UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

Civil Action No. 2:14-cv-14-13710

Hon. SEAN F. COX

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Defendant.
_____/

DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S MOTION TO DISMISS

Defendant **R.G. & G.R. HARRIS FUNERAL HOMES, INC.**, by and through its attorney, **JOEL J. KIRKPATRICK, P.C.**, moves this Court, pursuant to Fed.R.Civ.P. 12(b)(6), for entry of an order dismissing the complaint on grounds that Plaintiff has failed to state a claim on which relief can be granted. The grounds for this Motion are set forth more specifically in the attached supporting Brief.

Pursuant to Local Rule 7.1(a), on November 18, 2013, concurrence was sought on the subject matter of this motion, but such concurrence was not obtained.

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Dated: November 19, 2014

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BRIEF IN SUPPORT OF DEFENDANT R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S MOTION TO DISMISS

ISSUE PRESENTED

WHETHER THE COMPLAINT SHOULD BE DISMISSED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) BECAUSE PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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I. INTRODUCTION

Plaintiff Equal Employment Opportunity Commission (hereinafter "EEOC"), an agency of the United States of America, has brought this federal employment discrimination suit against defendant, R.G. & G.R. HARRIS FUNERAL HOMES, INC (hereinafter "Funeral Home"). The complaint alleges unlawful employment practices on the basis of sex discrimination regarding former employee, William Anthony B. Stephens[1] (hereinafter "Anthony"). The EEOC alleges that Anthony was terminated from his employment as a funeral director/embalmer for informing the Funeral Home that he was transgender. (Complaint ¶ 10, 11) The EEOC further alleges that Anthony was subject to unlawful employment practices on the basis of sex. The Complaint should be dismissed, however, because the EEOC is without a statutory basis to bring this action and has failed to state a claim upon which relief can be granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

Anthony was employed with the Funeral Home from September 2007 until August 2013. Anthony was an at-will employee, employed as an embalmer and funeral director.

As do all funeral homes, the Funeral Home has a dress code. The Funeral Home's *Dress Code* is in writing and is provided to all Funeral Home staff. The Funeral Home's *Dress Code* – provides that

> "*To create and maintain our reputation as "Detroit's Finest", it is fundamentally important and imperative that every member of our staff shall always be distinctively*

[1] The Complaint identifies the employee as "Aimee Stephens." However, the Funeral Home has never employed anyone by the name of "Aimee Stephens." Anthony Stephens's name was, at the time he was hired and at all times during his employment with the Funeral Home, "William Anthony Beasley Stephens," and to the best of the Funeral Home's knowledge, information, and belief, Anthony Stephens' legal name is still "William Anthony Beasley Stephens" and so will be referred to by his legal name throughout this Brief.

attired and impeccably groomed, whenever they are contacting the public as representatives of The Harris Funeral Home. Special attention should be given to the following consideration [sic], *on all funerals, all viewings, all calls, or on any other funeral work.*"

The *Dress Code* then goes on to distinguish between what male funeral directors are required to wear and what women funeral directors are required to wear. Male funeral directors are required to wear suits and ties. The suits must be black, gray, or dark blue. Shirts must be white with regular medium length collars. Ties must be Funeral Home issued or similar. Only black or dark blue socks and black or dark shoes may be worn. To assist funeral directors in complying with the Dress Code, the Funeral Home provides them with Dress Code compliant clothing.

In August of 2013, Anthony advised the Funeral Home that he had a "gender identity disorder" and that he intended to "live and work full-time as a woman," including dressing as a woman. The Funeral Home terminated Anthony's employment.

All the documentation in the Funeral Home's possession, most of which was provided by Anthony, including Anthony's *Certificate* from the Conference of Funeral Service Examining Board of the United States, his *Associate of Applied Science in Funeral Service* degree from Fayetteville Technical Community College, his cover letter and resume, his Funeral Service License issued by the State of Michigan, his employment tax records, his driver's license issued by the State of Michigan, and his 08/29/2013 Unemployment Insurance Claim, identify Anthony as male. In addition, Anthony is currently married to a woman, which would not be legally possible under the laws of Michigan if Anthony were a woman. Indeed, despite *referring* to himself on occasion as "female," nowhere does Anthony ever claim he is not biologically,

anatomically, and legally a male.

Upon his termination, Anthony filed an administrative complaint with the EEOC alleging unlawful employment practices. The EEOC brings this Complaint, alleging gender discrimination and unlawful employment practices. Specifically, the EEOC alleges in its complaint that Anthony was terminated on the basis of "sex" under Title VII. The Funeral Home brings this Motion to Dismiss on the ground that the EEOC has failed to state a claim upon which relief can be granted and lacks the statutory basis to bring its complaint under Title VII.

III. LEGAL STANDARD

A motion under Federal Rule of Civil Procedure 12(b) (6) seeks to have the complaint dismissed based upon the plaintiff's failure to state a claim upon which relief can be granted. *Hunter v. Secretary of U.S. Army*, 565 F.3d 986, 992 (6th Cir. 2009). "To survive a motion to dismiss under Rule 12(b) (6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Hunter*, 565 F.3d at 992, quoting *Advocacy Org. For Patients & Providers v. Auto Club Ins. Ass'n, 176 F.3d 315, 319* (6th Cir. 1999). The complaint's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Hunter, 565 F.3d at 992.*

Ordinarily, if matters outside the pleadings are presented to the court, a Rule 12(b)(6) motion is treated as one for summary judgment under Federal Rule of Civil Procedure 56. Fed.R.Civ.P. 12(c). Where a plaintiff, however, has actual notice of all the information in the

movant's papers and has relied upon these documents in framing the complaint, the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated. *Cortec Indus. v. Sum Holding L.P., 949 F.2d 42, 48 (3d Cir. 1991).* The Court also permits the consideration of materials beyond the complaint on a Rule 12(b)(6) motion challenging a limitation period, if such materials are appropriate for taking judicial notice. *New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495, 501 (6th Cir. 2003)* (citations omitted).

The EEOC claims Anthony was discharged "*due to my sex and gender identity, female, in violation of Title VII of the Civil Rights Act of 1964*."

IV. ARGUMENT

A. Because Gender Identity Disorder is Not a Protected Class Under Title VII, The EEOC's Claim Must Fail As A Matter Of Law.

The Title VII provision under which the EEOC is bringing its claims against the Funeral Home provides:

> *(a) Employer practices: It shall be an unlawful employment practice for an employer:*
>
> *(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or*
>
> *(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of*

> *employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin.*

42 U.S.C. Sec. 2000e-2.

It is clear from the face of the statute that "gender identity disorder" is not a protected class under the statute, because within Congress's exhaustive list of protected classes 'gender identity' is nowhere to be found. In fact, the EEOC acknowledges that Title VII does not protect "gender identity disorder" *per se* as a protected class. Instead, the EEOC alleges that the "unlawful employment practices" it is pursuing is "on the basis of sex," not on the basis of transgender, transsexual, or gender identity disorder.

But, contrary to the EEOC's position, a multitude of courts have recognized that Title VII's "sex" discrimination provision applies only to discrimination based on a person's biological, anatomical, or physiological status as male or female, not one's so-called "gender identity" that is inconsistent with one's biological sex. *Grossman v. Bernards Tp. Bd. of Educ.*, 1975 WL 302 (D.N.J. 1975), aff'd without opinion, 538 F.2d 319 (3d Cir. 1976); *Dobre v. National R.R. Passenger Corp. (Amtrak)*, 850 F.Supp. 284 (E.D. Pa. 1993); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D.Md. 1977); *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541 (E.D. La. 2002); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 19834); *Creed v. Family Express Corp.*, 2007 WL 2265630 (N.D. Ind. 2007); *Sweet v. Mulberry Lutheran Home*, 2003 WL 21525058 (S.D. Ind. 2003); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir.) 1977); *Kastl v. Maricopa County Community College Dist.*, 2006 WL 2460636 (D.Ariz. 2006), aff'd on other grounds, 325 Fed.Eppx. 492 (9th Cir. 2009); Voyles *v. Ralph K. Davies Medical Center*, 403 F.Supp. 456

(NB.D. Cal. 1975), aff'd without opinion, 570 F.2d 354 (9th Cir. 1978); *Doe v. U.S. Postal Service*, 1985 WL 9446 (D.D.C. 1985); Spearman v. Ford Motor Company, 231 F.3d 1080 (7th Cir. 2000, cert. denied, 532 U.S. 995 (2001)..

By attempting to shoehorn "gender identity disorder" into Title VII as a species of "sex discrimination," the EEOC is trying to unilaterally extend the reach of Title VII to a class it knows is not protected under Title VII. Such bureaucratic overreaching should be rejected as an attempt by the executive branch of government to unilaterally and wrongfully amend a federal statute. To the extent the EEOC's claim is that Anthony was terminated due to his gender identity disorder, the claim must be dismissed.

B. Because The EEOC's Prosecution of Gender Identity Disorder Claims Under Title VII's Sex Discrimination Provision Is An *Ultra Vires* Act And, Therefore, An Invalid Exercise Of Its Authority, The EEOC's Claim Must Fail As A Matter Of Law.

Administrative agencies derive their powers from their enabling legislation. Their authority cannot exceed that granted by the legislature and they are legally bound to comply strictly with their enabling statutes. Agencies are bound by the terms of the statutes granting them their powers, and are required to act in accordance therewith and to keep within the limits of the powers and authority granted them. Even when an agency is pursuing the policy objectives underlying the statutory scheme the agency is charged with enforcing, the agency may not disregard or expand upon the terms of the statutes themselves. Agency actions beyond delegated authority are *ultra vires* and should be invalidated. An agency that exceeds the scope of its authority acts *ultra vires* and the act is void. Courts look to an agency's enabling statute and to subsequent legislation to determine whether the agency has acted within the bounds of

its authority. 73 C.J.S., *Public Administrative Law and Procedure*, § 163. The Sixth Circuit Court of Appeals has recognized that "[a]n agency garners its authority to act from a congressional grant of such authority in the agency's enabling statute." *United States v. Miami Univ., 294 F.3d 797, 807 (6th Cir. 2002).* Consequently, [i]f Congress does not expressly granted or necessarily imply a particular power for an agency, and that power does not exist." Id. When determining the extent of an administrative agency's authority, courts "must adhere to the plain language of the statute, unless a contrary congressional intent is clearly established in the legislative history." *United States v. Miami Univ., 91 F. Supp. 2d 1132, 1149 (S. D. Ohio 2000) aff'd, 294 F.3d 797 (6th Cir. 2002).*

As clearly noted above, it is obvious from both the face of Title VII and case law that Title VII does not extend its protections to "gender identity disorder."

Moreover, if the face of the statute is not clear enough, one need only note the actions of Congress, which make clear that Congress did not and does not intend to include "gender identity" as a protected class under Title VII. In particular, for 19 of the last 20 years, the Employment Non-Discrimination Act ("ENDA") – the sole purpose of which is to make "sexual orientation" and, in some versions of ENDA, "gender identity," protected classes under Title VII and other federal non-discrimination statutes – has been introduced in Congress, and every year ENDA has been introduced, Congress has rejected it. *http://en.wikipedia.org/wiki/Employment_Non-Discrimination_Act.* These are legislative facts of which this Court may take judicial notice. *Territory of Alaska v. American Can Company, 358 U.S. 224 (1959).*

The history of ENDA makes two things very clear. First, it clarifies that even the proponents of ENDA acknowledge that "sexual orientation" and "gender identity" are not

currently protected classes under Title VII - because if they were there would be no need to enact ENDA to add them. And, second, the fact that Congress has rejected ENDA every year that it has been introduced is a clear expression of Congressional intent that Congress does not intend Title VII to protect "sexual orientation" or "gender identity."

(It is also relevant to note that Congress specifically excluded "*transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders*" (our emphasis) from the definition of what constitutes a disability under the Americans With Disabilities Act. 42 U.S.C. Sec. 12211(b)(1).) See *Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007)*(the court agrees with the vast majority of federal courts to have addressed this issue and concludes that discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII). See also *Vickers v. Fairfield Medical Center, et al., 453 F.3d 757 (6th Cir. 2006)*(because sexual orientation is not one of the listed protected classes under Title VII, sexual orientation is not a prohibited basis for discriminatory acts under Title VII).

Since it is clear, both from the face of Title VII, as well as from Congress's long and repeated history of expressly rejecting attempts to add "gender identity" to Title VII, that Title VII does not protect "gender identity" as a protected class, the EEOC has no authority to prosecute gender identity claims under Title VII. Any attempt to do so is clearly an *ultra vires* act and void. Therefore, the EEOC's gender identity claim here must fail as a matter of law.

C. The EEOC's Claim That Gender Identity Disorder Is Covered By The Sex Discrimination Provisions Of Title VII, Not as Gender Identity, *Per Se*, But As

Gender Stereotyping Under *Price Waterhouse*, Is Without Merit.

To the extent the EEOC's claim on behalf of Anthony's gender identity disorder is based upon the argument that Anthony was not discriminated against on account of his gender identity, *per se*, but rather was discriminated against due to gender stereotyping under *Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)*, that claim must fail as well.

First, it is important to note that *Price Waterhouse* neither confronted nor addressed the issue of whether a person suffering from gender identity confusion and expressing that confusion in the workplace states a claim under Title VII. *Price Waterhouse* involved a woman, identifying and expressing herself as a woman, but whose fellow employees felt was not behaving in a sufficiently feminine manner – not a woman claiming to be a man and expressing herself as a male. The two situations are so different that any attempt to stretch the *Price Waterhouse* holding to encompass transgender claimants is untenable. See, for example, *Etsitty v. Utah Transit Auth., 2005 WL 1505610 (D. Utah 2005)*("There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman"); *Oiler v. Winn-Dixie La., Inc., 2002 WL 31098541 (E.D. La. 2002)*("*Plaintiff's* [cross-dressing] actions are not akin to the behavior of plaintiff in *Price Waterhouse*. The plaintiff in that case may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona. This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. . . While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase 'sex' has not been interpreted to include sexual identity or gender identity disorders.").

The United States District Court for the District of Columbia made this distinction clear in *Schroer v. Billington, 424 F.Supp.2d 203 (D.C. 2006). In Billington* the court found that the *Price Waterhouse* holding "is considerably more narrow than its sweeping language suggests." In particular, the court pointed out that the "sexual stereotyping" claim recognized in *Price Waterhouse* was limited to claims of a *woman* claiming she was a *woman* who was discriminated against in employment because she was not *feminine* enough (in other words, for being out of sync with her claimed sex) – or a *man*, claiming to be a *man*, who was discriminated against in employment because he was not *masculine* enough (again, being out of sync with his claimed sex). It was not applicable to a *woman* claiming to be a *man* being allegedly discriminated against for *conforming* to masculine stereotypes (in other words, for *conforming* to her claimed sex) or, as here, a *man* claiming to be a *woman* discriminated against for *conforming* to *feminine* stereotypes (for *conforming* himself to stereotypes associated with his claimed sex). As the court stated:

> "To the extent that Title VII after *Price Waterhouse* prohibits sex stereotyping alone, it does so to allow <u>women</u> such as Ms. Hopkins to express their individual <u>female</u> identities without being punished for being 'macho,' or for <u>men</u> to express their individual <u>male</u> identities without reprisal for being perceived as effeminate. . . Protection against sex stereotyping is different, not in degree, but in kind, from protecting men, whether effeminate or not, who seek to present themselves <u>as</u> women, or women, whether masculine or not, who present themselves <u>as</u> men. The difference is illustrated in this case. *Schroer* is not seeking acceptance as a man with feminine traits. She seeks to express her female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it. She has embraced the cultural mores

> dictating that 'Diane' is a female name and that women wear feminine attire. The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave – she adopts those norms." (our emphasis). *Billington*, supra, at 210-211.

In other words, when, as here, a man suffering from gender identity disorder makes a claim of gender stereotyping, he is not, in fact, claiming that he is a man being discriminated against for expressing as a woman; rather, he is claiming that he is a woman being discriminated against for expressing as a woman. In such a case, he is not complaining that he is being punished for not conforming to his sex, but rather that he is being punished precisely because he is conforming to his true sex. Anthony is claiming he is a woman being discriminated against for conforming to gender stereotypes applicable to women. Therefore, in such a case, there is and can be no gender stereotyping discrimination as identified in *Price Waterhouse*.

Second, distinguishing between Anthony's gender identity disorder and his expression of that disorder by the wearing of women's clothing and by otherwise attempting to take on the appearance and mannerisms of a woman, is a distinction without a difference. Anthony's adoption of a female name, donning women's clothing, and exhibiting other outward expressions of being female, is simply the acting out of and one and the same with his gender identity disorder. See, for example, Sex Stereotyping Per Se: Transgender Employees and Title VII, 95 Ca. L. Rev. 561, 563 (2007)("[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."); Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L. Rev. 392, 392 (2001)(defining transgender persons as those whose "*appearance, behavior, or other personal characteristics differ from traditional gender*

norms"). So to make the distinction the EEOC is trying to make – that an employer can lawfully discriminate against an employee like Anthony on account of the employee's gender identity disorder, *per se*, but not on account of his expression of that disorder, is nonsense. They are inseparable. Indeed the latter is synonymous with the former. So, because in the gender identity disorder context, the disorder and the expression of the disorder are synonymous, extending Title VII protection to the expression of the disorder effectively extends protection to the former, without exception, thereby undermining Congress's clearly expressed intent that gender identity disorder not be protected under Title VII. That this is not a legally acceptable resolution of this matter is made clear by the 6th Circuit Court of Appeal's decision in *Vickers v. Fairfield Medical Center*, supra. In *Vickers*, the court held that the sex stereotyping theory under *Price Waterhouse* was not broad enough to encompass the plaintiff's claim that he was discriminated against due to his harassers' perception that his sexual practices did not conform to traditional masculine sexual roles. Recognizing that Title VII does not protect "sexual orientation," the court warned that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII. As the court went on to say:

> "*Ultimately, recognition of Vickers' claim would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if the claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.*" Vickers, supra, at 764.

The same, of course, must be said with respect to claims based in gender identity disorder – but to an even greater extent. The effect of recognizing the EEOC's claims here would be to

bootstrap all gender identity claims into Title VII because all employees suffering from gender identity disorder fail to conform to traditional gender norms. That is the essence of gender identity disorder.

That is not to say that some lower courts haven't *appeared* to hold – on a cursory reading – that the *Price Waterhouse* holding goes further. But a close reading of those cases makes clear that they certainly do not stand for the proposition at issue here – that Title VII prohibits an employer from requiring that its male employees – even male employees suffering from gender identity disorder – comply with reasonable male-specific dress and appearance policies.

Take *Smith v. City of Salem Ohio, 378 F.3d 566 (6th Cir. 2004),* for example. In *Smith*, a male fire department employee, suffering from gender identity disorder, brought a Title VII action against the city for sex discrimination based upon allegations that he was terminated for not conforming to male sexual stereotypes. Based upon *Price Waterhouse*, the court held that the fire fighter stated a claim for relief under Title VII's sex discrimination provision because he had alleged that he had suffered adverse employment action due to the fact that his employer thought his appearance and mannerisms were too feminine for a male. But there was no evidence or allegation that his appearance violated the fire department's dress code. Indeed, it is common knowledge that fire fighters wear uniforms while on duty and that there is no difference between the uniform of a male fire fighter and the uniform of a female fire fighter. So, since *Smith* did not address the issue before the Court here, *Smith* is not determinative in this case.

i. Employer Dress And Grooming Policies – Even When Sex Specific – Do Not Violate Title VII's Sex Discrimination Provision. Therefore, Where, As

Here, the Complainant Was Terminated For Refusing To Comply With The Employer's Dress and Grooming Code, Such Claim Must Fail.

EEOC's claim must fail for Anthony's refusal to comply with Defendant's dress and grooming code. "Courts before and after *Price Waterhouse* have found no Title VII violation in gender-specific dress and grooming codes, so long as the codes do not disparately impact one sex or impose an unequal burden." *Schroer v. Billington*, supra, at 208-209, citing *Jesperson v. Harrah's Operating Co., Inc., 392 F.3d 1075 (9th Cir. 2004); Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000); Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998); Tavora v. New York Mercantile Exchange, 101 F.3d 907 (2nd Cir. 1996).* "Evenhanded and evenly applied grooming codes may be enforced even where the code is based on highly stereotypical notions of how men and women should appear." *Schroer v. Billington, supra, at 209. See also Schiavo v. Marina District Development Company, LLC,, 2013 WL 4105183 (N.J.Super. 2013)*(an employer's dress and grooming requirements that women, but not men, wear custom fitted black skirts, bustier tops, small jackets, pantyhose, and black shoes did not constitute illegal gender stereotyping); *Dodd v. Septa, 2007 WL 1866754 (E.D.Pa. 2007)*, citing *Belissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3d Cir. 1985)*(dress codes are permissible under Title VII even though the specific requirements between men and women differ, and this remains true even where an employer does not have a written dress code or policy); *Kleinsorge v. Eyeland Crop., 2000 WL 124559 (E.D. Pa. 2000)*(a grooming policy allowing women but not men to wear earrings fell outside the purview of Title VII); *Harper v. Blockbuster, 139 F.3d 1385 (11th Cir. 1998)*(employer's grooming policy allowing women, but not men, to wear long hair did not violate Title VII).

Indeed, a quick perusal of the cases the *Smith* court relied on for its decision reveals that

none of them involved the dress code issue [and only one of them even involves a gender identity disordered complainant and that was not even in an employment context]. *Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001)*(male employee harassed for carrying his tray "like a woman" and having "feminine mannerisms" but not for not complying with a dress or grooming code), *Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999)*(homosexual employees claim of sex discrimination on account of harassment over his homosexuality – but not involving any claim of not conforming to a dress or grooming policy); and *Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000)*

ii. If The Smith Principle Were Extended To Employer Dress Code Cases , It Would Effectively Invalidate All Employer Sex-Designated Dress And Grooming Policies And Deprive All Employers Of The Ability To Control The Appearance Of Their Employees.

There is absolutely no support for the proposition that the Supreme Court in *Price Waterhouse* had any intention of depriving employers of the right to impose reasonable sex-specific dress and grooming policies on their employees. That is clear, first, because *Price Waterhouse* did not itself involve an employee who was presenting as a person of a sex opposite to her biological sex, or transgressing any employer-mandated dress or grooming policy. And, second, there is no Supreme Court or other case before or after *Price Waterhouse* that has declared employer-mandated dress or grooming policies – including gender stereotypical dress or grooming policies – to constitute "sex discrimination" under Title VII. Indeed, the Ninth Circuit Court of Appeals recognized this very issue when it held an employer's grooming policy that required women, but not men, to wear makeup, did not constitute sex discrimination under

Title VII. In rejecting the claim that such gender specific grooming policies were illegal under Title VII, the court stated "if we were to do so [hold that a policy requiring women but not men to wear makeup constituted sex discrimination under Title VII], we would come perilously close to holy that **every** grooming, apparel, or appearance requirement that an individual finds personally offensive, **or in conflict with his or her own self-image**, can create a triable issue of sex discrimination." (Our emphasis) *Jespersen*, supra, at 1112.

Imagine the employment world if it were otherwise. Every employer has a legitimate business interest in presenting a certain "face" to the public – a face that reflects the employer's brand; a face that attracts customers; literally the face of the business. Indeed, this is the very reason that sex-specific dress and grooming policies have never been considered a violation of Title VII's sex discrimination provisions.

And this is particularly important in the funeral service industry, because funeral homes serve their clientele in the most serious and heart-rending contexts imaginable – the loss of loved ones. And funeral directors, such as Anthony, interact directly with these grieving families, both in making funeral arrangements and in appearing at funerals – interacting with the family, guiding attendees to their seats, closing caskets during funeral services, driving hearses, and appearing with the family and funeral attendees at cemeteries for burials. Indeed, this is precisely why the Funeral Home (1) requires its male funeral directors to wear men's suits and ties and (2) pays for that clothing to make sure they comply. The Funeral Home wants to make sure that its funeral directors appear professional and that they do not detract or distract from the somber context in which the Funeral Home operates.

However, if the EEOC's position prevails, neither this Funeral Home nor any business will be able to any longer control how its employees and agents appear to the public. Men will

be able to wear dresses, high heels, their hair long, and lip stick, and women will be able to shave their heads, wear men's suits and ties, and no make-up. Indeed, under the EEOC's position, there would be nothing to prevent employees from mixing and matching their wardrobes. Men will be able to wear dresses, but with men's shoes and facial hair. And women will be able to wear men's suits and ties, but with high-heels, make-up and women's hairstyles. Such a result would deprive business owners of the right to control their employees' work-related appearance and, therefore, the viability of their businesses.

Consequently, since no court – including any court in the 6th Circuit – has invalidated the historically recognized principle that employers may hold their employees to sex-specific dress and grooming policies, and because there is no allegation by the EEOC that the Funeral Home's dress and grooming policy in this case is unreasonable or otherwise unlawful, the Funeral Home's holding Anthony to its dress and grooming policy in this case cannot, as a matter of law, constitute a violation of Title VII's sex discrimination provision.

