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Gerald A. Madek

Christine Neylon O’Brien

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WOMEN DENIED PARTNERSHIPS: FROM HISHON TO PRICE WATERHOUSE v. HOPKINS

Gerald A. Madek*
and
Christine Neylon O'Brien**

I. INTRODUCTION

In the 1990's, it is a truism that women have been liberated from the home and have entered the workforce in unprecedented

* Associate Professor of Law, Bentley College, Waltham, Mass.; B.A., M.A. Boston College; J.D. Suffolk University Law School; LL.M. Boston University School of Law.

** Associate Professor of Law, Bentley College; B.A. Boston College; J.D. Boston College Law School.

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numbers. Because the presence of women in the halls of business is so prevalent, Americans tend to believe that whatever problems women encountered upon their initial venture into the world of work have now been resolved. After all, the common reasoning infers, Title VII of the Civil Rights Act of 1964 has been affording women legal protection from job discrimination for more than a quarter of a century, long enough to have established some clear precedents on which women can rely to demand equality in the workforce. Unfortunately, the complacency which American men and women display toward the issue of women’s job rights is unwarranted. Although legal precedents for equal treatment of women in low and middle echelon jobs have been established under Title VII, parallel precedents for equal treatment of women seeking entry to the highest echelons of the professions in this country do not exist in comprehensive form. In fact, the first battle, and one which took considerable time to win, involved simply achieving legal recognition that promotion to partnership is an area covered under Title VII. With the Supreme Court’s decision in *Hishon v. King & Spalding*, that first threshold was crossed. The Court rejected the partners’ contention that ad-

1. *See* 42 U.S.C. § 2000e-2(a)(1), (2) (1982) (stating that an employer may not “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” or “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex.”); *infra* notes 139-48 and accompanying text (discussing the Supreme Court’s treatment of gender discrimination).


3. *See* *Note, Compensating Victims of Preferential Employment Discrimination Remedies*, 98 YALE L.J. 1479, 1494 & n.92 (1989) (stating that judicial enforcement of Title VII is much stricter for low-skill jobs than for professional jobs).

4. 467 U.S. 69, 78-79 (1984) (Burger, C.J., per curiam)(concluding that this partnership decision was subject to scrutiny under Title VII).
vancement to partnership is not within Title VII and concluded that such a claim is cognizable under the Civil Rights Act of 1964. The war, however, is not won. As the Supreme Court’s recent decision in Price Waterhouse v. Hopkins indicates, although women can sue under Title VII if they have been discriminated against when applying for admission to partnership, the grounds on which such a discrimination suit can be won and the rules of the fight are as yet unclear. This, then, is the second threshold, the one women must cross to make full use of Title VII in their quest for total equality in the workplace. To clarify what legal precedents have been established for women seeking equal access to the brass ring of partnership, this Article will examine how the United States Supreme Court has dealt with this issue. Such an examination will make clear that while women have crossed the first threshold leading to equal access to partnerships, they are still struggling to cross the second threshold.

II. WOMEN IN THE PROFESSIONS

As stated earlier, while women are entering all of the professions and occupations in the American workforce, even career areas previously seen as male bastions, they are not being allowed to progress to the highest levels of their chosen professions. Instead, a “glass ceiling” often halts a woman’s progress at a point in her ca-

5. Id. at 77-79.
6. 109 S. Ct. 1775 (1989); see infra notes 173-217 and accompanying text (discussing Hopkins).
7. 109 S. Ct. at 1775. Hopkins was a plurality decision which held that when a plaintiff proves that gender played a motivating part in the employment decision, the defendant must prove it would have made the same decision regardless of gender. Id. Justice O’Connor, however, wrote a concurring opinion which suggested a different approach. See id. at 1805 (suggesting that a plaintiff must first prove “that an illegitimate criterion was a substantial factor” in an employment decision and then the burden shifts to the defendant to show the decision is justified “by other wholly legitimate considerations”). Justice Kennedy, in his dissent, argued that the Court should adhere to the established order of proof for disparate treatment cases enunciated by McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981). See Hopkins, 109 S. Ct. at 1809 (Kennedy, J., dissenting) (maintaining that a plaintiff must first prove disparate treatment so that an inference of discrimination arises, then the employer must articulate a legitimate reason for its action, and finally, the plaintiff has the ultimate burden of persuasion).
8. See Women’s Work, supra note 2, at 1400 (noting that despite Title VII’s commitment to workplace equality, courts have not used it effectively to confront entrenched conceptions of job requirements which exclude women).
reer where she can see the top but is not allowed to reach it. A case in point is the plight of the woman attorney in today's marketplace. Although the number of women lawyers has more than quadrupled since 1970, so that women now make up approximately twenty percent of the legal profession, women are still discriminated against in law firms today. This discrimination is evidenced by the fact that women are not rising through that "glass ceiling" to become partners in their law firms in numbers proportional to the their male counterparts. In fact, the American Bar Association's Commission on Women found that "decades after their entry into the big firms, women make up a third or more of the associates but less then eight percent of the partners." Worse still, the Commission concluded that neither the increased number of women entering the legal profession nor the mere passage of time will necessarily eliminate the barriers that currently stop qualified women attorneys from becoming partners. Obviously, the fact that women have not been represented in the legal profession in large numbers for as long as men have been so represented, may partially explain the disparity presented above. However, it does not, fully explain the difference.

Clearly, the woman attorney's difficulties in attaining equality in her profession are most probably representative of the difficulties facing women in comparable fields as they attempt to attain full professional development. It is also clear that Title VII has not as yet

9. See Schwartz, supra note 2, at 68. The author sees the "glass ceiling" metaphor, which suggests the existence of an invisible barrier set up by corporations to impede women's progress to upper ranks, as misleading. Id. Ms. Schwartz suggests using a cross-sectional geological diagram as an appropriate metaphor. Id. She believes that "[t]he barrier to women's leadership occurs when potentially counterproductive layers of influence on women—maternity, tradition, socialization—meet management strata pervaded by the largely unconscious preconceptions, stereotypes, and expectations of men." Id. These interfaces are impermeable for women. Id.

10. See N.Y.L.J., Aug. 19, 1988, at 2, col. 3. See generally Gender Bias Committee, Final Report of the Massachusetts Gender Bias Study: Gender Bias in Courthouse Interactions, 74 MASS. L. REV. 50, 52-56 (1989) (providing several examples of how stereotypical notions negatively affect female attorneys); Goldberg, Gender Bias, 74 A.B.A. J. 144, 144 (1988) (containing the ABA Commission on Women in the Profession findings that sex discrimination continues and that female attorneys have been systematically excluded from the judiciary, law firm partnerships, and tenured faculty posts).

11. See Kaye, Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality, 57 FORDHAM L. REV. 111, 119-20 (1988); Marcus, Women Lawyers, Despite Success, Say Sex Bias Hurt Their Careers, Wall St. J., Dec. 4, 1989, at B9, col. 5 (discussing a survey of 900 women lawyers at large law firms which disclosed that 49 percent perceived that promotion opportunities were better for men).

12. See Kaye, supra note 11, at 119.

13. Id.

14. See Schwartz, supra note 2, at 69 (stating that management ranks will include more
afforded these women the reality of equitable treatment in the workforce.  

III. THE FIRST HURDLE: THE NATURE OF PARTNERSHIP AND PROMOTION DECISIONS

The fact that women have not been able to use Title VII to protect themselves against job discrimination when applying for partnerships is not for lack of trying. Unfortunately, the first attempts by women at litigating unfavorable partnership decisions under Title VII were curtailed by judicial refusal to consider equal access to partnerships as a protected area under Title VII.  

Partnerships are a very popular form of doing business in the United States. In fact, a recent count revealed that there are 1.7 million partnerships currently on record. Firms providing professional services, such as law firms, engineering firms, accounting firms and investment firms, commonly organize themselves as partnerships. Such firms most often hire young professionals in their fields to work as associates for a set number of years, after which these associates are promised that they will be considered for admission to the partnership. The associates are employees, while the partners are co-owners sharing liability, profits and losses, in the manner determined by their partnership agreement. Because so many of the professional firms are organized this way, it is clear why access to these partnerships is critical to women’s attainment of true professional equality. The history of the suits brought by women under Title VII alleging sex discrimination in partnership decisions reveals several basic issues impeding women’s ability to make full use of

women, but questions remain as to how they will succeed, how high they will climb and how long they will stay); cf. O’Brien & Madek, Pregnancy Discrimination and Maternity Leave Laws, 93 Dick. L. Rev. 311, 336 (stating that federal legislation providing for job preservation during the period of pregnancy-related disability is necessary to actualize equal employment opportunities for women).

15. See Women’s Work, supra note 2, at 1400 (discussing court limitations of the effectiveness of Title VII in confronting conceptions of job performance that exclude women).


18. See Hishon, 467 U.S. at 71-72 (concerning a recent law school graduate who accepted a position as an associate after being told that advancement to partnership would follow after five to six years of satisfactory work).

19. Id. at 75-76.
Title VII in this area.

The first of these issues is that the nature of a partnership seems to demand that the partnership association be congenial for all concerned. Indeed, the Uniform Partnership Act (hereinafter "UPA"), the main source of partnership law in the United States today, adopted in forty-nine states, characterizes the partnership relationship as a voluntary one.20 Pointing to another legal support for voluntary partnerships, defendant partnerships in Title VII suits have consistently claimed as a defense the First Amendment guarantee of freedom of association.21 In turn, the courts have traditionally respected the rights of partners to freely choose their co-owners and have been reluctant to get involved in forcing partnerships to unwillingly accept a new partner.22 Articulating this judicial reluctance, the district court that originally dismissed Elizabeth Hishon’s complaint in Hishon v. King & Spalding, likened the professional partnership to a business marriage and so reasoned that applying Title VII to coerce an unwanted partnership would too closely resemble a statute for the enforcement of shotgun weddings.23

In a concurring opinion to the Supreme Court’s decision in Hishon, Justice Powell felt the need to explain the rationale for protecting the voluntary nature of the partnership association.24 He spoke of the sensitive nature of the decisions shared by partners and emphasized that the relationship among partners is not at all like the relationship between an employer and an employee.25 Justice Powell’s concern gains more credence when one considers that each partner is jointly and severally liable for the negligent acts of any partner who is acting in the ordinary course of partnership business and with the authority of his or her co-partners.26 In this context, forcing the acceptance of an unwanted partner seems unfair to the existing partners who must assume liability for the unwanted partner’s actions. All of these sources emphasize the valid concern that to force a partner on a group might undermine the ability of that group to function as an effective management body.

