



University of Baltimore Law ScholarWorks@University of Baltimore School of Law

All Faculty Scholarship

Faculty Scholarship


1993

A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motive Cases

Margaret E. Johnson

University of Baltimore School of Law, majohnson@ubalt.edu

Follow this and additional works at: http://scholarworks.law.ubalt.edu/all_fac

 Part of the [Civil Rights and Discrimination Commons](#), [Labor and Employment Law Commons](#), [Law and Gender Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motive Cases, 1993 Wis. L. Rev. 231 (1993)

This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

A UNIFIED APPROACH TO CAUSATION IN DISPARATE TREATMENT CASES: USING SEXUAL HARASSMENT BY SUPERVISORS AS THE CAUSAL NEXUS FOR THE DISCRIMINATORY MOTIVATING FACTOR IN MIXED MOTIVES CASES

MARGARET E. JOHNSON*

This Comment examines a unified approach for disparate treatment mixed motives claims paired with sexual harassment claims under Title VII. The Author argues that because of the policy for nondiscriminatory and desegregated work environments embodied in Title VII, and because of the documented harm resulting from sexual harassment, courts should allow the burden of proof to shift to the defendant if the plaintiff demonstrates that her supervisor sexually harassed her, or condoned the harassment, and that the harassing supervisor made an employment decision that was adverse to her.

I. INTRODUCTION

In the wake of the United States Supreme Court's decision in *Price Waterhouse v. Hopkins*¹ and the recently enacted Civil Rights Act of 1991,² one important question remains concerning the Title VII plaintiff's burden of proof in mixed motives disparate treatment cases: How close a causal nexus is required between the plaintiff employee's evidence of the defendant employer's discriminatory motive and the adverse

* Class of 1993, University of Wisconsin Law School. I wish to thank Professors Carin Clauss and Vicki Schultz for their help.

1. 490 U.S. 228 (1989). For discussions of *Price Waterhouse* see Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 52-68 (1991); Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 VT. L. REV. 89 (1990); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1499-1503 (1990); Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment under Title VII*, 56 BROOK. L. REV. 1107 (1991); Robert C. Johnson, Comment, *Partnership and Title VII Remedies: Price Waterhouse Cracks the Glass Ceiling*, 1991 WIS. L. REV. 787 (1991).

2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 [hereinafter Civil Rights Act].

employment decision made against the plaintiff? This Comment will explore the recently resuscitated order of proof for sexual discrimination cases under Title VII of the Civil Rights Act of 1964.³ The Supreme Court applied this framework to the mixed motives disparate treatment case brought by a female plaintiff in *Price Waterhouse*. The Civil Rights Act of 1991 modifies the standard of proof put forth by the plurality in *Price Waterhouse*.

This Comment argues for a "unified approach" to sexual harassment cases and mixed motives disparate treatment cases that would invoke the burden shifting of *Price Waterhouse* and the Civil Rights Act of 1991.⁴ Under the Unified Approach, in certain circumstances, the proven hostile environment sexual harassment by the plaintiff's supervisor⁵ constitutes proof of the illegitimate and discriminatory "motivating factor"⁶ necessary in a mixed motives disparate treatment claim of sex discrimination. Once the plaintiff makes such a showing, the burden of persuasion shifts to the defendant employer to show that the same employment decision would have been made, even absent the impermissible motivating factor. At this point, whether or not the defendant carries his burden, liability may attach. If the defendant is successful, however, damages will not be awarded.⁷

3. 42 U.S.C. § 2000e et seq. [hereinafter Title VII]. Title VII states: 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 [or her] compensation, terms, conditions, or privileges of employment . . . [or to] limit, segregate, or classify his [or her] employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §§ 2000e-2(a)(1), (2) (1988).

4. In this Comment the phrase "the modified *Price Waterhouse* burden shifting" refers to the Civil Rights Act of 1991's modification of the *Price Waterhouse* burden of proof. See *infra* notes 39-41 and accompanying text.

5. Throughout this Comment, in regard to the Unified Approach, the requirement of proof by the plaintiff of hostile work environment sexual harassment by the plaintiff's supervisor also may be satisfied by proof of hostile work environment harassment when the harassers are the plaintiff's coworkers, and the supervisor was aware of the harassment but did not act in any manner to stop it.

6. Civil Rights Act of 1991, § 107(a). This section amends § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988), and states "(m) . . . an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice."

7. Civil Rights Act of 1991, § 107(b)(3)(B) states:

On a claim in which an individual proves a violation under 703(m) [42 U.S.C. § 2000e-2(m)] and a respondent demonstrates that the respondent would have

This Comment supports the Unified Approach by providing relevant research showing the connection between sexual harassment and women leaving the workforce. Because one of Title VII's goals is to eliminate sex segregation in the workforce, the Unified Approach promotes the achievement of the overriding policy of the statute and provides a policy reason for having a broader definition of causation.

Part II of this Comment examines the order of proof established by a line of cases decided prior to *Price Waterhouse*. These cases, dealing with pretext, operated on the assumption that the employment decision resulted from either a discriminatory purpose or a non-discriminatory purpose, but not a mixture of both. The purpose of this part is to explain the order of proof in this line of cases, thereby providing a comparison for the order of proof in *Price Waterhouse*.

Part III discusses *Price Waterhouse* and the order of proof detailed by the plurality. This part also discusses Justice O'Connor's concurrence and Justice Kennedy's dissent, and the different approaches for proof that they propose. Finally, this part details the modifications of and changes to the *Price Waterhouse* decision resulting from the Civil Rights Act of 1991.

Part IV discusses sexual harassment law under Title VII. Part V details the link between sexual harassment and Title VII's policy. By documenting the harm to women caused by harassment and the effect of harassment on women's employment, this part suggests that to better serve Title VII's goals, the courts must account for harassment's role in the disparate treatment claims brought in conjunction with sexual harassment claims.

Part VI details the Unified Approach and its definition of causation. This part looks more closely at the parameters of the causal nexus in mixed motives cases. Part VII applies the Unified Approach to specific factual situations in order to further demonstrate the Unified Approach's framework.

II. DISPARATE TREATMENT "PRETEXT" CASES

Prior to the United States Supreme Court's 1989 *Price Waterhouse* decision, courts addressed disparate treatment sex discrimination claims primarily within the analytical framework utilized in two previous

taken the same action in the absence of the impermissible motivating factor, the court- (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Supreme Court Title VII discrimination cases: *McDonnell Douglas Corp. v. Green*⁸ and *Texas Department of Community Affairs v. Burdine*.⁹ In *McDonnell Douglas*, the complainant argued that he was subjected to racially discriminatory hiring practices. The Court held that the complainant must convince the trier of fact to infer a discriminatory purpose from the employer's behavior.

Because the complainant used circumstantial, or indirect, evidence to support his allegations of racial discrimination, the Court stated that he could meet his burden of establishing a prima facie case by showing that (1) the complainant is a member of a protected group; (2) the complainant applied and was qualified for the job; (3) the complainant was rejected despite the complainant's qualifications; and (4) even after the complainant was rejected the employer continued to accept applications for the job from similarly qualified applicants.¹⁰

It is important to note that a prima facie case under *McDonnell Douglas* only raises an inference of discrimination. The prima facie case is used to rule out most of the possible nondiscriminatory explanations for the adverse employment action, and therefore, the courts presume that the acts, unless shown to be otherwise, are more likely than not the result of discrimination.¹¹ Once the plaintiff meets this initial burden of proof by showing a prima facie case, the burden "shifts" to the defendant employer to show a legitimate, nondiscriminatory reason for the activity in question.¹² Then, the burden shifts back to the plaintiff, providing her with an opportunity to show that the defendant's "legitimate" reason is merely a pretext for the true, discriminatory reason.¹³ In other words, this order of proof prevents the employer from using a false legitimate reason as a smoke screen for the underlying discriminatory reason.

