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RESPONSE

A REPLY TO WOMEN DENIED PARTNERSHIPS REVISITED

*Christine Neylon O'Brien**

In Professor Wade's recent response¹ to our Article,² several issues were raised which attracted this reply. The title of our Article³ reflects our definition of the topics we selected to pursue relating to the two relevant Supreme Court decisions⁴ involving sex discrimination⁵ in the partnership promotion process. Never having purported

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1. Wade, *Women Denied Partnerships Revisited: A Response to Professors Madek and O'Brien*, 8 HOFSTRA LAB. L.J. 81 (1990).

2. Madek & O'Brien, *Women Denied Partnerships: From Hishon to Price Waterhouse v. Hopkins*, 7 HOFSTRA LAB. L.J. 257 (1990).

3. *Id.*

4. *Hishon v. King & Spaulding*, 467 U.S. 69, 78-79 (1984). In this case of first impression, the Supreme Court concluded that the decision not to promote a female candidate to partnership within a law firm was subject to Title VII scrutiny. See Madek & O'Brien, *supra* note 2, at 261-73. The other principal case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), involved a negative promotion decision regarding a female partnership candidate in an accounting firm. See Madek & O'Brien, *supra* note 2, at 274-302.

5. Professor Wade asserts that Hopkins is a "black female." See Wade, *supra* note 1, at 81. He also claims that she is "a minority candidate." See Wade, *supra* note 1, at 112. However, Ms. Hopkins is apparently a white female. See ROTHSTEIN, KNAPP & LEIBMAN, EMPLOYMENT LAW 238 (2d ed. 1991); *Discrimination; Perseverance Pays Off*, TIME, May 28, 1990, at 53; Sachs, *A Slap at Sex Stereotypes; The Supreme Court Clears the Way for Discrimination Suits*, TIME, May 15, 1989, at 66; Lacayo, *A Hard Nose and a Short Skirt; Two Cases Raise Questions About a Woman's On-The-Job Style*, TIME, Nov. 14, 1988,

to write a treatise on the broad reaches of Title VII protection in the overall employment arena, it was our modest aim to analyze some of the legal issues raised in the limited context of the two named cases.

As Professor David Hoch wrote in his pithy article about legal publishing, "the creative high often makes it difficult to stop."⁶ Professor Hoch aptly noted, however, that stopping is a prerequisite to finishing and printing research. Even after publication, an author must at times resurrect both ideas and the research to readdress concerns expressed by other scholars.⁷ Rather than copiously responding to every minute difference of opinion that I might encounter with Professor Wade's ideas⁸ or retorting to the inadequacy perceived by

at 98. *Nowhere* in the lengthy Supreme Court opinion is the race of Ms. Hopkins discussed. Her cause of action was grounded on sex discrimination under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-2(a)(1)(2) (West 1981 & Supp. 1990).

One might infer that Professor Wade confused the facts in the *Price Waterhouse v. Hopkins* case with those in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (discussing that a black female was discriminated against by bank's subjective promotion practices). *Watson* is discussed in Wade, *supra* note 1, at 94-95. There has been further examination of the changes in disparate impact analysis wrought by the Supreme Court in the *Watson* case. See Shaw, *Watson v. Fort Worth Bank & Trust: New Evidential Standards for Disparate Impact Analysis*, 40 LAB. L.J. 347 (1989). It should be mentioned that the *Watson* decision involved disparate impact analysis as well as discussion of disparate treatment. 487 U.S. at 985-1000. Professor Wade expressed concern that our Article failed to note recent cases involving disparate impact decisions. Wade, *supra* note 1, at 84. We mentioned the *Watson* case and Professor Shaw's article, but chose not to expand upon it. Madek & O'Brien, *supra* note 2, at 282 n.173. Every author need not travel the same path of analysis, but most welcome the expanded development of other relevant or even tangential issues by other authors who find themselves stimulated by those issues. However, it is noteworthy that in an article cited by us in Madek & O'Brien, *supra* note 2, at 280, n.164 and in Wade, *supra* note 1, at 90 n.48, Professor Cynthia Cohen also chose to focus not on disparate impact analysis as Professor Wade recommends, but on disparate treatment analysis and the burden of proof in mixed motive cases. See Cohen, *Price Waterhouse v. Hopkins: Mixed Motive Discrimination Cases: the Shifting Burden of Proof and Sexual Stereotyping*, 40 LAB. L.J. 723 (1989).

