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In Praise of Macho Women: *Price Waterhouse v. Hopkins*

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CASENOTE

In Praise of Macho Women: *Price Waterhouse v. Hopkins*

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I. INTRODUCTION

When the Supreme Court handed down its decision in *Price Waterhouse v. Hopkins*¹ in the spring of 1989, both sides claimed victory.² The Court's plurality opinion lowered the standard of proof imposed by the court of appeals for an employer to escape liability for certain alleged violations of Title VII of the Civil Rights Act of 1964.³ But the decision also affirmed the shifting of the burden of persuasion to the defendant-employer where there is direct evidence that the employer relied on both permissible and impermissible factors in making its employment decision.⁴ The defendant-employer, the Supreme Court concluded, could escape liability in such "mixed-motive" cases 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.⁵

Price Waterhouse claimed that it did not promote Ann Hopkins to partner because of what it perceived to be severe shortcomings in

1. 490 U.S. 228 (1989).

2. "[L]awyers on both sides professed to be able to find clarity—and victory—in wholly different parts of the ruling. Tony Mauro, *Court Remains Befuddled by Title VII*, LEGAL TIMES, May 15, 1989, at 10.

3. The Court found that the court of appeals erred in holding that an employer may escape liability for a Title VII violation "if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination." *Price Waterhouse*, 490 U.S. at 237.

4. "[I]f an employer allows gender to affect its decisionmaking process, then it must carry the burden of justifying its ultimate decision." *Id.* at 248.

5. *Id.* at 258.

her interpersonal skills.⁶ At trial, the district court found this to be a legitimate factor in the accounting firm's evaluation.⁷ However, the trial judge also found that in evaluating Hopkins' performance, Price Waterhouse had given substantial weight to comments tainted by sex stereotyping.⁸ Reliance on these comments in the evaluation process constituted an impermissible factor in the firm's decision not to make Hopkins a partner.⁹ Because the firm considered both legitimate and illegitimate factors, the Court dubbed the case one involving "mixed-motive[s]."¹⁰

Despite Hopkins' success on remand,¹¹ this Note argues that the Supreme Court's construction of the case is ultimately unsatisfactory. Part II examines the district court's findings of fact and the Court's reliance on these facts in crafting its mixed-motive standard. Part III surveys social psychology research to provide an alternative explanation for the intensely critical evaluation Hopkins received. Part IV demonstrates that the Court erred in accepting the firm's highly suspect appraisal at face value. This Part suggests that the motives attributed to Price Waterhouse were not, as the Court suggests, "mixed" at all, but rather uniformly illegitimate. Closer examination of the remarks characterizing Hopkins' interpersonal skills, viewed in the context of her employment situation, reveals that these assessments were probably discriminatory. Finally, Part V suggests a stricter rule that would require an employer in a mixed-motive case to prove that its "legitimate" assessment of interpersonal skills was free from sex stereotyping, and applies the rule to the *Price Waterhouse* case.

6. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1113 (D.D.C. 1985), *aff'd in part, rev'd in part, and remanded*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd and remanded*, 490 U.S. 228 (1989).

7. *Id.* at 1114.

8. *Id.* at 1120.

9. *Id.*

10. *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring).

11. On remand, the district court held that Price Waterhouse had failed to meet its burden of persuasion under the lower preponderance of the evidence standard. *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1207 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990). The court found that "Price Waterhouse ha[d] failed to separate out those comments tainted by sexism from those free of sexism for the purpose of demonstrating that non-discriminatory factors alone justified the hold decision." *Id.* The firm was ordered to admit Hopkins as a partner and to pay her \$371,175 in back compensation and interest. *Id.* at 1216-17. Price Waterhouse appealed, but the judgment was affirmed in its entirety by the Court of Appeals for the District of Columbia Circuit. 920 F.2d 967, 970 (D.C. Cir. 1990). Ann Hopkins returned to Price Waterhouse in February, 1991, at the salary level of a seventh-year partner. According to one of her attorneys, Douglas B. Huron, co-counsel, the firm was "treating her well." Telephone Interview with Douglas B. Huron, Attorney for Ann Hopkins (July 17, 1991).

II. EVOLUTION OF THE CASE

At Price Waterhouse, a senior manager becomes a partnership candidate when the partners in her local office submit her name as a candidate.¹² All other partners in the firm are then asked to submit comments on each candidate on either a long or short form, depending on how well the partner knows the candidate.¹³ Not every partner submits comments on every candidate.¹⁴ The Admissions Committee reviews the comments, interviews the partners who made them, and makes a recommendation to the Policy Board either endorsing the candidate, placing her application on "hold," or denying her the promotion.¹⁵ The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to place her candidacy on hold, or to reject her.¹⁶

The process is not controlled by fixed guidelines. A candidate is not guaranteed success because of a certain number of positive comments, nor will she necessarily fail because of a specific number of negative remarks.¹⁷ Ann Hopkins had been a senior manager at the firm's Office of Government Services for five years when she was proposed for partnership in 1982.¹⁸ She was the only woman among the eighty-eight candidates proposed that year,¹⁹ and had outperformed her competition by successfully securing more major contracts for Price Waterhouse than any other candidate.²⁰ She played a key role in securing a \$25 million State Department contract for the accounting firm.²¹ In supporting her bid for partnership, the partners in Hopkins' office called this effort "an outstanding performance" carried out "virtually at the partnership level."²²

Hopkins' colleagues praised her character as well as her accomplishments.²³ They described her as "an outstanding professional" who had a "deft touch . . . strong character, independence and integrity."²⁴ Clients also had high praise for Hopkins. One State Department official described her as "extremely competent, intelligent . . .