In *Burdine*, the Court expanded upon the *McDonnell Douglas* framework. The respondent filed suit against her employer claiming that she was subjected to sex discrimination in violation of Title VII when she

8. 411 U.S. 792 (1973).

9. 450 U.S. 248 (1981).

10. *McDonnell Douglas*, 411 U.S. at 802. It should be noted the Court stated that when the facts change in other Title VII cases, the four factors necessary for a prima facie case should also change in light of the different facts. *Id.* at n.13. For example, in a sex discrimination claim of disparate treatment in promotion, the elements of a prima facie case would be that: (1) the complainant is a member of a protected group; (2) the complainant was qualified and eligible for the promotion; (3) the complainant was not promoted despite her qualifications; and (4) after the complainant was not promoted, a man received the promotion.

11. Sullivan, *supra* note 1, at 1115 (quoting *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978)).

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

13. *Id.* at 804.

was terminated from her job.¹⁴ The Court, following *McDonnell Douglas*, held that once the plaintiff proves a prima facie case of discrimination by a preponderance of the evidence, the burden shifts to the defendant to articulate a legitimate reason for the employee's termination. The employer does not need to show that he was actually motivated by the nondiscriminatory reason. Finally, if the defendant provides a legitimate reason, overcoming the presumption of discrimination, the plaintiff must show, by a preponderance of the evidence, that the defendant's reason was a pretext for discrimination.¹⁵

The *Burdine* Court clarified that the defendant, in order to rebut the presumption of discrimination, needs to create only a genuine issue of fact as to whether the defendant discriminated against the plaintiff.¹⁶ Therefore, the ultimate burden placed upon the plaintiff to persuade the Court that the employer discriminated against her is not altered by the "burden shift" to the defendant. The defendant carries only a burden of production, and not a burden of persuasion.

Later Supreme Court cases helped clarify the *McDonnell Douglas/Burdine* standard of proof. In *Trans World Airlines v. Thurston*,¹⁷ the Supreme Court stated that the *McDonnell Douglas* framework does not apply to situations where the plaintiff has produced direct evidence of discrimination.¹⁸ The Court further explained that the *McDonnell Douglas* framework promotes a policy of allowing plaintiffs, whose claims consist only of circumstantial evidence, to have their day in court.¹⁹ As in *Thurston*, however, if a plaintiff offers direct evidence of

14. In this case, the Texas Department of Community Affairs initially hired the respondent for the position of accounting clerk and later promoted her to Field Service Coordinator. Although she applied for a supervisor position, she was not hired for it, and the position remained open until a male was hired for the position. *Burdine*, 450 U.S. at 250. The male supervisor fired the respondent. She was soon rehired in a position comparable to that of supervisor, but in another department. The respondent filed suit, alleging that the decision to not promote her and then to fire her constituted gender discrimination in violation of Title VII. *Id.* at 251.

15. *Id.* at 252-53.

16. *Id.* at 254.

17. 469 U.S. 111 (1985). In *Thurston*, the plaintiffs claimed that they were discriminated against on the basis of age. They brought suit under the Age Discrimination in Employment Act (ADEA) stating that TWA's transfer policy violated the Act because the policy did not provide the same employment privileges for employees who were forced to retire at age 60 as it did for employees who were displaced for reasons other than age. *Id.* at 118. The TWA policy constituted "direct evidence" of age discrimination. In this case, the label of direct evidence was assigned easily because the policy was not facially neutral. *Id.* at 121.

18. *Id.* at 121.

19. *Id.* See also *Radomsky v. United States*, 180 F.2d 781, 783 (9th Cir. 1950)(stating that "[d]irect evidence establishes facts to be proved without the necessity

discrimination, the prima facie case of discrimination is not necessary and the *McDonnell Douglas* framework is inapplicable.

The order of proof in pretext disparate treatment cases requires the plaintiff to carry the burden of proof throughout the entire case. Under the *McDonnell Douglas* framework, the plaintiff makes a prima facie case using circumstantial evidence. Then the burden of production shifts to the defendant to articulate a legitimate reason for the treatment. If the plaintiff can prove by a preponderance of the evidence that the defendant's reason is pretextual, then the plaintiff has proven that the defendant has violated Title VII. If the plaintiff is unable to prove pretext, however, then the defendant escapes liability.

III. PRICE WATERHOUSE

The Supreme Court applied a different standard of proof in *Price Waterhouse v. Hopkins*.²⁰ In *Price Waterhouse*, Ann Hopkins, an accountant, was denied a promotion to partnership in a large accounting firm. She brought a sex discrimination claim under Title VII, stating that her employer denied her promotion because of her gender. Hopkins supported her claim with evidence of boardroom comments concerning her recommendation for partnership. The comments included references to her poor interpersonal skills, as well as negative reactions to Hopkins' lack of stereotypically female personality traits.²¹ Because both legitimate and illegitimate motivations existed, the case was labeled a "mixed motives" case.

for . . . inference[s]" that are required by circumstantial evidence).

20. 490 U.S. 228 (1989).

21. The comments included such praise as "an outstanding professional," possessing "strong character," and a "stimulating conversationalist." The comments also referred to her as abrasive, harsh, and impatient. The comments that led the plurality to believe that some of the partners' evaluations were negative because she was a woman included those that described her as "macho," objected to her use of profanity "because it's a lady using foul language," and maintained that she "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but much more appealing lady ptr [sic] candidate." The most dramatic comment came from the partner who personally advised Hopkins, upon announcing to her that she had been put on hold for partnership, that her chances would improve if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse*, 490 U.S. at 234-35.

A. The Plurality Decision

A plurality of the Court remanded the case to the court of appeals to apply the appropriate standard: When a plaintiff establishes that the employer's motivation for its activity was discriminatory, the plaintiff has carried her burden of proof. Once gender is proven to be a factor in the employment decision, the employer can avoid liability only by showing, by a preponderance of the evidence, that absent the illegitimate gender-based motivation, the employment decision would have been the same.²²

The Court explained that because the plaintiff in a mixed motives case cannot separate out the true reason for the adverse employment decision, primarily because she cannot access the defendant's thoughts, the *Burdine* standard of proof framework is inapplicable.²³ The *Burdine* framework is appropriate for cases in which the only reason for the adverse employment decision was an illegitimate one. In a mixed motives case²⁴ such as *Price Waterhouse*, there is more than one reason, and the motives are usually a combination of illegitimate and legitimate reasons for the employer's actions. The *Price Waterhouse* plurality held that in a mixed motives case, the plaintiff must carry the ultimate burden of proof as to the gender issue, but the employer must carry a burden as to the non-gender issues.²⁵

The question to be determined through these different burdens is whether gender, at the moment the employment decision was made, was a motivating factor.²⁶ In saying "gender played a motivating role," the plurality meant that "if [they] asked the employer at the moment of the decision what its reasons were and if [they] received a truthful response, one of those reasons [for the employment decision] would be that the applicant or employee was a woman."²⁷

22. *Id.* at 258.

23. *Id.* at 245-47.

24. *Id.* at 247 n.12. The Court stated that to establish a mixed motives case the plaintiff must "satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision" If the plaintiff fails to prove this, "then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual." *Id.*

25. *Id.* at 246 n.11. The employer's burden is in the form of an "affirmative defense." *Id.* at 246. The Court further stated that "where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, [the Court is] entitled to conclude that gender *did* make a difference to the outcome." *Id.* at 246 n.11.

26. *Id.* at 241.

27. *Id.* at 250 (footnote omitted). The plurality stated that they do not believe this definition to be hypothetical. *Id.* at 250 n.13.

The plurality stated that once the plaintiff has shown that gender was a motivating factor, Title VII allows the employer to present an affirmative defense. In other words, if the employer wishes to escape liability, the employer must persuade the court that even absent gender, the result would have been the same. The Court explicitly maintained that this so called "affirmative defense" is not a shifting of the burden of proof in regard to the gender issue.