6. Hoch, *You Can Publish!: Confessions of a Reluctant Researcher*, 8 J. LEGAL STUD. EDUC. 121, 125 (1989). Professor Hoch further addresses another practical concern about article length where he quotes the reaction of a well-published friend to an article that Professor Hoch had recently finished. *Id.* at 124. "I think you're an idiot." *Id.* This was the friend's response in light of the article's length, which was 45 pages with three hundred footnotes. The friend gauged this a "colossal waste of energy that would result in only one line on a resume." *Id.* Outside the realm of the law, one might almost take judicial notice of the fact that published articles tend to be shorter. See generally Lasson, *Commentary: Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990). In this article, the author discusses that the scholarship of science is shorter, contains fewer footnotes and is of considerably greater utility than legal scholarship. *Id.* at 933. Lasson further notes that legal scholars "exalt quantity." *Id.* at 942.

7. See the instant article.

8. Wade, *supra* note 1. This temptation is a sore one and is only partially stemmed by a sense of collegiality which encourages scholarly discourse and is respectful of diverse opinions. Nonetheless, it is difficult to entirely suppress my amazement at the notion that Professor Wade's "relatively easy way" to "avoid *Hopkins*' more onerous burdens," Wade, *supra* note 1,

Professor Wade in each instance,⁹ my primary point is simply that

at 83-84, is effected in "two simple steps." *Id.* at 91. "First, strike out those comments in partner's evaluations which seem, in any measure, to partake of gender-based 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." *Id.* at 91-92 (citations omitted). This scenario strikes me as damage control at best. It produces a trail of paper that is discoverable in the context of an employment discrimination lawsuit. The partners should be educated about impermissible criteria *before* they evaluate a candidate. One thesis of our Article was that the *Price Waterhouse* decision would put partners on notice that subjective evaluations of associates may not legally be tainted or prejudiced by personal biases regarding women. See Madek & O'Brien, *supra* note 2, at 300-301; see also, Sachs, *A Slap at Sex Stereotypes: The Supreme Court Clears the Way for Discrimination Suits*, TIME, May 15, 1989, at 66 (stating that the "net result" of *Hopkins* case, according to "legal experts, is that firms will be under pressure to root out bias among individuals making important personnel decisions."). *Id.*

Another more imaginative line of reasoning that Professor Wade developed in his "response" to Madek & O'Brien, is that *Hopkins* creates an "alarming inconsistency in that [s]everal courts of appeals have held that effeminacy is a permissible basis for refusing to hire a male applicant." Wade, *supra* note 1, at 121 (citations omitted). Professor Wade contends that allowing employers "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." *Id.* at 122. Professor Wade portends that despite the absence of Title VII protection for homosexuals, *Hopkins* extends the scope of impermissible sex stereotyping to intra-class sex stereotyping. *Id.* at 120-21. Thus, arguably, within the class of males, males with effeminate characteristics could not be subjected to negative evaluations based upon behaviors not generally associated with their gender. This analogy has equitable appeal but may involve more cultural bootstrapping that many courts would permit to indulge absent further legislative direction.

As *Hopkins* was a woman who was evaluated in the context of a predominately male work environment by all male partners, the issue of gender stereotyping directly lent itself to proof of sex discrimination. Many traits necessary for advancement in that business would be primarily defined in U.S. culture as masculine traits. *Hopkins* exhibited a number of behaviors found to be objectionable by some partners that would have been deemed acceptable if displayed by a male candidate. See *Hopkins v. Price Waterhouse*, 825 F.2d 458 (1987) (stating that a supporter defended *Hopkins*' language and tough personality on the basis that "[m]any male partners are worse than Ann."). *Hopkins*, 825 F.2d at 463. Since Ms. *Hopkins* was disqualified from promotion because of those traits, the court saw the situation as a "Catch-22" for the woman candidate in a traditionally male job. One could argue that the inconsistency that Professor Wade encounters in his analysis of the absence of protection afforded an effeminate male versus the judicial acceptance of the discriminatory motive in the *Hopkins* case, is further evidence of a firmly entrenched bias in our society in favor of those traits commonly associated with masculinity and against so-called feminine traits. One news report on the *Price Waterhouse v. Hopkins* case quoted a song from "My Fair Lady" where Henry Higgins lamented, "Why can't a woman . . . be more like a man?" See Lacayo, *A Hard Nose and a Short Skirt*, TIME, Nov. 14, 1988, at 98 (raising the question of whether *Hopkins* was penalized for qualities treated as assets in a male).