These arguments are cogent ones. However, from a legal standpoint, they do not excuse partnership decisions that are based on dis-
criminatory motives. First, the UPA, an act which regulates partnerships at the state level, is preempted by Title VII, which regulates employment decisions at the federal level. 27 Second, *Hishon v. King & Spalding* clearly renounced the First Amendment freedom of association defense in cases where discrimination, in fact, exists, stating that “invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.” 28 The *Hishon* Court addressed the possibility that the First Amendment might indeed be the smokescreen obscuring an employer's real unwillingness to include women in a partnership and emphasized its refusal to allow the First Amendment to be used in this way. 29

As to the concern about unfairness to existing partners and the possibility of preventing the partnership's effective functioning, it becomes apparent that Title VII is not structured to force partnerships to accept a less qualified individual because of that individual's sex. Rather, the mandate of Title VII is that an employer is not free to consider an individual less qualified because of that person’s sex. 30 This distinction is made clear in *Kohn v. Royall, Koegel & Wells*, a case involving the denial of summer employment to a female law student by a law partnership. 31 In this case, the court stated that “although a law firm is undoubtedly free to make complex, subjective judgments as to how impressive an applicant is, it is not free to inject into the selection process the a priori assumption that, as a whole, women are less acceptable professionally than men.” 32 In other words, the only impermissible reasons for disqualifying an employee for promotion to partnership under Title VII are illegal, discriminatory reasons. If an individual is careless or excessively pugnacious or is otherwise lacking in his or her merits, these characteristics provide an appropriate basis for denial of partnership. Thus, since Title VII would only require a partnership to accept a

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28. 467 U.S. at 78 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).
29. *Id.* (noting that, although lawyers make distinctive contributions to the ideas and beliefs of society, the defendant law firm failed to show that such a function would be inhibited by requiring it to consider applicants on their merits rather than their gender).
32. 59 F.R.D. at 521.
qualified employee, compliance with Title VII's anti-discrimination mandate when considering women employees for promotion to partnership should not hamper the ability of a partnership to function effectively, nor should it unfairly increase the exposure of existing partners to liability.\textsuperscript{33}

\textbf{A. Can Partners be Employees?}

Those who oppose the use of Title VII to prevent discrimination in partnership decisions focus not only on the necessity for the association of partners to be a voluntary one, but also on the wording of Title VII itself.\textsuperscript{34} Thus, the second issue always raised as a deterrent to applying Title VII's mandates to partnerships decisions, is whether or not the wording of Title VII's key clauses precludes partnerships from such inclusion. In order to better understand this argument, it is necessary to examine the relevant clauses of Title VII. These clauses state that it is unlawful for employers to engage in the following practices:

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

(2). to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.\textsuperscript{35}

In addition, Title VII states that it shall be applicable only in an employment setting where the employer has fifteen or more employees for each working day for at least twenty calendar weeks out of the current or preceding calendar year.\textsuperscript{36}

An analysis of these provisions suggests two issues which have been repeatedly raised relative to Title VII and partnerships. Both issues involve the seminal question of whether a partner can ever be considered an employee, since Title VII covers only potential or ac-

\begin{itemize}
  \item \textsuperscript{33} See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1794-95 (1989) (finding that accounting partnership promotion should be based on objective evaluations of a candidate without regard to gender).
  \item \textsuperscript{34} See 42 U.S.C. § 2000e-2(a) (1982).
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} See 42 U.S.C. § 2000c(e)(2) (1982).
\end{itemize}
tual employment situations. The first issue, the less critical of the two, is whether a partner can be considered an employee for the purpose of reaching the minimum number of employees necessary to invoke Title VII. The second issue, the more important one, raises the question of whether a partner suing other partners can be disqualified from such a suit precisely because a partner is not an employee. This second issue leads directly to one of the main concerns of this Article. If partners are considered owners, rather than employees, then admission to partnerships is not an employment situation covered by Title VII, but a voluntary association of co-owners outside of Title VII's mandate. Indeed, this was a key claim made by defendant partnerships before the Court's decision in *Hishon v. King & Spalding*.

In order to examine the obstacles to the definitive statement that partnership decisions are indeed covered under Title VII, it is necessary to examine the judicial history of the two issues raised above.

The first context in which the question of whether partners can ever be considered employees, is raised in cases seeking to establish that a firm is large enough to be covered by Title VII. In stating that only firms with fifteen or more employees for a substantial part of the calendar year must comply with Title VII, Congress clearly intended to exempt small operations or firms with fewer human and financial assets. Nevertheless, individuals have attempted to sue firms of less than requisite size under Title VII. In these cases, the plaintiff has often sought to have the partners in the firm classified as "employees" since this was the only way in which the firm could

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37. See generally EEOC v. Dowd & Dowd, 736 F.2d 1177 (7th Cir. 1984) (holding that shareholders in a professional corporation engaged in the practice of law were not employees under Title VII and the corporation was not an employer subject to Title VII because it employed less than fifteen nonshareholders); Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) (holding that partners cannot be regarded as employees under Title VII).


39. See infra notes 59-79 and accompanying text (discussing Title VII suits between partners).

40. See infra notes 59-79.

41. 467 U.S. 69, 77-78 (1984) (rejecting partnership's contention that Title VII categorically exempts partnership decisions from scrutiny); see also Note, supra note 3, at 1494 n.94 (discussing *Hishon* and how the plaintiff's burden of proof is the "relatively heavy" one involved in disparate treatment cases).

42. See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1781 n.1 (1989) (noting that the Court currently reviews only decisions relating to advancement to partnership, rather than all partnership decisions).

43. See infra notes 46-58 and accompanying text (discussing suits against small businesses).
be considered to be of the requisite size. In general, plaintiffs attempting this tactic have failed to prevail.

In the two most notable cases to raise this issue, *Burke v. Friedman* and *EEOC v. Dowd & Dowd Ltd.*, the courts rejected the request that the partners be included in the count of employees, using the per se rule, which suggests that partners per se are not employees. That is, by definition, partners are employers with hiring and firing capabilities and have status as co-owners and managers and thus are not employees. This argument further states the truism that one cannot be an employer and an employee at the same time. In *Burke*, the plaintiff, a non-partner accountant, instituted a suit against the partners claiming sex-based employment discrimination. However, since the firm consisted of thirteen non-partners and four partners, both parties agreed that Title VII's jurisdictional requirement of fifteen employees would be met only if the partners were considered employees under Title VII. In hearing this case, the district court adopted the per se rule described above to find that partners were not employees for the purposes of Title VII. The Court of Appeals for the Second Circuit concurred with the district court's analysis and affirmed its decision, thus laying the foundation for the judicial precedent that partners cannot be considered employees for the purpose of applying Title VII.

In *Dowd & Dowd*, virtually the same issue was raised, except that the defendant law firm was organized not as a partnership but as a professional corporation in which the partner-like individuals were defined as shareholders. The EEOC claimed that the firm had violated Title VII because of the way in which its health benefit plan was structured. Although Dowd & Dowd had fewer than fifteen non-shareholder employees, the EEOC claimed that the *Burke* per se
rule did not apply here, since Dowd & Dowd was a professional corporation, rather than a partnership like the defendant firm in Burke. However, the Seventh Circuit affirmed the lower court, finding that the shareholders of Dowd & Dowd were not employees and so the firm was too small to be covered by Title VII. The court noted that the structures of professional corporations and partnerships were much alike and that “[t]he role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation.” Thus, the court saw no reason to treat the shareholders in this case differently than the partners in Burke. The Dowd & Dowd ruling consolidated further the belief that partners could not be employees under Title VII.

The second issue raised in the courts by the language of Title VII, the issue of whether a partner can sue a fellow partner under this statute, illustrates judicial adoption of more flexible criteria than the per se rule of Burke for determining whether a partner is an employee under Title VII. The leading cases on this issue are Caruso v. Peat, Marwick, Mitchell & Co. and Wheeler v. Hurdman. In the former case, Mr. Caruso had been a partner with the firm of Peat, Marwick, Mitchell & Co. (hereinafter “Peat, Marwick”). When he was fired, he claimed discrimination and sued Peat, Marwick under the Age Discrimination in Employment Act (hereinafter “ADEA”). In turn, Peat, Marwick claimed that since Caruso had been a partner at the time of his dismissal, he was not an employee in an employment situation and thus not entitled to sue under the ADEA. Instead of automatically applying the per se rule that partners are not employees as the court did in Burke and Dowd & Dowd, the Caruso court chose to look into the nature of

56. Id. at 1178.
57. Id. at 1178-79.
58. Id. at 1178. But see Hyland v. New Haven Radiology Ass’n, 794 F.2d 793, 797-98 (2d Cir. 1986) (rejecting the Seventh Circuit’s analogy of professional corporations to partnerships).
59. See infra notes 60-79 and accompanying text (discussing suits under Title VII).
63. Id.; see also 29 U.S.C. §§ 621-634 (1982) (stating that it is unlawful for employers to discriminate in employment decisions because of an individual’s age).
64. Compare Caruso, 664 F. Supp. at 146-47 (wherein the employer alleged that a fellow partner was not an employee within meaning of the ADEA) with Burke, 556 F.2d at 867 (wherein partners were not considered employees).
Caruso's position at Peat, Marwick. The court used the traditional indicia test to determine whether Mr. Caruso indeed possessed the traditional characteristics of a partner in his firm. The attributes used as the litmus test by the Caruso court were Mr. Caruso's ability to control and operate the business, his method of compensation and the permanence of his work relationship.

The court in Caruso believed that a true partner maintains a joint right of control of the business, receives a percentage of the firm's profits as compensation, and also remains a permanent member of the partnership except under exceptional circumstances. Using these traditional indicia, the court decided that Mr. Caruso was not a true partner but rather an employee and thus entitled to sue under the ADEA. In explaining its rationale for rejecting the per se rule that partners are not employees, the Caruso court stated that the per se rule might tempt employers to evade the mandates of the anti-discrimination statutes by labeling all employees as partners.

In support of this view, the Caruso court cited Justice Powell's concurring opinion in Hishon which states that "an employer may not evade the strictures of Title VII simply by labeling its employees as partners."

In Wheeler v. Main Hurdman the plaintiff, Marilyn Wheeler, had been a partner in the international accounting firm of Main Hurdman for one and one-half years when she was fired. She alleged that her dismissal was because of her gender, inter alia, and sued Main Hurdman under Title VII and several other anti-discrimination acts. As in Caruso, the district court decided that Ms. Wheeler was not a partner but rather an employee and thus was entitled to sue under Title VII, because of the "economic realities"
underlying her relationship with the principals of Main Hurdman.\textsuperscript{74} In other words, she was lacking the traditional indicia of a partner, as reflected in the economic realities of her position at Main Hurdman.\textsuperscript{75} Although the Court of Appeals for the Tenth Circuit reversed the district court, rejecting the "economic realities" test in this case, it suggested that the test could be appropriate in other cases and that, while general partners are not employees, a partner may qualify as an employee if the traditional indicia of partnership status are lacking.\textsuperscript{76} Thus, both the \textit{Caruso} and \textit{Wheeler} courts were willing to entertain the possibility that persons termed partners might, in reality, function in their firms more like employees and so be entitled to protection from discrimination under Title VII and the other discrimination acts.\textsuperscript{77}

The judicial debate over whether partners can be termed employees indicates that for the purpose of determining if a firm is large enough to be sued under Title VII, partners are per se not employees, but for the purpose of claiming discrimination when being dismissed from a partnership, partners may be viewed as employees if they function more like employees than like partners within their firms. However, the entire issue of whether a partner is an employee or not becomes irrelevant when considering whether an employee can sue over alleged discrimination concerning the decision not to admit that employee to a partnership. Defendant firms, of course, attempted to make the issue relevant by claiming that since partners were not per se employees, admission to a partnership was not an employment situation and, hence, was not covered under Title VII. The Supreme Court's decision in \textit{Hishon v. King & Spalding}\textsuperscript{78} eliminated this argument. For, while implying that true partners are

\begin{itemize}
\item \textsuperscript{74} \textit{Wheeler}, 825 F.2d at 258.
\item \textsuperscript{75} \textit{See id.} The district court concluded that while Ms. Wheeler was a partner, she was also an employee for purposes of the federal anti-discrimination statutes, therefore the court was bound to follow the "economic realities" test. \textit{Id.} The district court agreed with Ms. Wheeler that her work remained unchanged after being made partner, in that she managed the same client load and support staff, and was supervised by the same department head. \textit{Id.} at 261.
\item \textsuperscript{76} \textit{Id.} at 276-77. The court expressly rejected the "economic realities" test in "bona fide general partner situations," but suggested that the test might be acceptable in situations where the plaintiff is "clearly placed" in a different economic and legal category from general partners. \textit{Id.} at 276.
\item \textsuperscript{77} \textit{See generally id.} at 267-68 (finding categorical absolutes difficult to sustain in this area of law); \textit{Caruso v. Peat, Marwick, Mitchell & Co.}, 664 F. Supp. 144 (S.D.N.Y. 1987) (wherein the court found the plaintiff to be an employee for purposes of the ADEA since he had almost no control over operation of the business and was not considered a permanent member of the firm).
\item \textsuperscript{78} 467 U.S. 69 (1984).
\end{itemize}
not employees, the Hishon Court also decided that this is not the relevant issue to be examined. To better understand the Supreme Court's reasoning in Hishon, one must first examine the facts and judicial progress of the case.

B. Hishon v. King & Spalding; Title VII Regulates Partnership Decisions

Elizabeth Hishon accepted a position as an associate at the Atlanta law firm of King & Spalding in 1972. The firm, organized as a general partnership, was then composed of approximately fifty partners, fifty associates and more than fifty other clerical and paralegal employees. Ms. Hishon, pursuant to the normal course of events at King & Spalding, was considered for partnership in May 1978, at the end of her sixth year of employment as an associate with the firm. Since she was not invited to join the partnership, in accordance with the firm's "up or out" policy, she was extended a reasonable period of time to secure other employment prior to termination. Ms. Hishon applied for reconsideration eight months after the negative decision, but was again denied partnership at the firm's May 1979 meeting. She left the firm's employ on December 31, 1979. Ms. Hishon filed a timely sex discrimination suit with the EEOC on November 19, 1989, alleging, inter alia, that the respondent firm discriminated against her on the basis of her sex in its decision to deny her a partnership position. The EEOC issued a Notice of Right to Sue within ten days, which right Ms. Hishon asserted in district court within the requisite ninety-day period. Her complaint alleged sex discrimination with respect to the firm's decision not to make her a partner, a violation of the Equal Pay Act and a breach of contract.

