ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: PRICE WATERHOUSE, Petitioner V. ANN B. HOPKINS

CASE NO: 87-1167

PLACE: WASHINGTON, D.C.

DATE: October 31, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

PRICE WATERHOUSE,

Petitioner

v. : No. 87-1167

ANN B. HOPKINS

Washington, D.C.

Monday, October 31, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 o'clock p.m.

APPEARANCES:

KATHRYN A. OBERLY, ESQ., Washington, D.C.; on behalf of the Petitioner.

JAMES H. HELLER, ESQ., Washington, D.C.; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

(1:56 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1167, Price Waterhouse v. Ann B. Hopkins.

Ms. Oberly, you may begin whenever you're ready.

ORAL ARGUMENT OF KATHRYN A. OBERLY

ON BEHALF OF THE PETITIONER

MS. OBERLY: Mr. Chief Justice, and may it please the Court:

This is a challenge under Title VII of the Civil Rights Act to Price Waterhouse's decision not to make Respondent a partner in the firm.

The District Court in this case, after a five-day trial, found that Price Waterhouse had legitimate non-discriminatory reasons for that decision.

The District Court also found that Respondent failed to prove that those reasons were a pretext for discrimination. Under this Court's Title VII decisions, including the ones that have been discussed in the last hour, those findings should have resulted in a judgment for Price Waterhouse.

But then something inexplicable happened in

the District Court's reasoning. After making the findings that should have ended the case in favor of Price Waterhouse, the District Court went on to hold that three factors, each of which was innocent by itself, somehow combined to produce a Title VII violation in this case.

None of those factors was found to be evidence of intentional discrimination, or evidence that discrimination had in fact caused Respondent any injury.

But the District Court nevertheless concluded that Price Waterhouse violated Title VII because the firm failed to take affirmative steps to purge or purify its decision-making process of an unquantifiable, unconscious, and unintentional element of sex stereotyping.

This finding of a tainted process at Price Waterhouse led the District Court to characterize the case as one involving mixed motives for the employment decision.

On that basis of the mixed motive characterization, the Court then held that it became Price Waterhouse's burden to prove, and to prove by clear and convincing evidence, that its decision would have been the same even if the process hadn't been

tainted.

QUESTION: As you put it, the District Court must have -- if there was a mixed motive, didn't it necessarily find that one of the reasons for the refusal was, was gender based?

MS. OBERLY: Justice White, that's the part of the opinion that I frankly find inexplicable, and somewhat like an O'Henry novel, because he first found all the factors that should have resulted in Price Waterhouse's winning this case.

He then found that he was unable to conclude what role the supposedly illegitimate motive played in the decision. He didn't say it played a significant role. He didn't say it played a substantial role. He said it played an undefined role.

QUESTION: Well then, I'd better wait until you tell me what the Court of Appeals did.

MS. OBERLY: I'll tell you now that the Court of Appeals affirmed it. But I'll come back to that.

QUESTION: You interpret an undefined role to mean some role?

MS. OBERLY: Yes.

QUESTION: Or --

MS. OBERLY: Yes, I interpret it to mean some role.

QUESTION: Some role.

MS. OBERLY: And I also interpret, as I'll be arguing to the Court, that some role is not enough to satisfy the Plaintiff's burden in this case, that at a minimum it has to be a significant or a substantial role, and that the District Court was unable to make those findings on the record in this case.

QUESTION: Well, you argue for some "but for" standard of causation? Or are you willing to settle for a substantial factor?

MS. OBERLY: Choosing between those labels, we argue for a "but for" standard.

But I actually think that all of the labels of causation floating around in this case, including those supplied by the Solicitor General, just add an element of confusion to what to me is a relatively straightforward question.

QUESTION: Well, what, what is the liability situation in a case when there are two independently sufficient causes for a particular employer's action, either one of which would be sufficient in and of itself, and one of which is an illegitimate reason, such as racial or gender discrimination?

MS. OBERLY: Then the situation we have, Justice O'Connor, is basically who wins in the case of a

tie? Who wins if the District Court, as was the case here, is unable to decide which motive actually caused the decision? And our position on that issue is that the answer has to be for the Defendant.

The Plaintiff brought this case, and if the Plaintiff can't prove by a preponderance of the evidence, and we don't suggest that she be held to any higher standard than preponderance, even though she would hold us to a clear and convincing standard, if she can't show by a preponderance that the discriminatory motive actually caused the result she's complaining about, then there's no sound reason either in policy or in this Court's prior precedence for holding that the employer has violated the law.

Because you have on the other side of the ledger an overwhelming proof, accepted by the District Court here, that the employer acted for legitimate reasons.

And you have throughout both the language and the legislative history of Title VII, you have starting with the language, you have Congress saying, it is only unlawful for an employer to act because of a prohibited reason.

