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# The Umpire Strikes Out: *Postema V. National League*: Major League Gender Discrimination

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# UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW

## ARTICLES

### THE UMPIRE STRIKES OUT: *POSTEMA v. NATIONAL LEAGUE*: MAJOR LEAGUE GENDER DISCRIMINATION

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#### I. INTRODUCTION

From 1967 to 1972 Bernice Gera fought in court to achieve her goal of umpiring Class A minor league baseball.<sup>1</sup> Gera prevailed,

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1. *Obituary: Bernice Gera, Umpire*, 61, N.Y. TIMES, Sept. 25, 1992, at A22. See also PAM POSTEMA & GENE WOJCIECHOWSKI, YOU'VE GOT TO HAVE BALLS TO MAKE IT IN THIS LEAGUE 20-21 (1992).

but her minor league career was short-lived. Following her first minor league game, Gera quit, claiming that she was disenchanted with the job when the other umpires refused to cooperate with her on the field.<sup>2</sup> Furthermore, she faced harassment off the field and even received death threats.<sup>3</sup> Only a few women besides Gera have worked in the minor leagues to date; no woman has ever umpired in the major leagues.<sup>4</sup>

Recently, one woman, Pamela Postema, has taken Gera's cause one step further by filing suit to gain entry into the male bastion of major league baseball umpiring.<sup>5</sup> Postema, a minor league umpire for thirteen years, initiated a sex discrimination lawsuit against a number of professional baseball organizations in 1991 because she was not promoted to the major league umpiring ranks in 1989 and was fired from the minor league position she held at the time.<sup>6</sup>

In recent years, aided by favorable legislation and court decisions, women have been making inroads into such formerly all-male professions as law, accounting, and corporate management. This Article will examine Pamela Postema's case in light of other recent cases involving women who have sought a foothold in male-dominated professions. The Article will also explore the impact on Postema's case of such laws as the Civil Rights Acts of 1964 and 1991. This Article concludes that, despite recent progress in the caselaw and legislation, the lawsuit instituted by Pamela Postema to gain a major league umpiring position remains an uncertain quest.

## II. BACKGROUND

There were no working women umpires in minor league baseball<sup>7</sup> when Pam Postema responded to an ad in a local Florida

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2. Obituary: *Bernice Gera, Umpire*, 61, *supra* note 1, at A22.

3. POSTEMA & WOJCIECHOWSKI, *supra* note 1, at 20.

4. Obituary: *Bernice Gera, Umpire*, 61, *supra* note 1, at A22.

5. *Postema v. National League of Professional Baseball Clubs, American League of Professional Baseball Clubs, Triple-A Alliance of Professional Baseball Clubs, and Baseball Office of Umpire Dev.*, 799 F. Supp. 1475 (S.D.N.Y. 1992) [hereinafter *Postema v. National League*].

6. M.P. McQueen, *She Claims Baseball Foul: Woman Umpire Claims Sex Bias*, *NEWSDAY*, Dec. 20, 1991, at 6.

7. Bernice Gera quit after umpiring one game in 1972, and Postema's only other predecessor, Christine Wren, quit for a better paying job in 1977, after umpiring in the minor leagues for two years. Sandy Keenan, *The Umpress Strikes Back*, *SPORTS ILLUS.*, July 30, 1984, at 45.

newspaper for the Al Somers Umpire School in Daytona Beach.<sup>8</sup> She had to fight to get into the school, whose founder said, "There'll never be a woman student in my school. It's just not a job for a woman."<sup>9</sup> The school had no women's restrooms<sup>10</sup> when Postema and another woman were eventually accepted and enrolled in the six-week course in 1977.<sup>11</sup> She graduated from the umpire school high in her class,<sup>12</sup> and was offered a job in the Gulf Coast League, the bottom of the minor league circuit.<sup>13</sup>

For the next thirteen years, Postema umpired some 2,000 games in the minor leagues,<sup>14</sup> tolerating exhausting travel schedules, low salaries, and a series of umpiring partners, not all of whom were supportive of her.<sup>15</sup> The attitude of many of the other umpires was, "If you have to, work with her. But don't help her. Don't make it easy."<sup>16</sup>

By 1980 Postema had made it to the Texas League, a Double A League, making her one of only twenty-nine minor league umpires who were promoted and one of only sixteen to make the jump from single A to the next level.<sup>17</sup>

Despite numerous challenges thrown at her, Postema was determined to overcome the obstacles. Although umpiring in the major leagues may not be among the top career choices for most young women, Postema wished to ensure that she would reach the majors by spending her time in the minor leagues honing her skills, while surmounting barriers that would discourage even most men.<sup>18</sup> For example, she worked winters in Columbia, where one manager spat in her face,<sup>19</sup> and in Puerto Rico and Venezuela, where fans threw fruit at her and issued death threats.<sup>20</sup>

Postema came as close as one could get to the majors.<sup>21</sup> Her

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8. Linda Lehrer, *Big League a Big Step for Female Ump*, CONN. POST, July 8, 1992, at B2.

9. POSTEMA & WOJCIECHOWSKI, *supra* note 1, at 22.

10. *Id.* at 23.

11. Lehrer, *supra* note 8, at B2.

12. Postema finished 17th in a class of 130. Keenan, *supra* note 7, at 44.

13. Lehrer, *supra* note 8, at B2. The other woman in the class was not offered a job. *Id.*

14. Susan Reed & Lyndon Stambler, *The Umpire Strikes Back*, PEOPLE, May 25, 1992, at 87.

15. Lehrer, *supra* note 8, at B2.

16. Reed and Stambler, *supra* note 14, at 88 (quoting Postema).

17. Lehrer, *supra* note 8, at B2.

18. *Id.*

19. *Id.*

20. Reed & Stambler, *supra* note 14, at 88.

21. John Altavilla, *Rejected Postema Cries Foul on Baseball*, NEW HAVEN REGISTER,

assignments included working in winter league ball and seven years at the Triple A level, where she was crew chief in 1989.<sup>22</sup> She was also chosen to umpire American League exhibition games in 1986, the 1987 Hall of Fame game in Cooperstown, New York,<sup>23</sup> and the 1989 Triple A All-Star Game.<sup>24</sup> Reportedly, she was given serious consideration for two openings in the National League in 1989 after umpiring their spring training games in 1988 and 1989.<sup>25</sup>

Despite her achievements, in 1989 an evaluation report by the league office for Umpire Development claimed that Postema's work had "deteriorated" in the area of "enthusiasm and execution," even though that office had rated her "better than average" earlier that season.<sup>26</sup>

The Triple A baseball league has a rule that if after three years an umpire is not being considered for promotion, the league will release that person to make room for other up-and-coming umpires.<sup>27</sup> Postema had worked in the Triple A league for six years,<sup>28</sup> when in November 1989 she was notified by the league that she had been fired.<sup>29</sup> The judgment was that Postema simply did not have the ability to work in the major leagues.<sup>30</sup> Pamela Postema, the woman who came closest to becoming a major league umpire, took a job making deliveries for Federal Express.<sup>31</sup>

Postema realized that she had hit baseball's equivalent of the glass ceiling when she saw that the major leagues were not within the grasp of a female umpire.<sup>32</sup> Postema declared, "Women had to sue to get into the minor leagues, so I guess women will have to sue to get into the majors."<sup>33</sup> Hence, in 1991 Postema filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC).

### III. THE CASE

After receiving a right to sue letter from the EEOC, Postema

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July 30, 1990, at 28.

22. *Id.*

23. *Id.*

24. *Postema v. National League*, 799 F. Supp. at 1478.

