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PRICE WATERHOUSE, *Petitioner,* v. ANN B. HOPKINS, *Respondent.*

No. 87-1167

SUPREME COURT OF THE UNITED STATES

*1987 U.S. Briefs 1167; 1988 U.S. S. Ct. Briefs LEXIS 1249*

October Term, 1987

June 17, 1988

[*1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* NOW LEGAL DEFENSE AND EDUCATION FUND, AMERICAN CIVIL LIBERTIES UNION, WOMEN'S LEGAL DEFENSE FUND, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, INC., GREATER WASHINGTON AREA CHAPTER, WOMEN LAWYERS DIVISION, NATIONAL BAR ASSOCIATION, INSTITUTE FOR RESEARCH ON WOMEN'S HEALTH, NADINE TAUB, NATIONAL COALITION FOR WOMEN'S MENTAL HEALTH, NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS, NATIONAL ORGANIZATION FOR WOMEN, NATIONAL WOMEN'S LAW CENTER, NORTHWEST WOMEN'S LAW CENTER, ORGANIZATION OF PAN ASIAN-AMERICAN WOMEN, SAN FRANCISCO WOMEN LAWYERS ALLIANCE, WOMEN EMPLOYED, WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS, WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, WOMEN'S EQUITY ACTION LEAGUE IN SUPPORT OF RESPONDENT

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**INTERESTS:** INTEREST OF AMICI CURIAE n1

n1 The parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

Amici curiae are non-profit women's legal, education and research organizations, women's political and membership organizations, women's bar associations, women's professional organizations and other public interest groups and individuals concerned about women's legal rights and women's economic status and well-being. The interest of each individual amicus curiae is set forth in the Appendix to this brief.

Amici believe that the opinion below sets important precedent for the enforcement of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e* et seq., and that this Court should affirm that decision to give important and needed guidance to the Circuits.

[*11]

SUMMARY OF ARGUMENT

As United States Ambassador to the United Nations Jeane Kirkpatrick, reflecting upon others' perceptions of her as a woman in a high government office, has said, "I've come to see here a double-bind: if a woman seems strong, she is called 'tough,' and if she doesn't seem strong, she's found not strong enough to occupy a high level job in a crunch." These evaluations, she noted, "express a certain . . . general surprise and disapproval at the presence of a woman in arenas in which it is necessary to be – what for males would be considered – normally assertive." Ambassador Kirkpatrick's observations summarize the experience of many women who have entered male-dominated occupations and have sought advancement. Her observations are borne out also by the conclusions reported in a vast body of scientific research on sex-based stereotyping, particularly in organizational behavior. n2

n2 The brief of Amicus Curiae American Psychological Association in Support of Respondent addresses the breadth, depth and general scientific acceptability of this research upon which the expert testimony in this case is based. See also Taub, Keeping Women in Their Place: Stereotyping Per Se As A Form of Employment Discrimination, *21 B.C.L. Rev. 345 (1980)* (discussing relevance of sex stereotyping research to Title VII law).

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The problem encapsulated by Ambassador Kirkpatrick in her speech is at the core of this case; strong, talented women like Ann Hopkins, seeking promotion in traditionally male realms of corporate and political power, all too often face evaluation by colleagues and superiors who perceive them as women first, as employees second. If care is not taken to avoid stereotyping women in the process, women are impermissibly and illegally assessed using completely different standards and sexist norms.

In this case the record is replete with evidence that the decision-making process applied by Price Waterhouse to Ann Hopkins' bid for partnership was pervaded by easily identifiable sex stereotyping, to her detriment. There is no indication that Price Waterhouse, a virtually all-male domain, took any steps to stop the obvious sexism in the evaluation process. Such evidence is direct evidence of discriminatory motive, that sex-based discrimination occurred, entitling the plaintiff to at least declaratory and injunctive relief. No more need be shown for the burden to shift to the defendant so that the defendant may attempt to show that other types of requested relief are inappropriate. At [*13] this stage the defendant, as a proven wrongdoer, should bear the burden of proving, if indeed it can, by clear and convincing evidence that make whole relief is inappropriate.

INTRODUCTION

This case typifies the "second generation" of employment discrimination cases. Although women are entering business and the professions, they are prevented from achieving the highest levels in those professions because of gender-based biases.

In this case, Ann Hopkins was denied advancement to partnership status at Price Waterhouse even though she was personally responsible for bringing to the firm more new clients than anyone else in her candidate class and generating an estimated $34 to $44 million dollars in business. She was highly recommended by her clients. Her remarkable business achievements, which were alone sufficient to qualify her to join the ranks of the more than 650 partners, were virtually ignored, and instead the firm's all-male partnership committee focused almost exclusively on her personality, and in particular, on her "unladylike" characteristics: her harddriving, aggressive, and "unfeminine" behavior. Behavior that would have been expected, acceptable and perhaps [*14] even required of a man in a leadership position became a liability for this woman who was told she needed "a course in charm school" to qualify for partnership.

That Ann Hopkins' sex was a critical factor in the failure of her partnership bid at Price Waterhouse is indisputable. She was evaluated in terms of sex-based stereotypes which prescribe specific forms of behavior and appearance for women. n3 These stereotypes are similar to other impermissible sex-based assumptions and generalizations, e.g., that women are not good at math, that they do not like or want factory work, or that they are or should be more nurturing than men. In the employment context, an employer's reliance on sex-based assumptions about appropriate behavior or other characteristics constitutes direct evidence of intentional discrimination. Here the requirement that women conform to an idealized model of femininity was patently not job-related, since by virtually any measure, Hopkins' job performance was stellar.

n3 These stereotypes rest on assumptions or generalizations that women should conform to certain "female" personality characteristics, but many women do not conform to "even a true generalization." *City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 (1978)*. Stereotypes apply to expected behavior as well as other traits.

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Moreover, as this case demonstrates, generalizations about how women should look and act create a profound dilemma for women aspiring to high-level positions. Those who fail to conform, like Ann Hopkins, are criticized because they are not sufficiently "ladylike"; those who do conform to a female stereotype are deemed inadequate in job-related skills, because they are said not to be qualified to do a "man's" job. n4 Women seeking high-powered professional leadership positions thus walk a tightrope, so long as sex-stereotyped personality characteristics control access to such jobs. The significance of this phenomenon has been widely noted, as women have moved into lower level professional jobs in significant numbers, but have failed to progress to the upper echelon, in substantial part because of these invisible barriers. n5

n4 See generally The Trapped Woman: Catch-22 in Deviance and Control 206-08 (J. Figueira-McDonough & R. Sarri eds. 1987); C. Tavris & C. Wade, The Longest War: Sex Differences in Perspective 265 (2d ed. 1984); E. Schur, Labeling Women Deviant: Gender, Stigma, and Social Control (1983); V. Nieva & B. Gutek, Women & Work 59 (1982); Heilman, Sex Bias in Work Settings: The Lack of Fit Model in 5 Research in Organizational Behavior 269 (B. Staw & L. Cummings eds. 1983);

n5 As one study noted, the most insurmountable barrier is the way women are perceived by their male colleagues and evaluators. A. Morrison, R. White & E. Van Velsor, Breaking the Glass Ceiling: Can Women Reach the Top of America's Largest Corporations? (1987).