You have the legislative history which shows that the opponents of the bill were extremely concerned

that the statute was going to cut much too deeply into employers' traditional freedom to make employment decisions for any reason they wanted to, as long as it wasn't a prohibited reason.

The effect of the Court of Appeals' mixed motive analysis, which basically awards the tie to the plaintiff in a case where you can't decide what the cause was.

QUESTION: Well, you tell us you don't like labels, but it seems to me we have to use labels at times in order to describe to District and trial courts what they should do, and that the answer you have just given to Justice O'Connor is that the Plaintiff must show "but for" causation.

MS. OBERLY: If we need a label, that is the answer I would give.

But I submit that for district courts and litigants to actually trying this case, or this type of case, the much simpler formulation is to say to those parties and to the Court, the question you're looking at is did the prohibitive motive make a difference? That's the same as "but for" causation.

QUESTION: Well, maybe the meaning. Maybe the meaning, though, and maybe what lower courts have done in if there are two reasons established, one legitimate,

one illegitimate, maybe the burden shifts to the employer at that stage to do something.

MS. OBERLY: That --

QUESTION: Maybe not by clear and convincing evidence, but maybe to do something. Maybe then the burden shifts to the employer. Is that what the --

MS. OBERLY: That is certainly what the --

QUESTION: Solicitor General is suggesting?

MS. OBERLY: I think that's what the Solicitor General is suggesting. It's certainly what the Court of Appeals held in this case.

We find that there are numerous problems with that approach. The first one is before we even get to who has the burden, we have a substantive question of what is the standard of liability under Title VII. Is it "but for" causation? It is causation that made a difference to the outcome?

If that's the case, then this Court's Title VII decisions hold, then it always remains the plaintiff's burden. It never shifts on the plaintiff's burden to show that she was the victim of intentional discrimination.

If she can't establish causation, in other words if she can't establish that the action she's challenging was caused by the prohibitive motive, then

there's no sound reason compatible with Title VII's purposes to give the judgment to her.

So that what you're doing, one of the phrases, besides the many different causation labels floating around in this case, one of the phrases that also permeates the case is the notion that the employer in this situation is a "proven wrongdoer." And I think that's in part the question you're asking.

But I would point out that the employer in this case is simultaneously a proven rightdoer, if you will. In other words, the Court has found that the employer has acted at least as much for a legitimate motive, which Congress clearly didn't intend to punish, as it has for an illegitimate motive.

And again, I come back to it being the Plaintiff's burden to bring the ball over the 50-yard line. If she can't show by a preponderance of the evidence that the prohibitive motive caused the injury she's suing to redress, then it's quite unclear why you are awarding her a judgment --

QUESTION: Well, there's language in a number of cases out there that it's enough to show that the discriminatory reason was a substantial factor.

MS. OBERLY: There this, that language appears, and in this Court's cases I think it doesn't

translate to the Title VII setting.

In this Court's cases it appears in two cases, the Transportation Management case and the Mt. Healthy case.

Neither of those cases dealt with either Title VII-specific language or with the legislative history of Title VII, which shows extensive Congressional debate about, on the one hand preserve, making sure that employers were not allowed to act for prohibited reasons but at the same time ensuring employers complete freedom to make employment decisions based on any other reason than a prohibited reason.

And what the Court of Appeals analysis does here by resorting to significant factor or motivating factor, as opposed to "but for" causation, is allow a plaintiff to establish liability even though the record also establishes that the employer acted for a perfectly legitimate reason.

The second problem besides the distinction between Title VII and the other two cases of this Court, which didn't address Title VII's history and language, is that Transportation Management, for example, was in my view purely an agency deference case.

The Court upheld the significant factor and then burden-shifting approach in that case, because the

Board, the National Labor Relations Board, presented that to the Court as its interpretation of its own statute.

The Court simultaneously said that it would have been perfectly acceptable, and perfectly plausible and reasonable and something the Court would have upheld, had the Court, had the Board taken the position under the NLRA that we take here under Title VII.

Essentially, the Court said it was a matter for the Board's discretion, and it was unwilling to overturn the policy judgment that the Board had made in that case. But none of that bears on how Title VII should be interpreted.

And then a final factor that makes this case quite different from Transportation Management and Mt. Healthy is that in those cases, as you've noted, at least the triggering predicate for shifting the burden was a finding that the prohibited motive was either a substantial or a significant or a motivating factor in the decision.

Here we don't even have that. Here we have the District Court saying that at most this was an undefined -- the prohibited motive played an undefined role, an unquantifiable role.

We don't have a finding that it was a

significant factor. We have the Court of Appeals saying that it was a significant factor, but the Court of Appeals wasn't the one hearing the evidence and making the findings.

QUESTION: It interpreted the District Court's opinion and findings.

MS. OBERLY: One can, as I have read the District Court's opinion --

QUESTION: Isn't that what the Court did, the Court of Appeals?

