Women Denied Partnerships Revisited: A Response to Professors Madek and O'Brien

David R. Wade
WOMEN DENIED PARTNERSHIPS REVISITED: A RESPONSE TO PROFESSORS MADEK AND O'BRIEN

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I. INTRODUCTION

Title VII of the 1964 Civil Rights Act prohibits employment discrimination by private employers and federal and state governments on the basis of race, color, religion, sex and national origin. In Price Waterhouse v. Hopkins, a black female first had her partnership bid placed on hold and later was denied reconsideration for partnership in the accounting firm of Price Waterhouse in violation of Title VII. A plurality of the U.S. Supreme Court determined that decision-makers permitted negative gender stereotypes to play a motivating part in their employment decision. The Court found that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that

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4. Hopkins, 490 U.S. at ____, 109 S. Ct. at 1779. Partners were invited to submit written evaluations of each partnership candidate and decisions were essentially derived from a consensus of these evaluations. 490 U.S. at ____, 109 S. Ct. at 1781. Negative stereotypical comments appeared in the partner's evaluations and included criticisms that she was too "macho" and that she "overcompensated for being a woman." Hopkins, 618 F. Supp. at 1116-17. One partner advised her to take "a course at charm school". Id. at 1117. The man who bore the responsibility to explain the Board's decision to Hopkins advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 1117. Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University testified that these comments as well as other aspects of Price Waterhouse's selection process were likely influenced by sex stereotyping. Id. The district court concluded that sex stereotyping was at work. Id. at 1120.
she must not be, has acted on the basis of gender." 5 The Court held that "once a plaintiff . . . shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." 6 In cases of individual disparate treatment, 7 Hopkins establishes an alternative to the scheme of litigation crafted in McDonnell Douglas v. Green 8 and Texas Department of Community Affairs v. Burdine. 9

5. Hopkins, 490 U.S. at —, 109 S. Ct. at 1790-91. Justice Brennan wrote the opinion in which Justices Marshall, Blackmun and Stevens joined. Id. at —, 109 S. Ct. at 1780. Justices White and O'Connor each filed separate concurring opinions. Id. at —, 109 S. Ct. at 1795-96. Justice Kennedy filed a dissenting opinion, which was joined by Chief Justice Rehnquist and Justice Scalia. Id. at —, 109 S. Ct. at 1806. The Court found that decisions based on such stereotypes constituted discrimination based on sex. Id. at —, 109 S. Ct. at 1791. The plurality adopts the view that a plaintiff must show that gender played a "motivating part in an employment decision." Id. The plurality offers no comment on the substantiality of the illegitimate motivation a plaintiff must show. Id. at —, 109 S. Ct. at 1790. Instead, the plurality places the determination of substantiality within the defendant's rebuttal burden requiring the defendant to dispel an illegitimate motive's substantiality by proving that "even if it had not taken [an illegitimate motive] into account, it would have come to the same decision." For the plurality, if the illegitimate factor was simply among the employer's reasons at the time of making the decision, the illegitimate factor was a motivating part of the employment decision. 490 U.S. at —, 109 S. Ct. at 1787-88; see infra notes 33 & 34 and accompanying text (discussing competing definitions of causation). See also CIVIL RIGHTS ACT OF 1990 as passed by House § 5 S. 2104, 101 Cong., 1st Sess. 1990, Daily Lab. Rep. (BNA) No. 153, at D-1 (Aug. 8, 1990) (adopting the plurality view that an impermissible motive must only be a contributing factor even though there were other factors as well).

6. Hopkins, 490 U.S. at —, 109 S. Ct. at 1787. The Court finds that two circuits require clear and convincing evidence while nine circuits require either a preponderance of the evidence or make no mention of any evidentiary standard. Id. at —, 109 S. Ct. at 1784 n.2. The Court adopts the latter view endorsing the preponderance standard. Id. at —, 109 S. Ct. at 1791-93; see infra notes 36 & 37 and accompanying text (discussing the employer's rebuttal burden).

7. Disparate treatment means that an employer treats some people less favorably than others because of their race, sex, religion or national origin. Proof of discriminatory motive is crucial. Such a motive may be inferred from statistical evidence and from unexplained differences in treatment. Such inferential uncovering of discriminatory motive is not limited to the employment context. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977) (finding discriminatory intent in de facto segregation in housing).


8. 411 U.S. 792 (1973). In McDonnell Douglas, the employer laid off Green as part of a general reduction in the employer's workforce. Id. at 794. Green, a long time civil rights activist protested the lay-off and, as part of this protest, joined with members of the Congress on Racial Equality and engaged in an illegal "stall-in" and "lock-in" blocking ingress and egress of the employer's business premises. Id. Subsequently, business conditions improved and the employer placed advertisements seeking qualified mechanics but rejected Green's application for employment.

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In a recent article, Professors Madek and O'Brien explore the principles announced in *Hopkins* within the specific context of alleged gender discrimination in promotions from associate to partner. The authors identify two thresholds women must cross to attain equal opportunity for entry into "the highest echelons of the professions in this country." While finding women have crossed the first threshold, standing to sue under Title VII for discrimination when applying for admission to a partnership, the authors find women's crossing of the second threshold, the grounds upon and the rules by which such suits can be won, more problematic. Ultimately the authors conclude that while the second threshold has not been crossed, the doorbell has been rung, the door opened and women are "struggling through that second threshold."

The authors' examination is under-inclusive in several significant ways. First, the authors overestimate the effect *Hopkins* will exert on decision-makers considering promotions from associate to partner. This Article will first examine the doctrinal development of individual disparate treatment cases. This Article will then explore the doctrinal changes effected by *Hopkins* in mixed-motive cases. Lastly, this Article will explore the relatively easy ways decision-makers consider the possibility of partnering to induce an associate to join a firm.

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9. 450 U.S. 248 (1981). In *Burdine*, plaintiff brought suit alleging that McDonnell Douglas refused to rehire him because of his race and persistent involvement in the civil rights movement. *Id.* at 797. *McDonnell Douglas* is generally considered to have established the basic allocation of burdens and order of presentation of proof in a Title VII case of individual disparate treatment. *Id.* at 802.


11. *See Women Denied*, supra note 10, at 258. While speaking of the highest echelons, the authors limit their examination to female applications for partner status. *Id.* at 258-59. The authors ignore the difficulties of women's progression up the ladder in sole proprietorships, corporations and other forms of business organizations.


makers may avoid Hopkins' more onerous burdens.

Second, by limiting their examination to Hopkins, the authors fail to note recent disparate impact decisions of the U.S. Supreme Court and their significance in cases involving allegedly discriminatory denials of admission to partner status. This Article will examine these cases and note their probable applications.

Third, the authors underestimate the doctrinal applications and force of the decision in Hopkins on other areas of discriminatory treatment. Changes in these areas may have significant effects on partnership decisions in ways the authors fail to recognize. This Article will explore these broader applications and their possible impact on partnership promotion decisions. Specifically, this Article will discuss the ripple effects of Hopkins on the affirmative action doctrine, retaliation doctrine, and explore the window of opportunity Hopkins offers for Title VII protection of homosexuals.

II. INDIVIDUAL DISPARATE TREATMENT

A. Established Doctrine

The scheme of litigation in an individual disparate treatment case was first established in McDonnell Douglas v. Green. The plaintiff, during the prima facie case, must demonstrate membership in a protected class, application and minimal qualifications for the position, rejection, and that the employer continued to seek applicants or filled the position with someone else. This four-part test "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection," lack of qualifications and absence of a vacancy. Satisfaction of these four prima facie elements gives rise inferentially to a rebuttable presumption of intentional discrimination.

15. See supra note 7 (discussing the distinction between disparate treatment and disparate impact).


17. The phrase "prima facie case" in the Title VII context describes "the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 254 n.7.

18. McDonnell Douglas, 411 U.S. at 802. While these prima facie elements were not established in challenges to allegedly discriminatory promotion from associate to partner, the district court in Hopkins applied these elements in such a case. 618 F. Supp. at 1113.

19. Burdine, 450 U.S. at 254; see International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (stating that though "the McDonnell Douglas formula does not require direct proof of discrimination, it does demand . . . that his rejection did not result from the two most common legitimate reasons . . . an absolute or relative lack of qualifications or the absence of a vacancy.

20. A rebuttable presumption is a traditional device used in the common law for allocating the burden of production. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.9 at 255

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The defendant/employer, to rebut this presumption of intentional discrimination, has a burden to produce evidence of a legitimate, nondiscriminatory reason for the plaintiff’s rejection. It is not required that the employer persuade the factfinder that the stated reason is the actual reason for rejection. If the employer satisfies his rebuttal burden of production, plaintiff has an opportunity to persuade the factfinder, by a preponderance of the evidence, that the employer’s stated reason is merely pretext to disguise intentional discrimination. Pretext is shown through adducing evidence of the employer’s past discrimination against the particular plaintiff involved in the suit, statistical evidence sufficient to persuade the trier.
At the close of evidence, the trier of fact makes the factual finding of the presence or absence of intentional discrimination. It is without dispute that, under the McDonnell Douglas/Burdine scheme of litigation, the burden of persuasion remains with the plaintiff at all times. It is further without dispute that a finding of intentional discrimination is arrived at inferentially by the trier of fact on the basis of circumstantial or statistical evidence. Rarely will an employer in language or in script admit intentional discrimination.

B. The Effects of Hopkins

The plurality decision in Hopkins established an alternative scheme of litigation in "mixed-motive" cases of individual dispa-


26. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989 (1988) (noting that plaintiff was apparently told that the teller position involved "a lot of money . . . for blacks to have to count.") (citation omitted); Slack v. Havens, 522 F.2d 1091, 1093 (9th Cir. 1975) (finding a supervisor commented that "[c]olored people are hired to clean because they clean better, or words to that effect.").

27. Such a factual finding is subject to a "clearly erroneous" standard on appeal. FED. R. Civ. P. 52(a). A factual finding is clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). "If the district court's account of the evidence is plausible . . . the court of appeals may not reverse it even though convinced that . . . it would have weighed the evidence differently." Anderson v. City of Bessemer, 470 U.S. 564, 573-74 (1985).

28. See Hopkins, 490 U.S. at ___, 109 S. Ct. at 1802 (O'Connor, J., concurring); Id. at 1810 (Kennedy, J., dissenting); see also Burdine, 450 U.S. at 253; Sweeney, 439 U.S. at 29; cf. Watson, 487 U.S. at 991 (stating that in cases of disparate impact "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.").

29. It is never directly proven that the employer intentionally discriminated because there is no "smoking gun" nor any admission by the defendant. Rather, we infer intentional discrimination when the plaintiff successfully eliminates all the common legitimate justifications for the adverse employment decision and the defendant fails to produce evidence of a less obvious or common justification for the decision. See Teamsters, 431 U.S. at 358 n.44. (stating that the McDonnell Douglas formula does not require direct proof of discrimination).

30. The exception to this rule is on cases of retaliation in which an employee is intentionally discriminated against because of unreasonable conduct in opposition to arguable violations of Title VII. In such cases, the employer often admits intentional discrimination but succeeds in justifying it. See infra notes 185-227 and accompanying text (discussing retaliation).

31. Hopkins, 490 U.S. at ___, 109 S. Ct. at 1791-92. While this is the first time the Supreme Court has considered a "mixed-motive" case, the circuits have considered such cases. See Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); Blalock v. Metal Trades, Inc., 775 F.2d ___.

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rate treatment. In mixed-motive cases, both legitimate and illegitimate factors are considered by decision-makers in reaching an employment decision. In such mixed-motive cases, the plaintiff must persuade the factfinder, by a preponderance of the evidence, that an illegitimate factor played a "motivating part in [the] employment decision" or was a "substantial factor" considered by a decision-maker.

703 (6th Cir. 1985); Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985); Lewis v. University of Pittsburgh, 725 F.2d 910 (3d Cir. 1983).

32. *Hopkins*, 490 U.S. at 109, 109 S. Ct. at 1785. Illegitimate factors include the protected classes identified in Title VII: race, sex, religion and national origin. *Id.* at 109, 109 S. Ct. at 1787 n.9. Legitimate factors presumably consist of everything else. *Id.* The significance of *Hopkins* lies in the Court's inclusion of a broadened definition of stereotypes concerning the protected classes among the illegitimate factors. See infra notes 231-40 and accompanying text (discussing stereotypes); see also infra notes 35, 59 & 242 and accompanying text. In *Hopkins*, illegitimate stereotypes appeared in partner's written evaluations of partnership candidates. 618 F. Supp. at 1116-19. At trial, legitimate factors advanced in support of Hopkins' rejection included abrasiveness and inadequate interpersonal skills. *Id.* at 1113. Evidence adduced at trial indicated Hopkins had improved in these areas as well as establishing that Hopkins had been instrumental in attracting new contracts for the firm. *Id.* at 1112-13.