The district court dismissed Ms. Hishon's complaint, using the previously cited argument, that forcing an unwanted partner on a

79. Id. at 77.
80. Id. at 71.
81. Id..
82. Id. at 71-72.
84. Id.
85. Id.
86. Id. at 1024-25.
87. Id. at 1025.
89. Hishon, 678 F.2d at 1025.
partnership was like forcing a shotgun marriage by law. The Court of Appeals for the Eleventh Circuit affirmed the decision of the district court to dismiss Ms. Hishon’s complaint. The court concluded that Title VII does not apply to decisions concerning partnerships because partners are not employees under Title VII and that the opportunity to be considered for promotion to partner is neither a “term, condition or privilege of employment,” protected by section 703(a)(1) nor an “employment opportunity” protected by section 703(a)(2). In response to the plaintiff’s argument that she was denied “employment opportunities” by the firm’s “up or out” policy, the Eleventh Circuit ruled that the termination was a result of the partnership decision and thus lost its separate identity as a cause of action under Title VII. The court further stated that the plaintiff “assumed the risk” that a negative decision concerning promotion to partnership would set in motion the termination procedure.

Thus, the district and circuit courts used the arguments previously analyzed to disqualify King & Spalding’s partnership decision from coverage by Title VII. The district court used the freedom of association argument, and the circuit court argued that, since partners were not employees and admission to partnerships was not an employment opportunity, partnership decisions were exempt from the mandates of Title VII. The Supreme Court, however, reversed the Eleventh Circuit.

In its decision, the Court held that Ms. Hishon’s complaint stated a claim cognizable under Title VII. The Court noted that the underlying employment relationship between Ms. Hishon and King & Spalding was contractual, and thus the “terms, conditions or privileges of employment” included benefits that are part of an employment contract, including an alleged promise to consider an employee for partnership. Where an employee can prove that the parties contracted to have that employee considered for partnership,

91. 678 F.2d at 1030.
92. Id. at 1027-28.
93. Id. at 1028.
94. Id. at 1029.
95. Id. at 1029-30.
96. Hishon, 24 Fair Empl. Prac. Cas. (BNA) at 1304-06.
97. Hishon, 678 F.2d at 1026-30.
98. Hishon, 476 U.S. at 69.
99. Id. at 78.
100. Id. at 74; see 42 U.S.C. § 2000e-2(a)(1) (1982).
Title VII requires that the consideration be non-discriminatory.\textsuperscript{102} Even though an employer would be able to eliminate a privilege attached to the employment relationship (e.g., the opportunity to be considered for partnership), where the privilege exists, it must be applied consistently with Title VII.\textsuperscript{103} If an associate can prove that a firm used the prospect of ultimate partnership to induce prospective associates to join the firm, this finding supports the determination that partnership consideration was a term, condition or privilege of employment under Title VII.\textsuperscript{104}

Again, responding to King & Spalding’s argument that the elevation to partnership entails a change in status from “employee” to “employer,” the Court held that the benefit a plaintiff is denied need not be employment to fall within Title VII’s protection; it need only be a term, condition or privilege of employment.\textsuperscript{105} The Court attributed no significance to the fact that employment as an associate necessarily ends when the associate becomes a partner because a benefit (e.g., a pension benefit) need not accrue before a person’s employment is completed to qualify as a term, condition or privilege of that employment.\textsuperscript{106} The Court cited \textit{Lucido v. Cravath, Swaine & Moore}\textsuperscript{107} for the proposition that nothing in the change in status that advancement to partnership might entail means that partnership consideration falls outside the terms of the statute.\textsuperscript{108} In its decision

\begin{enumerate}
\item Id.
\item Id. at 75-76.
\item Id. at 76.
\item Id. at 77.
\item Id.
\item Hishon, 476 U.S. at 77; see Lucido, 425 F. Supp. at 125. Plaintiff Lucido was a white, Catholic male of Italian ancestry who brought suit against a large New York law partnership, alleging that he was unlawfully discriminated against as an associate, and that his employment was unlawfully terminated because of his national origin or religion or both. \textit{Id.} The complaint alleged that Mr. Lucido was discriminated against with respect to work assignments, training, rotation and outside work opportunities, as well as being denied promotion to partner because of his national origin or religion or both. \textit{Id.} at 127. The district court in \textit{Lucido} ruled that the opportunity to become a partner was a “term, condition or privilege of employment” and an “employment opportunit[y]” within the meaning of Title VII. \textit{Id.} at 128.
\item The district court interpreted section 703(a) of Title VII as indicating “a Congressional intent to define discrimination in the broadest possible terms and to include the entire scope of the working environment within the Act’s protective ambit.” \textit{Id.} at 126. The \textit{Lucido} opinion analogized the case before it to the situation where an employee who is protected by the National Labor Relations Act, is denied a promotion to a supervisory position (a position which would no longer provide the individual with NLRA protection) because of discrimination in violation of the NLRA. \textit{Id.} at 128-29; see NLRB v. Bell Aircraft Corp., 206 F.2d 235, 237 (2d Cir. 1953); accord Golden State Bottling Co., v. NLRB, 414 U.S. 168, 188 (1973). In \textit{Bell Aircraft}, the Second Circuit held that such an employee was protected from discrimination in violation of the NLRA because “[a]t the time that the discrimination took place he was
\end{enumerate}
in *Hishon*, the Supreme Court ended the debate over whether partnership decisions fall within the purview of Title VII. The critical factual issue became whether consideration for partnership was a term, condition or privilege of the original employment contract made with the partnership. The *Hishon* opinion is legally correct, well-reasoned and follows from the clear language of Title VII. Further, Title VII contains no exceptions for professional level employment decisions and there is nothing in its legislative history which excludes professionals or other individuals with high-level positions from its protection. Indeed, the legislative history reveals the opposite to be true, that Congressional intent was to include professional level positions within the coverage of Title VII. Partnerships are specifically included as "persons" subject to the strictures of Title VII.

Thus, *Hishon* clarified an essential point. By clearly stating that partnership decisions must be made on a fair and equal basis without regard to the applicant's sex, the Court vaulted women across the first hurdle on their way to truly equal career opportunity. With regard to women passing through that "glass ceiling" to the top of the career ladder, the issue would no longer be a semantic debate over whether freedom of association prevails or whether partners are employees. Rather, it would be assumed that Title VII was meant to protect people from discrimination in partnership decisions just as it was meant to prevent them from discrimination in entry level employment decisions and that a woman’s right to be considered on a fair and equal basis in such decisions would be protected by law. The first threshold had been crossed.

clearly a protected employee, and his prospects for promotion were among the conditions of his employment.” 206 F.2d at 237. As the Supreme Court noted in *Hishon*, certain sections of Title VII are patterned after the NLRA and thus the Court frequently refers to cases interpreting analogous language. 476 U.S. at 76 n.8.

109. See 476 U.S. at 69 (holding that partnership decisions fall within the scope of Title VII).

110. *Hishon*, 467 U.S. at 274.

111. See .Note, supra note 22, at 460; see also EEOC v. Rinella & Rinella, 401 F. Supp. 175, 179-80 (N.D. Ill. 1975) (discussing the legislative history of Title VII supporting the court's assertion of jurisdiction in cases involving sex discrimination in a law firm); 42 U.S.C. § 2000e-2(a) (1982).


113. *Hishon*, 467 U.S. at 75-76.
IV. THE SECOND HURDLE—CAUSATION AND THE BURDEN OF PROOF

Once the Court established in Hishon that consideration for partnership, when clearly a “term, condition or privilege of employment,” was protected under Title VII, the battle for women’s equality at the top of the career ladder entered murkier waters. The next problem was successfully challenging discrimination in the actual decision-making process. Since the decision to admit an individual to a partnership is usually a highly complex one, involving both objective and subjective factors, and is often a collaborative decision made by many individuals, rooting out the “real cause” of such decisions is often impossible. This fact is apparent when one traces the judicial history of the second major case to be examined in this Article, Price Waterhouse v. Hopkins. Ann Hopkins was refused admission to the Price Waterhouse partnership and alleged that this partnership decision involved sex discrimination. Representative of the problem in analyzing partnership decisions to determine causation, Price Waterhouse is a mixed-motive case. That is, there were many reasons why Price Waterhouse refused to admit Ann Hopkins to its partnership, some of which were legal and some of which were discriminatory. To understand what protection Title VII has afforded women affected by such “mixed motive” partnership decisions, it is necessary to look briefly at the findings of the district and appellate courts in this case and then at the key issues.

114. Id. at 73, 74, 78-79 (concluding that Hishon’s complaint stated a cognizable claim under Title VII).
115. See infra notes 185-232 and accompanying text (discussing causation and burden of proof in Hopkins).
117. 109 S. Ct. at 1775.
118. Id at 1780-81. Justice Brennan joined by Justices Marshall, Blackmun, and Stevens wrote this important decision. Id. at 1780. Justices White and O’Connor both filed concurring opinions. Id. Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. Id.
119. Id. at 1780-81. When the partners refused to reconsider Ms. Hopkins for partnership, she sued Price Waterhouse under Title VII claiming discrimination “against her on the basis of sex in its decision regarding partnership.” Id. at 1781.
120. Id. at 1781-83. The Court reviewed evidence submitted to the district court by both sides. Id. It noted that the partnership legitimately evaluated such traits as rainmaking ability and ability to meet deadlines. Id. It also noted, however, that the partners reacted negatively to Ms. Hopkins simply because she was a woman and they let this interfere with their decisionmaking. Id.
highlighted in the Supreme Court’s decision.

The facts of this case clearly outline the problem at hand. Ann Hopkins, a senior manager at Price Waterhouse, a national accounting firm included in the “Big Eight,” applied for promotion to partner. Ms. Hopkins was very successful at obtaining new business for Price Waterhouse, having generated more new business for the firm than any of the other nominees being considered for partnership with her. However, Ms. Hopkins was also known to be demanding, brusque and impatient with her staff, as well as a difficult person to work for. In short, there were reasons to make her a partner and reasons to refuse her admission to the partnership.

In its usual manner, Price Waterhouse solicited comments from its partners about whether or not Ann Hopkins, the only female candidate in a pool of eighty-eight partnership applicants, should be admitted to the partnership. Of the six-hundred-sixty-two partners at Price Waterhouse, thirty-two of them submitted evaluations and comments concerning Ms. Hopkins’ candidacy. Thirteen partners recommended that Ms. Hopkins be admitted to the partnership. Three partners wanted her nomination to be put on hold. Eight abstained, stating that they had no basis for an opinion, and eight recommended that her nomination be rejected. The Policy Board, following the Admissions Committee’s recommendation, decided to place Ms. Hopkins’ nomination on hold because of reservations about her interpersonal skills.

121. As of May, 1989, the “Big Eight” included: Arthur Andersen & Co.; Arthur Young & Co.; Coopers & Lybrand, Deloitte, Haskins & Sells; Ernst & Whinney; Peat, Marwick, Main & Co.; Price Waterhouse; and Touche, Ross & Company. See Greising, The New Numbers Game in Accounting, Bus. Wk., July 24, 1989, at 20-21 (discussing the need for cost cutting as driving six of the “Big Eight” to merge). There is, however, an industry-wide consolidation at this time. Id.

122. Hopkins, 109 S. Ct. at 1780-81. Ms. Hopkins worked in the firm’s Washington, D.C. office for five years prior to this time. Id.


124. Id. at 1113, 1117. The court found that evaluations of both supporters and opponents of Hopkins contained remarks about her lack of interpersonal skills. Id.


126. Id.

127. Id.

128. Id.

129. Id.

130. Id. at 1781, 1782. Although the partners perceived some improvement in Ms. Hopkins’ interpersonal skills, her “perceived shortcomings in this important area eventually doomed her bid for partnership.” Id.
When Ms. Hopkins later lost the support of two partners who originally supported her nomination, the partners at Price Waterhouse decided not to re-propose her for nomination to the partnership. Ms. Hopkins resigned from Price Waterhouse in 1984. After pursuing administrative remedies to no avail, Ms. Hopkins filed suit against Price Waterhouse in federal district court alleging sex discrimination under Title VII.