12. *Price Waterhouse*, 490 U.S. at 232.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 232-33.

18. *Id.* at 233.

19. *Id.*

20. *Id.* at 234.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

strong and forthright, very productive, energetic and creative."²⁵ Another official praised her decisiveness, broadmindedness, and "intellectual clarity."²⁶ At trial, the district court concluded that Hopkins "had no difficulty dealing with clients and her clients appear to have been very pleased with her work" and that she "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked."²⁷

Despite her outstanding performance, Hopkins' bid for partnership was placed on hold.²⁸ Thirty-two partners had submitted comments on Hopkins' candidacy. Thirteen supported her bid for partnership, three recommended her candidacy be placed on hold, eight said they had no informed opinion about her, and eight recommended that she be denied partnership.²⁹ When Hopkins was later informed that she would not be repropose for partnership and that the partners in her office had withdrawn their support, she brought a sex discrimination action against Price Waterhouse under Title VII of the Civil Rights Act of 1964.³⁰

At trial, the district court found that the firm had considered both legitimate and illegitimate factors in its decision not to admit Hopkins as a partner. The court found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decision,³¹ an area in which Hopkins received harsh criticism.³² Specifically, the court found that Hopkins had difficulty dealing with staff members; that "[s]upporters and opponents of her candidacy indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff," and that "[s]he sometimes used profanity and appeared to be insensitive to others."³³ Later, the Supreme Court affirmed the district court's findings, noting that "Hopkins' aggres-

25. *Id.*

26. *Id.*

27. *Id.* (citing *Price Waterhouse*, 618 F. Supp. at 1112-13).

28. *Id.* at 233.

29. *Id.*

30. *Id.* at 231-32. Title VII, codified at 42 U.S.C.A. §§ 2000e (West 1991), is considered the centerpiece of the 1964 Civil Rights Act. It was the first effort by the federal government to establish a national standard of employment practices. CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION 35 (2d ed. 1988). The statute makes it unlawful for an employer "to fail to 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." 42 U.S.C.A. § 2000e-2(a) (West 1991).

31. *Price Waterhouse*, 618 F. Supp. at 1114.

32. *Price Waterhouse*, 490 U.S. at 234.

33. *Price Waterhouse*, 618 F. Supp. at 1113.

siveness apparently spilled over into abrasiveness."³⁴

However, the trial court also found that "[d]iscriminatory stereotyping of females was permitted to play a part" in Price Waterhouse's evaluation process.³⁵ In their evaluation of Hopkins, partners commented that she was "macho"³⁶ and may have "overcompensated for being a woman."³⁷ Another suggested that she needed to take a "course at charm school."³⁸ Several partners criticized her use of profanity. In order to improve her chances for partnership, Hopkins was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."³⁹

Because the firm gave substantial weight to these comments, and failed to address the problem of stereotyping in the partners' evaluations, the decision to place Hopkins' candidacy on hold was "tainted" by a discriminatory bias.⁴⁰ The district court found for Hopkins on the issue of liability⁴¹ and the Court of Appeals for the District of Columbia Circuit affirmed.⁴² The Court granted certiorari to resolve a conflict among the circuits concerning the burden of proof in a mixed-motive suit brought under Title VII.⁴³

In its opinion, the Court distinguished a mixed-motive case from a pretext case. In a mixed-motive case, the Court noted that "there is no one 'true' motive behind the decision."⁴⁴ Rather, the employment decision reflects multiple factors, at least one of which is legitimate.⁴⁵ By contrast, a pretext case presents no direct evidence of discrimination,⁴⁶ although intent to discriminate may be inferred from the plaintiff's proof of a prima facie case of disparate treatment.⁴⁷

In *McDonnell Douglas Corp. v. Green*,⁴⁸ the Court established a four-part test setting out what a plaintiff must show to create an inference that her employer's decision showed an intent to discriminate. This allocation was later reaffirmed in *Texas Department of Commu-*

34. *Price Waterhouse*, 490 U.S. at 234.

35. *Price Waterhouse*, 618 F. Supp. at 1120.

36. *Id.* at 1117.

37. *Id.* at 1116-17.

38. *Id.* at 1117.

39. *Id.*

40. *Id.* at 1120.

41. *Id.*

42. *Price Waterhouse*, 825 F.2d at 473.

43. *Price Waterhouse*, 490 U.S. at 232.

44. *Id.* at 260 (White, J., concurring).

45. *Id.*

46. SULLIVAN ET AL., *supra* note 30, at 256-57.

47. *Id.*

48. 411 U.S. 792 (1973).

nity Affairs v. Burdine.⁴⁹ Under the *McDonnell Douglas-Burdine* framework, a plaintiff must show: (1) that she belongs to a protected minority; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that she was rejected; and (4) that the position remained open and the employer continued to seek applicants from persons with the complainant's qualifications.⁵⁰ Once the plaintiff proves these facts, the employer's conduct is presumed discriminatory.⁵¹ To rebut the presumption, the employer needs to articulate some reason why the plaintiff was rejected.⁵² If the defendant is able to allege facts which raise a question as to whether its actions were discriminatory, the burden shifts to the plaintiff to show that the reason asserted by the defendant was not the true reason for the action, but merely a pretext to hide the employer's intent to discriminate.⁵³ The court then weighs the evidence, and decides in favor of the defendant in the event of a draw, because the plaintiff bears the ultimate burden of persuasion.⁵⁴ In essence, the court must choose between two alternative and contradictory stories of a single motive for the defendant's action.

