

PRICE WATERHOUSE V. HOPKINS:
A PERSONAL ACCOUNT OF A
SEXUAL DISCRIMINATION PLAINTIFF

*Ann Hopkins**

INTRODUCTION

I was asked to discuss my experience with the legal system and to go beyond previously published material to answer some questions.

- Why did the case succeed?
- What happened after you went back to Price Waterhouse?
- What changed after the litigation?
- What advice would you offer to people who seek to combat discrimination?

In this article, I offer some answers, all of which are colored by my point of view, my profession, and my personality. My point of view is that of a litigant. By profession I am a management consultant, although I have been variously (and erroneously) assumed to be an attorney or an accountant. By personality type I am a value driven, big picture, people watching problem solver.

Most problems look like management problems to me. Solutions may involve elements of research, writing, psychology, analysis, and other skills or disciplines. These solutions, however, are posited with time constraints and less than perfect information. I usually begin with an evolving hypothetical solution, an opinion, if you will, grounded in

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my core values, common sense, and experience, not necessarily in data or evidence. When time runs out, hypothesis becomes the management solution. Remember that when I comment on numbers, matters of law, or psychology: I try to be accurate, but I don't always get it right.

BACKGROUND

I am a Texan as were my parents. My father was a career army officer, my mother a nurse. I am the oldest of three children. My sister, brother and I grew up in Germany where my father served a couple of three-year tours separated by four years at Fort Leavenworth, Kansas. Each of us earned master's degrees: my sister Susan in languages, my brother John in psychology, and I in mathematics. Susan and her husband, Henry, are teachers, she at The Brooks School, he at Phillips Academy in Andover. Their two children graduated from Andover. One teaches and is married to a teacher, the other is an environmental scientist married to a biologist. My brother and his wife, Cathy, live and work in New York. She is a physician's assistant. He is a speech therapist. They have one child out of college, one in, and one en route. We are a tightly knit family that believes in education and work – values we learned from our parents.

I graduated from Hollins College and Indiana University and began my career in aerospace at IBM in the late sixties. I developed mathematical models to simulate the motion of scientific and weather satellites under the influence of various magnetic, gravitational, and radiation forces. In the early seventies I moved from purely technical work into project management and from IBM to a series of smaller companies. As aerospace work declined, I was exhausted by the hand to mouth existence of the small company for which I worked. I went to work for Touche Ross & Co., one of the "Big Eight" national accounting firms, as a management consultant. I was the oldest of three women on the consulting staff in my office when I started. I worked on projects for the Mayor's Office in Chicago, the Federal Reserve, the Corporation for Public Broadcasting, and National Public Radio. My biggest project was for the United Mine Workers of America (UMWA) Health and Retirement Funds (HRF). In the course of that work I traveled to many coal mines and mining communities. I loved the work at Touche – the projects, the clients, the Touche teams I worked with, the travel, the way that Touche did business, the culture – all of it.

At the Touche offices in downtown Washington, I shared an office, which held only five desks, with five other consultants. We were usually

out of the office so the seemingly inadequate desk to person ratio was no problem. I married one of my officemates. We had dinner together sixteen nights in a row and decided to be married. My husband, Tom Gallagher, was a housing and real estate consultant. He tumbled endless streams of numbers to assess the financial viability of housing and real estate programs and projects. He was a tenor who played banjo and guitar, had a riotous sense of humor, great charm, and was very smart. He earned a master's degree from the University of Edinburgh and on holidays had toured Scotland on a Triumph motorcycle with a sidecar. I rode a Yamaha 175 at the time. Our daughter, Tela, was a Touche baby. She was born while I was helping the UMWA HRF define, design, implement, and operate a medical claims processing system for its 850,000 beneficiaries.

When my husband and I married, we became a nepotism policy violation. Neither of us could be a partner as long as we both worked for Touche. I decided to look for a new position. At the time, I was pregnant with my son Gilbert so I looked for and found a new job in the second trimester when I was barely showing. Gilbert, also a Touche baby, was born in November. I went to work for a computer consulting company in December 1977. My husband, in time, became a partner at Touche.

I disliked working for the computer consulting company, largely because of the way it did business and its culture. The company was hierarchical and paternalistic. Decisions about most matters, technical, administrative, or management, were made by the five founding fathers of the company. I wanted to go back to work for an organization like Touche, another one of the "Big Eight." A Touche partner suggested Price Waterhouse, his favorite of the remaining seven. He made introductions and recommended me. In August 1978, I joined Price Waterhouse (the firm), in the consulting practice of the Office of Government Services (OGS). At about the same time, although unknown to me, Elizabeth Anderson Hishon (Betsy) started what became landmark litigation with King & Spalding, an Atlanta law firm of about a hundred partners.

At Price Waterhouse, my first client was the Bureau of Indian Affairs (BIA) – I have been on more Indian reservations than most people. My son Peter was born while I was working with the BIA. Lew Krulwich, the partner I worked for, covered for me when I couldn't travel. As BIA projects finished and BIA business wound down, I decided I wanted to write a proposal in response to a request for proposals (RFP) from the U.S. Department of State (State). The RFP had been declined by the other senior managers in the office. It was en route to the trash can when

I picked it up. State wanted an analysis leading to design recommendations for a worldwide financial management system. It planned two small contracts with different companies, each of which would independently do the analysis and design. State would then select a design and require the two companies to compete for a big contract to implement the design. This type of contract was called a “fly-off” based on a type of aircraft procurement whereby two competing contractors would each build one aircraft. After flying both of them, the government would award a contract to build the better aircraft in volume.

The State analysis and design proposal was the first time I worked for Thomas O. Beyer, the partner in charge of consulting in OGS. Tom was a Harvard MBA. His father had been the managing partner at Touche Ross. Tom transferred from Boston the summer my son Peter was born. He was a lean man, on the short side, with fierce steel blue eyes. He was bald on top with very curly, closely cropped grey hair on the sides. Decisive, direct, his demeanor scared some, offended others. When he took over the consulting function, OGS was a cost center of the firm’s national office – it was not required to make a profit. He had a new and aggressive charter for OGS. It was going to be a profit center; it was going to grow exponentially; and State was going to be an engine for that growth. Tom became the partner in charge of my work at State. Of all the people for whom I worked in my career, none has more of my professional respect, regard, or admiration than Tom Beyer. Whatever I needed to win the State analysis and design proposal he provided. After phone calls from Tom to partners in other offices, people I needed flew in from wherever they were to do whatever I needed done.

State selected Price Waterhouse for one of the “fly-off” design contracts. As the second, State chose the computer consulting company for which I had briefly worked. After two and a half years, travel to thirty or forty countries, and a 26 volume proposal, Price Waterhouse won the \$30-50 million implementation project for State. At the time, that project was the biggest consulting deal the firm had ever done. The senior partner of the firm, Joseph E. Connor, signed the contract for the firm at a formal, State-arranged award ceremony that included a lot of civil service people who were prominent in federal financial management.

In August 1982, at the end of a nomination process that began in June, the partners in my office, Tom and Lew leading the charge, proposed me as a candidate for the partner class to be admitted in July of 1983. I was the only woman among 88 candidates. Six of the firm’s 667 partners were women. About 10% of the partners were consultants. When I was told I would not be among the 47 members of the partner

class of 1983, I was miserable, depressed, furious, disconsolate, and inconsolable in cycles. Tom was in a state of controlled depression. Lew was visibly sad.

Joe invited me to New York so that he could explain why I wasn't admitted. He was pleasant, but there was no warmth about him. He summed up the paperwork that partners had submitted with their votes on me. By his analysis, "Admit" votes from three partners who knew me well represented strong support. My downfall was negative comments from 26 partners who didn't know me well, some of whom were supposedly supporters. The 26 voted: ten to admit, seven not to admit, one to hold over for another year, and 8 abstained for lack of information.

Joe read the comments to me. A few of the more memorable ones were:

- Needs a course in charm school,
- Matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate,
- Macho,
- Overly aggressive, unduly harsh, difficult to work with and impatient with staff,
- Overcompensated for being a woman,
- Universally disliked.

Clearly a bunch of partners didn't like me. When I asked Joe what I had to do to make partner in the next year, the answer I got sounded like: keep up the good work and avoid getting negative comments. When I got back to Washington, Tom Beyer offered some memorable advice that came to figure prominently in the litigation. He suggested that I walk more femininely, talk more femininely, dress more femininely, wear makeup and jewelry, have my hair styled.

After the next nomination cycle I was told I would never be a partner.

What more could I do? The firm had the business I had been instrumental in winning and I was a failed partner candidate in an "up or out" profession. Lacking a reasonable explanation for what appeared to be an irrational business decision, my husband suggested that I "sue the bastards," which I did.

In August of 1983, as first step on the path to litigation, I filed a sex discrimination claim with the Equal Employment Opportunity Commission (EEOC) alleging that Price Waterhouse had violated Title VII of The Civil Rights Act of 1964 (the Act). I left Price Waterhouse early in 1984 and worked as a consultant to the State Department, and later, as a budget officer for the World Bank until the litigation ended.

Hishon v. King & Spalding

In 1984 *Hishon v. King & Spalding*¹ was under consideration by the U.S. Supreme Court. At issue was whether a partnership was subject to Title VII of the Act.² In the lower courts, King & Spalding claimed that its constitutional right to freedom of association was paramount in decisions to admit partners to the firm. Betsy Hishon alleged that she had been discriminated against and was entitled to relief under the Act.³ The lower courts weighed the competing constitutional and federal interests, agreed with King & Spalding and denied Betsy her day in court for lack of jurisdiction of the Act.⁴

Because *Hishon* raised questions about federal jurisdiction over discrimination in partnership decisions, *Hopkins v. Price Waterhouse* entered the court system as a matter before the Superior Court of the District of Columbia alleging violation of the D.C. Human Rights Act. At issue was whether Price Waterhouse had discriminated against me when it failed to make me a partner.

In the summer of 1984, the Supreme Court ruled on *Hishon*: decisions concerning advancement to partnership are governed by Title VII, and must therefore be made without regard to race, sex, religion, or national origin. King & Spalding was subject to the Act. Betsy settled with the firm – the terms of the settlement undisclosed. Her discrimination case was never tried.

Hopkins v. Price Waterhouse

In September of 1984, *Hopkins v. Price Waterhouse*⁵ entered the legal system as a federal case before the District Court for the District of Columbia Circuit. In that case, I alleged:

Discrimination – Price Waterhouse had discriminated against me when it failed to make me a partner because of gender stereotyping in the partnership evaluation process.

Constructive Discharge – Price Waterhouse had, in effect forced me to leave the firm.

1. 467 U.S. 69 (1984).

2. *Id.* at 73-4.

3. *Id.* at 72.

4. *Id.* at 72-3.

5. 618 F. Supp. 1109 (D.D.C. 1985).

As remedy I sought admission to the partnership, back pay, legal fees and court costs.

A year later, in September 1985, the District Court held that Price Waterhouse had discriminated, but that I left the firm voluntarily – I was not constructively discharged.⁶ Absent constructive discharge, I was not entitled to the partnership remedy I sought. I appealed the constructive discharge result. Price Waterhouse appealed the discrimination result.

After a couple of years, in August 1987, the Court of Appeals for the District of Columbia Circuit upheld the lower court on the discrimination result, reversed it on the constructive discharge result, and remanded the matter to the lower court for trial on remedy.⁷ Price Waterhouse appealed to the Supreme Court on the discrimination issue.⁸ Constructive discharge was never appealed. In the D.C. Circuit, *Hopkins* expanded the definition of constructive discharge to include career ending situations.

Price Waterhouse v. Hopkins

Better known than *Hopkins* is the firm's appeal to the Supreme Court, *Price Waterhouse v. Hopkins*⁹ (hereinafter *Price Waterhouse*). In that appeal, the firm offered several arguments on the issue of liability:

- There was no discrimination.
- Freedom of association is paramount in partnerships.
- Stereotyping is inadequate evidence of discrimination.
- The burden of proof should never have shifted to the firm to prove that absent the discriminatory behavior the firm would have made the same decision (not to admit).
- The evidentiary standard required when the firm had the burden of proof was too high. (The firm had to prove its point by clear and convincing evidence and I had to prove mine by only a preponderance of the evidence.)

After another couple of years, on May Day 1989, in six opinions, the Justices of the Supreme Court discussed their views and related rulings, only one of which affected me. The Court ruled that plaintiffs and defendants should be held to the same evidentiary standard – preponderance of the evidence.¹⁰ The case was reversed and remanded to lower

6. 618 F. Supp. 1109 (D.D.C. 1985).

7. *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987).

8. *Price Waterhouse v. Hopkins*, 485 U.S. 933 (1988).

9. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

10. *Id.*

courts for reconsideration by the lesser evidentiary standard.¹¹ The District Court would have to reconsider the firm's argument that it would not have made me a partner even if there had been no discrimination and then decide whether it was convinced by a preponderance of the evidence. It had not been convinced by clear and convincing evidence.

What made this case famous, among other things, was that the Supreme Court recognized stereotyping as a way of showing evidence of discrimination and it characterized cases in which an employment decision is made for both lawful and unlawful reasons as "mixed-motive" cases. In such cases, once a plaintiff proves that an unlawful reason is a substantial or motivating factor in the decision, the burden of proof shifts to the employer to prove that it would have made the same decision in spite of the unlawful reason. The Court went on to rule that an employer may avoid **all** liability - including attorney's fees and court costs - if it succeeds with this "same-decision" defense.¹²

The *Price Waterhouse* decision was one of nine Supreme Court decisions issued in May and June of 1989 that narrowed in some respect the scope of key civil rights laws. Partly in response to the Court's decisions, Congress passed the Civil Rights Act of 1991. In response to *Price Waterhouse*, Title VII, as amended in 1991, provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."¹³ The 1991 amendments also overruled *Price Waterhouse's* holding that an employer could avoid Title VII liability entirely by showing that it would have made the same employment decision in spite of the discriminatory motive. An employer violates the law if unlawful discrimination is a motivating factor for the employment practice. The employer can, however, **limit** its liability if it shows that it would have taken the same action absent the discrimination.