Now, the EEOC may argue that what is unlawful in this case is the Funeral Home's holding of Anthony to its *men's* dress and grooming policy because Anthony and the EEOC are claiming that – contrary to all objective evidence – Anthony is not a man, but rather a woman. But the facts of this case do not support that assertion. If the EEOC takes the position that Anthony is a woman, then the EEOC has effectively incorporated gender identity into Title VII, thereby committing an *ultra vires* act, as discussed above

D. The EEOC's Claim Of Sex Discrimination Based Upon The Claim That Anthony Is A Woman Is Without Merit And Must Fail As A Matter Of Law

This brings us to the EEOC's claim that Anthony was discriminated against on the basis of his "female" sex – evidently apart from his gender identity. For a variety of reasons, this

claim, too, must fail as a matter of law.

First, Anthony is not, in fact, a woman. As discussed above, he is biologically, anatomically and legally, a man. He may assert – against all objective evidence – that he is a woman, but there is no medical or legal authority that would support him in that assertion. He may intend to undergo therapy and surgery that might to some extent change his *physical* appearance to resemble a female. But doing so would not make him a female and, in any event, he has not done so yet. There is no evidence that there has been any change in Anthony's legal status as a male, and if there has been it was certainly not the case when Anthony's employment was terminated. Since it is an undisputable fact that Anthony is a man – not a woman – he cannot claim his employment was terminated *on account of his being female*. See *Kantara v. Kantara* 8*84 So.2d 155, 159 (App. Fla. 2004*) (a male to female post-operative transsexual does not fit the definition of a female); *In re Burnett Estate 834 N.W. 2dv 93, 99 (Mich. App.Ct. 2013)* (a postoperative male to female transsexual is not a "woman"); *In re the marriage of Simmons, 825 N.E 2d 303 (App.Ill. 2005)* (a woman who undergoes some sex reassignment surgery and is issued a new birth certificate is not a man); *In the Matter of the Estate of Gardiner, 42 P.3d 120 (Kansas 2002)* (a male to female postoperative transsexual does not fit the definition of a female); *Littleton v. Prange, 9 S.W. 3d 223, 231 (App. Tex. 1999)* (holding, as a matter of law, that a man who underwent sex reassignment surgery and changed his birth certificate to appear female, is still a male).

Second, as pointed out above, the law is clear that Title VII's "sex" discrimination provision applies only to discrimination based on a person's biological, anatomical, or physiological status as male or female, not one's so-called "gender identity" that is inconsistent with one's biological sex. That Anthony – a biological male – is claiming he is really a female

is the sort of claim that is clearly not covered by Title VII's sex discrimination provision and must, therefore, fail as a matter of law.

Third, a claim that a man suffering from gender identity disorder has a claim for sex discrimination because such a man is really a woman is precisely the sort of bootstrapping that the court in *Vickers* rejected, for if such a claim were to be recognized, then all gender identity disorder claimants – by definition – would have a claim under the sex discrimination provision of Title VII, thereby resulting in a *de facto* amendment of Title VII. Since this position has already been definitely rejected, the EEOC's position must fail as a matter of law.

Fourth, there is no case law that stands for the proposition that a male suffering from gender identity disorder has a claim for sex discrimination on the ground that he is really a female (or that a female suffering from gender identity disorder has a claim for sex discrimination on the ground that she is really a male). The only gender identity disorder claim arguably recognized under Title VII is that the plaintiff was discriminated against for not conforming to gender stereotype expectations associated with the claimant's biological sex. The theory itself precludes a claim that the claimant is not, in fact, his or her biological sex. Indeed, the claim requires the recognition of the claimant's biological sex because, absent that, there is no ground to complain that the claimant was discriminated against for not conforming to his or her biological sex.

Consequently, to the extent the EEOC is claiming that Anthony was illegally discriminated against because he is a woman, that claim must fail as a matter of law.

E. The EEOC's Claims Are Incoherent and Result in the Failure to State a Claim.

A thoughtful and reasoned analysis of the EEOC's positions clearly demonstrates their incoherence and their failure to state a claim. Here's why –

The EEOC must be contending either of the following propositions:

(1) **Anthony is a man**. But if Anthony is a man who wants to dress and present as a woman, including wearing women's clothing, such is contrary to the Funeral Home's legitimate dress and grooming policies. If this is the EEOC's position, then the Funeral Home was merely requiring Anthony – a man – to comply with the Funeral Home's male dress and grooming code, which is imposed equally on all male funeral directors. And if this is the case, then the Funeral Home was not illegally discriminating against Anthony when it terminated his employment for Anthony's refusal to abide by the Funeral Home's male dress code.

Or the EEOC is claiming that:

(2) **Anthony is a woman**. But, even apart from the fact that there is absolutely no evidence to support such a claim, if Anthony is a woman, then the Funeral Home did not terminate him for his failure to conform to stereotypical female dress and expression, because by dressing and presenting as a woman Anthony – a woman – would not have been engaging in *non-conforming* gender stereotypical expression; instead he would have been engaging in *conforming* gender stereotypical expression. In this case, if Anthony is a woman it is impossible to claim that the Funeral Home illegally terminated Anthony for dressing and grooming contrary to feminine gender expectations since Anthony wanted to wear feminine attire. And, as pointed out above, there is no legal authority for the proposition that a gender identity disorder claimant has a sex discrimination claim under Title VII based upon the assertion that the claimant is a sex other than his biological sex. The only claim a gender identity disordered claimant has under Title VII is that he was discriminated against for not-

conforming with his biological sex – a male.

So, under either of the EEOC's possible positions, the Funeral Home could not have illegally discriminated against Anthony on account of gender stereotyping and, therefore, the EEOC's claims must fail as a matter of law.

I. CONCLUSION

For the foregoing reasons, Defendant R.G. & G.R. Harris Funeral Homes, Inc. respectfully requests that the Court grant its Motion to Dismiss, and dismiss the complaint with prejudice.

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Dated: November 19, 2014

CERTIFICATE OF SERVICE

I certify that on November 19 2014, a copy of the above Motion to Dismiss was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/*s/ Joel J. Kirkpatrick*

JOEL J. KIRKPATRICK

EXHIBIT A

Questioned
As of: Nov 19, 2014

CHRISTOPHER VICKERS, Plaintiff-Appellant, v. FAIRFIELD MEDICAL CENTER, STEVE ANDERSON, KORY J. DIXON, JOHN MUELLER, and "JANE DOE" DIXON, Defendants-Appellees.

No. 04-3776

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0252p.06; *453 F.3d 757*; *2006 U.S. App. LEXIS 18060*; *2006 FED App. 0252P (6th Cir.)*; *98 Fair Empl. Prac. Cas. (BNA) 673*; *88 Empl. Prac. Dec. (CCH) P42,443*

June 8, 2005, Argued
July 19, 2006, Decided
July 19, 2006, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Vickers v. Fairfield Med. Ctr., 2007 U.S. LEXIS 6847 (U.S., June 4, 2007)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employee sued defendants, employer and three co-workers, and alleged sex discrimination, sexual harassment, and retaliation in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.* The United States District Court for the Southern District of Ohio at Columbus granted the employer and the co-workers' motion for judgment on the pleadings. The employee appealed.

OVERVIEW: The district court granted the motion for judgment on the pleadings based on the fact that Title VII did not protect individuals from discrimination based on sexual orientation and that the United States Supreme Court case law did not recognize the employee's claims of harassment based on being perceived as homosexual as violations of Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.* The appellate court found that the theory of sex stereotyping did not support the employee's sex discrimination and sexual harassment claims under *42 U.S.C.S. § 2000e-2* because the gender non-conforming behavior which the employee claimed supported his theory of sex stereotyping was not behavior observed at work or affecting his job performance, the employee made no argument that his appearance or mannerisms on the job were perceived as gender non-conforming in some way and provided the basis for the harassment he experienced; rather, the harassment of which the employee complained was more properly viewed as harassment based on the employee's perceived homosexuality, rather than based on gender non-conformity.

OUTCOME: The district court's grant of the employer and the co-workers' motion for judgment on the pleadings was affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pretrial Judgments > Judgment on the Pleadings

[HN1] An appellate court reviews the district court's dismissal of a complaint pursuant to *Fed. R. Civ. P. 12(c)* de novo. The manner of review under *Fed. R. Civ. P. 12(c)* is the same as a review under *Fed. R. Civ. P. 12(b)(6)*; the appellate court must construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Same-Sex Harassment
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employees

[HN2] Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e et seq.*, prohibits an employer from discriminating against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. *42 U.S.C.S. § 2000e-2(a)(1)*. Sexual orientation is not a prohibited basis for discriminatory acts under Title VII. However, the United States Supreme Court has held that same-sex harassment is actionable under Title VII under certain circumstances. Likewise, individuals who are perceived as or who identify as homosexuals are not barred from bringing a claim for sex discrimination under Title VII.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Proof > Burdens of Proof > Employee Burdens
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Burdens of Proof > Employee Burdens
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment

[HN3] In order to establish a prima facie case of sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e et seq.*, a plaintiff must show: (1) that he is a member of a protected class; (2) that he was subject to an adverse employment decision; (3) that he was qualified for the position; and (4) that he was treated differently than a similarly situated individual outside the protected class. In order to bring a hostile work environment sexual harassment claim, a plaintiff must show the following: (1) the employee was a member of a protected class; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the charged sexual harassment created a hostile work environment; and (5) the existence of employer liability. The United States Supreme Court has held that making employment decisions based on sex stereotyping is actionable discrimination under Title VII. The Court focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff's manner of walking and talking at work, as well as her work attire and her hairstyle. Later cases applying the Court's holding have interpreted it as applying where gender non-conformance is demonstrable through the plaintiff's appearance or behavior.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > Sexual Orientation
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > Stereotypes

[HN4] The United States Court of Appeals for the Second Circuit has noted the faulty logic in viewing what is, in reality, a claim of discrimination based on sexual orientation as a claim of sex stereotyping: When utilized by an avowedly homosexual plaintiff, gender stereotyping claims can easily present problems for an adjudicator. That is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality. The court has therefore recognized that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > Sexual Orientation
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > General Overview
[HN5] Harassment on the basis of sexual orientation has no place in society. Congress has not yet seen fit, however, to provide protection against such harassment.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Same-Sex Harassment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN6] The United States Supreme Court has stated that Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e et seq.*, covers hostile work environment claims based on same-sex harassment. However, an individual does not make out a claim of sexual harassment merely because the words used have sexual content or connotations. Rather, the critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. The Court has provided three ways a male plaintiff could establish a hostile work environment claim based on same-sex harassment: (1) where the harasser making sexual advances is acting out of sexual desire; (2) where the harasser is motivated by general hostility to the presence of men in the workplace; and (3) where the plaintiff offers direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.

COUNSEL: ARGUED: Randi A. Barnabee, SMITHBARNABEE & CO., LPA, Bedford, Ohio, for Appellant.

William R. Case, THOMPSON HINE, Columbus, Ohio, Lois A. Gruhin, ZASHIN & RICH, Columbus, Ohio, for Appellees.

ON BRIEF: Randi A. Barnabee, SMITHBARNABEE & CO., LPA, Bedford, Ohio, for Appellant.

William R. Case, THOMPSON HINE, Columbus, Ohio, Lois A. Gruhin, ZASHIN & RICH, Columbus, Ohio, Helena Oroz, Stephen S. Zashin, ZASHIN & RICH, Cleveland, Ohio, for Appellees.

JUDGES: Before: SILER and GIBBONS, Circuit Judges; LAWSON, District Judge. * GIBBONS, J., delivered the opinion of the court, in which SILER, J., joined. LAWSON, D. J., delivered a separate dissenting opinion.

* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION BY: Julia S. Gibbons

OPINION

[*759] [***2] JULIA SMITH GIBBONS, Circuit Judge. Christopher Vickers brought a claim against Fairfield Medical Center (FMC), three co-workers, and a co-worker's spouse alleging sex discrimination, sexual harassment and retaliation [**2] in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, conspiracy to violate Vickers' equal protection rights in violation of *42 U.S.C. § 1985(3)*, failure to prevent the conspiracy in violation of *42 U.S.C. § 1986*, and twenty-one state law claims. The district court granted defendants' motion for judgment on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)*, finding that Vickers could not prevail on any of his federal claims as a matter of law. The district court declined to exercise supplemental jurisdiction over the state law claims. Vickers now appeals.

For the following reasons, we affirm the decision of the district court.

I.

Vickers was employed as a private police officer by Fairfield Medical Center in Lancaster, Ohio. Kory Dixon and John Mueller were also police officers at FMC and often worked with Vickers. Steve Anderson was Police Chief of FMC's police department and was Vickers' supervisor.

Vickers' seventy-one page complaint is extremely detailed. It gives a virtually day-by-day account of Vickers' allegations [**3] of harassment. According to the complaint, Vickers befriended a male homosexual doctor at FMC and assisted him in an investigation regarding sexual misconduct that had allegedly occurred

against the doctor. Once his co-workers found out about the friendship, Vickers contends that Dixon and Mueller "began making sexually based slurs and discriminating remarks and comments about Vickers, alleging that Vickers was 'gay' or homosexual, and questioning his masculinity." Vickers asserts that following a vacation in April 2002 to Florida with a male friend, Dixon's and Mueller's harassing comments and behavior increased. Vickers asserts that Anderson witnessed the harassing behavior but took no action to stop it and frequently joined in the harassment. Vickers asserts that he has never discussed his sexuality with any of his co-workers.

Vickers contends that he was subject to daily instances of harassment at the hands of his co-workers from May 2002 through March 2003. The allegations of harassment include impressing the word "FAG" on the second page of Vickers' report forms, frequent derogatory comments regarding Vickers' sexual preferences and activities, frequently calling Vickers a "fag, [**4] " "gay," and other derogatory names, playing tape-recorded conversations in the office during which Vickers was ridiculed for being homosexual, subjecting Vickers to vulgar gestures, placing irritants and chemicals in Vickers' food and other personal property, using the nickname "Kiss" for Vickers, and making lewd remarks suggesting that Vickers provide them with sexual favors.

Vickers also asserts that on several occasions, he was physically harassed by his co-workers. According to his complaint, on October 20, 2002, Vickers and Mueller were conducting handcuff training. Dixon handcuffed Vickers and then simulated sex with Vickers while Anderson photographed this incident. Vickers downloaded the digital picture and placed it in his mailbox, [*760] intending to take it home later, but it was removed from his mailbox. Vickers contends that a few days later, Dixon's wife, a nurse at Grant Medical Center, faxed the picture to FMC's Registration Center, where several people saw it. Vickers further contends that the picture was hanging up in a window at FMC on January 15, 2003, where FMC officers, staff and visitors could see it. On other occasions, Vickers' co-workers repeatedly touched his crotch [**5] with a tape measure, grabbed Vickers' [***3] chest while making derogatory comments, tried to shove a sanitary napkin in Vickers' face, and simulated sex with a stuffed animal and then tried to push the stuffed animal into Vickers' crotch. Vickers considered reporting the harassment he was experiencing to FMC's Vice-President or President but asserts that Anderson confronted Vickers before he reported the harassment, telling him that reporting the harassment would be futile, as it would not change the work environment. Vickers spoke with Anderson, Dixon, and Mueller several other times about the harassment, but no action appears to have been taken. In April 2003, Vickers retained a lawyer to aid him in dealing with the harassment he was experiencing on the job. Vickers' attorney met with FMC representatives, at which time the representatives stated that they would begin investigating Vickers' complaints immediately. In connection with the investigation, Vickers asserts that Anderson, Dixon and Mueller, among others, were interviewed.

FMC's counsel informed Vickers' attorney at the conclusion of the interview that FMC did not believe that Vickers had a "legally actionable claim" [**6] against them. Shortly thereafter, Vickers met with the human resources department at FMC, where he learned that Anderson, Dixon and Mueller had been suspended for staggered periods as a result of FMC's investigation into Vickers' complaints. Vickers was told that human resources would attempt to rearrange Vickers' schedule in order to minimize his contact with Anderson, Mueller, and Dixon. Vickers was also informed during this meeting that the investigation had revealed actionable misconduct by Vickers, but that human resources had elected not to pursue any action against him in light of the harassment Vickers had experienced. Vickers claims that human resources refused to provide specific information regarding Vickers' alleged misconduct despite his request.

Vickers asserts that, contrary to the statements of human resources regarding a schedule shift, he continued to work closely with Anderson, Dixon and Mueller. Vickers contends that Dixon and Mueller were openly hostile toward him during this time period. Despite human resources' instructions to all involved parties to keep Vickers' complaint confidential, word of the situation spread. Vickers met with human resources again and [**7] was assured that appropriate action would be taken. A few days later, Anderson informed Vickers that his request to transfer shifts had been denied. Soon thereafter, Anderson informed Vickers that he was required to meet with the human resources department. Vickers was told by a co-worker that the meeting was for the purpose of initiating a personnel action against him "in order to discredit him" if he filed a lawsuit against FMC. Vickers attempted to discern from human

resources whether the meeting was for disciplinary purposes. He was told that it was in fact a disciplinary meeting and that he was informed that he was not allowed to have an attorney present at the meeting. Vickers spoke with his attorney and thereafter decided to resign from his position at FMC.

[*761] Vickers filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on June 19, 2003, and the EEOC issued a right to sue letter on July 8, 2003. Vickers filed the instant action against FMC, Anderson, Dixon, Mueller, and "Jane Doe" Dixon (Dixon's wife) on or about September 19, 2003 in the United States District Court for the Southern District of Ohio. The complaint alleged sex discrimination, [**8] sexual harassment, and retaliation in violation of Title VII, *42 U.S.C. § 2000e et seq.*, conspiracy to violate Vickers' equal protection rights in violation of *42 U.S.C. § 1985(3)*, failure to prevent the conspiracy in violation of *42 U.S.C. § 1986*, and twenty-one state law claims.

All defendants-appellees filed a joint motion for judgment on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)* on or about January 21, 2004. On May 5, 2004, the district court granted defendants-appellees' motion on the federal claims pursuant to *Federal Rule of Civil Procedure 12(c)* and declined to exercise supplemental jurisdiction over Vickers' state law claims. The district court granted the motion based on the fact that Title VII does not protect individuals from discrimination based on sexual orientation and that Supreme Court and Sixth Circuit case law [***4] do not recognize Vickers' claims of harassment based on being perceived as homosexual as violations of Title VII. Vickers filed a timely notice of appeal. [1]

1 Although Vickers claims in his brief to be appealing the district court's decision on all of his federal claims, he fails to make any argument regarding his Title VII retaliation claim and his claims under *42 U.S.C. §§ 1985(3)* and *1986*. These claims are therefore waived. *See Robinson v. Jones, 142 F.3d 905, 906 (6th Cir. 1998)* (issues raised before district court but not raised on appeal are deemed abandoned and are not reviewable on appeal).

[**9] **II.**

[HN1] We review the district court's dismissal of a complaint pursuant to *Rule 12(c) de novo*. *Smith v. City of Salem, 378 F.3d 566, 570 (6th Cir. 2004)*. The manner of review under *Rule 12(c)* is the same as a review under *Rule 12(b)(6)*; we must "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." *Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998)*.

Vickers argues on appeal that the district court erred in finding that he cannot prevail on his Title VII claims as a matter of law. Vickers contends that while some of the facts alleged in the complaint establish, as the district court found, that the discrimination Vickers experienced was motivated by Vickers' perceived homosexuality, more of the facts suggest that Vickers' harassers were motivated by Vickers' gender non-conformity. As a result, Vickers argues, his claim is covered under the sex stereotyping theory of liability embraced by the Supreme Court in *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)*. [**10] Vickers also argues that this circuit's opinion in *Smith v. City of Salem, 378 F.3d at 566*, an opinion released after the district court granted defendants-appellees' motion in the current case, sufficiently changes this circuit's view of same-sex harassment such that his claim is now viable.

The district court found that Vickers' allegations, if proven, could not support a finding that the harassment and discrimination he endured occurred because he [*762] was male, and thus his claim failed as a matter of law. The district court found that Vickers claim could not fit within the sex stereotyping theory of liability under *Price Waterhouse, 490 U.S. at 228*. The district court noted that Vickers had not alleged that the harassers were motivated by sexual desire for Vickers or by general hostility for men in the workplace, nor was any information presented regarding how females were treated in comparison at FMC. Although the district court expressed sympathy for Vickers' situation, the district court found that Vickers pled no harassment or discrimination claim under Title VII.

Title VII of the Civil Rights Act of 1964 [HN2] prohibits an employer from discriminating [**11] against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

origin." *42 U.S.C. § 2000e-2(a)(1)*. As is evident from the above-quoted language, sexual orientation is not a prohibited basis for discriminatory acts under Title VII. However, the Supreme Court has held that same-sex harassment is actionable under Title VII under certain circumstances. *See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)*; *see also Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063 (9th Cir. 2002)* (en banc) ("[S]exual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment."). Likewise, individuals who are perceived as or who identify as homosexuals are not barred from bringing a claim for sex discrimination under Title VII. *See Smith, 378 F.3d at 574-75*.

[HN3] In order to establish a *prima facie* case of sex discrimination under Title VII, a plaintiff must show (1) that he is a member of a protected class, (2) that [**12] he was subject to an adverse employment decision, (3) that he was qualified for the position, and (4) that he was treated differently than a [***5] similarly situated individual outside the protected class. *Humenny v. Genex Corp., 390 F.3d 901, 906 (6th Cir. 2004)*. In order to bring a hostile work environment sexual harassment claim, a plaintiff must show the following: (1) the employee was a member of a protected class; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the charged sexual harassment created a hostile work environment; and (5) the existence of employer liability. *Clark v. UPS, 400 F.3d 341, 347 (6th Cir. 2005)*. Vickers relies on the theory of sex stereotyping adopted by the Supreme Court in *Price Waterhouse, 490 U.S. at 228*, to support both his sex discrimination and sexual harassment claims. In *Price Waterhouse*, the plaintiff, a senior manager in an accounting firm, was passed over for partnership in part because she was too "'macho'" and "'overcompensated for being a woman.'" *Id. at 235*. The plaintiff was [**13] told that in order to improve her chances for partnership, she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id.* The Supreme Court held that making employment decisions based on sex stereotyping, i.e., the degree to which an individual conforms to traditional notions of what is appropriate for one's gender, is actionable discrimination under Title VII. *See id. at 250* ("In 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.").

[*763] Vickers contends that this theory of sex stereotyping supports his claim, and thus, the district court should be reversed. Vickers argues in his brief that he was discriminated against because his harassers objected to "those aspects of homosexual behavior in which a male participant assumes what Appellees perceive as a traditionally female-or less masculine-role." [2] In other words, Vickers contends that in the eyes of his co-workers, his sexual practices, whether real or perceived, did not conform to the traditionally masculine [**14] role. Rather, in his supposed sexual practices, he behaved more like a woman.

2 In support of this theory, Vickers notes that he was only teased about giving, not receiving fellatio, and about receiving anal sex.

We conclude that the theory of sex stereotyping under *Price Waterhouse* is not broad enough to encompass such a theory. The Supreme Court in *Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff's manner of walking and talking at work, as well as her work attire and her hairstyle. *See id. at 235*. Later cases applying *Price Waterhouse* have interpreted it as applying where gender non-conformance is demonstrable through the plaintiff's appearance or behavior. *See, e.g., Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005)* (stating that an individual may have a viable Title VII discrimination claim where the employer acted out of animus toward his or her "*exhibition* of behavior [**15] considered to be stereotypically inappropriate for their gender") (emphasis added); *id. at 221* ("Generally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance."); *Smith, 378 F.3d at 573* (*Price Waterhouse* was concerned with protecting women "who failed to conform to social expectations concerning how a woman should look and behave"); *Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1082 (9th Cir. 2004)*; *Weinstock v. Columbia Univ., 224 F.3d 33, 57 (2d Cir. 2000)*. By contrast, the gender non-conforming behavior which Vickers claims supports his theory of sex stereotyping is not behavior observed at work or affecting his job performance. Vickers has made no argument that his appearance or mannerisms on the job were perceived as gender non-conforming in some way and provided the

basis for the harassment he experienced. Rather, the harassment of which Vickers complains is more properly viewed as harassment based on Vickers' perceived homosexuality, rather than based on gender non-conformity.

In considering Vickers' sex stereotyping argument, the Second [**16] Circuit's recent opinion in *Dawson v. Bumble & Bumble, 398 F.3d at 211*, is instructive. In *Dawson*, a female former employee [***6] of a hair salon and self-described lesbian attempted to bring a sex discrimination claim against her employer after she was terminated based on alleged gender stereotyping. *Id. at 218*. The plaintiff in that case complained that the discrimination she suffered was based on her non-conforming appearance. *Id. at 221*. [HN4] The Second Circuit noted the faulty logic in viewing what is, in reality, a claim of discrimination based on sexual orientation as a claim of sex stereotyping:

> When utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality. [*764] Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.

Id. at 218 (internal quotation marks, [**17] citations, and alteration omitted). Although Vickers has declined to reveal whether or not he is, in fact, homosexual, the claim he presents displays precisely the kind of bootstrapping that the *Dawson* court warned against.