33. *Hopkins*, 490 U.S. at 109, 109 S. Ct. at 1790. The Court offers conflicting analyses of the causation issue. *Id.* The plurality exhaustively canvassed conflicts among circuit courts of appeal as to the standard of causation finding that four circuits require a plaintiff to show that "but-for" the discriminatory motive, the decision would have been in his favor. *Id.* at 109, 109 S. Ct. at 1784 n.2. Seven circuits require only that the discriminatory motive be a "substantial" or "motivating" factor. *Id.* The *Hopkins* plurality opinion denies that the statutory language "because of" means "but-for" causation which, would be tantamount to meaning "solely because of." *Id.* at 109, 109 S. Ct. at 1785. Instead, the plurality holds that an employment decision is "because of" sex when one of the reasons supporting the decision is the candidate's gender. *Id.* at 109, 109 S. Ct. at 1790; see also supra note 5 (discussing the term "motivating"). Justice O'Connor finds that despite "the plurality's dictum that the words 'because of' do not mean 'but-for' causation; manifestly they do." *Id.* at 109, 109 S. Ct. at 1797. The dissent finds that despite "the plurality's rhetoric ... denouncing a 'but-for' standard of causation ... [t]he theory ... the plurality adopts ... essentially incorporates the 'but-for' standard." *Id.* at 109, 109 S. Ct. at 1806. (Kennedy, J., dissenting). The dissent finds that "because of" does mean "but-for" causation. *Id.* at 109, 109 S. Ct. at 1809. Professors Madek and O'Brien exhaustively discuss the differing views of causation offered by the Court. See *Women Denied*, supra note 10, at 284-300.

34. See *Hopkins*, 490 U.S. at 109, 109 S. Ct. at 1795 (White, J., concurring); *id.* at 109, 109 S. Ct. at 1796 (O'Connor, J., concurring). Justices O'Connor and Whites' "substantial factor" requires that the illegitimate factor play more of a role in an employment decision than the plurality opinion's "motivating part". See *id.* at 109, 109 S. Ct. at 1795-96, 1796-1801. The dissent takes issue with this evidentiary standard finding it fatally vague and requiring "the generation of a jurisprudence of the meaning of 'substantial factor'". *Id.* at 109, 109 S. Ct. at 1812.

The Court has applied this causation standard in a first amendment case, where the burden is on plaintiff to show that first amendment conduct is a "substantial factor" or a "motivating factor" in the employment decision. Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977). The Court has also applied this causation standard to fourteenth amendment claims. See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977), The Court further applies it to unfair labor practices. See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-400 (1983).
maker at the time of making the adverse employment decision. Hopkins further endorses the view that stereotypes based on gender, racial, religion or national origin, when relied on by a decision-maker, are examples of such illegitimate factors.

If the plaintiff is successful in establishing a mixed-motive decision, the defendant/employer must do more than simply produce a legitimate, nondiscriminatory reason for the plaintiff's rejection. In order to "avoid a finding of liability, [the employer must prove] by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." The plaintiff retains the opportunity, in surrebuttal, to persuade the factfinder that the reason advanced by the employer was merely pretext to disguise intentional discrimination.

The plurality "refrains from deciding . . . which specific facts,

35. While Hopkins expands the definition of impermissible stereotype, such stereotypes have constituted Title VII violations in previous cases. See Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 (1977); Dothard v. Rawlinson, 433 U.S. 347 (1977); Phillips v. Martin Marietta, 400 U.S. 542 (1971); see also Slack v. Havens 522 F.2d 1091 (9th Cir. 1975); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971). See infra notes 232-40 and accompanying text (discussing how Hopkins expands what constitutes a stereotype).

36. Hopkins, 490 U.S. at ----, 109 S. Ct. at 1795. A similar burden has been placed on employers by several courts of appeals. See, e.g., Blalock, 775 F.2d at 712 (holding "that in order to prove violation of Title VII, a plaintiff need demonstrate by a preponderance of the evidence that the employer's decision . . . was more likely than not motivated by a criterion proscribed by the statute"). "Upon such proof, the employer has the burden to prove that the adverse employment action would have been taken even in the absence of the impermissible motivation." Id. See Miles, 750 F.2d at 875-76 (noting that "where a case of discrimination is proved by direct evidence . . . [t]he employer can then rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of the discriminatory motive."); see also supra note 5 (discussing the conflicting rebuttal burdens among the circuit courts of appeal). The Court applied this burden in Mount Healthy, "[T]he Board [must show] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." Mount Healthy, 429 U.S. at 287. The Court has applied this rebuttal burden to Arlington Heights, 429 U.S. at 270 n.21, and Transportation Management, 462 U.S. at 399-400.

37. The plurality denies that this is a burden-shifting scheme. Hopkins, 490 U.S. at ----, 109 S. Ct. at 1788. Instead, they consider the employer's burden to be of the nature of an affirmative defense in which "the plaintiff must persuade the factfinder on one point [decision-maker considered an illegitimate factor] and the employer, if it wishes to prevail, must persuade it on another [that the same decision would have been made in the absence of the illegitimate factor]." Id. Justice O'Connor also similarly provides that the defendant may, in the nature of an affirmative defense, defeat such a prima facie showing of "but-for" causation by proving the decision would have been the same in the absence of the illegitimate factor. 490 U.S. at ----, 109 S. Ct. at 1800. The dissent rejects the creation of an affirmative defense by the plurality and O'Connor's concurrence imposing on the defendant a burden of persuasion while approving the current McDonnell Douglas' imposition of only a burden of production. Id. at ----, 109 S. Ct. at 1809.
'standing alone,' would or would not establish a plaintiff’s case.” It is thus unclear what sort of evidence would be sufficient to shift a McDonnell Douglas/Burdine case into a Hopkins scheme. Justice O’Connor, in her concurrence, identifies “direct” evidence as necessary to invoke the Hopkins scheme of litigation. The dissent finds this evidentiary distinction ambiguous and likely to generate as much confusion as clarity.

It is similarly unclear when, during the course of litigation, the trier of fact makes the determination of which scheme applies to the given case. This is a particularly important issue in that the defendant is left, throughout the litigation, in a position of ignorance regarding their evidentiary burden. Specifically, will the employer be forced merely to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment decision under the McDonnell Douglas/Burdine scheme or is there a need to produce some form of “direct” evidence of discriminatory intent? Justice O’Connor makes clear that “stray remarks in the workplace statements by non-decisionmakers [and] testimony such as Dr. Fiske’s in this case, standing alone, . . . [would] justify shifting the burden of persuasion to the employer.”

Several courts of appeal have taken a similar view. See, e.g., Dybcyzak v. Tuskegee Inst., 737 F.2d 1524, 1528 (11th Cir. 1984), cert. denied, 469 U.S. 1211 (1985) (holding that statistics are not direct evidence); Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 69 n.6 (1st Cir.), cert. denied, 469 U.S. 1018 (1985) (stating that statistical evidence is circumstantial); Clay v. Hyatt Regency Hotel, 724 F.2d 721, 724 (8th Cir. 1984). But see Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975). The racially discriminatory comments of plaintiffs’ immediate supervisor were held to constitute direct evidence of discriminatory intent. Id. at 1095. Plaintiff’s general supervisor, not their immediate supervisor, made the decision to terminate the plaintiffs.

The dissent finds that “[c]ourts will . . . be required to make the often subtle and difficult distinction between ‘direct’ and ‘indirect’ or ‘circumstantial’ evidence [and the] [a]ddition of a second burden-shifting mechanism . . . is not likely to lend clarity to the process.” Indeed, the dissent’s concerns over subsequent confusion appear well-founded. In their dissent in Ward’s Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2131 (1989) the same four Justices joining in the Hopkins plurality opinion find that the employer has no independent burden of persuasion even if the employee produces direct evidence of discriminatory intent.
Douglas/Burdine scheme or persuade the factfinder it is more likely than not the actual reason under the Hopkins scheme? The plurality and concurrence soft-pedal the significance of this problem finding that the employer, regardless of whether McDonnell Douglas or Hopkins framework applies, has “every incentive to convince the trier of fact that the decision was lawful.” The plurality decision offers little guidance and addresses this issue only obliquely in a footnote.

Justice O’Connor indicates that the structure of the presentation of evidence in a mixed-motive case “should conform to the general outlines . . . established in McDonnell Douglas and Burdine.” Then once “all the evidence has been received, the court should determine whether the McDonnell Douglas or Hopkins framework property applies.” Within these general outlines, any direct evidence of discriminatory animus should be presented by the plaintiff when making the prima facie case. Then, the defendant should present its rebuttal case consisting of a legitimate, nondiscriminatory reason for the adverse employment decision. A prudent defendant must assume a worst case scenario in which the rebuttal burden will be one of persuasion and not simply production. The dissent takes issue with this loose guidance counseling continued adherence to the McDonnell Douglas/Burdine scheme of litigation.

C. Hopkins Applied and Avoided

On the one hand, the analytic differences between the plurality, concurring and dissenting opinions in Hopkins as to the type of evidence and the degree of causation, required in a mixed-motive case will likely generate interesting legal scholarship. On the other

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41. Hopkins, 490 U.S. at ___, 109 S. Ct. at 1805 (O’Connor, J., concurring) (quoting Burdine, 450 U.S. at 248). This observation takes little account of the significant difference between merely producing evidence of a legitimate, nondiscriminatory reason and proving it was the actual reason for its decision. Id.

42. See id. at ___, 109 S. Ct. at 1789 n.12 (stating that “nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a ‘pretext’ case or a ‘mixed motives’ case from the beginning in the district court; instead, we expect that plaintiffs often will allege, in the alternative, that their cases are both. . . [and] at some point . . . the District Court must decide.”).

43. Id. at ___, 109 S. Ct. at 1805 (O’Connor, J., concurring).

44. Id.

45. See supra notes 38-40 and accompanying text.

46. See supra notes 5, 33 & 34 and accompanying text.

hand, because of the ease by which decision-makers can actually or apparently eschew reliance on impermissible stereotypes, *Hopkins'* effect on actual partnership decisions will be minimal. 49

In *Hopkins*, a finding of liability was predicated solely on the existence and effect of sexist stereotypes in partners' written evaluations. 50 Lack of interpersonal skills caused Hopkins' rejection. 51 Hopkins was perceived as lacking interpersonal skills because of gender stereotypes. 52 Thus, gender stereotypes caused her rejection. 53 The trial court found that Price Waterhouse did not discourage sexist stereotyping, 44 did not acknowledge nor interrogate partner's evaluations for gender-based stereotyping, 55 and routinely permitted such stereotyping to play a role in partnership evaluations. 56 These trial court findings were affirmed on appeal. 57

In a factually analogous case, a partnership could avoid the application of *Hopkins* principles by taking two simple steps. First,
strike out those comments in partner's evaluations which seem, in any measure, to partake of gender-based stereotyped stereotypes. This should defeat any inference that such comments "caused" the adverse employment decision. Second, return those evaluations betraying sexist stereotypes to the partners with a memo discouraging such expression. This should generate evidence that the partnership is taking all reasonable steps to educate decision-makers of the offensiveness of stereotyping and to discourage such stereotyping in the future.

In this sense, Hopkins may serve the purpose of attuning decision-makers to the existence of sexism, but it may or may not act to discourage its effect. Partners may continue to indulge sexist stereotypes so long as they make an effort to conceal their indulgence by excising such stereotypes from tangible evaluation materials and discouraging their expression. Plaintiffs will, in most cases, be left...

58. While gender-based stereotypes were at issue in Price Waterhouse, race-based, religion-based and national origin-based stereotypes would be treated the same. See, e.g., Hishon v. King & Spalding, 467 U.S. 69 (1984) (ruling that decisions concerning advancement to partnership are governed by Title VII and therefore must be made without regard to race, sex, religion or national origin).

59. See Hopkins, 618 F. Supp. at 1119 (discussing the agreement in both plurality and concurring opinions that stray stereotypical comments in the workplace by non-decisionmakers are insufficient, in themselves, to constitute a violation of Title VII); see supra notes 38-39 and accompanying text (discussing this agreement). Both the plurality and Justice O'Connor find that it is a decision-maker's reliance on such stereotypes when reaching an employment decision which constitutes the violation. Hopkins, 490 U.S. at ----, 109 S. Ct. at 1791, 1805.

A third alternative also exists. Price Waterhouse could eliminate their request for comments explaining partner's recommendation to accept, reject or hold a candidate. While stereotypes may subconsciously influence a partner's numerical evaluation of a candidate on the subjective though neutral criteria, the elimination of comments will preclude such stereotypes from being a matter of direct discussion and consideration. Eliminating such comments doubly serves the employer's interest. First, it decreases the possibility that such stereotypes will influence the decision-making process, thus promoting compliance with the remedial goals of Title VII. See infra note 198 and accompanying text. Second, it eliminates the direct or inferential evidence necessary to a plaintiff's disparate treatment claim. See supra notes 33-40 and accompanying text.