Hopkins v. Price Waterhouse on Remand

When the District Court judge got *Hopkins* back after appeals he was irritated at being overruled by the Court of Appeals for the D.C. Circuit and then told by the Supreme Court to reconsider the evidence.

11. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202 (D.D.C. 1990).

12. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

13. 42 U.S.C. 2000e-2(m) (2000).

Except for a bankruptcy case or two, *Hopkins* was the oldest case on his docket. His “bosses,” as he referred to the judges on the Court of Appeals, had reversed him on constructive discharge, thereby precipitating a trial on remedy, and their “bosses” (the Justices of the Supreme Court) had told him to reconsider the firm’s position on discrimination by a different evidentiary standard. In October 1989, at a scheduling conference for the much amended case, he scheduled oral arguments for reconsideration of the evidence and a trial on remedy. He also announced that he would offer his opinions on reconsideration and remedy simultaneously. Because his calendar was clogged with criminal cases, he scheduled the trial on remedy for February 1990.

A year after the Supreme Court ruled on *Price Waterhouse*, The District Court judge ruled that his opinion on discrimination was unchanged after reconsideration by the new evidentiary standard and ordered that Price Waterhouse admit me to the partnership and pay lost wages, legal fees and court costs.¹⁴ Price Waterhouse appealed the discrimination result again.

In September 1990 the Court of Appeals got the case for the second time. Its legal name was “*Hopkins v. Price Waterhouse*, (District Court for the District of Columbia 1985), affirmed in part and reversed in part, (Court of Appeals for the District of Columbia Circuit 1987), affirmed in part and reversed and remanded in part, Supreme Court (1989).” (I was as weary as the title was long.) One of the judges on the appeals panel had been the Chief Judge on the panel that considered the first appeal. The Court of Appeals was only slightly less anxious than the District Court to be rid of the case. Three months later, the Court of Appeals unanimously affirmed the District Court on all issues.¹⁵

Early in 1991, the firm paid what it was ordered to pay and I rejoined the firm as a partner with compensation and benefits set at the average of the partner group admitted in July 1983. I received checks for court ordered back pay, attorneys’ fees that I had paid, and for back pay earned between the date of the court order and when I returned to the firm. When the dust settled, I paid almost \$300,000 in income taxes for 1991. My attorneys were paid about \$500,000.

14. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202 (D.D.C. 1990).

15. *Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990).

WHY THE CASE SUCCEEDED

In litigation, for a case to “succeed” surely means to prevail on liability and achieve the desired remedy. By that definition, my case, after it finally got through two trials, two appeals, and a trip to the Supreme Court, was successful.

But if you break my case into the cases that constitute its parts, some were more successful than others.

In the initial case on liability, I won a declaratory judgment and lost constructive discharge with the result that I earned no back pay and no partnership. On the first appeal I won liability again, with a split opinion, won constructive discharge and earned a trip to the Supreme Court, another trial, and another appeal on liability. Technically, I lost the Supreme Court case – it was reversed and remanded. I “rewon” liability and earned attorneys’ fees, back pay, and a partnership in the case on remedy, although I lost an amount roughly equal to the back pay award for failure to mitigate damages. When the litigation ended with the final appeal, I had lost seven years of my career.

There is, however, more to discrimination cases than “winning.” In the years since she argued the firm’s case before the Supreme Court, I have had the pleasure of meeting Kay Oberly, as she refers to herself, on several occasions.

“Nothing personal. Litigation polarizes,” she said when we were first introduced. The warmth of her smile and the sincerity that radiated from troubled eyes banished any recollection I had of her at the arguments. I gave her a ride to the airport once. I was driving to work and noticed her unsuccessfully trying to hail a cab. We chatted about being single parents and the trauma of divorce proceedings, matters that we had in common. I like Kay.

“Nothing personal. Litigation polarizes.” I’m sure it wasn’t personal to her, but it was to me. Discrimination cases tend to get very personal, very fast. My life became a matter of public record. Attorneys pored over my tax returns. People testified about expletives I used, people I chewed out, work I reviewed and criticized, and they did so with the most negative spin they could come up with. I’m no angel, but I’m not as totally lacking in interpersonal skills as the firm’s attorneys made me out to be. So there is a personal side to success: how did I survive the personal onslaught?

That the case, in all its parts, was personally successful is because of a lot of people. I attribute that success to me, my firm, my family, my friends, my attorneys, the trial judge and the judges on the appeals pan-

els, my predecessors, and some people I never even met. People on both sides of the litigation made the case successful. Had I been less accomplished, my firm less prominent, my family less involved, my attorneys less brilliant, the trial judge less insightful, the appeals panels less liberal, my predecessors less sympathetic, and others in the civil rights community less committed, the outcome could have been dramatically different. I might have become a nut case.

So let's talk about the people in the context of the case in all its parts.

William Glaberson wrote an article entitled, "Determined to be Heard," which appeared in the *New York Times Magazine* the day before the 1989 Supreme Court term started.¹⁶ I was one of several litigants discussed in that article. When Bill interviewed me for it, he commented that interesting stories often emerge when people have "opposing views, strongly held." This is such a story.

I liked Price Waterhouse, the work, the clients, the culture, and most of the people I knew. The firm had more, and more interesting, opportunities to develop professionally, personally, and financially than any other business I encountered in my career. Before the litigation I counted many of the partners I knew as friends. They remained friends afterward.

The legal fight between me and my firm was, by and large, conducted politely and with dignity. The people were educated, experienced, skilled professionals who did their very best, very well, to represent their opposing views.

After my husband's memorable advice, I asked a friend who was a senior partner at Arnold & Porter, a giant law firm, to recommend an attorney. He gave me a list of tiny law firms. Big law firms, he said, rarely represent plaintiffs like me. I started calling for an appointment with the first name on the list – no answer. Second on the list was Stein & Huron. At my first appointment, I observed that the office of Stein & Huron occupied less space than the cafeteria at Arnold & Porter. Doug Huron seemed very serious, even a little stuffy. He was a slender, medium-

16. William Glaberson, *Determined To Be Heard*, N.Y. TIMES, Oct. 2, 1988, at 33.

height man with a shock of dark, straight hair and a mustache. He offered coffee and stepped into the hall to produce cups from a curtained closet that also contained neat piles of office supplies. He filled the coffee pot with water from a little bathroom that, judging from the style and pattern of the tile, had not been redecorated since the 1930s. He struck me as organized, careful, thoughtful, considered in his speech, and analytical, with a touch of the “Renaissance man” mixed into his personality. By contrast, I am ill-organized, sometimes emotional, generally intuitive, and occasionally reckless or inclined toward acting on whim. I didn’t know if I would like him, but I was confident that he would add balance to whatever I did and, thereby, keep me out of trouble.

I only learned when I went in search of facts for this article that Doug graduated from Swarthmore College (1967) and the University of Chicago Law School (1970). He worked for the Civil Rights Division of the Department of Justice from 1970 until he joined the Carter presidential campaign in 1976. After Carter’s election, he was at the White House as Senior Associate Counsel to the President from January 1977 to January 1981.

When I retained Doug, I wanted him to file a lawsuit and I wanted to quit working for Price Waterhouse and get on with my life. I couldn’t get what I wanted. I had to file a claim with the EEOC to get permission to file a lawsuit and Doug insisted that I keep working at Price Waterhouse until he could make an argument for constructive discharge. Without constructive discharge, I would not be entitled to remedy. The firm’s attorneys bogged down the EEOC process by maintaining that the EEOC lacked jurisdiction because Title VII did not apply to admissions to partnership. After six months, the EEOC finished doing nothing and granted me the right to sue. About the same time, I left Price Waterhouse. Although I was still pretty miserable as a failed partner, I was relieved to escape from the adversarial environment that I had created. The State Department kept me busy professionally as a consultant and three small children kept me busy the rest of the time.

With *Hishon v. King & Spalding*¹⁷ undecided, Doug filed a lawsuit in the D.C. Court alleging violation of the D.C. Human Rights Act. There was less of a jurisdictional question about the D.C. Human Rights Act¹⁸. The D.C. Court was, however, clogged with criminal cases and

17. 467 U.S. 69 (1984).

18. In fact, after all these years, we still don’t know if D.C. law is broader than Title VII in this respect.

priority-setting criteria gave precedence to criminal cases over civil cases. In the D.C. Court we expected major schedule delays.

The D.C. lawsuit was short-lived because the Supreme Court ruled on *Hishon*, enabling me to file a federal lawsuit. After almost a year of what I perceived to be “diddling around” with the EEOC and DC Superior Court, I was excited at the prospect that something might happen. But what? I wondered. I dialed information in Atlanta to find Betsy Hishon’s phone number. After a few referrals from polite people at former phone numbers, I found myself listening to an exuberant voice with a dramatic southern accent. I offered my congratulations and told her that I was next in the legal line behind her. She told me about her legal battle, which started in 1978, and how she failed to get into the federal court system for lack of jurisdiction, a result affirmed by the Court of Appeals for the Eleventh Circuit that serves Atlanta. I thanked her for her efforts on my behalf – after all, had she not started her legal battle six years earlier, I might have had to fight that one too. She wished me luck. We both hoped that my case would take less time than hers.

Betsy and I stayed in touch regularly and became friends over the years. We talked before and after every court event and every opinion. When she accompanied her husband, also an attorney, to annual meetings in Washington, we usually met for drinks or dinner. The summer after oral arguments on the first appeal, Betsy and I were part of a symposium on “Women and the Constitution” held by an organization associated with the Carter Library of Emory University. We were on a panel that included Sara Weddington, the attorney who, at age 28, argued *Roe v Wade* before the Supreme Court. I took my daughter, Tela, who was then eleven, to Atlanta for the event. She was less interested in discussions of women or the Constitution than she was in the glass elevator that ascended twenty plus stories through the hotel atrium. We had dinner with President Carter and Rosa Parks. It was hardly intimate. As I recall there were about three hundred guests. The President and Mrs. Parks sat at the head table. Tela, who wanted to shake hands with the former President, walked the thirty yards across the hotel dining room and discussed the matter with a security officer at one end of the table. President Carter and Tela spoke, shook hands. He kissed her on the forehead.

As the firm’s appeal was going through the Supreme Court process, the media started to refer to it as a landmark. Betsy and I met at the Grand Hyatt downtown. Over grins and gin and tonics, we toasted each other as “Landmark 1” and “Landmark 2.” She talked about her experiences with briefs and oral arguments. I discovered that her case and

mine were both heard on Halloween. We laughed at the fact that her amicus briefs outnumbered mine twenty to four. We couldn't figure out if that was good or bad.

After I returned to the firm, Betsy developed cancer and asked me to fill in for her as keynote speaker at a meeting of the South Carolina Women Lawyers Association. I did so. When she died a few years ago, her brother called from Atlanta to tell me. I miss her. She cheered me up and boosted my morale regularly over the years of litigation. I wonder who helped her. I never asked.

Doug prepared to file suit in federal court. Because federal court schedules are rigorously controlled, we expected a federal case to be resolved quickly – in less than a year or so. Doug reviewed and revised discovery requests used for the EEOC to make them appropriate for a federal case. He asked for a lot of private or confidential data, including partner candidate evaluations, minutes of partner admissions committee and policy board meetings, and compensation data that might be needed to determine lost compensation or other damages. We both knew Price Waterhouse would resist providing any information about partner compensation. Such information was closely guarded, even from the partners.

In the federal court complaint Doug made three accusations: discrimination, retaliation and harassment, and constructive discharge.

Discrimination. The accusation of discrimination was based on nothing more than the fact that the reasons for rejection seemed inconsistent with my business accomplishments. The only information we had at that time was copies of my performance appraisals (glowing). There were no sexist comments in evidence about me or anyone else.

Retaliation and harassment. The accusation of retaliation and harassment was based largely on the fact that my technical work was subject to an extensive internal review process that resulted in a declaration that the work my team was doing for the State Department was “technically not in conformance with the firm’s high standards for quality.” About the same work, the Comptroller at the State Department was prepared to compare me to every partner he ever met, and not to the benefit of the partners. A senior Foreign Service Officer, who later became ambassador to Nicosia, was prepared to comment that I was a very good project manager, that he tried to hire me for the State Department,

and that he thought I provided a good sense of direction and leadership to the Price Waterhouse team.

Constructive discharge. The constructive discharge accusation was that any reasonable senior manager in my position would view the decision not to admit as a career-ending action.

Doug strongly discouraged me from seeking to be made a partner as remedy for discrimination. As the first case since *Hishon*, I was already on the bleeding edge of the law. He doubted that any judge would order a partnership to admit me. In spite of his reservations, as remedy, he asked that Price Waterhouse make me a partner retroactive to July 1, 1983, compensate me for lost wages, and pay my attorneys' fees and court costs. He also asked that Price Waterhouse be enjoined from discriminating or retaliating in the future.

Doug's partner, Eileen Stein, tired of the practice of law, so Doug joined a new firm and I gained legal reinforcements for the federal court suit. The complaint filed in September 1984 was signed by James H. Heller. The court's docketing system entitled the case *Hopkins v. Price Waterhouse* and numbered it 84-3040. I never saw the federal lawsuit or the accompanying papers. I was in Nepal working on a World Bank project to determine the organizational placement of and resources needed by a newly created budget and planning office for the Government of Nepal.

My attorneys were pleased when Judge Gesell was assigned to the case. By their descriptions the man was brilliant and thoughtful, loved the law and managed his calendar. His parents founded the Gesell Human Development Institute. He graduated from Andover (1927), where my niece and nephew went to school, Yale (1932), and Yale Law School (1935). He was a partner at Covington and Burling, a prominent Washington law firm, on Pearl Harbor day in 1967 when President Johnson appointed him to the federal bench. He could be impatient, especially with the irrelevant, and acerbic when irritated. He was known to glaze over when confronted with statisticians, especially those who testify about statistically insignificant numbers.