MS. OBERLY: The Court of Appeals took, made findings, which is in its role, that the District Court never made. The District Court --

QUESTION: Should we, should we judge this case on the basis of, are we reviewing the Court of Appeals or the District Court?

MS. OBERLY: You obviously are reviewing the Court of Appeals' judgment. But to the extent that the Court --

QUESTION: And, I take it that part of what it based its judgment on was its understanding of the facts as found by the District Court that there was --

MS. OBERLY: We're not asking --

QUESTION: That there was a mixed motive, and that there was an unacceptable, something unacceptable

caused the -- contributed to this refusal.

MS. OBERLY: Contributed to, that's, Justice White, that is a significant and crucial difference between contributed to and caused the decision.

And although this starts off --

QUESTION: Well, what if I put it part of the cause for the decision?

MS. OBERLY: Part of the cause is not enough, if the decision would have been the same in any event. Part of the cause is some factor, some role --

QUESTION: So then I take it you agree that we should review the case on the basis that the Court of Appeals at least found that part of the cause was, and then you say, well, that isn't enough. Is that what we --

MS. OBERLY: That's correct. It's not enough under the Court's own prior cases that have addressed similar issues under different statutes. Or under the Constitution.

Part of the cause skips the causal link that we contend is essential between the action the Plaintiff is challenging and what actually happened to her in this case.

I'd like to back up for a moment, because although these burden of proof and burden-shifting

issues are quite significant, there is in this case a fundamental threshold question of whether this even is a mixed motive case in the first place.

And before the Court wrestles with the difficult burden-shifting issues, it's quite important that it understand the consequences as applied by the Court of Appeals of attaching the mixec motive label to any particular case.

In this case, we have overwhelming evidence, accepted by the District Court, not overturned by the Court of Appeals, of a legitimate motive in Price Waterhouse's favor.

The evidence showed, the District Court found, and the Court of Appeals did not disagree, that from the very beginning of Respondent's tenure at Price Waterhouse there were significant problems in her ability to get along with staff and peers.

The evidence further shows that she was warned about those problems, that she was told she needed to correct them, that she agreed she needed to correct them. But at the time of the partnership decision in this case she had not in fact taken any action to correct them at all.

So the issue in this case really wasn't, should Ann Hopkins be made a partner, but should Ann

Hopkins either be rejected outright or placed on hold for future consideration?

We basically don't have in this case enough evidence of the type that the Court had in Transportation Management or in Mt. Healthy to characterize this as a mixed motive case.

All that we have on Respondent's side of the ledger, on the illegitimate motive side of the ledger, is a few isolated comments, virtually all of them sex neutral, virtually all of them from her supporters, that a psychologist characterized as the product of stereotype thinking.

We don't in this case deny that there were a few sex-based comments about Respondent, and that those comments were probably inappropriate. But they simply don't shed any light on the existence of a mixed motive in this case.

QUESTION: Well, Ms. Oberly, do you say that the comments by partners about women, past women candidates, and also evidence about the way in which the employer system was structured, are irrelevant to a showing of discriminatory motive?

MS. OBERLY: No, Your Honor. They clearly would be relevant evidence. But they don't in this case amount to supplying what's crucial, which is the causal

link between the comments and the action that happened, that the firm took in the case of Ann Hopkins.

The comments come from the supporters, the comments that are criticized as stereotypes come from her supporters. They come from men who wanted her to become a partner in this firm. There's no linkage between those comments.

First of all, it takes a great leap of imagination to say that stereotype comments, even if inappropriate, from people who wanted her to become a partner, somehow hurt her.

And the Court of Appeals was unable to make that conclusion. The Court of Appeals said, we can't tell that those comments hurt her. The Court of Appeals instead took those comments of evidence, as evidence of discrimination in the process.

That we submit is discrimination in the air. That doesn't mean that the discrimination didn't touch the plaintiff when you talk about discrimination in the air, it may well have touched the plaintiff. But there's no causal connection between the comments and Hopkins' fate at Price Waterhouse.

QUESTION: Did anybody testify to that?

MS. OBERLY: Pardon?

QUESTION: Did anybody testify that that was

not the policy?

MS. OBERLY: Price Waterhouse put on evidence that its policy was non-discriminatory.

QUESTION: Did anybody say that those specific statements made by people in authority were not the statements of Price Waterhouse?

MS. OBERLY: The record is quite clear, Justice Marshall, that the statements that are being criticized here were not the statements of the ultimate decision makers.

QUESTION: Where is that, what does the record say?

MS. OBERLY: The record shows an elaborate process, so I can't give you one page.

QUESTION: The record, the record at no place says that those statements were untrue.

MS. OBERLY: You mean that they weren't made? We agree they were made.

QUESTION: That they were untrue. Is there anything in the statement, in the record that says those statements were untrue?