In *Price Waterhouse*, however, the Court noted that "[w]here a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was 'the "true reason." ' "⁵⁵ Such an inquiry "would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source—for the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision."⁵⁶ Instead, the Court crafted a new standard for a mixed-motive case. In his plurality opinion, Justice Brennan held that "the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision"⁵⁷ shifts the burden of persuasion to the defendant to show by a preponderance of the evidence "that it would have made the same decision in the absence of the unlawful motive."⁵⁸

As the Court noted in referring to Hopkins' asserted failures of

49. 450 U.S. 248, 253 n.6 (1981).

50. *McDonnell Douglas*, 411 U.S. at 802.

51. *Burdine*, 450 U.S. at 254.

52. *Id.* at 254-55.

53. *Id.* at 256.

54. *Id.*

55. *Price Waterhouse*, 490 U.S. at 247.

56. *Id.*

57. *Id.* at 250.

58. *Id.*

interpersonal skills, Hopkins' "perceived shortcomings in this important area eventually doomed her bid for partnership."⁵⁹ At trial, Price Waterhouse conceded that Hopkins probably would have been promoted to partner "but for" the complaints about her interpersonal skills.⁶⁰ The trial judge found that the firm did not fabricate complaints about Hopkins' interpersonal skills as a pretext for discrimination.⁶¹ However, to say that the comments were not a pretext for discrimination misses the point that the comments themselves reflect a sexual bias. The legitimacy of the partners' evaluations of Hopkins' interpersonal skills is highly questionable in light of their "impermissibly cabined view of the proper behavior of women."⁶² To neatly categorize one set of remarks by the partners as "sex stereotyping" and another set as "legitimate" concerns about interpersonal skills is to ignore the inherently suspect quality of all their subjective evaluations.

What is most disturbing about the *Price Waterhouse* decision is the Court's unquestioning approval of the so-called "legitimate" reasons given by Price Waterhouse for refusing to admit Hopkins as a partner.⁶³ Considering Hopkins' "token"⁶⁴ status at Price Waterhouse, the "double bind"⁶⁵ she was placed in as a woman in a man's world, and the specific terms used to describe her interpersonal shortcomings, the partners' evaluation of Hopkins was anything but legitimate. In other words, the partners' motives may not have been "mixed" at all—a fact the Court failed to recognize.

III. THE PSYCHOLOGY OF SEX STEREOTYPING

Both the partners' understanding and their evaluations of Hopkins' interpersonal skills must be examined in the context of our knowledge of sex stereotyping. A key element in that context is the fact that Hopkins was a token in a large organization. When only a few women are in upper management positions, they are exposed to many subtle forms of discrimination, particularly when evaluated by their male peers. An extensive study by Professor Rosabeth Moss Kanter documented the group dynamics that occur in a corporation when only a few women are employed on a professional or manage-

59. *Id.* at 234.

60. *Price Waterhouse*, 618 F. Supp. at 1113.

61. *Id.* at 1114.

62. *Price Waterhouse*, 490 U.S. at 236-37.

63. *Id.* at 234.

64. ROSABETH M. KANTER, *MEN AND WOMEN OF THE CORPORATION* 208 (1977).

65. Jane Prather, *Why Can't Women Be More Like Men*, 15 AM. BEHAV. SCI. 172 (1971).

ment level.⁶⁶ She labeled as "skewed" a group, like a public accounting firm, in which there is a large preponderance (defined as 85% or more) of one type of person.⁶⁷ Those who comprise the majority group are identified as "dominants," while the minority group members are called "tokens."⁶⁸

Professor Kanter's study revealed the interaction between the dominants' stereotyping of the tokens and the dominants' perceptions of the tokens' performance, and the consequences of this interaction for the tokens' status.⁶⁹ Tokens are more easily stereotyped than people found in greater proportions.⁷⁰ While they are highly visible because of their rarity, tokens are "not permitted the individuality of their own unique, non-stereotypical characteristics."⁷¹ This visibility means that a token's performance is carefully scrutinized, often causing her to experience performance pressures.⁷² Every characteristic of the token could be a topic of conversation. For example, Professor Kanter found that when a token woman used a swear word in an informal setting with colleagues, she was quickly labelled as a "radical."⁷³

Another consequence of the token's high visibility is that her status threatens to eclipse other aspects of her performance.⁷⁴ A token does not have to work hard to get noticed, but she does have to work hard to have her achievements noticed.⁷⁵ In Kanter's study, the women's technical abilities as sales representatives were likely to be overshadowed by an awareness of their physical appearances, creating an additional performance pressure.⁷⁶ Outstanding performance by a token does not free her from the bind of tokenism. Instead, it triggers yet another performance pressure: not to make the dominants look

66. KANTER, *supra* note 64, at 208-42.

67. *Id.* at 208.

68. *Id.*

69. *Id.* at 206. Later research suggests, however, that the consequences of "token" status differs for men and women. In one study, men were perceived to be the most masculine when they had "solo" status, whereas similarly situated females were perceived to be least feminine. Solo males were easily integrated as group leaders because both the solo and other group members were accustomed to it. However, each group became dissatisfied when there was no subservient role for the solo woman to fulfill and she had to be integrated into the groups as a peer. Violation of traditional roles may lead to problems in groups with solo status members. See Jennifer Crocker & Kathleen M. McGraw, *What's Good for the Goose Is Not Good for the Gander*, 27 AM. BEHAV. SCI. 357, 366-67 (1984).