On the day before Halloween 1984, the judge scheduled a pretrial conference for the first week in March and a trial for the week beginning March 25, 1985.

Gibson, Dunn & Crutcher (GD, double entendre intended), a law firm a lot bigger than King & Spalding, represented Price Waterhouse. As we expected, the GD lawyers resisted interrogatories about and

document production requests for sensitive data. They were reluctant to turn over personnel information that might be publicly exposed and even more reluctant to provide compensation data.

Doug was a little queasy at taking on a huge, prominent, national law firm. He had no desire to irritate the GD lawyers for fear of being overwhelmed with legal activity if he provoked them. Doug and the GD lawyers made a deal to the effect that partner compensation data would be provided only if Price Waterhouse were found liable (guilty of discrimination). They agreed to bifurcate the trial, split it into two parts – one on liability and a second on remedy. Unfortunately, they failed to let Judge Gesell in on their deal. At the end of the trial when the Judge found out about it he was shocked and furious with both sets of attorneys for not seeking a court order to bifurcate.

I first met Jim Heller when I went to the Kator, Scott & Heller offices to discuss the firm's response to our document production request. The office, just above Farragut Square, was much more convenient to me than the office of Stein & Huron had been. To enter, I proceeded through the small, unsecured hall that served as a building lobby and took the closet sized elevator to the seventh floor. The elevator door opened on a cozy, cluttered area that served as an office waiting room. It was partially occupied by people typing and others standing around in shirt sleeves talking. Doug's new office was small, barely large enough for a couple of uncomfortable looking, overstuffed chairs and a drafting table. But that wasn't really an issue. Doug worked standing up.

When I entered Jim's office he stood, walked around his desk, and shook hands firmly. He wore a white shirt with a slightly curling collar. The fact that it was unbuttoned at the neck was obscured by a nondescript tie. Although he clearly came to work in a business suit, his coat was nowhere to be seen. Atop his craggy face, a curly mass of short, dark brown, grey speckled hair fell naturally in an appealing state of disarray. He seemed very serious. He fit perfectly into his cluttered surroundings. Boxes and piles of legal stuff – work paper binders, briefs, and law books – covered most flat surfaces and a lot of the floor of his office. Only the center of his desk was relatively clear. It contained a yellow pad and a few loose yellow sheets covered with what can only be described as undecipherable black scribbling.

It was years later that I learned that Jim graduated from Harvard College (*magna cum laude*, 1949) and Yale Law School (1952). From his first years as a lawyer he handled federal employment cases. He served as a volunteer lawyer for the American Civil Liberties Union (ACLU) and as the elected Chairman of the ACLU's National Capital

Area affiliate, which he helped found. He organized the affiliate's legal challenges to the mass arrests and detentions of the "Mayday" 1971 demonstrators against the Vietnam War.

Jim asked questions from no apparent agenda. "What happened? What reasons did they give for rejecting you? What did they say? What did you do?" When he seemed to have finished, I asked him what he thought of my chances. He said he was reluctant to answer me until he had pored over the pile of materials the firm had sent over in response to our request that they produce documents, but that as near as he could tell, there was no "smoking gun," no piece or pattern of evidence that screamed discrimination. He also said that the legal outcome might depend on the defense the firm offered. "If they argue that they just didn't like you, and that's why they didn't make you a partner, they might win," he said. Not liking a candidate was probably an acceptable basis for rejection, as long as it was used indiscriminately.

I was not feeling confident when I left.

In a day when discrimination cases were won by "smoking guns," situations in which an obvious villain pursued an obviously discriminatory course of action, Doug came up with the novel notion that more subtle behavior, stereotyping, can result in organizationally discriminatory results without an obvious villain. He based his notion on the pattern of remarks in the materials that Price Waterhouse submitted under discovery. These included documents and notes related to partner votes on all partner candidates in my class, and minutes and notes taken at several years of Partner Admissions Committee and Policy Board meetings.

Doug discussed his theory with Donna Lenhoff of the Women's Legal Defense Fund. She and Doug had worked together on legal matters in which they shared a common interest. Donna referred him to Sarah E. "Sally" Burns who then worked at the Georgetown Sex Discrimination Clinic, but shortly thereafter joined the National Organization of Women (NOW) Legal Defense Fund. Sally suggested that Doug solicit the testimony of an expert on stereotyping and recommended Dr. Susan T. Fiske, a Harvard PhD who was an associate professor of psychology at the Carnegie Mellon Institute. Sally had worked with Susan on a case involving the General Accounting Office (GAO) but Susan never testified because the GAO matter was settled the night before trial.

Doug, who was already worried that his novel theory of the case might fail, also worried that the judge might not qualify her as an expert.

Doug sent Susan the material that was available to the firm's Partner Admissions Committee and Policy Board when they evaluated partner candidates. In January and February they had a few phone conversations to discuss the data and her evolving conclusions. After each conversation, Doug called me to summarize and explain whatever she had said. I found it close to impossible to understand an attorney's summary and explanation of the conclusions of a research psychologist related to a point of law. After each conversation with Doug, I called my brother John, the family psychologist, for a lay interpretation of the psychological terms and theories that were being thrown around.

As Doug worked to develop his theory of the case we prepared for depositions, which consume hours of attorney time and incur travel costs. Doug and Jim wanted to keep the number and locus of depositions to a minimum. They decided to depose the four OGS partners who had voted on me, partners representing the Partner Admissions Committee and the Policy Board, and Joe Connor. That limited out of town travel to Philadelphia and New York.

All the lawyers agreed to take all Washington depositions at the GD offices. At the first deposition, it was clear that GD spent more money on its offices than did Kator, Scott & Heller. GD was located in one of the best office buildings in downtown. It was a tall, new, pink stone building with a multistoried atrium over the entrance. Doug and I presented ourselves to the receptionist who was more or less hidden on two sides behind a marble and mahogany structure. "We're here to meet Mr. Tallent for a deposition," Doug said. She told us we could have a seat and she would call him. We stood and waited beside elegant chairs designed as accessories rather than furniture. They reminded me of my grandmother's living room.

Price Waterhouse believed I had serious interpersonal skills problems and was rejected because I was overly assertive, aggressive, and abrasive. In the depositions, the GD lawyers asked questions intended to demonstrate these problems, and bring out all my personality defects. By contrast, my attorneys wanted to show a track record of remarkable accomplishments and were hoping to find a "smoking gun."

By and large, the ten days or so of depositions that I attended were long, boring, anxiety-producing, exhausting, and depressing. They were also quite polite. On occasion, they were interesting and entertaining.

On one such occasion, Doug and I had spent the entire day closeted in a windowless conference room while he took Tom Beyer's deposi-

tion. At close to 5:00PM, just before we quit for the day, Doug asked Tom what advice he offered to better position me as a partner candidate after I failed the first time. Tom was trying to be helpful when he offered his advice. It was often quoted in the newspapers: “. . . walk more femininely, talk more femininely, dress more femininely, wear makeup and jewelry . . .” That remark was the closest thing to a smoking gun that we ever found.

Doug contained himself until the revolving door whooshed behind us as we left the building. Then the normally somber man broke into a broad grin and said “The walk, talk, dress femininely stuff didn’t hurt.” The grin stayed on his usually serious face for most of the time it took us to walk the four or five blocks back to Kator, Scott & Heller.

The first time I saw Jim in legal action was in a deposition that started late in the morning on a Friday. I was tired. Someone was using a jackhammer on one of the floors above the GD offices. The noise was conducted through the concrete superstructure of the building and reverberated through the normally quiet conference room with nerve wracking irregularity. Jim’s first legal action on my behalf was to comment, on the record, that if the noise got too bad we would have to move or stop and reschedule.

We had to take one deposition on videotape. Joe Connor, the Chairman and Senior Partner of the U.S. firm of Price Waterhouse, had business plans that called for him to be out of the country during the week in which the trial was scheduled. When the GD lawyers suggested that the trial date be moved to April to accommodate Joe’s plans, the Judge suggested that the deposition be videotaped and that the tape substitute for Joe’s testimony at trial. He managed his calendar. The trial date remained fixed.

Doug and Jim didn’t like the videotape agreement (you can’t cross-examine a videotape), but they liked less the prospect of an appearance before Judge Gesell to argue about the presence of a witness who was less than critical to my case. So Jim went to the National Office in New York to take Joe’s deposition.

The deposition went well for the firm. According to Jim, Joe had all of the media presence of a first-rate politician. He frequently answered the question that he preferred to answer instead of the question he was asked. Jim summed it up when he said: “I understand how he became senior partner of the firm.” Jim was convinced that the Judge Gesell would be positively impressed.

The deposition process taught Doug and Jim about the partners, the partnership, and the admission process, but with rare exception, notably

Tom Beyer's advice, contributed less to the outcome of the case than did the firm's written record. The firm kept meticulous files of annotated partner candidate evaluation forms, notes of Admission Committee proceedings, and Policy Board minutes. These became public in the discovery process.

Doug wrote the pretrial brief and prepared the list of witnesses. In the process, he and Jim negotiated with the GD lawyers. Price Waterhouse wanted to avoid testimony by prominent clients who regarded me more favorably than the firm. Doug and Jim wanted to avoid testimony about my competence. Both kinds of testimony often consume lots of trial time and smear both parties. The GD lawyers agreed to stipulate to competence and Doug and Jim agreed to drop the harassment and retaliation charge.

Doug delivered the pretrial package about a week before the trial. He decided to call Susan Fiske on rebuttal to offer expert testimony to the effect that stereotyping played a determinative role in the Admission Committee's decision. Doug had never met Susan. He still worried because stereotyping had never been used to support a claim of discrimination and Judge Gesell might not qualify her as an expert.

Doug met Susan for the first time when she came to Washington on Friday to prepare to testify in the trial that began on Monday.

Judge Gerhard A. Gesell reminded me of Moses without a beard. He was close to seventy-five the first time I stood to watch him enter his courtroom. His full head of perfectly groomed, snow white hair was in stark contrast with his black ankle length robe. He had alert, curious eyes and a warm smile. I had watched the interaction between him, his marshal, and court reporter at a couple of the conferences that took place before the trial. The steady-eyed, unfailing attention that they paid him gave me the impression they worshipped the man.

The Judge lived up to all that Doug and Jim had said about him.

He couldn't believe that I really wanted to be a partner at Price Waterhouse. When I testified about my then current job at the World Bank, he asked in an incredulous tone, "And you want to leave that job and go back and join this crowd? That's what you're asking me to do, right?"

He had trouble with the scarcity of women in senior positions at Price Waterhouse. When my mentor Tom Beyer testified, the Judge grilled him with "You spotted a star, right? Now then, what happened?"

What happened?" and "Did you ever have a woman project manager work with you on a major matter?" He questioned other testifying partners: "Do you need women partners? Do you have women clients?" "You don't have a very good percentage of women, do you?" "You're not interested in how someone gets along with clients?"

Joe Connor on film impressed him, as Jim said he would. Joe was elegantly positioned center screen as the videotape equipment was moved so all could see him. Judge Gesell leaned forward with a mildly astonished look on his face, eyes glued to the screen, and asked in obvious admiration "How old is this man? Does anybody know?" (He was 53.)

He managed the trial schedule by keeping the lawyers moving along. When Doug overran his time after promising twenty minutes to finish an examination, the Judge prodded him with "You said yesterday that you had twenty minutes – we've now been an hour."

Of the statistical data submitted in volumes through hours of testimony, he remarked "Well it's unintelligible to me. If you want me to consider it, I have to know what it is. It doesn't make any sense at all. It looks like gibberish. I am sure it is important in terms of analyzing something, but what is its evidentiary value?"

The Judge also justified Doug's worries about his stereotyping the story of the case when he commented "You've got to identify who you say are the discriminating officials. You haven't done it."

When Susan Fiske took the stand the plan was for her to talk through the relevant definitions, literature, research, and findings about stereotyping and then state her opinion. Not very far into the definitions, Judge Gesell frowned and commented "You are not telling me anything. You have got to talk to a layman, ma'am. You have got to talk to a layman. You are not talking to one of your colleagues and so I have got to understand what you are saying. . ."

Judge Gesell wanted the "big picture." He had another plan. He turned to Doug and asked, "Why doesn't she give me her opinion? And then tell me what she bases it on . . . If we did that then I think I would have a better understanding of where you are getting."

She offered her opinion: "I am confident that stereotyping played a role in the decision about Ann Hopkins. . . . In lay language I would say it played a major determining role." Her opinion was based on the same evidence that the policy board used to make partnership decisions.

Susan fared well when questioned by the GD lawyer, in part, I believe, because he used a sarcastic tone in what appeared to be an effort to impugn the science, which he didn't seem to know much about.

As an example, he asked "Are there abrasive women? Are there mean women? Are there arrogant women? Women who are just plain rude? . . . Now, if I run across one of these women and I comment that she is just plain rude, what must I do to ensure that my own reactions are not springing from some deep seated stereotype that I am carrying around in my bosom?"

Susan answered, "Well, if you say she is the rudest person you ever met you should pay attention to what she said because she is unlikely the rudest person you ever met. When people say extreme statements like that, they should be reexamining the basis for those statements."

The GD lawyer also asked: "Did you sample that [data] in any scientific way that I can take an empirical number to see if you had a scientific basis for that?" No, she answered. And she didn't count them either, she said. She used no empirical data base and no statistics. She observed, however, "I am an expert in observing behavior and at drawing conclusions from written documents" and "You don't need to have a sample in this particular case because I have the entire population of comments that were made . . ."

He followed up with: "Some of these folks describe Miss Hopkins as . . . overbearing, arrogant, self-centered, abrasive, thinks she knows more than anyone in the universe, and potentially dangerous. Would you think it would be somehow a stereotypical decision to exclude such a person from the partnership, if that was in fact true?"

Susan answered "I am not qualified to say whether or not it is true."