MS. OBERLY: I'm not -- you need to help by telling me which statements you're referring to.

QUESTION: Well, was there any statement in the record that said that she didn't have to be less

macho.

MS. OBERLY: I'm not aware of -- there probably isn't. But that's not the point here.

The point is that that statement --

QUESTION: But it's my point, if you don't mind.

MS. OBERLY: I understand it's your point. But my point is that that statement was made by someone who wanted her to become a partner.

QUESTION: But is there anything --

MS. OBERLY: And the statement, I would like to focus, Justice Marshall, for a minute on the negative comments, on the comments from opponents of Ann Hopkins, which are the ones that were characterized by the expert in this case as being the product of stereotype thinking.

Those comments, which reflect --

QUESTION: Is there anything that says that Price Waterhouse would consider her better if she had her hair done?

MS. OBERLY: It's clear, Your Honor, we've covered that thoroughly in our brief, that that comment was made by her strongest supporter in the firm, after the fact, after the decision was made in this case, that however ill-advised it may have been, and I personally

regard it as an inappropriate comment, but however ill-advised it may have been it was his personal reaction to her situation. And there is no linkage between that comment and the ultimate decision made about her. He was not the ultimate decision maker.

QUESTION: Same time, practically.

MS. OBERLY: Pardon?

QUESTION: It came practically at the same --

MS. OBERLY: No, it came after the decision had been made.

QUESTION: It did, but it was how long after?

MS. OBERLY: I think a matter of months. Maybe somewhat less than that.

QUESTION: Much less than that.

QUESTION: Isn't the point, Ms. Oberly, that the statement, although not indicating the point of, the frame of mind of the person who made the statement, is taken by your opponents as evidence of the fact that this reveals the kind of thinking that went into the decisional process and this was more or less as an explanation of how this unfortunate thing happened?

MS. OBERLY: That's certainly --

QUESTION: That's their argument.

MS. OBERLY: That's their characterization of what was happening. But what they're confusing, I

think, is the type of case she brought with an entirely different case that she didn't bring, she didn't try, that the District Court never heard, and the Court of Appeals didn't review. And isn't before this Court either.

She brought a case challenging disparate treatment in her individual situation. The focus of that kind of case under this Court's precedence is on the particular employment decision about her.

If she'd wanted, and this evidence is relevant, the evidence you're talking about is relevant to a different type of case. If she'd wanted to attack the decision-making process at Price Waterhouse, there were a number of other ways she could have proceeded.

The most obvious would have been a case under Section 703(a)(2) of Title VII. That section focuses on employment practices that deprive, or tend to deprive, employees of opportunities without limiting the focus to a specific employment decision made about the particular plaintiff bringing the suit.

If she'd brought that type of case it would have been --

QUESTION: I understand that. But supposing the case she did bring, the trier of fact was persuaded that nobody really deliberately, intentionally wanted to

disfavor female applicants for partnership, but that unconsciously there was this threat of stereotype thinking that may have affected the decisional process, and in her case was critical, even though it was not deliberate. Would she prevail or not?

MS. OBERLY: I'd have to first tell you that that isn't our case at all. We have no findings that this was critical.

QUESTION: I understand that. I understand that.

MS. OBERLY: And we of course don't agree that may have affected is a relevant causation standard. But taking all that away, then it's possible that she has a cause of action. But that's not the case, and it's not the --

QUESTION: So it's not a question of the, you're not really emphasizing the intentional factor in that --

MS. OBERLY: One of the key components of the case she brought, which is an individual plaintiff disparate treatment case, is intent.

QUESTION: Right.

MS. OBERLY: She didn't prove intent. If she had brought the case I was describing under Section 703(a)(2), where she challenged the decision-making

process at Price Waterhouse, it would not have been recessary for her to show intentional discrimination at the liability stage.

It would have been sufficient for her to establish that there was a tainted process at work, and then you would have a separate inquiry into whether she in particular, or if she brought a class action any other members of class, were entitled to relief, because they themselves had been harmed by the process.

But she didn't bring a process case --

QUESTION: Well, you don't deny that showing a tainted process is certainly relevant to the disparate treatment case.

MS. OBERLY: It's relevant, but it's --

QUESTION: You're just saying it's not enough to get you over the hill.

MS. OBERLY: That's correct. It's like, it's very much like the Court's case at the end of last term in Watson, where there was evidence of substantial racial stereotyping, which the Court said may not have been enough to prove a disparate, an intentional disparate treatment case, but may in fact have been quite relevant to proving a case under Section 703(a)(2) of disparate impact attacking the fairness of the employer's subjective decision-making process.

Plaintiff, or Respondent, could have brought that type of case here, and she, and the evidence we're talking about would have been relevant in that type of case.