Such comments are not completely irrelevant in discrimination cases. In a McDonnell Douglas/Burdine scheme, such comments are relevant when the plaintiff endeavors to prove that the legitimate, nondiscriminatory reason advanced by the employer to justify the adverse employment decision was simply pretext to disguise intentional discrimination. See supra notes 24-27 and accompanying text. Such comments may also be relevant in a Teamsters-type case of systemic disparate treatment when the plaintiff attempts to establish a pattern or practice of discrimination. Similarly, O'Connor notes that such comments may be relevant in establishing a case of harassment. Hopkins, 490 U.S. at ----, 109 S. Ct. at 1804 (O'Connor, J., concurring).

60. See Hopkins, 618 F. Supp. at 1119-20.

61. The district court disagrees believing that awareness "can be effective in eliminating or minimizing stereotyping." Id. at 1120 n.15.

62. The D.C. Court of Appeals, in discussing the intent requirement, noted "[i]t is the rare case indeed in which a group of sophisticated professionals . . . would formally pass on
with a McDonnell Douglas/Burdine scheme with the plaintiff attempting to overcome the defendant's production of a legitimate, nondiscriminatory reason by persuading the factfinder that the reason advanced was pretextual.\textsuperscript{63}

III. DISPARATE IMPACT

A. Established Doctrine

It is undisputed that disparate treatment theory requires a finding of discriminatory intent.\textsuperscript{64} When a disparate impact theory is applied, intentionality is not required.\textsuperscript{65} While disparate impact theory is generally used to challenge employment practices disproportionately disadvantaging current minority employees or applicants,\textsuperscript{66} the Court has also recognized that disparate impact strikes at selection practices which tend to deter qualified minorities from applying.\textsuperscript{67}
In *Watson v. Fort Worth Bank & Trust*, eight members of the Supreme Court held that subjective or discretionary employment practices may, in appropriate cases, be challenged under a disparate impact theory. The Court advanced two rationales for this extension. First, it avoids nullifying *Griggs*. Without the extension to subjective practices, employers could insulate themselves from disparate impact liability by substituting subjective criteria for standardized criteria. Second, subjective criteria often give effect to subcon-
scious stereotypes and prejudices. In Ward's Cove Packing Co. v. Atonio, the Supreme Court conclusively identified the scheme of litigation in a disparate impact challenge. In their prima facie case, plaintiffs must "show that there are statistical disparities in the employer's work force . . . and is responsible for isolating and identifying the specific employment practices that are already responsible for any observed statisti-

73. Id. at 990. Congress has also recognized this problem. In explaining the rationale behind the expansion of EEOC enforcement power in the 1972 amendments to Title VII, the House Report noted: "Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject [now] generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. . . . The forms and incidents of discrimination which the Commission is required to treat are increasingly complex." House Comm. on Education and Labor, Equal Employment Opportunity Act of 1972, H.R. Rep. No. 238, 92d Cong., 2d Sess. 9, reprinted in 1972 U.S. Code Cong. & Admin. News. 2137, 2144.

74. 109 S. Ct. at 2115 (1989). In Ward's Cove, plaintiffs, a class of nonwhite cannery workers, brought a Title VII action alleging employer's "hiring/promotion practices . . . were responsible for racial stratification of the workforce, and had denied them and other nonwhites employment as noncannery workers on the basis of race." Id. at ______, 109 S. Ct. at 2120. The district court rejected all disparate treatment claims. 34 Empl. Prac. Dec. (CCH) ¶ 34, 437 (Nov. 4, 1983). The district court also rejected disparate impact claims on the ground they were not subject to attack using a disparate impact theory. Id. at 31-33. The court of appeals, following the Supreme Court's intervening ruling in Watson, reversed the district court ruling disparate impact could be applied to subjective hiring practices. Ward's Cove, 810 F.2d 1477, 1482 (9th Cir. 1987).

75. Ward's Cove, 109 S. Ct. at 2115-36. While Watson first identified the relative burdens of plaintiff and defendant in a disparate impact case, that part of the binding opinion dealing with the relative burdens could only garner the support of a plurality of the Court. 487 U.S. at 982-1000. In Ward's Cove, a majority endorsed the Watson plurality's view. 109 S. Ct. at 2118-27.

76. Ward's Cove, 109 S. Ct. at 2125. The determination of the required amount of statistical disparity is neither clear nor precise. See Watson, 487 U.S. at 994 (stating that the "plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected [class]."); see also Teal, 457 U.S. at 446 (stating that there should be a "significantly discriminatory impact"); Beazer, 440 U.S. at 584 (stating that there should be "statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities"); Dothard, 433 U.S. at 329 (stating that there should be a "significantly discriminatory effect"); Washington, 426 U.S. at 246-47 (1976) (stating that there should be proof of "practices disqualifying substantially disproportionate numbers of blacks"); Albermarle, 422 U.S. at 425 (holding that the "tests in question select applicants . . . in a racial pattern significantly different from that of the pool of applicants."); Griggs, 401 U.S. at 426 (finding that the "requirements operate to disqualify Negroes at a substantially higher rate than white applicants.").

For more specific guidance, courts have looked to the EEOC's four-fifth's rule, which provides that if the selection rate for minorities is less than 80% of the selection rate for the majority, discriminatory impact is inferred. See 29 C.F.R. § 1607.4(D) (1987). Courts have also considered a standard deviation analysis based on a binomial distribution analysis. See Hazelwood, 433 U.S. at 308 n.14; Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977).
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The Court believes plaintiffs have both the information and the statistical methodology necessary to accomplish their prima facie task. For the purpose of establishing plaintiff's prima facie case, the Court has endorsed a number of statistical comparisons: selection rate, qualification rate and population rate.

77. *Ward's Cove*, 109 S. Ct. at 2124 (citing *Watson*, 487 U.S. at 994). Plaintiff's duty to isolate and identify a specific practice relieves employers of the need to adopt prophylactic quotas and preferential treatment as a cost-effective means of avoiding costly litigation defending innocent practices. *Watson*, 487 U.S. at 993. The majority in *Ward's Cove* notes that plaintiff's duty to isolate and identify a specific practice is particularly acute where an employer combines subjective and objective rules and tests. 109 S. Ct. at 2125. *But see Hopkins*, 490 U.S. at ____, 109 S. Ct. at 1803 (O'Connor, J., concurring) (stating that "[p]articularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that any one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions.").

78. *See Ward's Cove*, 109 S. Ct. at 2125. The EEOC's Uniform Guidelines required employers to "maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group(s)". *See Uniform Guidelines*, 29 C.F.R. § 1607.4(A) (1987). Also included are records regarding "the individual components of the selection process" in cases of significant disparities in the selection rates of white and nonwhites. *Id.* at § 1607.4(C).

79. Analysis of variance (ANOVA) may be the best statistical technique designed to study the influence of a number of continuous and discrete variables when the dependent variable is discrete (e.g. hired or not, discharged or not, promoted or not). *See Fisher, Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980). An ANOVA analysis determines the percentage influence of each independent variable (e.g. sex of candidate, race of candidate, score on standardized measure, years of experience, educational attainment, etc.) on the dependent variable (e.g. hired or not, discharged or not, promoted or not). When the outcome variable is continuous such as salary, multiple regression may be the preferable statistical technique. *Id.* at 702-03. In a regression analysis, the relationship between the dependent or outcome variable (e.g. salary) and the independent variable (e.g., sex of candidate, race of candidate, score on standardized measure, years of experience, educational attainment, etc.) is determined by holding the other major independent variables constant. *Id.* at 706. The measure of the relationship is the regression coefficient of the independent variable. *See Campbell, Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299 (1984); D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980 & Supp. 1983).

80. This compares the percentages of minority and non-minority candidates selected with the percentages available in the applicant pool. *See Ward's Cove*, 109 S. Ct. at 2123 (stating that "if the selection rate of nonwhites is not significantly less than the percentage of qualified nonwhite applicants, the selection mechanism probably does not operate with a disparate impact on nonwhites."). *But see Teal*, 457 U.S. at 450 (rejecting an employer's "bottom-line" defense that, despite discrimination, the employer's workforce is balanced).

81. This compares the relative percentages of minorities and non-minorities in the relevant population possessing qualification(s). *See Dothard*, 433 U.S. at 321 (wherein 99% of males and 59% of females meet height and weight requirements).

82. This compares the percentage of minorities in an employer's workforce vs. the percentage of qualified minorities in relevant population area. *See Ward's Cove*, 109 S. Ct. at ____.
If plaintiffs meet their prima facie proof burden, the case shifts to the employer’s business justifications for using the practice. Specifically, does the challenged practice significantly serve the legitimate employment interests of the employer? “In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice.” If the employer produces
sufficient evidence to establish a business justification, the plaintiffs have an opportunity to persuade the factfinder that there exist alternative practices which equally serve the employer's legitimate business interests with a lesser discriminatory effect. The ultimate burden of persuasion remains at all times with the plaintiff.

B. Disparate Impact in Partnership Decisions

The decision to admit an individual to a partnership often involves broad subjective and discretionary employment practices. The decision in Watson thus opens an entirely new avenue of attack on promotions to partnership. While the district court in Hopkins did not apply disparate impact principles to the promotion scheme used by decision makers, the Admissions Committee and Policy Board's recommendations were found to be wholly discretionary because they were "not controlled by fixed guidelines." The district court also found that the discretionary partnership selection process used by Price Waterhouse "permitted negative comments tainted by stereotyping to defeat Ms. Hopkins' candidacy." It is likely that, in

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86. See Ward's Cove, 109 S. Ct. at 2125-27; see also Albermarle, 422 U.S. at 425. Factors such as cost, inconvenience, unsuitability, etc. are relevant in determining equal effectiveness. See Ward's Cove, 109 S. Ct. at 2127; Watson, 487 U.S. at 991-94.

87. See Ward's Cove, 109 S. Ct. at 2126; see also Watson, 487 U.S. at 997. The Court wishes to avoid creating any incentive for employers to adopt any surreptitious quotas. Id. at 993. The dissent in Ward's Cove vehemently disagrees with this proposition, arguing that the rebuttal burden on an employer in a disparate impact case is proof of an affirmative defense. See Ward's Cove, 109 S. Ct. at 2127 (Stevens, J., dissenting). Similarly, three Justices in Watson, while concurring that disparate impact theory can be applied to subjective or discretionary employment practices, find the burden of persuasion as to business necessity on the employer. See Watson, 487 U.S. at 1000 (Blackmun, J., with Brennan, J. and Marshall, J. concurring).


89. While Watson was decided by the U.S. Supreme Court in 1988 and Hopkins in 1989, the district court decided Hopkins in 1985 at which time a disparate impact challenge was not advanced nor applied. At the time of trial, there was a split among the circuits regarding the applicability of disparate impact theory to subjective evaluations. See supra note 71 (discussing this split). The district court did note his split. Hopkins, 618 F. Supp. at 1120 n.16. Since the district court did not apply disparate impact theory, it was not the subject of appeal and neither the circuit court of appeals nor the U.S. Supreme Court discussed its application. See Hopkins, 825 F.2d 458 (D.C. Cir. 1987), rev'd, 490 U.S. 228 (1989).

90. Hopkins, 490 U.S. at ____, 109 S. Ct. at 1781. "A certain number of positive comments from partners will not guarantee a candidate's admission to the partnership, nor will a specific quantity of negative comments necessarily defeat her application." Id. The Supreme Court reaches this conclusion despite the district court's finding that negative comments are often given great weight and "no" votes even from partners who may have only limited contact with the candidate often result in a "no" or a "hold" decision. Hopkins, 618 F. Supp. at 1116.

91. 618 F. Supp. at 1118.
future analogous cases, disparate impact challenges will be brought
as companion actions to disparate treatment challenges.\textsuperscript{92}

1. \textit{Plaintiff's Prima Facie Case.}—Often, two selections are
made in a decision to admit someone to a partnership: first, the
nomination of a candidate for partnership,\textsuperscript{93} second, the admission of the
candidate as a partner.\textsuperscript{94} A disparate impact plaintiff would likely
challenge both selection decisions through a proper statistical analy-
sis of selection rates.\textsuperscript{95}

Price Waterhouse is a national accounting firm.\textsuperscript{96} Candidate are
first identified and nominated by the partners in their local offices.\textsuperscript{97}
One cannot become a partner without first being selected as a can-
didate. Following nomination by partners in their local offices, nominating partners draft and distribute detailed recommendations\textsuperscript{98} concerning the nominee to all of the firm's 662 partners who are invited
to submit evaluation forms,\textsuperscript{99} an assessment of whether to accept,

\textsuperscript{92} The Supreme Court, in \textit{Teamsters}, spoke obliquely on this issue stating "[e]ither
theory may, of course, be applied to a particular set of facts." 431 U.S. at 336 n.15. Some
circuits have permitted both theories to be used in the same action; in a class action suit,
plaintiffs usually claim both disparate treatment and disparate impact. \textit{See Segar v. Smith},
738 F.2d 1249 (D.C. Cir. 1984), \textit{cert. denied}, 471 U.S. 115 (1985) (challenging Drug En-
forcement Agency's promotion scheme is analyzed under both disparate treatment and dispa-
rate impact theories); \textit{Hayes v. Shelby-Memorial Hospital}, 726 F.2d 1543 (11th Cir. 1984)
(discussing challenge to fetal vulnerability policy is analyzed under both disparate treatment
and disparate impact). The availability of a disparate impact challenge will be particularly
important because of the ease by which a partnership can eschew illegitimate stereotyping in
tangible evaluation materials. \textit{See supra} notes 46-63 and accompanying text (discussing this in
detail).