The plurality explained that its decision to shift the burden of persuasion to the defendant was compelled by the plurality's interpretation that Title VII forbids any consideration of gender in an employment decision.²⁸ The Court permitted employers to avoid liability by offering an affirmative defense because of "[t]he other important aspect of the statute: [the] preservation of an employer's remaining freedom of choice."²⁹

The plurality found that the evidence provided by Hopkins showed the existence of the mixed motives. Hopkins proved that some of the comments written about her in the partnership decision-making process were based on sex-based stereotypes.³⁰ She also proved that part of the decision not to promote her was based on those comments, and that Price Waterhouse never disclaimed that the decision did rely on the gender stereotype.³¹ The Court stated that proof of sex-based stereotypes can constitute proof of an illegitimate motive and thereby prove that gender was actually a motivating factor in the employment decision. The plurality found that Hopkins had proven illegitimate motives by specific evidence, but the plurality refrained from deciding what specific facts would or would not meet the threshold of establishing a plaintiff's case in other cases.³²

28. Gudel, *supra* note 1, at 60.

29. *Price Waterhouse*, 490 U.S. at 242 (Brennan, J., plurality opinion). Congress, in enacting the Civil Rights Act of 1991, changed this part of the decision. Civil Rights Act of 1991, § 107(a),(b)(3)(B). Liability now attaches after the plaintiff has shown that gender was a discriminatory motivating factor in the employment decision. The employer, in stating that the same decision would have been made even absent the discriminatory motive, is not stating an affirmative defense. Instead, this stage allows the defendant to avoid "make whole" remedies, such as back pay. The change in this decision is rooted in Title VII, § 706(g), which permits a court to award affirmative relief when it finds that an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice," and yet forbids a court to order reinstatement of, or backpay to, "an individual . . . if such an individual was refused . . . employment or advancement or was suspended or discharged for any reason, other than discrimination on the basis of . . . sex." 42 U.S.C. § 2000e - 5(g).

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

31. *Id.* at 251.

32. *Id.* at 251-52. Because Title VII prohibits employment discrimination "because of" sex, many courts have debated about what "because of" means. Here, the

B. Justice O'Connor's Concurrence

On the facts of this case, Justice O'Connor agreed with the plurality that the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision even absent the discriminatory motive.³³ Justice O'Connor did not join the plurality's opinion, however, because she disagreed with the plurality as to when, in future cases, the burden should shift to the defendant.

Justice O'Connor's concurrence distinguished cases such as *McDonnell Douglas*, in which the plaintiff has presented no direct evidence toward proving that the employer based its decision on the plaintiff's sex, from cases such as *Price Waterhouse*, in which the plaintiff offers direct evidence.³⁴ Because of this distinction, Justice O'Connor maintained that the issue of causation should only be shifted if the plaintiff has produced direct evidence that her sex was a substantial factor in the employment decision.³⁵ Without direct evidence, she stated, there was no justification for shifting the burden of persuasion. Consequently, Justice O'Connor would not allow stray remarks in the workplace, statements by nondecision-makers, or statements by decision makers "unrelated to" the employment decisional process to satisfy the plaintiff's burden.³⁶

Justice O'Connor disagreed primarily with the plurality's holding that once the plaintiff had produced evidence showing gender was a "motivating factor," the burden of persuasion shifted to the defendant to

Court stated that stray stereotyping remarks in the workplace would not be enough to prove that gender played a part in the adverse employment decision. The Court stated that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision." *Id.* at 251. The Court further stated that "we refrain from deciding here which specific facts, 'standing alone,' would or would not establish a plaintiff's case, since such a decision is unnecessary in this case." *Id.* at 252. The Unified Approach, laid out in Part VII of this Comment, would allow evidence of sexual harassment, in some instances, to operate as specific proof for establishing a plaintiff's mixed motives disparate treatment claim.

33. *Id.* at 261 (O'Connor, J., concurring). Justice O'Connor referred to the area of tort liability to show that in certain civil cases, such as those tort cases involving multiple causation, the burden has shifted to the defendant because it would be unfair and not in the interest of the deterrent policy of tort law to have the plaintiff prove "but for" causation. Therefore, torts shifts the burden to the defendants to prove that their negligent acts were not the but for causation. *Id.* at 263-64.

34. *Id.* at 270. See *supra* text accompanying note 18.

35. *Id.* at 276.

36. *Id.* at 277.

offer an affirmative defense. Justice O'Connor maintained that the plaintiff must make an initial showing of "direct evidence" of causation. Justice O'Connor stated that the plurality had confused the causation requirement set out in Title VII—the "because of"—for the affirmative defense requirement. Justice O'Connor disagreed that once there was some evidence that an employment decision was "tainted" by the plaintiff's sex, the burden should shift to the employer to show that, absent the awareness of the plaintiff's sex, the decision would have been the same.³⁷

C. *The Dissenting Opinion*

The dissent, authored by Justice Kennedy, argued that the mixed motives cases should have the same order of proof as the other disparate treatment cases. In other words, mixed motives cases should follow the *Burdine* order of proof. The dissent maintained that Title VII does not mandate the creation of a new order of proof for mixed motives cases. Therefore, Justice Kennedy argued that the *Burdine* framework, which clearly leaves on the plaintiff the ultimate burden of persuasion concerning whether or not the defendant intentionally discriminated against the plaintiff, should be the order of proof for mixed motives cases as well.³⁸

D. *Modifications of Price Waterhouse by the Civil Rights Act of 1991*

The Civil Rights Act of 1991 clarified and changed the ruling of the *Price Waterhouse* plurality in two ways. First, the Act clarifies that the burden shifts to the defendant once the plaintiff has established that sex was a "motivating" factor for any employment practice.³⁹ Although the *Price Waterhouse* plurality discusses a "motivating reason," the opinion also suggests that the plaintiff only has to show that gender was "a factor in the employment decision *at the moment it was made.*"⁴⁰

The second element of the Civil Rights Act of 1991 related to mixed motives cases actually changes the *Price Waterhouse* decision. Under the *Price Waterhouse* plurality decision, liability does not attach if the defendant proves an affirmative defense—that the same employment decision would have been made even absent the illegitimate, discriminatory motive.

37. *Id.* at 277-78.

38. *Id.* at 290 (Kennedy, J., dissenting).

39. Civil Rights Act of 1991, § 107(a), (b)(3)(B).

40. *Price Waterhouse*, 490 U.S. at 241 (Brennan, J., plurality opinion).

Under the Civil Rights Act of 1991, however, liability attaches after the plaintiff has shown that gender was a discriminatory motivating factor in the employment decision. At this point, the court may grant declaratory relief, injunctive relief, and attorney's fees. The employer, in stating that the same decision would have been made even absent the discriminatory motive, is not stating an affirmative defense. Instead, this stage allows the defendant to avoid a ruling awarding "make whole" remedies, such as damages or back pay.⁴¹ The Act's modification of *Price Waterhouse* is more generous to the plaintiff because it does not allow the defendant to escape liability if he relied upon gender in his employment decision.

Therefore, under the modified *Price Waterhouse* burden shifting standard, when a plaintiff establishes that part of the employer's motivation for its activity was discriminatory, she has carried her burden of proof and liability attaches. Once gender is proven to be a factor in the employment decision, the employer may avoid the payment of damages and make whole remedies by showing by a preponderance of the evidence that the employment decision would have been the same even absent the illegitimate motivation of gender.

In order to trigger the modified burden shifting standard for mixed motives disparate treatment claims, the plaintiff must show that gender was a motivating factor in the employment decision. This Comment next examines sexual harassment and its relationship to disparate treatment claims in order to advocate the Unified Approach, which uses proof of sexual harassment as evidence that gender was a motivating factor.