70. KANTER, *supra* note 64, at 211.

71. *Id.*

72. *Id.* at 212.

73. *Id.*

74. *Id.* at 216.

75. *Id.*

76. *Id.*

bad.⁷⁷ Tokens must “toe the fine line between doing just well enough and too well.”⁷⁸ One woman in Kanter’s study said “the company she worked for had fired another woman for not being aggressive enough,” and although she succeeded in “doing all they asked and brought in the largest amount of new business during the past year, [she] was criticized for being ‘too aggressive, too much of a hustler.’”⁷⁹

Dominants maintain their generalizations about tokens, despite their presence as colleagues, by categorizing them into stereotypical roles that preserve familiar forms of interaction between the token and the dominants.⁸⁰ Among the roles examined, the most important one for the purposes of this analysis is the iron maiden. A strong woman is typically characterized as an iron maiden⁸¹ because she is perceived as “tough” or “dangerous” by her male peers. Once established in the iron maiden role, a woman may be stereotyped as tougher than she actually is, and trapped in a more militant stance than she might have chosen.⁸²

With this in mind, consider Hopkins’ place at Price Waterhouse. Accounting was, and continues to be, a male-dominated field⁸³ and partnership status has been particularly elusive for women in the “Big Eight” accounting firms.⁸⁴ Hopkins, for example, was the only

77. *Id.* at 217.

78. *Id.*

79. *Id.*

80. *Id.* at 233. The other roles identified by Professor Kanter are: 1) the mother, expected to comfort the men in the group when they came to her with their private troubles; 2) the seductress, seen as sexually desirable and potentially available, and a source of considerable tension within the group; and 3) the pet, adopted by the male group as a cute, amusing “little thing” and taken along on group events as mascot—a cheerleader for shows of prowess. *Id.* at 233-35.

81. *Id.* at 236.

82. *Id.*

83. ANN HARRIMAN, *WOMEN/MEN/MANAGEMENT* 228 (1985). One study concentrating on the accounting profession showed there is still a preference for male applicants, though 85% of the employers claimed that they treated male and female applicants equally. In the study, application letters were sent in response to advertisements for accounting positions at several levels of skills. If the employer sent back an application form or scheduled an interview, the effort was considered “successful.” Male applicants had considerably more success than identically qualified females. *Id.* at 228.

84. Women represented three percent of the partners in the “Big Eight” public accounting firms in 1986, as compared to one percent in 1983, a small increase in light of the growth in the number of women actually in the field. Martha S. Weisel, *Sexual Stereotyping in Partnership Decisions: The Second Stage*, THE WOMAN CPA, Oct. 1989, at 4 (citations omitted). Price Waterhouse, a professional partnership specializing in auditing, tax, and management consulting services primarily for private corporations and government agencies, is among the firms in that group. *Price Waterhouse*, 825 F.2d at 461. In 1991, women held four percent of all partnerships at Price Waterhouse. Julie Goss, *She Took the Lead and Make It Up Stairway*

woman among the eighty-eight candidates proposed for partnership at Price Waterhouse in 1982.⁸⁵ All of the partners in her office were men,⁸⁶ and as of 1984, only seven out of the firm's 662 partners were women.⁸⁷ Certainly, this "skewed"⁸⁸ ratio made Hopkins a "token"⁸⁹ as a partnership candidate. An overall impression of Hopkins emerges from the partners' comments: she was perceived as an iron maiden. They described her interpersonal skills in iron-maiden terms: "overly aggressive, unduly harsh, difficult to work with and impatient with staff."⁹⁰ Another partner, in fact, suggested that these other partners objected to her swearing only "because it's a lady using foul language."⁹¹

A noted social psychologist, Dr. Susan Fiske,⁹² testified at trial for Hopkins, explaining that even some gender-neutral remarks made by the partners could be the product of sex stereotyping.⁹³ For example, one partner claimed that "Hopkins was 'universally disliked' by staff . . . and another described her as 'consistently annoying and irritating' . . . ; yet these were people who had had very little contact with Hopkins."⁹⁴ Dr. Fiske pointed out that "Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks . . . were the product of sex stereotyping."⁹⁵ Certainly, this same analysis could apply to the evaluation of Hopkins' interpersonal skills. Given the direct evidence of the partners' discriminatory view of women, and the expert testimony on the gendered quality of the "gender-neutral" criticism of Hopkins, it is impossible to characterize the partners' evaluation of Hopkins' interpersonal skills as a "legitimate" factor properly considered in a partnership decision.⁹⁶

of Success, SEATTLE TIMES, Aug. 5, 1991, at B3 (profiling a woman who became the third woman to make partner in the 84-year history of Price Waterhouse's Seattle office).

85. *Price Waterhouse*, 618 F. Supp. at 1112.

86. *Id.*

87. *Id.*

88. KANTER, *supra* note 64, at 208.

89. *Id.*

90. *Price Waterhouse*, 490 U.S. at 235.

91. *Id.*

92. During the course of the litigation, there was intense negative reaction to Dr. Fiske's testimony. Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 VT. L. REV. 91-92 (1991). She was "disparaged, dismissed as irrelevant, and accused of lacking professional integrity." *Id.* at 91. Professor Chamallas argues that "much of the criticism of Fiske was itself sexist." *Id.* at 92. Even Justice Brennan was tempted to call Fiske's testimony merely "icing on [Hopkins'] cake." *Id.* at 91.