\textsuperscript{93} This is the case in \textit{Hopkins} in which partners in local offices nominate candidates for
partnership. 618 F. Supp. at 1111-12.

\textsuperscript{94} In \textit{Hopkins}, following nomination by the partners in their local office, candidates
undergo an elaborate recommendation and review process. \textit{Id.} at 1112. \textit{See also infra} notes
97-103 and accompanying text (discussing the review process).

\textsuperscript{95} It is unclear whether these two decisions are merely sub-parts of a single decision to
admit a partner or whether they will be considered as two separate decisions. If the former is
the case, the plaintiff will simply isolate and identify the discretionary nomination process as
discriminatory during the prima facie case. The legal effect will be the same since the selection
rates for the two temporal moments will differ because the pools used for comparison will
differ. For a discussion of selection rate, \textit{see supra} note 80 and accompanying text. For a
discussion of proper statistical pools, see \textit{infra} notes 121-135 and accompanying text.

\textsuperscript{96} At the time of Ms. Hopkins' employment, Price Waterhouse was one of the "Big
Eight" accounting firms. The "Big Eight" have now, through merger, become the "Big Six".
5.

\textsuperscript{97} \textit{Hopkins}, 618 F. Supp. at 1111-12.

\textsuperscript{98} It is important to note that these detailed recommendations are drafted after the
discretionary selection by local partners of a candidate from the pool of senior managers. \textit{Id.}
at 1111-12. Detailed recommendations are not drafted concerning those senior managers not pro-
aposed as candidates. \textit{Id.} at 1112.

\textsuperscript{99} \textit{Id.} at 1111-12. Partners who have significant and recent contact submit "long form"
reject or hold the candidate and a short comment explaining their assessment. An Admissions Committee reviews all evaluation materials, prepares a summary and makes a recommendation to accept, reject or hold the candidate to the Policy Board. The Policy Board then reviews the Admissions Committee’s recommendations and votes to include the candidate on the partnership ballot, reject or hold the candidate. All partners ultimately vote to accept or reject the candidates included on the partnership ballot.

If brought as an impact case, Ms. Hopkins would have had to isolate and identify specific discriminatory practices. Hopkins most likely would have been successful at isolating and identifying two specific employment practices. One is the partner’s written comments accompanying their numerical rankings along the 48 neutral criteria. Illegitimate stereotypes all appear in the written comments. Two is the practice of leaving to local partners’ discretion the task of identifying and selecting persons for partnership candidacy. Unlike the decision to admit to partnership, the selection for candidacy was wholly discretionary and lacking in any identifiable or quantifiable components. In such a case, courts may consider the prima facie burden of isolation and identification satisfied.

100. In Hopkins, practices included discretionary selection of candidates for partnership by partners in the local offices, candidate’s scores on 48 neutral items, written comments, partner recommendations, recommendation of Admissions Committee, and recommendations of the Policy Board. 618 F. Supp. at 1111-12.


102. Id. at 1116-19. In order to nominate a candidate, partners in local offices “draft written recommendations based on a detailed consideration of the candidates’ qualifications.” Id. at 1112. It is wholly unclear whether there existed a specific, stable set of criteria to guide the nominating partners selection and/or recommendation. Partners are not asked to rank candidates on the 48-category evaluations until after candidates are selected by partners in the local offices. Id. Similarly, neither the Admissions Committee nor the Policy Board review the qualifications of those senior managers not nominated. Id.

103. See id. at 1111-12. In order to make their decision making process deliberately vague. In Watson, Justice Blackmun recognized this danger and warned that the identification requirement cannot be used “to shield from liability an employer whose selection process is so poorly defined that no
While isolation and identification of a specific practice is a necessary element of Hopkins' prima facie case, it is not sufficient. Hopkins must also prove an identified practice caused a statistically significant disparity in employment opportunities between minority and majority class candidates. It is unlikely that Hopkins could have proven prima facie causation as to the decisions to place her candidacy on hold and deny her reconsideration. The district court identified females' selection rate for partnership at 60% and males' at 68%. This would be statistically insignificant and unavailing to Hopkins. She would have failed to prove her prima facie case of disparate impact.

Hopkins may have been successful at establishing causation as to the selection of candidates for partnership. There were 87 men and one woman selected for candidacy in 1982. While no specific numbers are available to determine the number of female or male senior partners qualified for candidacy, the pool of qualified male senior managers would have to have been approximately seventy times the size of the pool of qualified female senior managers, in order to preclude Hopkins from demonstrating a statistically significant adverse impact.

Specific criterion can be identified with any certainty, let alone be connected to the disparate effect. See Ward's Cove at 2132 n.19 (Stevens, J., dissenting) (noting that an amicus brief filed on behalf of the employer recognizes that in some complex, multiple factor selection rules it may be impossible to challenge each factor and the decision should be challenged as a whole).

109. See supra notes 76, 80-82 and accompanying text (discussing causation and selection rates in a disparate impact case).

110. Hopkins, 618 F. Supp. at 1116. Presumably these rates reflect the relative percentages of male and female candidates nominated who actually are admitted as partners.

111. The female selection rate is at least 80% of the male selection rate and thus no inference of discrimination arises. See 29 C.F.R. § 1607.4(D) (1987) (describing how one group selection rate must be within less than 80% of the predominant group selection rate).

112. While Hopkins fails to establish causation according to a disparate impact theory because of the lack of sufficient statistical disparity, she may have established causation under a disparate treatment theory. For a discussion of causation in a disparate treatment case, see supra notes 5, 33, 34 & 37 and accompanying text.

113. This would require a percentage of the female senior managers selected for candidacy from the pool of female senior managers qualified for candidacy compared to the percentage of male senior managers selected for candidacy from the pool of male senior managers qualified for candidacy. 29 C.F.R. §§ 1607.1(B) & 1607.4(D) (1987).


115. 29 C.F.R. § 1607-4(D) (1987). This would follow from the application of the four-fifths' rule. See supra note 76. If there were 100 female senior managers qualified for candidacy and one was selected, the female selection rate would be .01%. .01% is 80% of a .0125 male selection rate. If 87 males were selected at a rate of .0125, the pool would have to contain 6,960 male senior managers qualified for candidacy. Any less than 6,960 and the firm's selection rates enter the domain of statistically significant adverse impact. Id.
2. Defendant’s Rebuttal.—If the plaintiff is successful at establishing a prima facie case, the firm will have two options in rebuttal: first, attempt to discredit plaintiff’s statistical showing, second, produce evidence that its selection scheme is based on legitimate business interests.

If the defendant opts to discredit the plaintiff’s statistics, challenges will center around the pool’s plaintiffs used for statistical comparison. Attacks on statistical pools will generally take two forms. One, the pool was not sufficiently large to permit a statistical inference of discriminatory impact. Two, the pool was insufficiently refined because it contained persons unqualified for the employment opportunity.

It is unlikely Ms. Hopkins could have successfully established her prima facie proof of causation as to the decision to admit her to partnership. See supra notes 110-13 and accompanying text (discussing this in detail). As such, no rebuttal by the defendant firm would be necessary as to that selection. The following consideration of defendant’s rebuttal burden concerning such a decision to admit a candidate presumes plaintiff is successful at establishing the prima facie burdens of isolation, identification and causation. See supra notes 75-87 and accompanying text (discussing these burdens).

It is presumed partnerships will not attempt to avail themselves of their third option—the exception for professionally developed tests contained in 42 U.S.C. §§ 2000e-2(a) (1988).

Essentially the defendant would argue either that there is no disparity at all or that the disparity is not the result of the identified practice. See Dothard, 433 U.S. at 338-39 (stating that defendants “may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiff’s evidence should be accorded.”); see also infra notes 125-39 and accompanying text (discussing defendant’s argument).

If successful, the firm will have established the “business necessity” or “job relatedness” of the selection scheme. See supra notes 83-87 and accompanying text (discussing defendant’s burden).

See generally Teamsters, 431 U.S. at 339-41; Hazelwood, 433 U.S. at 299.

The sample must be large enough to convince a court that any disparity is not due to chance or inadvertence. Rose v. Mitchell, 443 U.S. 545, 571 (1979); Castaneda v. Partida, 430 U.S. at 494 n.13 (1974). The district court in Hopkins noted that because women have only recently entered the accounting profession and partners have been selected over a long span of years, plaintiff’s attempt to show that the small number of women partners indicates discrimination fails. 618 F. Supp. at 1116. In Teamsters, the company claimed that a low turnover rate in the post-Act period may have accounted for persistent disparities between minority and non-minority representation. 431 U.S. at 341.

In Hopkins the plaintiff had attempted to statistically show that the small number of female partners at Price Waterhouse indicated discrimination. 618 F. Supp. at 1116. The district court found that Hopkins did not present sufficient data on the number of qualified women available for partnership. Id. In Hazelwood, plaintiff used general population data for comparison with teachers in school board’s workforce, and the Court found that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population . . . may have little probative value.” 433 U.S. at 308 n.13; see also Teamsters, 431 U.S. 324 (stating that the use of general population data was permissible since the job skill involving the ability to drive a truck is either possessed or readily acquired by most persons).
As to the attack on pool size, if the plaintiff simply challenges the decision to admit or not admit a nominated candidate, pools of candidates are likely to be small. Even if the pool of candidates is sufficient, the number of decisions to admit may be small. While the plaintiff may be able to show a statistical disparity, a defendant will be able to destroy its probative value by demonstrating that the pool is too small to permit a confident inference of causation. In most partnerships, the defendant firm will likely prevail in shouldering its rebuttal burden of production as to decisions to admit persons to partnership.

The same may not be true of decisions to nominate persons for admission to the partnership. In Hopkins, the District Court found that partners are regularly drawn from the partnership's senior managers. The labor pool of qualified persons for nomination would be the pool of Price Waterhouse's senior managers. This pool will, by definition, be larger than the pool of nominees and may be large enough to constitute an adequate sample for statistical comparisons.

123. The year Hopkins was nominated, eighty-eight candidates were proposed for partnership. Hopkins, 618 F. Supp. at 1112. Eighty-seven were male and one was female. Id.

124. See, e.g., Hishon v. King & Spalding, 467 U.S. 69, 71 (1984) (discussing that the firm, at the time plaintiff was hired, was composed of more than fifty partners and approximately fifty associates). This may not be the case in large national accounting or legal partnerships. In Hopkins, there were 662 total partners at the time of the suit. 490 U.S. at ___, 109 S. Ct. at 1781. The year Hopkins was nominated, forty-seven candidates were admitted to partnership. Id.

125. See Thomas v. Metroflight Inc., 814 F.2d 1506, 1509 (10th Cir. 1987) (citing authority that no spouse rules in practice result in discrimination against women; however a disparate impact challenge failed because only plaintiff and one other person had been discharged under the rule); Fudge v. City of Providence Fire Dept., 766 F.2d 650, 658 (1st Cir. 1985) (holding that disparate impact in a single sample of individuals "may not justify the conclusion that the test has a discriminatory impact upon the population as a whole."). See generally D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980 & Supp. 1982) (discussing more thoroughly, specific statistical tests and their requisite sample sizes).

126. In Hopkins, the pool of female nominees was one who was not admitted. 490 U.S. at ___, 109 S. Ct. at 1781. The pool of male nominees was eighty-seven from which forty-seven were admitted. Id. While eighty-seven is a sufficiently large pool, one is not. Therefore, while the male selection rate would be sufficient to permit comparisons, the female selection rate would be insufficient to compare with it. A firm could avoid disparate impact challenges by simply depressing the number of persons in one or both pools nominated each year.

127. 618 F. Supp. at 1111.

128. It is unclear how many male and female senior managers there were at Price Waterhouse. It is similarly unclear whether any other specified criteria existed for distinguishing senior managers qualified for nomination from senior managers unqualified for nomination beyond the unbridled discretion of partners in the local offices. See supra note 108 and accompanying text (discussing the selection of a candidate); see also infra notes 147-52 and accompanying text (discussing the discretionary selection process).

129. In Hopkins, there were 662 partners. Although plaintiff presented no evidence as to
The difficulty arises when we define the geographic scope of this pool. A defendant may argue that since candidates are nominated by local office partners from the senior managers working in that partner's local office, pools for determining selection rates should be local.\textsuperscript{130} If local office selection rates are permitted, the number of selections may be too few to permit a confident statistical inference. Even if local office rates are used, an alternative statistical comparison may be made. First, determine national male and female selection rates. Second, compare those national rates to the rates in each local office.