IV. SEXUAL HARASSMENT LAW

Sexual harassment, because it is sex discrimination, presents a cause of action under Title VII.⁴² The Equal Employment Opportunity Commission's "Guidelines on Discrimination Because of Sex"⁴³ define sexual harassment as unwelcome "verbal or physical conduct of a sexual nature" unreasonably interfering with an employee's work or creating an "intimidating, hostile, or offensive working environment."⁴⁴ If the sexual harassment interferes with the individual's ability to work or creates a hostile working environment, then the sexual harassment is

41. Civil Rights Act of 1991, § 107(b)(3)(B).

42. See E.E.O.C. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1985) [hereinafter E.E.O.C. Guidelines]. The E.E.O.C. Guidelines state that "[h]arassment on the basis of sex is a violation of Sec. 703 of Title VII." *Id.*

43. *Id.*

44. *Id.* See also, Comment, *Sexual Harassment Claims of Abusive Work Environment under Title VII*, 97 HARV. L. REV. 1449, 1453 (1984).

actionable under Title VII.⁴⁵ Sexual harassment is actionable even if it is not causally related to an economic detriment.⁴⁶

Title VII provides for two kinds of sexual harassment claims. The first, "quid pro quo" sexual harassment, involves the requirement of the woman's sexual compliance in exchange for an employment or economic benefit, such as being hired, promoted, or not fired.⁴⁷ In a quid pro quo claim, the woman alleges that a term of her employment is being threatened because of her gender.⁴⁸ The second type of sexual harassment is "hostile work environment."⁴⁹ This category involves "the persistent subjection of female employees to an intimidating, hostile, or offensive working environment."⁵⁰

The Eleventh Circuit, in *Henson v. City of Dundee*, outlined five elements of a sexual harassment claim: A plaintiff must prove that (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the sexual harassment was based upon her sex; (4) the sexual harassment affected a term, condition, or privilege of her employment; and (5) the employer is liable under respondeat superior theory.⁵¹ The fourth factor must be tested both objectively and subjectively. For the claim to be actionable, the sexual harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."⁵² Courts recognize hostile work environment sexual harassment as affecting a "term" of employment that is protected under Title VII: the work environment.⁵³ In *Meritor Savings Bank v. Vinson* the United States Supreme Court adopted the *Henson* test for sexual harassment.⁵⁴

Prior to *Meritor*, lower courts did not recognize hostile work environment sexual harassment as a cause of action under Title VII if the

45. E.E.O.C. Guidelines, *supra* note 42.

46. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (citing E.E.O.C. Guidelines, 29 C.F.R. § 1604.11(a)(3) (1983)).

47. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 32 (1979). *See also* Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990); Steele v. Offshore Shipbuilding, 867 F.2d 1311 (11th Cir. 1989); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

48. Joshua F. Thorpe, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361.

49. *See* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

50. Comment, *supra* note 44, at 1455.

51. *Henson*, 682 F.2d at 903-05. This five element test is a modification of the *Burdine* prima facie case for showing disparate treatment.

52. *Id.* at 904.

53. Thorpe, *supra* note 48, at 1361.

54. 477 U.S. 57 (1986).

harassment did not result in any economic injury to the victim. In *Meritor*, the Supreme Court clarified that Title VII prohibits "arbitrary barriers to sexual equality at the workplace" created by a hostile or offensive environment through sexual harassment.⁵⁵

The five-part test proving sexual harassment requires a plaintiff to offer very substantial evidence of the harassment. In a claim based on quid pro quo sexual harassment, the plaintiff has to prove that she was denied an employment benefit because of her refusal to comply with her supervisor's sexual advances. In a claim alleging hostile work environment sexual harassment, the plaintiff must prove that the harassment was severe and pervasive. As stated in *Meritor*, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."⁵⁶ To demonstrate the threshold for "severe and pervasive," the Court explained that one offending remark related to the victim's gender would not be sufficiently "severe and pervasive" to affect employment conditions, and therefore would not violate Title VII. Additionally, the successful plaintiff must show that the harassment intimidated and offended her.

V. RELATIONSHIP BETWEEN SEXUAL HARASSMENT AND THE OBJECTIVES OF TITLE VII

Congress, by enacting Title VII, intended to promote workplace integration across gender lines and to protect women from discrimination in the workplace.⁵⁷ Although as originally introduced in Congress the Civil Rights Act of 1964 did not include sex as a protected class, sex was included shortly before passage.⁵⁸ Sexual harassment is documented as more pervasive when women enter into male-dominated and partially

55. *Id.* at 67 (citing *Henson*, 682 F.2d at 902).

56. *Id.*

57. *See Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971) ("One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.").

58. Sex was originally included in an attempt to defeat the bill. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115-17 (1985). Regardless of the haphazard manner by which the class entered Title VII, courts have treated the inclusion of prohibiting discrimination based on sex as equal to the inclusion of prohibiting discrimination based on race, national origin, or religion. *See Price Waterhouse*, 490 U.S. at 243-44 n.9.

sex-segregated types of employment.⁵⁹ Consequently, for the policy goals of Title VII to be realized, courts must recognize the link between sexual harassment, sex segregation in the workplace, and employment decisions based on an employee's gender.

The harm suffered by victims of sexual harassment has been well documented. Most sexual harassment claims involve the harassment of a female employee by a male supervisor or coworker.⁶⁰ A common experience is that the persistent exposure to harassment causes a decrease in the woman's ambition, motivation, job performance, and job attendance.⁶¹ As one victim stated "I . . . looked forward to being laid off—it was such a relief from the barrage of psychological and physical warfare targeted at me personally and at women in general."⁶² Many women may choose to leave a job rather than continue to endure the harassment.⁶³

When women have experienced sexual harassment, they very rarely have brought a Title VII action because, historically, the law offered little relief. Until the enactment of the Civil Rights Act of 1991, women could obtain only injunctive relief or affirmative relief such as the posting of sexual harassment complaint procedures for a successful harassment claim.⁶⁴ Women thus often waited to bring suit until a detrimental employment result occurred, such as being fired, not promoted, or demoted. Other women waited to bring suit until the harassment was so severe that the woman had no choice but to leave.⁶⁵ Therefore, sexual

59. Susan E. Martin, *Sexual Harassment: The Link Joining Gender Stratification, Sexuality, and Women's Economic Status*, in *WOMEN: A FEMINIST PERSPECTIVE* 57, 61 (Jo Freeman ed., 4th ed. 1989) (citing the U.S. Merit Systems Protection Board that "55 percent of those [women] who worked in virtually all-male groups and 49 percent of those in predominantly male groups were subjected to harassment . . ."); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in The Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *HARV. L. REV.* 1749, 1833-34 (citing Gutek & Morasch, *Sex Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, *J. Soc. Issues*, Winter 1982, at 67-68; Martin, *supra*).

60. David J. Burge, Note, *Employment Discrimination—Defining an Employer's Liability under Title VII for On-The-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 *N.C. L. REV.* 795 (1984).

61. Martin, *supra* note 59, at 62; Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 *HARV. WOMEN'S L.J.* 35, 51 (1990).

62. Pollack, *supra* note 61, at 37.

63. Christine Merriman & Cora Yang, Note, *Employer Liability for Coworker Sexual Harassment under Title VII*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 83, 84-85 (1984-1985).

64. Civil Rights Act of 1964, § 706(g). Civil Rights Act of 1991, § 1977A allows for compensatory and punitive damages.

65. This is known as "constructive discharge."

harassment suits usually were paired with a disparate treatment claim or a constructive discharge claim.

Even with the pairing of sexual harassment and disparate treatment claims, the courts have employed a bifurcated approach to the two claims.⁶⁶ When courts have analyzed the claims separately, they have tended to divide the plaintiff's proof among the various claims. Rather than determining the relevancy of all the plaintiff's evidence to the various claims, the courts have used the sexual harassment evidence only as evidence for the hostile environment claim and have not also considered it as proof of the disparate treatment claim. Consequently, the plaintiff's proof for the disparate treatment claim appears less strong than it actually is.