93. *Price Waterhouse*, 490 U.S. at 235-36.

94. *Id.* at 235.

95. *Id.* at 236.

96. *Id.*

The centerpiece of the partners' criticism of Hopkins' interpersonal skills was her perceived abrasiveness. This perception tainted the partners' evaluation in two related ways. First, aggression, like other characteristics attributed to males, is negatively evaluated when displayed by women.⁹⁷ Because many of these masculine characteristics are the norm in business and the professions, women who enter traditionally male-dominated fields are caught in a double bind. Second, women whose behavior deviates from the feminine stereotypes of docility and passivity are perceived as more aggressive because of this break from "tradition."⁹⁸ A survey of social psychology literature reveals that both kinds of sex stereotyping were operating against Hopkins at Price Waterhouse.

Our society values men and masculine characteristics more highly than women and feminine characteristics.⁹⁹ Nurturance, accommodating warmth, and eagerness to soothe hurt feelings are thought of as feminine,¹⁰⁰ while assertiveness, competitiveness, dominance, and standing up well under pressure are considered masculine.¹⁰¹ However, women who display these highly valued masculine traits are not held in the same high regard as men who display them. Instead, they are labelled as deviants¹⁰² because they do not conform to the perception of the ideal woman: less aggressive, less independent, less dominant, less active, more emotional, and more indecisive.¹⁰³

This perception of the ideal woman and her proper role in society was articulated more than 100 years ago in Justice Bradley's concurrence in the oft-cited Supreme Court case, *Bradwell v. State*.¹⁰⁴ A state's refusal to permit a woman the right to practice law violated no constitutional right because the "paramount destiny and mission of women" under the "law of the Creator" is "to fulfil [sic] the noble and benign offices of wife and mother."¹⁰⁵ While some would like to dismiss such language as a reflection of the past, much of its viewpoint pervades the workplace today. Masculine personality qualities are

97. See *supra* notes 90-91 and accompanying text.

98. *Id.*

99. Inge K. Broverman et al., *Sex-Role Stereotypes: A Current Appraisal*, 28 J. Soc. ISSUES 59, 65 (1972).

100. Benson Rosen & Thomas H. Jerdee, *Perceived Sex Differences in Managerially Relevant Characteristics*, 4 SEX ROLES 837, 842 (1978).

101. P.T.P. Wong et al., *On the Importance of Being Masculine: Sex Role, Attribution, and Women's Career Achievement*, 12 SEX ROLES 757, 766 (1985).

102. EDWIN M. SCHUR, LABELING WOMEN DEVIANT 51-52 (1983).

103. Broverman et al., *supra* note 99, at 69.

104. 83 U.S. (16 Wall.) 130 (1872).

105. *Id.* at 141.

still considered helpful to compete successfully in male-dominated occupations.¹⁰⁶ Successful managers are perceived to possess those characteristics, attitudes, and temperaments more commonly ascribed to men than women.¹⁰⁷ For instance, attributes found in most professional and occupational roles are considered to be masculine: persistence and drive, personal dedication, aggressiveness, emotional detachment, and a kind of sexless matter-of-factness equated with intellectual performance.¹⁰⁸

Similarly, many norms regarding desirable work-related behaviors are often not compatible with norms regarding behaviors appropriate to the female sex role.¹⁰⁹ In one study, general competence was expected on the job, but not of women.¹¹⁰ As a result, a woman who behaves in a competent manner deviates from sex role expectations, and usually suffers one or both of two possible fates. Either she is disliked and excluded from the group, or her performance is discounted and attributed to chance.¹¹¹ Successful performance by females, particularly in masculine and demanding situations, is often perceived as a freak phenomenon, attributable not to the woman's real abilities, but to other unstable or external factors.¹¹²

In particular, traits considered desirable for effective workers often conflict with those considered appropriate for women.¹¹³ "Assertiveness . . . is frequently a necessary attribute for success in many areas, but is regarded negatively for women."¹¹⁴ Women who adopt a masculine orientation may be considered more competent by their employers, but this strategy tends to alienate co-workers.¹¹⁵ "[I]f the woman wishing success emulates the masculine characteristics deemed essential for the job, she is then called 'unfeminine,' 'aggressive,' or other adjectives considered derogatory for women."¹¹⁶ On the other hand, if she does not demonstrate these so-called masculine characteristics, she may be considered inadequate for the job.¹¹⁷

106. Wong et al., *supra* note 101, at 766.

107. Virginia E. Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics*, 57 J. APPLIED PSYCHOL. 95, 99 (1973).

108. CYNTHIA F. EPSTEIN, *WOMAN'S PLACE* 23 (1970).

109. Veronica F. Nieva & Barbara A. Gutek, *Sex Effects on Evaluation*, 5 ACAD. MGMT. REV. 267, 272 (1980).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* (citations omitted).