As to the attack on pool composition, the Court in \textit{Ward's Cove} reiterates the principles established in \textit{Hazelwood} requiring refined, precise statistical pools in discrimination litigation.\textsuperscript{131} Specifically, "the racial composition of the qualified person in the labor market and the persons holding at-issue jobs . . . generally forms the proper basis for the initial inquiry in a disparate impact case."\textsuperscript{132} The proper labor pool of qualified persons for actual admission to the partnership would be those persons proposed as candidates.\textsuperscript{133} The proper pool of qualified persons for nomination as a candidate would be the pool of senior managers.\textsuperscript{134}

If the defendant firm is unsuccessful at impeaching the plaintiff's statistical showing, it will attempt to justify the disproportionately disadvantageous selection practice identified by producing evidence that it is adequately job-related and constitutes a business necessity.\textsuperscript{135} While "job-relatedness cannot always be established

\begin{itemize}
\item the total number of senior managers, eighty-eight candidates were nominated. 490 U.S. at 490, 109 S. Ct. at 1761.
\item It would be a substantial injustice for minorities to have an excellent chance of being selected as a partnership candidate in one part of the country and virtually no chance in another part of the country.
\item The Court in \textit{Hazelwood} required that the pool reflect persons possessing the skills required for the employment opportunity; that the pool be limited to the geographic area in which the employer recruits and hires and that the pool adequately distinguish pre-Act and post-Act conduct. 433 U.S. at 1310.
\item \textit{Ward's Cove}, 109 S. Ct. at 2121. While the Court in \textit{Ward's Cove} was considering a challenge based on race, the same would be true of a challenge based on gender. \textit{Id.} at 2118-21. The majority does note that where such labor statistics are difficult or impossible to ascertain, "the racial composition of otherwise-qualified applicants for at-issue jobs are equally probative." \textit{Id.} at 2121.
\item For the purposes of this article, the author is ignoring the possibility of partners from other firms being admitted as partners at Price Waterhouse and bypassing the elaborate recommendation and review process.
\item \textit{See supra} notes 128-30 and accompanying text (discussing this in detail).
\item \textit{See supra} notes 83-87 and accompanying text (discussing business necessity and job relatedness); \textit{Women Denied, supra} note 10, at 262 (wherein a partnership's legitimate employment interests have been identified as latitude to freely select new partners because the
with mathematical certainty" and involves a case specific judgment, courts generally require employers to show a rational connection between the selection process and job performance. Generally, this connection is established through validation of the employer's selection system.

In the context of promotions to partnership, the plurality opinion in Watson notes that “[i]t is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amendable to standardized testing.” A lack of standardized testing generally presumes that discretionary or subjective criteria will be used instead. In Watson, there was substantial disagreement concerning the amenability of subjective criteria and measures to validation techniques.

The Watson plurality concludes that when defending subjective
tests or criteria, employers are not required to “introduce formal ‘validation studies’ showing that particular criteria predict actual on-the-job performance.” The plurality further notes that “in the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a ‘manifest relationship to the employment in question.’ ”

As to the ease by which an employer can establish such a manifest relationship, there is a distinction to be drawn between subjective systems which identify a coherent list of subjective criteria and wholly discretionary systems lacking any clear or stable criteria. The system used by Price Waterhouse to select partners from the pool of nominees is an example of the former, and validation is possible. While formal validation is not required, an employer may have to produce at least some evidence that formal validation would be unreasonably difficult, or prohibitively costly to justify not validating a subjective system shown to have an adverse impact.

The nominations of candidates by partners in their local offices would be an example of the latter. While partners in the local offices when nominating candidates must draft “written recommendations based on detailed considerations of the candidates qualifications,” it is wholly unclear whether each of the partners was considering the same or similar criteria or whether there was a stable set of criteria at all. In such a case, there is “simply no way to determine whether the criteria actually considered were sufficiently related to the [firm’s] legitimate interest . . . to justify a . . . system with a . . . discriminatory impact.” The EEOC’s Guidelines express similar concerns.

The concurrence in Watson counsels that

141. 487 U.S. at 990.
142. Id. at 991 (citing Beazer, 440 U.S. at 587 n.31).
143. See supra notes 96-103 and accompanying text (discussing this selection system).
144. “[A] variety of methods are available for establishing the link between these [subjective] selection processes and job performance, just as they are for objective-selection devices.” Watson, 387 U.S. at 1000. (Blackmun, J., concurring).
145. This would essentially limit the use of unvalidated subjective devices or criteria to those circumstances where no viable alternative exists. See 29 C.F.R. § 1607.(B) (1987).
146. See supra notes 96-103 and accompanying text (discussing this selection system).
148. Albermarle, 422 U.S. at 433 (emphasis in original).
149. “In view of the possibility of bias in subjective evaluations, supervisory rating techniques . . . should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group.” 29 C.F.R. § 1607.14B(2) (1987). See also Bartholet, supra note 141, at 1006-1008 (arguing for procedural reform of subjective systems including greater specification and weighting of criteria used so as to make them more amenable to professionally ac-
"the bald assertion that a purely discretionary selection process allowed [an employer] to discover the best people for the job, without any further evidentiary support, would not be enough to prove job-relatedness."\textsuperscript{150} Instead, the employer may have to produce evidence that an absence of specified criteria was job-related and thus a wholly discretionary judgment was a business necessity.\textsuperscript{151}

\textbf{C. Conclusion}

In future cases, plaintiffs will use disparate impact to challenge not only their rejection for admission as partners but the system used to select them for candidacy.\textsuperscript{152} The perception that one's chances to become a candidate for partnership are tainted by discrimination is equally as chilling as the perception that, if selected as a candidate, one's chances for partnership are tainted by discrimination. Such perceptions may tend to deter qualified minorities from applying or remaining with the firm.\textsuperscript{153}

It is in this respect that disparate impact has the most utility. Disparate impact permits plaintiffs, themselves victims of disparate treatment, to challenge phases or components of a system which do not specifically victimize them.\textsuperscript{154} Persons need not ignore a discriminated validation techniques).

150. 387 U.S. at 1000. (Blackmun, J., concurring). The concurrence goes on to note that if an employer attempted to justify a system providing a hirer near-absolute discretion, the employer would have to establish that the absence of specified criteria was necessary to the proper functioning of the business. \textit{Id.} at 1000 n.8. In \textit{Watson}, bank supervisors were given complete, unguided discretion in evaluating applicants for the promotions in question. \textit{Id.} In Hopkins, partners in the local offices were given similar unguided discretion to identity and nominate candidates for partnership. 618 F. Supp. at 1111-12.

151. See 29 C.F.R. § 1607.6(B) (1987) (stating that when "informal or unscored procedures" are used, the employer must either (1) amend the procedure to a more formal, scored or quantified one and then validate it, or (2) "otherwise justify [its] continued use . . . in accordance with Federal law."); see also Watson, 387 U.S. at 1000 n.8 (Blackmun, J., concurring).

152. Even though the ultimate selection rates were essentially equivalent (males at 68%; females at 60%), this "bottom line" will not preclude a finding of liability if a specific component of the selection system is discriminatory. See supra note 80 (discussing the "bottom line" defense). See \textit{generally Teal}, 457 U.S. 440.

153. Indeed, the district court notes that "many potential women partners were hired away from Price Waterhouse by clients and rival accounting firms." Hopkins, 618 F. Supp. at 1116. This willingness of women qualified for candidacy to flee may be a consequence of their perception of diminished opportunity for partnership (as of July 1984 only seven of the 662 partners at Price Waterhouse were women) or even candidacy for partnership (Hopkins was the only woman among the 88 candidates for partnership in 1982). \textit{Id.} at 1112.

154. A finding of liability in such a case would not necessarily entitle the plaintiff to any remedy. \textit{See Teamsters}, 431 U.S. at 324. In such cases, courts, in a subsequent remedy phase, permit defendants to show that despite the disparate impact of the selection device or criteria on the class of minority employees or applicants, the plaintiff was not directly its victim and
natory phase or component of a promotion system because they fortunately escaped being its victim. Prima facie proof of adverse impact in one phase or component of a discretionary or subjective promotion system will likely generate much suspicion of the promotion system as a whole.¹⁵⁵

IV. RIPPLE EFFECTS

A. Affirmative Action

The dissent, in a footnote, presages the difficulty courts will have applying Hopkins' new framework in the context of affirmative action claims.¹⁵⁶ In affirmative action cases, employment decisions are explicitly premised upon a consideration of race or gender. Leaving aside arguments for and against affirmative action plans as a matter of statutory interpretation or public policy¹⁵⁷, the effect of Hopkins on affirmative action burdens of proof may be substantial.

The framework of litigation in a challenge to an affirmative action plan "fits readily within the analytic framework set forth in McDonnell Douglas."¹⁵⁸ The plaintiff is required to establish "a prima facie case that race or sex has been taken into account in an employment decision."¹⁵⁹ Once established, "the burden shifts to the em-

Therefore is not entitled to remedial relief in the form of reinstatement, backpay or retroactive seniority. See id. at 360-62. Nevertheless, defendants may be required to eliminate the discriminatory system either by court order or because continuation of the practice exposes them to liability to other plaintiffs. See id.¹⁵⁵

Traditionally, courts have been extremely suspicious of discretionary or subjective selection practices because they allow expression of conscious or unconscious bias. See Watson, 487 U.S. at 989. If enough suspicion is generated, the plaintiff's burden of proving the existence of a lesser discriminatory alternative to the employer's system may be easier. See supra note 86 and accompanying text (discussing the least restrictive alternative in disparate impact litigation).

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¹⁵⁶. The dissent notes that while "[t]he plurality states that it disregards the special context of affirmative action . . . [i]t is not clear that this is possible . . . [and] [i]f the structures of the burdens of proof in Title VII suits is to be consistent, today's decision suggests that plaintiffs should no longer bear the burden of showing that affirmative action plans are illegal." Hopkins, 490 U.S. at ___, 109 S. Ct. at 1813 n.4 (Kennedy, J., dissenting).


¹⁵⁸. Johnson v. Transportation Agency, 480 U.S. 616, 626 (1987). While the McDonnell Douglas framework applies in Title VII challenges to affirmative action plans, such plans, when adopted by public employers (state actors) may also be challenged under the Equal Protection Clause of the U.S. Constitution. See id. In Equal Protection challenges, the state actor must establish a compelling state interest and necessarily related means that are narrowly tailored in order to justify an affirmative action plan. See infra notes 164-65 (discussing such challenges).

¹⁵⁹. Johnson, 480 U.S. at 626. In an affirmative action action challenge, the plaintiff will be a
employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such as rationale.\textsuperscript{160}

Once these threshold showings are made, the litigation focuses on justifications supporting the plan. If the justifications are sufficient, the plan is valid.\textsuperscript{161} If the justifications are insufficient, the plan is invalid.\textsuperscript{162} Justifications must support the plan at two levels. First, does the history of the employer's treatment of minorities support the adoption of an affirmative action plan as a voluntary remedy?\textsuperscript{163} Second, if the plan's adoption is justified, are its structural components justified?\textsuperscript{164}

white, a male or both. The defendant will be the employer adopting the preferential plan.

160. \textit{Id.}

161. In such a case, the employer would prevail and the selection of the minority candidate would stand. \textit{See Johnson}, 480 U.S. 616.

162. In such a case, the non-minority plaintiff would prevail. \textit{See id.}

163. A majority of the Court has upheld affirmative action plans as justifiable remedies for past discrimination resulting in "traditionally segregated job classifications." \textit{See Johnson}, 480 U.S. at 616 (finding valid a plan adopted by a public employer giving women preference in "traditionally segregated job classifications" challenged under Title VII); United States v. Paradise, 480 U.S. 149 (1987) (finding valid under the Equal Protection Clause a plan requiring 50\% of Alabama state trooper promotions go to blacks due to Alabama's long-term, open and pervasive discrimination); Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a set-aside plan adopted by U.S. Congress reserving 10\% of federal subcontracts for minorities challenged under the Equal Protection Clause); United Steelworkers of Amer. v. Weber, 443 U.S. 193 (1979) (finding valid under Title VII a private employer's plan reserving 50\% of the slots in a training program for blacks because of traditionally segregated job classifications); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (finding the particular special admissions program unconstitutional, finding some remedial use of race constitutional for the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession, and finding the particular special admission program unconstitutional); \textit{see also} City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (finding the City's 30\% set aside plan invalid because discrimination was not a sufficiently compelling state interest and the plan was not narrowly tailored); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding invalid a provision in a collective bargaining agreement under which the Jackson Board of Education extended preferential layoff protection to some minority employees); \textit{cf.} Firefighters Local Union Number 1784 v. Stotts, 467 U.S. 561 (1984) (overturning a district court's injunction of a seniority system that, without the injunction, would decrease the proportional representation of blacks in the department).