[*16]

Ambassador Jeane Kirkpatrick, United States Permanent Representative to the United Nations, described the problem in another way:

[I]f I make a speech, particularly a substantial speech, it has been frequently described in the media as "lecturing my colleagues," as though it were somehow peculiarly inappropriate, like an ill-tempered schoolmarm might scold her children. When I have replied to criticisms of the United States (which is an important part of my job), I have frequently been described as "confrontational". . . . It was a while before I noticed that none of my male colleagues, who often delivered more "confrontational" speeches than I, were labeled as "confrontational". . . .

I've come to see here a doublebind: if a woman seems strong, she is called "tough," and if she doesn't seem strong, she's found not strong enough to occupy a high level job in a crunch. Terms like "tough" and "confrontational" express a certain very general surprise and disapproval at the presence of a woman in arenas in which it is necessary to be - what for males would be considered - normally assertive. Stereotyping has endless variations.
5 News for Women in Psychiatry 14, 14-15 (Oct. [*17] 1986) (reprinting speech of Ambassador Kirkpatrick to the Women's Forum, New York City, December 19, 1984) (emphasis in original).

Ambassador Kirkpatrick's experiences are similar to Ann Hopkins', in that for both the perceptions and evaluations of their conduct were fundamentally altered because of their sex. In Hopkins's case, the result was the denial of partnership.

At trial, Hopkins showed that the decision not to promote her, the sole woman, best client recruiter and highest money earner in a class of 88 candidates, resulted from an unfavorable evaluation directly related to the fact of her sex. The process by which this flawed evaluation was made is well-recognized and described by a large body of scientific research which explains why women encounter substantial difficulties achieving prominence in non-traditional professional jobs.

Indeed, in this case, an expert cognitive psychologist, Dr. Susan Tufts Fiske, testified that such sex stereotyping pervaded Price Waterhouse's decisionmaking.

This scientific research exposes the mechanisms by which invidious sexual, racial and other stereotypes operate in evaluation processes. Thus, in his classic volume, The Nature [*18] of Prejudice, Gordon Allport observed that "people use a 'least effort' principle of organization and group apparently similar people into categories. . . ." n6 At the simplest level the research observes that perceivers use discriminating cues, especially physical traits such as sex and race, as ways of categorizing people and organizing information about them. As a result, because "similarity" is the organizing principle, within-group differences become minimized, and between-group differences become exaggerated. For example, women are seen as more similar to each other and more different from men. n7

n6 Taylor, A Categorization Approach to Stereotyping, in Cognitive Processes in Stereotyping and Intergroup Behavior 83, 83 (D.L. Hamilton ed. 1980) (citing G. Allport, The Nature of Prejudice (1954), and Pettigrew, The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice, 5 Pers. & Soc. Psych. Bull. 461 (1979)).

n7 See S. Fiske & S. Taylor, Social Cognition 160-61 (1984); Taylor, supra n.6, at 84-85. The within/between effect in cognitive process is documented in, among other sources, Tajfel, Sheikh & Gardner, Content of Stereotypes and the Inference of Similarity Between Members of Stereotyped Groups, 22 Acta Psychologica 191 (1964); Campbell, Enhancement of Contrast as a Composite Habit, 53 J. Abn. & Soc. Psych. 350 (1956).

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Once people are categorized into such groups, the potential for discrimination arises. Research on ingroup/outgroup effects "consistently demonstrates" when subjects are asked to evaluate their own group and the other group and allocate rewards between the groups, "out group members are evaluated less favorably and given fewer rewards than in group members . . . even when the subject or subject's group do not benefit from depriving or unfavorably evaluating the out group." n8

n8 Taylor, supra n.6, at 84 (citing Hamilton & Gifford, Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments, 12 J. Exp. Soc. Psychology 392 (1976); Wilder, Categorization, Belief Similarity and Intergroup Discrimination, 32 J. Per. & Soc. Psych. 971 (1975); Tajfel & Billig, Familiarity and Categorization in Intergroup Behavior, 10 J. Exp. Soc. Psych. 159 (1974); Billig & Tajfel, Social Categorization and Similarity in Intergroup Behavior, 3 European J. Soc. Psych. 27 (1973); Tajfel, Billig, Bundy & Flament, Social Categorization and Intergroup Behavior, 1 European J. Soc. Psych. 149 (1971)).

An example of this phenomenon has been documented in "resume studies", [*20] in which evaluators were given resumes of job "applicants" that were identical in every respect except the sex of the individual named on the resume; female resumes were consistently rated lower than the sex-neutral or male resumes. n9

n9 See generally Hitt & Zikmund, Forewarned is Forearmed: Potential Between and Within Sex Discrimination, 12 Sex Roles 807 (1985); Rosen, Career Progress of Women: Getting In and Staying In, in Women in the Workforce 70 (H. Bernardin ed. 1982); Heilman, supra n.4, at 281-82; Rosen & Jerdee, Influence of Sex Role Stereotypes on Personnel Decisions, 59 J. App. Psych. 9 (1974). The resume studies have been replicated under field and laboratory conditions with subjects of all ages and levels of accomplishment.

In other words, even where all things are equal, evaluators tend to discount the accomplishments of women precisely because the accomplishments are those of women. The stable expectation, in the workplace, is that men succeed because of skill and fail because of bad luck or lack of effort and that women succeed because of luck or effort and fail because of lack of ability. n10 That is, men are credited for success and women [*21] are blamed for failure; men are assumed to be capable and women must prove themselves repeatedly. n11

n10 See K. Deaux, The Behavior of Women and Men (1976); Hansen & O'Leary, Actresses and Actors: The Effect of Sex on Causal Attributions, 4 Basic and Applied Soc. Psych. 209 (1984); Deaux, Sex: A Perspective on the Attribution Process, in New Directions in Attribution Research (J. Harvey, W. Ickes & K. Kidel eds. 1976).

n11 The tendency to stereotype is increased where the target of the stereotyping is a token, i.e. comprises fifteen to twenty-five percent or less of the relevant group, and evaluations are more extreme in such circumstances. See

R. Kanter, Men and Women of the Corporation 206–42 (1977); Crocker & McGraw, What's Good for the Goose is Not Good for the Gander, 27 Am. Behav. Scientist 357 (1984); Heilman, The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool, 26 Org. Behav. and Hum. Perf. 386 (1980); Taylor, supra n.6, at 89–98; Spangler, Gordon & Pipken, Token Women: An Empirical Test of the Kanter Hypothesis, 84 Am. J. Soc. 160 (1978); Wolman & Frank, The Solo Woman in a Professional Peer Group, 45 Am. J. Orthopsychiatry 164 (1975);.

[*22]

The implications of these research results are that impermissible sex–based factors are likely to block the attempts of women like Ann Hopkins to advance in careers from which women have previously been excluded. The effect is not just attributable to categorization and ingroup/outgroup dynamics, however. Sex–based categories are heavily laden with extensive social meanings and that baggage becomes applied when an individual is categorized based upon sex. n12 Despite the apparent fluidity of sex role definitions in contemporary society, the social science research demonstrates a notable consistency in the different traits, characteristics and behaviors considered appropriate and desirable in men and women.

n12 See Fiske & Taylor, supra n. 7, at 139–189; Taylor, supra n. 6.