25. Altavilla, *supra* note 21, at 28.

26. Reed and Stambler, *supra* note 14, at 87.

27. Lehrer, *supra* note 8, at B2.

28. Altavilla, *supra* note 21, at 28.

29. Reed & Stambler, *supra* note 14, at 88.

30. Altavilla, *supra* note 21, at 28.

31. Altavilla, *supra* note 21, at 28.

32. Lehrer, *supra* note 8, at B2.

33. *Id.*

filed suit in the United States District Court in Manhattan, naming as defendants the National League, the American League, the minor league Triple A Alliance, and the Baseball Office of Umpire Development.<sup>34</sup> Postema sought a jury trial, back pay, and punitive damages.<sup>35</sup> In addition, she requested that the court order the major leagues to hire her for the next available umpire opening.<sup>36</sup>

Postema's suit alleges that "a longstanding prejudice against women" is the only reason that she and other women have not been able to break into the major leagues.<sup>37</sup> The suit accuses the leagues of tolerating and even encouraging a work environment in which she was subjected to frequent sexual harassment.<sup>38</sup> Postema further contends that less qualified males were hired and promoted ahead of her as a result of a prejudice against women and alleges the existence of a conspiracy to keep her and other women from becoming major league umpires.<sup>39</sup> She further claims she was unfairly fired by the Triple A Alliance when neither the American nor the National League hired her.<sup>40</sup>

Postema will have an uphill climb convincing the courts that her performance merits an opportunity to work in the major leagues. The problem is that the decision to fire her, like the past decisions that promoted her, was made subjectively by supervisors who work without score cards.<sup>41</sup> Her work over a thirteen-year period and the high regard in which managers and players held her, however, casts doubt on the motivations of the men who made the call that she was not qualified for the job.<sup>42</sup> One baseball veteran, former San Francisco Giants manager Roger Craig, said, "I don't know why she lost her job. She was a pretty good umpire,"<sup>43</sup> a view echoed by such baseball officials as Atlanta Braves General Manager Bobby Cox, New York Yankees owner George Steinbrenner, and the late baseball commissioner, A. Bartlett Giamatti.<sup>44</sup>

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34. McQueen, *supra* note 6, at 2.

35. *Id.*

36. *Id.*

37. Christi Harlan & R. Gustav Niebuhr, *Former Umpire Sues Professional Baseball for Sex Discrimination*, WALL ST. J., Dec. 20, 1991, at B2.

38. *Id.*

39. Alex Michelini, *Ump Cries Foul: She Sues the Big Leagues*, N.Y. DAILY NEWS, Dec. 20, 1991, at 4.

40. *Judge Rules for Postema*, NEW HAVEN REGISTER, July 18, 1992, at 24.

41. Altavilla, *supra* note 21, at 28.

42. David Hinckley, *Baseline Bigotry: The Umpire Strikes Back*, N.Y. DAILY NEWS, July 21, 1992, at 35.

43. Reed & Stambler, *supra* note 14, at 88.

44. POSTEMA & WOJCIECHOWSKI, *supra* note 1, at 162. Steinbrenner reportedly said, "She can umpire the Yankees anytime she wants." *Id.*

Postema's own book about her experiences does not make a convincing case for her elevation to the major leagues, as it reports that she often blew calls and ejected players or managers.<sup>45</sup> In addition, Postema modestly rated herself a 3.5 on a scale of 5.<sup>46</sup> As one reviewer put it, "[A] B-minus candidate is not an irresistible choice for surmounting baseball's sex barrier."<sup>47</sup>

Whatever Postema's credentials to umpire in the majors—and many sportswriters felt she would have been neither the best nor the worst—it is clear, as one writer put it, that "the boys who decide still aren't comfortable with girls in the club."<sup>48</sup> Of course, at one time, the baseball establishment said Satchel Paige and Josh Gibson were not major league material because the major leagues did not let African-American men play. Postema is convinced that the same exclusionary principle exists today for women.<sup>49</sup>

Is she right? Even if baseball's decision was correct and she is not "major league material," the obstacles thrown in her path over the years cast doubt on the objectivity of those who made the calls.<sup>50</sup> Postema's case details the forms of sexual harassment she endured as a woman on exclusively male turf.<sup>51</sup> She was subjected to harassment in the form of verbal assaults from players and fans, including incessant comments about her anatomy and sexual preference.<sup>52</sup> She also endured such acts as a manager kissing her on the lips after handing her a lineup card and a team mascot pulling a brassiere from his shirt.<sup>53</sup>

On July 17, 1992, Judge Robert P. Patterson ruled that Postema's suit against professional baseball for sex discrimination could go to trial.<sup>54</sup> The judge dismissed Postema's claim against the American League, ruling that she cannot sue the American League for discrimination in hiring because the league had hired too few new umpires to establish a pattern of discrimination.<sup>55</sup>

45. Felicia E. Halpert, *You've Got to Have Balls to Make It in This League*, N.Y. TIMES BOOK REV., May 24, 1992, at 14 (book review).

46. *Id.*

47. *Id.*

48. Hinckley, *supra* note 42, at 35.

49. *Id.*

50. *Id.*

51. *Postema v. National League*, 799 F. Supp. at 1478-1479.

52. Halpert, *supra* note 45, at 14.

53. *Id.* See also POSTEMA & WOJCIECHOWSKI, *supra* note 1, at 163-64.

54. *Postema v. National League*, 799 F. Supp. at 1489-90. See also Jonathan M. Moses, *Major League Discrimination Suit by Woman Baseball Umpire Can Go to Trial*, WALL ST. J., July 20, 1992, at B6.

55. Moses, *supra* note 54, at B6. Between 1988 and 1992 the American League hired only one new umpire. *Id.*

Postema's claim against the National League for not hiring her is still pending because that league had more openings.<sup>56</sup> Indeed, this fact may be the Achilles' heel of Postema's case. Martin Springstead, American League executive director for umpiring, notes that at the time there were only thirty-two jobs in the American League and twenty-eight in the National League, with a low turnover rate, making it difficult for anyone, even qualified males, to make it.<sup>57</sup>

In her book Postema argues that baseball is about survival and the diamond is a battle zone where umpires are the most visible and loneliest targets.<sup>58</sup> Still, umpiring in the major leagues was her dream, and she was willing to face daunting odds to achieve it.<sup>59</sup>

#### IV. THE CIVIL RIGHTS ACT OF 1964

Postema is not the first woman to have faced such odds to achieve her goal. Many women have faced similar situations and have attempted to vindicate their rights. For nearly thirty years Title VII of the 1964 Civil Rights Act<sup>60</sup> had been the chief vehicle to achieve these ends.

##### A. History and Purpose of Title VI

It is an ironic but well-known fact that Title VII's prohibition against sex discrimination in employment had a dubious origin. It was not until the last day of the bill's consideration by the House Rules Committee that there first appeared a motion to add "sex" discrimination to the other types of employment discrimination already in the bill.<sup>61</sup> The motion was defeated by a vote of 8-7.<sup>62</sup>

56. *Id.*

57. Reed & Stambler, *supra* note 14, at 88.

58. Halpert, *supra* note 45, at 14.

59. See POSTEMA & WOJCIECHOWSKI, *supra* note 1, at 10.

60. 42 U.S.C.A. § 2000e (West 1981 & Supp. 1993). Title VII provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

*Id.* § 2000e-2(a)(1).

The term "employer" for purposes of Title VII means "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ." *Id.* § 2000e(b).

61. Leo Kantrowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310 (1968).

62. *Id.*



Two weeks later, after a debate on the floor of the House, and one day before the law was passed, Representative Howard Smith, who opposed the bill, offered an amendment to include "sex" as a prohibited basis for discrimination.<sup>63</sup> Since he had been a principal opponent of the legislation along with many other Southern representatives, it is clear that the reason that the amendment was introduced was to *prevent* the law from being passed and not because of a concern for protecting women against discrimination.<sup>64</sup> As a result of Smith's amendment to "kill" the bill, the 1964 Civil Rights Act, which did indeed pass, included a provision protecting women's rights, along with prohibitions against employment discrimination based on race, color, religion, and national origin.<sup>65</sup>

In general, the purpose of Title VII of the Civil Rights Act of 1964 is to eliminate employer and union practices that discriminate against employees and job applicants who fall into the five protected categories.<sup>66</sup>

The Supreme Court has created two legal theories under which one may prove a case of unlawful employment discrimination: disparate treatment and disparate impact.<sup>67</sup> A disparate treatment claim exists when an employer treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proving an employer's discriminatory motive is critical in a disparate treatment case.<sup>68</sup> This is the theory under which Postema's case is brought.

A disparate impact claim may be brought when an employer's facially neutral employment practices, such as hiring or promotion examinations, make no direct reference to race, color, religion, sex, or national origin and are neutrally applied but have an adverse impact on a protected group.<sup>69</sup> Under the disparate impact theory, it is no defense for an employer to demonstrate that he or she did not intend to discriminate.<sup>70</sup>

While the Act defines what employment activities are unlawful, section 703 exempts several key practices from the scope of

63. *Id.* at 310-11.

64. *Id.* at 311.