This court's opinion in *Smith v. City of Salem, 378 F.3d at 566*, does not alter this conclusion. The plaintiff in *Smith*, a lieutenant in the Salem Fire Department, was a transsexual undergoing a physical transformation from male to female. *Id. at 568*. The treatment resulted in a display of "'a more feminine appearance on a full-time basis.'" *Id.* The plaintiff was suspended based, at least in part, on co-workers' expressed concerns that "his appearance and mannerisms were not 'masculine enough.'" *Id.* In *Smith*, the court made explicit that a plaintiff cannot be denied coverage under Title VII for sex discrimination merely based on a classification with a group that is not entitled to coverage. *See id . at 575* ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal [**18] to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."). The point is well-taken; we do not suggest that Vickers' claim fails merely because he has been classified by his co-workers and supervisor, rightly or wrongly, as a homosexual. Rather, his claim fails because Vickers has failed to allege that he did not conform to traditional gender stereotypes in any observable way at work. Thus, he does not allege a claim of sex stereotyping. The *Smith* opinion does nothing to lessen the requirement that a plaintiff hoping to succeed on a claim of sex stereotyping show that he "fails to act and/or identify with his or her gender." *Id. See also Barnes v. City of Cincinnati, 401 F.3d 729, 738 (6th Cir. 2005)* (affirming district court's denial of defendant's motion for judgment as a matter of law on discrimination claim where pre-operative male-to-female transsexual was demoted based on his "ambiguous sexuality and his practice of dressing as a woman" and his co-workers' assertions that he was "not sufficiently masculine").

Ultimately, recognition of Vickers' claim would have the effect of *de facto* [**19] amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices. Indeed, this may be Vickers' intent; he argues in his brief that the unique nature of homosexuality entitles it to protection under Title VII sex discrimination law. Further, at oral argument, Vickers argued that the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim. In making this argument, Vickers relies on a paragraph in *Smith, 369 F.3d 912, 921-22 (6th Cir. 2004)*. Unfortunately for Vickers, the paragraph he relied on in making this argument was voluntarily removed by the panel and the opinion was subsequently reissued without this language. *378 F.3d at 566*. The decision to

omit the language from the [**20] *Smith* opinion strongly indicates that the law simply does not embrace his claim. While the harassment alleged by Vickers reflects [***7] [*765] conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, Vickers claim does not fit within the prohibitions of the law. *See Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001)* [HN5] ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.") (internal citations omitted).

Nor does the prevailing case law on same-sex sexual harassment provide an avenue for Vickers' claim. As noted above, [HN6] the Supreme Court has stated that Title VII covers hostile work environment claims based on same-sex harassment. *Oncale, 523 U.S. at 79*. However, an individual does not make out a claim of sexual harassment "merely because the words used have sexual content or connotations." *Id. at 80*. Rather, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment [**21] to which members of the other sex are not exposed." *Id.* (internal citation and quotation marks omitted). The *Oncale* court provided three ways a male plaintiff could establish a hostile work environment claim based on same-sex harassment: (1) where the harasser making sexual advances is acting out of sexual desire; (2) where the harasser is motivated by general hostility to the presence of men in the workplace; and (3) where the plaintiff offers "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id. at 80-81*; *see King v. Super Serv., Inc., 68 Fed. Appx. 659, 663 (6th Cir. 2003)*.

Nothing in Vickers' complaint indicates that his harassers acted out of sexual desire. Similarly, the complaint does not support an inference that there was general hostility toward men in the workplace. Finally, Vickers included no information regarding how women were treated in comparison to men at FMC. In fact, defendants-appellees maintain that Vickers worked in an all-male workforce, an assertion that Vickers has apparently not disputed.

The Sixth Circuit has previously rejected hostile work environment [**22] claims brought by plaintiffs in very similar factual scenarios in one published and two unpublished cases. *See EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 519-23 (6th Cir. 2001)* (hostile work environment claim rejected where plaintiff experienced frequent inappropriate touching because though harassment was sexual in nature, it could not be said to be "because of . . . sex" as required by *Title VII); King, 68 Fed Appx. at 664* (rejecting hostile work environment claim where plaintiff was subject to verbal and physical abuse insinuating that plaintiff was a homosexual because his claim did not fit into the three examples given in *Oncale* of same sex harassment); *Dillon v. Frank, 1992 U.S. App. LEXIS 766, No. 90-2290, 1992 WL 5436, at * 7 (6th Cir. Jan 15, 1992)* (rejecting plaintiff's claim where plaintiff suffered severe verbal harassment and physical assault based on co-workers' belief that plaintiff was a homosexual, because the plaintiff failed to allege that "harassment was directed at [him] for a statutorily impermissible reason"). Other circuits have also failed to recognize hostile work environment claims in similar factual situations because the [**23] plaintiff could not show that the harassment occurred because of sex. *See e.g., Bibby, 260 F.3d at 264* (hostile work environment claim fails where plaintiff was subjected to vulgar statements regarding his sexual orientation and practices accompanied by physical assault and graffiti because the plaintiff "[h]is claim [*766] was, pure and simple, that he was discriminated against because of his sexual orientation."); *Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000)* (male employee who endured threatening and hostile statements, taunting, and graffiti did not establish hostile work environment claim because his co-workers "maligned him because of his apparent homosexuality, and not because of his sex"); *see id. at 1086* ("Title VII is not a 'general civility code' for the workplace; it does not prohibit harassment in general or of one's homosexuality in particular.") (quoting *Oncale, 523 U.S. at 81*); *Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258 (1st Cir. 1999)* (rejecting hostile work environment claim where plaintiff was verbally harassed and mocked due to his homosexuality because [**24] he failed to show that harassment occurred because of his sex). *But see Rene, 305 F.3d at 1066* (finding that male employer who was subject to severe, pervasive, and unwelcome physical conduct was harassed because of his sex because he was subjected to attacks "which targeted body [***8] parts clearly linked to his sexuality"). Based on the foregoing precedent, Vickers has failed to plead a hostile work environment claim.

III.

For the foregoing reasons, we affirm the decision of the district court granting defendants-appellees' motion for judgment on the pleadings pursuant to *Rule 12(c)* as well as the district court's decision not to exercise supplemental jurisdiction over Vickers' state law claims.

DISSENT BY: David M. Lawson

DISSENT

[***9] DAVID M. LAWSON, District Judge, dissenting. As the majority correctly states, in *Price Waterhouse v. Hopkins*, the Supreme Court held that "making employment decisions based on sex stereotyping, i.e., the degree to which an individual conforms to traditional notions of what is appropriate for one's gender, is actionable under Title VII." *Ante* at 5. Because I believe that the plaintiff in this case has pleaded exactly [**25] that, I conclude that he has stated a cognizable claim in his complaint that should have survived dismissal under the standard of review that applies to motions under *Federal Rule of Civil Procedure 12(c)*. Since the majority has concluded otherwise, I must respectfully dissent.

I.

It is beyond debate that Title VII does not prohibit workplace discrimination or harassment based on sexual preference, sexual orientation, or homosexuality. It is equally clear that employment decisions or workplace harassment that are based on the perception that the employee is not masculine enough or feminine enough - that is, he or she fails "to conform to [gender] stereotypes," *Price Waterhouse v. Hopkins, 490 U.S. 228, 272, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)*, (O'Connor, J. concurring) - violates Title VII's declaration that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . sex." *42 U.S.C. § 2000e-2(a)(1)*.

The majority correctly points out that a sexual harassment claim based on a hostile workplace environment requires the claimant to plead [**26] that he was a member of a protected class, he was subjected to unwelcome sexual harassment, the harassment was based on sex, the conduct created a hostile environment, and the employer is accountable for the condition. *Ante* at 5 (citing *Clark v. UPS, 400 F.3d 341, 347 (6th Cir. 2005)*). The thrust of the opinion is that Vickers failed to plead that the harassment was based on sex because it had its roots in the harassers' perception that [*767] Vickers's private sexual practices were woman-like. The majority apparently believes that *Price Waterhouse* extends only to behavior and appearances that manifest themselves in the workplace, and not to private sexual conduct, beliefs, or practices that an employee might adopt or display elsewhere. It concludes, therefore, that Vickers's tormentors were motivated by Vickers's perceived homosexuality rather than an outward workplace manifestation of less-than-masculine gender characteristics.

However, I believe that such a reading of the complaint in this case is too narrow and imposes an obligation on the plaintiff that is more exacting at this stage of the proceedings than is required by the *Federal Rules of Civil Procedure. Rule 8(a)* [**27] requires only that the plaintiff set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Vickers's 71-page, 256-paragraph tome is hardly "short and plain." However, he does allege that his claims are "for unlawful discrimination on the basis of sex and/or sex stereotyping" and "perpetuation of a hostile working environment on the basis of sex." Compl. at P10(A) & (B), J.A. at 10. He then proceeds in excruciating detail to describe the vile and sexually explicit acts that allegedly were committed against him by defendants Dixon and Mueller, and which allegedly were approved or condoned by defendant Anderson. In the context of a motion for judgment on the pleadings, we, like the trial court, must view these allegations as true and "construe the complaint in the light most favorable to the plaintiff." *Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998)*. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)* [**28] (citing *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*).

[***10] I have no quarrel with the proposition that a careful distinction must be drawn between cases of gender stereotyping, which are actionable, and cases denominated as such that in reality seek protection for sexual-orientation discrimination, which are not. Nor do I believe that gender stereotyping is actionable *per se* under Title VII, although certainly it may constitute evidence of discrimination on the basis of sex. As Judge

Posner of the Seventh Circuit pointed out:

> [T]here is a difference that subsequent cases have ignored between, on the one hand, using evidence of the plaintiff's failure to wear nail polish (or, if the plaintiff is a man, his using nail polish) to show that her sex played a role in the adverse employment action of which she complains, and, on the other hand, creating a subtype of sexual discrimination called "sex stereotyping," as if there were a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the waist in hot weather.

Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1067 (7th Cir. 2003) [**29] (Posner, J. concurring). However, these distinctions can be complicated, and where, as here, the plaintiff has pleaded facts from which a fact finder could infer that sex (and not simply homosexuality) played a role in the employment decision and contributed to the hostility of the work environment, drawing the line should not occur at the pleading stage of the lawsuit. "Claims lacking factual merit are properly dealt with through summary judgment under *Rule 56*. . . . This is because under the notice pleading standard of the Federal Rules, courts are reluctant to dismiss colorable claims which have not had the benefit [*768] of factual discovery." *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist., 428 F.3d 223, 228 (6th Cir. 2005)* (citing *Conley, 355 U.S. at 48*). Most of the cases relied on by the majority were decided on summary judgment or after trial. *See, e.g., Price Waterhouse, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268* (review of decision following bench trial); *Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005)* (review of summary judgment); *Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004)* [**30] (same); *Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063 (9th Cir. 2002)* (en banc) (same); *EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001)* (review of jury verdict); *Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001)* (review of summary judgment); *Weinstock v. Columbia Univ., 224 F.3d 33 (2d Cir. 2000)* (same); *Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000)* (same); *Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258 (1st Cir. 1999)* (same); *King v. Super Serv., Inc., 68 Fed. Appx. 659, 663 (6th Cir. 2003)* (same). It behooves courts to view the evidence developed during discovery before declaring that a defendant's behavior was motivated by hostility to homosexuals rather than discrimination "because of . . . sex." *42 U.S.C. § 2000e-2(a)(1)*.

II.

Looking at the allegations in this case, I cannot conclude that no set of facts could be proved that would entitle the plaintiff to relief. The allegations permit the conclusion that the defendants were hostile to the plaintiff because he was not masculine [**31] enough, justifying an inference that a female - or a man with female characteristics - would not be tolerated in the job of private police officer at the Fairfield Medical Center (FMC).

Vickers asserts that there are some twenty-five incidents of harassment that could be construed as evidence of the defendants' perception that Vickers was not masculine enough for them. To be sure, the conduct that Vickers cites for the most part requires following Vickers's argument from point to point, and it is not a crystal-clear statement of sex stereotyping due to the conflation with homosexual references. However, as the district court noted, Vickers does allege that he was not perceived as sufficiently masculine. In March of 2002, the complaint alleges, Vickers began investigating allegations of sexual misconduct against a male doctor at FMC by a "gay" complainant. Compl. at P15, J.A. at 23. Vickers ultimately befriended the individual and [***11] assisted him in investigating the matter. *Ibid.* Fellow police officers Dixon and Mueller, upon learning of the investigation and that the complainant was a homosexual, suspected Vickers of being a homosexual "and *question*[*ed*] *his* [**32] *masculinity*." Compl. at P16, J.A. at 23 (emphasis added). Vickers alleges that he was a private person and did not share details of his personal life at work.

In paragraph 250 of the complaint, Vickers states:

> Vickers does not make any claim of protected status on the basis of homosexuality *per se* - whether real or perceived - with regard to his Title VII claim. Vicker[s]'s claim is instead grounded in the body of sex-discrimination jurisprudence set forth

> by the landmark U.S. Supreme Court decision *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)*, and its progeny. Although Title VII does not prohibit discrimination against homosexuals *per se* - whether real or perceived - the *Price Waterhouse* line of cases stands for the proposition, *inter alia*, that it is improper to discriminate in employment on the basis of real [*769] or perceived nonconformity with gender norms.

J.A. at 77. Vickers cites at least one factual example of this perception: on January 22, 2003, Dixon informed Mueller that Vickers "*might jump your ass. He did me for no reason when I walked in.* " Compl. at P72, J.A. at 37. According to Vickers, the [**33] following ensued:

> Dixon then proceeded to explain to Mueller that Vickers was in a bad mood. Mueller said, "*Maybe he is having a heavy (menstrual) flow day, huh?*" Mueller then said to Vickers, "*Why don't you pluck that tampon out and put a new pad in and lose some of that pressure?* " Mueller walked out of the office momentarily, returning with a sanitary napkin which he tried to rub in Vickers' face. Vickers said, "*What are you putting a tampon on me for?*" Mueller snapped, "*You fucker, it's a fucking pad,*" and continued to try and put the sanitary napkin in Vickers' face. Mueller then began making sexual panting noises, followed by sexual grunts and moans. Mueller finally settled for taping the sanitary napkin to Vickers' uniform coat.

Compl. at PP71-72, J.A. at 37. When Vickers returned to work on January 25, 2003, Mueller asked Vickers if his mood had improved. Compl. at P73, J.A. at 37. Thus, Vickers alleges that he was subjected to harassment because he was perceived as being insufficiently masculine, Vickers clarifies in his complaint that the events alleged therein are indicative of the defendants' perception that Vickers does not measure up to [**34] their stereotypes of masculinity and that he does not wish his complaint to be construed as suggesting otherwise, the district court recognized that Vickers was alleging a claim of sex stereotyping, and Vickers cites at least one example where his conduct incited harassment because the defendants believed him to be acting like a woman.

There are other examples. For instance, on one occasion when Vickers, Dixon, Mueller, and Anderson were working, Mueller extended a tape measure to touch Vickers's crotch several times until Vickers got angry and told Mueller to stop. Anderson remarked that Vickers "must be tired, he's not in the mood to play." Compl. at PP65-67, J.A. at 35-36. A few moments later, Dixon grabbed Vickers's breast and remarked "Kiss [the defendants' nickname for the plaintiff] has titties." Compl. at P67, J.A. at 36. At another point, Vickers's truck was rear-ended causing Dixon to express that he did not want his "favorite bitch" to get hurt and Anderson, Dixon, and Muller to joke that Vickers had been "rammed in the ass." Compl. at PP111-12, J.A. at 45. In yet another instance, Anderson phoned the station, but when Vickers answered Anderson demanded to speak to " [**35] *a real officer.*" Compl. at P115, J.A. at 46. The complaint also contains an allegation that a note was left for the plaintiff in the workplace, purportedly from a woman, asking if he was "interested" but stating that "I know your plumbing is hooked up wrong." Compl. at P124, J.A. at 48.

[***12] These allegations, in my view, provide a basis for the inference that the plaintiff was perceived as effeminate and therefore unworthy to be considered "a real officer." The permissible conclusion that emerges is that the plaintiff was not tolerated - and the defendants made the workplace environment hostile - because the job required only "manly men," not woman-like ones or women themselves. The complaint need only contain "direct *or inferential* allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Johnson v. City of Detroit, 446 F.3d 614, 618 (6th Cir. 2006)* (emphasis [*770] added). Certainly, the complaint is replete with allegations that the plaintiff also was harassed because of his perceived homosexuality. But as homosexuality is not a qualifying classification for relief under Title VII, neither is it disqualifying. [**36] That point has been made clear by this court's precedents. In *Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)*, the court reversed a judgment on the pleadings for the defendant in a claim brought by a transsexual male fireman under Title VII. "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is

not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." *Smith, 378 F.3d at 575*.

As in *Smith*, I believe that the plaintiff in this case has "alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions." *Id. at 572*. Following *Smith*, this court has held that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior." *Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005)* (citations omitted). Allegations that a plaintiff's "failure [**37] to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions" has been deemed sufficient to "state[] a claim for relief pursuant to Title VII's prohibition of sex discrimination." *Ibid.* Therefore, I must conclude that Vickers "has sufficiently pleaded claims of sex stereotyping and gender discrimination." *Smith, 378 F.3d at 572*.

III.

The plaintiff has set forth sufficient facts in his complaint to support a Title VII claim. I do not believe we can conclude on the basis of the pleadings alone that the harassment endured by the plaintiff was motivated solely by the defendants' perception that he was a homosexual, as distinguished from a belief that for reasons other than sexual preference the plaintiff did not conform to the stereotypical image of masculinity, as the plaintiff has alleged in many ways, at least inferentially. "A motion for judgment on the pleadings under *Rule 12(c)* may be granted only if all material issues can be resolved on the pleadings by the district court; otherwise, a summary judgment motion or a full trial is necessary." Wright & Miller, *Federal Practice and Procedure: Civil* [**38] *3d*, § 1368 pp. 248-51 (2004). Because the majority believes that the case can be resolved on the pleadings alone, I respectfully dissent.

EXHIBIT B

PRICE WATERHOUSE v. HOPKINS

No. 87-1167

SUPREME COURT OF THE UNITED STATES

490 U.S. 228*; *109 S. Ct. 1775*; *104 L. Ed. 2d 268*; *1989 U.S. LEXIS 2230*; *57 U.S.L.W. 4469*; *49 Fair Empl. Prac. Cas. (BNA) 954*; *49 Empl. Prac. Dec. (CCH) P38,936

October 31, 1988, Argued
May 1, 1989, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: *263 U.S. App. D. C. 321, 825 F. 2d 458*, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer appealed from the decision of the United States Court of Appeals for the District of Columbia Circuit, which affirmed the lower court's ruling in favor of plaintiff employee in her sex discrimination claim under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*

OVERVIEW: Defendant employer appealed a judgment in favor of plaintiff employee in her action under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.* The courts below held that an employer who had allowed a discriminatory impulse to play a motivating part in an employment decision could avoid liability by showing by clear and convincing evidence that it would have made the same decision in the absence of discrimination. However, the Supreme Court held that conventional rules of civil litigation generally applied in Title VII cases, and one of those rules was that parties to civil litigation need only prove their case by a preponderance of the evidence. Thus, the Court held that when a plaintiff in a Title VII case proved that gender played a motivating part in an employment decision, defendant could avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account.

OUTCOME: The Court reversed and remanded the case to the lower court, holding that defendant employer had to prove by a preponderance of the evidence that its employment decision relating to plaintiff employee was not motivated by a discriminatory purpose.

LexisNexis(R) Headnotes

Civil Rights Law > Civil Rights Acts > Civil Rights Act

of 1964

Labor & Employment Law > Discrimination > Disability Discrimination > Proof > General Overview

[HN1] Title VII of the Civil Rights Act of 1964 forbids an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's sex. *42 U.S.C.S. §§ 2000e-2(a)(1), (2).*

Torts > Negligence > Causation > Cause in Fact

[HN2] But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, the court begins by assuming that that factor was present at the time of the event, and then asks whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview

[HN3] Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, condemns employment decisions based on a mixture of legitimate and illegitimate considerations. Therefore, when an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN4] Title VII of the Civil Rights Act of 1964 does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise. *42 U.S.C.S. § 2000e-2(e).*

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview

[HN5] An important aspect of Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, is its preservation of an employer's remaining freedom of choice. The preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting

Labor & Employment Law > Discrimination > Disability Discrimination > Proof > General Overview

[HN6] After a plaintiff has made out a prima facie case of discrimination under Title VII of the Civil Right Act of 1964, *42 U.S.C.S. § 2000e et seq.*, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. The plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Defenses & Exceptions > General Overview

[HN7] Since the plaintiff retains the burden of persuasion on the issue whether gender played a part in an employment decision, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Defenses & Exceptions > General Overview

[HN8] When an employer has asserted that gender is a bona fide occupational qualification within the meaning of § 703(e) of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e-* 2(e), the employer who must show why it must use gender as a criterion in employment.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Enforcement

[HN9] If an employer allows gender to affect its decision-making process, then it must carry the burden of

justifying its ultimate decision.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview

[HN10] In 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.

Labor & Employment Law > Discrimination > Disability Discrimination > Proof > General Overview
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Enforcement

[HN11] Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part.

Labor & Employment Law > Discrimination > Disability Discrimination > Proof > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Proof > General Overview

[HN12] As to the employer's proof in sex discrimination suits, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. Moreover, proving that the same decision would have been justified is not the same as proving that the same decision would have been made. An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Enforcement

[HN13] An employer who had allowed a discriminatory impulse to play a motivating part in an employment decision must prove by a preponderance of the evidence that it would have made the same decision in the absence of discrimination.

Civil Procedure > Remedies > Damages > Monetary Damages
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Enforcement

[HN14] Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action, action more dramatic than entering an award of money damages or other conventional relief, against an individual.

Civil Rights Law > Civil Rights Acts > Civil Rights Act of 1964
Labor & Employment Law > Discrimination > Disability Discrimination > Proof > General Overview
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Employment Practices > General Overview

[HN15] When a plaintiff in a Title VII, *42 U.S.C.S. § 2000e et seq.*, case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.

DECISION:

Employer shown to have considered gender in making employment decision held properly required, in federal civil rights action, to prove by preponderance of evidence that decision would have been same absent such consideration.

SUMMARY:

A woman who was employed as a senior manager by a nationwide professional accounting firm was proposed for partnership in the firm by the partners in the office where she worked, and the firm, following its usual practice, solicited evaluations of the woman from all of its partners, nearly all of whom were men. In those

evaluations, which split sharply on the question whether the woman should be granted or denied partnership, her supporters strongly praised her ability and her record of securing major contracts for the firm, but a number of evaluations sharply criticized her interpersonal skills and specifically accused her of being abrasive. Several of the evaluations on both sides made comments implying that the woman was or had been acting masculine, and one partner, in explaining to the woman the firm's decision to hold her candidacy for reconsideration the following year, suggested that she could improve her chances for partnership by walking, talking, and dressing more femininely. After the partners in her office refused to repropose her for partnership the next year, the woman resigned and brought an action against the firm in the United States District Court for the District of Columbia, which action alleged that the firm had discriminated against her on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*), partly on the theory that the evaluations of the woman had been based on sexual stereotyping. The District Court (1) held the firm liable under that theory, as it found that (a) the firm and its partners had not intentionally discriminated on the basis of gender, but (b) the firm had consciously maintained a system which, in this and other partner-candidacy decisions, had given weight to biased criticisms without discouraging sexism or investigating comments to determine whether they were influenced by sexual stereotypes; and (2) ruled that, while the firm could avoid equitable relief such as an order for backpay by proving by clear and convincing evidence that it would have placed the woman's candidacy on hold even absent the discrimination, it had not met that burden of proof; but (3) concluded on other grounds that the woman was not entitled to any relief except (a) attorneys' fees and (b) the difference between her pay and that of a partner from the date she would have been elected partner until her resignation (*618 F Supp 1109*). The United States Court of Appeals for the District of Columbia Circuit (1) affirmed the District Court's judgment with regard to liability, although it held that an employer may avoid liability, and not merely equitable relief, if it proves by clear and convincing evidence that it would have made the same employment decision even if discrimination had not played a role; (2) reversed the District Court's judgment with respect to remedies; and (3) remanded the case for the determination of appropriate damages and relief (*825 F2d 458*).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals with respect to the firm's liability and remanded the case for further proceedings. Although unable to agree on an opinion, six members of the court agreed that (1) on some showing by the plaintiff in a Title VII action that an illegitimate factor such as gender entered into an employment decision--which showing had been sufficiently made by the woman in the case at hand--the employer may be required to prove, by a preponderance of the evidence, that it would have made the same decision absent consideration of the illegitimate factor; but (2) the courts below had erred in requiring the defendant firm to prove this point by clear and convincing evidence.

Brennan, J., announced the judgment of the court and, in an opinion joined by Marshall, Blackmun, and Stevens, JJ., expressed the view that (1) when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision, for a legitimate reason, even if it had not taken the plaintiff's gender into account; (2) gender need not be a "but-for" cause of an employment decision in order for the decision to have been made "because of" sex within the prohibition of Title VII, and the burden placed on the employer under the above rule is most appropriately deemed an affirmative defense rather than a shift in the burden of proof; (3) the District Court's finding that sexual stereotyping was permitted to play a part in the evaluation of the plaintiff in this case was not clearly erroneous, given that the firm relied heavily on partner evaluations and had not disclaimed reliance on the sexual-stereotype comments, and regardless of the fact that many of those comments were made by the plaintiff's supporters; (4) in most cases the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive; and (5) the principles announced in this opinion apply with equal force to discrimination based on race, religion, or natural origin.

White, J., concurred in the judgment, expressing the view that (1) the plaintiff's burden was to show not that the illegitimate factor was the only, principal, or true reason for the firm's action, but that the unlawful motive was a substantial factor in the adverse employment action; (2) the burden of persuasion then should have shifted to the defendant firm to prove by a preponderance

of the evidence that it would have reached the same decision in the absence of the unlawful motive; (3) if that burden of proof is carried, there is no violation of Title VII; and (4) there is no special requirement in such cases that the employer carry its burden by objective evidence, and ample proof is provided if the legitimate motive found would have been ample ground for the action taken and the employer credibly testifies that the action would have been taken for the legitimate reasons alone.