Studies show that overall, women are expected to be passive, nurturing, and emotive and not to be aggressive, egotistical and competitive. Men, on the other hand, are expected to possess what is referred to as the "competency cluster of traits," e.g. independence, ambition, competitiveness, and control. n13 Research reveals that as women have moved into such traditionally "male" fields as [*23] law, accountancy and management consulting, there is a degree of acceptance of women as competent, strong and professional, but only so long as they continue to display the traits of the stereotypically female "warmth–expressiveness cluster". n14 The research also shows that when women violate traditional sex role expectations, others tend to react negatively. Feelings of disappointment, irritation and anger are common responses to those who do not conform. n15 Interestingly, men have a wider latitude of acceptable traits and behaviors than do women n16, particularly in the workplace. The men who have risen to the top of corporate America are described by those who work under them and by the media, as everything from "mild mannered" n17 to "manag[ing] by intimidation". n18

n13 Ruble, Sex Stereotypes: Issues of Change in the 1970s, 9 Sex Roles 397 (1982); Broverman, Vogel, Broverman, Clarkson & Rosenkrantz, Sex Role Stereotypes: A Current Appraisal, 28 J. of Soc. Issues 59 (1972).

n14 Broverman, supra n.13; A. Morrison et al., supra, n.5, at 54–56.

n15 N. Henley, Body Politics 197 (1977); V. Nieva & B. Gutek, supra n.4, at 76.

n16 E. Schur, supra n.4, at 134.

n17 "A Humble Hero Drives Ford To The Top," Fortune, January 4, 1988 at 23, describing the Chairman of the Ford Motor Company.

n18 "How Tom Mitchell Lays Out The Competition," Fortune, March 30, 1987 at 91, describing the President of Seadate Technology. In an article describing some of the country's most prominent male executives, such as General Electric's Chairman, Simon & Schuster's President and Gulf & Western's Chief Executive Officer, Fortune Magazine wrote, "[i]f you want to know how tough they can be, ask the people who work for them – the subordinates who have to put up with ego–shredding, criticism, insatiable demands, and Wagnerian fits of anger." "The Toughest Bosses in America," Fortune, August 6, 1984 at 18.

[*24]

Some of these points were brought out in Dr. Fiske's testimony. But this knowledge is not the province only of social scientists. People who care about the problems of inequality or the loss of human capital when managerial decisions are based upon sex (or race) rather than actual ability or performance are instinctively aware of the dynamics of sex stereotyping. Moreover, sex stereotyping is preventable; it is possible to perceive and judge others, even tokens, based upon their individual characteristics and behavior rather than through the prism of their sex. Caring, taking time and paying attention to tangible performance requirements and actual performance, not generalized, ambiguous characteristics such as those used by Price Waterhouse, helps. Being aware of one's own thought–processes and staying alert for evidence of sex stereotyped thinking — the tell–tale words, phrases and concepts prevalent in Price Waterhouse's partners' discussions of Ann Hopkins' candidacy — also curtails stereotyped decision–making. n19 Finally, as the proportion that any minority

represents in a larger group increases, the pressures to stereotype diminish.

n19 See generally S. Fiske & S. Taylor, supra n.7, at 139–81; Fiske & Neuberg, A Continuum of Impression Formation from Category–Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation, in 23 Advances in Experimental Interpretation (M. Zanna ed. 1988); Heilman, supra n.4, at 289–92; Ruble, Cohen & Ruble, Sex Stereotypes: Occupational Barriers for Women, 27 Am. Behav. Scientist 339 (1984).

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I. The Record is Replete with Evidence of Intentional Sex Discrimination, Both Direct and Circumstantial.

Ann Hopkins was an exceptionally well–qualified partnership candidate. "None of the other candidates considered for partnership in 1983 had generated more business for Price Waterhouse than plaintiff." *Hopkins v. Price Waterhouse, 825 F.2d 458, 462 (D.C. Cir. 1987)* (citing *Hopkins, 618 F. Supp 1109, 1112 (D.D.C. 1985))*. "She billed more hours than any of the other candidates under consideration." Id. The clients whom she served liked her work. See *Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985)*.

Yet, the comments by the evaluating partners show that their focus was on her gender, not her business acumen. Her critics and supporters alike couched their evaluations of her in gender specific terms. It was said that "she . . . over–compensated for being a woman," and that she "had matured from a . . . somewhat masculine . . . mgr. [manager] to [a] . . . much more appealing lady partner candidate." *Id. at 1116–1117*. One partner described her as "macho." *Id. at 1117*. [*26]

It is clear from the record that Hopkins' perceived deficiencies lay in her failure to conform to sex–based behavioral stereotypes. Ann Hopkins was evaluated as a "lady partner candidate," according to standards applicable only to female candidates. She was a "tough–talking," "formidable" woman whose use of "foul language" was offensive only because, as one partner explained, "it's a lady using foul language." Id. She was explicitly told, by a partner who conveyed the information as to why her partnership consideration was deferred and how she might do better, n20 to "walk more femininely, talk more femininely, dress more femininely, wear make–up, have her hair styled, and wear jewelry." Id. Therefore, she was evaluated according to standards applicable only to female candidates.

n20 That many of the obviously sex stereotyped comments about Ann Hopkins quoted in the District Court's opinion were made by her supporters, rather than her detractors, does not mean that Hopkins' gender was not a significant factor in Price Waterhouse's refusal to promote her. The comments by Hopkins' staunchest supporters demonstrate their awareness that Hopkins' nonconformity to the stereotype of the "acceptable" female was working against her and that she was being held to a different standard of behavior than male partnership candidates. Her supporters understood that if she conformed to sex stereotypes, she might be accepted. That her supporters were aware that Ms. Hopkins was judged according to gender specific standards and that they advised her to comply with those standards does not, erase the discrimination upon sex, as Judge Williams, dissenting from the court of appeals decision, erroneously concluded; it compounds it. See *Connecticut v. Teal, 457 U.S. 440 (1982)* (holding that discrimination in a decision process is not eliminated by an apparently nondiscriminatory outcome).

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Such evidence is more than sufficient to establish a case of intentional discrimination based largely on direct evidence, not on inferences. The discriminatory process to which Hopkins was subjected was not an isolated event. In fact, the sex–based comments made about her were "part of the regular fodder of partnership evaluations." Id. Female candidates for partnership had previously been denigrated for their feminist politics and their unfeminine manners. Id. One partner categorically refused to consider any woman seriously for partnership and "believed that women were not even capable of functioning as senior managers." Id. Discriminatory intent is also evident from the history of sex–segregation in the job, n21 and the use of a male dominated subjective promotion process that credited biased evaluations and was consciously retained by the company despite evidence that it was tainted by sex stereotypes. Id. n22

n21 The fact that Anne Hopkins was the only woman among 88 candidates and was being evaluated for partnership by an organization having 662 male and partners and only seven female partners demonstrates the overwhelming historical sex–segregation in this professional milieu.

n22 As the district court noted, "whenever a promotion system relies on highly subjective evaluations of candidates by individuals or panels dominated by members of a different sex . . . such procedures must be closely

scrutinized because of their capacity for masking unlawful bias." *Hopkins, 618 F. Supp. 1109, 1119* (quoting *Davis v. Califano 613 F.2d 957, 965 (D.C. Cir. 1979))*. See also, *Coble v. Hot Springs School District No. 6, 682 F. 2d 721, 726 (8th Cir. 1982)*.