We're not focusing here on simply a technical pleading defect, saying she pled the wrong subsection of the statute. The problem is much bigger than that, because no one knew until her brief in this Court, which is the first time that Section 703(a)(2) has ever been mentioned in this litigation, that we were litigating a process case that not only focused on the employment decision about her but purported to be an indictment of Price Waterhouse's entire decision-making process.

If that type of case is to be brought, then obviously you need something that didn't happen in the District Court. You need a focused and fair and full inquiry into the fairness of Price Waterhouse's entire decision-making process.

If she succeeds in proving, she or someone else succeeds in proving a tainted decision-making process, it may well be that at that point specific relief, such as an injunction or a declaratory judgment, might be appropriate.

But here we're talking about a plaintiff who is unable, who brings an individual disparate treatment

case, who is unable to establish that the conduct she challenges actually caused the results she's complaining about, and yet she nevertheless claims that she's entitled at least to a liability judgment, and to some sort of partial relief, such as an injunction, declaratory judgment, and attorneys' fees, even though she can't make the necessary causal link.

QUESTION: What do we do with the Court of Appeals' statement that Hopkins demonstrated and the District Court found that she was treated less favorably than male candidates because of her sex?

MS. OBERLY: The District Court, in fact, didn't find that. The District Court rejected --

QUESTION: I know. But this is what the Court of Appeals says, and that's the Court of Appeals' interpretation of the District Court's findings. And that's, that's just one of several places where the Court of Appeals says this.

MS. OBERLY: The Court of Appeals says that repeatedly, Your Honor. But if you're looking at the findings, they come only from the District Court. The District Court, he expressly rejects --

QUESTION: I know, but the Court of Appeals would have had to have found -- was looking at the judgment below, the facts from the standpoint of whether

they were clearly erroneous.

MS. OBERLY: Well, the Court of Appeals was drawing its own legal conclusions on the same facts that the District Court said, don't support the claim you just read.

The District Court specifically rejected the notion that she had established a claim showing she was treated differently than comparably situated men. The District Court specifically rejected a claim that, based on her introduction of statistical evidence to show that she was treated differently, that women in general were treated differently than men at Price Waterhouse.

So that, to take findings which clearly are the province of the District Court and have the Court of Appeals elevate them into something that the District Court never found doesn't --

QUESTION: So you suggest we make our own judgment on what the --

MS. OBERLY: I suggest that when you're looking --

QUESTION: What the District Court said or found, I guess we're supposed to anyway. Aren't we?

MS. OBERLY: When you're looking for findings, you will find them in the District Court's opinion. And for the Court of Appeals to characterize them as

something other than the District Court found does not turn them into findings.

The final issue in this case, which I'll just devote a minute to and then save the minute of my time for rebuttal, is simply the Court of Appeals' error in switching the burden of persuasion, if it's to be switched at all, to Price Waterhouse by clear and convincing evidence.

Respondent makes only a half-hearted attempt to defend that portion of the Court of Appeals' judgment, and with good reason. That standard is rarely invoked.

It's certainly, to our knowledge, never been invoked to require a defendant to disprove a plaintiff's case. And the Court of Appeals here offered no explanation for departing from the normal preponderant standard. And certainly that aspect of the Court of Appeals' judgment requires reversal.

I'll save the remainder of my time.

QUESTION: Thank you, Ms. Oberly. We'll hear now from you, Mr. Heller.

ORAL ARGUMENT OF JAMES H. HELLER

ON BEHALF OF THE RESPONDENT

MR. HELLER: Mr. Chief Justice, and may it please the Court;

I guess I had not expected to spend this much time on findings as I now think it's expected I should do. This Court has so often talked about not engaging in second-guessing of the findings, and I don't think the Court of Appeals did that, even if it used slightly different language.

But the District judge in this case did, I think, a remarkably careful job, and I think unfortunately Ms. Oberly has rather scanted what the findings say.

He found in the final order, which is on page 62 of the appendix to the petition, the discrimination caused in part a denial of this partnership. It did so because Price Waterhouse did not protect the partnership evaluation process from stereotyped attitudes.

Before he got to that he built very carefully the reason why it took three elements to find that Price Waterhouse had done this with what is the equivalent of a corporate or a firm intent.

QUESTION: Do you suppose that this finding as historical fact sort of saying that is subject to the

clearly erroneous standard in the Court of Appeals?

MR. HELLER: I would have thought it was subject to the clearly erroneous standard, and I will, I see very little mention of Anderson v. City of Bessemer City and Pullman v. Swint in the briefs either of the government, as a matter of fact, or of Price Waterhouse.

Yes, we have thought all along that what, what we are perhaps being assailed for, or what Judge Gesell is being assailed for, is being careful in this case, not overstating what he found, that this is a classic mixed motives case.

And unfortunately they don't subject themselves to the kind of analysis that the bean-counting approach of the government's brief seems to suggest, because there is no way that votes get counted here.