65. *Id.* at 312. Rep. Edith Green of Oregon believed that legislation against sex discrimination in employment "considered by itself, and . . . brought to the floor with no hearings and no testimony . . . would not [have] receive[d] one hundred votes." *Id.* at 310 (citing 110 CONG. REC. 2720 (1964)).

66. See DAVID P. TWOMEY, *EQUAL EMPLOYMENT OPPORTUNITY LAW* 2 (2d ed. 1990).

67. *Id.* at 5.

68. *Id.* at 6.

69. *Id.*

70. *Id.*

Title VII enforcement. For example, the Act stipulates that it shall not be an unlawful employment practice for an employer to hire employees on the basis of their religion, sex, or national origin in those instances when religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the enterprise.<sup>71</sup> Because the BFOQ exception is construed narrowly by the Court and the burden of proving business necessity is on the employer,<sup>72</sup> it is inconceivable that such a defense could be used by major league baseball as a reason for denying Postema an umpiring opportunity despite the baseball establishment's long-held view that umpires should be exclusively males.

### B. What Postema Must Show Under Title VII

In *McDonnell Douglas Corp. v. Green*,<sup>73</sup> the Supreme Court discussed how a prima facie showing of discrimination in a disparate treatment case may be established.<sup>74</sup> Based on *McDonnell Douglas*, Postema will have to show that she belongs to one of the groups protected from discrimination under Title VII on the basis of sex. Next, she must demonstrate that she applied for, and was qualified for, a job for which the employer (major league baseball) was seeking applicants and that, despite being qualified, she was rejected. Finally, she must show that after she was denied a position, the job remained open and the employer continued to seek applicants whose qualifications were similar to hers.<sup>75</sup>

Once Postema establishes a prima facie case, the burden will shift to professional baseball to articulate some legitimate non-discriminatory reason for its action.<sup>76</sup> If the National League and the Office of Umpire Development offer such a reason, then Postema will have an opportunity to demonstrate by a preponderance of the evidence that the supposedly valid reason for baseball's action was

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71. 42 U.S.C.A. § 2000e-2(e) (West 1981). This section provides in pertinent part: Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

*Id.*

72. TWOMEY, *supra* note 66, at 34.

73. 411 U.S. 792 (1973).

74. *Id.* at 802.

75. TWOMEY, *supra* note 66, at 49-50.

76. See TWOMEY, *supra* note 66, at 50.

a pretext for a decision that discriminated against her.<sup>77</sup>

Postema will have to prove that she was qualified for the position denied her. But how should "qualified" be defined? Must Postema prove that she was performing at a level that met her employer's expectations? More importantly, how can she prove her qualifications, given the subjectivity of her bosses' evaluations? It will be difficult for her to prove that her umpiring skills were equal to or superior to those of her male colleagues who made the major leagues.

Courts are divided over the role that subjective qualifications for a job, such as leadership, likeability, and loyalty, can play in determining whether the prima facie case has been made out. Several circuits have held that subjective factors are more likely to mask discrimination and are difficult to evaluate when both objective and subjective criteria make up job qualifications. All a plaintiff like Postema need show is that she satisfies the objective criteria for the job. The National League and Triple A Alliance and Office of Umpire Development must assert alleged failure to satisfy subjective standards as part of a rebuttal.<sup>78</sup>

In *Texas Department of Community Affairs v. Burdine*,<sup>79</sup> Justice Powell said that the burden of establishing a prima facie case of disparate treatment is not onerous.<sup>80</sup> Postema must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.<sup>81</sup> The prima facie case serves an important function by eliminating the most common nondiscriminatory reasons for the plaintiff's rejection.<sup>82</sup>

The Supreme Court further explained the *McDonnell Douglas* decision in *Furnco Construction Co. v. Waters*,<sup>83</sup> stating that the prima facie case raises an inference of discrimination only because the court presumed that these acts, if otherwise unexplained, are

77. *Id.*

78. JOEL WILLIAM FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS* 63 (teacher's manual 2d ed. 1990). See also *Bienkowski v. American Airlines*, 851 F.2d 1503, 1505-1506 (5th Cir. 1988); *Burrus v. United Telephone Co. of Kan.*, 683 F.2d 339, 342 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 244-245 (4th Cir. 1982); *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1344-1345 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).

79. 450 U.S. 248 (1981).

80. *Id.* at 253.

81. *Id.*

82. *Id.* at 253-54.

83. 438 U.S. 567 (1978).

more likely than not based on consideration of impermissible factors.<sup>84</sup>

Establishment of the *prima facie* case in effect creates a presumption that an employer unlawfully discriminated against the employee.<sup>85</sup> If the judge believes Postema's evidence and if professional baseball is silent in the face of the presumption, the court must enter judgment for Postema because no issue of fact will remain in the case.<sup>86</sup>

If, on the other hand, baseball chooses to rebut the evidence of discrimination, they must produce evidence that Postema was rejected, and someone else was preferred, for a legitimate nondiscriminatory reason.<sup>87</sup> An example of such a reason would be that the hired person possessed umpiring skills superior to Postema's. Baseball need not persuade the court that it was actually motivated by the proffered reasons; it is sufficient if their evidence raises a genuine issue of fact as to whether it discriminated against Postema.<sup>88</sup> To accomplish this, defendant baseball must clearly set forth through introduction of admissible evidence, the reason for Postema's rejection. The explanation must be legally sufficient to justify a judgment for defendant.<sup>89</sup> If baseball carries the burden of production, the presumption raised by the *prima facie* case is rebutted and the factual inquiry proceeds to a new level of specificity.<sup>90</sup>

Placing the burden of production on baseball serves simultaneously to meet Postema's *prima facie* case by presenting a legitimate reason for the action and to frame factual issues with sufficient clarity so that Postema will have a full and fair opportunity to demonstrate pretext.<sup>91</sup> Although baseball will not bear a formal burden of persuasion, it nevertheless has an incentive to persuade the trier of fact that its employment decision was lawful and prove the factual bias for its explanation.<sup>92</sup>

Since Postema still retains the burden of persuasion, she now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. Postema

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84. *Id.* at 577.

85. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

86. *See id.*

87. *See id.*

88. *See id.* at 254-55.

89. *See id.* at 255.

90. *See id.*

91. *See id.* at 255-56.

92. *See id.* at 258.

may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the proffered explanation is unworthy of credence.<sup>93</sup> An example of a discriminatory reason that Postema might use directly is that baseball simply did not want a woman umpire.

Thus, an employer is required to show that plaintiff's objective qualifications were inferior to those persons selected. If baseball cannot make such a showing, a court should conclude that baseball has discriminated against Postema.

The *Burdine* opinion makes it clear that Title VII was not intended to diminish traditional management prerogatives.<sup>94</sup> Nor does it require the employer to restructure his employment practices to maximize the numbers of minorities and women hired.<sup>95</sup> Rather, the Court states, "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions."<sup>96</sup>

Title VII does not obligate an employer to accord employee preferences. Rather the employer has discretion to choose among equally qualified candidates provided the decision is not based upon unlawful criteria.<sup>97</sup> Thus, assuming Postema's umpiring abilities were equal to those of the men who applied for major league umpiring positions, and assuming no gender discrimination was at play in the selection process, baseball was free under Title VII to choose among the equally qualified applicants.

## V. LEADING GENDER DISCRIMINATION CASES THAT MAY IMPACT POSTEMA'S CASE

Many women who have sought a foothold in non-traditional occupations have been forced to go to court to vindicate their rights under Title VII. Among the leading cases are *Hishon v. King & Spalding*<sup>98</sup> and *Price Waterhouse v. Hopkins*.<sup>99</sup> This section will examine each of these decisions and analyze how they are relevant to Pam Postema's lawsuit.

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93. *See id.* at 256.

94. *Id.* at 259.

95. *Id.*

96. *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

97. *Id.*

98. 467 U.S. 69 (1984).

99. 490 U.S. 228 (1989).

### A. *Hishon v. King & Spalding*

The question raised by *Hishon v. King & Spalding* was whether the district court properly dismissed a Title VII complaint alleging that a law partnership had discriminated against Elizabeth Hishon, a woman employed as an associate, when it failed to invite her to become a partner.<sup>100</sup>

In 1972, after graduating from Columbia Law School, Hishon accepted a position as an associate with King & Spalding, a large Atlanta law firm established as a general partnership.<sup>101</sup> She was only the second woman to be hired as an associate by the firm.<sup>102</sup>

When Hishon filed her suit in 1980, the firm had more than fifty partners and employed more than fifty associates. Up to that time, no woman had ever served as a partner in the firm.<sup>103</sup> Hishon's complaint alleged, however, that the firm used the possibility of ultimate partnership as a recruiting device to induce her and other young lawyers to become associates,<sup>104</sup> in much the same way that baseball held out the possibility of a position in the major leagues to Pam Postema.