[*28]

Finally, the testimony of Dr. Fiske established discrimination. Dr. Fiske examined the record created in connection with Price Waterhouse's partnership decision-making. She found all of the antecedent conditions that, according to the research, strongly indicate that stereotyping is likely to take place -- rarity of the target, selectivity of perception and memory by the target's evaluators, extremely negative reactions and broad overgeneralizations by her detractors, to name only a few factors. She also found the factor most obvious to the lay observer - the extensive discussions referring to Hopkins' sex. Finally she found no factors indicating that the influences of stereotypes would be avoided in the ultimate outcome. Based upon these indicators, she concluded that sex stereotyping was important in Price Waterhouse's decision about Ann Hopkins' candidacy. See Fiske Testimony. The court accepted this testimony. n23 Thus the promotion process itself was "impermissibly infected by sexual stereotypes." *Hopkins v. Price Waterhouse, 825 F.2d 458, 468 (D.C. Cir. 1987)*.

n23 Dr. Fiske is an extremely well-qualified researcher in the field of social cognition including sex stereotyping, trained as well in the research on organizational behavior, the author of numerous articles and a leading text on the subject of social cognition. The methodology applied by Dr. Fiske in reaching that conclusion in this case, grounded as it is in extensive research and drawing from the evidence created in the ordinary course of the subject's daily events without further intrusion by the researcher, is an accepted and respected mode of research in its own right. See E. Webb, D. Campbell, R. Schwartz & L. Sechrest, Unobtrusive Measures: Nonreactive Research in the Social Sciences (1966). The research on stereotypes confirms that where stereotyping is evidenced the stereotyped category, i.e. the sex or race of the target is the causal factor. S. Fiske & S. Taylor, supra n.7, at 138-89. See H. Blalock, Causal Inferences in Nonexperimental Research (1964) (explaining causal analysis in research).

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Such a process in and of itself violates Title VII. n24 To end employers' reliance on outmoded sex stereotypes of the sort present in this case was a primary congressional purpose in enacting Title VII:

Women are subject to economic deprivation as a class . . . Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. . . . The time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities. n25

As this Court stated in City of Los Angeles Department of Water and Power v. Manhart:

Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. . . . [T]he statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.

*435 U.S. at 708-09.* [*30] See also *Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971)* (Marshall, J., concurring) (Title VII does not permit "ancient canards" about women to be a basis for discrimination). n26 Thus, this Court has refused to allow fringe benefits to depend on sex, notwithstanding valid longevity statistics (Manhart); it has refused to permit negative assumptions about women's ability to combine paid work with parental responsibilities to affect employment decisions (Phillips). Consistent with this precedent, there is no basis to permit Price Waterhouse to make promotion decisions in express reliance on stereotypical notions about "ladylike" behavior, especially when such behavior is palpably unrelated to job performance. n27

n24 *Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985)*. In Bibbs, one of the key players in the promotion process was known to utter racial slurs. The court held that "[f]orcing Bibbs to be considered for promotion in a process in which race plays a discernible part is itself a violation of the law, regardless of the outcome of the process." *Bibbs, 778 F.2d at 1322*. See also *Fields v. Clark Univ., 817 F.2d 931, 935-37 (1st Cir. 1987)* (tenure decision found to be impermissibly tainted by "pervasively sexist attitudes"); *Fadhl v. City and County of San Francisco, 741 F.2d 1163* (9th Cir.), aff'd after remand, *804 F.2d 1097 (9th Cir. 1984)* (court held that employer's statements about plaintiff's femininity were evidence that she was held to a different, sex-linked standard and required an initial finding of Title VII liability); *Thorne v. City of El Segundo, 726 F.2d 459, 468 (9th Cir. 1983),* cert denied, *469 U.S. 979 (1984)*

(employer's reference to plaintiff's femininity was found to evince a sex stereotyped view of her physical abilities and was "the kind of invidious discrimination that violates Title VII"); *EEOC v. FLC and Brothers Rebel, Inc., 663 F. Supp. 864 (W.D. Va. 1987)* (court found discriminatory animus in employer's statement that he fired woman bartender for her use of "unladylike language")

In a related context, this Court has held that plaintiff may establish a violation of Title VII by proving that sex discrimination created a hostile or abusive work environment. See *Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).* See also *Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981)* (sexually stereotyped insults and demeaning propositions that poison one's working environment violate Title VII). The very maintenance of a hostile work environment may lead to the conclusion that promotion decisions made in that context were discriminatory. See, e.g., Broderick v. Ruder, No. 86-1834, slip op. (D.D.C. May 13, 1988) (that SEC superiors permitted sexually harassing working conditions to be created and refused to remedy environment compels conclusion that plaintiff lost promotion and job opportunities because of the hostile climate).

n25 H.R. Rep. No. 889, 92d Cong. 2d Sess. 1 (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 2140, 2141 (1972) (Legislative History of the Equal Opportunity Act of 1972).

n26 This Court has in the equal protection context recognized the discrimination inherent in the "baggage of sexual stereotypes" which is used to classify, limit, protect or otherwise needlessly differentiate between men and women, to the historical disadvantage of women as a class. *Orr v. Orr, 440 U.S. 268, 283 (1979); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973).* In *Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984),* this Court noted:

[D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society of the benefits of wide participation in political, economic, and cultural life.

See also *Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).*

n27 Whether Hopkins' personality characteristics could be job-related is not presented by this case, since she clearly was more than capable of performing the significant elements of her job. Nor can the associational interests of the partners create a legitimate reason to deny her advancement, given that Price Waterhouse, a business with over 650 partners, is not an exclusive group. See *Hishon v. King & Spalding, 467 U.S. 59 (1984).* Some of Price Waterhouse's arguments seem to be based on a need to satisfy "customer preference", but in fact Hopkins' customers were well pleased with her services.

[*31]

The courts below designated this a "mixed" or "dual motive case" - one in which the defendant is motivated by both illegal and legal considerations. To the contrary, the proof was that defendant was motivated by only one consideration, plaintiff's gender. As discussed above, plaintiff's personality and personality-related conduct were perceived as inappropriate because of her gender. Neither defendant nor plaintiff nor the court could be expected to isolate defendant's perceptions, recollections and inferences about Hopkins made through the interpretive lens of sex stereotypes from defendant's allegedly non-sex-based subjective reactions to Ms. Hopkins' personality. n28 Moreover, it is virtually impossible fairly to examine Hopkins' conduct without taking into account the discriminatory conditions under which Ms. Hopkins had to perform her job, knowing that her evaluators were using her sex as the basis of their perceptions of and assumptions about her. n29

n28 In a true "dual motive" case, the permissible and impermissible motives are to some degree, separate. For instance, one could imagine a mixed motive case in which the court accepts proof of discriminatory bias and the defendant asserts that its decision was based instead on the fact that the plaintiff embezzled funds in the job. In such a case, the fact that the plaintiff committed a felony is distinct from the proven discriminatory bias. As a factor in job suitedness, it is capable of separate evaluation in a way that an allegation about an individual's personality is not.

n29 See Hamilton, et al., The Emotional Consequences of Gender-Based Abuse in the Workplace, 6 Women and Therapy 155 (1987); Taub, supra n.2, at 357-360.

[*32]

Indeed, if anything, this case is more akin to "sex-plus" cases. In the first "sex-plus" case, Martin Marietta attempted to exonerate its refusal to hire women, but not men, who had preschool aged children by claiming that the burden of women's family responsibilities were its operative motivation. *Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)*. This Court rejected that argument. Price Waterhouse similarly attempts to exonerate its refusal to promote Hopkins on the alleged grounds of her "poor interpersonal skills," where men's interpersonal skills did not block their advancement. This is no more availing.

Assumptions based on the sex of the individual constitute intentional discrimination in its classic form. This is true regardless of the precise nature of the sex-based assumptions, which have taken many forms as the cases demonstrate. Title VII forbids employment decisions that are so tainted.