What happens is this is a process in which there is in effect a veto power in a relatively small group of objectors among the partners who comment on this, because that is what the policy committee takes note of. And we had that from the senior partner, Joseph Connor, when we took his deposition de bene esse. That is the decisive factor here.

Using subjective standards, collegial

decision-making, which is as hard to penetrate as the kind of legislative and administrative decision making that this Court talked about in the Arlington Heights case, Price Waterhouse relies very heavily and gives great weight and leverage to the comments of these partners.

Now, the evidence that was given about what those comments mean is quite full, and it's all in the joint appendix. Not all of it. There are some obvious things.

There is that comment about dressing more femininely, walking more femininely, talking more femininely. That's said by one of the two messengers in this case. That is the messenger from the policy board in the partnership, and that's what Judge Gesell found, to Ms. Hopkins.

There is also another messenger who comes from the local office where she's being nominated to the policy board, and that was Roger Marcellin. And he's the man who said, I have no doubt that Tom Beyer, the man who made those remarks, knew exactly what to tell her, where the problems lay. That was in response to a question by the Judge, by the way.

But the predicate for this, "caused in part," and I do think that that is really stronger than played

a role or a motivating factor or a substantial factor, and I see no reason why any of those tests wouldn't work.

One could even use the definition of material in the Kungys case as a natural tendency to influence the decision.

But whatever, whatever formulation of that is used, here there was a finding that was caused in part and the predicate for that finding was a series of decisions, of statements in Judge Gesell's decision itself.

He said, although the stereotyping by individual partners may have been unconscious on their part, the maintenance of a system that gave weight to such biased criticisms was a conscious act of the partnership as a whole.

And he said then almost in the next sentence, and I'm reading at 56 and 57, the Plaintiff appears to have been a victim of omissive and subtle discrimination created by a system that made evaluations based on outmoded attitudes, that is stereotyping, determinative. Determinative. Hard to find a more decisive word.

And then finally, before he went on to talk about mixed motives where he said again, discrimination played a role in the employment decision.

Before he went on to say that, he said, the court finds that the policy board's decision not to admit the Plaintiff to partnership was tainted by discriminatory evaluations that were the direct result of its failure, the policy board's, to address the evident problem of sexual stereotyping in partnership evaluations.

Now, this isn't a question of the 50-yard line. This is a question of two motives possibly playing a part, and what must the Plaintiff show. That we thought was the first main issue in this case.

What we believe the Plaintiff must show is clearly marked by this Court's decisions. A motivating factor, a substantial factor. And Transportation Management, I believe, characterized Mt. Healthy as saying, played a role.

This is if anything a statute which is --

QUESTION: Suppose an, suppose an employee gets his, gets reinstated on the basis of such a suit, having established that the dismissal was for a mixed motive, I assume that having won that wonderful victory the employee could thereupon immediately be refired for the valid reasons that, that were themselves self-sufficient. Wouldn't that follow?

MR. HELLER: You might -- that certainly is

possible. You might have the same case again, but you might have the retaliation problem as well.

QUESTION: Well, yes, but -- but in theory there is, it's a hollow victory, to get reinstated and say you, the effective factor was not necessarily unlawful. Take me back and fire me for the other effective factors, leaving out the unlawful one.

MR. HELLER: That's a little bit, I think, Justice Scalia, that's a little bit like what the findings and testimony were about whether or not a partnership price, such as Price Waterhouse, really tries to control this sort of thing.

If the courts give smart money or equitable relief because it has happened, it is not likely to happen again. We have no thought that Price Waterhouse, like other intelligent firms in this world, doesn't learn by its past mistakes and doesn't learn that this process as it was conducting it at the time of Ms. Hopkins' candidacy is really, is really just unacceptable.

But, so I don't think, I think yes, in theory that can happen again. There can be a serial kind of mystery or murder story going on --

QUESTION: I wonder. Do you, do you agree with the, with the bottom line in the District Court and

the Court of Appeals that if the employer nevertheless said, well, this was a mixed motive case, but the lawful motive was sufficient in itself and we would have denied this person a partnership anyway, following Mt. Healthy. Do you agree with that?

MR. HELLER: Well, we agree that that is, we certainly agree that that is open to them. We have said that it should be a stronger burden of proof --

QUESTION: Well, nevertheless, it is open to them.

MR. HELLER: There's no question.

QUESTION: It's just not enough, it's just not enough in any particular case that it's a mixed motive case.

MR. HELLER: Oh no. You don't win just because it's a mixed motive case. That gets you to --

QUESTION: Although there is some submissions in this case that indicate that that should be the standard.

MR. HELLER: Well, we have not taken that position. We tried to distinguish between the liability stage and the relief stage.

When you get to the relief stage, and 706(g) of the act we think is structured very clearly to say that, the second sentence just reeks of a defendant's

responsibility to come forward and say, that's not the reason we did it. We would have done it anyway.