Judge Gesell was harder to deal with. Toward the end of her testimony he referred to a meeting conducted by Tom Beyer, in which I cut off one of my staff members:

He had a group of managers in the company talking about how the job was going, women, new managers, including this plaintiff. He was asking for suggestions on how they ought to proceed. And another woman spoke up and she was told by Miss Hopkins to keep still. It wasn't relevant. So he said, look, we are all trying to work on this. You shouldn't be so assertive. A stereotype?

Susan responded: "I would suggest that the same behavior coming from a man would be less likely to be focused on as much of a problem."

The Judge angrily shot back at her. “Well, he probably would have fired a man. I agree with that. If a man had done it, he probably would fire him . . . I don’t understand what you are talking about.”

It was clear that the Judge thought Doug’s theory of the case was a novel approach to proving discrimination and he was skeptical. The GD lawyers must have been more skeptical. They failed to call an opposing expert.

In the final analysis, Susan’s testimony was a major determining factor in my becoming a partner at Price Waterhouse. In September of 1985 Judge Gesell found that Price Waterhouse had discriminated. He also found that I had failed to show constructive discharge and was, therefore, not entitled to be a partner. He declined to order back pay: no one ever introduced evidence adequate to compute it because of the bifurcation side deal that both sets of attorneys had agreed to without telling the Judge.

By my calculation back pay wouldn’t have been much – maybe \$15,000. More troublesome, however, was the fact that he was furious with the attorneys for making the unauthorized “side deal.” His anger carried over to the trial on remedy years later.

Had no one appealed my cost of litigation would have been less than \$60,000. However, both sides appealed.

In my town, appeals from decisions of the district court are usually handled by a panel comprised of three judges from the United States Court of Appeals for the District of Columbia Circuit. If the circuit court judges are very busy, a district judge may sit on a panel with two circuit judges. This was the case when *Hopkins* first landed in the Court of Appeals. As the appeals panel, I drew two circuit judges, Harry T. Edwards and Stephen F. Williams, and a district court judge, Joyce Hens Green. Doug and Jim told me that Harry Edwards was one of the smartest and most respected judges on the circuit. They didn’t know much about Judge Williams, who had only recently been appointed. They described him as an academician: he had taught, rather than practiced law. They respectfully described Joyce Hens Green as articulate, experienced, knowledgeable, hardworking and tough-minded. They always referred to her by full name. I assumed they did it to avoid confusion with another Judge Green.

My children and I went to the federal court house for the oral arguments without my husband. He left me the summer after Judge Ge-

sell's opinion. After one look at the courtroom, with its dark, austere portraits of dignified, black-suited men hanging on both side walls, the children decided they would prefer to kill an hour in the cafeteria or explore the halls of justice rather than enter. The court had scheduled an hour for the arguments. According to Doug, that was a little unusual. Half an hour was customary.

I stood when my three judges entered the court. Judge Edwards was a stately man. Standing on a platform several feet above the courtroom floor, he seemed very tall. Had we been on equal footing he still would have been tall. Judge Edwards was the chief judge—he sat in the middle chair. Judge Williams sat to his right. Judge Joyce Hens Green took the remaining seat. Judge Edwards smiled. In a lilting voice, he welcomed everyone to the proceedings. The attorneys introduced themselves. Jim argued my side from a full folder of black scribbles. “Two minutes into my prepared statement, I’ll be interrupted with questions. The trick then is to answer the questions and still make my points before I run out of time,” he said.

He was wrong. The questions, mainly from Judge Williams, started forty-five seconds into his remarks and focused almost entirely on liability. Jim, however, wanted to argue about constructive discharge. By his legal theory, resignation by an employee confronted with a career ending situation was constructive discharge. He believed that Judge Gesell made a mistake when he concluded that I left voluntarily and was, therefore, not subjected to constructive discharge. Measured by the number of questions on the subject, none of the judges was interested in Jim's point.

Steve Tallent, the GD lawyer presenting the firm's argument, barely finished his first sentence when Judge Edwards politely interrupted to explain the role of the Court of Appeals. That court is prohibited by the Supreme Court from resifting the facts found by the District Court and is further prohibited from coming to new conclusions based on a different interpretation of the facts. Unless Judge Gesell missed something major or concluded something absurd, his findings and conclusions on liability would stand.

Steve knew that, but he persisted in rearguing liability anyway. First he argued that some of the stereotypical remarks were really gender-neutral. Charm, as an example, is equally prized in men and women. (He referred to the comment that I needed a “course in charm school.”) Even if some remarks were sexist, he continued, they really had nothing to do with the decision. After all, the remarks were made, with few ex-

ceptions, by my supporters. Opponents made no sexist comments, he said.

Judge Edwards observed that Susan Fiske had reached a different conclusion. In her expert opinion, stereotypical views were a determining factor in the partnership decision. Was the firm now challenging the expert witness who had been unchallenged at trial? Steve vehemently asserted that it was not.

Judge Edwards asked about Tom Beyer's oft-published advice that I walk, talk, and dress differently. Steve argued that Joe Connor – not Tom – was responsible for telling me what I had to do to take corrective action and Joe told me, in gender-neutral terms. According to Steve, Tom was speaking as a friend. His views did not represent those of the partnership.

Judge Green had been relatively silent to that point. She had disappeared deep into her chair. She held her left hand in front of her face, hiding her mouth. The body language said contemplation, skepticism or disbelief. Claspng both hands in front of her, she leaned forward on her elbows. "Tell me, Mr. Tallent, in a partnership, which partners do not speak for the firm?" she asked, mildly incredulous. She seemed unable to buy the "Beyer-was-speaking-only-for-himself" argument.

When the arguments ended, Doug and Jim were of the opinion that the vote would be 2-1 in my favor on liability. They were perplexed by the apparent lack of interest in constructive discharge and declined to offer opinions on the outcome.

They were right. The decision on liability was split 2 to 1 in my favor. Judge Williams dissented. The decision on constructive discharge was unanimous in my favor.

The majority opinion was written by Judge Joyce Hens Green. Early in the opinion she reiterated what Judge Edwards had stated so clearly at oral arguments. The Court of Appeals does not retry district court cases.

In order to overturn a determination of liability, we must conclude that it is 'based on an utterly implausible account of the evidence.'

She then knocked off the firm's arguments:

Price Waterhouse . . . suggests that one partner's comment that Hopkins needed to take a 'course at charm school' is not sex-indicative, because charm is a quality admired both in men and women. This argument borders on the facetious. . . . The sexist import of the comment is patently clear, particularly as charm schools are inextricably linked,

both historically and philosophically, with the antiquated notion that women should devote their energies to social and cultural affairs rather than business or professional endeavors.¹⁹

The firm argues that the District Court erred in stating that Beyer was 'responsible for telling her what problems the Policy Board had identified with her candidacy.' Price Waterhouse claims that this task officially fell to the firm's Senior Partner, Joseph Connor, who made no reference to Hopkins femininity in his meeting with her . . . This contention not only rests on the artificial assumption that Beyer, the chief partner in Price Waterhouse's Washington office and Hopkins' leading supporter, would be kept completely in the dark as to the Policy Board's views on her candidacy, but is directly contradicted by the testimony of Roger Marcellin, a member of both the Policy Board and the Admissions Committee at the time of Hopkins' nomination, who stated that he had 'no doubt that Tom Beyer would be the one that would have to talk with her [Hopkins]. He knew exactly where the problems were.' Beyer's advice, of course, speaks for itself.²⁰

The GD lawyers created their own trap on the argument that Dr. Fiske's testimony was without evidentiary value. At trial they accepted her as an expert. They presented no opposing expert to refute her testimony. They made no attempt to disqualify her on appeal – a course of action likely to have failed. There was no way out.

Judge Green noted that the firm's argument that Judge Gesell made an error by accepting, as evidence, sexist statements that were irrelevant failed:

the firm challenges the District Court's reliance on comments partners made about other female candidates, contending that the trial judge intentionally misconstrued these statements in order to find in them evidence of stereotypical thinking. One partner stated that he could never vote for a female partner. One successful female candidate was criticized for being a 'women's libber' and two other unsuccessful women were characterized as . . . 'Ma Barker'; and 'one of the boys.' It is of course impossible to misconstrue the sentiment behind a categorical opposition to all female partnership candidates. Despite the fact that the firm took no steps to admonish this partner for his statement, which he made just one year before Hopkins came up for consideration, Price

19. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 466 (D.C. Cir. 1987).

20. *Id.* at 466-467.

Waterhouse suggests the comment is essentially irrelevant because it was obviously ignored by the Policy Board and was ‘of no further concern . . . by the time that plaintiff was proposed.’ The firm also argues that the comment about one candidate being a ‘women’s libber’ cannot be viewed as evidence of discrimination because the woman in question became a partner . . . These arguments miss the mark. The District Court did not purport to find that any of these comments determined the fate of the women in question, reflected the views of the Policy Board itself, or had a direct impact on plaintiff’s candidacy. Rather, the court relied on them as evidence that partners at Price Waterhouse often evaluated female candidates in terms of their sex. We find nothing erroneous in such reliance; on the contrary, we believe it is eminently correct.²¹

On these same remarks, Judge Williams disagreed with the majority in his dissenting opinion. He did it with humor:

These included one [remark] plainly beyond the pale – a remark by a partner that he ‘could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers.’ So we know that, at least at some time in the past, there was one male chauvinist pig rampant among the Price Waterhouse partners. But there is no evidence that this troglodyte ever influenced a single other partner.²²

Doug’s brief and Jim’s oral argument on the issue of constructive discharge must have been persuasive. The issue received as little attention in the majority opinion as it had at oral arguments. Judge Williams agreed with the majority in a dismissive footnote to his dissent. The Court decided in my favor.

I believe Jim was more proud about the constructive discharge ruling than he was about any of his other accomplishments on my behalf. The constructive discharge ruling in *Hopkins* established a legal precedent in the District of Columbia Circuit. Price Waterhouse appealed liability again.

Washington is full of attorneys and I have my fair share of friends and acquaintances in the business. Few believed the Supreme Court

21. *Id.* at 467-468.

22. *Id.* at 476.

would grant a writ of certiorari to hear the firm's appeal. I was exasperated when the Court took the case. I was already in a funk because my husband's departure made both me and the children miserable. I didn't want a divorce and didn't seek one until he sued me for custody. Jim didn't do divorces. Mine may have been the only one he ever handled, and he did it as the Supreme Court case cranked up.

The practice of law requires mastery of a body of schedules, rules, and protocols that dictate delivery of materials and oral presentations. These differ from court to court. By my observation, the Supreme Court process is the most specific, detailed, rigid, and unforgiving. The schedule, once set, is rarely changed. The Court almost always renders its opinion in the same session in which it hears a case. The format for briefs is prescribed in terms of length, page size – even cover color. Printing them is a specialty job. Protocol guides how to dress for oral arguments. Attorneys must wear black to argue before the Court. Proceedings are very formal. I was told that when the Attorney General appears, he wears a morning coat.

Price Waterhouse added Mayer, Brown & Platt, a high-powered, Chicago firm that specializes in appeals to the Supreme Court, to its legal team. In particular, the firm retained Paul Bator, a law professor with significant Supreme Court experience who was affiliated with Mayer, Brown, to write the briefs and to argue. Later, after the Court issued its decision and remanded the case to Judge Gesell, Theodore R. Olson, a Gibson Dunn partner who had served as President Reagan's personal lawyer (and who more recently has been Solicitor General under President Bush) became the lead lawyer for the firm.

Doug and Jim had their hands full writing and reviewing their own briefs, reading and responding to the firm's briefs, coordinating amicus briefs, and preparing for oral arguments. On our side, we had amicus briefs prepared by the American Federation of Labor and Congress of Industrial Organizations (AFL/CIO), the Women's Legal Defense Fund, the American Psychological Association (APA), and the New York State Bar Association. Donna Lenhoff coordinated the brief prepared by the Women's Legal Defense Fund to represent the interests of forty women's groups.

When invited to do so, Doug and Susan helped the APA attorneys by reviewing or exchanging drafts. That brief was tactically important because in the firm's briefs, Mayer Brown & Platt had consistently enclosed stereotyping in quotes, as part of an attempt to put psychology in the same legal credibility class with voodoo and witchcraft.

When Susan was in town, we had lunch together. I was surprised when she told me that although she had been asked, she had never given testimony on another matter. Flattered, I asked why she testified for me. "I had never seen anything so egregious," was her reply.

It was sobering for me to realize how much effort was expended on my behalf by people I barely knew.

Oral argument before the Supreme Court was a family affair. It was scheduled for Halloween, a holiday second only to Christmas for my children. It had been Halloween when Betsy Hishon went before me. Brother John, my sister Susan, and my sister-in-law, Sheila Gallagher, came to town to be ready for the argument on Monday. Afterward we planned a big, catered party to celebrate the argument, Gilbert's birthday, and Halloween. We expected about a hundred people including the children's school friends.

Chaos reigned in the family. Susan had presided over classes the Friday before Halloween dressed as a witch, complete with stage makeup and spray-painted hair. The frantic trip from school to train to New York where she met up with Brother left her covered with a gooey mess of makeup mixed with perspiration. "You look like a witch, Aunt Susan," said Brother's oldest child. Saturday when she and Brother strolled up the driveway to my house, she was her usual attractive self: clean blond hair, unnoticeable makeup, deftly applied. Susan, Brother and I sat up late that night talking about the case. When I went to bed, they read the pile of multi-colored Supreme Court briefs until just before dawn.

Sunday was consumed with planning and last minute running around. Between meals for a lot of hungry people and the usual chores that fall on a weekend, we had to address a lot of mundane questions. What would we wear? How would we get the crowd of family and friends to the Court? Who would pick up the children's party guests from three different schools and get them to the house for the party? What would we do with the dog?

Supreme Court Day was freezing cold. The family was noisily wandering around the house trying to get in and out of the showers. Friends arrived. We sat and talked in the kitchen where Sheila and I made volumes of coffee. It was getting close to Court time when Tela arrived, hair still wet from the shower. "We're going down to hold a

place in line. I didn't come all the way from Arkansas to miss the show," Sheila said as she and Tela left to catch a cab to the Court.