II. The Direct Evidence of Sex Discrimination Here Establishes Liability Under Title VII and Requires That the Burden Shift to Defendant To Show That No Relief Should Be Granted.

Title VII is violated once race or sex is shown to be a factor in the [*33] employment decision. *International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977)*. This was made clear when the statute was originally proposed: "What this bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment." n30 This showing is sufficient to award plaintiff relief unless the defendant proves that relief would clearly be inappropriate.

n30 Remarks by Senator Humphrey, 110 Cong. Rec. 13,088 (1964). See also remarks by Senator Case, 110 Cong. Rec. 13,837-13,838 (1964).

As demonstrated above, the record was replete with evidence that Price Waterhouse relied on sex-specific behavioral requirements and sex-stereotypical notions of personality characteristics. This evidence alone is sufficient to establish liability under Title VII. Whether Hopkins was entitled to a partnership, or whether there was a wholly independent and separate ground on which its denial can be justified, is another question - one of remedy-as to which the defendant bears the burden of proof.

A. With Direct Evidence of Intentional Discrimination a Title VII Violation is Shown and the Burden of Proof [*34] Shifts

This Court has held that proof of discriminatory motive "change[s] the position of the employer to that of a proved wrongdoer." *Teamsters, 431 U.S. at 360 n.45*. This occurs without any inquiry into the qualifications of a particular individual for a particular position, n31 which is solely relevant to the question of remedy. The initial "liability" determination turns on evidence of discriminatory conduct. n32 Once discrimination has been found, an individual plaintiff or class member enjoys "a rebuttable presumption in favor of individual relief," *Teamsters, 431 U.S. at 359 n.45,* and the burden shifts to the "employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id. at 362*. n33

n31 The Teamsters opinion notes that the absence of individual injury flowing from discriminatory conduct is a question not relating to liability but to relief. *Id. at 344 n.24*.

n32 Bifurcated proceedings as to liability and remedy are often held in Title VII cases.

n33 This burden cannot be satisfied simply by asserting that the best qualified candidates had been hired. *Teamsters, 431 U.S. at 344 n.24*. Likewise, in constitutional cases this Court has found "simple protestations" that discrimination did not affect the result "insufficient." *Castaneda v. Partida, 430 U.S. 482, 498 n.19 (1977)*. Accord *Alexander v. Louisiana, 405 U.S. 625, 632 (1972)*. See point IIc infra.

[*35]

The shift of the burden of persuasion is appropriate: n34 proof of discriminatory motive radically alters the position of the Title VII defendant to that of a "proved wrongdoer." By separating the issue of liability from that of relief, as this Court has traditionally done in Title VII cases, it becomes possible to adjust the burden on the defendant in accord with its changed status. Proof of bias creates liability and a presumption in favor of relief. It does not automatically compel a specific remedy in an individual instance, but the employer does and should bear a heavy burden to prove that the applicant or employee who was subjected to a discriminatory practice did not actually suffer as a result. n35

n34 Similarly, this Court has approved separating the question of liability from that of remedy in individual

cases under Title VI and the equal protection clause, *Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978)* (Powell, J., for the Court) (whether Bakke would have been admitted goes to the issue of relief, not liability), and under the due process clause, *Carey v. Piphus, 435 U.S. 247, 266 (1978)* (the right to due process is "absolute" and "does not depend upon the merits of a claimant's substantive assertions").

n35 Especially in this situation, there is "[n]o reason . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." *Franks v. Bowman Transp. Co., 424 U.S. 747, 773 n.32 (1976).*

[*36]

Similarly the difficulty of separating illegal from legal motives is a burden which the defendant, as wrongdoer, should properly bear. As this Court has explained:

The employer is a wrongdoer, he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was not created by innocent activity but by his own wrong-doing.

*NLRB v. Transportation Management Corp., 462 U.S. at 403 (1983)* (construing National Labor Relations Act). See also *League of United Latin American Citizens v. City of Salinas Fire Dep't, 654 F.2d 557, 559 (9th Cir. 1981)* (Title VII); *King v. Trans World Airlines, 738 F.2d 255, 257 (8th Cir. 1984)* (Title VII).

Requiring plaintiff to prove more than the presence of discrimination in the employment process to establish liability would undermine the purposes of Title VII. As Justice Scalia noted in *Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983):* "[I]t is unreasonable and destructive of the purposes of Title VII [*37] to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor."

In fact, Congress specifically rejected an amendment which would have imposed this impossibly heavy burden on plaintiff. n36 110 Cong. Rec. 13,838 (1964). In analogous contexts, this Court has approved shifting the burden to the employer to show that the same decision would have been reached absent discrimination "when there is a proof that a discriminatory purpose has been a motivating factor in the decision. . . ." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977).* In such a case, "judicial deference is no longer justified." Id.

n36 Congress rejected an amendment that would have required a plaintiff to show that a prohibited basis was "solely" the basis for an adverse employment decision. 110 Cong. Rec. 13, 837 (1964) (Amendment proposed by Senator McClellan; Senator Case explaining that proposed amendment would render Title VII "nugatory").

While the Court has occasionally described Title VII proof in terms of a "but for" test, e.g., *McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976),* this language has to be read in light of the fact that Congress explicitly rejected the proposed amendment.

[*38]

Some decisions appear to require a showing that an unlawful motive was a "substantial" factor in the challenged decision before shifting the burden to the defendant to prove that the "same decision" would have been reached anyway. n37 These are constitutional cases in which the burden on the plaintiff is concededly greater than in the Title VII context n38. Even in constitutional challenges, however, this approach has not been consistently followed, n39 and it is inappropriate, in discrimination cases, to attempt to quantify or calibrate the amount of discrimination and then determine how much is unlawful, before shifting the burden to defendant. This Court has explained:

"[I]nvidious discrimination does not become less so because the discrimination is a lesser magnitude. Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced choice or it is not."

*Personnel Adm'r of Mass. v. Feeney, 447 U.S. 256, 277 (1979)* (footnote omitted).

n37 See, e.g., *Hunter v. Underwood, 471 U.S. 222, 228 (1985)* (equal protection); *Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977)* (first amendment).

n38 Cf. *Washington v. Davis, 426 U.S. 229 (1976); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979)*

n39 Compare, e.g., *Carey v. Piphus, 435 U.S. 247, 266 (1978).*

[*39]

The approach adopted in Teamsters avoids the calibration problem and best effectuates the intent of the Title VII drafters to eradicate employment discrimination in all its manifestations. It recognizes that proof of discrimination, in and of itself, constitutes a cognizable injury for which liability attaches. See also *Heckler v. Mathews, 465 U.S. 728 (1984)*. Although a presumption in favor of make whole relief arises, defendant may nonetheless prove that the discrimination did not cause the specific injury complained of, and that the specific make whole relief requested is not warranted. This formulation derives directly from authoritative Title VII caselaw and is consistent with caselaw in analogous areas involving discrimination; it provides a clear, uniform, familiar, and workable analysis for "mixed motive" situations; and it would provide the same degree of statutory protection to plaintiffs in this category of cases as has traditionally been enjoyed by other Title VII plaintiffs.