In May 1978 the firm considered and rejected Hishon for admission to the partnership, and one year later the partners again declined to promote her.<sup>105</sup> After her seven years of service, she was forced to leave the firm.<sup>106</sup>

Hishon filed a charge with the EEOC on November 17, 1979, claiming that King & Spalding had discriminated against her because of her sex in violation of Title VII.<sup>107</sup> The district court dismissed the complaint on the grounds that Title VII was inapplicable to the selection of partners by a law partnership,<sup>108</sup> and the Court of Appeals for the Eleventh Circuit affirmed.<sup>109</sup> The Supreme Court reversed.<sup>110</sup>

Several allegations in Hishon's complaint supported the conclusion that the opportunity to become a partner was a key ele-

100. *Hishon*, 467 U.S. at 71.

101. *Id.*

102. William G. Blair, *Victor in Bias Case: Elizabeth Anderson Hishon*, N.Y. TIMES, May 23, 1984, at D27. The first woman, Antha Mulkey, was an associate for 33 years before retiring in 1977.

103. *Hishon*, 467 U.S. at 71.

104. *Id.*

105. *Id.* at 72.

106. Blair, *supra* note 102, at D27.

107. *Hishon*, 467 U.S. at 72.

108. *Hishon v. King & Spalding*, 24 Fair Empl. Prac. Cas. (BNA) (N. D. Ga. 1980).

109. *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982).

110. *Hishon*, 467 U.S. at 72-73.

ment of an associate's status as an employee at King & Spalding. Hishon alleged that law firm associates could regularly expect to be considered for a partnership at the end of their apprenticeship and it appeared that lawyers outside the firm were not routinely considered.<sup>111</sup> Thus, the benefit of the partnership consideration was allegedly linked directly with an associate's status as an employee, and the linkage was more than coincidental.<sup>112</sup> The importance of the partnership decision to a lawyer's status as an associate is underscored by the fact that an associate's employment is terminated if the associate is not elected to become partner.<sup>113</sup>

The Court concluded that Hishon's complaint stated a claim cognizable under Title VII because her allegations, if proved at trial, were sufficient to show that partnership consideration was a term, condition, or privilege of an associate's employment at the law firm.<sup>114</sup> Accordingly, partnership consideration must be made without regard to sex.<sup>115</sup>

Justice Powell in a concurring opinion said:

In admissions decisions made by law firms, it is now widely recognized—as it should be—that in fact neither race nor sex is relevant. The qualities of mind, capacity to reason logically, ability to work under pressure, leadership, and the like are unrelated to race or sex. This is demonstrated by the success of women and minorities in law schools, in the practice of law, on the bench, and in positions of community, state, and national leadership. Law firms—and, of course, society—are the better for these changes.<sup>116</sup>

In *Hishon*, it was not clear whether the Court concluded that Congress did not intend for the partnership decision to be covered by Title VII or that such a construction of Title VII would infringe upon incumbent partners' right to freedom of association. Nevertheless, the Supreme Court reversed the lower courts and held that "in appropriate circumstances" the partnership decision "may" qualify as a term, condition, or privilege of employment within the meaning of Title VII.<sup>117</sup>

111. *Id.* at 76.

112. *Id.*

113. *Id.*

114. *Id.* Title VII protects an employee from discrimination "with respect to his compensation, terms, conditions, or privileges of employment . . ." 42 U.S.C.A. § 2000e (West 1981).

115. *Hishon*, 467 U.S. at 76.

116. *Id.* at 81 (Powell, J., concurring).

117. FRIEDMAN & STRICKLER, *supra* note 78, at 16.

The application of Title VII was appropriate in this case (once the plaintiff proved the allegations in her complaint) because the law firm made representations to prospective associates that they would be considered for partnership after five or six years and that the firm used this inducement to lure young lawyers to the firm.<sup>118</sup> The Court concluded that the partnership consideration was directly linked with an associate's status as employer and this constituted either a contractually undertaken right of employment or a noncontractual benefit or privilege of employment.<sup>119</sup>

Women's groups applauded the Supreme Court's decision in *Hishon*, asserting that it would prod lawyers, accountants, engineers, architects, investment bankers, and others to elect many more women as partners in the firms. In response to the *Hishon* decision, Timmerman Tepel Daugherty, president of the National Conference of Women's Bar Associations said, "Inevitably that will make partners more careful about what they're doing and will probably lead to more documentation, which means the old-boy network won't function quite as well. If you've had to create a paper trail of evaluations, it's harder to make someone partner because he's the son of your golf partner."<sup>120</sup>

### B. *Price Waterhouse v. Hopkins*

Despite the optimism generated by *Hishon v. King & Spalding*, an accounting partnership did not take the *Hishon* decision to heart. In *Price Waterhouse v. Hopkins*,<sup>121</sup> Ann Hopkins, a senior manager for the accounting firm of Price Waterhouse, was proposed for partnership in 1982 but was neither offered nor denied a position. Instead, her candidacy was held over for reconsideration the next year. When the partners in her office later refused to

118. FRIEDMAN & STRICKLER, *supra* note 78, at 16.

119. *Hishon*, 467 U.S. at 74-75.

120. Tamar Lewin, *Impact of Court Ruling Called Mainly Symbolic*, N.Y. TIMES, May 23, 1984, at D27. In June 1984 King & Spalding settled the case out of court. *Hishon*, a corporate and commercial real estate attorney, accepted a partnership at another firm. She believes that her case has helped her to attract clients. She speaks on sex discrimination and still receives telephone calls from women seeking advice on job bias. Indicative of King & Spalding's attitude toward women is the fact that the firm once staged a bathing suit competition for female summer interns and named a Harvard woman as "the body we'd like to see more of." Martha Brannigan, *The Pioneers: Women Who Fought Sex Bias on the Job Prove to Be a Varied Group*, WALL ST. J., June 8, 1987, at A1, A13. In 1987 there were four woman partners out of 82 at King & Spalding, and one-third of the associates were women. *Id.* See also *Getting a Piece of the Power: Women Barred from Partnerships Can Now Go to Court*, TIME, June 4, 194, at 63.

121. 490 U.S. 228 (1989).



repropose her for partnership, she sued under Title VII of the 1964 Civil Rights Act, charging that the firm had discriminated against her on the basis of sex.<sup>122</sup>

Ruling in Hopkins' favor, the district court held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by "consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping,"<sup>123</sup> and the court of appeals affirmed.<sup>124</sup> Both courts held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination, concluding that Price Waterhouse did not carry the burden.<sup>125</sup>

The United State Supreme Court, however, reversed the lower courts, concluding that when a plaintiff like Hopkins in a Title VII case shows that gender played a part in an employment decision, the defendant need prove by only a preponderance of the evidence that it would have made the same decision even if it had not taken gender into account.<sup>126</sup> The Court noted that section 703(a)(1) of the Civil Rights Act of 1964 forbids an employer from making an adverse decision against an employee because of such individual's sex, but the preservation of the employer's freedom of choice means that the employer will not be liable if it can prove that it would have come to the same decision regardless of the employee's gender.<sup>127</sup>

The Supreme Court's previous decisions demonstrated that if a plaintiff shows that an impermissible motive played a part in an adverse employment decision, it thereby places the burden on the defendant to show that it would have made the same decision in the absence of the unlawful motive.<sup>128</sup> The Court said that Price Waterhouse did not meet the burden by merely showing that Hopkins' interpersonal problems, such as her abrasiveness with staff members, constitutes a legitimate reason for denying her a partnership. Price Waterhouse had to show that its legitimate reason,

122. *Id.* at 231-32.

123. *Id.* at 237. See *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1120 (D.D.C. 1985).

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

125. *Price Waterhouse*, 490 U.S. at 237.

126. *Id.* at 258. This decision was later modified by the Civil Rights Act of 1991. See *infra* notes 169-206 and accompanying text.

127. *Id.* at 240, 242.