I heard Brother thump down the stairs to the first floor to wake the boys, who had fallen asleep with the television running in the recreation room. He thumped by once again in the process of getting the boys into the shower. "Don't worry about it, Sis. I've got everything under control," Brother said. By all appearances, his statement was false. Barefooted, with his shirt unbuttoned and a tie draped over his shoulders, he poured himself a cup of coffee. Apparently the boys could only find one tie and were unable to find any socks at all.

"Get out of here. We'll handle it," said Susan as she coaxed me out of the house. When the door closed behind me, Brother, still barefooted, was making plans to borrow a tie from my next door neighbor.

A cab dropped me at Kator, Scott & Heller to meet Jim and Doug. Jim was wearing a new shirt that fit and an elegant tie, both acquired for him by his wife. Over the years, Jim's wife and I had gently, but persistently, teased him about his boring shirts. He always responded with indifference: shirts were generally irrelevant to him, but not on Supreme Court Day. A convoy of cabs transported me and most of the attorneys from Kator, Scott & Heller to the Court.

Susan and Sheila seemed relieved when I caught up with them shortly before noon at the front of the line that stretched for hundreds of feet at the base of the steps that lead to the Supreme Court entrance. They had arrived at ten o'clock for the mid afternoon argument. "Where's John?" they asked in unison. No one had seen Brother since he took the boys and left the house on a mission to buy socks en route to the Court. Fortunately, he and the boys, completely dressed with ties and socks, arrived as the line was released to proceed up the stairs and into the Court.

Susan and Brother had reserved seats in Justice Brennan's box. She got them through the efforts of a colleague whose family had for generations been friends of the Brennan family. I was impressed with her cleverness and her good fortune. I was also a little envious. Jim had obtained passes from the Court that guaranteed seats for me and the children somewhere in general seating.

The children and I were escorted into the courtroom to the middle of fifteen or twenty rows of high-backed benches by a young, very serious, female marshal. Gilbert and Peter sat to my right and along the aisle. Friends, supporters, and the rest of the family were sprinkled around the back of the full house. Gilbert and Peter and I were unable to see the argument before the Court. The seating was designed to observe

the Justices, not the attorneys. To the horror of the stern marshal who seated us, the boys, unable to see past the bench in front of them, decided to chat with each other. On her quiet command, I moved Peter so that my body separated the two bored boys.

The ceiling in the courtroom was easily eighteen feet high. Draperies, dark purple, shaded toward burgundy, hung from the ceiling behind the Justices' seats and along the sides of the general seating area. I wondered what the acoustics would be like as I stood and coaxed the boys to stand. The Justices of the Supreme Court entered through slits in the drapery. Chief Justice Rehnquist sat at center. The other Justices sat in seniority order, Justice Marshall to the Chief Justice's far right, Justice Scalia to his far left. Somewhere near the center, Justice O'Connor's eyes stared through deep grey rings on a ghostly white, stoically expressionless face. In spite of a mastectomy ten days earlier, she was on the bench. The press had speculated that she might be absent.

The boys fell asleep. I got another stern command from the marshal. Sleeping in the Supreme Court is prohibited.

Between the dreadful acoustics and the badgering marshal, I barely heard the arguments. Benches prevented me from seeing the attorneys. Susan and John later told me that from their vantage point, they could hear and see everything.

Jim argued for me. According to those who could see him, Jim was calm, poised, eloquent and articulate. Had he been taller they might have described him as elegant. Since he and I were close to the same height, most characterized him as urbane.

Kathryn "Kay" Oberly argued for the firm. She had been on brief, but a different attorney, Paul Bator, was supposed to argue the case, which was initially scheduled for the first week in October. He had another argument before the Supreme Court that same week so the firm's case was rescheduled. I believe he was terminally ill when Kay replaced him. She didn't look good in black.

All I remember about Supreme Court Day was the presence of family and friends and the party. My family, the attorneys with families, clients and colleagues from the World Bank and the State Department, friends and neighbors celebrated that Halloween and the party established a tradition for the litigation. We had a party whenever opinions came out and after every major court event.

When the Supreme Court announced its judgment in *Price Waterhouse v. Hopkins*²³ I got a message on my desk at the World Bank that Jim had called. Someone from Kator, Scott & Heller, was en route to the Supreme Court to pick up the opinion. Jim had no clue what it said.

When I got to the Kator, Scott & Heller offices I was told that Jim was in the copy room. I found him reading disjointed bits and snatches of the Supreme Court opinion as the copies trickled from what had to be one of the slowest copying machines I have ever seen. Jim told me that he was too busy copying the opinion to read it and it would be a while before he figured out what the Court had said.

The “opinion” was actually four opinions.

- Justice Brennan wrote the judgment of the Court and was joined by Justices Marshall, Blackmun and Stevens.
- Justice White wrote a concurring opinion.
- Justice O’Connor wrote a concurring opinion.
- Justice Kennedy wrote a dissenting opinion that was joined by Chief Justice Rehnquist and Justice Scalia.

The vote was six to three on something described in sixty or seventy pages. When Jim finished making copies, I took one and headed for home in a cab. Half way home on the Rock Creek Parkway, the local all news radio station announced that Ann B. Hopkins had won a major victory over Price Waterhouse. I felt better but I was skeptical and wondered how the local news station had figured it out before my attorneys did. The local news station must have had better copy machines.

The firm’s argument that Judge Gesell had made an error in finding discrimination when there was none was rejected by the majority. The Court dismissed the freedom of association argument as having been settled in its ruling on *Hishon*. Doug’s novel theory of the case was affirmed and Susan Fiske was quoted and given credit as the expert she was.

On the critical issue of burden shifting, I won. Price Waterhouse maintained that the courts should not have shifted the burden to them to prove that interpersonal skills problems, all by themselves, were the basis for the denial of partnership. On the issue of evidentiary standard, however, I lost. Price Waterhouse maintained that even if the burden to prove something did shift to them, they had been held to a standard of proof that was too tough. Judge Gesell had required that the firm prove

23. 490 U.S. 228 (1989).

its case by clear and convincing evidence. The appellate court had agreed with Judge Gesell. The Supreme Court disagreed with both lower courts: the firm should have been required to prove its point with only a preponderance of the evidence.

In the final analysis, I was unaffected by Supreme Court's decision. Technically, Price Waterhouse won the case because the Court reversed the judgment against the firm made by the Court of Appeals and sent the case back to the lower courts to get the evidentiary standard error fixed. Justice O'Connor succinctly stated just how the opinion applied to me:

On remand, the District Court should determine whether Price Waterhouse has shown by a preponderance of the evidence that if gender had not been part of the process, its employment decision concerning Ann Hopkins would nonetheless have been the same.²⁴

That error cost me \$3,946.61, which I had to pay for costs incurred by Price Waterhouse to print materials submitted to the Supreme Court. It could have been worse. The D.C. Superior Court ordered my divorce on May 10, 1989. That cost almost \$7,000.

Five months passed before Judge Gesell got back to the case on remand. The first week in October he held a scheduling conference. By all appearances he was angry. He expressed himself accordingly. He was extremely displeased with the legal mess that the Court of Appeals and the Supreme Court had dumped on him. He wanted to be rid of the matter.

Judge Gesell offered Price Waterhouse the opportunity to put in further evidence on the issue of liability. When Ted Olson said no, Jim and Doug breathed a sigh of relief because they did not know the effect any new evidence might have, and they were confident of our chances of winning with the original record. Judge Gesell then set dates for briefs and oral arguments to reconsider liability by the new evidentiary standard. Simultaneously he scheduled the legal steps preliminary to a trial on remedy. He said that he intended to conduct the trial on remedy without first announcing his judgment on liability because he was certain that anything he did would again be appealed. I had the impression that he planned to tie the remainder of the case neatly with a legal ribbon and

24. *Id.* at 279.

then let the Court of Appeals deal with it. He never wanted to see *Hopkins v. Price Waterhouse* again.

Doug, Jim, and I left the conference half relieved, half worried. They had long been concerned that the firm might ask for a new trial on liability or attempt to force the remedy trial to wait until the liability issue was reconsidered and resolved. Judge Gesell eliminated those concerns. We were relieved that the trial process finally had a fixed end date, but Judge Gesell's apparent anger, even after five years, was undiminished. We took little consolation in the fact that the anger was directed at both sides.

Ted Olson, as he introduced himself, argued reconsideration of liability for Price Waterhouse. He was a tall, trim, Nordic-looking blond with a never ending grin that looked sincere. There was something boyish about the way he held his chin down and peered upward with his eyes. He was likeable, but no match for Jim in the oral arguments. In fairness to Ted, he was in a difficult position because there were few novel ways to present the same old evidence. Judge Gesell had not been clearly and convincingly persuaded by that evidence in the liability trial. Common legal sense said he would not be preponderantly convinced either. However, he seemed so irritated that no one would hazard a guess about the outcome.

The remedy trial was shorter and probably legally easier than the liability trial. Doug and Jim had to show that I had made appropriate efforts to mitigate damages after I left the firm and present estimates for back pay and the value of the partnership (just in case the Judge declined to order me into the partnership). The GD lawyers had to present evidence that I failed to mitigate damages and was, therefore, entitled to lesser amounts, if any. They also had to persuade the Judge that he should avoid ordering a partnership.

The firm was legally obliged to provide whatever Doug and Jim needed to estimate the extent to which I had been financially "damaged." They had three problems:

- Figuring out what data they needed. Price Waterhouse had very unusual partner compensation and retirement programs.
- Getting the data. The firm was inclined to provide as little as was legally permissible.
- Figuring out what to do with the data when they got it. They needed an expert, probably an economist.

I helped them understand and interpret the annual compensation system. Partners were not salaried. Instead, each partner was entitled to a

portion of the profits of the firm based on a number of shares assigned to him. Unlike securities, the shares were not assets that could be bought or sold. A share value was computed at the end of a fiscal year based on the profits made in that year. Each partner was paid an amount equal to the share value multiplied by the number of shares he held. The number of individual shares varied from year to year based on individual performance.

I was useless to them on the retirement program about which I knew nothing. And I was not helping them by insisting on reinstatement as a partner. "If you insist on reinstatement, it will make the case harder to win," Jim had said on more than one occasion.

They got an expert economist to help them. Joseph L. Tryon was a Georgetown University economics professor. He held advanced degrees, including a PhD, from Harvard. By comparison to the dozens (maybe hundreds) of economists I must have met at the World Bank, Joe was the most unassuming.

Although Doug always referred to him deferentially as Professor Tryon, Joe referred to himself simply as "a teacher." He never qualified the term, not college teacher, not economics teacher; he was simply a teacher. He never referred to himself as Dr. Tryon or Professor Tryon, or even Mr. Tryon; he was just Joe.

I was impressed when we met to discuss the possibility of his testifying. I had the impression that he interviewed me to determine if I was acceptable as a client. Joe reminded me of Mr. Rogers, although he was probably a little shorter and bigger boned. In age he could have been a young grandfather. He spoke softly. Complicated principles of economics were explained in simple terms. He was never condescending.

The legal proceeding to arraign Marion Barry, then Mayor of the District of Columbia, began at the same time and on the same day as the trial on remedy. The army of police and media people and the drastically increased security for the Mayor's arraignment slowed efforts to get to Judge Gesell's courtroom. Judge Gesell greeted us on a cheery note. "Glad you were all able to get in. I put a lot of police out there to protect you."

Jim planned to call three witnesses:

- Myself, to testify that I wanted to be reinstated as a partner and to describe efforts I made to mitigate damages – to get work to earn an income – after I left the firm.

- My former husband, Tom Gallagher, to corroborate what I said about some of my job searches.
- Joe, to testify about his estimates of back pay to which I claimed to be entitled and “front pay,” a financial substitute for the partnership.

The GD lawyers planned to call:

- The “Big Six,” Representatives of Arthur Andersen, Coopers & Lybrand, Deloitte & Touche, Ernst & Young, Peat Marwick, and Price Waterhouse to testify about compensation and employment in the “Big Six.”
- Joe Connor to testify about Price Waterhouse.
- An executive search expert to testify about what my earnings should have been if I had appropriately mitigated damages.
- An outplacement expert to testify what I should have done to seek high-paying jobs.
- A “labor market economics and statistics and human resource management” expert to testify about the economic values of alternatives to making me a partner.

When I testified, the Judge was grappling with partnership as a remedy:

I’m just talking to you as a person and trying to understand. Not trying to say they’re right at all, but they’re all sitting here to keep you out of the partnership and you’re an intelligent woman, you’ve got a lot of experience and you’ve got – you’ve shown you make a living on your own. You’ve probably shown they were wrong, so what is the point of wanting to put yourself into a position of future friction?

That’s what I find so difficult to deal with because my responsibility here is an equitable responsibility. It’s a matter of trying to understand and be fair and you – It just seems to me that I’ve got two people that have got their minds made up. They’re going to butt heads together and I have to say to you that if you go back to the partnership, and you may as a result of these proceedings, I’m not saying one way or the other about that, but we’ll be back in here again and again on problems relating to your relationship with these people that don’t want you. Now that’s my trouble and I can’t get an answer.²⁵

25. Transcript, Hopkins v. Price Waterhouse, 737 F. Supp. 1202 (D.D.C. 1990) (No. 84-3040).

All I could say was “I may be deluded, but I feel that there are people there who would be happy to practice with me and there certainly are lots of them there that I’d be happy to practice with.”

Just before lunch, Jim called my former husband as a witness to corroborate my testimony that I had worked hard to find a comparable job after I resigned. Tom managed to testify to his name, age, and address. Then Tom sat dumbfounded as Judge Gesell expressed his frustrations with the state of the case.