115. John R. Adams et al., *Analyzing Stereotypes of Women in the Work Force*, 5 SEX ROLES 581, 583 (1979).

116. Prather, *supra* note 65, at 172.

117. *Id.*

This double bind typifies some of the difficulties women face trying to enter the top echelons of business and professions.¹¹⁸ Justice Brennan characterized this double bind as “an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not.”¹¹⁹ Women in male-dominated professions may be particularly susceptible to this conflict, because such occupations are likely to have strong, masculine-oriented traditions of behavior.¹²⁰

Given the underlying assumption in these findings—that successful performance in a management or professional position requires the male norm—many women are likely to respond by adopting these behavioral norms.¹²¹ However, this adaptive behavior is not without its consequences. Because this behavior deviates from sex role norms, women who display male characteristics are often perceived as more aggressive (or competitive, or insensitive) than men who display identical behavior.¹²² This exaggerated misperception of identical behav-

118. *Id.*

119. *Price Waterhouse*, 490 U.S. at 251.

120. Adams et al., *supra* note 115, at 584.

121. See Jeanne P. Lemkau, *Women in Male Dominated Professions: Distinguishing Personality and Background Characteristics*, 8 PSYCHOL. WOMEN Q. 144, 161 (1983) (noting that the tough-minded, assertive stance of women in atypical occupations may be viewed as realistic and adaptive for negotiating male-dominated occupational environments characterized by discrimination). This Note does not address whether these so-called masculine traits are really a “business necessity” or merely a vestige of the perception that management is a “man’s job.” *But see* Equal Opportunity Comm’n v. Sears, Roebuck and Co., 839 F.2d 302, 331-32 (7th Cir. 1988) (trial court did not err in finding that subjective testing practices were not sufficient to prove discrimination). *Price Waterhouse v. Hopkins* raises a different issue: even if a woman has the “necessary” job qualifications, can she be judged fairly by her male peers?

122. Sarah L. Hoagland, ‘Femininity,’ *Resistance and Sabotage*, in “FEMININITY,” “MASCULINITY,” AND “ANDROGYNY” 85, 87 (Mary Vetterling-Braggin ed., 1982). “To suggest the behavior is qualitatively different begs the question; it presupposes that w[omen] and men have different natures prior to investigating the hypothesis. . . . [S]uch a suggestion fails to consider the context of these perceptions—a society based on the rule of the fathers.” *Id.* Hoagland draws on a “humorous” characterization of the differences between businessmen and businesswomen who behave identically:

A businessman is aggressive.

A businesswoman is pushy.

. . .

He’s careful about detail.

She’s picky.

He loses his temper because he’s involved in his job.

She’s bitchy.

. . .

He isn’t afraid to say what he think.

She’s opinionated.

He’s a stern task maker.

She’s difficult to work for.

He follows through.

ior operates to further narrow the range of acceptable behavior for women in male-dominated fields.¹²³ An aggressive or assertive woman is seen as abrasive because she violates "sexpectations." Consequently, female applicants for managerial positions may be evaluated as less acceptable than male applicants with identical qualifications.¹²⁴

There also may be a tendency to discriminate against female applicants for managerial positions based on perceptions and expectations regarding a female employee's interpersonal competence and dependability, as well as her technical skill.¹²⁵

[D]espite the feminist movement, males still hold significantly more negative attitudes towards women managers than females. . . . [Research] suggests that male managers with negative attitudes are predisposed to act on these attitudes when dealing with women in organizations. Such actions may be particularly detrimental to women managers with respect to advances in salary and position.¹²⁶

Such subtle bias may operate without detection when a subjective evaluation is used to appraise a woman's performance.

Evaluations that are subjective are more likely to be tainted by this male bias because they reveal the evaluators' unreflective perceptions of the employee's performance—perceptions that cannot be reduced to a standardized measure. For example, if a job calls for a worker to be able to lift fifty pounds, any worker able to perform that task would satisfy that objective criterion. Regardless of the employer's perception of a woman's ability to lift that weight, she could prove she met the standard for the position if she successfully completed the task. However, it is more difficult to filter out bias in a subjective evaluation, where the employee's qualifications are seen through the evaluator's lens, and cannot be verified by any standardized measure.

Concededly, in certain employment decisions, particularly pro-

She doesn't know when to quit.

He's firm.

She's stubborn.

He's an authority.

She's a tyrant.

Id. at 86-87.

123. *Id.* at 87. ("Femininity exists to limit [women]; in these cases we are unable to perceive certain behavior outside the feminine stereotype.").

124. Benson Rosen & Thomas H. Jerdee, *Effects of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. APPLIED PSYCHOL. 511, 512 (1974).

125. *Id.* at 512.

126. Peter Dubno, *Attitudes Toward Women Executives: A Longitudinal Approach*, 28 ACAD. MGMT. J. 235, 238 (1985).

fessional and supervisory areas, the employer's use of subjective criteria is unavoidable.¹²⁷ Unfortunately, many male evaluators may not know how to evaluate women with any measure of neutrality.¹²⁸ An evaluating supervisor may look for traits that the supervisor feels he himself has, and if he is male, may find them more easily in other males than in women.¹²⁹ Compatibility,¹³⁰ for instance, inevitably involves subjective judgment,¹³¹ as do leadership, and identification with the organization's goals.¹³² Upper level subjective systems typically invest decisionmakers with broad discretion, allowing personal bias to enter into the decisionmaking process and inviting selection of candidates who resemble those doing the selecting.¹³³ Indeed, the more subjective or ambiguous the definition of quality, the more likely bias due to stereotypes will occur.¹³⁴

IV. THE MIXED-MOTIVE QUESTION

A. *The Court's Analysis*

A cursory look at Price Waterhouse's partnership evaluation system reveals its bias towards sex stereotyping. At Price Waterhouse, partners who have significant recent contact with the partnership candidate submit "long form" evaluations; partners who only have limited contact with the candidate submit "short form" evaluations.¹³⁵ The partners numerically rank the candidate in comparison to other recent partnership candidates in forty-eight categories, ranging from practice development and technical expertise to interpersonal skills and civic activities.¹³⁶ The partners are also asked to indicate whether they believe the candidate should be admitted to the partnership, denied partnership, or held for further consideration, and to explain their assessment with a short comment.¹³⁷ Although the Admissions Committee may ask some partners to clarify their views,¹³⁸ the evalu-

127. Len Biernat, *Subjective Criteria in Faculty Employment Decisions Under Title VII: A Camouflage for Discrimination and Sexual Harassment*, 20 U.C. DAVIS L. REV. 501, 512 (1987).