A. The District Court

The district court found that Ms. Hopkins "presented a prima facie case under Title VII" by showing that she was a member of a protected group, that she was a qualified partnership candidate, that she was refused admission to the partnership, and that Price Waterhouse continued to seek partners with her qualifications. The court found, however, that the motives for rejecting Ms. Hopkins partnership bid were indeed mixed.

On the one hand, the court found that the partners' concerns over Ms. Hopkins' interpersonal skills were legitimate, not pretextual, and that her management style justified the Policy Board's decision to place her candidacy on hold. Responding to Ms. Hopkins' contention that Price Waterhouse treated her differently than certain male nominees with interpersonal skills problems, the court concluded that the male nominees referred to by Ms. Hopkins did, in truth, possess other positive attributes which distinguished their situations from that of Ms. Hopkins. Thus, the court suggested that

131. Id. at 1781 n.1. A refusal to repropose a candidate for admission to partnership amounts to a constructive discharge. Id.
133. Id.
134. Id.; see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) (providing the model for a prima facie showing of discrimination); see also infra notes 272-85 and accompanying text (discussing this model further).
135. 618 F. Supp. at 1119-20. Judge Gesell noted that discriminatory stereotyping was permitted to play a part in the selection process. Id. at 1120.
136. Id. at 1114, 1116. The court noted that Price Waterhouse has consistently placed a high premium on candidates' interpersonal skills in an effort to promote cordial relations within an office. Id. at 1116. Price Waterhouse's records indicated that it had legitimate, non-discriminatory reasons for distinguishing Ms. Hopkins and other candidates. Id. at 1115.
137. Id. The court agreed with Price Waterhouse, which argued that these male candidates could be differentiated from Ms. Hopkins. Id. The firm had a specific, special need for the male candidates' skills which the firm felt it would lose unless they were promoted to partner. Id. Additionally, these male candidates received fewer negative comments from evaluators, and those that they did receive were less intense than the negative comments directed at Ms. Hopkins. Id.
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Ms. Hopkins’ management style, in and of itself, was a legitimate reason for putting her partnership application on hold.\footnote{138} On the other hand, however, the court found that Price Waterhouse was liable because the partnership selection process it used was unacceptable under the mandates of Title VII.\footnote{139} The district court pointed out that its finding of liability rested “on its determination that Price Waterhouse had discriminated against Ms. Hopkins by filtering her partnership candidacy through a system that gave great weight to negative comments and recommendations, despite evidence that those comments reflected unconscious sexual stereotyping by male evaluators based on outmoded attitudes toward women.”\footnote{140}

A look at the suspect comments referred to by the court makes clear their discriminatory nature. For example, one partner stated that “she may have overcompensated for being a woman.”\footnote{141} Another partner claimed that she needed a “course at charm school.”\footnote{142} Still another, attempting to defend her candidacy, remarked that Ms. Hopkins had changed and had become a “much more appealing lady partner candidate.”\footnote{143} More damning still, the head partner in Ms. Hopkins’ office, her strongest supporter and the person responsible for explaining to her the problems the Policy Board had with her candidacy, advised Ms. Hopkins that she would improve her chances of becoming a partner if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”\footnote{144}

In assigning liability, the district court found that Price Waterhouse took no action to discourage the stereotyping or to sensitize its partners to the dangers of sexism.\footnote{145} Further, the court found

\begin{itemize}
\item \footnote{138} Id. at 1116.
\item \footnote{139} Id. at 1120 (referring to 42 U.S.C. § 2000e-2(a)(1982)).
\item \footnote{140} Hopkins, 825 F.2d at 464. Price Waterhouse admitted that it gave heightened significance to negative comments and votes. Hopkins, 618 F. Supp. at 1115-16. The court found that the Policy Board assigned great weight to negative comments even though some of the partners had very little contact with Ms. Hopkins. Id. at 1118; cf. Dávila, The Underrepresentation of Hispanic Attorneys in Corporate Law Firms, 39 STAN. L. REV. 1403, 1423 (1987) (discussing the problem of stereotyping in regard to people who have different backgrounds and exploring the theory that the dominant group is prone to interact with those most similar to themselves, while maintaining unconscious negative feelings toward the members of the minority groups).
\item \footnote{141} 618 F. Supp at 1116-17; see infra note 164 and accompanying text (discussing sex stereotyping).
\item \footnote{142} Id. at 1117.
\item \footnote{143} Id.
\item \footnote{144} Id.
\item \footnote{145} Id. at 1118-19. The court concluded that the firm failed to articulate a policy
\end{itemize}
that Price Waterhouse's evaluation process gave "substantial weight" to the negative comments about Ms. Hopkins without attempting to determine if the comments in question were tainted by gender-based stereotypes. Evaluations given by Price Waterhouse partners in previous years about women nominees showed the same type of bias, and this confirmed that the Price Waterhouse evaluation system was tainted by discriminatory stereotyping. Finally, the district court found that the testimony of an expert witness, Dr. Susan Fiske, a social psychologist, supported Ms. Hopkins' contention that the comments in question were the product of sex stereotyping.

In addressing the issue of causation, the district court found that a plaintiff need only prove that sex discrimination played a role in an employment decision to be entitled to relief. At this point, the burden of proof shifts to the defendant to demonstrate by clear and convincing evidence that the decision would have been the same absent discrimination. Rather than the preponderance of evidence standard most commonly used in tort litigation, the district court determined that Price Waterhouse should be held to the more stringent clear and convincing standard. To justify this decision, the court stated that in a mixed-motive case, the benefit of the doubt must favor the employee "so that the remedial purposes of Title VII will not be thwarted by saddling an individual subject to discrimination with an impossible burden of proof." The court found that Price Waterhouse did not provide clear and convincing evidence that its decision would have been the same without the discriminatory motive. The two elements of the district court's decision highlighted here, causation and burden of proof, are pivotal concerns when examining how Title VII protects women from discriminatory partnership decisions. As such, they were examined again by the court of appeals and the Supreme Court.

146. Id. at 1119. The court found that Price Waterhouse maintained a system which allowed evaluations based upon outmoded attitudes to be determinative. Id.
147. Id. at 1117. Gender stereotyping appeared as "part of the regular fodder of the partnership evaluations." Id.
148. Id. Although Dr. Fiske, an expert witness called by Ms. Hopkins, concluded that the stereotyping played a major part in the partnership decision, she could not say to what degree it influenced the process. Id.
149. Id. at 1120.
150. Id.
151. Id.
152. Id.
153. Id.
B. The Court of Appeals

When Price Waterhouse appealed this decision to the court of appeals, that court upheld, for the most part, the district court's judgment on the issues of causation and burden of proof.\footnote{Hopkins, 825 F.2d at 473.} In fact, one of the bases on which Price Waterhouse appealed was on the issue of causation.\footnote{Id. at 465.} Price Waterhouse contended that the district court's finding of liability was incorrect because Ms. Hopkins did not establish a causal link between the partnership's sexist comments and its decision to put her candidacy on hold.\footnote{Id.} Further, the firm claimed that, since Ms. Hopkins failed to demonstrate the precise effect that the sexist comments had on the firm's ultimate decision, no discriminatory motive was established.\footnote{Id. at 468.} The court of appeals rejected Price Waterhouse's claims for two reasons. First, the court pointed out that the argument about precise causation was not on point since the lower court relied on the partners' sexist comments only as evidence of a tainted selection process, not as proof that Ms. Hopkins' nomination was held over because of gender.\footnote{Id. at 467-68. The court noted that the United States Supreme Court has never ruled definitively on causation, and that the circuit courts were divided. Id. at 469-70.} Then, the court pointed out that the circuit courts had divided on whether the plaintiff in a Title VII case must establish that the impermissible discrimination was the predominant motivating factor in an employment decision or simply establish that it was a substantial factor.\footnote{Id. at 469.} Thus, Price Waterhouse's claim that precise causation must be established was not supported by judicial precedent. The court further stated that requiring a plaintiff to establish precise causation would place an extreme burden on Title VII plaintiffs who challenge the employment decisions of collegial bodies such as partnerships.\footnote{Id. at 466.}

Price Waterhouse raised another issue related to causation when it contended that there was a lack of competent evidence that its partnership selection process was tainted by impermissible stereotyping.\footnote{Id. at 466. Although many of the comments describing Ms. Hopkins were made by supporters, the court nevertheless agreed with the district court that the comments reflected stereotypical thinking in violation of Title VII. Id.} The firm's intent here was to challenge the competence of Dr. 

\footnotesize{\begin{itemize}
\item \footnote{Hopkins, 825 F.2d at 473.}
\item \footnote{Id. at 465.}
\item \footnote{Id.}
\item \footnote{Id. at 468. Price Waterhouse contended that since Ms. Hopkins failed to prove that any unconscious stereotyping actually caused her partnership denial, the firm could not be liable under Title VII. Id.}
\item \footnote{Id. at 467-68.}
\item \footnote{Id. at 467 n.8. The court noted that the United States Supreme Court has never ruled definitively on causation, and that the circuit courts were divided. Id. at 469-70.}
\item \footnote{Id. at 469.}
\item \footnote{Id. at 466. Although many of the comments describing Ms. Hopkins were made by supporters, the court nevertheless agreed with the district court that the comments reflected stereotypical thinking in violation of Title VII. Id.}
Fiske, the expert witness who testified that the partners' comments revealed the presence of sex stereotyping.\textsuperscript{162} In addressing this issue, the court noted that in the past it had exercised a narrow standard of review in Title VII cases, overturning the district court's findings only where those findings were "based on an utterly implausible account of the evidence."\textsuperscript{163} The court held that, in this case, with or without the testimony of Dr. Fiske, the sexist meaning of the comments was quite clear to any observer, and they were evidence that the firm's selection process evaluated women nominees based on their sex.\textsuperscript{164} Thus, there was no basis on which to overturn the findings of the district court.

Again, Price Waterhouse claimed that, since many of the arguably sexist comments were made by partners who actually supported Hopkins's candidacy, no negative inferences could be drawn from these comments.\textsuperscript{165} The court of appeals disagreed and found that, to the contrary, the stereotypical comments made by Ms. Hopkins' supporters were "competent evidence that sexist attitudes were present in the partnership selection process."\textsuperscript{166}

Still addressing the issue of causation, Price Waterhouse claimed that Ms. Hopkins had the burden of proving intentional discrimination by the firm.\textsuperscript{167} The court, however, found that while "[p]roof of discriminatory motive is crucial,... the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question."\textsuperscript{168} The court further found that the fact that some of the partners at Price Waterhouse may have been unaware of a

\textsuperscript{162} Id. at 466 & n.3.
\textsuperscript{163} Id. at 465 (quoting Bishopp v. District of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986)).
\textsuperscript{164} Id. at 466 (quoting Bishopp v. District of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986)).
\textsuperscript{165} Id. at 465 (quoting Bishop v. District of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986)).
\textsuperscript{166} Id. at 466. The court noted that the sexist import of the many comments was "patently clear." Id.; see Cohen, Price Waterhouse v. Hopkins: Mixed Motive Discrimination Cases, the Shifting of the Burden of Proof and Sexual Stereotyping, 40 LAB. L.J. 723, 727 (1989) (discussing illegitimate factors and stereotypical comments tainted by sexism).
\textsuperscript{167} Hopkins, 825 F.2d at 466 n.3. The court of appeals noted that the favorable comments made by her supporters nevertheless reflected stereotypical thinking. Id.
\textsuperscript{168} Id. at 466. The court concluded that the supporters, by "couching their qualifications in terms of sexual stereotypes, . . . echoed the complaints of Hopkins' critics, thereby lending credence to those complaints and unwittingly undermining the support they sought to provide." Id. at 466 n.3.
\textsuperscript{169} Id. at 468. Price Waterhouse claimed that it was not liable since Ms. Hopkins failed to prove intentional discrimination. Id.
discriminatory motive within themselves neither alters the fact of its existence nor excuses it. In short, Ms. Hopkins established the existence of a discriminatory motive by showing that she was treated differently because of her sex. 169

As to the second key issue raised by this case, burden of proof, the court of appeals again agreed with the district court. That is, the court of appeals affirmed the district court’s ruling that Ms. Hopkins met her burden by proving that gender was a significant factor in her failure to make partner. 170 The court noted that Price Waterhouse’s claim that it had a legitimate reason for putting Ms. Hopkins’ nomination on hold in no way negated Ms. Hopkins’ showing that sexual stereotyping played a significant role in the firm’s decision. 171 The court affirmed the district court’s finding that, once Ms. Hopkins proved this, the burden of proof shifted to Price Waterhouse to prove by clear and convincing evidence that the contested employment decision would have been the same absent the illegal factor. 172 In so deciding, the Hopkins court reiterated the prevailing opinion among circuit courts, which have addressed the question of causation in mixed-motive cases, that “once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the contested employment decision, the burden shifts to the employer to show that the decision would have been the same absent discrimination.” 173 The only signif-

169. Id. at 469. The court thereby condemned both overt and subtle forms of employment discrimination. Id.

170. Id. The court noted that there was “ample support” for the district court’s conclusion that stereotyping played a significant role in denying Ms. Hopkins’ bid for partnership. Id.