Addressing both sets of attorneys, he raised questions about when it became my duty to mitigate damages. The question had been moot in the previous trial where he held that there were no damages because I was not constructively discharged. But he was overruled by the Court of Appeals and he was not happy about it. He complained to the GD lawyers for failing to appeal constructive discharge to the Supreme Court. He chastised both sets of attorneys for making the bifurcation deal without letting him in on it. He was displeased with getting the case back from the Supreme Court.

In spite of Judge Gesell’s obvious belief that the Court of Appeals’ ruling on constructive discharge was the law governing this case, Ted Olson politely disagreed. Tom was excused from the witness chair. The Judge declared his intention to go to lunch.

Joe Tryon’s testimony took more time than mine, almost half a day. He did a first rate job. He had mastered the complexities of the compensation and retirement systems of both the World Bank and Price Waterhouse. He unflappably responded to a steady stream of questions from Judge Gesell. Joe never cluttered up the testimony with specious, impressive sounding numbers or fake precision. Every interest rate, discount rate, cost of living or other factor that he used was taken from an unassailable source. The bottom line according to Joe amounted to a little more than half a million in back pay and about two and a half million in front pay.

The GD lawyers wanted to introduce compensation data from each of the “Big Six” to show how much money I could have made had I gone to work for one of them when I left Price Waterhouse. They wanted to do so without calling representatives of each of the firms to introduce the data into evidence. They asked Doug to stipulate to related documents. Doug declined. It irritated GD. For lack of stipulation, each

document had to be introduced and discussed by a representative of the relevant firm.

The first to testify was Deloitte & Touche. Ted gave the Judge a copy of the list of half a dozen or so Deloitte & Touche partners who had been managers at Price Waterhouse. It was marked "Confidential." Judge Gesell frowned as if he were growing angry. "Why is this marked confidential?" The Judge would have nothing off the record in his court. "It's not confidential as of this moment, all right?" he declared. Ted made no argument.

As near as I could tell Deloitte & Touche people made 25% or 30% less than comparable Price Waterhouse people. Coopers & Lybrand had nine partners who came from the firm. A new partner earned around \$100,000 - \$120,000 per year, about what a new partner at the firm made.

The man from Ernst & Young identified ten people. As a senior manager, he had no knowledge of partner compensation. Furthermore, he was reluctant to state his own. With a little help from Judge Gesell he said that he made in the range of \$80,000 - \$90,000 per year. The man from Andersen identified the two partners who had come from Price Waterhouse. He stated that he made \$160,000 his first year as a partner, up from \$100,000 the previous year. The person from Peat Marwick had a schedule conflict. He never made an appearance.

The witnesses painted a compensation picture that said my counterparts made a lot more money than I did.

Joe Connor testified live in this case. In the years between the videotape testimony at the first trial and his testimony at the trial on remedy, Joe had finished his term as the Chairman and Senior Partner of the U.S. firm of Price Waterhouse and changed jobs. He introduced himself as a representative of Price Waterhouse, World Firm. That firm had nothing to do with the management of the firm I was suing.

Joe's testimony was smooth, dignified and polished. He commented on the uncertainty of the accounting business: "[T]he economic attractiveness of the profession is quite different today than it was even as recently as ten years ago." He said that Price Waterhouse partners would obey the law: "[W]e would observe whatever the Court directs us to do and I think we would try to do that . . . in the best spirit possible. It is in my personal opinion doubtful that there would be acceptance of Miss Hopkins as a partner." He raised questions about my technical skills: "I now have some question as to her ability to perform as a partner . . . Ann had good technical skills six years ago, if I have the right number of years. But the practice in OGS has now become so techni-

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cally cutting edge, the size of the systems that we're doing, the methodology the firm now uses, all of which has been developed in the last six years, has moved so rapidly . . . I think she probably is rusty now in the system area."

Jim interrupted Joe's testimony, politely, but insistently.

Your Honor, I think I'm entitled to explain what I heard Mr. Connor saying since we have been criticized for the way the case comes to you. Some case was going to come to some judge this way. What I heard Mr. Connor saying is we don't accept the fact that we may have mistakenly or discriminatorily evaluated Miss Hopkins, for we don't think she's entitled to be a partner and we'll resent it if you order it. I heard that. I heard that quite clearly, if not in those words.²⁶

Judge Gesell disagreed.

I understood him to say something different. I understood him to say that although he was personally more favorable to your client's admission, that he felt that the judgment made by the partners that she had interpersonal relationships that were disadvantageous to the firm would not disappear if I ordered that she be made a partner. . . . And they will not disappear because they were matters that they had reached a conclusion on and whether or not that conclusion, in part in accordance with my findings, which I gather are now accepted, contains some people who are influenced by sexual stereotyping does not mean that your client was devoid of interpersonal difficulties, and you know from the record that's clear.²⁷

Jim refused to be diverted from his point.

There isn't a Title VII defendant in the world that doesn't think that they made a good judgment. A few are caught in an act and feeling guilty about it. Not very many of them believe that they honestly made the firing or promotion decision that some court has now told them was not valid and was illegal. If every court sits and listens and they say we just can't accept that we did that wrong and therefore there's going to be difficulty accepting your Honor's decree undoing that wrong, then I think Title VII is nullified by personal attitudes which just simply are unreconstructed as a result of the case, and I can't be-

26. *Id.*

27. *Id.*

lieve that that is where the law is and I didn't mean to suggest anything more, your Honor.

I don't think anybody is quite responsible for the posture of this case. Certainly I am not saying that the two lawyers together bear all of the responsibility for it. Somebody was going to get the first partnership case. This is the biggest partnership anybody could have imagined to have that case happen to. *Hishon v. King & Spalding* could have had it happen to it. It was a firm of about a hundred people with a former Attorney General who I'm sure didn't believe that they violated the law. That woman decided not to press that issue, but somebody was going to do it because it's an important part of Title VII.

Now I really do think, your Honor, that if you hear testimony and take it to heart, and again I shouldn't cut off a judge in a bench trial, but I do want to note for the record, if you take to heart Mr. Connor's, meritorious partner that he is, projection of how the policy board, which he no longer serves on, will deal with a decision which might come down in Miss Hopkins' favor saying not only was there enough discrimination to warrant relief but I ordered the relief, because that is what the law calls for. If that's where you Honor comes down and if the policy board of Price Waterhouse says we can't accept that, we're sure we were right before, then I don't know where we're ever going with these cases. But it's going to be true in every other Title VII case, corporate versus partnership level. At this size, level doesn't make any difference.²⁸

Shortly thereafter, we broke for lunch. "That speech either lost the case or made you a partner," Jim said.

Joe was followed by a pair of expert witnesses, representing an executive search firm and an outplacement counseling firm. The executive searcher testified that I should easily have been able to find a position at \$80,000 - \$200,000 per year when I left Price Waterhouse in early 1984. Furthermore, my income in 1990 should have been at least \$200,000 per year.

The outplacement counselor offered his expert opinion that I should have sent out at least 50-60 resumes as part of my Washington based job search. I should also have contacted 200 search firms nationwide. If Judge Gesell believed the two experts, then I clearly failed to mitigate damages adequately. On one hand, I should have been able to earn a lot

28. *Id.*

more money than I did. On the other hand I failed to look hard enough for another job.

Jim asked the outplacement counselor how he would advise a person to handle a litigation situation such as mine and what advice he would give to the litigant who had to participate in depositions, trials, or other legal proceedings. His response was “Oh, I would never advocate that anybody offer that as a piece of information in seeking a job.” “I would probably ask them to stretch their imaginations and say that they had some sort of legal business to take care of. I would not suggest to them to say that I am suing a company that I was employed by.”

The final expert and final witness for the day and the trial was “the figure man” as Judge Gesell referred to him. By contrast to Joe Tryon, Dr. Paul J. Andrisani was a “labor market economics and statistics and human resource management” specialist. Dr. Andrisani irritated Judge Gesell about five minutes into the direct examination. He was testifying to what he believed I should have earned had I stayed at Price Waterhouse and been nominated for the partnership the year after I was held.

The Judge protested.

I don't understand this whole scenario. It doesn't bear any relation to this case. We're talking about somebody else's case. We're not talking about this case.

This woman couldn't have stayed at Price Waterhouse. She was forced out. She was constructively discharged. So all of that supposition is pure hypothetical. In addition, if you carry it on as he apparently is about to do, he's carrying it out in a period when I've been hearing testimony all day that they don't want her anyhow.

So you're talking about something that has no relation to the case and I'm willing to have you make it as an offer of proof and I'm not critical of the witness because he's doing what he was asked to do, I'm not going to pay any attention to it. It hasn't anything to do with this case. It's just off the mark.²⁹

Then Judge Gesell realized that the constructive discharge issue remained unresolved to the GD lawyers.

29. *Id.*

You're assuming that – The assumption is that she wasn't constructively discharged?"

"I thought she was. Then I was wrong. I thought she could have stayed. I thought she could do just what this man was talking about. But I was told I was wrong. And that's our system.

I was told by the Court of Appeals that I was wrong. And that's an accepted fact in the case and I don't see why we can go ahead.³⁰

The GD lawyer explained that Dr. Andrisani's testimony also supported an alternate theory of the case, under which the Judge might order my return to the firm as an eligible partner candidate, instead of a partner. Judge Gesell gave his views on the alternate theory.

Well, you see, you've asked – you've proposed to me that I declare that she's eligible – to be considered eligible for partnership and then Mr. Connor got on the stand and indicated that they'd obey an order to make her a partner but otherwise he made it clear she would never be a partner, so making her eligible to be a partner would be utterly nonsensical . . . That's the only way she's going to be made a partner, by order.³¹

The GD lawyer moved on to front pay, a key element of which is an estimate of future earnings. The calculation involves factors similar to those used to predict the growth of the economy of the United States. (As any newspaper will tell you, these futuristic estimates are wildly unreliable.) He suggested a structured settlement or a structured award as a means of getting around the estimating vagaries.

The idea failed to appeal to Judge Gesell.

Well, you could, I suppose, fashion a front pay approach that would wait until the year's gone by and then each year come into court and we'd have another lawsuit and talk about it and fix the figures for that year in relation to the taxes and the interest rate and then we wait for another year and another judge would do it. Maybe some of my law

30. *Id.*

31. *Id.*

clerks would have children and maybe they'd become judges and they'd be doing it, . . . That would be called a structured settlement.³²

At the beginning of the trial, Jim and Doug had considered calling an additional expert witness to rebut the testimony of the executive searcher and the outplacement counselor. When they finished cross-examining Dr. Andrisani, they decided against the rebuttal witness. Their decision was based only partly on lack of perceived need. For either party to introduce any more witnesses would require that the trial continue into the next day. Jim and Doug were reluctant to prolong a proceeding that Judge Gesell clearly wanted to end.

The attorneys for both sides declared their cases closed. They stood before the Judge and agreed on the post trial procedures and schedules. As part of that discussion, Judge Gesell predicted the outcome:

I am of the view that since the case is obviously going to be appealed again on and on to the Supreme Court and back again, maybe that getting into the question of attorney's fees at this stage is probably not a wise thing to do.³³

Judge Gesell retired to his chambers. As we were leaving, Ted Olson ambled toward me. "If I lose this case, I'm going to call you and insist that you put me in touch with your employment experts to help me find one of those many high-paying jobs," I said with a grin.

He returned my comment with a good-natured chuckle. "That's fair," he said. "We should have to put up or shut up." He continued down the aisle and through the courtroom door into the hall.

In May of 1990 Judge Gesell published his "Findings of Fact and Conclusions of Law on Remand." My two normally sober, serious, thoughtful attorneys lost it. They behaved like a couple of high school boys who had just heard that the varsity list was posted.

Doug called me at the office to tell me that he and Jim were headed to the federal courthouse to pick up the opinion. He glibly noted that he had asked the clerk of the court if she would give him a clue as to what the Judge had found. She had declined, he said.

32. *Id.*

33. *Id.*

The two men, Jim driving, roared from the office parking lot in Jim's trusty Volkswagen Rabbit. They raced down Pennsylvania Avenue. While Jim sat, double parked in front of the courthouse, Doug fumbled his way through security. He skipped steps up the escalator to the second floor where the clerk was located and screeched to a halt outside the door to the office. Trying to give the impression of composure, he slowly entered the office and picked up the Judge's memorandum.

At a pace approaching an undignified run, he retraced his route back to Jim in the car, madly flipping pages as he went. There was no answer on the last page, where he usually found it. "Damn," he thought, there was no answer on the first several pages either. He finally found the answer in the middle of the thirty-three page document.

"Well, it looks like you're gonna be a partner," Jim said when he called me.

The Court will order that Ms. Hopkins be made a partner of Price Waterhouse effective July 1, 1990. Upon admission, Price Waterhouse must grant Ms. Hopkins sufficient partnership shares so that she will receive . . . the average compensation given management consulting partners admitted on July 1, 1983.³⁴

For my partial failure to mitigate, the Judge decided to eliminate lost wages for 1984 and reduce them for 1985-1989. Instead of the difference between what I made and what the average partner made, he set lost wages at the difference between \$100,000 and average partner earnings for that period.

Whatever the amount of lost wages, it was subject to interest, computed based on the year in which the individual annual amounts were "lost." Judge Gesell stated that he would rely on Professor Tryon to compute the current value of historically lost wages according to the assumptions testified to at trial. He would order the back pay after the expert computed the amount. He scheduled a status conference later in the month to approve the final order.

At the status conference a problem arose about attorney's fees. Both sides had agreed on Kator, Scott & Heller's costs of \$426,407.93 when Ted Olson presented the almost forgotten \$3,946.61 cost of printing Supreme Court documents. Because I lost, I had to pay.

Jim acknowledged that the roughly \$426,000 amount should be reduced by about \$4,000. When he made the calculation to the penny, however, he got the wrong number. With a twinkle in his eye and a

34. Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1211 (D.D.C. 1990).

broad grin, Judge Gesell said “I don’t seem to agree with your number Mr. Heller.”

Ted Olson suggested that the lawyers work out the detail and get back to him at a later date. Judge Gesell would have none of it. He made perfectly clear the fact that he was going to sign the order that afternoon, even if he accomplished nothing else.