The question I think there is whether it's to be clear --

QUESTION: And Mt. Healthy goes to liability, doesn't it?

MR. HELLER: No. We think, we think in all fairness that it doesn't go to liability. They showed liability, they showec that there were two motives.

Judge Gesell ended up saying there are two possible explanations for this, each of them may have caused it in part. At that point we think that the wording, the policy, the intent of Title VII, the dealings of the case --

QUESTION: Well, that's not what Mt. Healthy held.

MR. HELLER: Mt. Healthy --

QUESTION: Mt. Healthy said there was no Constitutional violation if the employer could show that he would have fired the person for the non-Constitutional reason.

MR. HELLER: That, that is true, in Mt. Healthy, that that is what Mt. Healthy held.

But we think that it comes really at the remedy stage, because Title VII is very explicitly

structured that way. And that's where it should come. That one does not simply say there are two possible factors, and therefore you lose. This is not a football game. Something has tended to deprive her of it.

And by the way, I don't think --

QUESTION: What do you think the two courts below said, meant when they said that the employer could have shown that it would have engaged in this denial of the partnership anyway, but it didn't do it? What do you think they meant?

MR. HELLER: I think they meant to say, show us some standards that you've written out, some history that's clear --

QUESTION: Right, right. Well, what if, what if the employer had come back and said, and proved to the satisfaction of the Court, would it have gone to liability? I would have supposed it would.

MR. HELLER: I wouldn't have supposed it would, no. It would go because 706(g) says that if you prove discrimination affected the employment decision, that is, that is grounds for some relief. That is the first sentence.

When you get to the second sentence, it says, however, there shall be no reinstatement or back pay if you show, if there was another reason. And that seems

to me to be a very intelligent structuring of the way one deals with relief rather than liability.

QUESTION: And no reinstatement.

MR. HELLER: And no reinstatement, if you make that showing by the necessary standard, which we've said should be clear and convincing.

QUESTION: What about attorneys' fees?

MR. HELLER: Excuse me.

QUESTION: What about attorneys' fees?

MR. HELLER: Attorneys' fees and a general injunction are declaratory judgment. That is correct --

QUESTION: Well, perhaps no attorneys' fees, if there's only injunctive relief, says Hewitt against Helms. Right?

MR. HELLER: Possibly, no attorneys' fees. But we would have though that that's a matter of, of analyzing to what extent you've succeeded on claims.

QUESTION: Aren't most cases mixed motive situations, for example, even in McDonnell Douglas and Burdine, in a sense they are so-called mixed motives. You have to decide, the trier of fact has to choose between a legitimate reason and an illicit reason. Isn't that right?

MR. HELLER: They are all that way until you get to the third stage and the trial judge says, I find

that this was either-or, and I believe this or that.

QUESTION: Well, why didn't the trial court have to make such a finding here?

MR. HELLER: Partly because of the complexity of the process that was going on here, and because I don't believe that there is anything that, in Title VII, that says you must say either-or, and this Court's decisions seem to say they're --

QUESTION: Well, wouldn't, wouldn't the evidence of gender stereotyping go to the question of whether the interpersonal skills criteria of the employer was a pretext, in effect?

MR. HELLER: Well --

QUESTION: Or was pretextual as applied here?

MR. HELLER: Prof. Fiske's testimony went partly to the intensity as well as the kind of comments that were being said.

Yes, it goes to it, and that's another reason, that's another reason why it could be possibly come out as a pretext case. But it did not.

Judge Gesell found there was some grounds for that, but when he looked at the nature of the comments of a very significant number of the objectors to this candidacy, and the way they were phrased, and the intensity, calling her potentially dangerous, nobody

likes her, universally disliked, he then came to a conclusion, a very careful conclusion, that there was something of both here.

QUESTION: Did he ever quantify that something?

MR. HELLER: No. That seems to me to be the government's approach, and I think it's pretty much unquantifiable.

Price Waterhouse does not run a counted vote system, and people aren't required to get up and explain their votes. So we're back with this problem that Arlington Heights addressed.

QUESTION: Well, that's pretty difficult when you combine that with Mt. Healthy. I mean, where are we on liability?

MR. HELLER: I believe we are on liability --

QUESTION: And who has what burden?

MR. HELLER: I believe we are on liability that she had met the burden of showing that it caused, in part, or was a significant, substantial factor, a motivating factor, that there may well have been another factor.

Now the question I think is to say, how much relief, what relief, if any, is she entitled to in the circumstances.

QUESTION: Do you have any support for the clear and convincing standard that the court shifted over to the employer?

MR. HELLER: What we think the support is is the common law principles of making the person who has been found to have had at least one wrong motive disentangle from --

QUESTION: Any support from any of our cases?