171. Id. at 470. The court stated that the question is not whether Ms. Hopkins was treated less favorably because of gender but rather whether such treatment caused the adverse employment decision. Id.

172. Id. at 471. Once a Title VII plaintiff has demonstrated evidence of significant discriminatory animus, the burden shifts to the defendant-employer. Id. at 470-71.

173. Id. at 470-71. There are subtle variations on the burden of proof in Title VII cases. The Third, Fourth, Fifth, and Seventh Circuits require the plaintiff to demonstrate that but for gender, the decision would have been favorable. See McQuillen v. Wisconsin Educ. Ass’n Council, 830 F.2d 659, 664-65 (7th Cir. 1987), cert. denied, 485 U.S. 914 (1988); Peters v. City of Shreveport, 818 F.2d 1148, 1161 (5th Cir. 1987), cert. denied, 485 U.S. 930 (1988); Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986); Ross v. Communications Satellite Corp., 759 F.2d 355, 365-66 (4th Cir. 1985).

The First, Second, Sixth, and Eleventh Circuits hold that once the plaintiff proves that discriminatory motives played a substantial part, the employer may avoid liability only by showing by a preponderance of the evidence that it would have made the same decision even absent the discrimination. See Berl v. County of Westchester, 849 F.2d 712, 714-15 (2d Cir. 1988); Fields v. Clark Univ., 817 F.2d 931, 936-37 (1st Cir. 1987); Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 115 (6th Cir. 1987); Bell v. Birmingham Linen Serv., 715
significant difference between the district court’s opinion and the court of appeals’ opinion relative to the defendant firm’s burden of proof is that the district court viewed an employer’s fulfillment of the “clear and convincing” standard only as a means of avoiding the obligation to provide Ms. Hopkins with equitable relief, whereas the court of appeals viewed the meeting of this standard as a means of totally avoiding a finding of liability under Title VII. 174

Thus, both the district court and the court of appeals, having heard the arguments in *Price Waterhouse v. Hopkins*, agreed that a plaintiff need not establish precise causation to prove unlawful discrimination in a partnership decision, but need only establish that a discriminatory motive was a significant factor in the decision. 176 Both courts also agreed that, once the plaintiff has proven by direct evidence that an illegal motive played a significant part in the decision, the burden of proof shifts to the defendant to prove that the partnership decision would have been the same without the illegal motive. 176 In addition, both courts also found that the appropriate burden of proof in such cases was the clear and convincing standard. 177 However, when the Supreme Court decided *Price Waterhouse v. Hopkins*, it resolved these issues with less unanimity. 178

C. The United States Supreme Court

The Court heard *Hopkins* issuing a plurality opinion which represented the views of four justices, as well as two singular concurring opinions and a dissenting opinion, representing the views of

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175. *Id.* at 470-71.
176. *Id.*; *infra* note 188-89 and accompanying text (discussing varying approaches to this issue).
177. *Id.* at 471-72. The court thereafter concluded that Price Waterhouse failed to demonstrate by clear and convincing evidence that impermissible bias was not the determinative factor in denying partnership status to Ms. Hopkins. *Id.* at 472.
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three justices. The plurality agreed with the lower courts’ approach to causation and burden shifting, but concluded that they erred in requiring Price Waterhouse to prove its case using the clear and convincing standard. Rather, the plurality stated, Price Waterhouse should only have been required to prove its case by the preponderance of evidence standard. Thus, the judgment was reversed in part and remanded for retrial to determine whether Price Waterhouse could prove its case by a preponderance of evidence. Justice White’s concurring opinion differed as to the method by which the defendant should bear its burden of proof, while Justice O’Connor’s concurrence defined a more stringent causation standard and a more complicated formula for burden shifting. The dissent, on the other hand, found that a much stricter standard of causation was required under Title VII than that proposed by the plurality and that, furthermore, the ultimate burden of proof must always remain with the plaintiff rather than shift to the defendant. To gauge ac-

179. 109 S. Ct. at 1780. Justice Brennan wrote the opinion in which Justices Marshall, Blackmun, and Stevens joined. Id. Justices White and O’Connor each filed separate concurring opinions. Id. at 1795-96. Justice Kennedy filed a dissenting opinion, which was joined by Chief Justice Rehnquist and Justice Scalia. Id. at 1806.

180. Id. at 1792-93. The Court agreed with the lower courts that once a plaintiff proves that gender played a motivating part in the employment decision, the defendant may avoid liability only by showing that the decision would have been the same absent such discrimination. Id. at 1787-88. The Court concluded that the better rule as to level of proof was the preponderance standard since the rules of civil litigation apply in Title VII cases. Id. at 1792.

181. Id. at 1791-93.

182. Id. at 1793. The district court will determine whether “Price Waterhouse had proved by a preponderance of the evidence that it would have placed Hopkins’ candidacy on hold even if it had not permitted sex-linked evaluations to play a part in the decisionmaking process.” Id. (emphasis in original).

183. Id. at 1795-96. (White, J., concurring). Justice White disagreed with the Court’s requirement that the employer submit objective evidence, and argued that proof is ample when an employer credibly testifies that “the action would have been taken for the legitimate reasons alone.” Id. at 1796.

Justice O’Connor suggested a different approach. Id. at 1796-1806 (O’Connor, J., concurring). Justice O’Connor urges that the plaintiff must “produce evidence sufficient to show that an illegitimate criterion was a substantial factor . . . such that a reasonable factfinder could draw an inference that the decision was made ‘because of’ the plaintiff’s protected status.” Id. at 1805. Once the plaintiff proved this, the defendant would have the burden to prove that its decision was justified by “wholly legitimate considerations.” Id.

184. Id. at 1806-14 (Kennedy, J., dissenting). The dissent cautioned against a departure from the existing Title VII framework for this isolated case. Id. at 1806. Justice Kennedy reiterated the order of proof for Title VII disparate treatment cases. Id. at 1809. The dissent stated that “once plaintiff presents a prima facie case, an inference of discrimination arises. The employer must rebut the inference by articulating a legitimate nondiscriminatory reason for its action. The final burden of persuasion, however, belongs to the plaintiff.” Id. See generally Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
curately the current and probable future level of protection afforded by Title VII to women seeking admission to partnerships, it is necessary to examine the Court's varying views on standard of causation and burden of proof.

1. Causation.—When analyzing causation in Title VII cases, courts look to the clause from Title VII which mandates that no unfavorable employment decision can be made against an employee “because of such individual’s . . . sex.” The problematic words here are the words “because of.” Do these words imply strong causation, where the discriminatory employment decision would not have taken place “but for” the illegal motive, or do they imply merely that the discriminatory motive must be a contributory factor to the decision? None of the opinions in Hopkins claim that the discriminatory motive must be the sole cause of the adverse partnership decision to trigger partnership liability, but they do stake out positions on differing points along this causation spectrum.

The plurality opinion, written by Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, argues that “because of” in this context does not require “but for” causation. The plurality reasoned that, since the phrase “because of” does not, in any logical context, mean “solely because of,” it is clear that, in mixed-motive cases, that decision is “because of” legitimate and illegitimate considerations. Thus, if the plaintiff can prove that the defendant partnership relied on a sexually discriminatory motive in making its partnership decision, the burden of proof shifts to the partnership.


186. See infra notes 187-232 and accompanying text (discussing the causation requirement).

187. Hopkins, 109 S. Ct. at 1784-86 (construing “because of” as a substitute for “but-for” causation is misunderstanding the language of Title VII). Justice Brennan criticized this construction of the “because of” language, noting that it is merely a hypothetical concept. Id. at 1785. Finally, Justice Brennan rejects any requirement that the plaintiff prove the “precise causal role,” and concluded that it is sufficient to “prove that the employer relied upon sex-based considerations in coming to its decision.” Id. at 1786. But see id. at 1808-09 & n.2 (Kennedy, J., dissenting) (discussing that the “but-for” causation is the substantive standard under Title VII); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (stating that “no more is required to be shown than that . . . [discrimination prohibited by Title VII] was a ‘but-for’ cause.”).

188. Hopkins, 109 S. Ct. at 1785.

189. Id. at 1787-88 (stating that at the point the defendant may avoid liability by “proving it would have made the same decision even if it had not allowed gender to play such a role.”).
Since such a formulation stops short of saying "but for" sexual discrimination, the employment decision would have been different.

In applying this interpretation to Ms. Hopkins, the plurality concluded that the plaintiff in a mixed motive case need only "prove that the employer relied upon sex-based considerations in coming to its decision," rather than proving the exact causal role of permissible and impermissible factors in the decision process. In this context, the plurality found that the evidence presented by Ms. Hopkins was sufficient to establish an actionable claim under Title VII. However, the plurality specified that, by focusing on the rather direct evidence presented by Ms. Hopkins, it was not implying "a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." Commenting further on the issue of causation, Justice Brennan, speaking for the plurality, agreed with the lower courts that some of the comments made by the Price Waterhouse partners were indicative of sex stereotyping, but cautioned that stray remarks based on sexual stereotypes do not always establish that gender was "a motivating factor" in an adverse employment decision. To be successful in a Title VII suit, Justice Brennan concluded, a plaintiff must show that the employer actually relied on her gender in making its decision.

The plurality further explicated their view on when gender constitutes a "motivating factor" that was "relied on" in an employment decision. If one of the reasons an employer decides not to admit a woman to a partnership is because she is a woman, then gender is a motivating factor. Again, if an employer bases this decision on sex stereotypes, such as the stereotype that a woman cannot or must not be aggressive, gender is a motivating factor in that decision.

The plurality points out that an employer who objects to aggressiveness in women but whose positions require this trait effectively places women in an "impermissible Catch-22," of the type prohibited by Title VII.