B. The Burden-shifting Formulation of Burdine and McDonnell Douglas is Inappropriate Here.

The petitioner incorrectly asserts that the burden-shifting [*40] approach in cases such as *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981),* and *McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973),* is appropriate here. That analysis applies where plaintiffs, in order to establish a prima facie case, rely on circumstantial evidence supporting an inference of discrimination. As explained in *Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978),* the prima facie case "raises an inference of discrimination only because we presume that these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Thus, the Court said in *Burdine, 450 U.S. at 255 n.8,* that the "allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Proof of discriminatory motive is the endpoint contemplated by the Burdine analysis. In this case, Hopkins proved through direct evidence that Price Waterhouse considered her gender in evaluating her candidacy for [*41] promotion. Under Burdine and Furnco, she thus satisfied her ultimate burden, and the kind of defense those cases contemplate was no longer available.

This Court has held squarely that the burden shifting formula set forth in McDonnell Douglas is "inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)*. "The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that 'the plaintiff [has] his day in court despite the unavailability of direct evidence'" Id. (citation omitted).

The Burdine formula was not meant to be a "Procrustean bed within which all disparate treatment cases must be forced to lie." *Bell v. Birmingham Linen Services, 717 F.2d 1552, 1556 (11th Cir. 1983),* cert. denied, *467 U.S. 1204 (1984)*. See also *United Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983)* (quoting *Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)* (citations omitted) ("the prima facie case method established in McDonnell Douglas was [*42] 'never intended to be rigid, mechanized, or ritualistic'")).

The Courts of Appeals have uniformly recognized the inapplicability of the Burdine approach in cases presenting direct evidence of discrimination. For instance, in *Bell v. Birmingham Linen Services., 715 F.2d 1552 (11th Cir. 1983),* cert. denied, *467 U.S. 1204 (1984),* the Eleventh Circuit noted:

If the evidence consists of direct testimony that the defendant acted with discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. Defendant cannot refute this evidence by mere articulation of other reasons; the legal standard changes dramatically.
*Id. at 1557*. This approach has been widely endorsed. n40

n40 *Terbovitz v. Fiscal Court of Adair County, Ky., 825 F. 2d 111, 114-5 (6th Cir. 1987)* ("The McDonnell Douglas formula is inapplicable . . . to cases in which the . . . plaintiff presents credible, direct evidence of discriminatory animus."); *Goodman v. Lukens Steel, 777 F.2d 113, 130 (3rd Cir. 1985),* aff'd, *U.S. , 107 S.Ct. 2617 (1987)* ("The presumptions and shifting burdens are merely an aid - not ends in themselves. When direct evidence is available, problems of proof are no different than in other civil cases."); *Miles v. MNC Corp, 750 F.2d 867, 875 n. 9 (11th Cir. 1985)* (quoting *Lee v. Russell County Board of Education, 684 F.2d 769, 774 (11th Cir. 1982)* (where the evidence consists, as it does here, of direct testimony that defendants acted with a discriminatory motivation, "if the trier of fact believes the prima facie evidence, the ultimate issue of discrimination is proved, no inference is required.")); *Lewis v. Smith, 731 F.2d 1533, 1537-1538 (11th Cir. 1984)* (where discriminatory intent has been proved by direct evidence, the ultimate issue is proved); *Muntin v. State of California Parks and Recreation Department, 671 F.2d 360, 363 (9th Cir. 1982),* aff'd, *738 F.2d 1054 (1984)* (where plaintiff proves discriminatory animus by direct evidence, "this . . . not only permits, but compels an inference [of discrimination].

That being so, there is no need, for the purpose of deciding whether a Title VII violation has occurred, to consider the explanations which an employer might claim . . . . No such explanation could be sufficient, as a matter of law, to justify a judgment that unlawful discrimination did not occur."); *Loeb v. Textron, 600 F.2d 1003, 1014 (1st Cir. 1979)* (Burdine approach is inapplicable where plaintiff relies on direct evidence of discrimination).

[*43]

Price Waterhouse's characterization of this as a "mixed motive" case does not make the Burdine formula any more applicable. n41 As the Eleventh Circuit noted in Bell, it would be "illogical" and "ironic" if direct evidence of motive or conduct forbidden by Title VII could be negated by the mere articulation, not proof, that the employment decision was undertaken for permissible reasons. n42 In almost every circuit, once plaintiff proves by direct evidence the presence of discrimination, the burden is placed on the defendant to prove that a remedy should not be required. n43

n41 That Burdine did not contemplate the so-called "mixed-motive" case is obvious. In Burdine, as this Court discussed in an analogous context, "the question was who had '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff . . . .' The Court discussed only the situation in which the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." *NLRB v. Transportation Management Corp., 462 U.S. 393, 400 n. 5 (1983)* (citation omitted). See also, *Bibbs v. Block, 778 F.2d 1318, 1320-21 (8th Cir. 1985).*

n42 In addition, this allocation of the burden is in accord with the principle of placing upon a party the burden of proving facts peculiarly within its own knowledge. *United States v. New York, N.H. & Hartford R.R., 355 U.S. 253, 256 n.5 (1957).* See also C. McCormick, Evidence, § 337 (1984).

n43 Whether or not the inquiry is separated into liability and remedy phases, the burden shifts to defendant to prove that the plaintiff is not entitled to relief. See, e.g., *Fields v. Clark University, 817 F.2d 931 (1st Cir. 1987); Haskins v. United States Dept of the Army, 808 F.2d 1192* (6th Cir.), cert. denied, *108 S.Ct. 68 (1987). Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); Smallwood v. United Airlines, Inc., 728 F.2d 614* (4th Cir.), cert. denied, *469 U.S. 832 (1984); Fadhl v. City and County of San Francisco, 741 F.2d 1552 (9th Cir. 1984); Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983),* cert. denied, *467 U.S. 1204 (1984); Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976);* But see *McQuillen v. Wisconsin Education Ass'n Council, 830 F.2d 659 (7th Cir. 1987),* cert. denied, *108 S.Ct. 1068 (1988), Lewis v. University of Pittsburgh, 725 F.2d 910* (3rd Cir.), cert. denied, *469 U.S. 892 (1984).*

[*44]

C. Where the Plaintiff has Proved that the Employment Decision Was Tainted by Discrimination, The Purposes of Title VII Can Be Served Only by Requiring the Defendant to Meet a Clear and Convincing Evidentiary Standard.

The twin goals of Title VII — deterring illegal conduct by employers and affording employees make whole relief — are aptly served by requiring a defendant, upon a showing by direct evidence of discriminatory intent, to show by clear and convincing evidence that the plaintiff would have suffered the challenged adverse employment action even absent discrimination. Title VII was "intended to strike at the entire spectrum of disparate treatment." *City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978).* See also *McDonnell Douglas Corp. v. Green, 411 U.S. at 801:* "Title VII tolerates no . . . discrimination, subtle or otherwise." The primary thrust of Title VII is to "eradicat[e] discrimination throughout the economy and [to make] persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).*

Title VII's protection [*45] is a narrow but stringent prohibition against discrimination based on certain immutable characteristics ennumerated as prohibited bases in the statute, in one and only one context — that of employment. Because it narrowly focuses solely on the employment context, in contrast to the broader sweep of the equal protection clause which reaches the full range of employment and nonemployment government action, this Court and Congress have recognized that it is appropriate to place more stringent requirements on the defendant employer under Title VII than under the equal protection clause. n44 Title VII's remedial and deterrent purposes are best served by imposing a clear and convincing evidentiary standard on defendants who have acted illegally. "By making it more difficult for employers to defeat successful plaintiffs' claims . . . the higher standard of proof might well discourage unlawful conduct by employers." *Toney v. Block, 705 F.2d at 1373* (Tamm, J., concurring).

n44 Compare *Washington v. Davis, 426 U.S. 229 (1976)* (equal protection does not reach neutral action with discriminatory effect without a showing of intent) with *Griggs v. Duke Power Co., 401 U.S. 424 (1971)* (liability

in Title VII may be imposed upon a showing of discriminatory impact; explicit discriminatory intent need not be proved); compare *Geduldig v. Aiello, 417 U.S. 484 (1974)* (employment discrimination against pregnant women does not violate the equal protection clause) with Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (amending Title VII to define pregnancy discrimination as sex discrimination).