One of the other attorneys made another attempt at the calculation – still wrong. Finally Price Waterhouse’s in-house counsel, who had never uttered a single word in all the years of litigation, computed the right number, \$422,460.32.

“It always helps to have an accounting firm handle the numbers,” Judge Gesell remarked. He was in a jovial mood.

The attorneys retired to Judge Gesell’s chambers, where the order was printed and signed on the spot. Doug gave me a copy when we met in the hall afterward. As I walked away from the court room, I ran into a woman who worked for Judge Gesell. She smiled warmly and said “I hope you enjoy your new job, Miss Hopkins.”

Price Waterhouse appealed again.

Judge Harry Edwards was back on the appeals panel, this time with Judges Abner J. Mikva and Karen L Henderson. Chief Judge Mikva seated himself and greeted the attorneys in a friendly mellow voice. He leaned over the bench to introduce Judge Henderson, the newest member of the Court of Appeals. It was her first day on the job. Judge Edwards, who sat to Judge Mikva’s right, needed no introduction. He had been the chief judge at the last argument.

Ted Olson went first. The gist of his argument was:

- Ann Hopkins had genuine and serious interpersonal skills problems. Her problems and the complaints about her were not a pretext for discrimination. They were real and serious and gender-neutral. These same problems had been grounds for holding or rejecting males. Some of the criticisms of Ann Hopkins did show some indication of sexual stereotyping, but it was unconscious.
- Her serious problems and stereotypical biases both contributed to the decision to hold her over for consideration in the next year, a common practice. She was not rejected. She

had a chance. 85% of those held over became partners the next year. She, however, blew it.

- Her own unreasonable conduct destroyed her chances for the partnership. She left. Although she had plenty of opportunities to work elsewhere, she ignored or rejected them.
- Price Waterhouse may have committed an error in the evaluation process. It did not, however, commit an error in weighing the negative against the positive factors.
- Gender-neutral issues were overpowering. Twenty of twenty-one comments were negative in some manner. When Price Waterhouse investigated, it found a pervasive theme: unacceptable interpersonal relationships. Three partners testified to that effect at trial.

Judge Edwards, who had been sitting back in his chair to this point, leaned forward on his elbows. He had heard the story before.

Mr. Olson, your argument would be more properly presented to the District Court. Judge Gesell asked you to resubmit your evidence there. Now you raise factual arguments before the Court of Appeals. . . This Court of Appeals can't go through the entire record. What you are asking for is impermissible.³⁵

Ted argued that Judge Gesell never weighed the evidence and failed to evaluate gender-neutral comments.

Judge Edwards disagreed.

- Judge Gesell reviewed the trial transcript; considered briefs prepared by both sides, listened to their arguments, and decided that, at best, the facts were in equipoise. Price Waterhouse did not meet its burden by a preponderance of the evidence.
- The gender-neutral comments were tainted.

Judge Mikva joined Judge Edwards and the two took turns reading quotes from Judge Gesell's opinion and that of the Supreme Court. The

35. Transcript, *Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990) (No. 90-7099).

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PERSONAL ACCOUNT OF ANN HOPKINS

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evidentiary record was in balance. The record was not discarded. It was in balance. Judge Gesell said so. Justice O'Connor said so.

Ted tried again.

- Although some comments were affected by stereotyping, others were unaffected.
- Judge Gesell considered none of the unaffected comments.
- “It’s like throwing out all the apples in a barrel because of a few bad ones.

Judge Mikva joined the fray. “You didn’t submit any more evidence.” With one arm over his head, he expanded on the apple barrel metaphor, “How hard is it to hold up an apple and say ‘This is a good apple?’”

“You were told by several judges that no matter how good you thought your evidence was, it wasn’t,” Judge Edwards retorted. “The Supreme Court didn’t disagree with Gesell, so you lose again.”

As he was running out of time he got to his arguments on the nature of my legal injury and the related remedy. He argued quickly about the lack of injury. Ann Hopkins was not rejected; consideration of her partnership was deferred. Her own actions, as opposed to an act of the partnership resulted in her not being proposed the second time.

With a few seconds remaining, Ted got to remedy. He referred the panel of judges to Price Waterhouse’s brief, which he summarized.

- Partnership as a remedy is not described in Title VII or its legislative history.
- Partnership is an inappropriate remedy where the plaintiff took herself out of the running.
- She unreasonably prevented herself from being a partner.
- She also failed in her duty to mitigate
- She refused to go on interviews.
- At most she is entitled to receive back pay for the one year that she was in suspension.

Jim argued on my behalf:

- The Supreme Court said that Price Waterhouse didn't explain how the evidence was preponderant.
- It was Price Waterhouse's burden to show that it was preponderant.
- Price Waterhouse ignored stereotyping.
- Judge Gesell recognized that some statements that seem to be gender-neutral may not be. He merely asked Price Waterhouse to identify or explain the non-stereotypical comments.

Judge Mikva frowned. He seemed concerned that perhaps Price Waterhouse had an impossible quest. Perhaps no evidence existed that could be used to separate the stereotypical from the other. He asked: What kind of evidence could have qualified? How would you expect someone to respond, after the fact, when asked to explain if the language was discriminatory?

Jim explained: "Relevant evidence might have included expert evidence saying 'we don't agree that there was stereotyping.' Lay witnesses could have been called. Subject lay witnesses to cross-examination. Ask questions like 'How long did you know Miss Hopkins? Did you ever tell a man to go to charm school? You only knew Miss Hopkins for five minutes; on what do you base your criticism?'" The job was legally possible. Price Waterhouse simply decided not to call opposing experts or the authors of the comments to testify.

Judge Henderson was troubled by my bad relations with one of the partners: How can he trust Hopkins as a partner, or be forced to, as an equitable form of relief? Shouldn't a partnership depend on trust? Jim ran out of time as he explained: That there was one nose out of joint should not affect the remedy. Judge Gesell said that there wasn't such hostility that she shouldn't be made a partner.

My government sat on my side of the Court of Appeals in the persona of an attorney from the EEOC. Ms. Susan Starr was responsible for an amicus brief filed on my behalf by her agency. Price Waterhouse had unsuccessfully opposed the brief. Before the arguments, the EEOC asked Jim and Doug to relinquish a little of the time allocated to them.

The EEOC wanted to participate. Jim and Doug reluctantly refused to give up the time. They wanted to be sure that they had all the time available to counter whatever the GD lawyers came up with.

The Court decided to add time to the schedule to permit the EEOC to argue on my behalf. Ms. Starr stated the legal position of the EEOC: partnership can be ordered as a remedy under Title VII. Furthermore, monetary relief would be insufficient to deter future discrimination. The arguments were not novel. It was, however, nice to have part of my government on my side.

On rebuttal Ted reiterated the heinous nature of my interpersonal skills by citing the page numbers for non-discriminatory, gender-neutral comments. He characterized them as substantial evidence. He said that witnesses at the original trial were asked if sex was a consideration in making the comments. Those witnesses denied it. Furthermore, male candidates were treated equally.

Expert testimony came up. At this point, he couldn't argue that it wasn't expert or that it was wrong, the courts had already settled the expertise question and the firm failed to produce opposing expert testimony. So he argued that opposing expert testimony was unnecessary to make Price Waterhouse's case more persuasive. He noted that the Supreme Court regarded such testimony as "icing on the cake" and that it would have been of dubious value.

Judge Edwards reiterated a point made by the Supreme Court. The Supreme Court endorsed the notion that people who stereotype often are unaware of or unconcerned about their actions. In return, Ted argued that Price Waterhouse made the right decision: if a person, who is not a partner, is abusive, she should be given a *second chance* before a partnership, not a partnership.

Judge Edwards seemed frustrated with Ted's arguments when he said "If someone said 'I hate Blacks,' it might be clearer to you, but you seem to suggest that sexual stereotyping is different from race stereotyping. What Price Waterhouse did is like saying 'nigger.'" Undaunted, Ted continued. There were legitimate problems and therefore legitimate reasons for the deferral. He did, however, change the subject to remedy. Ted's position was that partnership was an inappropriate remedy. Judge Gesell acknowledged that Price Waterhouse had some legitimate concerns. Congress never addressed the issue of partnerships when it passed

Title VII. The Congress, not the courts should decide if a partnership can be ordered under Title VII.

What a hoot! Here we were, arguing before the Court of Appeals for the second time, and after two trials, an appeal, and a trip to the Supreme Court, Ted Olson wanted an act of Congress.

Judge Mikva asked Ted: "Suppose that an employer said all employees who do 'such and such' are eligible for a \$50,000 bonus and a person was denied it because she was a woman. Would that violate Title VII?" Ted acknowledged that it would. "What in the statute prohibits the same remedy if partnership is substituted for \$50,000?" Judge Mikva asked. "What if it were a vice presidency of a company?" "You don't think that a court can order the remedy?" he asked rhetorically. "Until a few years ago, we couldn't order universities to give tenure," he quipped. Ted's position was unchanged. The court could not order a partnership. "So a court could order someone to be made president of General Motors but not a partner in an accounting firm?" Judge Mikva asked finally.

"Not until Congress recognizes non-employee relationships," replied Ted.

On Tuesday, December 4, 1990 the Court of Appeals unanimously affirmed Judge Gesell's order on all issues. The liability issue had been to the Supreme Court. It was dead.

The opinion of the Court of Appeals was written by Judge Edwards. In the first sentence of the opinion, I immediately sensed a desire to be rid of the matter.

This case, before this court for the second time, arises from a decision by appellant Price Waterhouse to deny partnership to one of its employees, appellee Ann B. Hopkins. We are again asked to review a finding by the District Court that Price Waterhouse's denial of partnership to Ms. Hopkins violated Title VII of the Civil Rights Act of 1964 . . . and to assess its shaping of an appropriate remedy.³⁶

Unlike Judge Gesell's memorandum, it was not difficult to find what the Court of Appeals decided. Very early in the opinion, Judge Edwards wrote the overall ruling of the Court on the issues of liability and remedy:

36. Hopkins v. Price Waterhouse, 920 F.2d 967, 968 (D.C. Cir. 1990).

Having found appellant liable under Title VII, the District Court ordered Price Waterhouse to admit Ann Hopkins . . . and to pay her . . . back pay On this appeal, Price Waterhouse challenges both the District Court's finding of liability and its remedial order that Ms. Hopkins be made a partner. We can find no merit in either of these challenges.³⁷

For the second time, the Court of Appeals stated its position on constructive discharge. The position was unchanged.

"We find no error in Judge Gesell's finding that Ms. Hopkins was constructively discharged when Price Waterhouse informed her that she would not be renominated for partnership."³⁸

Betsy Hishon was mentioned once again when Judge Edwards wrote that Judge Gesell had the authority to order a partnership.

Price Waterhouse also asserts that the District Court had no authority to order admission to partnership to remedy a Title VII violation Given the Court's judgment in *Hishon*, and after a careful review of Title VII, its legislative history and the case law interpreting it, we find that the District Court clearly acted within the bounds of the remedial authority conferred by the statute.³⁹

The final page of the twenty-nine page opinion summed it up.

"For all of the foregoing reasons, the judgment of the District Court is affirmed.

So Ordered."⁴⁰

Judge Henderson added a concurring opinion to express her dissatisfaction with the outcome. She was not a fan of Judge Gesell's finding on discrimination.

I concur in the majority's decision, but only because the narrow scope of our review compels affirmance. The district court found as a fact that the decision to defer consideration of Hopkins's partnership candidacy was a product of intentional discrimination. While I view this finding as highly questionable, in light of the all but overwhelming evidence that the decision resulted from Hopkins's own, well-attested

37. *Id.* at 969.

38. *Id.* at 974.

39. *Id.* at 975.

40. *Id.* at 982.

personality deficiencies, I cannot say it is ‘based on an utterly implausible account of the evidence’ so as to warrant reversal of the district court’s decision.⁴¹

And she did not want to reward me with partnership as remedy.

I also concur, but even more reluctantly, in affirming the award of a partnership interest under the circumstances here. . . . In my view, Hopkins’s conduct toward other employees and partners both before and, particularly, after her candidacy deferment casts great doubt on her ability to function effectively with the other Price Waterhouse partners. Nevertheless, I cannot say that under these circumstances the district court abused its discretion in awarding Hopkins a partnership interest.⁴²

RETURN TO PRICE WATERHOUSE

It was two months after the Court of Appeals ruled before I returned to the firm. I was a little reluctant to leave the World Bank where I liked the people and I was getting the hang of being a bureaucrat. I was also reluctant to return to a firm that I worried I might not know. After all, by the end of 1990, I had spent five years working for the firm and seven years in litigation. The prominent partners I had worked with in the early eighties were then running the firm. Tom Beyer was in charge of consulting and Lew Krulwich was in line right behind him. I would reenter without the strong mentors I had as a senior manager. Most of the OGS senior staff I had worked with became partners during the litigation. I knew nothing about how to “be a partner,” while my legally-established peer group, the class of 1983, had had seven years to learn the ropes.

On return to the firm in February 1991, I was sent for new partner orientation and technology training in Tampa, Florida, probably to keep me out of the press and to teach me something about the firm’s information technology methodologies. Neither happened. Someone from the television show “What’s my line” called, and actually reached me in Tampa, to ask me to appear on the show. I declined. The methodology was voluminous, irrelevant to what I did, and distastefully uninteresting. Furthermore, I later learned that few people, partners or staff, used it. Every consulting organization had to have one, but methodology never

41. *Id.* at 982-83.

42. *Id.* at 983.

differentiated firms in the marketplace, nor was it key to success. I believe that people, not methodologies, get things done.

After “training” I was assigned to a big office, in excess and largely unoccupied Price Waterhouse office space, located in what I considered the far-out suburbs of Washington, D.C. (I lived, and continue to live, two subway stops from downtown.) I had a delightful secretary, no clients, no staff, and almost nothing to do. On a daily basis I spent more time getting to the office than I spent on value-adding activities. A typical day looked like this: arrive at nine, find coffee, answer phone calls from the press and people congratulating me or seeking advice, read piles of irrelevant publications to partners, leave at five. I was invited to participate in media events, speaking engagements, and congressional testimony.