O'Connor, J., concurred in the judgment, expressing the view that (1) if a plaintiff alleging individual disparate treatment under Title VII offers direct evidence that an illegitimate criterion was a substantial factor in the employment decision in question, and proves this point by a preponderance of the evidence, then the burden shifts to the defendant employer to demonstrate by a preponderance of the evidence that, with the illegitimate factor removed, sufficient business reasons would have led to the same decision; (2) a substantive violation of Title VII occurs only when consideration of an illegitimate criterion is the "but-for" cause of an adverse employment action, but when a plaintiff makes the above showing, a reasonable factfinder could conclude, absent further explanation, that the employer's discriminatory motive "caused" its decision, and nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule shifting the burden of persuasion to the employer; and (3) this burden-shift rule is part of the liability phase of the case.

Kennedy, J., joined by Rehnquist, Ch. J., and Scalia, J., dissented, expressing the view that (1) regardless of who bears the burden of proof, Title VII liability requires a finding that impermissible motives are a "but-for" cause of employment decisions; (2) while an inference of discrimination arises once a Title VII plaintiff presents a prima facie case, and the defendant must then rebut that inference by articulating a legitimate nondiscriminatory reason for its action, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff; (3) the burden-shift rule adopted by the court will benefit plaintiffs in only a limited number of cases, and will burden the courts with the difficult and confusing task of developing standards for determining when to apply that rule; and (4) since the District Court found that sex discrimination was not a "but-for" cause of the defendant's decision to put the plaintiff's partnership candidacy on hold, the case should be remanded for entry of a judgment in favor of the defendant.

LAWYERS' EDITION HEADNOTES:

APPEAL §1677

CIVIL RIGHTS §63

EVIDENCE §383;

employment discrimination action -- Title VII -- burden of proof -- reversal and remand -- ;

Headnote:

Under the facts presented in an action charging a nationwide professional accounting firm with employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e et seq.*)--where (1) the plaintiff, a woman who formerly worked for the firm as a senior manager, alleges that the firm's decision to place her nomination for partnership on hold for a year, based on evaluations by the nearly all-male partners that were critical of the woman's interpersonal skills, reflects sexual stereotyping, and (2) a Federal District Court, in holding the firm liable, finds that the firm had not fabricated the complaints about the woman's interpersonal skills, and had not given those traits decisive emphasis only because of her gender, but had consciously given credence and effect to partners' comments resulting from sexual stereotypes--the firm is properly required to prove by a preponderance of the evidence that it would have reached the same decision concerning the woman's candidacy for partnership absent consideration of her gender, and, on certiorari, the United States Supreme Court will reverse a Federal Court of Appeals' judgment which affirms the finding of liability because of the firm's failure to make such a showing by clear and convincing evidence, and will remand the case for further proceedings, where (1) four Justices are of the opinion that (a) when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision, for a legitimate reason, even if it had not taken the plaintiff's gender into account, (b) gender need not be a "but-for" cause of an employment decision in order for the decision to have been taken "because of" sex within the prohibition of Title VII, and the burden

placed on the employer under the above rule is most appropriately deemed an affirmative defense rather than a shift in the burden of proof, and (c) the same principles apply to cases of discrimination on the basis of race, religion, or national origin; (2) a fifth Justice is of the opinion that (a) the woman in this case has the burden of showing, not that the illegitimate factor was the only, principal, or true reason for the firm's action, but that the unlawful motive was a substantial factor in the adverse employment action, (b) the burden of persuasion then should have shifted to the defendant firm to prove by a preponderance of the evidence that it would have reached the same decision in the absence of the unlawful motive, and (c) if that burden is carried, there is no violation of Title VII; and (3) a sixth Justice is of the opinion that (a) if a plaintiff alleging individual disparate treatment under Title VII shows by a preponderance of the evidence, using direct evidence, that an illegitimate criterion was a substantial factor in the employment decision in question, then the burden shifts to the defendant employer to demonstrate by a preponderance of the evidence that, with the illegitimate factor removed, sufficient business reasons would have led to the same decision, (b) a substantive violation of Title VII occurs only when consideration of an illegitimate criterion is the "but-for" cause of an adverse employment action, but when a plaintiff makes the above showing, a reasonable factfinder could conclude, absent further explanation, that the employer's discriminatory motive "caused" its decision, and nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule shifting the burden of persuasion to the employer, and (c) this burden-shift is properly part of the liability phase of the litigation. [Per Brennan, Marshall, Blackmun, Stevens, White, and O'Connor, JJ. Dissenting: Kennedy, J., Rehnquist, Ch. J., and Scalia, J.]

SYLLABUS

Respondent was a senior manager in an office of petitioner professional accounting partnership when she was proposed for partnership in 1982. She was neither offered nor denied partnership but instead her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued petitioner in Federal District Court under Title VII of the Civil Rights Act of 1964, charging that it had discriminated against her on the basis of sex in its partnership decisions. The District Court ruled in respondent's favor on the question of liability, holding that petitioner had unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping. The Court of Appeals affirmed. Both courts held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination, and that petitioner had not carried this burden.

Held: The judgment is reversed, and the case is remanded.

COUNSEL: Kathryn A. Oberly argued the cause for petitioner. With her on the briefs were Paul M. Bator, Douglas A. Poe, Eldon Olson, and Ulric R. Sullivan.

James H. Heller argued the cause for respondent. With him on the brief was Douglas B. Huron. *

* *Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* for the American Psychological Association by *Donald N. Bersoff;* for the Committees on Civil Rights, Labor and Employment Law, and Sex and Law of the Association of the Bar of the City of New York by *Jonathan Lang, Eugene S. Friedman, Arthur Leonard*, and *Colleen McMahon;* and for the NOW Legal Defense and Education Fund et al. by *Sarah E. Burns, Lynn Hecht Schafran, Joan E. Bertin, John A. Powell*, and *Donna R. Lenhoff*.

Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Merrill, Deputy Assistant Attorney General Clegg, Brian J. Martin, and *David K. Flynn* filed a brief for the United States as *amicus curiae*.

JUDGES: Brennan, J., announced the judgment of the Court and delivered an opinion, in which Marshall, Blackmun, and Stevens, JJ., joined. White, J., post, p. 258, and O'Connor, J., post, p. 261, filed opinions

concurring in the judgment. Kennedy, J., filed a dissenting opinion, in which Rehnquist, C. J., and Scalia, J., joined, post, p. 279.

OPINION BY: BRENNAN

OPINION

[*231] [***276] [**1780] JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

Ann Hopkins was a senior manager in an office of Price Waterhouse when she was [**1781] proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later refused [*232] to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, *42 U. S. C. § 2000e et seq.*, charging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership. Judge Gesell in the Federal District Court for the District of Columbia ruled in her favor on the question of liability, *618 F. Supp. 1109 (1985)*, and the Court of Appeals for the District of Columbia Circuit affirmed. *263 U.S. App. D. C. 321, 825 F. 2d 458 (1987)*. We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. *485 U.S. 933 (1988)*.

I

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate -- either on a "long" or a "short" form, depending on the partner's degree of exposure to the candidate. Not every partner in the firm submits comments on every candidate. After reviewing the comments and interviewing the partners who submitted them, the firm's Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on "hold," or deny her the promotion outright. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to "hold" her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments from partners will not guarantee a candidate's admission to the partnership, nor will a specific [*233] quantity of negative comments necessarily defeat her application. Price Waterhouse places no limit on the number of persons whom it will admit to the partnership in any given year.

[***277] Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D. C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1 -- Hopkins -- was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20 -- including Hopkins -- were "held" for reconsideration the following year. [1] Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

1 Before the time for reconsideration came, two of the partners in Hopkins' office withdrew their support for her, and the office informed her that she would not be reconsidered for partnership. Hopkins then resigned. Price Waterhouse does not challenge the Court of Appeals' conclusion that the refusal to repropose her for partnership amounted to a constructive discharge. That court remanded the case to the District Court for further proceedings to determine appropriate relief, and those proceedings have been stayed pending our decision. Brief for Petitioner 15, n. 3. We are concerned today only with Price Waterhouse's decision to place Hopkins' candidacy on hold. Decisions pertaining to advancement to partnership are, of course, subject to challenge under Title VII. *Hishon v. King & Spalding, 467 U.S. 69 (1984)*.

[**1782] In a jointly prepared statement supporting

her candidacy, the partners in Hopkins' office showcased her successful 2-year effort to secure a $ 25 million contract with the Department of State, labeling it "an outstanding performance" and one that Hopkins carried out "virtually at the partner level." Plaintiff's Exh. 15. Despite Price Waterhouse's attempt at trial to minimize her contribution to this project, Judge Gesell [*234] specifically found that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State." *618 F. Supp., at 1112*. Indeed, he went on, "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership." *Ibid.*

The partners in Hopkins' office praised her character as well as her accomplishments, describing her in their joint statement as "an outstanding professional" who had a "deft touch," a "strong character, independence and integrity." Plaintiff's Exh. 15. Clients appear to have agreed with these assessments. At trial, one official from the State Department described her as "extremely competent, intelligent," "strong and forthright, very productive, energetic and creative." Tr. 150. Another high-ranking official praised Hopkins' decisiveness, broadmindedness, and "intellectual clarity"; she was, in his words, "a stimulating conversationalist." *Id., at 156-157*. Evaluations such as these led Judge Gesell to conclude that Hopkins "had no difficulty dealing with clients and her clients appear to have been very pleased with her work" and that she "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked." *618 F. Supp., at 1112-1113*.

[***278] On too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins' brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins' perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners' negative remarks about Hopkins -- even those of partners supporting her -- had to do with her "inter-personal [*235] skills." Both "[s]upporters and opponents of her candidacy," stressed Judge Gesell, "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id., at 1113*.

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" (Defendant's Exh. 30); another suggested that she "overcompensated for being a woman" (Defendant's Exh. 31); a third advised her to take "a course at charm school" (Defendant's Exh. 27). Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Tr. 321. Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." Defendant's Exh. 27. But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace:* in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *618 F. Supp., at 1117*.

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that the partnership selection process at [**1783] Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was "universally disliked" by staff (Defendant's Exh. 27), and another described her as "consistently annoying and irritating" *(ibid.);* yet these were people who had had very little contact with Hopkins. According to [*236] Fiske, Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping -- although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion on a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of

conclusion without having met any of the people involved in the decisionmaking process.

[***279] In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, "[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers"; in this environment, "[t]o be identified as a 'women's lib[b]er' was regarded as [a] negative comment." *618 F. Supp., at 1117*. In fact, the judge found that in previous years "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers -- yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations." *Ibid.*

Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.

The judge went on to decide, however, that some of the partners' remarks about Hopkins stemmed from an impermissibly [*237] cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping. Noting that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have placed Hopkins' candidacy on hold even absent this discrimination, the judge decided that the firm had not carried this heavy burden.

The Court of Appeals affirmed the District Court's ultimate conclusion, but departed from its analysis in one particular: it held that even if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination. *263 U.S. App. D. C., at 333-334, 825 F. 2d, at 470-471*. Under this approach, an employer is not deemed to have violated Title VII if it proves that it would have made the same decision in the absence of an impermissible motive, whereas under the District Court's approach, the employer's proof in that respect only avoids equitable relief. We decide today that the Court of Appeals had the better approach, but that both courts erred in requiring the [**1784] employer to make its proof by clear and convincing evidence.

II

The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute. According to Price Waterhouse, an employer violates Title VII only if it gives decisive consideration to an employee's [***280] gender, race, national origin, or religion in making a decision that affects that employee. On Price Waterhouse's theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had [*238] not discriminated. In Hopkins' view, on the other hand, an employer violates the statute whenever it allows one of these attributes to play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability. [2] We conclude that, as often happens, the truth lies somewhere in between.

2 This question has, to say the least, left the Circuits in disarray. The Third, Fourth, Fifth, and Seventh Circuits require a plaintiff challenging an adverse employment decision to show that, but for her gender (or race or religion or national origin), the decision would have been in her favor. See, *e. g., Bellissimo v. Westinghouse Electric Corp., 764 F. 2d 175, 179 (CA3 1985)*, cert. denied, *475 U.S. 1035 (1986)*; *Ross v. Communications Satellite Corp., 759 F. 2d 355, 365-366 (CA4 1985)*; *Peters v. Shreveport, 818 F. 2d 1148, 1161 (CA5 1987)*; *McQuillen v. Wisconsin Education Assn. Council, 830 F. 2d 659, 664-665 (CA7 1987)*. The First, Second, Sixth, and Eleventh Circuits, on the other hand, hold that once the plaintiff has shown

that a discriminatory motive was a "substantial" or "motivating" factor in an employment decision, the employer may avoid a finding of liability only by proving that it would have made the same decision even in the absence of discrimination. These courts have either specified that the employer must prove its case by a preponderance of the evidence or have not mentioned the proper standard of proof. See, *e. g., Fields v. Clark University, 817 F. 2d 931, 936-937 (CA1 1987)* ("motivating factor"); *Berl v. Westchester County, 849 F. 2d 712, 714-715 (CA2 1988)* ("substantial part"); *Terbovitz v. Fiscal Court of Adair County, Ky., 825 F. 2d 111, 115 (CA6 1987)* ("motivating factor"); *Bell v. Birmingham Linen Service, 715 F. 2d 1552, 1557 (CA11 1983)*. The Court of Appeals for the District of Columbia Circuit, as shown in this case, follows the same rule except that it requires that the employer's proof be clear and convincing rather than merely preponderant. *263 U.S. App. D. C. 321, 333-334, 825 F. 2d 458, 470-471 (1987)*; see also *Toney v. Block, 227 U.S. App. D. C. 273, 275, 705 F. 2d 1364, 1366 (1983)* (Scalia, J.) (it would be "destructive of the purposes of [Title VII] to require the plaintiff to establish . . . the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). The Court of Appeals for the Ninth Circuit also requires clear and convincing proof, but it goes further by holding that a Title VII violation is made out as soon as the plaintiff shows that an impermissible motivation played a part in an employment decision -- at which point the employer may avoid reinstatement and an award of backpay by proving that it would have made the same decision in the absence of the unlawful motive. See, *e. g. Fadhl v. City and County of San Francisco, 741 F. 2d 1163, 1165-1166 (1984)* (Kennedy, J.) ("significant factor"). Last, the Court of Appeals for the Eighth Circuit draws the same distinction as the Ninth between the liability and remedial phases of Title VII litigation, but requires only a preponderance of the evidence from the employer. See, *e. g., Bibbs v. Block, 778 F. 2d 1318, 1320-1324 (1985)* (en banc) ("discernible factor").

[*239] A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. [3] Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of [***281] "for cause" legislation, [4] Title VII eliminates [**1785] certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

3 We disregard, for purposes of this discussion, the special context of affirmative action.

4 Congress specifically declined to require that an employment decision have been "for cause" in order to escape an affirmative penalty (such as reinstatement or backpay) from a court. As introduced in the House, the bill that became Title VII forbade such affirmative relief if an "individual was . . . refused employment or advancement, or was suspended or discharged *for cause*." H. R. Rep. No. 7152, 88th Cong., 1st Sess., 77 (1963) (emphasis added). The phrase "for cause" eventually was deleted in favor of the phrase "for any reason other than" one of the enumerated characteristics. See 110 Cong. Rec. 2567-2571 (1964). Representative Celler explained that this substitution "specif[ied] cause"; in his view, a court "cannot find any violation of the act which is based on facts other . . . than discrimination on the grounds of race, color, religion, or national origin." *Id.*, at 2567.

Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, [HN1] the statute forbids [*240] an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's . . . sex." *42 U. S. C. §§ 2000e-2(a)(1), (2)* (emphasis added). [5] We take these words to mean that gender must be irrelevant to

employment decisions. To construe the words "because of" as colloquial shorthand for "but-for causation," as does Price Waterhouse, is to misunderstand them. [6]

5 In this Court, Hopkins for the first time argues that Price Waterhouse violated § 703(a)(2) when it subjected her to a biased decisionmaking process that "tended to deprive" a woman of partnership on the basis of her sex. Since Hopkins did not make this argument below, we do not address it.

6 We made passing reference to a similar question in *McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282, n. 10 (1976)*, where we stated that when a Title VII plaintiff seeks to show that an employer's explanation for a challenged employment decision is pretextual, "no more is required to be shown than that race was a 'but for' cause." This passage, however, does not suggest that the plaintiff *must* show but-for cause; it indicates only that if she does so, she prevails. More important, *McDonald* dealt with the question whether the employer's stated reason for its decision was *the* reason for its action; unlike the case before us today, therefore, *McDonald* did not involve mixed motives. This difference is decisive in distinguishing this case from those involving "pretext." See *infra*, at 247, n. 12.

[HN2] But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) ("to fail or refuse"), in contrast, turns our attention to the actual moment of the [*241] event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*. Moreover, since we know that the [***282] words "because of" do not mean "*solely* because of," [7] we also know that [HN3] Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations -- even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

7 Congress specifically rejected an amendment that would have placed the word "solely" in front of the words "because of." 110 Cong. Rec. 2728, 13837 (1964).

To attribute this meaning to the words "because of" does not, as the dissent asserts, [**1786] *post*, at 282, divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. *Ibid.* Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant [*242] to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Our interpretation of the words "because of" also is supported by the fact that [HN4] Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a "bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise." *42 U. S. C. § 2000e-2(e)*. The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities. An employer may not, we have held, condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are

not required for performance of the job. See *Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)*; *Griggs v. Duke Power Co., 401 U.S. 424 (1971)*.

To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. [HN5] The other important aspect of [***283] the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.

To begin with, the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute. And our emphasis on "business necessity" in disparate-impact [*243] cases, see *Watson* and *Griggs*, and on "legitimate, nondiscriminatory reason[s]" in disparate-treatment cases, see *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)*; *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)*, results from our awareness of Title VII's balance between employee rights and employer prerogatives. In *McDonnell Douglas*, we described as follows Title VII's goal to eradicate discrimination while preserving workplace efficiency: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no [**1787] racial discrimination, subtle or otherwise." *411 U.S., at 801*.

When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute's legislative history. An interpretive memorandum entered into the Congressional Record by Senators Case and Clark, comanagers of the bill in the Senate, is representative of this general theme. [8] According to their memorandum, Title VII "'expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.'" [9] 110 Cong. Rec. 7247 (1964), quoted in [***284] *Griggs v.* [*244] *Duke Power Co., supra, at 434*. The memorandum went on: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title." 110 Cong. Rec. 7213 (1964).

> 8 We have in the past acknowledged the authoritativeness of this inter-pretive memorandum, written by the two bipartisan "captains" of Title VII. See, *e. g., Firefighters v. Stotts, 467 U.S. 561, 581, n. 14 (1984)*.
>
> 9 Many of the legislators' statements, such as the memorandum quoted in text, focused specifically on race rather than on gender or religion or national origin. We do not, however, limit their statements to the context of race, but instead we take them as general statements on the meaning of Title VII. The somewhat bizarre path by which "sex" came to be included as a forbidden criterion for employment -- it was included in an attempt to *defeat* the bill, see C. & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115-117 (1985) -- does not persuade us that the legislators' statements pertaining to race are irrelevant to cases alleging gender discrimination. The amendment that added "sex" as one of the forbidden criteria for employment was passed, of course, and the statute on its face treats each of the enumerated categories exactly the same.
>
> By the same token, our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.

Many other legislators made statements to a similar effect; we see no need to set out each remark in full here. The central point is this: while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which

gender is a BFOQ), it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability [10] only by proving that [**1788] it would have made the same [*245] decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.

10 Hopkins argues that once she made this showing, she was entitled to a finding that Price Waterhouse had discriminated against her on the basis of sex; as a consequence, she says, the partnership's proof could only limit the relief she received. She relies on Title VII's § 706(g), which permits a court to award affirmative relief when it finds that an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice," and yet forbids a court to order reinstatement of, or backpay to, "an individual . . . if such individual was refused . . . employment or advancement or was suspended or discharged *for any reason other than* discrimination on account of race, color, religion, sex, or national origin." *42 U. S. C. § 2000e-5(g)* (emphasis added). We do not take this provision to mean that a court inevitably can find a violation of the statute without having considered whether the employment decision would have been the same absent the impermissible motive. That would be to interpret § 706(g) -- a provision defining *remedies* -- to influence the substantive commands of the statute. We think that this provision merely limits courts' authority to award affirmative relief in those circumstances in which a violation of the statute is not dependent upon the effect of the employer's discriminatory practices on a particular employee, as in pattern-or-practice suits and class actions. "The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.'" *Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 (1984)*, quoting *Teamsters v. United States, 431 U.S. 324, 360, n. 46 (1977)*.

Without explicitly mentioning this portion of § 706(g), we have in the past held that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. See *Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976)*; *Teamsters v. United States, supra, at 367-371*; *East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 404, n. 9 (1977)*. These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination, not on charges of individual discrimination. Cf. *NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)* (up-holding the National Labor Relations Board's identical interpretation of § 10(c) of the National Labor Relations Act, *29 U. S. C. § 160(c)*, which contains language almost identical to § 706(g)).

[***285] Our holding casts no shadow on *Burdine*, in which we decided that, [HN6] even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. *450 U.S., at 256-258*. We stress, first, that neither [*246] court below shifted the burden of persuasion to Price Waterhouse on this question, and in fact, the District Court found that Hopkins had not shown that the firm's stated reason for its decision was pretextual. *618 F. Supp., at 1114-1115*. Moreover, since we hold that [HN7] the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of "shifting burdens" that we addressed in *Burdine*. Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the fact finder on one point, and then the employer, if it wishes to prevail, must persuade it on another. See *NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983)*. [11]

11 Given that both the plaintiff and defendant bear a burden of proof in cases such as this one, it is surprising that the dissent insists that our approach requires the employer to bear "the ultimate burden of proof." *Post*, at 288. It is,

moreover, perfectly consistent to say *both* that gender was a factor in a particular decision when it was made *and* that, when the situation is viewed hypothetically and after the fact, the same decision would have been made even in the absence of discrimination. Thus, we do not see the "internal inconsistency" in our opinion that the dissent perceives. See *post*, at 285-286. Finally, where liability is imposed because an employer is unable to prove that it would have made the same decision even if it had not discriminated, this is not an imposition of liability "where sex made no difference to the outcome." *Post*, at 285. In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that gender *did* make a difference to the outcome.

Price Waterhouse's claim that the employer does not bear any burden of proof (if it bears one at all) until the plaintiff has shown "substantial evidence that Price Waterhouse's explanation for failing to promote Hopkins was not the 'true reason' for its action" (Brief for Petitioner 20) merely restates its argument that the plaintiff in a mixed-motives case [*247] must squeeze her proof into *Burdine*'s framework. Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was [**1789] "*the* 'true reason'" (Brief for Petitioner 20 (emphasis added)) for the decision -- which is the question asked by *Burdine*. See *Transportation Management, supra, at 400, n. 5*. [12] [***286] Oblivious to this last point, the dissent would insist that *Burdine*'s framework perform work that it was never intended to perform. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source -- for the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. To say that *Burdine*'s evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed.

12 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; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual. The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. See, *e. g., post*, at 292. Juries long have decided cases in which defendants raised affirmative defenses. The dissent fails, moreover, to explain why the evidentiary scheme that we endorsed over 10 years ago in *Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)*, has not proved unworkable in that context but would be hopelessly complicated in a case brought under federal antidiscrimination statutes.

[*248] B

In deciding as we do today, we do not traverse new ground. We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer's burden to justify decisions resulting from that practice. [HN8] When an employer has asserted that gender is a BFOQ within the meaning of § 703(e), for example, we have assumed that it is the employer who must show why it must use gender as a criterion in employment. See *Dothard v. Rawlinson, 433 U.S. 321, 332-337 (1977)*. In a related context, although the Equal Pay Act expressly permits employers to pay different wages to women where disparate pay is the result of a "factor other than sex," see *29 U. S. C. § 206(d)(1)*, we have decided that it is the employer, not the employee, who must prove that the actual disparity is not sex linked. See *Corning Glass Works v. Brennan, 417 U.S. 188, 196*

(1974). Finally, some courts have held that, under Title VII as amended by the Pregnancy Discrimination Act, it is the employer who has the burden of showing that its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy. See, *e. g., Hayes v. Shelby Memorial Hospital, 726 F. 2d 1543, 1548 (CA11 1984)*; *Wright v. Olin Corp., 697 F. 2d 1172, 1187 (CA4 1982)*. [HN9] As these examples demonstrate, our assumption always has been that if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision. We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.

We have reached a similar conclusion in other contexts where the law announces that a certain characteristic is irrelevant to the allocation of [***287] burdens and benefits. In *Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274* [**1790] *(1977)*, the [*249] plaintiff claimed that he had been discharged as a public school teacher for exercising his free-speech rights under the *First Amendment*. Because we did not wish to "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *id., at 285*, we concluded that such an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." *Id., at 286*. We therefore held that once the plaintiff had shown that his constitutionally protected speech was a "substantial" or "motivating factor" in the adverse treatment of him by his employer, the employer was obligated to prove "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct." *Id., at 287*. A court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a "but-for" cause of the employment decision. See *Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 417 (1979)*. See also *Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270-271, n. 21 (1977)* (applying *Mt. Healthy* standard where plaintiff alleged that unconstitutional motive had contributed to enactment of legislation); *Hunter v. Underwood, 471 U.S. 222, 228 (1985)* (same).