128. *Id.* at 514.

129. *Id.*

130. *Id.* at 515.

131. *Id.*

132. Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 996 (1982).

133. *Id.*

134. Thomas L. Ruble et al., *Sex Stereotypes*, 27 AM. BEHAV. SCI. 339, 347 (1984).

135. *Price Waterhouse*, 618 F. Supp. at 1112.

136. *Id.*

137. *Id.*

138. *Id.*

ation process is highly susceptible to bias because it depends primarily on the perceptions of male partners, who rank the candidate in comparison with other recent, male candidates. Moreover, the process is based heavily on factors that are ambiguous, subjective, and easily manipulated, rather than on concrete, objective criteria.¹³⁹ If Hopkins' evaluation had been supported by some standardized measure of performance, such as the number of reprimands, outbursts, or complaints due to Hopkins' interpersonal skills, the partners' conclusions would have had at least an "underpinning of objectivity."¹⁴⁰ Finally, although much of the intense criticism Hopkins received came from people who had a little interaction with her, these comments were given equal weight in the evaluation process.

The Court, however, failed to address the bias present in the firm's evaluation of Hopkins' interpersonal skills. Despite the direct evidence of sex stereotyping, the Court accepted Price Waterhouse's assessment that Hopkins was "difficult," and therefore, presumptively undeserving of partnership status, rather than scrutinizing the partnership selection process more closely. In affirming the district court's findings, the Court recognized that some of the partners' comments were sex-linked, reflecting a negative reaction to Hopkins' personality because she was a woman.¹⁴¹ The Court had little difficulty acknowledging, for instance, that remarks characterizing Hopkins as "macho" or "overcompensat[ing] for being a woman" were tainted by sex stereotyping.¹⁴² In that regard, they found the coup de grâce to be the advice given to Hopkins to "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹⁴³ Yet for all the Court's ability to recognize the more obvious sex stereotyping in the evaluation process, it failed to reach the more subtle discrimination that tainted the assessment of Hopkins' personality. The Court unquestioningly accepted the firm's harsh evaluation of Hopkins' personality and concluded that her "aggressiveness apparently spilled over into abrasiveness,"¹⁴⁴ without further examining the

139. Ruble et al., *supra* note 134, at 347. Interestingly, biases tend to be reduced when the rater is given objective data. *Id.* at 349. Negative evaluations of competent women are least likely in situations where persons are judging someone they know well, or with whom they have worked or interacted. Bernice Lott, *Devaluation of Women's Competence*, 41 J. Soc. ISSUES 43, 55 (1985).

140. See Donald R. Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737, 749 (1976) (describing "a dozen canons" courts have applied when evaluating subjective criteria in discrimination litigation).

141. *Price Waterhouse*, 490 U.S. at 235.

142. *Id.*

143. *Id.*

144. *Id.* at 234.

employment context in which the appraisal was made. Hopkins' uniqueness in the pool of partnership candidates, her deviation from the feminine stereotype, the exaggerated perception of her "aggressive" behavior by her male peers, the use of a subjective evaluation, and the direct evidence of sex stereotyping all strongly suggest that the evaluation of Hopkins' interpersonal skills was also imbued with discrimination. By failing to recognize that the terms used to describe Hopkins' personality were not gender neutral in the context of her employment situation, the Court legitimated this highly suspect factor.

A simple analogy illustrates the problem with the Court's limited inquiry. Imagine a person being denied a promotion for the facially neutral reason that he is considered "too uppity" or "too pushy" by his employer. Would this still seem a neutral, legitimate reason if we knew that the employee in question was black in an overwhelmingly white environment, or a Jew in a Gentile one? In the *Price Waterhouse* case and similar employment contexts, the terms "too aggressive" or "abrasive" reflect this same kind of prejudice against women. A modification of the Court's holding in *Price Waterhouse* would counter this pervasive and subtle form of discrimination.

B. *An Alternative Approach to Mixed-Motive Cases
Under Title VII*

Where there is direct evidence of sex stereotyping, in addition to a so-called legitimate factor such as a subjective evaluation of interpersonal skills, the Supreme Court's mixed-motive analysis is inadequate. The standard may not be sensitive enough to reach the subtle forms of sex discrimination demonstrated in the *Price Waterhouse* case. The Court cannot end its inquiry by finding that a negative evaluation of interpersonal skills is legitimate and asking whether the employment decision would have been made for this reason alone. To do so ignores the inherently suspect nature of such an evaluation in a given employment context.