[*46]

A preponderance of the evidence standard is appropriate only where the interests of the parties are balanced and it is just that they share equally the "risk of error." *Herman and MacLean v. Huddleston, 459 U.S. 375, 390 (1983)*. See also *Addington v. Texas, 441 U.S. 418, 423 (1979)*. However, where the interests weigh more heavily in favor of one party, the more stringent clear and convincing evidence standard must be imposed. *Huddleston, 459 U.S. at 389*.

The interest of an employee not to be harmed in his or her ability to make a livelihood because of his or her race, sex, national origin or religion is far superior to the interest of an employer to make employment decisions based upon such prohibited characteristics. See *Hishon v. King & Spalding, 467 U.S. 59, 68-69 (1984)*. Once the defendant in a Title VII case has been proved to engage in discriminatory conduct, it is only fair and equitable that such a "proved" wrongdoer should bear the lion's share of the risk of error: "The higher standard of proof is justified by the consideration that the employer is a proved wrongdoer whose unlawful conduct [*47] has made it difficult for the plaintiff to show what would have occurred in the absence of that conduct." *Toney v. Block, 705 F.2d 1364, 1373 (D.C. Cir. 1983)* (Tamm, J., concurring). As noted by the D.C. Circuit in *Day v. Mathews, "[i]t is now impossible for an individual discriminatee to recreate the past with exactitude . . . because of the employer's unlawful action; it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem." 530 F.2d 1083, 1086 (D.C. Cir. 1976)* (citation omitted).

This standard is routinely applied to defendants in a number of circuits. The D.C. Circuit was the first to apply it in *Day v. Mathews, 530 F.2d 1083 (D.C. 1976)*. In Day, the plaintiff proved discrimination by circumstantial evidence and sought retroactive relief. The defendant did not contest the finding of discrimination on appeal. The Court placed the burden on the employer to defeat plaintiff's claim for retroactive relief and required the employer to meet a clear and convincing evidentiary standard because of both the deterrent and make whole purposes of Title VII. *Id. at 1086.* [*48] n45

n45 For a fuller explication of Day v. Mathews as interpreted by the U.S. Court of Appeals for the District of Columbia, see *Milton v. Weinberger, 696 F.2d 94, 97-99 (D.C. Cir. 1982)*. See also *Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981)* (where discriminatory work environment is shown, burden shifts to employer to show by clear and convincing evidence that particular employment action was not the result of discrimination). But see *Johnson v. Brock, 810 F.2d 219, 224 (D.C. Cir. 1987)* (Day applies only after plaintiff has established a statutory violation with respect to the particular position for which retroactive relief is sought); *Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983)* (same).

Here, plaintiff has shown by direct evidence that discrimination played a significant role in the decision not to promote her. See pp. 22-29 supra. Accordingly, plaintiff's proof is considerably more substantial than that presented in *Toney v. Block, 705 F.2d 1364 (D.C. Cir. 1983)*. In Toney, the district court found that race was not a factor in the promotion decision at issue. Plaintiff showed only that race played a role in another employment context which plaintiff argued might have influenced the promotion decision. *Id. at 1365*.

[*49]

The Ninth Circuit also applies this standard to employers at the remedy stage of litigation. See, e.g., *Muntin v. State of Cal. Parks and Recreation Dep't, 671 F.2d 360, 362-63 (9th Cir. 1982),* aff'd, *738 F.2d 1054 (9th Cir. 1984); Marotta v. Usery, 629 F.2d 615, 618 (9th Cir. 1980)*. In the Ninth Circuit once plaintiff has established initial liability by proving by direct evidence that discrimination played a significant factor in the adverse employment decision, she is entitled to prospective relief. Retroactive relief is forthcoming unless the defendant shows by clear and convincing evidence that the same decision would have been reached absent the discrimination. The Fourth and Eleventh Circuits have imposed a clear and convincing evidence standard on defendants who have an immediate or recent past history of discrimination. See, e.g., *Gilchrest v. Bolger, 733 F.2d 1551, 1554 (11th Cir. 1984); Knighton v. Laurens County School Dist., 721 F.2d 976 (4th Cir. 1983)*. The Fourth Circuit has also established clear and convincing evidence as the appropriate standard where plaintiff proves [*50] discrimination by direct evidence. *Patterson v. Greenwood School District 50, 696 F.2d 293 (4th Cir. 1982)*. In Patterson, the plaintiff produced evidence of sex stereotyping in the decision not to promote her to principal. *696 F.2d at 294*. n46 As in the Ninth and D.C. Circuits, this burden is applied to defendant at the remedy stage of litigation, once

liability for injunctive relief has been imposed. n47 See also *Price v. Denison Independent School Dist., 694 F.2d 334, 376 n. 78 (5th Cir. 1982)* (application of clear and convincing evidence standard in Fifth Circuit). n48

n46 The district court based its finding of discrimination in part on the subjective and male dominated selection procedure and evidence that the committee was searching for a candidate who fit a male stereotype. Plaintiff was penalized in the process for her "nervousness," "high-pitched voice" and "over-domineering personality." *Patterson, 696 F.2d at 294.*

n47 Similarly, in class action discrimination cases, several circuits have held the employer as a proven wrongdoer to a clear and convincing evidence standard to rebut a showing of entitlement to relief. See, e.g., *Cox v. American Cast Iron Pipe Co., 784 F.2d 1546,1561 (11th Cir. 1986),* cert. denied, *U.S. , 107 S. Ct. 274 (1986); McKenzie v. Sawyer, 684 F.2d 62, 77 (D.C. Cir. 1982); League of United Latin American Citizens v. City of Salinas, 654 F.2d 557, 558 (9th Cir. 1981); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 444* (5th Cir.) cert. denied, *419 U.S. 1033 (1974).*

n48 Only two circuits explicitly reject the clear and convincing evidence standard in Title VII cases involving direct evidence of discrimination. *Fields v. Clark University, 817 F.2d 431, 437 (1st Cir. 1987); Craik v. Minnesota State University Board, 731 F.2d 465, 470 n.8 (8th Cir.1984).* The preponderance of the evidence standard has been applied elsewhere, but with no discussion of the reason for its use instead of the clear and convincing evidentiary standard.

[*51]

Finally, clear and convincing evidence is required of defendants in actions before the EEOC. See EEOC Remedial Actions, 29 C.F.R. 1613.271 (1980). The guidelines, while not controlling upon the courts, "do constitute a body of experience and informed judgment to which courts and litigants properly resort for guidance." *Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)* (quoting *General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).*

Price Waterhouse was properly held to a clear and convincing evidentiary standard in this case. Plaintiff proved by direct evidence that discriminatory bias played a significant role in the decision not to promote her to the position for which retroactive relief was sought. Defendant's status was therefore elevated to proved wrongdoer. In order to avoid liability for make-whole relief, it was appropriately obligated to prove that it would have made the "same decision" absent bias by clear and convincing evidence.

## CONCLUSION

Accordingly, this Court should affirm the decision below and remand for further proceedings consistent with that judgment.