In *Transportation Management*, we upheld the NLRB's interpretation of § 10(c) of the National Labor Relations Act, which forbids a court to order affirmative relief for discriminatory conduct against a union member "if such individual was suspended or discharged for cause." *29 U. S. C. § 160(c)*. The Board had decided that this provision meant that once an employee had shown that his suspension or discharge was based in part on hostility to unions, it was up to the employer to prove by a preponderance of the evidence that it would have made the same decision in the absence of this impermissible motive. In such a situation, we emphasized, [*250] "[t]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." *462 U.S., at 403*.

We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive. Our decision today treads this well-worn path.

C

In saying that gender played a motivating part in an employment [***288] decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. [13] [HN10] In the specific context of sex stereotyping, [**1791] 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.

13 After comparing this description of the plaintiff's proof to that offered by Justice O'Connor's opinion concurring in the judgment, *post*, at 276-277, we do not understand why the concurrence suggests that they are meaningfully different from each other, see *post*, at 275, 277-279. Nor do we see how the inquiry that we have described is "hypothetical," see *post*, at 283, n. 1. It seeks to determine the content of the entire set of reasons for a decision, rather than

shaving off one reason in an attempt to determine what the decision would have been in the absence of that consideration. The inquiry that we describe thus strikes us as a distinctly nonhypothetical one.

Although the parties do not overtly dispute this last proposition, the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities. [*251] As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work. See *infra*, at 255-256. As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)*, quoting *Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1198 (CA7 1971)*. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

[HN11] Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, "discrimination in the air"; rather, it is, as Hopkins puts it, "discrimination brought to ground and visited upon" an employee. Brief for Respondent 30. By focusing on Hopkins' [***289] specific proof, however, we do not suggest a limitation on the possible ways [*252] of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case. But see *post*, at 277 (O'Connor, J., concurring in judgment).

[HN12] As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. [14] Moreover, proving "'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" *Givhan, 439 U.S., at 416*, quoting *Ayers v. Western Line Consolidated School District, 555 F. 2d 1309, 1315 (CA5 1977)*. An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate [**1792] reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins' interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

14 Justice White's suggestion, *post*, at 261, that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision, is baffling.

III

The courts below held that an employer who has allowed a discriminatory impulse to play a motivating part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence [*253] of discrimination. We are persuaded that the better rule is that [HN13] the employer must make this showing by a preponderance of the evidence.

[HN14] Conventional rules of civil litigation generally apply in Title VII cases, see, *e. g., United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)* (discrimination not to be "treat[ed] . . . differently from other ultimate questions of fact"), and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. See, *e. g., Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983)*. Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action -- action more dramatic than entering an award of money damages or other conventional relief -- against an individual. See *Santosky v. Kramer, 455 U.S. 745, 756 (1982)* (termination of parental rights); *Addington v. Texas, 441 U.S. 418, 427 (1979)* (involuntary [***290] commitment); *Woodby v. INS, 385 U.S. 276 (1966)* (deportation); *Schneiderman v. United States, 320 U.S. 118, 122, 125 (1943)* (denaturalization). Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief, see, *e. g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)* (defamation), and we find it significant that in such cases it was the defendant rather than the plaintiff who sought the elevated standard of proof -- suggesting that this standard ordinarily serves as a shield rather than, as Hopkins seeks to use it, as a sword.

It is true, as Hopkins emphasizes, that we have noted the "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931)*. Likewise, an Equal Employment Opportunity Commission (EEOC) regulation does require federal agencies proved to have violated [*254] Title VII to show by clear and convincing evidence that an individual employee is not entitled to relief. See *29 CFR § 1613.271(c)(2) (1988)*. And finally, it is true that we have emphasized the importance of make-whole relief for victims of discrimination. See *Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)*. Yet each of these sources deals with the proper determination of relief rather than with the initial finding of liability. This is seen most easily in the EEOC's regulation, which operates only after an agency or the EEOC has found that "an employee of the agency was discriminated against." See *29 CFR § 1613.271(c) (1988)*. Because we have held that, by proving that it would have made the same decision in the absence of discrimination, the employer may avoid a finding of liability altogether and not simply avoid certain equitable relief, these authorities do not help Hopkins to show why [**1793] we should elevate the standard of proof for an employer in this position.

Significantly, the cases from this Court that most resemble this one, *Mt. Healthy* and *Transportation Management*, did not require clear and convincing proof. *Mt. Healthy, 429 U.S., at 287*; *Transportation Management, 462 U.S., at 400, 403*. We are not inclined to say that the public policy against firing employees because they spoke out on issues of public concern or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender. Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence.

Although Price Waterhouse does not concretely tell us how its proof was preponderant even if it was not clear and convincing, this general claim is implicit in its request for the less stringent standard. Since the lower courts required Price Waterhouse to make its proof by clear and convincing evidence, they did not determine whether Price Waterhouse had proved by *a preponderance of the evidence* that it would have placed Hopkins' candidacy on hold even if it had not permitted [*255] sex-linked evaluations to play a part [***291] in the decision-making process. Thus, we shall remand this case so that that determination can be made.

IV

The District Court found that sex stereotyping "was permitted to play a part" in the evaluation of Hopkins as a candidate for partnership. *618 F. Supp., at 1120*. Price Waterhouse disputes both that stereotyping occurred and that it played any part in the decision to place Hopkins' candidacy on hold. In the firm's view, in other words, the District Court's factual conclusions are clearly erroneous. We do not agree.

In finding that some of the partners' comments reflected sex stereotyping, the District Court relied in part on Dr. Fiske's expert testimony. Without directly impugning Dr. Fiske's credentials or qualifications, Price Waterhouse insinuates that a social psychologist is unable to identify sex stereotyping in evaluations without investigating whether those evaluations have a basis in reality. This argument comes too late. At trial, counsel

for Price Waterhouse twice assured the court that he did not question Dr. Fiske's expertise (App. 25) and failed to challenge the legitimacy of her discipline. Without contradiction from Price Waterhouse, Fiske testified that she discerned sex stereotyping in the partners' evaluations of Hopkins, and she further explained that it was part of her business to identify stereotyping in written documents. *Id.*, at 64. We are not inclined to accept petitioner's belated and unsubstantiated characterization of Dr. Fiske's testimony as "gossamer evidence" (Brief for Petitioner 20) based only on "intuitive hunches" (*id.*, at 44) and of her detection of sex stereotyping as "intuitively divined" (*id.*, at 43). Nor are we disposed to adopt the dissent's dismissive attitude toward Dr. Fiske's field of study and toward her own professional integrity, see *post*, at 293-294, n. 5.

[*256] Indeed, we are tempted to say that Dr. Fiske's expert testimony was merely icing on Hopkins' cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism. [15]

15 We reject the claim, advanced by Price Waterhouse here and by the dissenting judge below, that the District Court clearly erred in finding that Beyer was "responsible for telling [Hopkins] what problems the Policy Board had identified with her candidacy." *618 F. Supp., at 1117*. This conclusion was reasonable in light of the testimony at trial of a member of both the Policy Board and the Admissions Committee, who stated that he had "no doubt" that Beyer would discuss with Hopkins the reasons for placing her candidacy on hold and that Beyer "knew exactly where the problems were" regarding Hopkins. Tr. 316.

[**1794] Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; [***292] that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible -- and, one might say, inevitable -- conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment. [16]

16 We do not understand the dissenters' dissatisfaction with the District Judge's statements regarding the failure of Price Waterhouse to "sensitize" partners to the dangers of sexism. *Post*, at 294. Made in the context of determining that Price Waterhouse had not disclaimed reliance on sex-based evaluations, and following the judge's description of the firm's history of condoning such evaluations, the judge's remarks seem to us justified.

[*257] Price Waterhouse concedes that the proof in *Transportation Management* adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff. Brief for Petitioner 45. But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of his union activity; there was, contrary to Price Waterhouse's suggestion, no direct evidence that that grudge had played a role in the decision, and, in fact, the employer had given other reasons in explaining the plaintiff's discharge. See *462 U.S., at 396*. If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

Nor is the finding that sex stereotyping played a part in the Policy Board's decision undermined by the fact that many of the suspect comments were made by supporters rather than detractors of Hopkins. A negative comment, even when made in the context of a generally favorable review, nevertheless may influence the decisionmaker to think less highly of the candidate; the Policy Board, in fact, did not simply tally the "yesses" and "noes" regarding a candidate, but carefully reviewed the content of the submitted comments. The additional suggestion that the comments were made by "persons outside the

decisionmaking chain" (Brief for Petitioner 48) -- and therefore could not have harmed Hopkins -- simply ignores the critical role that partners' comments played in the Policy Board's partnership decisions.

Price Waterhouse appears to think that we cannot affirm the factual findings of the trial court without deciding that, instead of being overbearing and aggressive and curt, Hopkins is, in fact, kind and considerate and patient. If this is indeed its impression, petitioner misunderstands the theory [*258] on which Hopkins prevailed. The District Judge acknowledged that Hopkins' conduct justified complaints about her behavior as a senior manager. But he also concluded that the reactions of at least some of the partners were reactions to her as a *woman* manager. Where an evaluation is based on a subjective assessment of a person's strengths and weaknesses, it is simply not true that each evaluator will focus on, or even mention, the same weaknesses. Thus, even if we knew [***293] that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as [**1795] sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.

V

We hold that [HN15] when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Because the courts below erred by deciding that the defendant must make this proof by clear and convincing evidence, we reverse the Court of Appeals' judgment against Price Waterhouse on liability and remand the case to that court for further proceedings.

It is so ordered.

CONCUR BY: WHITE; O'CONNOR

CONCUR

JUSTICE WHITE, concurring in the judgment.

In my view, to determine the proper approach to causation in this case, we need look only to the Court's opinion in *Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)*. In *Mt. Healthy*, a public employee was not rehired, in part [*259] because of his exercise of *First Amendment* rights and in part because of permissible considerations. The Court rejected a rule of causation that focused "solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire," on the grounds that such a rule could make the employee better off by exercising his constitutional rights than by doing nothing at all. *Id., at 285*. Instead, the Court outlined the following approach:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor' -- or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id., at 287* (footnote omitted).

It is not necessary to get into semantic discussions on whether the *Mt. Healthy* approach is "but-for" causation in another guise or creates an affirmative defense on the part of the employer to see its clear application to the issues before us in this case. As in *Mt. Healthy*, the District Court found that the employer was motivated by both legitimate and illegitimate factors. And here, as in *Mt. Healthy*, and as the Court now holds, Hopkins was not required [***294] to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as Justice O'Connor states, her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action. The District Court, as its opinion was construed by the Court of Appeals, so found, *263 U.S. App. D. C. 321, 333, 334, 825 F. 2d 458, 470, 471 (1987)*, and I agree that the

finding was supported by the record. The burden of persuasion then [*260] should have shifted to Price Waterhouse to prove "by a preponderance of the evidence that it would have reached the same decision . . . in the absence of" the unlawful motive. *Mt. Healthy, supra, at 287*.

I agree with Justice Brennan that applying this approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248* [**1796] *(1981)*, and *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)*. The Court has made clear that "mixed-motives" cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." *NLRB v. Transportation Management Corp., 462 U.S. 393, 400, n. 5 (1983)*. In mixed-motives cases, however, there is no one "true" motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate. It can hardly be said that our decision in this case is a departure from cases that are "inapposite." *Ibid.* I also disagree with the dissent's assertion that this approach to causation is inconsistent with our statement in *Burdine* that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *450 U.S., at 253*. As we indicated in *Transportation Management Corp.*, the showing required by *Mt. Healthy* does not improperly shift from the plaintiff the ultimate burden of persuasion on whether the defendant intentionally discriminated against him or her. See *462 U.S., at 400, n. 5*.

Because the Court of Appeals required Price Waterhouse to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in *Mt. Healthy*, I concur in the judgment reversing this case in part and remanding. [*261] With respect to the employer's burden, however, the plurality seems to require, at least in most cases, that the employer submit objective evidence that the same result would have occurred absent the unlawful motivation. *Ante*, at 252. In my view, however, there is no special requirement that the employer carry its burden by objective evidence. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof. This [***295] would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action. *

* I agree with the plurality that if the employer carries this burden, there has been no violation of Title VII.

JUSTICE O'CONNOR, concurring in the judgment.

I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins' candidacy absent consideration of her gender. I further agree that this burden shift is properly part of the liability phase of the litigation. I thus concur in the judgment of the Court. My disagreement stems from the plurality's conclusions concerning the substantive requirement of causation under the statute and its broad statements regarding the applicability of the allocation of the burden of proof applied in this case. The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established by our unanimous decisions in *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)*, and *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)*, for use in cases such as this one where the employer has created uncertainty as to causation by knowingly giving [*262] substantial weight to an impermissible [**1797] criterion. I write separately to explain why I believe such a departure from the *McDonnell Douglas* standard is justified in the circumstances presented by this and like cases, and to express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered.

I

Title VII provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's

race, color, religion, sex, or national origin." *42 U. S. C. § 2000e-2(a)* (emphasis added). The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the "but-for" cause of an adverse employment action. The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts. Critics of the bill that became Title VII labeled it a "thought control bill," and argued that it created a "punishable crime that does not require an illegal external act as a basis for judgment." 100 Cong. Rec. 7254 (1964) (remarks of Sen. Ervin). Senator Case, whose views the plurality finds so persuasive elsewhere, responded:

> "The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental [***296] act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." *Ibid.*

Thus, I disagree with the plurality's dictum that the words "because of" do not mean "but-for" causation; manifestly they [*263] do. See *Sheet Metal Workers v. EEOC, 478 U.S. 421, 499 (1986)* (White, J., dissenting) ("[T]he general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination"). We should not, and need not, deviate from that policy today. The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.

The evidence of congressional intent as to which party should bear the burden of proof on the issue of causation is considerably less clear. No doubt, as a general matter, Congress assumed that the plaintiff in a Title VII action would bear the burden of proof on the elements critical to his or her case. As the dissent points out, *post*, at 287, n. 3, the interpretative memorandum submitted by sponsors of Title VII indicates that "the plaintiff, *as in any civil case*, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (1964) (emphasis added). But in the area of tort liability, from whence the dissent's "but-for" standard of causation is derived, see *post*, at 282, the law has long recognized that in certain "civil cases" leaving the burden of persuasion on the plaintiff to prove "but-for" causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the "but-for" cause of the plaintiff's injury. See *e. g., Summers v. Tice, 33 Cal. 2d 80, 84-87, 199 P. 2d 1, 3-4 (1948)*. The same rule has been applied where the effect of a defendant's tortious conduct combines with a force of unknown or innocent origin to produce the harm to the plaintiff. See *Kingston v. Chicago & N. W. R. Co., 191 Wis. 610, 616, 211 N. W. 913, 915 (1927)* ("Granting that the union of that fire [caused by defendant's [*264] [**1798] negligence] with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that . . . the fire set by him was not the proximate cause of the damage"). See also 2 J. Wigmore, Select Cases on the Law of Torts § 153, p. 865 (1912) ("When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that one of the two persons, or one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm").

While requiring that the plaintiff in a tort suit or a Title VII action prove that the defendant's "breach of duty" was the "but-for" cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action,

> [***297] "at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy." Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 67 (1956).

Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. As we have noted in the past, the award of backpay to a Title VII plaintiff provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as [*265] possible, the last vestiges" of discrimination in employment. *Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975)* (citation omitted). The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id., at 418.*

Both these goals are reflected in the elements of a disparate treatment action. There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, "[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote." 110 Cong. Rec. 7218 (1964). See also *id.*, at 13088 (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment"). Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the *Equal Protection Clause* have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual. See *Richmond v. J. A. Croson Co., 488 U.S. 469 (1989)*. At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.

Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer's [**1799] discriminatory motivation "caused" the employment decision. The employer has [*266] not yet been shown to be a violator, but neither is it entitled to the same presumption of good [***298] faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. Both the policies behind the statute, and the evidentiary principles developed in the analogous area of causation in the law of torts, suggest that at this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire.

We have given recognition to these principles in our cases which have discussed the "remedial phase" of class action disparate treatment cases. Once the class has established that discrimination against a protected group was essentially the employer's "standard practice," there has been harm to the group and injunctive relief is appropriate. But as to the individual members of the class, the liability phase of the litigation is not complete. See *Dillon v. Coles, 746 F. 2d 998, 1004 (CA3 1984)* ("It is misleading to speak of the additional proof required by an individual class member for relief as being a part of the damage phase, that evidence is actually an element of the liability portion of the case") (footnote omitted). Because the class has already demonstrated that, as a rule, illegitimate factors were considered in the employer's decisions, the burden shifts to the employer "to demonstrate that the individual applicant was denied an employment opportunity for legitimate reasons." *Teamsters v. United States, 431 U.S. 324, 362 (1977)*. See also *Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976)*.

The individual members of a class action disparate treatment case stand in much the same position as Ann Hopkins here. There has been a strong showing that the employer has done exactly what Title VII forbids, but the connection between the employer's illegitimate motivation and any injury to the individual plaintiff is unclear. At this point calling upon the employer to show that despite consideration of illegitimate factors the individual plaintiff would not have been hired or promoted in any event hardly seems "unfair" or [*267] contrary to the substantive command of the statute. In fact, an individual plaintiff who has shown that an illegitimate factor played a substantial role in the decision in his or her case has proved *more* than the class member in a *Teamsters* type action. The latter receives the benefit of a burden shift to the defendant based on the *likelihood* that an illegitimate criterion was a factor in the individual

employment decision.

There is a tension between the *Franks* and *Teamsters* line of decisions and the individual disparate treatment cases cited by the dissent. See *post*, at 286-289. Logically, under the dissent's view, each member of a disparate treatment class action would have to show "but-for" causation as to his or her individual employment decision, since it is not an element of the pattern or practice proof of the entire class and it is statutorily mandated that the plaintiff bear the burden of proof on this issue throughout the litigation. While the Court has properly drawn a distinction between the elements of a class action claim and an individual disparate treatment claim, see *Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 873-878 (1984)*, and I do not suggest the wholesale transposition of [***299] rules from one setting to the other, our decisions in *Teamsters* and *Franks* do indicate a recognition that presumptions shifting the burden of persuasion based on evidentiary probabilities and the policies behind the statute are not alien to our Title VII jurisprudence.

Moreover, placing the burden on the defendant in this case to prove that the same decision would have been justified by legitimate reasons is consistent with our interpretation of the constitutional guarantee of equal protection. Like a disparate treatment plaintiff, one who asserts that governmental [**1800] action violates the *Equal Protection Clause* must show that he or she is "the victim of intentional discrimination." *Burdine, 450 U.S., at 256*. Compare *post*, at 286, 289 (Kennedy, J., dissenting), with *Washington v. Davis, 426 U.S. 229, 240 (1976)*. In *Alexander v. Louisiana, 405 U.S. 625 (1972)*, we dealt with a criminal defendant's allegation that [*268] members of his race had been invidiously excluded from the grand jury which indicted him in violation of the *Equal Protection Clause*. In addition to the statistical evidence presented by petitioner in that case, we noted that the State's "selection procedures themselves were not racially neutral." *Id., at 630*. Once the consideration of race in the decisional process had been established, we held that "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Id., at 632*.

We adhered to similar principles in *Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)*, a case which, like this one, presented the problems of motivation and causation in the context of a multimember decisionmaking body authorized to consider a wide range of factors in arriving at its decisions. In *Arlington Heights* a group of minority plaintiffs claimed that a municipal governing body's refusal to rezone a plot of land to allow for the construction of low-income integrated housing was racially motivated. On the issue of causation, we indicated that the plaintiff was not required

> "to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, [*269] this judicial deference is no longer justified." *Id., at 265-266* (citation omitted).

If the strong presumption of regularity and rationality of legislative decisionmaking must give way in [***300] the face of evidence that race has played a significant part in a legislative decision, I simply cannot believe that Congress intended Title VII to accord *more* deference to a private employer in the face of evidence that its decisional process has been substantially infected by discrimination. Indeed, where a public employee brings a "disparate treatment" claim under *42 U. S. C. § 1983* and the *Equal Protection Clause* the employee is entitled to the favorable evidentiary framework of *Arlington Heights*. See, *e. g., Hervey v. Little Rock, 787 F. 2d 1223, 1233-1234 (CA8 1986)* (applying *Arlington Heights* to public employee's claim of sex discrimination in promotion decision); *Lee v. Russell County Bd. of Education, 684 F. 2d 769, 773-774 (CA11 1982)*

(applying *Arlington Heights* to public employees' claims of race discrimination in discharge case). Under the dissent's reading of Title VII, Congress' extension of the coverage of the statute to public employers in 1972 has placed these employees under a less favorable evidentiary regime. In my view, nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role [**1801] in the employment decision. Even the dissenting judge below "[had] no quarrel with [the] principle" that "a party with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent." *263 U.S. App. D. C. 321, 341, 825 F. 2d 458, 478 (1987)* (Williams, J. dissenting).

[*270] II

The dissent's summary of our individual disparate treatment cases to date is fair and accurate, and amply demonstrates that the rule we adopt today is at least a change in direction from some of our prior precedents. See *post*, at 286-289. We have indeed emphasized in the past that in an individual disparate treatment action the plaintiff bears the burden of persuasion throughout the litigation. Nor have we confined the word "pretext" to the narrow definition which the plurality attempts to pin on it today. See *ante*, at 244-247. *McDonnell Douglas* and *Burdine* clearly contemplated that a disparate treatment plaintiff could show that the employer's proffered explanation for an event was not "the true reason" either because it *never* motivated the employer in its employment decisions or because it did not do so in a particular case. *McDonnell Douglas* and *Burdine* assumed that the plaintiff would bear the burden of persuasion as to both these attacks, and we clearly depart from that framework today. Such a departure requires justification, and its outlines should be carefully drawn.

First, *McDonnell Douglas* itself dealt with a situation where the plaintiff presented no direct evidence that the employer had relied on a forbidden factor under Title VII in making an employment decision. The prima facie case established there was not difficult to prove, and was based only on the statistical probability that when a number of [***301] potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision. See *Teamsters, 431 U.S., at 358, n. 44* ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination"). In the face of this inferential proof, the employer's burden was deemed to be only one of production; the employer must articulate a legitimate reason for the adverse employment action. See *Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)*. The plaintiff must then be given an "opportunity to demonstrate [*271] by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas, 411 U.S., at 805*. Our decision in *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)*, also involved the "narrow question" whether, after a plaintiff had carried the "not onerous" burden of establishing the prima facie case under *McDonnell Douglas*, the burden of persuasion should be shifted to the employer to prove that a legitimate reason for the adverse employment action existed. *450 U.S., at 250*. As the discussion of *Teamsters* and *Arlington Heights* indicates, I do not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII.

The only individual disparate treatment case cited by the dissent which involved the kind of direct evidence of discriminatory animus with which we are confronted here is *United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 713-714, n. 2 (1983)*. The question presented to the Court in that case involved only a challenge to the elements of the prima facie case under *McDonnell Douglas* and *Burdine*, see Pet. for Cert. in *United States Postal Service Bd. of Governors* v. *Aikens*, O. T. 1981, No. 81-1044, and the question we confront today was neither [**1802] briefed nor argued to the Court. As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there *is* direct evidence of intentional discrimination. Indeed, in one Age Discrimination in Employment Act case, the Court seemed to indicate that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World* [*272]

Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). See also *East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403-404, n. 9 (1977)*.

Second, the facts of this case, and a growing number like it decided by the Courts of Appeals, convince me that the evidentiary standard I propose is necessary to make real the promise of *McDonnell Douglas* that "[i]n the implementation of [employment] decisions, it is abundantly [***302] clear that Title VII tolerates no . . . discrimination, subtle or otherwise." *411 U.S., at 801*. In this case, the District Court found that a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership. *618 F. Supp. 1109, 1116-1117 (DC 1985)*. The District Court further found that these evaluations were given "great weight" by the decisionmakers at Price Waterhouse. *Id., at 1118*. In addition, the District Court found that the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." *Id., at 1117* (footnote omitted). As the Court of Appeals characterized it, Ann Hopkins proved that Price Waterhouse "permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner." *263 U.S. App. D. C., at 324, 825 F. 2d, at 461*.

At this point Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision. It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider [*273] her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid. If, as we noted in *Teamsters*, "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof," *431 U.S., at 359, n. 45*, one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision would have been justified by wholly legitimate concerns.

Moreover, there is mounting evidence in the decisions of the lower courts that respondent here is not alone in her inability to pinpoint discrimination as the precise cause of her injury, despite having shown that it played a significant role in the decisional process. Many of these courts, which deal with the evidentiary issues in Title VII cases on a regular basis, have concluded that placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate [**1803] criterion makes sense as a rule of evidence and furthers the substantive command of Title VII. See, *e. g., Bell v. Birmingham Linen Service, 715 F. 2d 1552, 1556 (CA11 1983)* (Tjoflat, J.) ("It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, [***303] nondiscriminatory reasons for its action"). Particularly 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. See, *e. g., Fields v. Clark University, 817 F. 2d 931, 935-937* [*274] *(CA1 1987)* (where plaintiff produced "strong evidence" that sexist attitudes infected faculty tenure decision, burden properly shifted to defendant to show that it would have reached the same decision absent discrimination); *Thompkins v. Morris Brown College, 752 F. 2d 558, 563 (CA11 1985)* (direct evidence of discriminatory animus in decision to discharge college professor shifted burden of persuasion to defendant).