Both Justice White and Justice O'Connor, in their respective

190. Id. at 1786.
191. See id. at 1792-95.
192. Id. at 1791; cf. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2121 (1989) (wherein the plaintiffs attempted to make out a prima facie case of disparate impact based upon statistics).
193. Id. at 1790-91.
194. Id. at 1795.
195. Id. at 1790.
196. Id. at 1790-91.
197. Id. at 1791.
concurring opinions, suggest that, for a Title VII plaintiff to succeed in shifting the burden of proof to the defendant, the plaintiff must show that sex discrimination played a "substantial" role in the adverse partnership decision. While Justice White declined to become involved in what he views as a semantic argument over the precise meaning of "but for" causation, Justice O'Connor addresses this issue directly, and it is her concurring opinion which demands analysis. In particular, she disagrees with the plurality's conclusion that the words "because of" do not mean "but for" causation. She states that the Court should not and need not deviate from the interpretation of the statute which finds the two phrases to be synonymous. Justice O'Connor further points out that, in her view, the plurality's misreading of the words "because of" in the statute apparently led it to conclude that if a decisional process is "tainted" by awareness of sex or race in any fashion, the employer has violated Title VII. However, Justice O'Connor believed that Congress hinged liability under Title VII on a determination that the consideration of an illegal factor caused a tangible employment injury of some kind. Thus, Justice O'Connor argued that in order to justify shifting the burden of proof on causation to the defendant partnership, the plaintiff must show disparate treatment through direct evidence that an illegitimate criterion was a substantial factor in the decision. Both Justices White and O'Connor agreed with the plurality when they stated that Ann Hopkins met this standard of causation so that the burden of proof properly shifted to Price Waterhouse. However, Justice O'Connor, in particular, believed that Ann Hopkins succeeded in meeting an even more stringent standard of causation than the plurality demanded because "but for" the dis-

198. Id. at 1805 (O'Connor, J., concurring); id. at 1795 (White, J., concurring).
199. Id. at 1795.
200. Id. at 1796-97. Justice O'Connor urged the Court to remain within the framework it had carefully established. Id. at 1797. See generally Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-03 (1973); supra note 185, at 1119-22 (discussing order of proof in Title VII cases).
201. Hopkins, 109 S. Ct. at 1797 (stating that legislative history shows Congress meant "because of" to mean "but-for"). But see id. at 1785 & n.7 (noting that Congress specifically rejected the "but-for" language implying that the two phrases are not synonymous).
202. Id. at 1804. The plurality, Justice O'Connor contended, effectively negated the causation requirement of Title VII. Id.
203. Id. at 1803-04.
204. Id. at 1803. Justice O'Connor requires that the explicit consideration of a forbidden criterion such as gender play a "substantial role in a particular employment decision." Id.
205. Id. at 1795-96.
criminatory motive, Ms. Hopkins had a reasonable chance of being admitted to the partnership.\textsuperscript{206} Ms. Hopkins showed that negative sex stereotyping was a substantial factor in Price Waterhouse's decision regarding her candidacy for partnership.\textsuperscript{207} The plurality suggested that while Ms. Hopkins presented direct evidence of the partnership's discriminatory motive, this should not be construed to suggest that discrimination could not be proven in other ways sufficient to shift the burden of proof to the defendant.\textsuperscript{208} In direct disagreement, Justice O'Connor believed that the plaintiff must provide direct evidence of the substantial discriminatory motive if the burden of proof is to shift to the defendant. Thus, while agreeing that Ms. Hopkins did prove her case, the plurality and Justice O'Connor disagreed about what causal and evidentiary standards can be extrapolated from this case for use under Title VII.

The dissent in \textit{Hopkins}, written by Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, appeared to agree with Justice O'Connor on the necessity of "but for" causation.\textsuperscript{209} The dissent, however, unlike Justice O'Connor, asserted that Ms. Hopkins failed to meet this standard and that, since the district court had found that sex discrimination was not a "but for" cause of Price Waterhouse's decision in Ms. Hopkins' partnership bid, the judgment should have been against the plaintiff in favor of Price Waterhouse.\textsuperscript{210} The dissent embraced a more stringent notion of what "but for" causation requires than did Justice O'Connor.\textsuperscript{211} Justice Kennedy also disagreed with the district court finding that, on the one hand, Ms. Hopkins failed to prove that sex discrimination was a "but for" cause of the adverse partnership decision and, on the other hand, Price Waterhouse's reliance on negative sex stereotyping as part of the decisional process made it liable.\textsuperscript{212}

In delineating their view of the proper standard of causation

\begin{itemize}
  \item \textsuperscript{206} \textit{Id.} at 1804-05.
  \item \textsuperscript{207} \textit{Id.}
  \item \textsuperscript{208} \textit{Id.} at 1791.
  \item \textsuperscript{209} \textit{Id.} at 1807. Justice Kennedy remarked that "it is clear that . . . Title VII liability requires a finding of but-for causation." \textit{Id.}; see also \textit{id.} at 1797 (O'Connor, J., concurring) (stating that "because of" is synonymous with "but-for"). \textit{But see id.} at 1785 (construing the two phrases as synonymous is to misunderstand them).
  \item \textsuperscript{210} \textit{Id.} at 1814.
  \item \textsuperscript{211} \textit{Id.} at 1807. Justice Kennedy asserted that Title VII is concerned with decisions directly \textit{resulting} from impermissible motives. \textit{Id.} Justice O'Connor agreed that a claim was actionable when the impermissible motives amounted to a "substantial factor." \textit{Id.} at 1804-05.
  \item \textsuperscript{212} \textit{Id.} at 1813-14. Justice Kennedy cautioned that a claim based on negative sex stereotyping is not actionable under Title VII, because the ultimate question is "whether discrimination caused the plaintiff's harm." \textit{Id.} at 1813.
\end{itemize}
under Title VII, the dissent interpreted the “because of” phrase in Title VII as Congress’s way of indicating that proof of liability under Title VII requires a showing that race, color, religion, sex or national origin caused the negative decision.\(^{213}\) To support this position, Justice Kennedy noted that the words employed by the Supreme Court in prior Title VII decisions “are synonymous with ‘but for’ causation.”\(^{214}\) Furthermore, the dissent observed that the “but for” standard is necessary because Title VII is “not concerned with the mere presence of impermissible motives,” but rather is concerned with the employment decisions that result from those motives.\(^{215}\) The dissent asserted that “[i]f a motive is not a ‘but for’ cause of an event, then, by definition, it did not make a difference to the outcome.”\(^{216}\) Hence, the dissent concluded that any standard less than the “but for” analysis simply represented a decision to impose liability without causation.\(^{217}\)

The dissent criticized the plurality’s contention that, since the words “because of” do not mean “solely because of,” a “but for” standard of causation is not applicable to Title VII cases.\(^{218}\) To support this challenge, Justice Kennedy pointed out that the issue of sole causation is a “separate question from whether consideration of sex must be a cause of the decision.”\(^{219}\) Justice Kennedy also noted that no one contends that sex must be the sole cause of a decision before there is a Title VII violation.\(^{220}\) Rather, the dissent contended that sex discrimination must be “merely a necessary element of the set of factors that caused the decision, i.e., a but for cause.”\(^{221}\)

Thus, on the issue of causation, there appear to be three views: the view of the plurality that the discriminatory motive must simply have been relied on in Price Waterhouse’s decisional process;\(^{222}\) the view of Justice O’Connor that the discriminatory motive must play a substantial part in the partnership decision;\(^{223}\) and the view of the dissent that the discriminatory motive must be a cause of the adverse

\(^{213}\) Id. at 1807; see 42 U.S.C. § 2000e-2(a)(1) (1982).
\(^{215}\) Hopkins, 109 S. Ct. at 1807.
\(^{216}\) Id.
\(^{217}\) Id.
\(^{218}\) Id. at 1808 (emphasis added).
\(^{219}\) Id.
\(^{220}\) Id.
\(^{221}\) Id.
\(^{222}\) Id. at 1786.
\(^{223}\) Id. at 1804.
employment decision. The plurality dismissed the need for “but for” causation because it viewed such causation as synonymous with sole causation. Justice O'Connor, on the other hand, stressed the importance of a “but for” standard of causation but appeared to define that standard less stringently than the dissent did. Thus, it would appear that the Court has not yet adopted a definitive rule on the degree of causation required for a successful Title VII suit relative to an adverse partnership decision. While Justices White and O'Connor seem to have staked out a middle ground on causation in Title VII claims, it is unclear where their votes might fall in future cases.

Whatever standard of causation is employed, once the plaintiff establishes a prima facie case of discrimination under Title VII, the relevant issue becomes which party shall bear the ultimate burden of proof. When discussing this issue, as it is treated in Hopkins, one must have as a frame of reference four previous Supreme Court cases which appear to establish two different legal precedents. One of these precedents, set in Mount Healthy City School District Board of Education v. Doyle and affirmed in NLRB v. Transportation Management, Corp., is espoused by the plurality and the other, established in McDonnell Douglas Corp. v. Green and reaffirmed in Texas Department Community Affairs v. Burdine, is espoused by the dissent. Justices White and O'Connor, as discussed,

224. \textit{Id.} at 1813.
225. \textit{Id.} at 1785 & n.6.
226. \textit{Id.} at 1805. Justice O'Connor contends that an actionable claim arose when Ms. Hopkins offered direct evidence that the defendant placed substantial negative reliance on illegitimate criteria. \textit{Id.} The dissent, however asserts that the inquiry is whether the discrimination caused the employment decision at issue. \textit{Id.} at 1813.
227. \textit{Id.} at 1796-1806 (O'Connor, J., concurring); \textit{id.} at 1795-96 (White, J., concurring).
228. \textit{Id.} at 1795, 1805, 1809-10. The plurality contended that once this plaintiff proves illegitimate criteria were used in an employment decision, the defendant “may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision” absent the gender issue. \textit{Id.} at 1795. However, the plaintiff retains the burden of persuasion. \textit{Id.} at 1788.
230. 462 U.S. 393, 400 (1983) (where an employer's burden was likened to an affirmative defense).
231. 411 U.S. 792, 801-07 (1973) (stating that the order and allocation of proof requires complainant to establish \textit{prima facie} case of discrimination, then the burden shifts to an employer to articulate legitimate reason for decision).
232. 450 U.S. 248, 252-56 (1981) (noting that plaintiff's \textit{prima facie} case creates an inference of discrimination which an employer may rebut with evidence of a legitimate reason for dismissal, although the ultimate burden of persuasion belongs with the plaintiff to demonstrate that the preferred reason was not the true reason for the dismissals).
staked out a middle ground.

2. Plurality Opinion.—In examining Mount Healthy and Transportation Management, the cases the plurality claim are appropriate precedents, one sees a clear statement relating to plaintiffs' burden of proof. In Mount Healthy, the plaintiff, a school teacher, claimed that he had been fired because he exercised his First Amendment right of freedom of speech. Once the plaintiff proved that this protected conduct, freedom of speech, was a motivating factor in his employer's decision to discharge him, the employer was required to prove by a preponderance of the evidence that it would have reached the same decision regarding the plaintiff without the presence of the protected conduct. Again, in Transportation Management, the Court reiterated this burden shifting precedent.

Here, the Court upheld the National Labor Relations Board's interpretation of section 10(c) of the National Labor Relations Act. The provision held that, once a union member has shown that adverse treatment by the employer was partially motivated by the employer's dislike of unions, the burden shifted to the employer to prove that the adverse treatment would have occurred absent the discrimination.

The plurality in Hopkins, modeled its decision on Mount Healthy and Transportation Management. Although Mount

233. Compare NLRB v. Transportation Management, Corp., 462 U.S. 393, 400-01 (1983) (per curiam) (stating that the burden of proving unfair labor practices rests with NLRB General Counsel who must prove that the employee's conduct was not a substantial or motivating factor in the discharge) with Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977) (per curiam) (stating that the plaintiff must first prove that the protected conduct was a substantial motivating factor behind the discharge, and then the employer must rebut the inference by showing that the same decision would have been reached even in the absence of the plaintiff's conduct).

234. Mount Healthy, 429 U.S. at 276. The plaintiff also alleged violations of his fourteenth amendment rights. Id.

235. Id. at 287.

236. 462 U.S. at 403. The Court disagreed with the employer's contention that such an allocation of proof contravenes established procedure. Id. at 403-04 n.7. Therefore, if the plaintiff carries the burden of proving that protected conduct played a role in the discharge, then the burden shifts to the defendant to show that it would have reached the same decision regardless of the conduct. Id.

237. Id. at 400-04 & nn. 5-6 (stating that the Court was unprepared to hold the NLRB's position that the burden of persuasion shifts to the employer, an impermissible construction of the Act even though such construction was not required under the Act). See generally 29 U.S.C. § 160(c) (1982) (providing that violations may be adjudicated only upon a preponderance of evidence) and 29 C.F.R. § 101.10(b) (1989) (providing the general counsel has the burden of proving violations of section 8 of the NLRA).

238. Transportation Management, Corp., 462 U.S. at 400-02.

239. Hopkins, 109 S. Ct. at 1784-95; cf. Transportation Management, Corp., 462 U.S.
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Healthy was a First Amendment case involving a public employee and Transportation Management was an NLRA case, the plurality reasoned that the facts in Hopkins were similar enough to warrant a similar burden shifting. Thus, the plurality concluded that the lower courts had been correct in shifting the burden of proof to Price Waterhouse after Ms. Hopkins established that sexual stereotyping was a motivating factor in the adverse partnership decision. However, the plurality preferred to refer to this burden shifting as an opportunity for Price Waterhouse to provide an "affirmative defense." The plurality reasoned that, since Ms. Hopkins carried the burden of proving that sex was a motivating factor in the employment decision, the call for Price Waterhouse to show that the outcome of the decision was unaffected by the sex stereotyping was not a question of burden shifting. Rather, Ms. Hopkins carried the burden of proof to establish causation, and Price Waterhouse, if it wished to prevail, had the burden of proof that the illegal causation did not, in fact, change the outcome of the decision.