In response to calls routinely received, at home and the office, from people who sought advice, counsel, sympathy, or just an ear on matters related to discrimination or alleged discrimination, I began to write topic-specific descriptions of what had happened over the many years in litigation. I did so partly because I had the spare time and partly because I got tired of answering the same questions over and over. The first description was of the Supreme Court case, the topic most prominent as a source of questions. Over time, many people – friends, family, others – said “You ought to write a book.” So I did. The descriptions piled up and eventually became a manuscript entitled “So Ordered: Making Partner the Hard Way.”⁴³

For the first year or so after my return, I was bored and frustrated professionally. But I had brought it on myself when I negotiated the terms of my return to Price Waterhouse and asked to be assigned to the private sector practice rather than OGS. At the time I believed that the devils I didn’t know in the private sector practice might be better than the ones I did know in OGS. I was wrong. I knew nothing about working with private sector clients. Any competitive advantage gained from twenty years experience and success working with federal government clients was close to worthless.

I met with senior partners in the National Office in New York to ask that I be transferred to OGS. My request was granted. Things picked up. I still lacked clients and staff, but there were lots of proposals to write and my proposal teams won more than they lost. I got a top secret security clearance and one of the OGS partners turned over his intelligence community client to me. I mastered the firm’s methodologies in

48. ANN BRANIGAR HOPKINS, *SO ORDERED: MAKING PARTNER THE HARD WAY* (1996).

change management and process analysis and, over a brief couple of years, developed clients and staff and lots of work, first in the intelligence community, then in the U.S. Patent and Trademark Office, the U.S. Department of Veterans Affairs, and the U.S. House of Representatives.

In 1993, Mary Roth Walsh invited me to participate in a conference on “Glass Ceilings in High Places” co-sponsored by her research center and the Harvard Law School. I perused my manuscript to prepare my remarks. At conference end, Mary Roth made the oft repeated comment “You ought to . . .” The manuscript would never have been published but for her efforts. She pitched it to the University of Massachusetts Press, which published it.

I made no secret of the fact that the book would be published or that I was pleased about it. I thought it would be nice to be an Author. While I was working on the first ever performance audit of the administrative operations of the House of Representatives, a couple of the more senior partners in my office invited me to lunch and asked me not to have it published. They asked that I get a few other partners to read the draft. I told them I would consider their requests. I asked four partners to read the manuscript. Each approved. In fact, one partner said that he had been interested in the case for years and had gone to the trouble of finding and reading each of the legal opinions on the case as they came down. The book was published in 1996.

As I look back on my years as a Price Waterhouse partner, I have no regrets. The time I spent in the private sector was rough, but after that, I developed an admirable track record for sales, client service, and staff development in OGS. I became a positive force in the Office. I am proud that at least half a dozen of the staff that I worked with, mentored and managed became successful partners. One friend and partner, a man for whom I worked, said of me “You successfully played the hand you were dealt, and I’ve never seen worse cards.”

I was a Price Waterhouse partner for only seven years. I lost about nine years of my career when time spent at the firm after a failed candidacy, in litigation, and wasted in the private sector practice is added together. I have wondered what might have happened if I had been a partner during those lost years. I know I would have learned how to be a partner faster, but would I have risen higher in the ranks to a position where I could have more effectively influenced the firm to cherish diversity? Would some of the men I worked for have been working for me? I don’t know. What I do know is I never compromised on what I valued or believed. I didn’t always get it right, but I did it my way.

The Price Waterhouse I knew vanished in 1998 when Price Waterhouse merged with Coopers & Lybrand. The new firm, PricewaterhouseCoopers, bore little resemblance to the old. My mentor into the partnership, Tom Beyer, put it well when he and I were speakers at a retirement dinner for a staff member that we had worked with in the eighties. He said “This is not the firm we fought for.”

I retired from PricewaterhouseCoopers in 2002. Shortly thereafter, that firm sold its consulting practice to IBM. The remaining firm is a global accounting and financial services firm, one of the “Final Four” left from what was the “Big Eight” in 1983.

WHAT CHANGED?

Twenty years ago when I sued Price Waterhouse, the firm lacked even a published equal employment opportunity policy. When I rejoined the firm in 1991, human resource (HR) policy was published in a classy, bound volume about the size of Fortune magazine. HR professionals and processes abounded. The firm had retooled the partner candidate evaluation forms, but not significantly – the instructions included language to prohibit gender-based comments. The evaluation process and criteria hadn’t changed much.

I grew up in my career without many HR professionals. Sure, there was an HR Office where one went to register hiring, firings, promotions and the like. But I rarely saw an HR person in most of what I did, which was working with people to write proposals and do projects for clients. Somewhere in time, people became resources like cash or trees and we needed many human resource professionals to manage them.

I have listened to HR and related professionals employed by partnerships, federal agencies, and corporations. These people described elaborate, time-consuming processes used to handle allegations of discrimination, processes veiled in confidentiality or secrecy and designed to protect the rights of both accuser and accused. Some talked guardedly about matters settled, without regard for merit, for small amounts of cash to avoid embarrassment or bad publicity. Others talked about “zero tolerance” policies that resulted in summary firing for certain kinds of discriminatory behavior.

In my experience, HR professionals, in and outside the firm, were generally talented, conscientious, caring people, but their role was, at least partly, to manage a process designed to protect the corporate interest from lawsuits. My comment to them was always that an appropriate corporate culture and managers who act on that culture are far more ef-

fective in eliminating discrimination than HR processes that seek to discover, examine, investigate, protect, and (usually a long time later) remedy discriminatory acts.

When I attended my first meeting of the partners and staff who worked in my practice area in OGS, the staff included two Asian women. They were new to the staff and recent graduates. One graduated with an MPA from the Kennedy School at Harvard, and the other earned a BA at Wellesley. They observed that they constituted most of the Asians on the OGS staff and asked why Asians were so underrepresented. A senior manager with many years tenure, who was heavily involved in recruiting, and the partner in charge of the practice area, both white males, engaged the two Asian women in a discussion. The men talked about how hard it was to recruit minorities. There just weren't enough able minorities available in the places we recruited. The discussion moved to where we recruited. The women suggested that maybe we weren't looking in the right places; the men held that we might have to lower our standards if we looked elsewhere. The senior manager summed it up "You can't catch sharks in Lake Erie." I annoyed both men by saying "Find a better body of water." We had better look for different fish in different waters. My comments in that meeting marked my debut as the office spokesman for diversity and a culture that seeks to encourage diversity.

Beginning in 1992 when I returned to OGS, I worked with HR and other partners and managers as an outspoken advocate for a culture that prized diversity and sought and nurtured it in the work place. I acted on perceived discrimination (in consultation with HR and without a lot of process) and encouraged other managers to do so. Five years later, in 1997, my OGS made more money than most of the rest of the firm and had a staff that was sufficiently diverse in that protected groups did not feel like minority groups. Only half of the thirty or so partners were white Anglo-Saxon men. The composition of the group of partners and staff that served clients was quite different from that in 1983 and even in 1991. Something changed. I believe it was in the culture.

Outside of my office, in the rest of the U.S. firm of Price Waterhouse, I believe the demographics (or the culture) were different. When I sued in 1983 only 1% of the partners were women. By the time I returned to the firm in 1991 the number of women partners had risen to a whopping 3%. I don't believe the number ever topped 10% and the largest number of minority group partners was in my office.

While I was a partner, Price Waterhouse merged its affiliated firms worldwide to form a global partnership. I went to at least one global

partner meeting and was hard pressed to find ten women in hundreds of men. After the 1998 merger with Coopers & Lybrand, I attended a “women’s partner meeting,” a Coopers & Lybrand remnant of which I mildly disapproved. A huge display calendar showing significant events related to women in the firm occupied several linear yards of wall space. I wasn’t on it. The self-proclaimed “leadership team” of partners from the national office came to the meeting briefly to introduce themselves and demonstrate how important the women partners were to the firm. They seated themselves at different tables around the room. They needed no introduction; with one exception they were all men.

ADVICE

I have listened to hundreds of litigants or potential litigants describe their situations in the work place and ask for advice about what to do. These people included women, men, African-Americans, Asians, Hispanics, gays, and lesbians. They were attorneys, accountants, consultants, polygraphers, research scientists, doctors, administrators, clerks, bureaucrats, and senior executives. They were all between 25 and 60 years old. Each felt displaced by someone in the corporate majority who was less qualified. Most were sad and frustrated. Many were angry. Many felt powerless. A few believed they could make money out of their plights. Another few, typically attorneys who had retained attorneys to represent them, were absorbed in managing their own litigations to the exclusion of getting on with their lives.

I offer advice reluctantly. That said, I suggested to most of the potential litigants that they ask themselves: If I win, will the prize be worth the price? At what cost is litigation worth it? Is one more grade or step in the civil service hierarchy worth a year of life struggling through internal administrative processes and the EEOC? What’s the human cost in time lost to self, family, and career? Considered in the greater context of life, is this the hill to die on?

In my case, I failed to consider any of these questions until it was too late. I got into litigation emotionally, almost on a whim. I fired the opening round with a law suit and then I was dragged through years of appeals. It seemed ill-advised to quit because each trial or appeal was favorable to me. In retrospect, perhaps I would advise: be sure to blow the opposition away with the opening round – you may not get a second shot.

I also suggested to those who appeared not to have done so that they get on with their lives. One potential litigant sat for months at a

desk near the water fountain with nothing to do, waiting for some administrative process to change her plight. Others spent all their time for months, even years, micromanaging their attorneys in hope, usually dashed, for a dramatic positive outcome. "Get on with your life, your career, your other interests," was usually somewhat unwelcome advice, but those who did so were much happier people six months later.

I lacked any alternative to getting on with it. My children had to eat, sleep, play, go to school and grow up.

CLOSING

So what's happened to these people since the litigation?

My daughter graduated from the University of Vermont with a degree in mathematics and became a management consultant with PricewaterhouseCoopers. She recently went to work for a client, the U.S. Department of Veterans Affairs. She has a 20 month old son, Peter. My older son earned a BA from the University of Cincinnati and an MFA from Columbia University. He chairs the English department at the Field School in Washington, D.C. My younger son Peter graduated from the Field School and went on to American University. He was killed in a car driven by a drunk. Fifteen hundred people attended the memorial service.

I am a gardener, carpenter, speaker, and occasional writer. I spend a lot of time with my grandson; he helps me with gardening and carpentry. The staff at my hardware store refer to him as my apprentice. His mother tells me "He is very advanced." I am in litigation again, this time over the death of my son.

Jim and Doug left Kator Scott & Heller to form their own firm, Heller, Huron, Chertkof, Lerner, Simon & Salzman. Although Jim "didn't do probate work," he handled the aftermath of my son's death. Jim died of cancer. I spoke at his memorial service. Doug Huron still practices law in Washington. He is on *Washingtonian Magazine's* top attorneys list. He has a non-fatal cousin of ALS, speaks through a computer, and gets around in a wheel chair or on a scooter. I regularly have lunch with him.

Susan Fiske is professor of psychology at Princeton University. She is a past president of the American Psychological Society and widely published in her field. She has testified in a small number of cases since *Hopkins*. The outcomes were almost always favorable to the plaintiff. Because she is first and foremost a researcher, she tries to choose cases to which social psychology literature is particularly applicable and that

seem especially egregious, intellectually interesting, and potentially useful as a legal precedent. She has turned down ten for every one that she accepted.

Joe Tryon is now Professor Emeritus at Georgetown University.

Sally Burns is professor of clinical law at New York University School of Law.

Several of the GD, Dunn & Crutcher associates who litigated on the firm's behalf became GD partners. Ted Olson represented George Bush and Dick Cheney in the Supreme Court's *Bush v. Gore* matter. He became the forty-second Solicitor General of the United States. His wife was killed in the attacks on September 11.

Kay Oberly still lives in Washington, D.C. The last time I saw her, she was counsel at one of the "Big Six."

Judge Gesell took senior status in January 1993 and died in February 1993. He was 83. Judge Edwards still sits on the U.S. Court of Appeals for the District of Columbia Circuit. He served as Chief Judge from 1994 to 2001. Judge Henderson still sits on that Court. Judge Mikva served as Chief Judge from 1991 to 1994, when he retired. He later became Counsel to President Clinton. Judge Williams took senior status in September 2001. Judge Joyce Hens Green took senior status in July 1995.

Joe Connor left Price Waterhouse and served as the Under-Secretary General for Management of the United Nations from 1994-2003. He is retired. Tom Beyer became Vice-Chairman of Price Waterhouse. He retired shortly after I returned to the firm. At his invitation, we had lunch together shortly after my son was killed. I run into him occasionally at the hardware store. He grows roses. Lew Krulwich also became Vice-Chairman of Price Waterhouse. He came down from New York to attend my son's memorial service. When he retired, I attended his retirement event. Tom Beyer and I sat side by side at the retirement dinner. I still get Christmas cards from Lew.

The "Big Eight" national accounting firms were Arthur Andersen; Arthur Young; Coopers & Lybrand; Deloitte, Haskins & Sells; Ernst & Whinney; Peat, Marwick, Mitchell; Price Waterhouse; and Touche Ross. Peat, Marwick, Mitchell became KPMG Peat Marwick and later KPMG. The eight became the "Big Six" after Arthur Young merged with Ernst & Whinney to form Ernst & Young and Touche Ross merged with Deloitte, Haskins & Sells to form Deloitte & Touche. The six became the "Big Four," sometimes the "Final Four," after Arthur Andersen went out of business in the aftermath of the Enron scandal and Price Waterhouse merged with Coopers & Lybrand leaving Deloitte & Touche,

Ernst & Young, KPMG, and PricewaterhouseCoopers. With the exception of Deloitte & Touche these firms disposed of their consulting practices.

Price Waterhouse no longer exists.