Finally, I am convinced that a rule shifting the burden to the defendant where the plaintiff has shown that an illegitimate criterion was a "substantial factor" in the employment decision will not conflict with other congressional policies embodied in Title VII. Title VII expressly provides that an employer need not give preferential treatment to employees or applicants of any race, color, religion, sex, or national origin in order to maintain a work force in balance with the general

population. See *42 U. S. C. § 2000e-2(j)*. The interpretive memorandum, whose authoritative force is noted by the plurality, see *ante*, at 243, n. 8, specifically provides: "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race." 110 Cong. Rec. 7213 (1964).

Last Term, in *Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)*, the Court unanimously concluded that the disparate impact analysis first enunciated in *Griggs v. Duke Power Co., 401 U.S. 424 (1971)*, should be extended to subjective or discretionary selection processes. At the same time a plurality of the Court indicated concern that the focus on bare statistics in the disparate impact setting could force employers to adopt "inappropriate prophylactic measures" in violation of *§ 2000e-2(j)*. The plurality went on to emphasize that in a disparate impact case, the plaintiff may not simply [*275] point to a statistical disparity in the employer's work force. Instead, the plaintiff must identify a particular employment practice and "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 group." *487 U.S., at 994*. The plurality indicated that "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." *Id., at 997*.

I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical [***304] proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision. First, the explicit consideration of race, color, religion, sex, or national origin in making employment decisions "was the [**1804] most obvious evil Congress had in mind when it enacted Title VII." *Teamsters, 431 U.S., at 335, n. 15*. While the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in a disparate impact case may both be indicators of discrimination or its "functional equivalent," they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting. Second, shifting the burden of persuasion to the employer in a situation like this one creates no incentive to preferential treatment in violation of *§ 2000e-(2)(j)*. To avoid bearing the burden of justifying its decision, the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decisions.

While the danger of forcing employers to engage in unwarranted preferential treatment is thus less dramatic in this setting than in the situation the Court faced in *Watson*, it is far from wholly illusory. Based on its misreading of [*276] the words "because of" in the statute, see *ante*, at 240-242, the plurality appears to conclude that if a decisional process is "tainted" by awareness of sex or race in any way, the employer has violated the statute, and Title VII thus *commands* that the burden shift to the employer to justify its decision. *Ante*, at 250-252. The plurality thus effectively reads the causation requirement out of the statute, and then replaces it with an "affirmative defense." *Ante*, at 244-247.

In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision. As the Court of Appeals noted below: "While most circuits have not confronted the question squarely, the consensus among those that have is that once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the employment decision, the burden shifts to the employer to show that the decision would have been the same absent discrimination." *263 U.S. App. D. C., at 333-344, 825 F. 2d, at 470-471*. Requiring that the plaintiff demonstrate that an illegitimate factor played a substantial role in the employment decision identifies those employment situations where the deterrent purpose of Title VII is most clearly implicated. As an evidentiary matter, where a plaintiff has made this type of strong showing of illicit motivation, the factfinder is entitled to presume that the employer's discriminatory animus made a difference to the outcome, absent proof to the contrary from the employer. Where a disparate treatment plaintiff has made such a showing, the burden then rests with the employer to convince the trier of fact that it is [***305] more likely than not that the decision would have been

the same absent consideration of the illegitimate factor. The employer need not isolate the sole cause for the decision; rather it must demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment [*277] action. This evidentiary scheme essentially requires the employer to place the employee in the same position he or she would have occupied absent discrimination. Cf. *Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 286 (1977)*. If the employer fails to carry this burden, the factfinder is justified in concluding that the decision was made "because of" consideration of the illegitimate factor and the substantive standard for liability under the statute is satisfied.

Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see *Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-69 (1986)*, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements [**1805] by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. In addition, in my view testimony such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden of persuasion to the employer. Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding. See *ante*, at 250, n. 13. The plurality proceeds from the premise that the words "because of" in the statute do not embody any [*278] causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status. Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations. See also *ante*, at 259-260 (White, J., concurring in judgment).

In sum, because of the concerns outlined above, and because I believe that the deterrent purpose of Title VII is disserved by a rule which places the burden of proof on plaintiffs on the issue of causation in all circumstances, I would retain but supplement the framework we established [***306] in *McDonnell Douglas* and subsequent cases. The structure of the presentation of evidence in an individual disparate treatment case should conform to the general outlines we established in *McDonnell Douglas* and *Burdine*. First, the plaintiff must establish the *McDonnell Douglas* prima facie case by showing membership in a protected group, qualification for the job, rejection for the position, and that after rejection the employer continued to seek applicants of complainant's general qualifications. *McDonnell Douglas, 411 U.S., at 802*. The plaintiff should also present any direct evidence of discriminatory animus in the decisional process. The defendant should then present its case, including its evidence as to legitimate, nondiscriminatory reasons for the employment decision. As the dissent notes, under this framework, the employer "has every incentive to convince the trier of fact that the decision was lawful." *Post*, at 292, citing *Burdine, 450 U.S., at 258*. Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, [*279] with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination. In my view, such a system is both fair and workable, and it calibrates the evidentiary requirements demanded of the parties to the goals behind the statute itself.

I agree with the dissent, see *post*, at 293, n. 4, that the evidentiary framework I propose should be available to all disparate treatment plaintiffs where an illegitimate consideration played a substantial role in an adverse employment decision. The Court's allocation of the

burden of proof in *Johnson v. Transportation Agency, Santa* [**1806] *Clara County, 480 U.S. 616, 626-627 (1987)*, rested squarely on "the analytical framework set forth in *McDonnell Douglas*," *id., at 626*, which we alter today. It would be odd to say the least if the evidentiary rules applicable to Title VII actions were themselves dependent on the gender or the skin color of the litigants. But see *ante*, at 239, n. 3.

In this case, I agree with the plurality that petitioner should be called upon to show that the outcome would have been the same if respondent's professional merit had been its only concern. On remand, the District Court should determine whether Price Waterhouse has shown by a preponderance of the evidence that if gender had not been part of the process, its employment decision concerning Ann Hopkins would nonetheless have been the same.

DISSENT BY: KENNEDY

DISSENT

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)*, and *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)*, is a wiser course than creation of more [***307] disarray in an area of the law already difficult for the bench and bar, and so I must dissent.

[*280] Before turning to my reasons for disagreement with the Court's disposition of the case, it is important to review the actual holding of today's decision. I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision. *Ante*, at 276-277 (opinion of O'Connor, J.); *ante*, at 259-260 (opinion of White, J.). As the opinions make plain, the evidentiary scheme created today is not for every case in which a plaintiff produces evidence of stray remarks in the workplace. *Ante*, at 251 (opinion of Brennan, J.); *ante, at 277* (opinion of O'Connor, J.).

Where the plaintiff makes the requisite showing, the burden that shifts to the employer is to show that legitimate employment considerations would have justified the decision without reference to any impermissible motive. *Ante*, at 260-261 (opinion of White, J.); *ante*, at 278 (opinion of O'Connor, J.). The employer's proof on the point is to be presented and reviewed just as with any other evidentiary question: the Court does not accept the plurality's suggestion that an employer's evidence need be "objective" or otherwise out of the ordinary. *Ante*, at 261 (opinion of White, J.).

In sum, the Court alters the evidentiary framework of *McDonnell Douglas* and *Burdine* for a closely defined set of cases. Although Justice O'Connor advances some thoughtful arguments for this change, I remain convinced that it is unnecessary and unwise. More troubling is the plurality's rationale for today's decision, which includes a number of unfortunate pronouncements on both causation and methods of proof in employment discrimination cases. To demonstrate the defects in the plurality's reasoning, it is necessary [*281] to discuss, first, the standard of causation in Title VII cases, and, second, the burden of proof.

I

The plurality describes this as a case about the standard of *causation* under Title VII, *ante*, at 237, but I respectfully suggest that the description is misleading. [**1807] Much of the plurality's rhetoric is spent denouncing a "but-for" standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard. The importance of today's decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof. The plurality's causation analysis is misdirected, for it is clear that, whoever bears the burden of proof on the issue, Title VII liability requires a finding of but-for causation. See also *ante*, at 261, and n. (opinion of [***308] White, J.); *ante*, at 262-263 (opinion of O'Connor, J.).

The words of Title VII are not obscure. The part of the statute relevant to this case provides:

"It shall be an unlawful employment

practice for an employer --

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin." *42 U. S. C. § 2000e-2 (a)(1)* (emphasis added).

By any normal understanding, the phrase "because of" conveys the idea that the motive in question made a difference to the outcome. We use the words this way in everyday speech. And assuming, as the plurality does, that we ought to consider the interpretive memorandum prepared by the statute's drafters, we find that this is what the words meant to them as well. "To discriminate is to make a distinction, to make a difference in treatment or favor." 110 Cong. Rec. 7213 (1964). Congress could not have chosen a clearer way [*282] to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex, or national origin caused the decision at issue.

Our decisions confirm that Title VII is not concerned with the mere presence of impermissible motives; it is directed to employment decisions that result from those motives. The verbal formulae we have used in our precedents are synonymous with but-for causation. Thus we have said that providing different insurance coverage to male and female employees violates the statute by treating the employee "'in a manner which but-for that person's sex would be different.'" *Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 683 (1983)*, quoting *Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 711 (1978)*. We have described the relevant question as whether the employment decision was "based on" a discriminatory criterion, *Teamsters v. United States, 431 U.S. 324, 358 (1977)*, or whether the particular employment decision at issue was "made on the basis of" an impermissible factor, *Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875 (1984)*.

What we term "but-for" cause is the least rigorous standard that is consistent with the approach to causation our precedents describe. If a motive is not a but-for cause of an event, then by definition it did not make a difference to the outcome. The event would have occurred just the same without it. Common-law approaches to causation often require proof of but-for cause as a starting point toward proof of legal cause. The law may require more than but-for cause, for instance proximate cause, before imposing liability. Any standard less than but-for, however, simply represents a decision to impose liability without causation. As Dean Prosser puts it, "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984).

[*283] [***309] One of the principal reasons the plurality decision may sow confusion is that it claims Title VII liability is unrelated to but-for causation, yet it adopts a but-for standard once it has placed the burden of proof [**1808] as to causation upon the employer. This approach conflates the question whether causation must be shown with the question of how it is to be shown. Because the plurality's theory of Title VII causation is ultimately consistent with a but-for standard, it might be said that my disagreement with the plurality's comments on but-for cause is simply academic. See *ante*, at 259 (opinion of White, J.). But since those comments seem to influence the decision, I turn now to that part of the plurality's analysis.

The plurality begins by noting the quite unremarkable fact that Title VII is written in the present tense. *Ante*, at 240-241. It is unlawful "to fail" or "to refuse" to provide employment benefits on the basis of sex, not "to have failed" or "to have refused" to have done so. The plurality claims that the present tense excludes a but-for inquiry as the relevant standard because but-for causation is necessarily concerned with a hypothetical inquiry into how a past event would have occurred absent the contested motivation. This observation, however, tells us nothing of particular relevance to Title VII or the cause of action it creates. I am unaware of any federal prohibitory statute that is written in the past tense. Every liability determination, including the novel one constructed by the plurality, necessarily is concerned with the examination of a past event. [1] The plurality's analysis of verb tense serves only to divert attention from the causation requirement that is made part of the statute by the "because [*284] of" phrase. That phrase, I respectfully submit, embodies a rather simple concept that the plurality labors to ignore. [2]

1 The plurality's description of its own standard is both hypothetical and retrospective. The inquiry seeks to determine whether "if we asked the employer at the moment of decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Ante*, at 250.

2 The plurality's discussion of overdetermined causes only highlights the error of its insistence that but-for is not the substantive standard of causation under Title VII. The opinion discusses the situation where two physical forces move an object, and either force acting alone would have moved the object. *Ante*, at 241. Translated to the context of Title VII, this situation would arise where an employer took an adverse action in reliance both on sex and on legitimate reasons, and *either* the illegitimate or the legitimate reason standing alone would have produced the action. If this state of affairs is proved to the factfinder, there will be no liability under the plurality's own test, for the same decision would have been made had the illegitimate reason never been considered.

We are told next that but-for cause is not required, since the words "because of" do not mean "*solely* because of." *Ante*, at 241. No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether consideration of sex must be *a* cause of the decision. Under the accepted approach to causation that I have discussed, sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. [***310] Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i. e.*, a but-for cause. See *McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282, n. 10 (1976)*. The plurality seems to say that since we know the words "because of" do not mean "solely because of," they must not mean "because of" at all. This does not follow, as a matter of either semantics or logic.

The plurality's reliance on the "bona fide occupational qualification" (BFOQ) provisions of Title VII, *42 U. S. C. § 2000e-2(e)*, is particularly inapt. The BFOQ provisions allow an employer, in certain cases, to make an employment decision of which it is conceded that sex is the cause. That sex may be the legitimate cause of an employment decision where gender is a BFOQ is consistent with the opposite command [*285] that a decision caused by sex in any other [**1809] case justifies the imposition of Title VII liability. This principle does not support, however, the novel assertion that a violation has occurred where sex made no difference to the outcome.

The most confusing aspect of the plurality's analysis of causation and liability is its internal inconsistency. The plurality begins by saying: "When . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations -- even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account." *Ante*, at 241. Yet it goes on to state that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision." *Ante*, at 242.

Given the language of the statute, these statements cannot both be true. Title VII unambiguously states that an employer who makes decisions "because of" sex has violated the statute. The plurality's first statement therefore appears to indicate that an employer who considers illegitimate reasons when making a decision is a violator. But the opinion then tells us that the employer who shows that the same decision would have been made absent consideration of sex is *not* a violator. If the second statement is to be reconciled with the language of Title VII, it must be that a decision that would have been the same absent consideration of sex was not made "because of" sex. In other words, there is no violation of the statute absent but-for causation. The plurality's description of the "same decision" test it adopts supports this view. The opinion states that "[a] court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a 'but-for' cause of the employment decision," *ante*, at 249, and that this "is not an imposition of liability 'where sex made no difference to the outcome,'" *ante*, at 246, n. 11.

[*286] The plurality attempts to reconcile its internal inconsistency on the causation issue by describing the employer's showing as an "affirmative defense." This is nothing more than a label, and one not found in the language or legislative history of Title [***311] VII. Section 703(a)(1) is the statutory basis of

the cause of action, and the Court is obligated to explain how its disparate-treatment decisions are consistent with the terms of § 703(a)(1), not with general themes of legislative history or with other parts of the statute that are plainly inapposite. While the test ultimately adopted by the plurality may not be inconsistent with the terms of § 703(a)(1), see *infra*, at 292, the same cannot be said of the plurality's reasoning with respect to causation. As Justice O'Connor describes it, the plurality "reads the causation requirement out of the statute, and then replaces it with an 'affirmative defense.'" *Ante*, at 276. Labels aside, the import of today's decision is not that Title VII liability can arise without but-for causation, but that in certain cases it is not the plaintiff who must prove the presence of causation, but the defendant who must prove its absence.

II

We established the order of proof for individual Title VII disparate-treatment cases in *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)*, and reaffirmed this allocation in *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)*. Under *Burdine*, once the plaintiff presents a prima facie case, an inference of discrimination arises. The employer must rebut the inference by articulating a legitimate nondiscriminatory reason for its action. The final burden of persuasion, however, belongs to the plaintiff. *Burdine* makes clear that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id., at 253*. See also *Board of* [**1810] *Trustees of Keene State College v.* [*287] *Sweeney, 439 U.S. 24, 29 (1978)* (Stevens, J., dissenting). [3] I would adhere to this established evidentiary framework, which provides the appropriate standard for this and other individual disparate-treatment cases. Today's creation of a new set of rules for "mixed-motives" cases is not mandated by the statute itself. The Court's attempt at refinement provides limited practical benefits at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision.

> 3 The interpretive memorandum on which the plurality relies makes plain that "the plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (1964). Coupled with its earlier definition of discrimination, the memorandum tells us that the plaintiff bears the burden of showing that an impermissible motive "made a difference" in the treatment of the plaintiff. This is none other than the traditional requirement that the plaintiff show but-for cause.

In view of the plurality's treatment of *Burdine* and our other disparate-treatment cases, it is important first to state why those cases are dispositive here. The plurality tries to reconcile its approach with *Burdine* by announcing that it applies only to a "pretext" case, which it defines as a case in which the plaintiff attempts to prove that the employer's proffered explanation is itself false. *Ante*, at 245-247, and n. 11. This ignores the language of *Burdine*, [***312] which states that a plaintiff may succeed in meeting her ultimate burden of persuasion "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *450 U.S., at 256* (emphasis added). Under the first of these two alternative methods, a plaintiff meets her burden if she can "persuade the court that the employment decision more likely than not was motivated by a discriminatory reason." *United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 717-718 (1983)* [*288] (Blackmun, J., concurring). The plurality makes no attempt to address this aspect of our cases.

Our opinions make plain that *Burdine* applies to all individual disparate-treatment cases, whether the plaintiff offers direct proof that discrimination motivated the employer's actions or chooses the indirect method of showing that the employer's proffered justification is false, that is to say, a pretext. See *Aikens, supra, at 714, n. 3* ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence"). The plurality is mistaken in suggesting that the plaintiff in a so-called "mixed-motives" case will be disadvantaged by having to "squeeze her proof into *Burdine*'s framework." *Ante*, at 247. As we acknowledged in *McDonnell Douglas*, "[t]he facts necessarily will vary in Title VII cases," and the specification of the prima facie case set forth there "is not necessarily applicable in every respect to differing factual situations." *411 U.S., at 802, n. 13*. The framework was "never intended to be rigid, mechanized, or ritualistic." *Aikens, supra, at 715*. *Burdine* compels the employer to come forward with its explanation of the decision and permits the plaintiff to offer evidence under either of the

logical methods for proof of discrimination. This is hardly a framework that confines the plaintiff; still less is it a justification for saying that the ultimate burden of proof must be on the employer in a mixed-motives case. *Burdine* provides an orderly and adequate way to place both inferential and direct proof before the factfinder for a determination whether intentional discrimination has caused the employment decision. Regardless of the character of the evidence presented, we have consistently held that the ultimate burden "remains at all times with the plaintiff." *Burdine, supra, at 253*.

[**1811] *Aikens* illustrates the point. There, the evidence showed that the plaintiff, a black man, was far more qualified than any of the white applicants promoted ahead of him. More important, the testimony showed that "the person responsible for the promotion decisions at issue had made numerous [*289] derogatory comments about blacks in general and Aikens in particular." *460 U.S., at 713-714, n. 2*. Yet the Court in *Aikens* reiterated that the case was to be tried under the proof scheme of *Burdine*. Justice Brennan and Justice Blackmun concurred to stress that the plaintiff could prevail under the *Burdine* scheme in either of two ways, one of which was directly to persuade the court that the employment [***313] decision was motivated by discrimination. *460 U.S., at 718*. *Aikens* leaves no doubt that the so-called "pretext" framework of *Burdine* has been considered to provide a flexible means of addressing all individual disparate-treatment claims.

Downplaying the novelty of its opinion, the plurality claims to have followed a "well-worn path" from our prior cases. The path may be well worn, but it is in the wrong forest. The plurality again relies on Title VII's BFOQ provisions, under which an employer bears the burden of justifying the use of a sex-based employment qualification. See *Dothard v. Rawlinson, 433 U.S. 321, 332-337 (1977)*. In the BFOQ context this is a sensible, indeed necessary, allocation of the burden, for there by definition sex is the but-for cause of the employment decision and the only question remaining is how the employer can justify it. The same is true of the plurality's citations to Pregnancy Discrimination Act cases, *ante*, at 248. In such cases there is no question that pregnancy was the cause of the disputed action. The Pregnancy Discrimination Act and BFOQ cases tell us nothing about the case where the employer claims not that a sex-based decision was justified, but that the decision was not sex-based at all.

Closer analogies to the plurality's new approach are found in *Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977)*, and *NRLB v. Transportation Management Corp., 462 U.S. 393 (1983)*, but these cases were decided in different contexts. *Mt. Healthy* was a *First Amendment* case involving the firing of a teacher, and *Transportation Management* involved review of the NLRB's interpretation of the National Labor Relations [*290] Act. The *Transportation Management* decision was based on the deference that the Court traditionally accords NLRB interpretations of the statutes it administers. See *462 U.S., at 402-403*. Neither case therefore tells us why the established *Burdine* framework should not continue to govern the order of proof under Title VII.

In contrast to the plurality, Justice O'Connor acknowledges that the approach adopted today is a "departure from the *McDonnell Douglas* standard." *Ante*, at 262. Although her reasons for supporting this departure are not without force, they are not dispositive. As Justice O'Connor states, the most that can be said with respect to the Title VII itself is that "nothing in the language, history, or purpose of Title VII *prohibits* adoption" of the new approach. *Ante*, at 269 (emphasis added). Justice O'Connor also relies on analogies from the common law of torts, other types of Title VII litigation, and our equal protection cases. These analogies demonstrate that shifts in the burden of proof are not unprecedented in the law of torts or employment discrimination. Nonetheless, I believe continued adherence to the *Burdine* framework is more consistent with the statutory mandate. Congress' manifest concern with preventing imposition of liability in cases where discriminatory animus did not actually cause an adverse action, see *ante*, at 262 (opinion of O'Connor, J.), suggests to me that an [**1812] affirmative showing of causation should be [***314] required. And the most relevant portion of the legislative history supports just this view. See n. 3, *supra*. The limited benefits that are likely to be produced by today's innovation come at the sacrifice of clarity and practical application.

The potential benefits of the new approach, in my view, are overstated. First, the Court makes clear that the *Price Waterhouse* scheme is applicable only in those cases where the plaintiff has produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue. The burden shift properly will be found to apply in [*291] only a limited

number of employment discrimination cases. The application of the new scheme, furthermore, will make a difference only in a smaller subset of cases. The practical importance of the burden of proof is the "risk of nonpersuasion," and the new system will make a difference only where the evidence is so evenly balanced that the factfinder cannot say that either side's explanation of the case is "more likely" true. This category will not include cases in which the allocation of the burden of proof will be dispositive because of a complete lack of evidence on the causation issue. Cf. *Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (1948)* (allocation of burden dispositive because no evidence of which of two negligently fired shots hit plaintiff). Rather, *Price Waterhouse* will apply only to cases in which there is substantial evidence of reliance on an impermissible motive, as well as evidence from the employer that legitimate reasons supported its action.

Although the *Price Waterhouse* system is not for every case, almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. Trial and appellate courts will therefore be saddled with the task of developing standards for determining when to apply the burden shift. One of their new tasks will be the generation of a jurisprudence of the meaning of "substantial factor." Courts will also be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence. Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process. The presence of an existing burden-shifting mechanism distinguishes the individual disparate-treatment case from the tort, class-action discrimination, and equal protection cases on which [*292] Justice O'Connor relies. The distinction makes Justice White's assertions that one "need look only to" *Mt. Healthy* and *Transportation Management* to resolve this case, and that our Title VII cases in this area are "inapposite," *ante*, at 258-260, at best hard to understand.

Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under *42 U. S. C. § 1981* or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials. See, *e. g.*, Note, The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change, *73 Va. L. Rev. 601 (1987)* [***315] (noting high reversal rate caused by use of Title VII burden shifting in a jury setting). Perhaps such cases in the future will require a bifurcated trial, with the jury retiring first to make the credibility findings necessary to determine whether the plaintiff has proved that an impermissible factor played a substantial part in the decision, and later hearing evidence on the "same decision" or "pretext" issues. Alternatively, perhaps the trial judge will have the unenviable task of formulating a single instruction for the jury on all of the various burdens potentially involved in the case.

I do not believe the minor refinement in Title VII procedures accomplished by today's holding can justify the difficulties [**1813] that will accompany it. Rather, I "remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination." *Burdine, 450 U.S., at 258*. Although the employer does not bear the burden of persuasion under *Burdine*, it must offer clear and reasonably specific reasons for the contested decision, and has every incentive to persuade the trier of fact that the decision was lawful. *Ibid.* Further, the suggestion that the employer should bear the burden of persuasion due to superior access to evidence has little force in the Title VII context, where the liberal discovery rules available to all litigants are supplemented by EEOC investigatory files. *Ibid.* [*293] In sum, the *Burdine* framework provides a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," *Aikens, 460 U.S., at 715*, and it should continue to govern the order of proof in Title VII disparate-treatment cases. [4]

4 The plurality states that it disregards the special context of affirmative action. *Ante*, at 239, n. 3. It is not clear that this is possible. Some courts have held that in a suit challenging an affirmative-action plan, the question of the plan's validity need not be reached unless the plaintiff shows that the plan was a but-for cause of the adverse decision. See *McQuillen v. Wisconsin Education Association Council, 830 F. 2d 659, 665 (CA7 1987)*, cert. denied, *485 U.S. 914 (1988)*. Presumably it will be easier for a plaintiff to show that consideration of race or sex pursuant to an affirmative-action plan was a

substantial factor in a decision, and the court will need to move on to the question of a plan's validity. Moreover, if the structure of the burdens of proof in Title VII suits is to be consistent, as might be expected given the identical statutory language involved, today's decision suggests that plaintiffs should no longer bear the burden of showing that affirmative-action plans are illegal. See *Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 626-627 (1987).*

III

The ultimate question in every individual disparate-treatment case is whether discrimination caused the particular decision at issue. Some of the plurality's comments with respect to the District Court's findings in this case, however, are potentially misleading. As the plurality notes, the District Court based its liability determination on expert evidence that some evaluations of respondent Hopkins were based on unconscious sex stereotypes, [5] and on the fact that [*294] [***316] Price Waterhouse failed to disclaim reliance on these comments when it conducted the partnership review. The District Court also based liability on Price Waterhouse's failure to "make partners sensitive to the dangers [of stereotyping], to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes." *618 F. Supp. 1109, 1119 (DC 1985).*

5 The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske's testimony, and at this late stage we are constrained to accept it, but I think the plurality's enthusiasm for Fiske's conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral -- *e. g.*, "overbearing and abrasive" -- without any knowledge of the comments' basis in reality and without having met the speaker or subject. "To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant, or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." *263 U.S. App. D. C. 321, 340, 825 F. 2d 458, 477 (1987)* (Williams, J., dissenting). Today's opinions cannot be read as requiring factfinders to credit testimony based on this type of analysis. See also *ante*, at 277 (opinion of O'Connor, J.).