In a mixed-motive case, the employer should be required to prove by a preponderance of the evidence not only that it would have made the same employment decision absent the impermissible factor, but that the remaining "legitimate" factor was not also tainted by sex discrimination. Where the "legitimate" factor is a subjective evaluation of ambiguous personality traits, the court should require an employer to prove that a male employee with the same personality traits would be similarly evaluated. The employer should have to prove that similar behavior is similarly labeled. The court should

require the employer to demonstrate that differences in evaluations of interpersonal skills between male and female employees are due to actual behavioral differences and not merely to differences in perception and tolerance, depending on the worker's sex. Finally, the employer should have to prove that the same qualities were evaluated in all candidates. Only then would an employer in a mixed-motive case have carried its burden of persuasion that the "legitimate" factor it cited was not tainted by its other impermissible considerations.

This is not to suggest that, under the proposed rule, a token woman in a male-dominated profession could never receive a fair and accurate negative evaluation of her interpersonal skills. Certainly, an employer could produce evidence of specific incidents of objectionable behavior, describing the circumstances of the offense, the frequency of the outbursts, and what, if any, disciplinary action was taken against other similarly situated individuals. Instead of merely relying on gender-linked adjectives such as "aggressive" or "abrasive," the employer would have to provide explanations of specific incidents that put the employee's interpersonal skills beyond the range of acceptable behavior in a professional setting. The employer should bear this burden because direct evidence of its consideration of an obviously impermissible factor in the employment decision raises the inference of taint in its subjective evaluation of the employee alleging discrimination. In other words, the employer must show that the point at which aggressiveness "spill[s] over into abrasiveness" is the same whether the employee is a man or a woman.¹⁴⁵

Applying the proposed rule to Hopkins' situation would severely undermine the evidence that led the district court to conclude that the criticism of Hopkins was legitimate. At trial, Hopkins introduced past partnership records that identified two male candidates "who were criticized for their interpersonal skills because they were perceived as being aggressive, overbearing, abrasive or crude, but were recommended . . . and elected partner."¹⁴⁶ Despite reservations about the candidates' interpersonal skills, Price Waterhouse made a "business decision" to admit the pair.¹⁴⁷ Apparently, the candidates had skills especially needed by the firm, and the partners feared that those talents would be lost if the candidates were placed on hold.¹⁴⁸ The district court noted that in comparison to Hopkins, the male candidates received fewer "no" votes and "the negative comments on these

145. *Price Waterhouse*, 490 U.S. at 234.

146. *Price Waterhouse*, 618 F. Supp. at 1115.

147. *Id.*

148. *Id.*

candidates were less intense than those directed at the plaintiff.”¹⁴⁹ This led the district court to conclude that Price Waterhouse had “legitimate, nondiscriminatory” reasons to distinguish between Hopkins and the men who were made partners.¹⁵⁰ However, under the proposed rule, showing that the two men received less criticism, without further proof that their behavior was actually less offensive than Hopkins’, would be insufficient to meet the burden of persuasion. The comparison would be especially suspect in light of a comment from one of the partners admitting that “many male partners [were] worse than [Hopkins]” in their language and tough personality.¹⁵¹

Hopkins may not have been the first female partnership candidate to fall victim to this form of subtle discrimination. At least two other women candidates had been rejected in previous years “because partners believed that they were curt, brusque and abrasive, acted like ‘Ma Barker’ or tried to be ‘one of the boys.’”¹⁵² While acknowledging that sex stereotyping may have influenced the partners’ evaluations of interpersonal skills,¹⁵³ the trial judge was unwilling to find that this subtle form of discrimination constituted an intentional discriminatory motive or purpose.¹⁵⁴ Likewise, the Supreme Court’s mixed-motive analysis fails to reach this discrimination because the employer need not show that characteristics such as aggressiveness or abrasiveness are evaluated equally whether the employee is male or female, or that these terms are applied evenhandedly, accurately describing the same behavior. The proposed rule would require a court to look beneath value-laden language used by the employer and examine the factual basis upon which the evaluation is made.

The rule could also be applied where there is no direct evidence of discrimination. For example, in a pretext situation, the plaintiff, as part of her prima facie case, could demonstrate through expert testimony and personnel records that males and females were not evaluated similarly when subjective criteria were used. The rule would allow a plaintiff to launch a pre-emptive strike against the employer by requiring the defendant to prove that a negative evaluation of interpersonal skills was not tainted by sex stereotyping. Because this kind of subjective evaluation is highly susceptible to bias, the mere production of a poor evaluation of interpersonal skills would not be sufficient to rebut the plaintiff’s inference of discrimination. If the

149. *Id.*

150. *Id.*

151. *Id.* at 1117.

152. *Id.*

153. *Id.*

154. *Id.* at 1118..

defendant-employer failed to produce evidence of specific incidents that formed the basis of the evaluation, the plaintiff would prevail as a matter of law.

V. CONCLUSION

This Note calls for a modification of the Supreme Court's holding in *Price Waterhouse v. Hopkins* and proposes a rule that places additional evidentiary burdens on a defendant-employer in a mixed-motive case brought under Title VII. The proposed rule would prevent an employer from escaping liability by merely proving that it would have made the same employment decision absent its consideration of an impermissible factor. It would require an employer to prove that other "legitimate" factors it considered were also free of sex discrimination. The proposed rule would enable courts to reach more subtle forms of bias present in subjective evaluations by requiring this additional burden of proof, and move the Court beyond recognition of the most blatant forms of sex stereotyping to a more sensitive test for discrimination. As employers become more sophisticated in masking their discriminatory motives, so too must the Court become more sophisticated in crafting tests to detect it.

J. CINDY ESON