

RESCUING THE DAMSEL IN DISTRESS: WHY THE JUDICIARY LEAVES THE HEROINE TIED TO THE TRAIN TRACKS

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INTRODUCTION

What does it mean to be feminine? Webster's dictionary defines it as, "characteristic of or appropriate or unique to women."¹ It seems intuitive; to be feminine is to be womanly. However, in a society where feminism and femininity are often pitted against each other, the definition seems incomplete—what does it mean to be a woman today? The simplest answer, no one really knows. As one psychologist put it, "I think we are in the process of redefining what it means to be a woman in today's world."² A sect of feminist theorists have put forward what is called "the new femininity" which purports to "allow" women to celebrate that which is traditionally feminine without crossing the feminist picket line.³ While the theory is admittedly centered on the physical, it represents the first step towards mending the rift between femininity and feminism.

From the beginning, the feminist movement has been something of a civil war. Although most modern women have taken advantage of, and arguably have taken for granted, feminist victories such as legislation

1. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11 ed. 2008), available at <http://www.merriam-webster.com/dictionary/feminine>.

2. Marcia Reynolds, *What Does it Mean to Be Feminine?*, PSYCHOLOGY TODAY (Dec. 13, 2010), <http://www.psychologytoday.com/blog/wander-woman/201012/what-does-it-mean-be-feminine>.

3. See generally Anthea Taylor, *What's New About 'the New Femininity'? Feminism, Femininity and the Discourse of the New*, 29 HECATE 182 (2003).

against discrimination on the basis of sex, legislation against sexual harassment, and increased awareness and protection against domestic violence, the majority of modern women do not consider themselves feminists.⁴ The question is why. For many women it is a refusal to abandon traditional feminine roles. As one blogger succinctly explains, “I want to live in a world where little girls are not pinkified, but where little girls who like pink are not punished for it, either. . . . Let’s stop acting like women who choose to be feminine are somehow colluders, betraying the movement, bamboozled into *thinking* that they want to be feminine.”⁵

Somehow, femininity has become a dirty word. Even as society has struck down discrimination on the basis of sex, it has snubbed its nose at femininity—that which is characteristic and unique to the female sex. This article will examine two main issues: First, the perceived conflict between femininity and feminist goals; and second, the judicial attitude toward femininity as displayed in Title VII sex discrimination cases.

I. “A WORLD OF DIFFERENCE BETWEEN BEING FEMALE AND BEING FEMININE”⁶

The term feminism was first used in 1895.⁷ Today, Webster’s dictionary defines it as “the theory of the political, economic, and social equality of the sexes” or “organized activity on behalf of women’s rights and interests.”⁸ Feminist theorists describe the movement as a series of three waves.⁹ The first wave of feminism began in the late 1800s and was primarily concerned with absolute rights, most notably suffrage.¹⁰ However, the first wave also struggled for reform in education, marriage laws, and employment.¹¹ The second wave of feminism occurred between the early 1960s and the late 1980s, although some theorists assert that the second wave has continued—now running concurrently with the third wave.¹² It is the second wave, and the transition that occurred there, that defines feminism for most modern women.¹³ During the 1970s, the feminist movement was in vogue and seen as an effort to gain women the same

4. Nancy Gibbs, *The War Against Feminism*, TIME, Mar. 9, 1992, at 50, available at <http://www.time.com/time/magazine/article/0,9171,975019-2,00.html>.

5. S.E. Smith, *Get Your Antifemininity Out of My Feminism*, THIS AIN’T LIVIN’ (Mar. 7, 2011, 10:17 AM), http://meloukhia.net/2011/03/get_your_antifemininity_out_of_my_feminism.html.

6. Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 11 (1995).

7. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 1.

8. *Id.*

9. See CHARLOTTE KROLOKKE & ANNE SCOTT SORENSEN, GENDER COMMUNICATION THEORIES & ANALYSES: FROM SILENCE TO PERFORMANCE 1-23 (2006).