It is of interest to note that the dissenting justices claimed that here the plurality is demanding of the defense proof of the same "but for" causation which it held was unnecessary for the plaintiff. The plurality further commented that, since Price Waterhouse's decision was, in part, illegally motivated, fairness dictated that the firm "bear the risk that the influence of legal and illegal motives cannot be separated."

The plurality affirmed the position of the circuit court that Price

at 393; Mount Healthy, 429 U.S. at 274; see supra notes 229-38 and accompanying text (discussing these cases).

240. 109 S. Ct. at 1792-93 (noting that Mount Healthy and Transportation Management are cases which most resemble Hopkins).

241. Id. at 1787-88 (stating that once the plaintiff proves that gender played a motivating part in the employment decision, the defendant may avoid liability only by proving that it would have made the same decision even if it had not allowed gender to play a role).

242. Id. at 1788. If the plaintiff persuades the factfinder on one point, for the employer to prevail the defendant must persuade the factfinder to believe another. Id. The Court commented that this balancing of burdens is a result of Title VII's balancing of rights. Id.; cf. Transportation Management, Corp., 462 U.S. at 400.


244. Id.

245. Id. at 1806-07 (Kennedy, J., dissenting) (stating that whoever bears burden of proof in Title VII cases must show but-for causation).

246. Id. at 1790 (quoting Transportation Management, Corp., 462 U.S. at 403).

Because the evidence of discrimination was so overwhelming in Hopkins, the plurality unreservedly applied the burden shifting analysis. 109 S. Ct. 1787-88. In closer cases, however, the Justices may be more reluctant to shift the burden of persuasion. See Hopkins, 109 S. Ct. at 1804-05 (O'Connor, J., concurring) (maintaining that there should be a requirement that would require direct and clear evidence of discriminatory treatment before the burden would shift, implying that circumstantial evidence is insufficient).

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Waterhouse could avoid a finding of liability altogether if it prevailed in its burden of proof. The Justices held that the issue of liability under Title VII was not concluded when the plaintiff demonstrates that sex was a factor in the employment decision. Thus, employers will not be liable if they can prove that, even if they had not taken gender into account, they would have come to the same decision regarding a particular person. In affirming the court of appeals' position on this issue, the Court rejected the district court's finding that liability under Title VII was determined when Ms. Hopkins proved that sex stereotyping was a motivating factor and that, when Price Waterhouse assumed the burden of proof, the most it could accomplish was to avoid the obligation to provide Ms. Hopkins with equitable relief. In offering its rationale for upholding the court of appeals' decision, the plurality pointed out that Title VII attempts to balance the rights of an employee to be treated equitably against the rights of an employer to freedom of choice regarding its employees. To best preserve this balance, the defendant must be able to avoid a finding of failure to comply with Title VII by establishing that the employment decision in question was one which the defendant had a right to make, a decision based on an employer's legitimate prerogatives rather than on illegal motives.

When considering how an employer might avoid liability under Title VII, the plurality disagreed with both the district court and the court of appeals on the standard of proof which the defendant must meet upon assuming its burden of proof. Both lower courts held Price Waterhouse to the elevated clear and convincing standard, while the Supreme Court held that the appropriate standard was the usual civil standard of a "preponderance of the evidence." In ex-

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247. *Id.* at 1783-84 (stating that the court of appeals had the right approach but "erred in requiring the employer to make its proof by clear and convincing evidence.").

248. *Id.* at 1787-88.

249. *Id.*

250. *Id.* at 1783 (wherein the district court noted that the employer "could avoid equitable relief by proving through clear and convincing evidence that it would have placed Hopkins' candidacy on hold even absent this discrimination.").

251. *Id.* at 1786; see supra note 228 and accompanying text (discussing Title VII's allocation of benefits and burdens).

252. Hopkins, 109 S. Ct. at 1786-88. *But see id.* at 1809 (Kennedy, J., dissenting) (stating that the Title VII order of proof requires the plaintiff to present a prima facie case of discrimination, then an employer may rebut such inference, but the final burden of persuasion belongs to the plaintiff to show that the employer intentionally discriminated).

253. *Id.* at 1783-84 (rejecting both lower courts' requirement of the clear and convincing standard).

254. *Id.*

255. *Id.* at 1792.
plaining this decision, the plurality noted that the "[c]onventional
rules of civil litigation generally apply to Title VII cases. . .and one
of these rules is that parties to civil litigation need only prove their
case by a preponderance of the evidence." 256 Again, the Justices
pointed out that exceptions to the preponderance of the evidence
standard are rare and that the clear and convincing standard usually
"serves as a shield [for defendants] rather than, as Hopkins seeks to
use it, as a sword [for the plaintiff]." 257 Thus, because the lower
courts had required Price Waterhouse to prove its innocence by
meeting a standard of proof which was too stringent, the Court re-
versed the court of appeals on this issue and remanded the case to
determine if Price Waterhouse could meet its burden of proof using
the preponderance of the evidence standard. 258

As to the kind of evidence which an employer must present to
successfully bear its burden of proof, the plurality found that "the
employer should be able to present some objective evidence as to its
probable decision in the absence of an impermissible motive." 259 The
Court stressed that, in a mixed-motive case, such as Hopkins, an
employer will not prevail "by offering a legitimate and sufficient rea-
son for its decision if that reason did not motivate it at the time
of the decision." 260 That is, the employer must convince the Court that,
at the time of the decision, the employer's legitimate reason, stand-
ing alone, would have induced it to make the same decision. 261

Thus, the plurality found that, in Title VII litigation of the type
discussed here, the appropriate case models are Mount Healthy and
Transportation Management. 262 The burden shifts to the defendant
once the plaintiff proves that the defendant relied upon an illegal
motive in making the employment decision in question. 263 The plu-

256. Id.
257. Id. The Court noted that the clear and convincing standard in Title VII cases is
related to the relief requested rather than to the initial determination of liability. See generally
29 C.F.R. § 1613.271(2)(c) (1989) (providing that if the EEOC finds "the record contains
clear and convincing evidence that, although discrimination existed at the time selection for
promotion was made, the employee would not have been promoted even absent discrimination,
the agency shall eliminate any discriminatory practice and ensure it does not recur.").
258. Hopkins, 109 S. Ct. at 1793.
259. Id. at 1791 (wherein the plaintiff must show that the employer actually relied on
gender in making its decision); cf. id. at 1805 (O'Connor, J., concurring) (finding that the
plaintiff must present sufficient evidence that an illegitimate criterion was used). But see id. at
1796 (White, J., concurring) (finding "no special requirement that the employer carry its bur-
den by objective evidence.").
260. Id. at 1791 (emphasis added).
261. Id.
262. See supra note 239 and accompanying text (discussing these cases).
263. See supra note 228 and accompanying text (discussing burden of proof).
rality further asserted that, when it assumes the burden of proof, the defendant must meet this burden with objective evidence that meets the preponderance of the evidence standard in order to prevail. \(^{264}\) Thus, the plurality mandated that Price Waterhouse be given an opportunity to prove that it did not violate Title VII, using this formulation to govern the shift of burden of proof. \(^{265}\)

In his concurring opinion, Justice White agreed with the plurality that *Mount Healthy* and *Transportation Management* were the appropriate legal precedents for the *Hopkins* case. \(^{266}\) Thus, Justice White felt that the burden of proof appropriately shifted to Price Waterhouse, after Ms. Hopkins presented a prima facie case. \(^{267}\) Justice White also agreed that Price Waterhouse should have been held to the preponderance of the evidence standard rather than to the clear and convincing standard. \(^{268}\) However, Justice White differed from the plurality regarding the type of evidence that the defendant should be required to produce once the defendant has assumed the burden of proof. Specifically, Justice White disagreed with the plurality's apparent requirement that, in order to avoid Title VII liability, "the employer [must] submit objective evidence that the same result would have occurred absent the unlawful motivation." \(^{269}\) In contrast, Justice White believed that "[i]n a mixed motive case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof." \(^{270}\) Here, Justice White seems to suggest that, to preserve the employer's right to freedom of choice in employment decisions, it should not be held to too stringent a standard, not only in terms of the overall weight of the evidence produced, but also in terms of the kind of evidence produced. \(^{271}\)

3. **Dissenting Opinion.**—In framing its comments on the burden of proof in *Hopkins*, the dissenting Justices relied upon the second set of cases referred to above, *McDonnell Douglas Corp. v. Green* \(^{272}\) and *Texas Department of Community Affairs v. Bur-
The dissent pointed out that these were cases decided under Title VII. On the other hand, *Mount Healthy* and *Transportation Management*, used by the plurality as precedents on burden-shifting, were, respectively, First Amendment and NLRA cases, decided under different mandates from those of Title VII. Thus, *McDonnell Douglas* and *Burdine* are, in the view of the dissent, the cases of choice for Title VII precedent.

As might be assumed, these cases provide a different model for assigning burden of proof than do *Mt. Healthy* and *Transportation Management*. Under *Burdine*, the plaintiff must first present a prima facie case: proof of membership in a protected class, or participation in a protected activity, qualification for promotion, rejection for promotion and employer's continued solicitation of applicants with similar qualifications. Once this has been established an inference of discrimination arises. Then, it is the defendant's burden to produce evidence of a legitimate motive for rejecting the applicant and rebut the inference of discrimination raised by the prima facie case. Under *Burdine*, however, the final burden of persuasion remains with the plaintiff to prove that the employer's allegedly legitimate motive is a pretext to cover the real motive, intentional discrimination. Thus, under *Burdine*, the burden of proof never shifts to the defendant, but remains at all times with the plaintiff.

Justice Kennedy believed that this was the framework most ap-

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274. *Hopkins*, 109 S. Ct. at 1809-10 (Kennedy, J., dissenting) (explaining that the Court should adhere to the *McDonnell Douglas* and *Burdine* analysis for disparate treatment allegations).
277. *Hopkins*, 109 S. Ct. at 1811 (stating that the plurality's new approach follows *Mount Healthy* and *Transportation Management* even though the context in *Hopkins* is different).
278. *Id.* at 1806, 1809 (stating that these two cases represent precedent for Title VII disparate treatment cases).
279. *See supra* note 233-35 and accompanying text (discussing *Mount Healthy*'s approach to the burden of proof).
280. *See supra* note 236-38 and accompanying text (discussing *Transportation Management*'s approach to burden of proof).
282. *Id.* at 252 & n.6.
283. *Id.* at 253.
284. *Id.* at 254. To avoid liability, the employer must articulate some legitimate nondiscriminatory reason for the plaintiff's rejection. *Id.*
The dissent argued that the plurality's decision to shift the burden of proof in mixed motive cases did not provide sufficient refinement to legal theory vis-a-vis Title VII to justify the confusion it would create in the judicial system. Since it would not apply to all Title VII cases, but only to that small subset of cases whose plaintiffs offered direct evidence of a substantial discriminatory motive, the dissent argued that the difficulties in evaluating the strength of the plaintiff's evidence and determining whether to shift the burden of proof are not justified. To emphasize even further the limited benefits of this burden shifting scheme, the dissenting Justices pointed out that burden shifting makes a real difference to outcome only in that even smaller subset of cases where the "evidence is so evenly balanced that the factfinder cannot say that either side's explanation of the case is more likely." Only in such cases will the defendant, by bearing the burden of proof, assume a real "risk of non persuasion" as a result of harboring an illegal motive in an employment decision.