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APPENDIX

Statements of Interest of Amici Curiae

The American Association of University Women ("AAUW") [*53] a national organization of over 150,000 college-educated women and men, is strongly committed to promoting and achieving legal, social, educational and economic equity for women. For more than a century AAUW has worked toward those goals by responsible participation in public policy issues at local, state, national and international levels. AAUM supports constitutional protection for the rights of all individuals and opposes all forms of discrimination. Therefore, AAUW has a strong interest in the outcome of this case.

The American Civil Liberties Union ("ACLU") is a nationwide union, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to work towards the elimination of the pervasive problem of gender-based discrimination. It has participated, both directly and as amicus curiae, in the litigation of many cases before the Supreme Court and other courts challenging sex discriminatory practices.

The Employment Law Center, a project of the Legal Aid Society of San Francisco, is a private non-profit public interest law firm [*54] which specializes in employment discrimination. Founded in 1916 to represent individuals unable to afford legal counsel, the Employment Law Center is dedicated to the eradication of all forms of employment discrimination. In the area of sex discrimination, the Employment Law Center has filed amicus curiae briefs in several cases, including California Federal Savings & Loan Association v. Guerra; Rotary Club of Duarte v. Board of Directors of Rotary International; Wygant v. Jackson Board of Education; and Meritor Savings Bank, FSB v. Vinson.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. ERA has been particularly concerned with gender equality in the work force because economic independence is fundamental to women's ability to gain equality in other aspects of society. If sex-role stereotyping may be used to exclude women from full participation in the marketplace, the dream of equality will never [*55] be realized.

The Institute for Research on Women's Health ("IRWH") is the co-sponsor of Sexual Harassment and Employment Discrimination Against Women, a consumer handbook for women who are the victims of employment discrimination. The IRWH also sponsors a project called "WAGES" (Women's Action for Good Employment Standards), which provides support to victims of gender-related abuse in the workplace.

The National Bar Association, Women Lawyers Division, founded in 1925, is a professional membership organization which represents more than 10,000 Black attorneys, judges and law students. Its purposes include protecting the civil and political rights of all citizens. The NBA, through its Women Lawyers Division, has been actively involved in issues concerning equal employment opportunity. The Greater Washington Area Chapter is particularly dedicated to addressing the needs of women in the Washington, D.C. metropolitan area.

The National Coalition for Women's Mental Health is an interdisciplinary organization established in 1985 to promote a women's health agenda. Our membership includes researchers who have contributed to the research literature that has documented the pervasiveness [*56] of gender stereotyping in the workplace, and the resulting evaluation bias that detracts from the recognition of women's achievements. Its Employment Task Force has focused on mental health effects of gender stereotyping and sex discrimination in the workplace. Along with the Institute for Research on Women's Health, the Coalition co-sponsored the consumer handbook, Sexual Harassment and Sexual Discrimination Against Women. The Coalition is honored to sign on to the women's group amicus brief in this case.

The National Conference of Women's Bar Associations (NCWBA) is a non-profit professional organization of approximately 98,000 male and female attorneys. Membership is open to all individual state, regional, and local women's bar associations. The NCWBA was formed in 1981 to promote the highest standards of the legal profession, to advance justice, to promote and protect the interests and welfare of women, and to pursue these goals through appropriate legal, social, and political action. Sexual discrimination as well as sexual harassment against women in the workplace is a common occurrence which hinders their full career development and advancement. The NCBWA supports [*57] efforts to assure that every woman be given the opportunity to enjoy a working environment free from sex discrimination.

The National Organization for Women ("NOW") is a national membership organization of approximately 160,000 women and men in over 700 chapters throughout the country. It is a leading advocate of women's equality in all areas of

life. NOW has as one of its priorities the elimination of sex-based discrimination in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for long standing discrimination against women and minorities.

The Northwest Women's Law Center is a private non-profit organization in Seattle, Washington, that works to advance the legal rights of women through litigation, education, legislative advocacy, [*58] and providing information and referrals to women with legal problems. One of the Law Center's priority issue areas is the elimination of sex discrimination in employment. The Law Center has participated in several cases involving sex discrimination in employment before the U.S. Supreme Court including California Federal Savings & Loan Association v. Guerra and Hishon v. King and Spalding.

The NOW Legal Defense and Education Fund ("NOW LDEF") was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The Organization of Pan Asian-American Women ("Pan Asia") is the oldest public policy oriented organization focused on concerns of Asian and Pacific Islander women in the United States. Founded in 1976, Pan Asia is [*59] a national, non-profit organization composed of Filipino, Chinese, East Indian, Japanese, Korean, Vietnamese, Pacific Islander, and other American women of Asian descent. Pan Asia seeks to insure full participation of Asian-Pacific American women in all aspects of American society, particularly in those areas where traditionally excluded or underrepresented. Asian-Pacific American women experience the double discrimination of sex and race stereotyping. Pan Asia is particularly concerned about the "glass ceiling" phenomenon as it applies to both sex and race job promotions in professional fields.

The San Francisco Women Lawyers Alliance is a bar association comprised of women lawyers and other legal professionals in the San Francisco Bay Area. The organization has filed a number of amicus briefs and lobbied for state and local legislation affecting economic and employment opportunities for women and equal access to the courts. The Alliance is committed to the principle that employment decisions should be based on legitimate job related criteria and not on gender, including sex stereotyping.

Nadine Taub is the Director of the Women's Rights Litigation Clinic and a Professor [*60] of Law at Rutgers Law School in Newark, New Jersey. She has litigated extensively in the areas of reproductive rights, sexual harassment and equal protection generally. Professor Taub is the author of Keeping Women In Their Place: Stereotyping Per Se As a Form of Employment Discrimination, *21 B.C.L.Rev. 345 (1980)*.

The Women's Bar Association of the District of Columbia is an organization of approximately 1600 women and men in the legal profession, including many members who are partners or who aspire to become partners in law firms. As a group committed to the advancement of women as attorneys and judges, the Association believes that equal criteria should apply to all candidates for promotion. The eradication of sex stereotypes from these decisions is essential to such progress.

The Women's Bar Association of Massachusetts is an organization of 1000 members which was founded in 1978 to promote the professional advancement of women attorneys and to address the problems that women attorneys face in their profession and in the workplace. The organization also protects and promotes the interests of women generally. The WBA submits this brief in support of affirmance [*61] because of WBA's profound concern with the prevalence of sex discrimination in the workplace. The WBA's participation in Meritor Savings Bank, FSB v. Vinson, and Hishon v. King & Spaulding reflects WBA's view that Title VII, and the application of the correct burdens of proof in Title VII cases are essential to eliminating all vestiges of sex discrimination from the workplace.

The Women's Equity Action League (WEAL), was founded in 1972 as a national, non-profit membership organization specializing in economic issues affecting women. WEAL sponsors research, education projects, litigation and legislative advocacy. WEAL is committed to the full and effective enforcement of antidiscrimination laws at both the federal and state levels to assure that all economic opportunities are available to women as well as men. WEAL has appeared as amicus curiae in numerous gender discrimination cases before this Court such as Arizona Governing Committee v. Norris, Roberts v. Jaycees, and Grove City College v. Bell.

Women Employed is a national membership association of working women. Over the past fifteen years, the organization has assisted thousands of women with [*62] problems of discrimination, monitored the performance of equal employment opportunity agencies, analyzed equal employment opportunity policies, and developed specific, detailed proposals for improving enforcement efforts.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide pro bono legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, and advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.

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