MR. HELLER: I don't think there is from any of your cases --

QUESTION: No.

MR. HELLER: Any of the Court's cases in a discrimination or --

QUESTION: Did the Plaintiff ever make out in the trial court a disparate impact claim under 703(a)(2)?

MR. HELLER: No. I think Judge Gesell's foctnote, which you'll find at page 60, is quite right. That seems to, seemed to us at the time, at least, to call for statistical proof, and I'm not sure Watson changes that. And we did not succeed on the statistics.

So I don't think -- and, but we just don't think Title VII gets boxed that way, so that 7(a)(2) is, 703(a)(2) is disparate impact and not disparate

treatment as well. In other words, the statute does not work in these nice cubby holes that way.

So what we do believe, if the clear and convincing is perhaps the one point where we think we are well out beyond the decisions of this Court, is that that is the proper solution to a case in which there is a kind of smog over a motivation now, because there have been two factors probably, and one of them is a forbidden one.

And that the employer has the records, the employer has the history, the employer has a knowledge of its own motives. It ought to be able to make a clear and convincing case.

It should be able to do that by pointing to history, it should be able to do that by pointing to a written standard, if that's so. But -- I'm sorry, Justice White.

QUESTION: Oh, I wasn't -- I was thinking about something else entirely.

MR. HELLER: Oh, excuse me. I thought I was burning you.

But that, if one says that, I also think clear and convincing says something about the kind of proof that is wanted. We are, we are perhaps in the last analysis less concerned about the quantum than we are

this Court instructing lower courts that you've got to say something more than what, in the Teamsters it said were general affirmations of good faith.

That's not where the case is now. You must come forward and say, we would have done this but for. And as to "but for" not one of those 87 male candidates, not one of them could have established that they were going to become partners but for a single factor in the world.

Actually 47 did and 21 didn't. That is the kind of impossible burden of proof that will simply extinguish Title VII suits and collegial decision making would likely, by subjective standards, would likely become a very common form of practice, because it would be impenetrable.

And that too, given the policy of the act, the history of the act, the defeat of the McClellan Amendment, with Senator Case, is a very clear statement about it.

The 1972 amendment, when this Court said that a new statute that said, any discrimination is, violates this act, and said that is assimilated to the standards under old Title VII.

All of that, we think, argues for saying, liability is not a demanding standard, or anywhere near

the demanding standard that Price Waterhouse insists. Remedy is where they may be able to show that they did something that should not have a consequence of the sort that we ask for in the complaint in this case.

If there are no other questions, I will then sit down.

QUESTION: Thank you, Mr. Heller. Ms. Oberly, you have four minutes remaining.

REBUTTAL ARGUMENT OF KATHRYN A. OBERLY

ON BEHALF OF THE PETITIONER

MS. OBERLY: There are just two points I'd like to address, Your Honor.

The first is Plaintiff's contention that our position puts an impossible burden of proof on the Plaintiff in a Title VII action. That's simply not the case.

This Court in Burdine recognized that the Plaintiff has full access to the EEOC's investigatory files, as well as to discovery in a civil case. And this case well bears that out, because by the time this case went to trial, Plaintiff knew as much about Price Waterhouse's decision-making process as Price Waterhouse itself knows. She was not laboring under any handicap. And to make her prove her case is simply not unfair.

The second point I'd like to address is

Plaintiff's theory that the way to deal with this class of cases is to draw a distinction between liability and remedy.

That distinction does not work and does not make sense in the type of case Plaintiff brought, of an individual disparate treatment claim. If she succeeds in proving causation in that type of claim, then she's entitled to full relief.

You may need to measure, you may need to have a quantification on the amount of back pay. You may need to work out the specifics of the relief. But there's no doubt that she gets full relief.

On the other hand, if she can't establish causation, there is no justification, and in fact there are serious Article III problems with giving her partial relief, Article III problems giving her an injunction when she's no longer there to enforce it, when she hasn't brought a class action, and there are no other women who can show that they're affected by Price Waterhouse's future conduct.

And you certainly would not give her attorneys' fees for establishing a process violation when she can't show that that process harmed her.

So that the liability/remedy dichotomy that the Plaintiff is urging the Court to adopt makes sense

in a different type of Title VII case.

It makes sense in disparate impact cases, it makes sense in class action cases, it makes sense in pattern or practice cases, where the liability showing does not require the establishment of "but for" causation, and you leave to a separate remedy stage whether particular individuals have been harmed and should be the beneficiaries of specific relief, such as reinstatement or back pay.

But in her type of case, those inquiries merge into the liability determination. And if she can't get over the liability hurdle, you simply don't reach the remedial phase of the case. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Oberly. The case is submitted.

(Whereupon, at 2:41 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1167 - PRICE WATERHOUSE, Petitioner V. ANN B. HOPKINS

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BY alan friedman

(REPORTER)