128. *Id.* at 248-50.

standing alone, would have induced Price Waterhouse to deny Hopkins a partnership.<sup>129</sup>

At Price Waterhouse a senior manager becomes a candidate for partnership when the partners in the local office submit the manager's name as a candidate. All the other partners in the firm are then invited to submit written comments on each candidate on a long or short form depending on the degree of the partner's exposure to the candidate.<sup>130</sup> After reviewing the comments and interviewing the partners who submitted them, the firm's admissions committee makes a recommendation to the policy board. The recommendation will be one of the following: that the firm accept the candidate for partnership, that it put the application on hold, or that it deny the promotion outright. The policy board then decides whether to submit the candidate's name to the entire partnership for a vote, to hold her candidacy, or to reject her.<sup>131</sup>

Like the decisions of the Office of Umpire Development,<sup>132</sup> the admissions committee's recommendations and the decisions of the policy board at Price Waterhouse are not controlled by fixed guidelines. A certain number of positive comments from the partners would not guarantee a candidate admission to partnership nor would a specific quantity of negative comments necessarily deflect the application.<sup>133</sup>

Hopkins had worked at Price Waterhouse's office of government service in Washington, D.C. for five years when the partners in that office proposed her as a candidate for partnership.<sup>134</sup> Of the 662 partners at the firm at that time, seven were women. Of eighty-eight persons proposed for partnership that year, she was the only woman. Forty-seven of the candidates were admitted to partnership, twenty-one were rejected, and twenty like Hopkins were put on hold until the following year. Of the thirty-two partners who submitted comments about Hopkins, thirteen supported her, three recommended putting her bid on hold, eight had no opinion, and eight said "deny."<sup>135</sup>

In a prepared statement supporting her candidacy, the partners in Hopkins' office had showcased her successful two-year effort to secure \$25 million in contracts from the State Department,

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129. *Id.* at 250-52.

130. *Id.* at 232.

131. *Id.*

132. *See supra* notes 41 and 78 and accompanying text.

133. *Id.* at 232-33.

134. *Id.* at 233.

135. *Id.*

labeling it "an outstanding performance" and one that Hopkins carried out "virtually at partner level."<sup>136</sup> Judge Gerhard Gesell specifically found that she had played a key role in winning the State Department contract. In fact, Gesell went on, no other partnership candidate of Price Waterhouse that year had a record comparable to Hopkins' in securing major contracts for the partnership.<sup>137</sup>

The partners in Hopkins' office praised her character as well as her accomplishments, describing her in a joint statement as an outstanding professional who had a deft touch and a strong character with independence and integrity.<sup>138</sup> Clients agreed with this assessment. In fact, at trial a State Department official described her as extremely competent, intelligent, strong, forthright, very productive, energetic, and creative.<sup>139</sup> Another official praised her decisiveness, broad-mindedness and intellectual clarity. In his words, she was a "stimulating conversationalist."<sup>140</sup>

It was said, however, that on too many occasions Hopkins' aggressiveness became abrasiveness, and staff members seemed to have borne the brunt of her brusqueness. Partners evaluating her work had counseled her to improve her relations with staff members. Later evaluations indicated an improvement, but virtually all of the partners' negative remarks about her, even those of supportive partners, discussed her flawed "interpersonal skills."<sup>141</sup>

One partner described her as "macho." Another said she "over-compensated" for being a woman. A third said she should take a course at a charm school.<sup>142</sup> Other partners criticized her use of profanity. One replied that these partners objected only "because it's a lady using foul language."<sup>143</sup> Ironically, many in baseball believed that the use of strong language on the baseball diamond disqualified a woman from being an umpire.<sup>144</sup>

Still another partner delivered the *coup de grace*, saying that in order to improve her chances for partnership, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>145</sup>

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136. *Id.*

137. *Id.* at 233-34.

138. *Id.* at 234.

139. *Id.*

140. *Id.*

141. *Id.* at 234-35.

142. *Id.* at 235.

143. *Id.*

144. See POSTEMA & WOJCIECHOWSKI, *supra* note 1, at 162.

145. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

At trial, Dr. Susan Fiske, a social psychologist at Carnegie-Mellon University, testified that the partnership process at Price Waterhouse was likely influenced by sex stereotyping.<sup>146</sup> Fiske's testimony focused not only on overly sex-based comments of partners but also on gender-neutral remarks that were heavily critical of Hopkins made by partners who knew her only slightly. One partner said that Hopkins was universally disliked by the staff, while another described her as consistently annoying and irritating, even though they had had very little contact with her.<sup>147</sup>

According to Fiske, in terms reminiscent of those applied to Pam Postema, Hopkins' uniqueness as the only woman in the pool of candidates and the subjectivity of the evaluations made it likely that such sharply critical comments were the product of sex stereotyping, although Fiske could not say with certainty whether any particular comment was the result of stereotyping.<sup>148</sup>

Female candidates for partnership in past years at Price Waterhouse had also been evaluated in sex-based terms.<sup>149</sup> In fact, in previous years one male partner had repeatedly commented that he could not consider any woman seriously as a partnership candidate because he believed that women were not even capable of functioning as senior managers. The firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluation.<sup>150</sup> His views echo the opinions of some of Pam Postema's colleagues in the umpiring ranks who openly stated women should not be umpires.<sup>151</sup>

The trial judge found that Price Waterhouse legitimately emphasized interpersonal skills in making its partnership decision and that the firm had not fabricated its complaints about Hopkins' interpersonal relationships as a pretext for discrimination.<sup>152</sup> Yet Judge Gesell decided that some partners' remarks about Hopkins stemmed "from an impermissibly cabined view"<sup>153</sup> and that Price Waterhouse had done nothing to disavow reliance on them.<sup>154</sup> The trial judge concluded, and the Court of Appeals agreed, that Price Waterhouse had unlawfully discriminated against Hopkins on the

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146. *Id.*

147. *Id.*

148. *Id.* at 236.

149. *Id.*

150. *Id.*

151. *See, e.g., POSTEMA & WOJCIECHOWSKI, supra* note 1, at 22.

152. *Price Waterhouse*, 490 U.S. at 236.

153. *Id.* at 236-37.

154. *Id.* at 237.

basis of sex.<sup>155</sup>

The Supreme Court said that in passing Title VII Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of an employee.<sup>156</sup> The intent of Congress to forbid employers from taking gender into account in making employment decisions appears on the face of the statute.<sup>157</sup> The law forbids an employer to "fail or refuse to hire or to discharge any individual" or otherwise "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."<sup>158</sup> The Court said, "We take these words to mean that gender must be irrelevant to employment decisions."<sup>159</sup>

Price Waterhouse charged that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold.<sup>160</sup> Hopkins showed that the partnership solicited evaluations from all the firm's partners, that it generally relied very heavily on such evaluations in making its decisions, that some of the partners' comments were the product of stereotyping, and that the firm in no way disclaimed reliance on those particular comments either in Hopkins' case or in the past.<sup>161</sup>

The Supreme Court found that it was "plausible" and "inevitable"<sup>162</sup> to conclude that the policy board at Price Waterhouse in making its decision did in fact take into account all of the partners' comments, including comments that were motivated by stereotypical notions about women's proper deportment.<sup>163</sup> The Court also found that many of the suspect comments were made in the context of favorable reviews by Hopkins' supporters and that such statements, even in otherwise favorable reviews, would influence the decision-makers to think less highly of the candidate.<sup>164</sup> The policy board in fact did not simply tally the "yesses" and "noes" regarding a candidate but carefully reviewed the content of sub-

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155. See *supra* notes 123-25 and accompanying text.

156. *Price Waterhouse*, 490 U.S. at 239.

157. *Id.*

158. *Id.* at 240 (quoting 42 U.S.C. §§ 2000(e)(2)(a)(1),(2)).

159. 490 U.S. 228, 240.