Although the District Court's version of Title VII liability is improper under any of today's opinions, I think it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decision-makers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination [**1814] caused the plaintiff's harm. Our cases do not support the suggestion that failure to "disclaim reliance" on stereotypical comments itself violates Title VII. Neither do they support creation of a "duty to sensitize." As the dissenting judge in the Court of Appeals observed, acceptance of such theories would turn Title VII "from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts." *263 U.S. App. D. C. 321, 340, 825 F. 2d 458, 477 (1987)* (Williams, J., dissenting).

Employment discrimination claims require factfinders to make difficult and sensitive decisions. Sometimes this may mean that no finding of discrimination is justified even though a qualified employee is passed over by a less than admirable employer. In other cases, Title VII's protections properly extend to plaintiffs who are by no means model employees. As Justice Brennan notes, *ante*, at 258, courts do not sit to determine whether litigants are nice. In this [*295] case, Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse's partnership process. Had the District Court found on this record that sex discrimination caused the adverse decision, I doubt it would have been reversible error. Cf. *Aikens, supra, at 714, n. 2.* That decision was for the finder of fact, however, and the District Court made plain that sex discrimination was not a but-for cause of the decision to place Hopkins' partnership candidacy on hold. Attempts to evade tough decisions by erecting novel theories of liability or multitiered systems of shifting burdens are misguided.

IV

The language of Title VII and our well-considered precedents require this plaintiff to establish that the decision to place her candidacy on hold was made

"because of" sex. Here the District Court found that [***317] the "comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose," *618 F. Supp., at 1118*, and that "[b]ecause plaintiff has considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually based evaluations," *id., at 1120*. Hopkins thus failed to meet the requisite standard of proof after a full trial. I would remand the case for entry of judgment in favor of Price Waterhouse.

REFERENCES

45B Am Jur 2d, Job Discrimination 2003- 2025

21 Federal Procedure, L Ed, Job Discrimination 50:218, 50:229, 50:239, 50:250, 50:250.5, 50:256

12 Am Jur Proof of Facts 2d 645, Sex Discrimination in Employment--Promotion Practices

21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts

42 USCS 2000e-2(a)(1)

RIA Employment Coordinator EP-38,619--EP-38,660

RIA Employment Discrimination Coordinator 58,530-58,664

US L Ed Digest, Civil Rights 63; Evidence 383

Index to Annotations, Discrimination; Equal Employment Opportunity; Labor and Employment; Presumptions and Burden of Proof; Prima Facie Evidence; Promotion of Employee; Sex Discrimination

Annotation References :

Sex discrimination. *27 L Ed 2d 935*.

Burden of proof in Title VII action alleging favoritism in promotion or job assignment due to sexual or romantic relationship between supervisor and another. *86 ALR Fed 230*.

Effect of mixed or dual motives in actions under Title VII (Equal Employment Opportunities Subchapter) of Civil Rights Act of 1964 (*42 USCS 2000e et seq.*). *83 ALR Fed 268*.

Construction and application of provisions of Title VII of Civil Rights Act of 1964 (*42 USCS 2000 et seq.*) making sex discrimination in employment unlawful. *12 ALR Fed 15*.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. *65 ALR3d 504*.

EXHIBIT C

1 of 1 DOCUMENT

Caution
As of: Nov 19, 2014

PETER OILER versus WINN-DIXIE LOUISIANA, INC.

CIVIL ACTION No. 00-3114 SECTION: "I"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2002 U.S. Dist. LEXIS 17417*; *89 Fair Empl. Prac. Cas. (BNA) 1832*; *83 Empl. Prac. Dec. (CCH) P41,258

September 16, 2002, Decided
September 16, 2002, Filed, Entered

DISPOSITION: [*1] Defendant's motion for summary judgment granted. Plaintiff's motion for summary judgment denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff transvestite brought an employment discrimination action for damages from defendant former employer, pursuant to Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e et seq.*, and the Louisiana antidiscrimination statute, *La. Rev. Stat. Ann. § 23:332(A)(1)* (West 2002), after his employment was terminated. Each moved for summary judgment.

OVERVIEW: The employee was in the habit of dressing in female clothing and accessories when he was not at work. The employer terminated him, reasoning that if he were recognized by customers as a cross-dresser, the customers would disapprove of his lifestyle. The employee brought suit, arguing that Title VII prohibited employment discrimination on the basis of sexual stereotyping and that his termination for his off-duty acts of cross-dressing was a form of forbidden sexual stereotyping. The court first found that his gender identity disorder did not meet the definition of a disability actionable under the Americans with Disabilities Act, *42 U.S.C.S. § 12101 et seq.* The court also held that the employee was not fired for failing to comply with a stereotype. Instead, the employee disguised himself as a person of a different sex and presented himself as a female. Congress had not chosen to protect that activity under Title VII, and the court thus could not grant relief on that basis.

OUTCOME: The employer's motion for summary judgment was granted, and the transvestite's motion was denied.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Legal Entitlement
[HN1] Pursuant to *Fed. R. Civ. P. 56(c)*, summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
[HN2] *Fed. R. Civ. P. 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > Discovery > Methods > General Overview
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
[HN3] To defeat a properly supported motion for summary judgment, the party opposing summary judgment must go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.

Civil Procedure > Summary Judgment > Standards > Materiality
[HN4] Whether a fact is material depends upon the substantive law. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. A dispute about a material fact is genuine if, construing the evidence in the light most favorable to the nonmoving party, the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
[HN5] See *42 U.S.C.S. § 12211(b)*.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview
[HN6] See *42 U.S.C.S. § 2000e-2(a)*.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview
[HN7] See *La. Rev. Stat. Ann. § 23:332*.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview
[HN8] Based upon the plain meaning of the word "sex" and the legislative history of Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, "sex" means "biological sex."

Governments > Legislation > Interpretation
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview
[HN9] It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview
[HN10] The words of Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, do not outlaw discrimination against a person who has a sexual identity disorder.

Labor & Employment Law > Discrimination > Disability Discrimination > Proof > General Overview

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Mixed Motive
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Remedies > General Overview
[HN11] An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible position: out of a job if they behave aggressively and out of a job if they do not. Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, remedies that issue.

Labor & Employment Law > Discrimination > Disability Discrimination > Proof > General Overview
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > Sexual Orientation
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN12] Courts have long held that discrimination on the basis of sexual orientation is not actionable under Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e et seq.* Because the term "sex" in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation.

Evidence > Inferences & Presumptions > Inferences
Evidence > Procedural Considerations > Circumstantial & Direct Evidence
Evidence > Relevance > Circumstantial & Direct Evidence
[HN13] A plaintiff in an action brought under Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e et seq.*, carries the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under Title VII. A plaintiff may use either direct or circumstantial evidence to prove a case of intentional discrimination. Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence to meet the test set out in McDonnell Douglas. That test establishes a prima facie case by inference, but it is not the exclusive method for proving intentional discrimination. The McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination. Direct evidence is evidence which, if believed, proves the fact of intentional discrimination without inference or presumption. In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Proof > Burdens of Proof > Burden Shifting
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN14] To establish a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C.S. § 2000e et seq.*, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in McDonnell Douglas Corp. v. Green. The McDonnell Douglas test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated. Once the employer articulates a legitimate, nondiscriminatory reason for the employment action, however, the scheme of shifting burdens and presumptions simply drops out of the picture, and the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved that the defendant intentionally discriminated against the plaintiff because of his or her sex.

Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion
Healthcare Law > Business Administration & Organization > Employment Discrimination
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
[HN15] A plaintiff bears the ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against him or her because of his or her protected status.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > Discharges & Failures to Hire
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
[HN16] For a plaintiff to show disparate treatment, he or she must demonstrate that the misconduct for which she was discharged was nearly identical to that engaged in by

an employee not within her protected class whom the company retained. Put another way, the conduct at issue is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer.

COUNSEL: For PETER OILER, plaintiff: Ronald Lawrence Wilson, Ronald L. Wilson, Attorney at Law, New Orleans, LA.

For PETER OILER, plaintiff: Christopher A. Hansen, Lenora M. Lapidus, Kenneth Y. Choe, American Civil Liberties Union Foundation, New York, NY.

For WINN DIXIE STORES, INC., defendant: Lawrence Joseph Sorohan, II, Fisher & Phillips, LLP, New Orleans, LA.

For WINN DIXIE STORES, INC., defendant: Steven Hymowitz, Howard L. Cleveland, IV, Kiesewetter Wise Kaplan Schwimmer & Prather, PLC, Memphis, TN.

JUDGES: LANCE M. AFRICK, UNITED STATES DISTRICT JUDGE.

OPINION BY: LANCE M. AFRICK

OPINION

ORDER AND REASONS

Plaintiff, Peter Oiler ("Oiler"), filed this employment discrimination action to recover damages from his former employer, Winn-Dixie Louisiana, Inc. ("Winn-Dixie"), pursuant to Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e-2(a)(1),* and the Louisiana antidiscrimination statute, *La. R.S. 23:332(A)(1)* (West 2002). [1] Plaintiff has filed a motion for summary judgment with respect to liability [*2] issues. [2] Defendant has filed a cross motion for summary judgment. [3] Both motions are opposed and both parties have filed reply memoranda. [4]

1 In footnote one of plaintiff's memorandum in support of his motion for summary judgment, plaintiff states: "For the sake of convenience, because the Louisiana state law counterpart to Title VII is 'similar in scope' to Title VII, Mr. Oiler discussed only Title VII in this memorandum. See *Wyerick v. Bayou Steel Corp., 887 F.2d 1271, 1274 (5th Cir. 1989)*(quotation omitted). That said, because Title VII does not necessarily limit the scope of Louisiana state law, Louisiana state law may afford greater protection than Title VII."

In an April 15, 2002, status conference, held after the cross motions for summary judgment were filed, plaintiff's counsel agreed that the remedy afforded by the Louisiana employment discrimination statute is coextensive with the remedy provided by Title VII, the federal employment discrimination statute. Rec. Doc. No. 55. Plaintiff's counsel also agreed that plaintiff would waive any argument that state law provided broader protection or greater remedies than Title VII. Rec. Doc. No. 55.

[*3]

2 Rec. Doc. No. 37.

3 Rec. Doc. No. 42.

4 Rec. Doc. No. 40 (Defendant's memorandum in opposition to plaintiff's motion for summary judgment), Rec. Doc. No. 51 (Plaintiff's consolidated memorandum in opposition to defendant's motion for summary judgment and in reply to defendant's opposition to plaintiff's motion for summary judgment), and Rec. Doc. No. 54 (Defendant's reply memorandum to plaintiff's opposition).

At issue is whether discharging an employee because he is transgendered and a crossdresser is discrimination on the basis of "sex" in violation of Title VII. For the following reasons, the motion of defendant for summary judgment is **GRANTED** and the motion of plaintiff for summary judgment is **DENIED.**

Facts

In 1979, plaintiff, Peter Oiler, was hired by defendant, Winn-Dixie, as a loader. [5] In 1981, he was promoted to yard truck driver and he later became a road truck driver. [6] As a road truck driver, plaintiff delivered groceries from Winn-Dixie's grocery warehouse in Harahan, Louisiana, to grocery stores in southern and central Louisiana and Mississippi. [*4] [7]

5 Rec. Doc. No. 37, Declaration of Peter Oiler ("Oiler Dec."), para. 5.

6 Rec. Doc. No. 37, Oiler Dec., para. 5.

7 Rec. Doc. No. 37, Oiler Dec., para. 5.

Plaintiff is a heterosexual man who has been married since 1977. [8] The plaintiff is transgendered. [9] He is not a transsexual and he does not intend to become a woman. [10] Plaintiff has been diagnosed as having transvestic fetishism with gender dysphoria [11] and a gender identity disorder. [12] He is a male crossdresser. [13] The term crossdresser is used interchangeably with transvestite. [14]

8 Rec. Doc. No. 37, Oiler Dec., paras. 2 and 4.

9 Rec. Doc. No. 37, Oiler Dec., para. 3. Plaintiff defines transgendered as meaning that his gender identity, i.e., his sense of whether he is a male or female, is not consistently male. Id.

Walter Bockting, Ph.D., a psychologist who describes himself as an expert on transgender issues, defines the term "transgendered" as:

> An umbrella term used to refer to a diverse group of individuals who cross or transcend culturally-defined categories of gender. They include crossdressers or transvestites (who desire to wear clothing associated with another sex), male-to-female and female-to-male transsexuals (who pursue or have undergone hormone therapy or sex reassignment surgery), transgenderists (who live in the gender role associated with another sex without desiring sex reassignment surgery), bigender persons (who identify as both man and woman), drag queens and kings (usually gay men and lesbian women who do 'drag' and dress up in, respectively, women's and men's clothes), and female and male impersonators (males who impersonate women and females who impersonate men, usually for entertainment).

Rec. Doc. No. 37, Bockting Dec., attached report, p. 7.

[*5]

10 Rec. Doc. No. 37, Oiler Dec., para. 3.

11 Dr. Bockting reports that:

> Mr. Oiler's transgender identity can best be described as a male heterosexual crossdresser. While Mr. Oiler does report a history of some gender dysphoria (discomfort with the male sex assigned at birth), he is not transsexual; he does not want to take feminizing hormones or undergo sex reassignment surgery .... His motivation) to crossdress appears two-fold: (1) to express a feminine side and (2) to relieve stress. In addition, he sometimes experiences sexual excitement in response to crossdressing. Associated distress includes emotional turmoil, agitation, and marital conflict. Therefore, a DSM-IV diagnosis of Transvestic Fetishism with gender dysphoria is warranted.

Rec. Doc. No. 37, Bockting Dec., attached report, p. 6.

12 Dennis P. Sugrue, Ph.D., is also a psychologist who describes himself as an expert on transgendered issues. Dr. Sugrue does not agree with Dr. Bockting's diagnosis of transvestic fetishism, but he instead opines that plaintiff is transgendered with a gender identity disorder. He states in his report:

> Mr. Oiler's cross-dressing behavior suggests that he is *transgendered*, a non-clinical term frequently used in recent years for individuals whose behavior falls outside commonly accepted norms for the person's biological gender. In clinical terms, *Gender Identity Disorder NOS (Not Otherwise Specified)* is the most appropriate diagnosis.
>
> The (DSM-IV) provides three diagnostic options for individuals with gender disturbances: *Transvestic Fetishism, Gender*

> *Identity Disorder*, and *Gender Identity Disorder NOS.* Although cross-dressing can at times have an erotic quality for Mr. Oiler, his behavior does not meet the DSM-IV transvestic fetishism criteria ....
>
> Mr. Oiler displays evidence suggestive of a *gender identity disorder* as defined by DSM-IV. For example, he frequently wishes to pass as the other sex, desires to be treated as the other sex, and is convinced that he has the typical feelings and reactions of the other sex. He does not, however, display a preoccupation with ridding himself of primary and secondary sex characteristics or the conviction that he was born the wrong sex--features necessary for the diagnosis of a *Gender Identity Disorder* (often referred to as *transsexualism*). Hence the diagnosis of *Gender Identity Disorder NOS.*

Rec. Doc. No. 37, Segrue Dec., attached report, p. 6.

[*6]

13 Rec. Doc. No. 37, Oiler Dec., para. 3.

14 Rec. Doc. No. 37, Bockting Dec., attached report, pp. 7 and 9.

When he is not at work, plaintiff appears in public approximately one to three times per month [15] wearing female clothing and accessories. [16] In order to resemble a woman, plaintiff wears wigs and makeup, including concealer, eye shadow, foundation, and lipstick. [17] Plaintiff also wears skirts, women's blouses, women's flat shoes, and nail polish. [18] He shaves his face, arms, hands, and legs. [19] He wears women's underwear and bras and he uses silicone prostheses to enlarge his breasts. [20] When he is crossdressed as a woman, he adopts a female persona and he uses the name "Donna". [21]

15 Rec. Doc. No. 37, Bockting Dec., attached report, p. 3.

16 Rec. Doc. No. 37, Oiler Dec., para. 3.

17 Rec. Doc. No. 40, Exh. A, Deposition of Peter Oiler ("Oiler Dep."), p. 94.

18 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 94-95.

19 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 94-95.

[*7]

20 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 95.

21 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 96.

Prior to 1996, plaintiff only crossdressed at home. After 1996, assuming the identity of "Donna", plaintiff crossdressed as a woman in public. [22] While crossdressed, he attended support group meetings, dined at a variety of restaurants in Kenner and Metairie, visited night clubs, went to shopping malls, and occasionally attended church services. [23] He was often accompanied by his wife and other friends, some of whom were also crossdressed. [24]

22 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 92.

23 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 92-93, 115.

24 Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 93-94.

On October 29, 1999, plaintiff told Gregg Miles, a Winn-Dixie supervisor, that he was transgendered. [25] He explained that he was not a transsexual and that he did not intend to become a woman. [26] However, he [*8] told Miles that for a number of years he had been appearing in public at restaurants and clubs while crossdressed. [27] He told Miles that while he was crossdressed, he assumed the female role of "Donna". [28] He asked whether he would be terminated if Michael Istre, the president of Winn Dixie Louisiana, Inc., ever saw plaintiff crossdressed as a woman. [29]

25 Rec. Doc. No. 37, Oiler Dec., para. 9.

26 Rec. Doc. No. 37, Oiler Dec., para. 9.

27 Rec. Doc. No. 40, Exh. C, Deposition I of Greg Miles ("Miles Dep. I"), pp. 110-111, 237.

28 Rec. Doc. No. 40, Exh. C, Miles Dep. I, pp. 237-238.

29 Rec. Doc. No. 40, Exh. C, Miles Dep. I, p. 111.

On the same day, Miles had a private meeting with Istre. [30] Miles told Istre that plaintiff was transgendered. Miles explained that for several years the plaintiff had been appearing in public crossdressed as a woman. [31]

Istre contacted Winn-Dixie's counsel for legal advice. [32]

30 Rec. Doc. No. 42, Exh. A, Deposition of Michael Istre ("Istre Dep."), p. 67; Exh. I, Declaration of Michael Istre ("Istre Dec."), para. 2.

[*9]

31 Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 69-70.

32 Rec. Doc. No. 42, Exh. A, Istre Dep., p. 71; Exh. B, Miles Dep., p. 112.

Istre and Miles made the decision to terminate the plaintiff's employment with Winn-Dixie. [33] On November 1, 1999, Istre and Miles asked Oiler to resign. [34] Several times after he was initially asked to resign, plaintiff met with Winn-Dixie managers who gave him a deadline by which he would have to resign. [35] The deadline was extended a number of times. [36] On January 5, 2000, when plaintiff did not resign voluntarily, Winn-Dixie discharged him. [37] The reason plaintiff was terminated was because he publicly adopted a female persona and publicly crossdressed as a woman. Specifically, Istre and Miles, acting for Winn-Dixie, terminated Oiler because of his lifestyle, i.e., plaintiff publicly crossdressed for several years by going to restaurants and clubs where he presented himself as "Donna", a woman. [38] Istre and Miles believed that if plaintiff were recognized by Winn-Dixie customers as a crossdresser, the customers, particularly those in Jefferson Parish [*10] where plaintiff worked, would disapprove of the plaintiff's lifestyle. [39] Istre and Miles thought that if Winn-Dixie's customers learned of plaintiff's lifestyle, i.e., that he regularly crossdressed and impersonated a woman in public, they would shop elsewhere and Winn-Dixie would lose business. [40] Plaintiff did not crossdress at work and he was not terminated because he violated any Winn-Dixie on-duty dress code. [41] He was never told by any Winn-Dixie manager that he was being terminated for appearing or acting effeminate at work, i.e., for having effeminate mannerisms or a high voice. [42] Nor did any Winn-Dixie manager ever tell plaintiff that he did not fit a male stereotype or assign him work that stereotypically would be performed by a female. [43]

33 Rec. Doc. No. 42, Exh. I, Istre Dec., para. 3.

34 Rec. Doc. No. 37, Oiler Dec., para. 10; Rec. Doc. No. 43, Exh. C, Miles Dep., pp. 236-238; Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91-100.

35 Rec. Doc. No. 37, Oiler Dec., para. 11.

36 Rec. Doc. No. 37, Oiler Dec., para. 11.

37 Rec. Doc. No. 37, Oiler Dec., para. 13.

[*11]

38 Rec. Doc. No. 42, Exh. B, Miles Dep. I, pp. 236-238. Miles explained that by "lifestyle" he meant that the plaintiff "told me that he had been doing this for several years. He knew he was different from childhood. He ... described what he did away from work. It wasn't that he did it at home. He went out into the public. He went out into the night life. He went out to dinner in a female persona and that was something he chose to do." Miles Dep. I, p. 237. In his deposition, Miles testified:

> Q: And so it was his off-the-job behavior over this period of time that you've referenced, is that what caused you to terminate him?
>
> A: You say behavior; I say life-style.
>
> Q: What do you mean by "life-style"?
>
> A: Mr. Oiler told me that he had been doing this for several years .... It wasn't that he did it at home. He went out into the public. He went out into the night life. He went to dinner in a female persona and that was something he chose to do.
>
> ****
>
> Q: So, what made it problematic for you such that you terminated him was the fact that he was taking this life-style out of his home into the public; is that correct?
>
> A: Yes, sir.
>
> Q: And, specifically, he was dressing in a certain way in full view of the public, going out to restaurants and clubs and things

like that. Is that what made this something that you wanted to terminate him for?

A: There's more to it than just that statement.

Q: So what more? Just clarify for me.

A: He had adopted a female persona. He called himself Donna when he went out. It wasn't just one or two things. It was the entire picture that he told."

Miles Dep. I, p. 236-238.

[*12]

39 Istre was concerned that plaintiff was "going out in public impersonating a woman, wearing the wig and the makeup and the jewelry and the dress and the shoes and the underwear and calling himself by name repeatedly." According to Istre, that "could have some effect on my business." Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91-92.

Istre explained that, "I think with him doing all of these things, and when he is at work driving one of my trucks with a 45 or 50 foot trailer, whatever he is driving with Winn-Dixie, and walking through my stores and people recognizing him coming up to the front of the store or driving up in the front of our stores, with the truck parked in the front of the parking lot or in the front of the building, walking in, going to the office and going through the back of the store, I think if my customers recognized him ... I'd lose business." Istre Dep., pp. 95-96.

Istre also considered the fact that plaintiff regularly worked in Jefferson Parish, stating that, "Well, Peter said ... [cross-dressing] was unacceptable in Jefferson Parish, and when I looked at Jefferson Parish and the amount of stores that I have in Jefferson Parish, which is approximately 18 or so stores and I've got a large customer base there that have various beliefs, be it religion or a morality or family values or people that just don't want to associate with that type of behavior, those are the things that I took into consideration." Istre Dep., p. 99.

[*13]

40 Rec. Doc. No. 42, Exh. A, Istre Dep., pp. 91-100; Rec. Doc. No. 42, Exh. B, Miles Dep., pp. 125-127.

41 Rec. Doc. No. 37, Exh. A, Istre Dep., p. 118.

42 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214. Prior to October 29, 1999, plaintiff had complained to Miles that there were rumors in his workplace that he was gay and he asked Miles to discourage the rumors. Rec. Doc. No. 37, Oiler Dec., para. 8. On October 29, 1999, Miles asked Oiler if the rumors had stopped and Oiler stated that they had. Rec. Doc. No. 37, Oiler Dec., para. 9.

Plaintiff is not making a Title VII claim for sexual harassment based upon rumors in his workplace that he was gay or that co-employees referred to him using demeaning terms, such as "sissy", or any other inappropriate term used by some to refer to a male who does not fit a masculine sexual stereotype. There is no evidence in the summary judgment record that any such name-calling occurred or that the plaintiff was harassed because of his gender identity disorder. Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214. Until plaintiff voluntarily told his supervisor at Winn-Dixie that he was transgendered, there is no indication in the record that any person employed at Winn-Dixie knew that plaintiff was transgendered.