10. *Id.* at 2-5.

11. *Id.* at 6-7.

12. *Id.* at 7-8.

13. See Gibbs, *supra* note 4.

rights and protections that their male counterparts enjoyed.¹⁴ However, all that changed in the 1980s; in what feminists have widely termed the “backlash,” feminism came to represent “denigrating motherhood pursuing selfish goals and wearing a suit.”¹⁵ The third wave of feminism deals with a backlash to the perceived shortcomings of feminist theory, as well as the continuing struggle for equality.¹⁶

A. *Sex and Gender*

So where does femininity enter into this? From the very beginning feminists have struggled with the balance between gender and sex.¹⁷ During the first wave, suffragettes wore their Sunday best, purposefully presenting an image of femininity while breaking away from the “cult of domesticity.”¹⁸ Understanding that the movement itself was a rejection of the accepted gender roles, suffragettes used their femininity to both affirm their place as women and to massage public acceptance of their cause—stubbornly refusing to allow a separation between gender and sex.¹⁹

In direct contrast, the second wave sought to forever sever the two concepts—often outright rejecting feminine norms in favor embracing the stereotypically masculine.²⁰ Many feminist writers demonized traditional notions of femininity, referring to the image as “Valium housewives” and “a lustless, cookie-baking June Cleaver in drag. A combo Stepford Wife/Virgin Mary.”²¹ Moreover, feminists of the second wave, focused on achieving full equality with their male counterparts.²² In many areas, such as in the workplace, sexuality, and reproduction rights, feminists strove toward the stereotypically masculine—to be equal to a man was to

14. *Id.*

15. *Id.*

16. See Krolokke & Sorensen, *supra* note 9, at 17-19.

17. See *id.* at 5-6. Feminist theorists commonly use “the terminology, ‘sex’ [to] refer[] to the anatomical and physiological distinctions between men and women; ‘gender,’ by contrast, is used to refer to the cultural overlay on those . . . distinctions.” Case, *supra* note 6, at 10.

18. Krolokke & Sorensen, *supra* note 9, at 3-5. The cult of domesticity refers to a belief that “a true woman’s place was in the home, meeting the needs of husband and children . . . [exemplifying modesty and wielding] only indirect influence, and certainly not engag[ing] in public activities.” *Id.* at 5.

19. See Margrit Shildrick, *Introduction: Sex and Gender*, in *THIRD WAVE FEMINISM: A CRITICAL EXPLORATION* 67, 67 (Stacy Gillis et al. eds., 2004).

20. See *id.*

21. Bess Summerlin Lewis, *A Woman’s Question: Reclaiming True Womanhood in the Age of Sexual Promiscuity* (May 2010) (unpublished honors thesis, University of Tennessee) (on file with author) (quoting another source).

22. See Betty Friedan, *The National Organization of Women’s 1966 Statement of Purpose*, NATIONAL ORGANIZATION FOR WOMEN, <http://www.now.org/history/purpos66.html> (last visited Oct. 19, 2011). This focus is clearly articulated in the opening of the National Organization of Women’s 1966 Statement of Purpose: “The purpose of NOW is to take action to bring women into full participation in the mainstream of American society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men.” *Id.*

be able to “act like one” with impunity.²³ It is this rejection of the feminine that many feminists cite as a reason for the backlash in popular culture: women refusing to label themselves feminists even as they acknowledge how much the movement has improved their lives.²⁴ “Younger women think of feminists as women who burn bras and don’t shave their legs . . . it’s become conventional wisdom.”²⁵

Although the third wave is still developing, it is interesting to see the decisive split between the factions. While some are reclaiming femininity as the right of their sex, others are perverting an affected girlish-ness as a rejection of traditional gender roles. On one end of the spectrum, feminists are reclaiming the “girly” by refusing to abandon the traditionally feminine for a masculine version of equality.²⁶ On the other hand, extreme factions like Riot Grrls are portraying “the girlishness and innocence preserved with the societal ideal of femininity, ‘while simultaneously . . . naming the performance of femininity . . . to be exactly its opposite—slutishness.’”²⁷ While one faction seeks to reconcile sex and gender, much as the first wave feminists, the other revels in the split of the second wave. This war between sex and gender, between idealizing the masculine ideal or reclaiming the feminine is echoed in sex discrimination theory.