160. *Id.* at 256.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 257.

mitted comments. Even if they were made by persons outside the decision-making chain, such comments were important to the policy board in making partnership decisions.<sup>165</sup> The Supreme Court concluded by stating:

We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.<sup>166</sup>

165. *Id.*

166. *Id.* at 258. As for Hopkins, on remand, the district court held that the firm had failed to show by a preponderance of the evidence that it would have denied her partnership even in the absence of sexually-biased evaluation. *Hopkins v. Price Waterhouse*, 737 F. Supp 1202, 1207 (D.D.C. 1990). The court ordered that the firm make Hopkins a partner effective July 1, 1990 and awarded her back pay. Faced with the question of whether it should force Price Waterhouse to make Hopkins a partner, Judge Gesell noted that while "extreme workplace hostility and disruption may influence a court to deny reinstatement," this was not such a case. *Id.* at 1210. Price Waterhouse had over 900 partners spread among 90 offices, and only a few partners had ever met Hopkins. The judge concluded that Price Waterhouse lacked the intimacy and the interdependence of smaller partnerships, so concerns about the freedom of association have little force. *Id.* Gesell ruled that front pay was not a viable alternative, because Hopkins' claim that partnership was always her objective could not be tested. The alternative of front pay for the rest of Hopkins' business life does not appear to make her whole and might well provide a wholly unwarranted windfall. The court said it could not determine whether she will be a successful, inadequate, or superior partner. Nor could it determine how factors affecting her health, availability, or the firm's own fortunes might impinge on her earnings. In addition, the court was skeptical as to whether monetary relief alone would provide a sufficient deterrent against future discrimination for a group of highly paid partners. *Id.* at 1211. "Given these considerations," the district court stated, "equity favors the course that will most vindicate the purpose of sex-discrimination statute, consistent with established national policy." *Id.*

Two days before she was to become a partner under the decree, the Court of Appeals for the District of Columbia stayed the injunction pending the outcome of any appeal by Price Waterhouse. The Appeals Court ruled that Price Waterhouse had to give a partnership to Hopkins, a decision that was hailed by lawyers and women's rights groups as a victory that would strengthen the position of women in the workplace. The judge also ordered Price Waterhouse to give Hopkins back pay and interest from 1983, totaling over \$370,000. Hopkins, who had taken a position at the World Bank said she intended to accept the partnership: "I think it's time we stop the litigating and get back to work." Ann Hagedorn & Wade Lambert, *Judge Orders Partnership in a Bias Case*, WALL ST. J., Dec. 5, 1990, at B6. Price-Waterhouse continued to maintain, "Our professionals are judged solely by non-discriminatory and business criteria." *Id.*

Furthermore, in 1990 a federal court judge ruled that a prominent Philadelphia law firm was guilty of sex discrimination when it refused to make Nancy O'Mara Ezold a partner in 1989. The judge said that Wolf, Block, Schorr, and Solis-Cohen applied tougher standards to women seeking partnerships than to men and that the firm promoted to partnership men whose evaluations were substantially the same or inferior to Ezold's. Ezold found work at a five-lawyer firm in Philadelphia but sought to be made a partner at Wolf, Block, where she had spent six years. It was the first suit against a law firm to go to trial charging sex discrimination in partnership decisions. Five percent of the partners and 30% of the

It has been lawsuits like *Hishon* and *Price Waterhouse* over the past quarter century that have given shape and force to Title VII of the Civil Rights Act of 1964.<sup>167</sup> Though bias persists, these cases have helped many women by lifting the "more obvious" barriers to equal treatment.<sup>168</sup>

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associates at Wolf, Block at the time were women. Ezold said she was told she could become a partner if she were willing to take over the firm's domestic relations department, but she would never be more than an associate in the litigation department. In addition, she was assigned less complex cases than the men in the year preceding the partnership decision and thus did not get the exposure critical to partnership decisions. Wolf, Block appealed the decision. Tamar Lewin, *Sex Bias Found in Awarding of Partnerships at Law Firm*, N.Y. TIMES, Nov. 30, 1990, at B5.

In 1992 the U.S. Court of Appeals for the Third Circuit threw out part of the *Ezold* decision, ruling that the trial judge had used the wrong standard in finding sex discrimination at Wolf, Block. The Court of Appeals said that the lower court judge "impermissibly substituted its own subjective judgment for that of Wolf in determining that Ezold met the firm's partnership standards." Junda Woo, *Part of Law Firm Sex-Bias Decision Rejected on Appeal*, WALL ST. J., Dec. 31, 1992, at B7. The appeals court ruled that the trial judge's analysis was faulty when he found that the law firm treated Ezold differently from men with equal abilities. The trial judge had ruled that even though Wolf, Block partners did not believe that Ezold's legal analysis abilities were up to par, the firm promoted to partner some men who had equal deficiencies. Although the men who made partner did have inadequacies, when it came to legal analysis, they were considered better than Ezold by the firm, said the Court of Appeals. The court also disputed each of the four examples of sex discrimination that the trial court found. The trial judge found that a partner had evaluated Ezold negatively for her interest in "women's issues." The appeals court said the judge should have taken into consideration that the partner testified that his words had been misconstrued. *Id.*

The Appeals Court did not address whether the trial judge had the authority to force Wolf, Block to give Ezold a partnership to correct the alleged sex discrimination. That part of the original ruling was considered a legal landmark. Because the Third Circuit left that aspect of the case untouched, it can be cited as precedent in other sex discrimination cases involving law firms. *Id.*

On February 4, 1993, the 13-member Third Circuit Court of Appeals refused to rehear the case. Ezold says she will appeal to the United States Supreme Court. *Lawyer Denied a Rehearing in Sex-Bias Suit Against Firm*, N.Y. TIMES, Feb. 5, 1993, at B16.

167. Martha Brannigan, *The Pioneers: Women Who Fought Sex Bias on Job Prove to Be a Varied Group*, WALL ST. J., June 8, 1987, at 1.

168. *Id.* Winning a sex discrimination case is not easy, and neither is living with the consequences. The cases are numerous. For example, Lorena Weeks was a clerk with Southern Bell Telephone Company. She wanted a higher-paying job as a switchman, but the company cited a state law barring women from lifting more than 30 pounds (the average weight of a two-year-old child) on the job. The company claimed that the law made promotion impossible. Weeks sued in 1969 and won a landmark decision opening up switchman (now called "switching-equipment technician") and other formerly all-male jobs. Weeks held the position for two years. She was forced to weather the resentment of supervisors and to fight for training and favorable postings. She learned what many women learn: Winning in court is often only a start. *Id.*

In 1967 Leah Rosenfeld fought Southern Pacific Company to get a better-paying job as an agent telegrapher. The railroad said that the job was closed to women under a California law barring them from working overtime and lifting more than 25 pounds. Rosenfeld got the law voided in federal court. She got the job but then had to fend off sexist jabs by male co-

## VI. THE CIVIL RIGHTS ACT OF 1991

In response to a series of adverse Supreme Court decisions, like *Price Waterhouse*, that made it more difficult for victims of job bias to win cases,<sup>169</sup> Congress, after a long fight, finally passed

workers. *Id.*

Dianne Rawlinson had a degree in psychology with an emphasis on counseling criminals but could not get a guard job at a prison because at 5'2" and 120 pounds, she was not tall or heavy enough. Rawlinson was instead working in a beauty shop. She mentioned her situation to a customer, lawyer Pam Horowitz, who filed a lawsuit and got the law thrown out. Rawlinson got the guard job but was branded a troublemaker. She was harassed by some supervisors, then transferred to another prison and placed under investigation. Her victory was a hollow one. *Id.* at 13.

Shyamala Rajender was an assistant professor of chemistry in 1972 and the only woman in her department at the University of Minnesota. She was denied promotion to a tenure track position. She filed a sex discrimination case and was traumatized by the trial, at which one professor said she was so bad that 150 students left her class in one semester. She produced records showing few transfers. Settled in 1980 by consent decree, the University had to have sex-neutral criteria for hiring, promotion, and tenure and to institute an affirmative action plan giving hiring preference to women with qualifications close to men's. *Id.*

Penny Harrington became the first woman police chief in the United States in Portland, Oregon in 1984. Since 1972, Harrington had filed 40 administrative complaints with the state, charging the police force with various acts of job discrimination against her. Gradually, she rose to captain and maintained her popularity until she became chief. She later resigned under pressure, and a special commission issued a scathing evaluation stating that as chief she had lost the confidence of many officers and that the department was in turmoil. She blamed what happened on sexism and has filed a sex discrimination suit in federal court. *Id.*

See also SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 388-92 (1992), offering an account of Diane Joyce who was the first female to hold a "skilled craft" position in Santa Clara County, California when she became a road dispatcher. She won a Supreme Court case (*Johnson v. Transportation Agency*, 480 U.S. 616 (1986)), but co-workers harassed her while she worked for four years on a road crew. Fellow workers changed instructions on how to drive bob-tail trucks and gave her wrong driving tips that nearly blew engines. The supervisor would not issue her a pair of coveralls until she filed a grievance to get them. The ladies room was kept locked, and men did not let her use their bathroom. The day after the Supreme Court decision, a friend sent her a congratulatory bouquet that she arranged in a vase. The next day she found the flowers crushed in a garbage bin. The road foreman claimed to have "drop-kicked them across the yard." *Id.* at 392.