It is not required that an employer admit intentional discrimination nor an "arguable violation" of Title VII in order to voluntarily adopt an affirmative action plan. \textit{See Wygant}, 476 U.S. at 267. The prospect of liability accompanying such an admission acts as a disincentive to an employer's voluntary compliance with Title VII. \textit{See id.} at 287-90 (O'Connor, J., concurring) (discussing a disincentive for public employers under Equal Protection); United Steelworkers of Amer. v. Weber, 443 U.S. at 193, 211-16 (discussing a disincentive for employers under Title VII).

164. \textit{In Weber}, the Supreme Court, while denying they were defining the "line of demarcation between permissible and impermissible affirmative action plans," identifies a number of criteria to be considered in analyzing affirmative actions plans. 443 U.S. at 208. They include: "the plan does not unnecessarily trammel the interests of white employees, does not
In such a framework, the determination of which party has the burden of persuasion as to the validity or invalidity of the plan becomes crucial. Specifically, must the defendant/employer persuade the factfinder the plan is sufficiently justified and therefore valid; or must the plaintiff/employee persuade the factfinder the plan is insufficiently justified and therefore invalid? Cases firmly establish that the burden of persuasion is on the employee.\(^{165}\) \textit{Hopkins} has the potential to shift the burden of persuasion to the employer.\(^{166}\) Without clearer guidance, \textit{Hopkins}, strictly applied, invites a future in which employers will find it more difficult to adopt voluntary affirmative action programs.\(^{167}\)

\(^{165}\) In the context of an Equal Protection challenge, the Court indicates that constitutional duties require "public employers to act with extraordinary care" in fashioning an affirmative action plan but the "ultimate burden remains with the employee to demonstrate the unconstitutionality of an affirmative action program." \textit{Wygant}, 476 U.S. at 277. In the context of a Title VII challenge, the Court stated, "reliance on an affirmative action plan is [not] to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff." \textit{Johnson}, 480 U.S. at 267.

\(^{166}\) \textit{Hopkins} has potentially the most impact in cases brought against both public and private employers under Title VII. In Equal Protection challenges, constitutional principles apply and the state actor (public employer) must establish a compelling state interest and necessarily related means that are narrowly tailored in order to justify an affirmative action plan. \textit{See supra} note 164 (discussing such cases). While Equal Protection challenges will not go untouched, the structure of constitutional litigation already imposes on the state actor voluntarily adopting an affirmative action plan a greater justificatory burden than that on an employer under Title VII. The Court has stated "[t]he fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which the employer must contend was not intended to extend as far as that of the Constitution." \textit{Johnson}, 480 U.S. at 627 n.6. In a sense, if \textit{Hopkins} is applied to cases of voluntary affirmative action by private employers, the effect will be to bring the justificatory burden on the private employer closer to the burden imposed on the public employer. A certain parallelism of burdens will be accomplished.

\(^{167}\) Such a reversal would be particularly ironic because the four Justices joining the binding opinion: Brennan, Marshal, Blackmun and Stevens, have been defenders and crafters of affirmative action. In \textit{Bakke}, Brennan, Marshall and Blackmun concurred in that part of the opinion establishing that some uses of racial preferences are permissible and reversing the lower court's judgment prohibiting the University from establishing race-conscious programs in the future. \textit{See Bakke}, 438 U.S. at 265. In \textit{Weber}, \textit{Johnson} and \textit{Paradise} in which affirmative action plans were held valid, Brennan, Marshall and Blackmun voted with the majority.
Application of *Hopkins* will potentially invalidate plans previously held valid. If the *Hopkins* framework were applied to the facts in *Johnson v. Transportation Agency*, the decision would certainly have come out differently. In that case, Mr. Johnson, a white male, was originally promoted to the position of dispatcher. It was only after the Affirmative Action Coordinator's intervention that Ms. Joyce was substituted. Mr. Johnson, in competition for the job, received slightly higher interview evaluations and had three years greater seniority than Ms. Joyce. The district court determined that "Johnson was more qualified for the dispatcher position than Joyce, and that the sex of Joyce was the 'determining factor' in her selection." Under the *Hopkins* framework, a finding that sex was a "determining factor" would satisfy the requirement of "substantial" or "motivating factor." The testimony of the Affirmative Action Coordinator, the interviewers who recommended Mr. Johnson and the Director of the Agency along with the interview scores and seniority statistics would certainly be the sort of evidence required to invoke a *Hopkins* framework. Indeed, in the context of the *Johnson* case, it can be said that Ms. Joyce's selection was "because of" sex.

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See 443 U.S. at 193; 480 U.S. at 616; 480 U.S. at 149. In *Wygant*, *Stotts* and *City of Richmond* in which affirmative action plans were held invalid, Brennan, Marshall and Blackmun dissented. See 476 U.S. at 267; 467 U.S. at 561; 488 U.S. at 469. Stevens, one of the Justices joining the plurality in *Hopkins*, has demonstrated a certain sympathy for affirmative action voting with the majority in *Weber*, *Johnson* and *Paradise* and dissenting in *Wygant* and *Stotts*. See *Hopkins*, 490 U.S. at 228. Yet Stevens concurred in *Bakke* and *City of Richmond*. See 438 U.S. at 265; 488 U.S. at 469. For a discussion of these cases, see supra notes 164-67. If *Hopkins* is strictly construed and broadly applied, the "liberal wing" of the Court will have succeeded in eviscerating its own sacred cow.

168. 480 U.S. 616 (1987). In *Johnson*, plaintiff brought the challenge solely under Title VII. *Id.* at 625. Since the Agency was a public employer it is possible that a similar challenge could have been brought under Equal Protection. Plaintiff opted not to raise or address the constitutional challenge in the litigation. *Id.*

169. This substituted decision was made pursuant to a voluntary affirmative action plan adopted by the County in 1978. "[T]he Agency Plan provides that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of the qualified applicant." *Johnson*, 480 U.S. at 620-21. *Johnson* is similarly notable in that the Court approved an extension of affirmative action beyond race to gender.

170. Mr. Johnson received a 75 and Ms. Joyce a 73 when interviewed by a two-person board. *Id.* at 624.

171. *Id.* at 625.

172. It would satisfy this requirement under any and all of the characterizations of causation discussed in *Hopkins*. *See supra* notes 5, 33 & 34.

173. *See supra* notes 38-40 (discussing evidence needed to shift a case to *Hopkins' framework*).

It would have been impossible for the Agency to persuade the factfinder they would have selected Ms. Joyce in the absence of the plan in that they earlier rejected Ms. Joyce based solely on her merits.\textsuperscript{175} If a challenge to an affirmative action plan is premised on facts substantially similar to those in \textit{Johnson}, the non-minority plaintiff would surely prevail and the interests of the beneficiaries of affirmative action defeated. The application of \textit{Hopkins} similarly will not validate plans previously held invalid.\textsuperscript{176}

Either affirmative action constitutes some sort of "special case"\textsuperscript{177} to which \textit{Hopkins} will not apply or affirmative action is simply one type of individual disparate treatment challenge to which the principles announced in \textit{Hopkins} will apply. If the former is the case, the Court will be forced to admit, without torturing legislative history or statutory text,\textsuperscript{178} that when direct evidence shows an employer allowed race, sex, religion and national origin to work against a minority applicant, a shift in the burden of persuasion to the employer is justified; while a similar evidentiary showing that an employer allowed race, sex, religion and national origin to work in favor of a minority applicant and against a majority applicant will not justify a similar burden-shifting to the employer.\textsuperscript{179}

While the holdings of \textit{Hopkins} arose from an employer's discrimination against a minority candidate for partnership, it is not

\textsuperscript{175} \textit{Hopkins} requires the employer to prove they would have made the same decision in the absence of the impermissible factor. 490 U.S. at \textsuperscript{179}_. 109 S. Ct. at 1795. Consideration of the candidate's merits is all that would remain in the absence of the impermissible factor. \textit{Id}.

\textsuperscript{176} \textit{See supra} notes 164-67 (discussing cases in which affirmative action plans were invalid).

\textsuperscript{177} \textit{Hopkins}, 490 U.S. at \textsuperscript{179}_, 109 S. Ct. at 1784 n.3.

\textsuperscript{178} Justice Rehnquist in his dissent in \textit{Weber} took issue with the majority's interpretation of legislative history finding that:

the majority rejects a 'literal construction of § 703(a)' in favor of newly discovered 'legislative history', which leads it to a conclusion directly contrary to that compelled by the 'uncontradicted legislative history' unearthed in \textit{McDonald} and other prior decisions. Now we are told that the legislative history . . . shows that employers are free to discriminate on the basis of race . . . in favor of black employees in order to eliminate 'racial imbalance'.

443 U.S. at 221. Similarly, Chief Justice Burger in his dissent was troubled by the majority's interpretation of Title VII's statutory language finding that "the [majority] seizes upon the very clarity of the statute almost as a justification for evading the unavoidable impact of its language. The [majority] blandly tells us that Congress could not really have meant what it said, for a 'literal construction' would defeat the 'purpose' of the statute—at least the congressional 'purpose' as five Justices divine it today." \textit{Id} at 217.

\textsuperscript{179} \textit{Hopkins}, 490 U.S. at \textsuperscript{179}_, 109 S. Ct. at 1788-90. The very existence of an affirmative action plan will constitute such direct evidence since such a plan explicitly provides for preferential treatment on the basis of minority status and acts as an open admission. \textit{Id}.
inconceivable that in the future the converse might occur.\textsuperscript{180} A partnership may wish to adopt an affirmative action plan providing that race, sex, religion or national origin be allowed to work in favor of a candidate for partnership. If \textit{Hopkins} is consistently applied, minority status may act neither as headwind nor tailwind.\textsuperscript{181} The "glass ceiling"\textsuperscript{182} obstructing minority access to the highest levels of the professions will not be removed by affirmative action. Under \textit{Hopkins}, if minority status is among the factors considered by the decision maker at the time of making the decision, the employer will be forced to persuade the factfinder they would have made the same decision in the absence of the factor.\textsuperscript{183}

\section*{B. Retaliation Doctrine}

Title VII creates a remedy for certain retaliatory conduct.\textsuperscript{184} The framework of litigation in a retaliation case requires the plain-
tiff to prove a prima facie case based on opposition to an unlawful employment practice.185 "The plaintiff meets this burden by establishing that: (1) she was engaged in statutorily protected expression, viz., opposition to a seemingly unlawful employment practice;186 (2) she suffered an adverse employment action; and, (3) there was a causal connection between the statutorily protected expression and the adverse employment action."187

If plaintiff is successful at establishing the prima facie case, the employer must produce evidence of a "legitimate, nondiscriminatory reason" for the adverse employment action.188 Not all employee opposition will be protected. Opposition conduct must be reasonable under the circumstances.189 Unreasonable opposition conduct may

185. See Burdine, 450 U.S. at 252-53. While "opposition" cases will often focus on the reasonableness or unreasonableess of the employee's opposition conduct, in "free access" cases, the protection of Title VII is nearly absolute. See East v. Romine Inc., 518 F.2d 332 (5th Cir. 1975) (striking employer retaliation based on employee's "litigious" nature in filing several previous charges); Barela v. United Nuclear Corp., 462 F.2d 149 (10th Cir. 1972) (deciding that employer retaliation based on the likelihood that employee will be nonpermanent during a pending charge seeking reinstatement with a former employer is struck down); Stebbins v. Nationwide Mutual Ins. Co., No. 373-99-A (E.D. Va.), aff'd on other grounds, 469 F.2d 268 (4th Cir. 1972) (deciding that employer retaliation based on a loss of essential confidence in the employer/employee relationship because of an unfounded charge is struck down); EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975), aff'd., 559 F.2d 1203 (2d Cir. 1977), cert. denied., 4334 U.S. 920 (1977) (striking employer retaliation based on the employee's request of information relevant to a charge against an employer from one of the employer's customers).

186. It is not necessary for the plaintiff to be correct that the employer is violating Title VII. A reasonable, good faith belief of a violation will be sufficient. See Berg. v. La Crosse Cooler Co., 612 F.2d 1041, 1045-46 (7th Cir. 1980); Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978).

187. Jennings v. Tinley Park Community Consol. School Dist., 864 F.2d 1368, 1371 (7th Cir. 1988) (holding that when secretaries bypassed the superintendent and presented an alternative pay schedule to that proposed by the superintendent directly to the school board, the superintendent only discharged his secretary, and offered as a legitimate, nondiscriminatory reason loss of "trust and confidence" caused by her bypass). Id. at 1369-71; see also EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1012 (9th Cir. 1983); Payne v. McLe- more's Wholesale and Retail Stores, 654 F.2d 1130, 1136 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

188. See Burdine, 450 U.S. at 253; McDonnell Douglas, 411 U.S. at 802; Crown Zellerbach, 720 F.2d at 1012. Disciplining an employee for the employee's opposition to an apparent unlawful employment practice would not be such a legitimate, nondiscriminatory reason. Jennings, 864 F.2d at 1372.