9. See Wade, *supra* note 1, at 83 n.11. Professor Wade chides the authors for "limiting their examination to female applications for partner status. . . . [and] ignor[ing] the difficulties of women's progression up the ladder in sole proprietorships, corporations and other forms of business organizations." *Id.* In Madek & O'Brien, *supra* note 2, at 259-61, the authors discuss the importance of women's access to the professions via partnerships as one avenue to the upper echelon of employment, but in no way dismiss the significance of any form of discrimination in other employment contexts or forms of doing business. See also *supra* notes 5

one generally does not mind being criticized for what one has said, but it is another matter entirely when one author tells another that he should have written more.¹⁰

I am only slightly assuaged by Professor Wade's grudging reference to our Article as some of the "interesting legal scholarship"¹¹ generated by the diverse opinions of the Supreme Court Justices in *Price Waterhouse v. Hopkins*. This is in part due to the fact that Professor Wade maintains in his conclusion that we "overestimate" the "power" of *Hopkins* which "may be limited because of the ambiguity of the decision."¹² We noted throughout our Article that the *Hopkins* decision was problematic but for one succinct reference, in our conclusion, in which we stated that "several factors combine to limit the predictive value of this decision for future female litigants

& 6 and accompanying text (discussing that the focus of the article is limited to two Supreme Court cases regarding sex discrimination in promotion to partnership and not intended as comprehensive treatise on employment discrimination law). Although Professor Wade sought more from us on some topics than we were willing to give, even he admits that we "exhaustively discuss the differing views of causation offered by the Court." Wade, *supra* note 1, at 87 n.33 (emphasis added).

If one wished to engage in a debate about underinclusiveness, a debate I do not generally recommend, this author would note that the Wade article did not choose to address in any detail one of our key cases, *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) or its accompanying historical case development. See Madek & O'Brien, *supra* note 2, at 261-73. This omission strikes the author as more objectionable than ours in that Wade entitled his article a "response" to ours. In Professor Wade's defense, however, I admit that even I questioned when I wrote that section whether anyone was still interested in *Hishon*. Of course, the interest of economy is also served by such omissions and this is a laudable goal. See Professor Lasson's refreshing and irreverent work. Lasson, *supra* note 6, at 942 (encouraging such economy in legal scholarship). Lasson's article has been applauded by some. See *Correspondence: Scholarship Admired: Response to Professor Lasson*, 103 HARV. L. REV. 2085 (1990). I also thoroughly enjoyed Professor Lasson's article, especially since none of my articles were pointed out as examples of the problems with legal scholarship referenced therein. Nonetheless, I admit that even I can be verbose at times and have a tendency to bury some barbs in footnotes. See generally Lasson, *supra* note 6, at 939 (discouraging just such tendencies). See also Hoch, *supra* note 6, at 124 (lamenting verbosity).

10. See generally *supra* note 6 and accompanying text (discussing the logic to the arguments regarding brevity in writing presented by Professors Hoch and Lasson). A cynic might add that since Professor Wade also wished to publish a related article in rapid succession to ours that he was fortunate that we did not cover all of his ideas, thus affording him, if I might borrow his phrase, "a window of opportunity" to publish a sequel in the guise of a response. See Wade, *supra* note 1, at 125. See generally Lasson, *supra* note 6, at 933 (discussing the phenomenon of the proliferation of law review commentaries of a merely descriptive and mildly plagiaristic nature). Lasson also discounts the value of law review articles because they are generally quoted by one another and not by the courts or legislature. *Id.* at 932 (citations omitted). Professor Lasson provides some comfort to authors who suffer "bashing" at the word processor of others by his inference that any form of citation or response to one's work is gratifying. *Id.* at 950.

11. Wade, *supra* note 1, at 90 n.48 and accompanying text.

12. *Id.* at 124.

. . . [and] the four opinions offer views on causation and burden of proof which fall at widely diverse points on any logical spectrum.”¹³ We further commented on the numerical breakdown of the supporters of each opinion and stated that “one can hardly say that *Price Waterhouse v. Hopkins* is the definitive case which will launch women onto a new plateau in their fight for equality.”¹⁴ Thus, our Article concluded that the burden of proof issue was in need of legislative clarification in light of *Price Waterhouse v. Hopkins*.¹⁵ The proponents of recent civil rights legislation appear to agree with this premise.¹⁶

13. Madek & O'Brien, *supra* note 2, at 300.

14. *Id.* at 301.

15. See Madek & O'Brien, *supra* note 2, at 301-302. In particular, the authors reflected upon the introduction of the Civil Rights Act of 1990 which one columnist deemed necessary in light of the stiffened burden of proof scheme for Title VII plaintiffs enunciated in *Price Waterhouse v. Hopkins*. See Madek and O'Brien, *supra* note 2, at 302 n.336.

16. See Rosenthal, *Sununu Resumes Talks on Rights Bill*, N.Y. Times, Sept. 22, 1990, at A10, col. 1. “Kennedy-Hawkins Civil Rights Bill of 1990 would reverse a succession of Supreme Court rulings last year that made it harder for people who felt they had been victims of discrimination to bring damage suits against employers.” *Id.* See also Kennedy, *Civil Rights Battle, Cont.*, The Boston Globe, Nov. 3, 1990, at 27, col. 1 (indicating that the vetoed Civil Rights Act of 1990 would be resubmitted in 1991 in an effort to reinstate the rule of law regarding job discrimination that was reversed in the 1989 Supreme Court term).