[*14]

43 Rec. Doc. No. 40, Exh. A, Oiler Dep., p. 214.

Plaintiff received a "Dismissal and Notice of Rights" issued by the United States Equal Employment Opportunity Commission. [44] Plaintiff subsequently filed this lawsuit. [45]

44 Rec. Doc. No. 42, Exh. C, Oiler Dep., Dep. Exh. 11. The EEOC Notice of Suit Rights states that, "the EEOC is closing its file on this charge for the following reason: The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC."

45 Rec. Doc. No. 1.

Summary Judgment Standard

[HN1] Pursuant to *Rule 56(c) of the Federal Rules of Civil Procedure*, summary judgment "shall be rendered

forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The mere existence [*15] of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)*. [46] [HN2] "*Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)*. [HN3] To defeat a properly supported motion for summary judgment, the party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex, 477 U.S. at 324, 106 S. Ct. at 2552, quoting F.R.Civ.P. 56(e); Auguster v. Vermilion Parish School Board, 249 F.3d 400, 402 (5th Cir. 2001)*. [*16]

46 [HN4] Whether a fact is material depends upon the substantive law. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson, 477 U.S. at 248, 106 S. Ct. at 2510, citing generally* 10A C. Wright, A. Miller, and M. Kane, Federal Practice & Procedure § 2725, pp. 93-95 (1983). A dispute about a material fact is genuine if, construing the evidence in the light most favorable to the nonmoving party, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

Issues Presented

Plaintiff alleges two grounds in support of his motion for summary judgment. First, plaintiff argues that Title VII prohibits employment discrimination on the basis of sexual stereotyping and that defendant's termination of him for his off-duty acts of crossdressing and impersonating a woman is a form of forbidden [*17] sexual stereotyping. [47] Second, plaintiff contends that he is a victim of disparate treatment in violation of Title VII. He alleges that he was terminated because he crossdressed while off-duty, although other similarly situated female employees were not discharged. [48]

47 Plaintiff does not claim that because of his gender identity disorder, he has a disability under the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101, et seq*, or that his discharge is a violation of ADA. Congress specifically excluded gender identity disorders from coverage under the ADA. *See, 42 U.S.C. § 12211(b)*, which states in relevant part: [HN5] "Under this chapter, the term "disability" shall not include--(1) transvestism, transsexualism, ... gender identity disorders not resulting from physical impairments, or other sexual behavior disorders."

48 Plaintiff alleges that the defendant "does not fire female employees who regularly wear masculine clothing and accessories in public off the job." Rec. Doc. No. 37, p. 15.

[*18] Defendant denies that plaintiff was fired for failing to conform to a male stereotype. It asserts that plaintiff's activities as a male who publicly pretended to be a female do not fall within Title VII's protection. As to plaintiff's disparate treatment claim, defendant contends that the there is no evidence in the record that any female employee of Winn-Dixie ever crossdressed and impersonated a male. [49]

49 Rec. Doc. No. 42, p. 15.

Title VII

Title VII, *42 U.S.C. § 2000e-2(a)* provides in part that [HN6] "it shall be an unlawful employment practice for an employer (1) to ... discharge any individual ... because of such individual's ... sex." [50] The threshold determination with respect to plaintiff's first claim is whether a transgendered individual who is discharged because he publicly crossdresses and impersonates a person of the opposite sex has an actionable claim under Title VII.

50 *La. R.S. 23:332*, the Louisiana counterpart to Title VII, provides in pertinent part that [HN7] "A. It shall be unlawful discrimination in

> employment for an employer to engage in any of the following practices: (1) Intentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's ... sex."

[*19] In *Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017, 105 S. Ct. 2023, 85 L. Ed. 2d 304 (1985)*, a male airline pilot was fired when, following sex reassignment surgery, she attempted to return to work as a woman. The court considered whether the word "sex" in Title VII meant not only biological sex, i.e., male or female, but also "sexual preference" and "sexual identity." [HN8] The Seventh Circuit concluded, based upon the plain meaning of the word "sex" and the legislative history of Title VII, that sex meant "biological sex". The court recognized that [HN9] it is a "maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning." *742 F.2d at 1085*. The Ulane court stated that:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. [HN10] The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself [*20] to be a female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on *section 2000e-2(a)(1)* strongly reinforces the view that the section means nothing more than the plain language implies.

Id.

Following Ulane, several courts have held that persons with gender identity disorders, including those discharged because they were transsexuals, did not have claims cognizable under Title VII. [51] Like the Ulane court, these courts have held that discrimination on the basis of *sex* means discrimination on the basis of the plaintiff's biological sex.

51 *Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977)*(Transsexual's Title VII claim rejected on the basis that Congressional intent was that the word "sex" in the statute was to be given its plain meaning as indicated by the failure of several bills to amend Title VII to prohibit discrimination on the basis of "sexual preference"); *Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982)*(The court held that the discharge of plaintiff, who "misrepresented himself 'herself' as an anatomical female when she applied for the job", was not actionable under Title VII. Plaintiff alleged that he was a "female with the anatomical body of a male." The court stated that, "we are in agreement with the district court that for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII."); *Dobre v. National R.R. Passenger Corp., 850 F. Supp. 284, 286-287 (E.D. Pa. 1993)*("An employer may not discriminate against a female because she is *female*. [citations omitted]. However, neither the plaintiff's memorandum of law nor the Court's independent research has disclosed any case broadening Title VII so as to prohibit an employer from discriminating against a male because he wants to become a female. Simply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism."); *Powell v. Read's, Inc., 436 F. Supp. 369, 370 (E.D. Md. 1977)*(Court dismissed Title VII claim of a transsexual, holding that to construe Title VII "to cover plaintiff's grievance would be impermissibly contrived and inconsistent with the plain meaning of the words .... The gravamen of the Complaint is discrimination against a transsexual and that is precisely what is not reached by Title VII."); *Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456, 457 (N.D. Cal. 1975), aff'd, 570 F.2d*

354 (9th Cir. 1978)(Table, No. 75-3808)("It is this Court's opinion, however, that employment discrimination based on one's transsexualism is not, nor was intended by Congress to be, proscribed by Title VII of the Civil Rights Act of 1964, of which *42 U.S.C. § 2000e-2(a)(1)* is part. *Section 2000e-2(a)(1)* speaks of discrimination on the basis of one's 'sex.' No mention is made of change of sex or of sexual preference. The legislative history of as well as the case law interpreting Title VII nowhere indicate that 'sex' discrimination was meant to embrace 'transsexual' discrimination, or any permutation or combination thereof."); *Doe v. United States Postal Service, 1985 U.S. Dist. LEXIS 18959 (D.D.C. 1985)*(Court held that plaintiff, a male transsexual whose offer of employment was rescinded after employer learned that he was planning to undergo sex reassignment surgery and wanted to begin work as a woman, failed to state a claim under Title VII. The court agreed with Ulane, noting that a "prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they are born", *quoting Ulane, 742 F.2d at 1085*); *Emanuelle v. United States Tobacco Co., Inc., 1987 U.S. Dist. LEXIS 9790 (D. Ill. 1987), aff'd, 886 F.2d 332 (7th Cir. 1989)*(Table, No. 87-2785)(Court held that the Title VII claims of plaintiff, a transsexual, must be dismissed as not within the jurisdiction of Title VII); *James v. Ranch Mart Hardware, Inc., 1994 U.S. Dist. LEXIS 19102 (D. Kan. 1994)*("Plaintiff cannot state a claim for discrimination based upon transsexualism because employment discrimination based upon transsexualism is not prohibited by Title VII", *citing Voyles, 403 F. Supp. at 457*. "Even if plaintiff is psychologically female, Congress did not intend 'to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual." Id. at *1, *quoting Sommers, 667 F.2d at 748*); *Rentos v. Oce-Office Systems, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996)*("Every federal court that has considered the question has rejected the application of the Civil Rights Act of 1964, *42 U.S.C. 2000e-2 (1982)* ["Title VII"] to a transsexual claiming employment discrimination [citations omitted] .... Plaintiff's counsel recognizes the uniformity of the federal courts' position in his Affidavit in Opposition, in which he states that he is 'aware that Federal Law, under Title VII, precludes protection of transsexuals with respect to discrimination in the workplace.' [Affidavit in Opposition, para. 4]. Plaintiff's Amended Complaint therefore cannot hope to, and does not purport to, state a claim under Title VII.").

[*21] In 1964, when Title VII was adopted, there was no debate on the meaning of the phrase "sex". [52] In the social climate of the early sixties, sexual identity and sexual orientation related issues remained shrouded in secrecy and individuals having such issues generally remained closeted. Thirty-eight years later, however, sexual identity and sexual orientation issues are no longer buried and they are discussed in the mainstream. Many individuals having such issues have opened wide the closet doors.

52 *Ulane, 742 F.2d at 1085*. As observed in Ulane, "When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. 'Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.' [citations omitted]. This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination. [citation omitted]." Id.

"The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation." Id.

[*22] Despite the fact that the number of persons publicly acknowledging sexual orientation or gender or

sexual identity issues has increased exponentially since the passage of Title VII, the meaning of the word "sex" in Title VII has never been clarified legislatively. From 1981 through 2001, thirty-one proposed bills have been introduced in the United States Senate and the House of Representatives which have attempted to amend Title VII and prohibit employment discrimination on the basis of affectional or sexual orientation. None have passed. [53]

53 H.R. 1454 Civil Rights Amendments Act of 1981 (Jan. 28, 1981-1st Session), rejected; H.R. 3371, Civil Rights Act of 1981 (May 1, 1981-1st Session), rejected; S. 1708, Civil Rights Amendments Act of 1981 (Sept. 9, 1981-1st Session), rejected; S. 430, Civil Rights Amendments Act of 1983 (Jan. 24, 1983-1st Session), rejected; H.R. 427, Civil Rights Amendments Act of 1983 (Jan. 3, 1983-1st Session), rejected; H.R. 2624, Civil Rights Amendments Act of 1983 (April 19, 1983-1st Session), rejected; S. 1432, Civil Rights Amendments Act of 1985 (July 15, 1985-1st Session), rejected; H.R. 230, Civil Rights Amendments Act of 1985 (Jan. 3, 1985-1st Session), rejected; S. 464, Civil Rights Amendments Act of 1987 (Feb. 4, 1987-1st Session), rejected; H.R. 709, Civil Rights Amendments Act of 1987 (Jan. 21, 1987-1st Session), rejected; S. 47, Civil Rights Amendments Act of 1989 (Jan. 3, 1989-1st Session), rejected; H.R. 655, Civil Rights Amendments Act of 1989 (Jan. 24, 1989-1st Session), rejected; S. 574, Civil Rights Amendments Act of 1991 (Feb. 6, 1991-1st Session), rejected; H.R. 1430, Civil Rights Amendments Act of 1991 (Mar. 13, 1991-1st Session), rejected; H.R. 423, Civil Rights Amendments Act of 1993 (Jan. 5, 1993-1st Session), rejected; S. 2238, Employment Non-Discrimination Act of 1994 (June 7, 1994-2nd Session), rejected; H.R. 431, Civil Rights Act of 1993 (Jan. 5, 1993-1st Session), rejected; H.R. 4636 Employment Non-Discrimination Act of 1994 (June 23, 1994-2nd Session), rejected; H.R. 382, Civil Rights Amendments Act of 1995 (Jan. 4, 1995-1st Session), rejected; S. 932, Employment Non-Discrimination Act of 1995 (June 5, 1995-1st Session), rejected; H.R. 1863, Employment Non-Discrimination Act of 1995 (June 15, 1995-1st Session), rejected; H.R. 365, Civil Rights Amendments Act of 1998 (Jan. 7, 1997-1st Session), rejected; S. 869, Employment Non-Discrimination Act of 1997 (June 10, 1997-1st Session), rejected; H.R. 1858, Employment Non-Discrimination Act of 1997 (June 10, 1997-1st Session), rejected; H.R. 311, Civil Rights Amendments Act of 1999 (Jan. 9, 1999-1st Session), rejected; S. 1276, Employment Non-Discrimination Act of 1999 (June 24, 1999-1st Session), rejected; H.R. 2355, Employment Non-Discrimination Act of 1999 (June 24, 1999-1st Session), rejected; H.R. 217, Civil Rights Amendments Act of 2001 (Jan. 3, 2001-1st Session), pending; S. 1284, Employment Non-Discrimination Act of 2001 (July 31, 2001-1st Session), pending; H.R. 2692, Employment Non-Discrimination Act of 2001 (July 31, 2001-1st Session), pending; Protecting Civil Rights for All Americans Act (Jan. 22, 2001-1st Session), pending.

[*23] In contrast to the numerous failed attempts by Congress to include affectional or sexual orientation within Title VII's ambit, neither plaintiff nor defendant can point to any attempts by Congress to amend Title VII in order to clarify that discrimination on the basis of gender or sexual identity disorders is prohibited. [54] Neither party has identified any specific legislative history evidencing Congressional intent to ban discrimination based upon sexual or gender identity disorders.

54 The Court directed the parties to file supplemental briefs addressing whether, from 1982 to the present, Congress had made any attempts to amend Title VII to expressly include affectional or sexual orientation, preference or identity within the meaning of discrimination on the basis of "sex". Rec. Doc. No. 59. While the defendant identified numerous attempts to amend Title VII to specifically prohibit employment discrimination on the basis of "affectional or sexual orientation", neither party identified any proposed bill by either the House or the Senate to amend Title VII to specifically prohibit discrimination on the basis of gender or sexual identity.

[*24] Plaintiff argues that his termination by

Winn-Dixie was not due to his crossdressing as a result of his gender identity disorder, but because he did not conform to a gender stereotype. In support of his argument, plaintiff relies on the United States Supreme Court's decision in *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)*. In Price Waterhouse, the United States Supreme Court held that discrimination on the basis of sex or gender stereotyping was discrimination because of "sex" within the meaning of Title VII. In that case, the partnership candidacy of the plaintiff, a senior manager who was the only woman of eighty-eight candidates considered for partnership, was placed on hold for a year. [55] The Supreme Court noted that the evidence suggested that "there were clear signs ... that some of the partners reacted negatively to Hopkins' personality *because she was a woman*." [56] *(italics added)*. Partners at the firm criticized her because she was "macho", "overcompensated for being a woman", and suggested that she needed "a course at charm school". [57] The most damning evidence of sex discrimination was the advice Ms. [*25] Hopkins was given to improve her partnership chances. She was told she should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." [58]

55 *490 U.S. at 231-232*; *109 S. Ct. at 1780-1781*.
56 *490 U.S. at 235*; *109 S. Ct. at 1782*.
57 Id.
58 *490 U.S. at 235*; *109 S. Ct. at 1782*.

The Supreme Court found that the plaintiff was discriminated against because of her gender, i.e., because she was a woman, in violation of Title VII. The Court explained:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or [*26] that she must not be, has acted on the basis of gender ....
>
> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[in] forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13, 98 S. Ct. 1370, 1375, n. 13, 55 L. Ed. 2d 657 (1978)*, quoting *Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)*. [HN11] An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

490 U.S. at 250-251; *109 S. Ct. at 1790-1791*.

In analyzing plaintiff's Title VII claim post Price Waterhouse, the Court notes that [HN12] courts have long held that discrimination on the [*27] basis of sexual orientation is not actionable under Title VII. In *Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000)*, the court found that, "because the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation." *232 F.3d at 36*. While the Simonton court did not decide whether the plaintiff was being discriminated against because of a sexual stereotype in violation of Price Waterhouse, it did observe:

> The Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief

would be available for discrimination based upon sexual stereotypes.

232 F.3d at 38. [59]

59 Long after Price Waterhouse was decided, courts have continued to hold that discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person's "sex." *Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999)*("We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment--and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."); *Spearman v. Ford Motor Co., 231 F.3d 1080, 1084-1085 (7th Cir. 2000), cert. denied, 532 U.S. 995, 121 S. Ct. 1656, 149 L. Ed. 2d 638 (2001)*("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation. [citation omitted]. Therefore, harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."); *Mims v. Carrier Corp., 88 F. Supp. 2d 706, 713-714 (E.D. Tex. 2000)*(Citing *Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978)*, the court agreed with the defendant that discrimination on the basis of sexual orientation is not actionable under Title VII, stating that "neither sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act. Therefore, lacking membership in a protected class, the plaintiff's claim must fail as a matter of law."); *Broadus v. State Farm Ins. Co., 2000 U.S. Dist. LEXIS 19919 (W.D. Mo. 2000)*(In a Title VII suit brought by a transsexual, the court rejected plaintiff's suggestion that harassment because of homophobia was protected by Title VII, stating that "Title VII's protections do not extend to discrimination on the basis of sexual orientation or sexual preference."); *Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3rd Cir. 2001), cert. denied, 534 U.S. 1155, 122 S. Ct. 1126, 151 L. Ed. 2d 1018 (2002)*("Harassment on the basis of sexual orientation has no place in our society [citations omitted]. Congress has not yet seen fit, however, to provide protection against such harassment. Because the evidence produced by Bibby--and, indeed, his very claim--indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII.").

[*28] After much thought and consideration of the undisputed facts of this case, the Court finds that this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. [60] Rather, the plaintiff disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity. The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named "Donna."

60 There is no evidence that plaintiff was discriminated against because he was perceived as being insufficiently masculine, i.e., that he suffered adverse employment actions because he appeared to be effeminate or had mannerisms which were stereotypically feminine. This is distinguishable from *Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001)*. In Nichols, the male plaintiff sued under Title VII alleging that he was verbally harassed "because he was effeminate and did not meet [his co-employees'] views of a male stereotype." *256 F.3d at 869*. The Nichols court recognized that this was a *Price Waterhouse* claim alleging discrimination on the basis of sexual stereotypes, stating that "at its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray 'like a woman'--i.e., for having feminine mannerisms. Sanchez was derided for not having sexual

> intercourse with a waitress who was his friend. Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as 'she' and 'her.' And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender. *Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here." *256 F.3d at 874-875*.

[*29] Plaintiff's actions are not akin to the behavior of plaintiff in Price Waterhouse. The plaintiff in that case may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona. [61]

> 61 *See also, Bellaver v. Quanex Corp., 200 F.3d 485, 495 (7th Cir. 2000)*. In a Title VII case filed by a woman claiming that she was discriminated against on the basis of sexual stereotypes, the court found that the evidence presented a genuine issue whether male employees were treated better than she was. *200 F.3d at 495*. The court observed:
>
> > As in *Price Waterhouse*, the evidence suggests that the employer here may have relied on impermissible stereotypes of how women should behave. Bellaver's evaluations are marred only by the repeated references to her interpersonal skills, but these same types of deficiencies seemed to be tolerated in male employees. Penny knew of the sexist double-standard, knew that men resented working with Bellaver because she was a woman and knew that the company had a reputation as a 'good ol' boy' network. Penny sought Bellaver's firing in late 1996 or early 1997 because of her social skills, or lack thereof. The human resources manager ... reviewed Bellaver's file and told Penny that he did not have cause to fire her based on her interpersonal skills .... Penny and Gulliford decided to fire Bellaver and have Penny, Hucker and others absorb her duties. A jury reasonably could find that this decision was motivated at least in part by the double-standard applied to men and women because only Bellaver [a woman employee] and not Breen, Arbizzani or Gulliford [all male employees], was criticized for being hard to get along with.
>
> *200 F.3d at 492-493*.

[*30] This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. After a review of the legislative history of Title VII and the authorities interpreting the statute, the Court agrees with Ulane and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex. While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase "sex" has not been interpreted to include sexual identity or gender identity disorders.

In holding that defendant's actions are not proscribed by Title VII, the Court recognizes that many would disagree with the defendant's decision and its rationale. The plaintiff was a long-standing employee of the defendant. He never crossdressed at work and his crossdressing was not criminal or a threat to public safety.

Defendant's rationale for plaintiff's discharge may strike many as morally wrong. However, the function of this Court is not to raise the social conscience of defendant's upper level management, but to construe the law in accordance [*31] with proper statutory construction and judicial precedent. The Court is constrained by the framework of the remedial statute enacted by Congress and it cannot, therefore, afford the luxury of making a moral judgment. As the Ulane court observed:

> Congress has a right to deliberate on

> whether it wants such a broad sweeping of the untraditional and unusual within the term "sex" as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view. We do not believe that the interpretation of the word "sex" as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court .... If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.

742 F.2d at 1086.

By virtue of the many courts which have struggled for two decades with the issue of whether Title VII, in prohibiting discrimination on the basis of "sex", also proscribes discrimination on the basis of sexual identity [*32] disorders, sexual preference, orientation, or status, Congress has had an open invitation to clarify its intentions. The repeated failure of Congress to amend Title VII supports the argument that Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder. In reaching this decision, this Court defers to Congress who, as the author of Title VII, has defined the scope of its protection. Neither Title VII nor the United States Supreme Court's decision in Price Waterhouse affords plaintiff the protection that he seeks.

Disparate Treatment

Plaintiff's second claim is that he, as a male crossdresser, was treated differently than three women employees whom he observed wearing male clothing and who were not fired for being crossdressers. [62] As explained in *Portis v. First National Bank of New Albany, MS, 34 F.3d 325 (5th Cir. 1994)*:

> [HN13] A Title VII plaintiff carries 'the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.' *International Bhd. of Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 1866, 52 L. Ed. 2d 396 (1977)* [*33] ....
>
> A plaintiff may use either direct or circumstantial evidence to prove a case of intentional discrimination. [*United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714, n. 3, 103 S. Ct. 1478, 1481, n. 3, 75 L. Ed. 2d 403 (1983)]*. Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence to meet the test set out in *McDonnell Douglas.* [63] This test establishes a prima facie case by inference, but it is not the exclusive method for proving intentional discrimination. "The McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 621-22, 83 L. Ed. 2d 523 (1984)*.
>
> 'Direct evidence is evidence which, if believed, proves the fact [of intentional discrimination] without inference or presumption.' *Brown v. East Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993)*. In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face. [citations omitted].

34 F.3d at 328-329.

62 Rec. Doc. No. 37, p. 15

[*34]

63 [HN14] "To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. The *McDonnell Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated. [Citation omitted]. Once the employer articulates a

> legitimate, nondiscriminatory reason for the employment action, however, the scheme of shifting burdens and presumptions 'simply drops out of the picture,' and 'the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [her]' because of [her sex]'." *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)*." *Urbano v. Continental Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998), cert. denied 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed. 2d 422 (1998), reh'g denied, 525 U.S. 1117, 119 S. Ct. 894, 142 L. Ed. 2d 792 (1999)*. [HN15] "The plaintiff bears the ultimate burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against her because of her protected status." *Wallace v. Methodist Hospital System, 271 F.3d 212, 220-221 (5th Cir. 2001), reh'g denied, 31 Fed. Appx. 157 (5th Cir. 2001)*(Table, No. 00-20255), *cert. denied, 122 S. Ct. 1961, 152 L. Ed. 2d 1022 (2002), citing Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981)* and *St. Mary's, 509 U.S. at 511-12, 113 S. Ct. at 2749-50*.

[*35] With respect to the proof necessary to establish a disparate treatment claim pursuant to Title VII, the Fifth Circuit has stated:

> We have held that in order [HN16] for a plaintiff to show disparate treatment, she must demonstrate "that the misconduct for which she was discharged was nearly identical to that engaged in by an employee [not within her protected class] whom [the company] retained." *Smith v. Wal-Mart Stores (No. 471), 891 F.2d 1177, 1180 (5th Cir. 1990)*(per curiam)(first and second alterations ours, third alteration in original)(quoting *Davin v. Delta Air Lines, Inc., 678 F.2d 567, 570 (5th Cir. Unit B 1982))*[other citations omitted]. Or put another way, the conduct at issue is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer. *See Wyvill v. United Cos. Life Ins. Co., 212 F.3d 296, 304-05 (5th Cir. 2000)*(requiring the plaintiff to show that the company treated others differently in "nearly identical circumstances" and finding that "the striking differences between the two men's [*36] situations more than account for the different treatment they received.")(other citations omitted).

Wallace, 271 F.3d at 221.

There is no evidence in the record establishing that any woman who worked for the defendant was a crossdresser, i.e., a woman who adorned herself as a man in order to impersonate a man and who used a man's name. [64] While there were women working for the defendant who wore jeans, plaid shirts, and work shoes while working in the warehouse or in refrigerated compartments, there is no evidence that they were transgendered or that they were crossdressers, i.e., that they impersonated men and adopted masculine personas or that they had gender identity disorders. [65] Plaintiff's claim for disparate treatment fails because he has not demonstrated a genuine issue of material fact with respect to this claim and the defendant is entitled to judgment as a matter of law. [66]

64 Rec. Doc. No. 42, Exh. A, Istre Dep., p. 131, and Exh. I, Istre Dec., para. 4 and 6; Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 235-236, 238, 243-244, and 247.

65 Plaintiff acknowledged in his deposition that he did not know if the three female employees whom he alleged were similarly situated were crossdressers or transgendered. Nor did he know whether Winn-Dixie management perceived these female employees to be crossdressers or transgendered. Rec. Doc. No. 40, Exh. A, Oiler Dep., pp. 248-253.

[*37]

66 *F.R.Civ.P. 56(c)*.

Conclusion

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of defendant, Winn-Dixie, Louisiana, Inc., for summary judgment is **GRANTED.**

IT IS FURTHER ORDERED that the motion of plaintiff, Peter Oiler, for summary judgment is **DENIED.**

New Orleans, Louisiana, this 16 day of Sep, 2002.

LANCE M. AFRICK

UNITED STATES DISTRICT JUDGE