Because of the correlation between sexual harassment and the reality of women leaving nontraditional jobs, whether they be blue collar trades, male-dominated professions, or other jobs not typically held by women,⁶⁷ the connection between sexual harassment and disparate treatment must be addressed in the courts' analytical frameworks and by the standards of proof applied. As discussed further in the following Part, the Unified Approach allows plaintiffs to use the proof of hostile environment sexual harassment when proving their disparate treatment claim. Under the Unified Approach, a judicial finding of sexual harassment by the supervisor⁶⁸ constitutes proof that sex was a motivating factor in the adverse employment decision made by the supervisor against the plaintiff. Therefore, when the supervisor claims that the employment decision was based on a legitimate motive, such as the plaintiff's poor interpersonal skills, the disparate treatment claim

66. The courts even divide their opinions and analysis under separate headings of "sexual harassment" and "disparate treatment." See *Danna v. New York Telephone Co.*, 752 F. Supp. 594 (S.D.N.Y. 1990). Additionally, many of the courts do not consider the evidence of sexual harassment as evidence also of the disparate treatment. See *Ramsey v. City and County of Denver*, 907 F.2d 1004 (10th Cir. 1990).

67. Schultz, *supra* note 59, at 1834 (citing BARBARA GUTTEK, *SEX AND THE WORKPLACE* 119 (1985); MOLLY MARTIN, *HARD-HATTED WOMEN: STORIES OF STRUGGLE AND SUCCESS IN THE TRADES* 11 (1988); Eisenberg, *Women Hard Hats Speak Out*, *NATION*, Sept. 18, 1989, at 272-73; Pollack, *supra* note 61, at 37-38; Carrie Mcnkel-Meadow, *Exploring a Research Agenda on the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 *LAW & SOC. INQUIRY* 289, 307 (1989); Linda Liefland, *Career Patterns of Male and Female Lawyers*, 35 *BUFF. L. REV.* 601, 609-11 (1986)). See also Martin, *supra* note 59, at 61 (citing the U.S. Merit Systems Protection Board that "the proportions of women in professional and technical, clerical, and blue-collar positions that reported victimization were 41, 40, and 38 percent respectively . . .").

68. See *supra* note 5.

becomes one of mixed motives, and should be analyzed under the modified *Price Waterhouse* framework.

VI. THE UNIFIED APPROACH: WHAT CONSTITUTES CAUSATION

The Unified Approach aims to create a new analytical framework for Title VII plaintiffs to show courts that an adverse employment decision was "because of" their sex. The Supreme Court's announcement, in *Price Waterhouse*, that the burden of persuasion would shift to the defendant was what made that case a landmark decision. Even with the Civil Rights Act of 1991, the burden shifting remains. The Act, however, has modified the decision in order to allow liability to attach after the plaintiff's proof that gender was a motivating factor in the adverse employment decision.⁶⁹ The modification by the Act, in fact, will help to deter consideration of forbidden criteria in the decisional process.⁷⁰

As explained previously, the Unified Approach would be used by plaintiffs who pair a hostile environment claim with a disparate treatment mixed motives claim. The Unified Approach would operate under the modified *Price Waterhouse* burden shifting order of proof. Under the Unified Approach, to show that gender was a motivating factor in an adverse employment decision, the plaintiff would need to make a three-step showing, including proof of (1) hostile environment harassment by the plaintiff's supervisor toward the plaintiff,⁷¹ (2) an adverse employment decision made against the plaintiff by the supervisor, and (3) the supervisor's involvement in both (1) and (2). Upon this three-step showing by the plaintiff, liability attaches because the plaintiff would have shown that the supervisor was motivated, at least in part, by the employee's gender when making the employment decision. The plaintiff would show that because the supervisor relied on her gender previously in order to harass her, he is again relying on her gender to make this employment decision. Then, the court would shift the burden of persuasion to the defendant to show by a preponderance of the evidence that absent the illegitimate motive, the result would have been the same.

69. See *supra* notes 39-41 and accompanying text.

70. See *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring). Justice O'Connor states that "[t]here is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself Reliance on such factors is exactly what the threat of Title VII liability was meant to deter Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's . . . sex." *Id.*

71. See *supra* note 5.

If the defendant were unable to successfully meet his burden, the court would award damages and make whole relief to the plaintiff.

In order to explain the Unified Approach, this part is divided into four sections. The first three sections focus on different aspects that the *Price Waterhouse* decision, the Civil Rights Act of 1991, and other federal courts have decided are necessary in a disparate treatment claim in order to employ the burden shifting of the modified *Price Waterhouse* case. The various aspects are mixed motives, proof of gender as the "motivating factor" in the employment decision, and "direct evidence" of the motivating factor. The last section explains how the Unified Approach would allow the courts to help Title VII more comprehensively achieve its mandate.

A. Mixed Motives

As seen in the earlier discussion of the *Price Waterhouse* framework,⁷² both illegitimate and legitimate motives must be involved in the alleged disparate treatment in order to invoke the modified *Price Waterhouse* burden shifting. The Unified Approach is applicable to mixed motives cases. Under the Unified Approach, once the plaintiff has proven the sexual harassment by the same supervisor who made the employment decision against her, she has proven that sex was a motivating factor in her disparate treatment. The employer claims, however, that he made the employment decision because of legitimate motives, such as the plaintiff's poor interpersonal skills. Because of the proof of illegitimate motives and the claim of legitimate motives, this case is a "mixed motives" case.

B. Gender as the Motivating Factor: Proving Causation

The Unified Approach offers one way for Title VII plaintiffs to demonstrate that gender was a "motivating factor" in the employment decision. In *Price Waterhouse*, the Supreme Court held that upon the plaintiff's demonstration that *gender was a motivating factor in the employment decision*, the burden shifts to the employer to show that even absent the discriminatory motivation, the employment decision would have been the same.⁷³ But no court or statute has stated explicitly the degree of proximity required for the causal nexus between the employment decision and the gender discrimination in order to satisfy the plaintiff's burden of proof that "gender was a motivating factor in the

72. See *supra* notes 20-38 and accompanying text.

73. See *supra* notes 22-32 and accompanying text.

employment decision." Under the Unified Approach, proof of sexual harassment proves that gender was a "motivating factor" in the employment decision and triggers application of the modified *Price Waterhouse* order of proof.

In *Price Waterhouse*, the plurality offered hints as to what would or would not satisfy the plaintiff's initial burden of persuasion to prove that gender was a "motivating factor." First, the plurality stated that "motivating factor" meant the true reason at the moment of the adverse decision that the employer would offer, if asked, for the adverse employment decision.⁷⁴ This standard is not helpful because it would be rare indeed for an employer to express that his reason for acting was discriminatory and illegal. Also, the plaintiff rarely will have access to this information, and therefore it does not aid the plaintiff in presenting proof that gender was a motivating factor.

The plurality's finding in *Price Waterhouse* that gender was a motivating factor provides guidance to future plaintiffs that evidence of the kind offered by Ann Hopkins was enough. But, again, it will be the rare case in which an employee's evidence consists of comments, written during the employment decision-making process, denying her promotion because of her inability to fit the "female stereotype." Therefore, the *Price Waterhouse* plurality opinion does not provide any clear guidance to future plaintiffs as to the threshold requirements for shifting the burden to the defendant.

The Civil Rights Act of 1991 has not helped to clarify the ambiguity surrounding how to prove that gender was a motivating factor in the employment decision. The Act states that "an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice."⁷⁵ The Act does not specify by what type of evidence the plaintiff must show that gender was a "motivating factor." Therefore, neither *Price Waterhouse* nor the Civil Rights Act of 1991 aid Title VII litigants in understanding the plaintiff's necessary proof for a mixed motives case.