169. In the 1980's the legal system grew increasingly inhospitable toward individual race and sex discrimination cases. Lawyers were declining to take such cases because they were time-consuming and difficult to win and brought far less money than other types of civil litigation like personal injury suits, which permit punitive damages. In addition, lawyers faced conservative judges who were bored by, if not downright hostile to such cases. The National Employment Lawyers Association, comprising 1,000 plaintiff-lawyers, revealed that 44% of its members rejected more than 90% of the job discrimination cases brought to them. Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*, N.Y. TIMES, July 24, 1991, at A1, A17. One of the major reasons for this reluctance on the part of lawyers to take on job-bias claims was a number of adverse Supreme Court cases. *Id.* at A17.

By the late 1980's it was extremely difficult for an attorney to earn a living in employment discrimination. The case had to be an excellent one, and the plaintiff had to have the resources to finance it, meaning few poor or working class plaintiffs were represented. When



the Civil Rights Act of 1991,<sup>170</sup> which dramatically broadened rights for millions of working women. As the *Price Waterhouse* case illustrates, acts of discrimination may be motivated by many factors, only one of which may be illegal. Hopkins was denied a partnership for several reasons, one of which was gender-related. Under the holding of *Price Waterhouse*, the accounting firm had the opportunity, with a proper showing, to avoid liability. The Civil Rights Act of 1991, however, significantly modified the *Price Waterhouse* case because it provides that if a termination or other employment practice is motivated *in part* by illegal discrimination, the practice violates the Title VII.<sup>171</sup> Thus, the opportunity for an employer to escape liability by showing that the same decision would have been made regardless of gender is eliminated. Section 107(a) of the Act provides that "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*."<sup>172</sup> This section pertains to the so-called "mixed motive" cases and renders illegal employment decisions based on, or motivated in part by, an illegal discriminatory factor. The Act thus overturns that portion of the Supreme Court decision in *Price Waterhouse v. Hopkins* that permitted an employer to defeat a plaintiff's claim by demonstrating that the same challenged action would have been taken without consideration of discriminatory factors.<sup>173</sup>

Under the 1991 Act, the presence of a discriminatory factor is dispositive of liability and leaves open only the question of remedy. Although an employer may escape some damages, including back pay and reinstatement, by showing that the same action would have been taken absent the discriminatory factor, a court

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private lawyers did not take cases, the EEOC did not pick up the slack. In 1990 the EEOC filed 524 lawsuits in federal court, an increase over the 486 suits in 1989. In 1990 the EEOC had a backlog of 45,000 cases. *Id.*

170. Pub. L. No. 102-166, 105 Stat. 1071-74 (codified in scattered sections of 42 U.S.C.A. (West Supp. 1993)).

171. Karen Morris, *New Faces of Discrimination/New Challenges for Employers: The Civil Rights Act of 1991 and the Americans with Disabilities Act 5* (1992) (unpublished paper, on file with author).

172. Pub. L. No. 102-166 §107(a), 105 Stat. 1075 (codified at 42 U.S.C.A. § 2000e-2(m) (West Supp. 1993)) (emphasis added). This subsection states that "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." *Id.*

173. See Hon. Theodore McMillian, *The Civil Rights Act of 1991—One Step Forward on a Long Road*, 22 STETSON L. REV. 69, 74-75 (1992).

may now award declaratory and injunctive relief as well as attorney's fees and costs.<sup>174</sup>

Civil rights and women's groups pushed for language in the 1991 Act outlawing any consideration of race or sex, in an effort to overturn *Price Waterhouse*.<sup>175</sup> These groups argued that the *Price Waterhouse* decision allowed sexism and racism to exist on the job, even if they were not the main factors for the denial of hiring and promotion and sought the provision outlawing all of these factors.<sup>176</sup>

Women have always had the right to sue employers for discrimination. For the first time under this new law, however, women, who comprise forty-six percent of all workers,<sup>177</sup> now can sue for punitive damages for sexual harassment, damages for pain and suffering, as well as for back pay.<sup>178</sup>

The new law also permits jury trials in discrimination cases.<sup>179</sup> Jury trials are viewed as being harder for employers to win than trials heard by judges, because juries generally consist of peers of the employee.<sup>180</sup>

Proponents of the law say the changes represent long-overdue justice for women, as well as for minorities and the handicapped, who face major hurdles in bringing employment discrimination actions.<sup>181</sup> The result of the Civil Rights Act of 1991 will undoubtedly be more lawsuits about hiring, firing, promotion, and on-the-job behavior like sexual harassment.<sup>182</sup> The greatest impact will probably be a substantial increase in cash awards to women and the disabled who sue for deliberate job bias.<sup>183</sup> The new law says job bias based on sex, disability, religion, or national origin will now be punished as severely as employment discrimination based on race.

Unlike the Civil Rights Act of 1964<sup>184</sup> and the Americans with

174. *Id.* at 75.

175. Steven A. Holmes, *Lawyers Expect Ambiguities in New Rights Law to Bring Years of Lawsuits*, N.Y. TIMES, Dec. 27, 1991, at A20.

176. *Id.*

177. Bruce D. Butterfield, *Civil Rights Bill Will Mean More Worker Lawsuits*, BOSTON GLOBE, Nov. 3, 1991, at A1.

178. Pub. L. No. 102-166 § 102, 105 Stat. 1072-74 (codified as amended at 42 U.S.C.A. § 1981a (West Supp. 1993)).

179. *Id.* at § 1073.

180. Butterfield, *supra* note 177, at A1.

181. Butterfield, *supra* note 177, at A7.

182. Timothy Noah & Albert R. Karr, *What New Civil Rights Law Will Mean: Charges of Sex, Disability Bias Will Multiply*, WALL ST. J., Nov. 4, 1991, at B1.

183. *Id.*

184. See *supra* note 60-72 and accompanying text.

Disabilities Act (ADA),<sup>185</sup> the Civil Rights Act of 1991 does not set forth major new requirements for employers to change their personnel practices.<sup>186</sup> Rather, under the Act the employer will have to demonstrate that the allegedly discriminatory practice is job-related for the position in question and consistent with business necessity.<sup>187</sup> The legislation fails to define "business necessity" or "job-related," so clarification of those key terms will be left to the courts.<sup>188</sup> Congress did stress that its purpose was to return to the more liberal standards in place before a series of Supreme Court cases in 1989 made it so difficult for job-bias plaintiffs to win lawsuits.<sup>189</sup>

The passage of the 1991 law looked like an auspicious development for Postema's case, but in an authoritative statement of policy on December 30, 1991, the EEOC declared that the law does not apply to the thousands of cases filed by people like her who claim that they suffered job discrimination before the Act was signed into law by President Bush on November 21, 1991.<sup>190</sup>

This ruling means that workers who filed complaints of discrimination before that date—Postema filed in 1989—must try to prevail under the old rules, which makes it much harder to prove discrimination.<sup>191</sup> This decision could limit the compensation Postema will obtain if she wins.<sup>192</sup>

Under the EEOC's policy, the benefits of the new law, including jury trials and punitive and compensatory damages of up to \$300,000 would also be unavailable to people who file lawsuits in the future complaining of discriminatory conduct that occurred before November 21, 1991.<sup>193</sup>

Whether the new law would apply to pending cases like Postema's was an important and disputed question during the two years that Congress and the White House were in conflict over the proposed law, but neither the statute nor the legislative history resolved the issue. The question may ultimately be appealed to the

185. Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C.A. §§ 12101-213 (West Supp. 1993)).

