Price Waterhouse v. Hopkins (No. 87-1167)

Syllabus	Opinion [Brennan]	Concurrence [White]	Concurrence [O'Connor]	Dissent [Kennedy]
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BRENNAN, J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

490 U.S. 228

Price Waterhouse v. Hopkins

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

No. 87-1167 Argued: October 31, 1988 --- Decided: May 1, 1989

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 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 [p232] 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 [p233] 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.

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.[n1] 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.

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 [p234] specifically found that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multimillion-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.

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 "interpersonal [p235] 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 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 [p236] 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.

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 [p237] 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 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 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 [p238] 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.[n2] We conclude that, as often happens, the truth lies somewhere in-between. [p239]

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.[n3] 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 "for cause" legislation,[n4] Title VII eliminates 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.

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, the statute forbids [p240] 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).[n5] 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.[n6]

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 [p241] 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 words "because of" do not mean "*solely* because of,"[n7] we also know that 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.

To attribute this meaning to the words "because of" does not, as the dissent asserts, *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. *Post* at 282. 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 [p242] 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 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 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. The other important aspect of 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 [p243] impact 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 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.[n8] 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.[n9]

110 Cong.Rec. 7247 (1964), quoted in *Griggs v.* [p244] *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).

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[n10] only by proving that it would have made the same [p245] 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.

Our holding casts no shadow on *Burdine,* in which we decided that, 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 [p246] 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 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 factfinder 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).[n11]

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 [p247] 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 "*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.[n12] 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. [p248]

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. 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). As these examples demonstrate, our assumption always has been that, if an employer allows gender to affect its decisionmaking 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 burdens and

benefits. In *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), the [p249] 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 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, [p250]

> [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 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.[n13] 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.

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. [p251] 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 & 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.

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' specific proof, however, we do not suggest a limitation on the possible ways [p252] 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).

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 [p253] of an impermissible motive. [n14] 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 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.

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 of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.

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 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 [p254] 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 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 [p255] sex-linked evaluations to play a part in the decisionmaking 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. [p256]

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.[n15]

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; 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. [n16] [p257]

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 [p258] 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 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 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, 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.

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).

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").

[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.

[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.

[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).

[8.] We have in the past acknowledged the authoritativeness of this interpretive 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.

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) (upholding 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)).

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.

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.

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.

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.

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.

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.