The Unified Approach helps give definition to "motivating factor." The Unified Approach would operate in common law suits in which Title VII plaintiffs have paired a sexual harassment claim with a disparate treatment claim. Under the Unified Approach, the proven hostile work environment sexual harassment by a supervisor⁷⁶ is a "motivating factor" for an adverse employment decision by the same supervisor, and invokes

74. *Price Waterhouse*, 490 U.S. at 241 (Brennan, J., plurality opinion).

75. Civil Rights Act of 1991, § 107.

76. See *supra* note 5.

the *Price Waterhouse* burden shifting. The Unified Approach suggests that the sexual harassment, found by the court to have been motivated by the plaintiff's sex,⁷⁷ is evidence that gender is also a "motivating factor" in the adverse employment action taken by the same supervisor.⁷⁸

For example, the Unified Approach would trigger a burden shifting in a mixed motives case in which a plaintiff brings both a sexual harassment and a disparate treatment claim of failure to promote. First, the plaintiff would be required to prove successfully, under the *Henson* five-part test, that she was subjected to hostile work environment sexual harassment by her supervisor. Second, the plaintiff would be required to show that she was not promoted and that the supervisor who harassed her was involved in the decision to not promote her. Third, the plaintiff would be required to show that gender was a motivating factor in the decision not to promote her because, as evident from the sexual harassment, her supervisor previously had acted discriminatorily against her. Thus, the plaintiff's claim would be that the proven sexual harassment constitutes discriminatory treatment and evidence of an illegitimate motive for not promoting her and shows that the promotional decision was truly based on the employee's gender. The supervisor, however, would argue that the plaintiff was fired because she has a difficult personality and weak interpersonal skills. This is a mixed motives case.

Under the Unified Approach, the proof that the harassing supervisor⁷⁹ was responsible for the employment decision provides the

77. See *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). Part three of the *Henson* five-part test for proof of hostile work environment sexual harassment requires that the plaintiff show that the sexual harassment was based upon her sex.

78. The distinction between the Unified Approach and a quid pro quo analysis is that in quid pro quo sexual harassment, the adverse employment action is in response to the woman declining a sexual advance or request for sexual favors. E.E.O.C. Guidelines stated:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual

The Unified Approach, on the other hand, allows a plaintiff, once she has proven hostile work environment sexual harassment by a supervisor, to use that determination as evidence of the "motivating factor" for the same supervisor's adverse employment action against her. Thus, under the Unified Approach, the employment action is not assumed to have resulted from the woman's response to the sexual harassment, as is the case in quid pro quo sexual harassment.

79. See *supra* note 5.

adequate causal nexus for the burden to shift. Hostile work environment sexual harassment committed by the supervisor, having been found by the court to be "sufficiently severe and pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment,"⁸⁰ would satisfy the threshold standard of causation for showing that gender was a motivating factor in the decision not to promote the plaintiff.⁸¹

In the above example, upon the plaintiff's three-step showing, liability would attach and the burden of persuasion would shift to the defendant. As in all mixed motives cases, the burden shifting makes it the defendant's responsibility to prove that the legitimate reasons by themselves were enough to cause the employment decision. Thus, in order to escape the payment of damages and make whole remedies, the defendant would be required to show that even absent the illegitimate motivation, the plaintiff would not have been promoted because of her weak interpersonal skills. The burden shifting employed by the Unified Approach is appropriate because it is easier for the defendant, than it would be for the plaintiff, to show the defendant's motivation.⁸²

C. Direct Evidence: The Causal Connection

As shown above, in a mixed motives case, the causal connection between the gender discrimination and the employment decision needs to be established in order to shift the burden onto the defendant and to establish liability. Neither the plurality in *Price Waterhouse* nor the Civil Rights Act of 1991 states that plaintiffs need "direct evidence" to prove the "motivating factor." On the other hand, Justice O'Connor required

80. *Vinson*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904).

81. As Professor Mark S. Brodin has noted, "Because 'cause itself is not a fact' but instead 'must necessarily be an inference drawn from data furnished by the evidence,' it is inevitable that 'matters of policy and estimates of factual likelihood become hopelessly interwoven with each other.'" Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 313 (1982).

82. *Price Waterhouse*, 490 U.S. at 266-67 (O'Connor, J., concurring). Justice O'Connor stated that:

[t]here has been a strong showing that the employer has done exactly what Title VII forbids, but the connection between the employer's illegitimate motivation and any injury to the individual plaintiff is unclear. At this point calling upon the employer to show that despite consideration of illegitimate factors the individual plaintiff would not have been hired or promoted in any event hardly seems "unfair" or contrary to the substantive command of the statute.

Id.

“direct evidence” in her *Price Waterhouse* concurrence, and many courts have refused to employ the *Price Waterhouse* burden shifting because of the lack of “direct evidence” proffered by the plaintiff.⁸³ The difficulty with the term “direct evidence” is that it has not been clearly defined. Therefore, there is no one definition or threshold to be met to satisfy the “direct evidence” requirement. Under the Unified Approach, in which proof of sexual harassment by a supervisor may constitute the causal connection between the adverse employment decision and illegitimate gender-based motivation, that evidence serves as “direct evidence” in a disparate treatment claim.

Justice O’Connor, in her *Price Waterhouse* concurring opinion, agreed with the plurality that the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that the same employment decision would have been made absent consideration of the employee’s sex.⁸⁴ She justified the burden shift by analogizing to tort liability law. Justice O’Connor stated that in a mixed motives case, as in multiple causation torts cases, once the plaintiff has shown that gender was a motivating factor, it would be impossible for the plaintiff to show that the defendant’s consideration of her gender was the “but for” causation.⁸⁵

Justice O’Connor disagreed, however, with the plurality as to what type of evidence the plaintiff must show in order for the burden of persuasion to be shifted to the defendant. The plurality said that the plaintiff had to show that gender was a motivating factor, and then the burden would shift. Justice O’Connor said that the plaintiff must demonstrate “by *direct evidence* that an illegitimate factor played a substantial role in a particular employment decision.”⁸⁶

Justice O’Connor also provided a few guidelines as to what would constitute “direct evidence” of disparate treatment, and thereby shift the burden of persuasion to the defendant. She stated that:

stray remarks in the workplace, while perhaps probative of sexual harassment . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers

83. See *Gray v. Univ. of Arkansas*, 883 F.2d 1394 (8th Cir. 1989); *Danna v. New York Telephone Co.*, 752 F. Supp. 594 (S.D.N.Y. 1990). See also *supra* notes 17-18 and accompanying text.

84. *Price Waterhouse*, 490 U.S. at 261 (O’Connor, J., concurring).

85. *Id.* at 263.

86. *Id.* at 275 (emphasis added).

unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard⁸⁷

Defining her threshold standard for shifting the burden of persuasion to the defendant, Justice O'Connor clarified that it was markedly different from that required by the plurality. The main difference was that O'Connor's standard embodied a strict causal requirement.⁸⁸

Many federal courts use the label of "direct evidence" to describe the causal connection between the employment action and the discriminatory purpose in a mixed motives case.⁸⁹ The Eleventh Circuit, in *Bell v. Crackin Good Bakers, Inc.*,⁹⁰ considered a supervisor's derogatory remarks based upon a plaintiff's gender "direct evidence" that her supervisor's failure to promote her was because of her sex. Unlike *Price Waterhouse*, the supervisor's derogatory comments in *Bell* occurred over time and did not occur at the specific instant of deciding on the plaintiff's promotion. And yet the court stated "[f]or a person who became the supervisor over the petitioner to have said [he would not have women in the plant because men perform better and that he could get rid of her], it approaches the frivolous to contend that there was no direct evidence of sex discrimination."⁹¹ *Bell* suggests that the supervisor's sexual harassment of the plaintiff constitutes "direct evidence" of discriminatory motive for the supervisor's adverse employment decision against the plaintiff, even though the harassment and the employment action do not occur at the same time. Thus, the Unified Approach should satisfy courts that require "direct evidence" to trigger the modified *Price Waterhouse* burden shifting.