186. Paul M. Barrett, *Some Specifics About the New Law*, WALL ST. J., Nov. 4, 1991, at B1.

187. *Id.*

188. *Id.*

189. *Id.*

190. Robert Pear, *Agency Prohibits Use of Law in Old Bias Cases*, N.Y. TIMES, Dec. 31, 1991, at A1.

191. *Id.*

192. *See id.*

193. *Id.*

Supreme Court.<sup>194</sup>

The EEOC did acknowledge that parts of the law created "an inference" that it should apply to pending cases of past discrimination.<sup>195</sup> But the EEOC also said that the Supreme Court's most recent decisions suggest that the law should not be construed to have retroactive effect when the language of the statute or intent of Congress is ambiguous.<sup>196</sup>

Civil rights lawyers cite cases going back two centuries to support their argument that, as Chief Justice John Marshall said in 1801, "new laws affecting great national concerns often have 'retrospective operation.'"<sup>197</sup> In a 1974 case involving desegregation of public schools in Richmond,<sup>198</sup> the Supreme Court held that a new law authorizing an award of lawyers' fees should be applied retroactively. The Court said, "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."<sup>199</sup> In 1988, however, in *Bowen v. Georgetown University Hospital*,<sup>200</sup> involving the payment of hospitals under certain Medicare rules, the Supreme Court said that "retroactivity is not favored in the law,"<sup>201</sup> and for that reason an agency cannot adopt retroactive rules unless Congress has explicitly given it authority to do so.<sup>202</sup>

The EEOC has argued both points of view. While the commission agreed that an employer would suffer manifest injustice if required to pay damages for conduct that occurred before the law required such a penalty, the commission also argued that "in light of the public concerns inherent in Civil Rights Act litigation, requiring employers to pay unforeseen damages for unlawful discrimination is not manifestly unjust."<sup>203</sup> Two sections of the law contain specific exemptions for conduct occurring before it was signed into law, which civil rights lawyers say there would be no need for, if the law applied only to future cases, as the EEOC and the Justice Department contended.<sup>204</sup>

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194. *Id.*

195. *Id.* at A14.

196. *Id.*

197. *Id.*

198. *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974).

199. *Id.* at 711.

200. 488 U.S. 204 (1988).

201. *Id.* at 208.

202. *Id.*

203. *Pear*, *supra* note 190, at A14 (quoting the EEOC).

204. *Id.* Civil rights lawyers say that the EEOC decision would severely limit the im-

The district court in Postema's case originally held that the 1991 Act's provisions for jury trials and damages were retroactive. The district judge, however, certified an order for appeal, and the Court of Appeals for the Second Circuit granted an interlocutory appeal.<sup>205</sup> The Second Circuit reversed the district court's decision, holding that the jury trial and damages provisions of the 1991 Civil Rights Act are *not* retroactive and remanded Postema's case.<sup>206</sup>

## VII. CONCLUSION

Former baseball commissioner Fay Vincent says that the day will come when a woman umpire reaches the major leagues. "I think it would be terrific if we had women umpires. And if they are able to perform at the level we expect, I see no reason why they shouldn't."<sup>207</sup> However, when Pam Postema was dismissed from her umpiring position, the conclusion was that she simply did not have the ability to work in the majors.<sup>208</sup> One umpire, Terry Tata, commented, "Along with Pam, several other umpires who were considered non-prospects were let go. You might as well let them get on with their lives instead of allowing them to kick around the minor leagues for years and years and develop bad habits."<sup>209</sup> Harry Wendlestedt, a veteran National League umpire said, "My feeling is that Pam was mistreated during her career. She was always in the public eye and never really allowed to learn and progress on her own without people badgering her."<sup>210</sup>

It is the mission of Postema's lawyer to prove that her firing was based on her gender, not a lack of talent. The jury will have to be convinced that Postema's performance merited an opportunity

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pact of the new law. Job discrimination based on race or sex was illegal before November 21, 1991. All the new law does is make discrimination easier to prove and increase penalties. *Id.*

Joseph M. Sellers, director of equal opportunity employment programs, stated, "From the plain language of the statute, it should be clear Congress intended the Civil Rights Act of 1991 to apply to pending cases." *Id.* The Supreme Court would likely side with the EEOC on this issue. Yet a major purpose of the new law was to overturn several Supreme Court decisions that made it harder for victims of discrimination to win in court. Under the new law, a plaintiff can demand a jury trial and blacks and women say that they get speedier and fairer decisions from juries rather than judges. In addition, women can seek damages for emotional distress, pain and suffering, mental anguish, humiliation, and other non-pecuniary losses caused by an employer's discriminatory actions. *Id.*

205. *Postema v. National League*, Nos. 92-9150, 92-9152, 92-9154, U.S. App. LEXIS 15504 (2d Cir. June 25, 1993).

206. *Id.* at \*3.

207. Altavilla, *supra* note 21, at 28.

208. *See supra* note 30 and accompanying text.

209. Altavilla, *supra* note 21, at 28.

210. Altavilla, *supra* note 21, at 28.

to work in the majors. The problem is that decision to fire her was made subjectively by her supervisors who had the same mindset as those men who denied promotions to Elizabeth Hishon and Ann Hopkins.

Postema's dismissal left Theresa Cox as the only female umpire in the minor leagues until Cox was released in 1992 from the Arizona League.<sup>211</sup> Today, ball girls are the only women left on the baseball field, and some major league teams, such as the Mets, the Phillies, and the Cubs, do not require ball girls to have the same athletic ability or perform the same clubhouse chores as do ball boys. Nor are ball boys required to wear tight shorts.<sup>212</sup> All the ball girls need is poise, good looks, and an ability to turn down fans' requests for souvenir balls pleasantly.<sup>213</sup> In fact, Theresa Cox said that she thought "klutzy" ball girls reinforced the very stereotypes that cost her a career in the minors. "Everyone believes girls can't throw or catch until someone proves them different."<sup>214</sup>

Major league baseball has never been ahead of the times when it comes to human relations and civil rights. In recent years the major leagues have come under intense scrutiny because of the paucity of African-Americans in baseball's front offices and, until recently, in the positions of field managers and coaches.<sup>215</sup> How can it be expected that women will gain admission to baseball's umpiring ranks without a fight, especially when one manager said, "No matter how good [Postema] is, I don't think she'll be the one"?<sup>216</sup> As another manager put it, "I think she might be able to handle it. But I just think our sport's not ready for her."<sup>217</sup>

With sentiments like those above, Pam Postema will have an uphill battle winning her case, because judgments about umpires' performances are so subjective. The court should remind itself that in baseball success is inseparable from failure.<sup>218</sup> Journalist George

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211. Alessandra Stanley, *Among Baseball's Ball Girls, Fielding Skills Take 2d Place*, N.Y. TIMES, July 5, 1992, at A1.

212. *Id.*

213. *Id.* at B3.

214. *Id.*

215. Claire Smith, *On Baseball: Hold the Game to a Special Moral Standard*, N.Y. TIMES, June 3, 1992, at B11. As of 1993, there are four black managers in the major leagues: Dusty Baker of the San Francisco Giants, Cito Gaston of the Toronto Blue Jays, Hal McRae of the Kansas City Royals, and Don Baylor of the Colorado Rockies. In addition, there are two Hispanic managers: Felipe Alou of the Montreal Expos and Tony Perez of the Cincinnati Reds. Walter Leavy, *Baseball's Minority Managers: Taking Charge on the Field*, EBONY, May 1993, at 110.

216. POSTEMA & WOJCIECHOWSKI, *supra* note 1, at 122.

217. *Id.*

218. George F. Will, *The Keepers of the Rules*, NEWSWEEK, Apr. 6, 1992, at 72.

F. Will commented, "The World Series winner is likely to be beaten about 70 times on the way to glory. Any batter who fails, say, only two thirds of the time for a dozen seasons goes to Cooperstown. But umpires are supposed to be perfect and anonymous."<sup>219</sup> Umpires are also supposed to do something humanly impossible—get everything right in what everyone says is a game of inches: the difference between a ball and a strike or whether a runner is safe or out. "Good umpires earn their reputations being right about inches in the heat and blur of action," Will also stated,<sup>220</sup> and Pam Postema did it under extraordinary pressure.

Will went on to add, "Sport presupposes equality for the purpose of establishing inequality—a level playing field on which some will achieve the pre-eminence of the highest attainment."<sup>221</sup> Pam Postema seeks a level playing field, and if justice prevails, she will win her case. As baseball official Dick Butler said, "She's got to be better because of the fact that she's a girl. I'm not saying it's fair. It's just the situation. I don't think it's fair but it exists and she's not going to change it."<sup>222</sup>

Why can't a woman be an umpire, or a coach, a manager, or even a player if she has the ability to do the job? As with a partnership in a law or accounting firm or a managerial position at a major airline or a Fortune 500 company, ability, not gender, should be the only criterion for employment in any league. Many of Pam Postema's detractors suggested that she should "go back to the kitchen." Where she wants to go is behind the plate.

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219. *Id.*

220. *Id.*

221. *Id.*

222. POSTEMA & WOJCIECHOWSKI, *supra* note 1, at 153.