidance for differentiating between comments influenced by sexual stereotyping and comments not so influenced.[44] Instead, it relied upon criticisms of the plaintiff's inadequate interpersonal skills but did not show that these remarks did not reflect "male-dominated standards governing how women were supposed to behave."[45] Price Waterhouse also relied on the district court's statement in its original opinion that because of plaintiff's interpersonal problems, the court had been unable to determine whether she would have been elected partner in an untainted process.[46] Neither of these contentions was sufficient to meet the shifted burden of persuasion.[47]

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37. *Id.* at 1207.

38. *Id.*

39. *Id.* at 1206 (quoting *Price Waterhouse*, 109 S. Ct. at 1790).

40. *Price Waterhouse*, 109 S. Ct. at 1797 (O'Connor, J., concurring).

41. *Hopkins*, 737 F. Supp. at 1206.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1207.

46. *Id.* at 1206.

47. *Id.* at 1206-07. See also Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806 (M.D. Ala. 1989), in which the court rejected defendant's contention that it would not have renewed a teacher's contract even if she passed the state teacher certification test. The school board failed to present evidence comparing the plaintiff's experience and observed ability with those of teachers holding certificates who had been rehired. It failed to show why the plaintiff, "if she had passed the state certification test, would not have been employed instead of . . . one of those [teachers] with less experience than Richardson." *Id.* at 814. *See also* Singletary v. Lane, 1990 U.S. Dist. LEXIS 1283, 48-49 (N.D. Ill.) (it was not sufficient for the employer to show that other black and white employees, whose actions were comparable to the black plaintiffs, had not suffered punitive action; the defendant was required to show that it had taken punitive action against those comparable employees).

IV. CONCLUSION

After *Price Waterhouse,* plaintiffs' lawyers should proceed much as they have previously. It is not necessary to characterize a particular case as either "pretext" or "mixed-motive" at the outset of litigation,[48] nor even at the summary judgment stage.[49] Plaintiffs' lawyers should, as before, present all direct and indirect evidence of a discriminatory motive,[50] since their ultimate goal is to persuade the fact-finder that discrimination was the one true reason, or at least a motivating or substantial reason, for the contested decision.

If reliance by the employer on an impermissible factor cannot be shown by direct evidence, the plaintiff may prevail only by showing pretext under *Burdine.*[51] If the court believes either the plaintiff's reason or the defendant's reason, the *Burdine* pretext analysis will be dispositive.[52] If, however, the court believes that both the reasons advanced by the parties were motivating factors behind the employer's decision, the burden shifts to the employer under *Price Waterhouse.*[53] In the latter scenario, a plaintiff operating under the *Burdine* framework would have lost because of a failure to prove pretext.[54] Under *Price Waterhouse*, though, the plaintiff will have made a sufficient showing to require the court to order the defendant employer to disentangle its motivations by proving it would have made the same decision regardless of the impermissible factors. Thus, Ms. Hopkins has in effect given future plaintiffs an additional means to redress employment discrimination.

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48. *Price Waterhouse*, 109 S. Ct. at 1789 n.12 (Brennan, J., plurality opinion).

49. Waltman v. International Paper Co., 875 F.2d 468, 481 n.5 (5th Cir. 1989).

50. *Price Waterhouse*, 109 S. Ct. at 1805 (O'Connor, J., concurring).

51. *Id.* at 1789 n.12 (Brennan, J., plurality opinion). *See, e.g.*, Summers v. Communication Channels, Inc., 729 F. Supp. 1234, 1238-40 (N.D. Ill. 1990).

52. *Price Waterhouse*, 109 S. Ct. at 1789 (Brennan, J., plurality opinion).

53. *Id.*

54. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).