A supervisor's "severe and pervasive" sexual harassment of an employee coupled with the supervisor's authority to be a decision maker in an adverse employment decision, similar to a discriminatory employment policy, should constitute a causal connection between an adverse employment decision and gender-based motivation. The sexual harassment should constitute direct evidence of disparate treatment and trigger the modified *Price Waterhouse* standard of proof. Therefore, the

87. *Id.* at 277.

88. *Id.* at 277-78.

89. *See Chamberlin v. 101 Realty*, 915 F.2d 777 (1st Cir. 1990); *Sennello v. Reserve Life Ins. Co.*, 872 F.2d 393 (11th Cir. 1989); *Gray v. Univ. of Arkansas*, 883 F.2d 1394 (8th Cir. 1989); *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497 (11th Cir. 1985); *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); *Danna v. New York Telephone Co.*, 752 F. Supp. 594 (S.D.N.Y. 1990); *Halbrook v. Reichhold Chemicals, Inc.*, 735 F. Supp. 121 (S.D.N.Y. 1990).

90. 777 F.2d 1497 (11th Cir. 1985).

91. *Id.* at 1501.

three-step showing under the Unified Approach is (1) proven hostile environment harassment by the supervisor toward the plaintiff,⁹² (2) an adverse employment decision made against the plaintiff by the supervisor, and (3) the supervisor's involvement in both (1) and (2). Upon this three-step showing by the plaintiff, liability attaches. Then the court should shift the burden of persuasion to the defendant to show that, absent the illegitimate motive, the result would have been the same. If the defendant is unable to successfully meet his burden, the court should award damages and make whole relief to the plaintiff.

D. The Unified Approach Helps Title VII Achieve Its Mandate

According to the plurality in *Price Waterhouse*, the mandate of Title VII is to help eliminate sex discrimination in the workplace, to promote employment decisions based on qualifications, and to penalize those based on sex.⁹³ Application of the Unified Approach would permit achievement of that mandate. Because liability attaches after the plaintiff demonstrates that sex was a motivating factor for the employment decision, the law proscribes a mixture of legitimate and illegitimate motives. The Unified Approach demonstrates the importance of attaching liability upon a showing of illegitimate motives, even when legitimate motives also were a factor, because legitimate motives often can and do result from the effects of illegitimate motives.

For example, in *Price Waterhouse*, one of the "legitimate" factors cited by the employer was Hopkins' poor interpersonal skills. She was too aggressive and lacked "social grace."⁹⁴ In other words, the legitimate motives were premised on Hopkins' inability to fit the female stereotype. Hopkins was caught in the double bind facing many women in the work place: Do not act as the supervisors expect workers to act (such as being aggressive in a large accounting firm and winning big accounts), abide by expected female stereotypes, and lose the job; or, act as the supervisors expect a worker to act, do not abide by female stereotypes, and lose the job. As one commentator stated "[t]he *Hopkins* litigation was itself a demonstration of the influence of sex-biased assumptions and gendered thinking in the decisionmaking processes of male-dominated institutions."⁹⁵

92. See *supra* note 5.

93. *Price Waterhouse*, 490 U.S. at 243 (Brennan, J., plurality opinion) (quoting 110 CONG. REC. 7247 (1964)).

94. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 463 (D.C. Cir. 1987), *rev'd and remanded*, 490 U.S. 228 (1989).

95. Chamallas, *supra* note 1, at 110 (footnote omitted).

The "legitimate" motivation, therefore, that employers are able to present in both the *McDonnell Douglas* framework and the *Price Waterhouse* framework actually may be an illusion. The *Price Waterhouse* standard, however, with the modification by the Civil Rights Act of 1991, accounts more adequately than the *McDonnell* standard for the illusory "legitimate" motives. Unlike the *McDonnell Douglas* framework, which allows the defendant to avoid liability by articulating any legitimate reason for the employment decision, the mixed motives standard delineated in the Civil Rights Act of 1991 allows the defendant to avoid payment of damages and make whole relief only upon proof that the same employment decision would have been made even absent the illegitimate motive. Therefore, proof of a "legitimate" factor in the new mixed motives standard will not allow the defendant to avoid liability, only damages.

It is important to realize the interplay of sexual harassment and "legitimate" motives for adverse employment decisions. As stated earlier in this Comment, much research has been done on the psychological damage on working women as a result of sexual harassment.⁹⁶ Consequently, in a sexual harassment claim coupled with a disparate treatment claim, a defendant's "legitimate" motives for the adverse employment decision usually include poor job attendance or poor job performance. From the research, however, it is apparent that many of these employer's explanations result directly from the sexual harassment endured by the plaintiff. Therefore, it is appropriate, in accordance with Title VII's policy for equal employment opportunities, to prevent the employer from escaping liability by relying on those factors resulting from sex discrimination and harassment. To do so, the courts should employ the Unified Approach and the modified *Price Waterhouse* order of proof, not that of *McDonnell Douglas*.

VII. APPLICATION OF THE UNIFIED APPROACH

The Unified Approach tries to apply the *Price Waterhouse* burden shifting to a broader set of cases than the unique situation of *Price Waterhouse*. Rarely is a plaintiff able to obtain written thoughts of an employer during an employment decision making process. Therefore, to utilize a supervisor as the causal connection between the proven gender discrimination (sexual harassment) and the adverse employment decision allows the courts to invoke the burden shifting of *Price Waterhouse* and thereby achieve Title VII's mandate of deterring any consideration of gender. In this part, the Unified Approach is applied to the facts from

96. See *supra* notes 59-65 and accompanying text.

two recent cases in which the plaintiffs brought a sexual harassment claim paired with a disparate treatment claim. In addition, this part describes a recent district court opinion in which the Unified Approach was employed.

A. *Helpful Models for Applying the Unified Approach*

In *Ramsey v. City and County of Denver*,⁹⁷ the plaintiff resigned from her job as an engineer for the city alleging that she was discriminated against on the basis of sex. The plaintiff alleged differential treatment, hostile work environment sexual harassment, and constructive discharge because of her treatment. She offered evidence of comments, drawings, sexually charged physical conduct and publications found in the environs of the workplace as the basis of her hostile environment sexual harassment claim. The plaintiff presented specific evidence including the fact that the director of the traffic division believed that women were suited better for some jobs than for others. Additionally, the plaintiff stated that most people knew of her employer's ideas about a woman's place in the workforce, and he even testified to such ideas during the trial.

The plaintiff's disparate treatment claim was based on her assertion that she was kept on probationary status rather than as a permanent employee, that she was inadequately supervised, that she was given inappropriate assignments, and that she was improperly relieved of her supervisory responsibilities. The city defendants stated that there was no discrimination, and said that the plaintiff only had her difficult personality to blame.⁹⁸ This is a mixed motives case because the defendant claimed that the employment decisions resulted from the plaintiff's difficult personality while the plaintiff claimed that the decisions were made also because of her sex.

Under the Unified Approach, the plaintiff first would have attempted to prove the existence of hostile work environment sexual harassment. The plaintiff would have used evidence, such as the comments, drawings, and sexually charged physical conduct, to show that the harassment was sufficiently severe and pervasive to create an abusive and hostile work

97. 907 F.2d 1004 (10th Cir. 1990).