189. A critical element in determining the reasonableness of the opposition conduct is the extent the conduct disrupts the employer's operations. See McDonnell Douglas, 411 U.S. at 792 (wherein illegal acts were held to be an unreasonable form of opposition); Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 229-34 (1st Cir. 1976) (wherein conduct which was hostile and disruptive to other employees' morale and work performance was held to be unreasonable opposition). Contra Crown Zellerbach, 720 F.2d at 1013 (writing letters to a corporate parent and/or a contractual party expressing a belief of employer's non-compliance with Executive Order 11246 held to be a reasonable form of opposition).
"exceed the cloak of statutory protection" and will constitute a legitimate, nondiscriminatory reason for the adverse action.160

If the employer carries the rebuttal burden, the plaintiff has the opportunity to prove the employer's articulated reason was merely pretext disguising the employer’s actual discriminatory motive.193 In proving pretext, the plaintiff essentially will reestablish the reasonableness of the opposition conduct.192 At the close of evidence, the trier of fact makes the factual finding of the presence or absence of unlawful retaliation. It is without dispute that, under the McDonnell Douglas/Burdine scheme of litigation the burden of persuasion remains with the plaintiff at all times.193

Since the framework of retaliation litigation follows McDonnell Douglas and Burdine, Hopkins potentially applies in cases of retaliation. Since a causal connection between the expression and the adverse employment action is an element of plaintiff's prima facie case,194 Hopkins' principles should apply whenever plaintiffs establish their prima facie case.195 If a retaliation case is shifted to a Hopkins scheme, the rebuttal burden on the employer will become one of persuasion and not simply production of a legitimate, nondiscriminatory reason for the adverse employment action. The consequence of such a burden shift will be to provide employees with greater protection from retaliatory conduct196 and should further the remedial goals of Title VII.197

190. Jennings, 864 F.2d at 1374.
191. Burdine, 450 U.S. at 253; McDonnell Douglas, 411 U.S. at 804; Jennings, 864 F.2d at 1372.
192. In Jennings, pretext would require evidence that the employer was likely to disrupt or prevent legitimate opposition. 864 F.2d at 1373.
193. Insofar as a retaliation case follows the McDonnell Douglas/Burdine scheme of litigation, the burden of persuasion is carried by the plaintiff. See supra note 28 and accompanying text (noting this burden).
194. See supra note 188 and accompanying text.
195. This is particularly true under the plurality opinion's definition of causation. See supra notes 5 & 33 and accompanying text. Under Justice O'Connor's concurrence, there may be a question whether the causal connection is "substantial." See supra note 34 and accompanying text.
196. In the future, victims may more confidently remain in their positions and attempt, through reasonable opposition conduct, to influence the dominant discriminatory workplace without fear of retaliation. While persons may not be able to prevent or prove discrimination, they will not be obliged to be silent victims for fear of losing their current positions.
197. The Court has identified Title VII's remedial goals as achieving equality of employment opportunities, the removal of barriers that, in the past, have operated in favor of non-minority employees and applicants. See Griggs, 401 U.S. at 429. In Albermarle, the Court identified the remedial goal of "caus[ing] employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of their discriminatory practices. 422 U.S. at 417-18. It is particularly important to
Two scenarios exist for plaintiffs to establish a claim of retaliation. In the first scenario, the employer admits the retaliation and seeks to justify it. In future retaliation cases, such an admission will certainly constitute the sort of evidence required to shift the case from a Burdine framework to a Hopkins framework. In the face of such an admission, litigation will turn on the reasonableness or unreasonableness of the opposition conduct. If Hopkins applies in cases of employer’s admissions of retaliation, the employer, in rebuttal, will be required to persuade the factfinder that the plaintiff’s opposition conduct was unreasonable under the circumstances. No longer will the plaintiff be required, in surrebuttal, to persuade the factfinder of the reasonableness of the opposition conduct.

In the second scenario, the employer makes no admission of retaliation yet the plaintiff establishes the prima facie case. In such cases, the employer will be required to persuade the factfinder that, in the absence of the opposition conduct, the employer would have made the same decision. In the case of an employee with a satis-

such self-examination and self-evaluation to permit opposition conduct to perceived discrimination based on stereotypes. The weight given to discriminatory stereotypes is often not consciously intentional and can only be minimized or eliminated by making persons aware of their stereotypes. See supra notes 60-62 and accompanying text. One cannot attack stereotypes without first exposing them to the person indulging them. It will be more effective to expose them informally in the workplace through reasonable opposition conduct rather than being forced to formally expose them during litigation in the courts.

198. In Jennings, the superintendent admitted the retaliation. See supra note 188 and accompanying text. Similarly, in McDonnell Douglas the employer admitted retaliation. 411 U.S. at 796. Employer had refused to rehire Green because of his civil rights activities which took the form of deliberate and unlawful “stall-ins” and “lock-ins”. Id.

199. See supra notes 38-40 (discussing the type of evidence required to invoke a Hopkins framework).

200. In Jennings, certain findings of fact were made. Mutual trust and confidence were essential to the proper functioning of the workplace, 864 F.2d at 1375. Jennings told the superintendent she did not trust him to deliver the salary to the board. Id. Jennings’ belief that the superintendent would not deliver the pay schedule to the School Board was unreasonable. Id. at 1376. Pay schedule was not delivered to the superintendent prior to delivery to the School Board. Id. Superintendent discharged Jennings because of the form of her protest. Id. Jennings’ discharge was based on a loss of trust and confidence by the superintendent which was reasonable under the circumstances. Id. It was thus determined that the employer was not liable for retaliatory discrimination. Id.

201. This follows from the particularized scheme of litigation in retaliation cases in which the employer admits the retaliation and seeks to justify it. Id.

202. Other circumstances less “direct” than an employer’s admission of the casual nexus between the opposition and the adverse employment action may also be considered sufficient evidence to shift the case to a Hopkins scheme. Such circumstances may include the temporal proximity of the adverse action to the opposition conduct, statistical evidence of a pattern, or practice of employer retaliation and testimonial evidence.

203. This follows from the general scheme of litigation in cases of individual disparate treatment applied to the specific context of retaliation cases. Such reasons would include work
factory work record, the employer may find it exceedingly difficult to persuade the factfinder that anything other than retaliation motivated the adverse employment action.\(^{204}\)

In *Hopkins*, Ms. Hopkins challenged two adverse employment decisions; first, the decision of the Policy Board to place her candidacy on hold,\(^{205}\) second, the decision of the Policy Board not to re-propose her for partnership.\(^{206}\) Both decisions were challenged as related components of a pretext case of disparate treatment.\(^{207}\) Had the principles of *Hopkins* been announced in an earlier case, the decision not to re-propose her would likely have been alleged as a separate discriminatory act of retaliation.\(^{208}\) Ms. Hopkins might have prevailed on the retaliation claim without prevailing on the claim that Price Waterhouse intentionally discriminated against her in rejecting her for partnership.\(^{209}\)

The district court found that, following the decision to place her on hold, Ms. Hopkins underwent a Quality Control Review in order to improve her chances for partnership the following year.\(^{210}\) She received favorable results.\(^{211}\) At the same time, Ms. Hopkins received performance so unsatisfactory as to justify the adverse employment action, decline in business sufficient to justify hour reductions, layoffs or terminations, or any other legitimate reason unrelated to the plaintiff's opposition conduct.

204. Shifting the burden of persuasion to the employer virtually guarantees that, in cases in which the reasonableness/unreasonableness of the employee's opposition conduct is at issue, a close case will be resolved in favor of the plaintiff/employee.

205. Price Waterhouse never disputed that Ms. Hopkins was qualified for partnership and conceded that, but for the complaints about her interpersonal skills, her candidacy would probably have been successful. 618 F. Supp. at 1113. The Policy Board, in reaching the initial decision to place her candidacy on hold, adopted the recommendation of the Admissions Committee stating "she should be held at least a year to afford time to demonstrate that she has the personal and leadership qualities required of a partner." *Id.* at 1113.

206. After this decision, Ms. Hopkins was informed it was highly unlikely she would be admitted to partnership. *Id.* at 1113. Ms. Hopkins then resigned. *Id.*

207. *Id.*; compare notes 16-30 supra, and accompanying text with notes 31-45, supra, and accompanying text (discussing the differences between pretext and mixed motive cases).

208. Hopkins had originally alleged both harassment and retaliation but both allegations were dropped before trial. 618 F. Supp. at 1121. While solely a matter of speculation since the issue was never litigated as a retaliation claim, Ms. Hopkins' rejection for reproposal may have been caused by disappointment at being rejected coupled with her good faith belief that the placing of her candidacy on hold was the product of discrimination. This disappointment may have made her otherwise marginal interpersonal skills intolerable to her senior partners.

209. It is not necessary that the employer have actually violated Title VII in the first adverse employment decision to predicate a finding of illegal retaliation in the second adverse employment decision. A victim's good faith belief of a Title VII violation is all that is necessary to bring opposition conduct under the protection of Title VII. *See supra* note 186 and accompanying text.

210. 618 F. Supp. at 1113.

211. *Id.* The Policy Board's decision not to re-propose her the next year was made before the favorable results of this review were submitted and considered. *Id.*
assurances from several partners that she would be provided "opportunities to demonstrate her abilities and receive more exposure" in hopes of a subsequent successful partnership bid. These opportunities never materialized. Instead, the Policy Board decided not to re-propose her for partnership only four months following her rejection.

The district court found the decision not to re-propose Ms. Hopkins for partnership was the result of two partners in her office changing their position. One partner had earlier voted to put her candidacy on hold. The other partner had earlier supported her candidacy. Both partners emphasized that concern over Ms. Hopkins' interpersonal skills motivated their change of position.

The district court found Ms. Hopkins had failed to satisfy her burden of proving the partners' explanations of their change of position were pretextual. Consequently, the Policy Board's decision

212. Id.
213. Id. at 1115.
214. Id. at 1113. The temporal contiguity of the Board's initial rejection of Ms. Hopkins for partnership and their subsequent decision not to re-propose her for partnership coupled with broken assurances of opportunities for improvement and dearth of investigation of current relationships with staff would likely be sufficient to establish the causal connection necessary in a plaintiff's prima facie case of retaliation.

215. Id.
216. Id. at 1114. Among the reasons offered for his later opposition to reproposal was because he "found her disagreeable to work with and had reservations about her . . . dedication to the firm." Id. Lack of dedication in this context cannot refer to an unwillingness to work hard. Ms. Hopkins "played a key role" in successfully winning a multi-million dollar contract with the State Department, "had no difficulty [working] with clients . . . [who] appeared to have been very pleased with her work" and "was generally viewed as a highly competent project leader who worked long hours." Id. at 1112-13. "None of the other partnership candidates . . . that year had comparable record in . . . securing major contracts." Id. at 1112. More likely it refers to a loss of trust and confidence. Loss of trust and confidence are often asserted as justifying retaliatory action. See supra notes 186, 188 and accompanying text.

217. Id. at 1114. He changed his mind after conversing with Ms. Hopkins several times, receiving additional staff criticism of her management style and further evaluating his previous experience with her work. Id.

218. Id. In Hopkins, the legitimate, nondiscriminatory reason advanced by the employer for placing Ms. Hopkins' candidacy on hold was that she was abrasive and aggressive. Id. at 1113. The partners simply reiterated this reason as motivating their change of position. Id. at 1114-15. In the interim four months between placing her candidacy on hold and denying her reconsideration, "no one made any effort to check on the plaintiff's current relationship with staff members. . . ." Id. at 1115.