For the plurality, the decisive factor in choosing Mount Healthy as the model for assigning burden of proof in mixed motive cases was the kind of evidence the plaintiff presented to prove the existence of discrimination. In its dismissal of Burdine as the appropriate framework for assigning burden of proof in Hopkins, the plurality claimed that it is solely a "pretext" case, so that a plaintiff in a mixed motive case, where there is objective evidence, rather than inferential evidence, of the presence of a discriminatory motive, will be disadvantaged by having to "squeeze her proof into Burdine's framework." Although forcing the plaintiff to carry the burden of proof throughout the trial is meant to protect the employer's freedom of choice regarding employees, the plurality stated that employers merit this benefit only in cases where the plaintiff's proof is solely

287. Id. at 1811-12 (noting that the potential benefits of the plurality approach are overstated).
288. Id. at 1812.
289. Id. Justice Kennedy wrote that the plurality's approach is not applicable to "cases in which the allocation of the burden of proof will be dispositive because of a complete lack of evidence on the causation issue."
290. Id.
291. Id. at 1788-89 & n.12 (discussing the evidentiary scheme). But see id. at 1812 (Kennedy, J., dissenting) (stating that the Hopkins analysis is only applicable to very limited facts).
292. Id. at 1788. The plurality observed that the premise in Burdine is that "either a legitimate or an illegitimate" set of motives was present. Id.
Where the proof is direct, the plurality found the employer forfeits this deference to its rights. On the other hand, the dissent believed that the framework provided by Burdine is flexible enough to protect the balance of rights between employer and employee, both in cases in which the plaintiff's proof is direct and in those in which the proof is inferential. The dissent claimed that the Burdine framework "is hardly a framework that confines the plaintiff; still less is it a justification for saying that the ultimate burden of proof must be on the employer in a mixed motive case." Rather, "Burdine compels the employer to come forward with its explanation of the decision and permits the plaintiff to offer evidence under either of the logical methods [direct or inferential] for proof of discrimination." Thus, the rights of both parties are protected under the Burdine framework. As precedent for this proposition, the dissent pointed to United States Postal Service Board of Governors v. Aikens, a case where a black man provided direct evidence that he had been passed over for promotion because of discriminatory reasons. In spite of the extraordinary evidence, the Aikens Court adhered to the Burdine framework in deciding the case.

Thus, the dissent used Burdine to argue strongly that the burden of proof must remain with the plaintiff in a Title VII suit, no matter what the nature of the discrimination. Perhaps the heart of this argument for the dissenting Justices is their determination to carry out what they see as the intent of Congress to prevent employers from being found liable under Title VII for stray remarks heard in hallways or for other discriminatory thoughts or attitudes that do not result in discriminatory employment decisions.

293. Id. at 1788-89. Here, however, the plaintiff's proof was objective. Id.
294. Id. at 1789-90.
295. Id. at 1810 (Kennedy, J., dissenting) (establishing that the McDonnell Douglas and Burdine framework are appropriate) (emphasis added).
296. Id. Justice Kennedy supported the framework in Burdine, calling it an orderly and adequate way to hear the case. Id.
297. Id.
298. Id. But see id. at 1788-89 (wherein the plurality opinion cautioned that not all disparate treatment cases may be "squeezed" into the Burdine framework).
300. Hopkins, 109 S. Ct. at 1810-11. (Kennedy, J., dissenting) (noting the application of the Burdine framework in this instance).
301. Id. (stating that the Burdine analysis is flexible enough to apply to any disparate treatment claim).
302. Id. at 1807 (stating that Title VII is concerned with impermissible employment decisions rather than the mere presence of impermissible motives).
tain that employers are held liable only for discriminatory acts, the
dissent argued that they should be presumed innocent until proven
guilty and that this can only be accomplished by requiring the plain-
tiff to bear the burden of proof throughout the case. The dissent, on the other hand, asserted that the Court’s primary duty is to make certain that employers are not penalized merely for discriminatory animus, and therefore they would force the plaintiff to bear the burden of proving that the discriminatory animus actually resulted in an adverse employment action.

4. Middle Ground.—As with the issue of causation, Justice O’Connor appears to have chosen a middle ground. She agreed with the plurality that the burden of proof must shift to the defendant in a case such as Hopkins, where there is direct evidence that a discriminatory motive played a substantial role in the partnership decision. She also agreed that, once the burden of proof has shifted to the defendant in such a case, the defendant should have to prove its innocence under the preponderance of evidence standard and that meeting such a standard of proof should allow the defendant to avoid liability altogether. Agreeing with the plurality, Justice O’Connor wrote that this burden shifting is justified because, once "a disparate treatment plaintiff show[s] by direct evidence that an illegitimate criterion was a substantial factor in the decision," the employer is no longer entitled to a presumption of good faith in its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. At this point, the employer may be required to convince the factfinder that, despite the smoke, there is no fire. Justice O’Connor appears to share with the plural-

303. Id. at 1809-10 & n.3.
304. Id. at 1787, 1790.
305. Id. at 1809, 1813-14 (Kennedy, J., dissenting).
306. Id. at 1796-97 (O'Connor, J., concurring).
307. Id. at 1796.
308. Id. (stating that the employer must prove it would have made the same decision absent considerations regarding the candidate’s gender).
309. Id. at 1804 (stating that where the plaintiff made a strong evidentiary showing, the trier of fact was entitled to assume that discriminatory animus contributed to the outcome).
310. Id. (suggesting that stray remarks in the workplace, while probative, cannot satisfy the plaintiff’s burden of proof).
ity the feeling that, once the existence of discriminatory animus has been shown, the employer must bear the risk of not being able to prove that this animus did not result in discriminatory action.\textsuperscript{311}

Justice O'Connor, however, shares the dissent's concern that employers not be penalized merely for harboring illegal thoughts.\textsuperscript{312} Again, Justice O'Connor voiced concern about "the danger of forcing employers to engage in unwarranted preferential treatment" of a protected group to avoid prosecution under Title VII.\textsuperscript{313} Although this concern for the balance of rights under Title VII is shared by both the plurality and the dissent, Justice O'Connor offers a different model.

Justice O'Connor argued that any Title VII suit should initially adhere to the \textit{McDonnell Douglas-Burdine} framework to structure the presentation of evidence.\textsuperscript{314} The plaintiff must first establish the \textit{McDonnell Douglas-Burdine} prima facie case described above.\textsuperscript{315} At this stage, the plaintiff should also present direct evidence of discriminatory motives at work in the decision making process.\textsuperscript{316} When the plaintiff has presented this evidence, the defendant employer should present its case, including whatever direct evidence it may have of legitimate motives for the employment decision in question.\textsuperscript{317} Once all the evidence has been presented, using \textit{Burdine} as the model, Justice O'Connor recommended a totally different scheme for assigning burden of proof than does the plurality or the dissent.\textsuperscript{318} Justice O'Connor stated that at this point the Court should assess the evidence to determine if the plaintiff has met the \textit{Price Waterhouse} threshold, that is, \textit{direct evidence} that the discriminatory animus played a \textit{substantial} part in the employment decision.\textsuperscript{319} If so, the Court should shift the burden of proof to the defendant employer.\textsuperscript{320} If not, the plaintiff should bear the burden of persuasion.

\textsuperscript{311.} \textit{Id.} at 1804-05. Justice O'Connor agreed with the approach adopted by the plurality. \textit{See id.} at 1787-88 (plurality opinion).
\textsuperscript{312.} \textit{Id.} at 1804-05 (O'Connor, J., concurring). Justice O'Connor agreed with the dissent. \textit{See id.} at 1807 (Kennedy, J., dissenting) (stating that Title VII requires more than the mere presence of impermissible motives).
\textsuperscript{313.} \textit{Id.} at 1804.
\textsuperscript{314.} \textit{Id.} at 1805; \textit{cf. id.} at 1809 (Kennedy, J., dissenting) (setting forth the order of proof in disparate treatment cases under the \textit{McDonnell Douglas-Burdine} analysis).
\textsuperscript{315.} \textit{Id.} at 1805 (O'Connor, J., concurring).
\textsuperscript{316.} \textit{Id.}
\textsuperscript{317.} \textit{Id.}
\textsuperscript{318.} \textit{Id.}
\textsuperscript{319.} \textit{Id.} at 1805 (emphasis added); \textit{see also id.} at 1787-88.
\textsuperscript{320.} \textit{Id.} at 1797-88.
that the employment action was “because of” discrimination. Justice O'Connor asserted that “such a system is both fair and workable and it calibrates the evidentiary requirements demanded of the parties to the goals behind the statute itself.”

V. CONCLUSION

Clearly, Justice O'Connor is concerned, as are all the Justices, with distinguishing frivolous suits from legitimate suits, and more subtly, suits where the discriminatory animus is very real, but not causative, from suits where the animus is not only real but also causative. This attempt to preserve a balance between the employee’s rights and the employer’s rights goes to the crux of the problem women have faced in using Title VII to gain equal access to the halls of power. It is legitimate to be concerned that federal law not intrude on a private employer’s right to decide whom to promote, but it is also legitimate to require that such an employer not allow personal prejudices to negatively impact into employment decisions regarding innocent parties. Walking the line between these two outcomes is a difficult balancing act indeed.

Although the United States Supreme Court in Price Waterhouse v. Hopkins attempts to walk this line, several factors combine to limit the predictive value of this decision for future female litigants attempting to use Title VII to rectify a discriminatory partnership decision. First, the four opinions offer views on causation and burden of proof which fall at widely diverse points on any logical spectrum. Second, four Justices supported the plurality opinion, three supported the dissenting opinion and two wrote concurring opinions. Such a numerical breakdown indicates that it will be difficult to predict which way future decisions might go, particularly since Justice O'Connor shows strong affinity with both

321. Id. at 1805 (using the principles set forth in McDonnell Douglas and Burdine). But see id. at 1785 (wherein the plaintiff argued and the plurality agreed that the but-for causation test is inapposite to this disparate treatment case).
322. Id. at 1805.
323. See id.
325. See id. at 1780 (Brennan, J., plurality); id. at 1795 (White, J., concurring); id. at 1796 (O'Connor, J., concurring); id. at 1806 (Kennedy, J., dissenting).
326. See id. at 1780 (containing Justices Brennan’s plurality opinion as supported by Justices Marshall, Blackmun, Stevens).
327. See id. at 1806 (containing Justice Kennedy’s dissenting opinion as supported by Chief Justice Rehnquist and Justice Scalia).
328. Id. at 1795 (White, J., concurring); id. at 1796 (O'Connor, J., concurring).
points of view. In light of these two factors, one can hardly say that *Price Waterhouse v. Hopkins* is the definitive case which will launch women onto a new plateau in their fight for equality. Neither is this the decision that sets the crusade for equality in the workplace back to the 1950's. Rather, *Hopkins* may be seen as the first decision to wrestle with the very complex issues that are raised when a woman questions the legitimacy of a partnership decision. It gives these issues credence and thus puts women in a better position to challenge such decisions in the future. The opinion further clarifies that subjective criteria will be analyzed along with the traditional objective evaluations relative to employment decisions violative of Title VII's prohibition against discrimination.

Women were better served by Title VII after *Hishon*, which acknowledged their right to litigate adverse partnership decisions caused by sex discrimination under Title VII. They remain well served by Title VII after *Hopkins*, where, by wrestling with this admittedly mixed motive case, the Court has served notice it will not be deterred by the complexity of sorting out motives and assigning burden of proof in high-level promotion decisions. Thus, after *Hishon*, women crossed the first threshold on the way through that "glass ceiling." While it might not be said that, after *Hopkins*, they have crossed the second threshold and, in fact, eliminated the ceiling, they are at least now struggling through that second threshold. Indeed, women now looking up the career ladder and wondering if office politics will permit them to reach the top, after *Hishon* and *Hopkins*, may question whether the mandate of Title VII has been tested and appropriately stretched. Ultimately, the burden of

329. *See id.* at 1796 (discussing her agreement with the plurality regarding the shift in the burden of persuasion but disagreeing with the substantive requirement of causation and the broad applicability of allocation the burden of proof).

330. *Id.* at 1786-92.


332. *Hopkins*, 109 S. Ct. at 1775; *supra* notes 179-322 and accompanying text (discussing this in detail).

333. *See supra* notes 16-113 and accompanying text (discussing this in detail).

334. *See supra* notes 114-322 and accompanying text (discussing this hurdle in detail).

335. *See supra* notes 16-322 and accompanying text (discussing these and other decisions).
proof issue in discrimination cases may require clarification by legislative amendment to Title VII.336

336. As this Article goes to press, Senator Edward M. Kennedy and Representative Augustus Hawkins have introduced proposals to amend Title VII of the Civil Rights Act of 1964 in the current legislative session. See Frisby, *New Civil Rights Proposal May Pose A Test For Bush*, Boston Globe, Feb. 7, 1990, at 1, 17, col. 1 (discussing, inter alia, that Title VII plaintiffs lost ground in the 1989 Supreme Court term due to stiffened burden of proof scheme in *Price Waterhouse v. Hopkins*). "Under the proposed bill, any reliance on prejudice in making employment decisions is made illegal. . .[and the] victims [could] recover compensatory as well as punitive damages." *Id.* at 17, col. 4.