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FEMINIST JUDGMENTS AND THE REWRITTEN *PRICE WATERHOUSE*

*Sandra Sperino**

In theory, Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on sex, race, color, national origin, and religion.[1] In practice, American courts have distorted this ambition by creating a host of complicated frameworks through which they determine what counts as discrimination and what does not. The Supreme Court has, at times, restricted the reach of discrimination law by interpreting Title VII narrowly. However, even many ostensibly proemployee cases have contributed to the analytical chaos of discrimination jurisprudence.

In *Feminist Judgments*,[2] Professor Martha Chamallas reimagines the canonical case of *Price Waterhouse v. Hopkins*.[3] In that case, the Supreme Court recognized that a plaintiff can prevail on a Title VII claim by showing that a protected trait was a motivating factor in a negative employment outcome.[4] In that case, the Court noted that plaintiffs in discrimination cases should not be required to prove but-for cause to prevail.[5]

The introduction to the Professor Chamallas concurrence correctly notes many of the rewritten opinion's strengths. Professor Chamallas provides richer detail about the facts underlying the case and the context in which Price Waterhouse made its decision. She embraces an enhanced role for experts to assist the courts in how discrimination occurs. Professor Chamallas also explicitly recognizes that bias may occur even when a particular decisionmaker does not express overt bias. However, there are many more contributions that are worth mentioning.

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1 42 U.S.C. § 2000e-2(a)(2) (2012).

2 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

3 490 U.S. 228 (1989).

4 *Id.* at 244–45.

5 *Id.* at 244 (plurality opinion); *id.* at 259 (White, J., concurring); *id.* at 262–63 (O'Connor, J., concurring).

Professor Chamallas improves on the original *Price Waterhouse* by focusing not only on the comments of the decisionmakers, but also on the role the employer itself played in the outcome. The *Price Waterhouse* opinion itself focused largely on the comments of the decisionmakers and did not emphasize the fairly unstructured partnership selection process and the fact that people who made biased comments about women were allowed to participate in partnership selection. As Professor Chamallas notes, the selection process could have been less prone to bias if the employer had taken steps such as "monitoring and structuring discretionary decisions to focus on job-related criteria, skills and performance."[6]

Professor Chamallas also explicitly describes the limits of the *McDonnell Douglas* proof structure and rejected current doctrine, which tries to divide claims into so-called single-motive and mixed-motive frameworks. She points out that *Price Waterhouse* itself could be a single-motive case, if the supposedly legitimate criticism of Ann Hopkins reflected sex-based stereotypes. As Professor Chamallas correctly notes, "we should not attempt to tightly constrain the methods of proof or arguments plaintiffs offer in future cases."[7]

Professor Chamallas also avoids the trap of declaring the case as one that falls within the label of an intentional disparate treatment claim. Title VII has two main operative provisions: 42 U.S.C. § 2000e-2(a)(1) and (2). Without much discussion, the courts have viewed the first provision as an intentional discrimination provision and the second as one that governs disparate impact.[8] This dichotomy is court created and is not driven by the text of the statute. In *Price Waterhouse*, the plurality unnecessarily reified this dichotomy by focusing on the language in subsection (a)(1), the so-called disparate treatment provision. Almost all discrimination jurisprudence has focused on subsection (a)(1), leaving the full breadth of the statute's reach untapped, even more than fifty years after Congress enacted Title VII. The (a)(2) provision prohibits additional discriminatory conduct, including limiting employees in any way that would "deprive or tend to deprive" them of employment opportunities or "otherwise adversely affect [their] status as an employee" because of a protected trait.[9] Professor Chamallas avoids unnecessarily separating the two provisions. It is a subtle, but important, nuance. When Professor Chamallas cites to Title VII, she cites to the entire statute.

Professor Chamallas also soundly rejects the idea that Title VII jurisprudence should indiscriminately borrow from tort law. Justice O'Connor's concurring opinion in *Price Waterhouse* suggested, without support, that Title VII was a "statutory employment 'tort.'"[10] This reference has created undue havoc in discrimination law, as the Supreme Court has recently started to interpret the text of both Title VII and the Age Discrimination in Employment Act ("ADEA") through

6 Martha Chamallas, *Rewritten Opinion in* Price Waterhouse v. Hopkins, *in* FEMINIST JUDGMENTS, *supra* note 2, at 345, 359.

7 *Id.* at 356.

8 *See, e.g.*, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 617 n.2 (1999); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977).

9 42 U.S.C. § 2000e-2(a)(2) (2012).

10 490 U.S. at 264 (O'Connor, J., concurring).

tort law.[11] As the Professor Chamallas concurrence properly pointed out, Congress enacted Title VII in part because tort law and the common law idea of at-will employment inadequately protected workers. She rightfully claimed Title VII as a "distinctive body of public law that aims to eliminate longstanding patterns of segregation, stratification, and lack of equal opportunity."[12]

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11 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524−25 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176−77 (2009).

12 Chamallas, *supra* note 6, at 349–50.