219. Id. If Ms. Hopkins had made her prima facie case of retaliation, she would not have the burden of proving pretext. Instead, Price Waterhouse would have the burden of persuading the factfinder that the partner's changed their position in response to something other than opposition conduct. Price Waterhouse may have been forced to persuade a factfinder that her interpersonal skills had become suddenly unacceptable as a result of disappointment at rejection and not simply because she had become engaged in protected expression of opposition.
not to re-propose her was not discriminatory.\textsuperscript{220} Having reached this finding, the district court held that Ms. Hopkins had failed to prove she had been constructively discharged\textsuperscript{221} and denied her appropriate relief.\textsuperscript{222} Specifically, the district court declined to award her backpay for the period subsequent to her resignation and declined to order the firm to make her a partner.\textsuperscript{223} Had Ms. Hopkins prevailed on a retaliation claim, she would have been entitled to a backpay award,\textsuperscript{224} reinstatement\textsuperscript{225} and re-proposal for partnership.\textsuperscript{226}

Ms. Hopkins did not require a retaliation claim to vindicate her interest. She was vindicated by her successful claim of discriminatory treatment against Price Waterhouse. Future plaintiffs in challenges to partnership decisions, mistaken in their good faith belief and vocal opposition of discriminatory treatment, might not be similarly vindicated. For such persons, the greater protection from retaliation provided by Hopkins may be important in two ways. First, if

\begin{itemize}
  \item \textsuperscript{220} Id. at 1115. If retaliation had been alleged, Hopkins needn't have proven discrimination. Rather, she would have had to prove retaliation. In a retaliation case, the surrounding circumstances of the partners' change of position would be relevant.
  \item \textsuperscript{221} Id. at 1121. Even though the district court held her rejection was tainted by illegal stereotyping, "the fact that discrimination has occurred does not, by itself, provide the 'aggravating factors' required to prove a constructive discharge." Id. The court of appeals, while agreeing with the district court that the mere fact of discrimination will not, without more, establish constructive discharge, did find that Ms. Hopkins' rejection coupled with the failure to renominate her, constituted a career-ending action and amounted to a constructive discharge. 825 F.2d at 472-73.
  \item Hopkins, 618 F. Supp. at 1121.
  \item Id. at 1120-21. The court of appeals disagreed with the district court's refusal and remanded for a determination of appropriate damages and relief. Hopkins, 825 F.2d at 473. The Supreme Court affirmed the court of appeals. 490 U.S. at ----, 109 S. Ct. at 1775. On remand, the district court ordered that Ms. Hopkins be made a partner effective July 1, 1990, partnership shares equivalent to the average compensation given to management consulting partners admitted on July 1, 1983, backpay in the sum of $371,175, attorney's fees in the sum of $422,460.32 and enjoined Price Waterhouse from retaliating against Ms. Hopkins. See 737 F. Supp. at 1216-17.
  \item The district court held Hopkins was entitled to backpay from the date of the first decision until her decision to resign seven months later. 618 F. Supp. at 1121. Had retaliation been found to generate a constructive discharge, Hopkins would be entitled to backpay from the date of her resignation to the date of her reinstatement. Hopkins, 825 F.2d at 473.
  \item Because the district court found Hopkins had voluntarily resigned and had not been constructively discharged, reinstatement was not ordered. 618 F. Supp. at 1121. Had Hopkins prevailed on the retaliation claim, even without a concurrent judgment of employer liability on the first disparate treatment claim, Hopkins would have been reinstated in order that her candidacy could be reproposed the following year.
  \item It is likely the court would order Price Waterhouse to reconsider Hopkins for partnership the following year as promised.
\end{itemize}
the person chooses to remain in the employ of the partnership and is, at a later date, considered for partnership again, the threat of further opposition conduct or legal challenge in the event of a second rejection may motivate decision-makers to accept the candidate. Second, employers may be more reluctant to make a follow-up decision not to re-propose the candidate for partnership for fear it will appear retaliatory.

C. Protection For Homosexuals

Judicially, it is a settled issue that Title VII offers no protection to homosexuals or transsexuals from discrimination in employment. Legislatively, efforts to amend Title VII to protect sexual preference have consistently failed. Under the current state of affairs, homosexuals must take care to conceal their homosexuality. Its exposure will render them vulnerable to discrimination without legal recourse. An employer is free to reject, terminate or refuse to promote homosexuals simply because they are a homosexual.


231. A number of governmental entities have prohibited discrimination in employment on the basis of sexual preference. See, e.g., WIS. STAT. ANN. §§ 111.31-395 (West 1988). Some states have executive orders banning some forms of sexual orientation discrimination in state employment. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 4, § 28 (1983). Cities and counties have enacted forms of anti-discrimination provisions: Tucson (Arizona); Berkeley,
Title VII prohibits "employment decisions . . . predicated on mere 'stereotyped' impressions about the characteristics of males and females." In Hopkins, a plurality of the Court held that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." This is a significant extension of the scope of sex stereotyping moving from an inter-class view emphasizing "habitual assumptions about a woman's ability to perform certain kinds of work," to a view recognizing intra-class sex stereotyping.

In the aftermath of Hopkins, an alarming inconsistency remains. Several courts of appeals have held that effeminacy is a permissible basis for refusing to hire a male applicant. To permit em-
ployers to penalize effeminate men for behavior and attitudes acceptable for female workers while prohibiting a similar penalty of aggressive women for behavior and attitudes acceptable for male workers offends even the most callous sense of justice. To reject, discharge or refuse to promote a man because he conforms to a feminine stereotype is not analytically distinguishable from rejecting, discharging or refusing to promote a woman because she conforms to a masculine stereotype.

It is interesting to note that within the context of sex stereotyping, when courts have addressed the issue of effeminacy under Title VII, they have included homosexuality as its analytic companion. In DeSantis v. Pacific Telephone and Telegraph Co., the court felt it necessary when considering effeminacy to also consider homosexuality and transsexuality finding all three of them outside the purview of Title VII. In Smith v. Liberty Mutual Insurance Co., the plaintiff "established that Liberty Mutual failed to hire him because he was classified as effeminate and that the interviewer didn't like this particular person... because he... gave evidence of the characteristics of sexual aberration."

It is conceivable that employers covertly or overtly use effeminacy in men and aggressiveness in women as stereotypical proxies for homosexuality. For such an employer, the effect of Hopkins will be significant. While employers will remain free to reject, dismiss or refuse to promote homosexuals, the ability of the employer to reject, dismiss or refuse to promote effeminate men or aggressive women because of a cultural stereotype equating effeminacy and aggressiveness with homosexuality may no longer be so easily indulged.

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237. The Court in Hopkins does not directly discuss its application in cases of discrimination based on effeminacy. Presumably, when this issue is raised, the Court will similarly prohibit intra-class sex stereotyping of men.

238. DeSantis, 608 F.2d at 332 (stating that discrimination because of effeminacy, like discrimination because of homosexuality or transsexualism, does not fall within the purview of Title VII.)

239. Smith, 569 F.2d at 328.

240. Id. at 328 n.4. Presumably, this "sexual aberration" is homosexuality.

241. This merely represents a second-order sexual stereotype. First, we have the stereotype that men shouldn't act like women and women shouldn't act like men. Second, we have the stereotype that if men do act like women and women do act like men they are likely homosexuals. In current culture, open discrimination against homosexuals is increasingly viewed with disfavor. See supra note 232 (discussing governmental entities who have independently made such discrimination illegal).

242. The employer will be forced to interrogate their bias and act in a manner which discourages others. The district court in Hopkins was concerned with the maintenance of a system which gave credence and weight to gender stereotypes. 618 F. Supp. at 1119. This is simply an extension of that concern to another set of stereotypes regarding sexual preference.
They will be forced to step forward and admit their intolerance. Their subterfuge will be lost.243

Both Burdine and Hopkins require the employer to show by reasonably specific “objective evidence” the legitimate, nondiscriminatory reason for his decision.244 While Burdine requires only that the employer produce such a reason, Hopkins requires the employer to prove by a preponderance of the evidence that the adverse employment decision would have been made in the absence of the impermissible motive; there the stereotype of aggressiveness.245 If effeminacy in men is equated with aggressiveness in women, such a case will shift to a Hopkins framework.

If the Hopkins framework applies, the employer must persuade the court in two stages. First, in the absence of the stereotype of effeminacy or aggressiveness, the same decision would have been made. Objective factors of job performance often support the consideration of the candidate for the employment opportunity. An employer using effeminacy or aggressiveness may be left with no other legitimate, nondiscriminatory reason other than homosexuality to justify his decision.

Second, if left with no other reason than homosexuality to justify the adverse employment action, the employer must persuade the court the person is a homosexual.246 An admission of homosexuality will be fatal to any plaintiff since homosexuality constitutes a legitimate, nondiscriminatory reason for the adverse employment decision.247 In the absence of such an employee admission, the employer, in order to carry the rebuttal burden, will be forced to persuade the trier of fact, with reasonably specific, “objective” evidence248 that a

243. This loss of subterfuge may, in some cases, be quite costly. Current estimates show that gays have an average household income of $55,430 compared with a national average of $32,144. 59.6% of gays are college educated compared with 20.3% of all Americans. Simmons Market Research Bureau Survey, USA Today, May 24, 1990, at 1. These communities also have a well-organized set of protective organizations. Id. It is likely that employers who openly discriminate on the basis of sexual preference will lose in money far more than they gain in comfort. In a competitive industry such as accounting, no firm can afford to intentionally alienate such a potentially fertile source of accounts.

244. See supra notes 22-23 and accompanying text (discussing the employer’s burden).

245. This essentially requires the employer to persuade the factfinder that the legitimate, nondiscriminatory reason is the actual reason for the adverse employment decision.

246. It is conceivable that the court will accept as a legitimate, nondiscriminatory reason that the employer thinks or believes the person is a homosexual. In order to prevail under such a theory in light of Hopkins, the employer must persuade the court that something other than the impermissible stereotype of effeminacy or aggressiveness leads him to that thought. It would seem that something must persuasively imply homosexuality.

247. See supra notes 22-32 and accompanying text (discussing this in detail).

248. See supra notes 22-23 and accompanying text.
person's effeminate behavior is linked to that person's homosexuality and not simply to his gender. Otherwise, the stereotype of effeminacy or aggressiveness may not be indulged. The Court has thus invited a future in which every effeminate man's or aggressive woman's sexual activities become the central issue of litigation.249

V. CONCLUSION

In his first dissenting opinion as a Justice of the U.S. Supreme Court, Oliver Wendall Holmes observed: "Great cases, like hard cases, make bad law. . . . Immediate interests exercise a hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."260 In Hopkins, the Court bends the well-settled principles established in McDonnell Douglas and Burdine so as to adapt them to mixed-motive cases.261

Professors Madek and O'Brien both overestimate and underestimate the influence of Hopkins. They overestimate the power of Hopkins in Title VII challenges to partnership decisions in several ways. First, its power may be limited because of the ambiguity of the decision. The plurality and concurring opinions leave the legal community in doubt as to the nature of the evidence required,262 the timing of evidentiary presentations,263 the relative burdens of plaintiff and defendant264 and the scope of application of the Hopkins scheme.265 Second, because of the ease by which decision-makers in a partnership can eschew reliance on impermissible stereotypes, Hopkins may have limited power.266 Third, while Professors Madek and O'Brien recognize that Hopkins broadens an existing avenue of attack, they fail to recognize that Watson and Ward's Cove have concurrently

249. It is not entirely unusual for the sexual activities of a plaintiff to become a central issue of litigation. In rape cases, a defendant often endeavors to establish a plaintiff's voluntariness through evidence of plaintiff's past sexual activities or appearance at the time of the rape. Nor is it unusual for courts and legislatures to find such circumstances undesirable. Indeed, some states have passed legislation prohibiting the submission of such evidence of victims' provocative dress or demeanor.

250. Northern Sec. Co. v. United States, 193 U.S. 197, 400-401 (1903). In a Title VII context, this sentiment was expressed by Chief Justice Burger dissenting in Weber. "It is often observed that hard cases make bad law . . . . "[H]ard cases always tempt judges to exceed the limits of their authority, as the Court does today by totally rewriting a crucial part of Title VII to reach a 'desirable' result." 443 U.S. at 218 (Burger, C.J., dissenting).

251. See generally supra notes 31-45 and accompanying text (discussing this in detail).
252. See supra notes 38-40 and accompanying text.
253. See supra notes 41-45 and accompanying text.
254. See supra notes 5, 33-37 and accompanying text.
255. See generally supra notes 157-250 and accompanying text.
256. See generally supra notes 16-63 and accompanying text.
engineered a parallel, perhaps more accessible, avenue of attack.\textsuperscript{257}

They underestimate the influence of Hopkins on other areas of employment discrimination. The power of Hopkins will not be felt in the limited area of partnership decisions. The primary force of Hopkins will be exerted along the periphery of disparate treatment cases; closing the gaping flank of affirmative action\textsuperscript{268} while proving impetus to the ongoing struggle toward a workplace free from all forms of discrimination and retaliatory threat.\textsuperscript{269} The plurality’s immediate interest in condemning inter-class and intra-class sex stereotyping produced a scheme of litigation which threatens to make voluntary affirmative action more difficult if not impossible,\textsuperscript{260} protection of employees from retaliatory action more complete\textsuperscript{261} and inadvertently creates a window of opportunity for protection of a group Congress had no intention of protecting.\textsuperscript{262}

\textsuperscript{257} See generally supra notes 64-156 and accompanying text.

\textsuperscript{258} Affirmative action, while currently justified as good public policy or remedial action, still requires preferential treatment on the basis of membership in a racial, gender, religious or national origin class. As such, it acts as a prior restraint on an identified class', namely non-minorities' employment opportunities. See generally supra notes 157-84 and accompanying text.

\textsuperscript{259} See generally supra notes 185-230 and accompanying text.

\textsuperscript{260} See generally supra notes 157-84 and accompanying text.

\textsuperscript{261} See generally supra notes 185-227 and accompanying text.

\textsuperscript{262} See generally supra notes 228-50 and accompanying text.