98. In *Ramsey*, the district court used a *Burdine* framework for its analysis of the plaintiff's disparate treatment claim. Because the city effectively showed nondiscriminatory reasons for its actions, the district court found in favor of the city. The court further concluded that the plaintiff did not prove sexual harassment or constructive discharge. *Id.* at 1006-07. On appeal, the Tenth Circuit agreed that the plaintiff did not show that her supervisor acted on his discriminatory beliefs. *Id.* at 1009-10. The Tenth Circuit affirmed the district court's decision. *Id.* at 1012.

environment. Upon a judicial finding that the plaintiff was subjected to sexual harassment, the plaintiff would have been required to show the supervisor's involvement in the sexual harassment. The plaintiff could have shown the supervisor's involvement through the documentation of either the supervisor's own active participation or his implicit condoning of the behavior by not stopping it once he was aware of the harassment.

Then, the plaintiff would have been required to prove that she was disparately treated by the harassing supervisor. In this example, she would have attempted to show that she was kept on probationary status rather than as a permanent employee, that she was inadequately supervised, that she was given inappropriate assignments, and that she was improperly relieved of her supervisory responsibilities.

Finally, the plaintiff would have been required to demonstrate the causal connection: that the employment decisions were caused by the supervisor's discriminatory motives. The plaintiff would have accomplished this offer of proof through the evidence that the supervisor who had sexually harassed her and allowed others to sexually harass her was the same supervisor who had made the various employment decisions against her.

If the plaintiff had satisfied all three steps outlined above, under the Civil Rights Act of 1991, liability would have attached. The significance of the finding of liability is the recognition that any consideration of illegitimate motives in employment decisions is in violation of Title VII. As in all mixed motives cases, the court next would have employed the *Price Waterhouse* framework and shifted the burden to the defendant to show that, absent the illegitimate motive, he still would have kept the employee on probationary status. If the defendant had been successful in carrying his burden of proof and convinced the court that, even absent consideration of the plaintiff's gender, the plaintiff's difficult personality was enough to cause him to keep her on probationary status, then the defendant would not have been responsible for the payment of damages and make whole relief. If the defendant had been unsuccessful in carrying his burden of proof, however, the court would have ordered him to pay damages and make whole relief.

In order to further illustrate the implementation of the Unified Approach, the following discussion uses facts from *Danna v. New York Telephone Co.*⁹⁹ In *Danna*, the plaintiff brought suit against her employer alleging that she was subjected to hostile work environment sexual harassment and that she was discharged and demoted because of sex discrimination in violation of Title VII. *Danna* provided evidence that she was subjected to unwelcome sexual harassment in the form of sexually

99. 752 F. Supp. 594 (S.D.N.Y. 1990).

explicit and offensive graffiti. Even though Danna's supervisors were aware of the graffiti, they did not try to stop it or remove it. Consequently, the graffiti remained on the walls for over two years.¹⁰⁰

The plaintiff's evidence included statements by her supervisor. For example, her supervisor told another of Danna's supervisor's that "they [were] looking to get rid of [Danna] . . . because she was a pain in the . . . ass."¹⁰¹ Danna's supervisor also told her that if she acted more "feminine [and] cutesy," others would be more willing to help her with her work.¹⁰² Another time, one of her supervisors told another supervisor to write a complaint about Danna, and stated that "one way or another' he would get [the] 'bitch.'"¹⁰³

Under the Unified Approach, the plaintiff first would have been required to prove that she was subjected to hostile work environment sexual harassment. As stated in *Vinson*, the plaintiff would have been required to establish that the unwelcome sexual harassment was severe and pervasive enough to cause an offensive and abusive working environment. Second, the plaintiff would have attempted to show that she was demoted and discharged by the supervisor. Third, the causal connection between the gender discrimination and the employment decision would have been established through the supervisor's involvement in both the sexual harassment and the disparate treatment. Once the court had found that she had been sexually harassed, the plaintiff would have shown that the supervisor discriminated against her because of her sex through the sexual harassment.

Application of the Unified Approach would have prevented Danna's employer from escaping liability for his illegitimate motives by pointing to Danna's poor job attendance as the legitimate reason for demoting and discharging her. As noted earlier, research suggests that it is possible that

100. *Id.* at 610. After applying the *Henson* test, the *Danna* court held that the plaintiff had been subjected to a hostile work environment. Additionally, the court held that the harassment was severe enough to result in employer liability. *Id.* For the allocation of the burdens of proof the court utilized the *Burdine*, rather than the *Price Waterhouse*, framework. The court reasoned that the facts offered by Danna were not direct evidence that the defendant used gender-based criteria in the plaintiff's demotion or discharge, and therefore applied the *Burdine* standard of proof. *Id.* at 613 n.6. The court stated that even though the defendants offered legitimate reasons for the demotion of Danna, the plaintiff had offered evidence showing that the reason for the demotion was pretextual. Concerning the discharge claim, Danna was unable to persuade the court that the employer's "legitimate" reasons for demoting her—because she violated the handbook rules—were pretextual. The court also stated that the sexual harassment was not related to the causes of her demotion.

101. *Id.* at 598.

102. *Id.* at 614.

103. *Id.*

Danna's job attendance declined because she was subjected to so much sexual harassment on the job. Thus, the employer's illegitimate conduct provided the employer with "legitimate reasons" for discharging her.¹⁰⁴

B. Unified Approach Applied

A district court, in *Halbrook v. Reichhold Chemicals*,¹⁰⁵ has applied the Unified Approach and the *Price Waterhouse* standard of proof. In *Halbrook*, the court denied the defendant's motion for summary judgment on both the plaintiff's claim of discriminatory failure to promote and her claim of constructive discharge.¹⁰⁶

The plaintiff alleged that she was subjected to sexual harassment. She claimed that "she was warned [by management] not to let women's issues 'get in the way'; harassed about whether or not she would return to Reichhold after her maternity leave; told to read a book about women's supposed fear of success; and ridiculed when she requested an appointment to an administrative committee."¹⁰⁷ The *Halbrook* court found that the sexual harassment evidence provided direct evidence of a discriminatory failure to promote her, and employed the *Price Waterhouse* standard of proof.¹⁰⁸ The decision in *Halbrook*, therefore, is a good example of how the Unified Approach should operate because the court broadened the causal nexus between gender-based motivation and the adverse employment decision in order to include supervisory or management's prior sexual harassment.

VIII. CONCLUSION

In *Price Waterhouse*, a plurality of the Supreme Court adopted an order of proof that shifted the burden of persuasion to the defendant. The decision held that in mixed motives cases the plaintiff must demonstrate

104. The court, in considering her demotion claim, considered the facts toward the demotion "against a background which consists of Danna being subjected to a hostile environment . . ." *Danna*, 752 F. Supp. at 615. Danna won on that claim. *Id.* The court did not find for Danna on the discharge claim because she could not establish the prima facie case required by *Burdine*. She could not show that a similarly situated male was not dismissed for the reasons she was dismissed, such as long coffee breaks and falsifying work records. *Id.* at 615-16.

105. 735 F. Supp. 121 (S.D.N.Y. 1990).

106. *Id.* at 123-24.

107. *Id.* at 125.

108. The court stated that "where a plaintiff provides direct evidence of discriminatory motive, the burden shifts to the employer to show that it would have made the same decision absent such a motive." *Id.* at 125 (quoting *Price Waterhouse*, 490 U.S. at 241-42).

that gender played a motivating role in an adverse employment decision. The employer defendant then may avoid liability by proving that he would have made the same decision absent the discriminatory motivating factor. The Civil Rights Act of 1991 modified the order of proof by attaching liability after the plaintiff demonstrated that gender was a motivating factor in the adverse employment decision.

The Unified Approach applies the modified *Price Waterhouse* framework to cases in which the plaintiff couples a sexual harassment claim and a disparate treatment claim. Because of the policy for nondiscriminatory and desegregated work environments embodied in Title VII, and because of the documented harm resulting from sexual harassment, courts should allow the burden to shift to the defendant if the plaintiff demonstrates that her supervisor sexually harassed her, or condoned the harassment, and that the harassing supervisor made an employment decision that was adverse to her.