B. Gender Roles and Jurisprudence

Title VII of the Civil Rights Act of 1964 reads in part:

(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

23. Krolokke & Sorensen, *supra* note 9.

24. A CBS poll found that although 69% of women felt that the feminist movement had made their life better, only 24% considered themselves feminists. Sean Alfano, *Poll: Women’s Movement Worthwhile*, CBS NEWS (Feb. 11, 2009, 7:03 PM), <http://www.cbsnews.com/stories/2005/10/22/opinion/polls/main965224.shtml>.

25. Gibbs, *supra* note 4.

26. See generally Rebecca C. Hains, *The Problematics of Reclaiming the Girlish: The Powerpuff Girls and Girl Power*, 5 FEMSPEC 1 (2004).

27. Lewis, *supra* note 21, at 12.

any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.²⁸

However, it is not unlawful for an employer to discriminate on the basis of sex "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."²⁹

As feminist author Catharine MacKinnon laments, there are only two standards by which sex discrimination claims are judged.³⁰ The first, called gender neutrality, assumes that women and men are the same; the second, special protection, is a sanctioning of double standards.³¹ However, as MacKinnon points out, both standards use the male ideal as the measuring stick.³² Under gender neutrality, the female is judged by her ability, or lack thereof, to mimic the male paradigm.³³ Special protection is a compensatory standard—affirmative action for failure to achieve the male standard.³⁴ There is no uniquely female standard.³⁵ Moreover, the courts in sexual discrimination cases have frequently blurred, or outright ignored, the separation between sex and gender.

From early on, "[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."³⁶ This attitude, at the very least, equates to discrimination because of sex on the basis on gender roles:

"[I]t is almost ludicrous to maintain that sex discrimination . . . takes place on the level of biology or genitals." Rather, almost all claims of sex discrimination are grounded in normative sex stereotypes and conformity to these stereotypes that "transform[s] a vagina into a she." Thus, "[b]iology and genitals . . . operate as

28. 42 U.S.C. § 2000e-2(a) (2006).

29. 42 U.S.C. § 2000e-2(e).

30. CATHERINE A. MACKINNON, *Feminism Unmodified: Discourses on Life and Law*, in GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 284, 284 (5th ed. 2009).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 285. Although phrased in relatively neutral and benign language, many feminists argue that "whenever women are, by this standard, 'different' from men and insist on not having it held against us, whenever a difference is used to keep us second class and we refuse to smile about it, equality law has a paradigm trauma." *Id.*

35. *Id.*

36. *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

false proxies for the real rules of both gender attribution and sexual identity in our culture.”³⁷

So what are sex stereotypes? Traditionally, gender generalizations which are fictitious or overbroad have been labeled sex stereotypes.³⁸ The answer is not that easy; sex stereotypes are based on generalizations about gender, although not every generalization is a stereotype.³⁹ The debate over classification has produced numerous ways to identify generalizations that have crossed the line into stereotypes.⁴⁰ However, the debate is largely an empty exercise. Whatever calisthenics are engaged, the goal is to determine whether or not the gender generalization is just—if it is unjust it becomes a stereotype and is disallowed.⁴¹ This labeling becomes a proxy for the court’s belief in the rightness of particular generalizations about gender and the alternative methods of classification provide reasonable grounds for whatever decision is desired. This is especially problematic when the rightness of traditional female gender roles, or femininity, is at issue.

What does it mean to be “characteristic of or appropriate or unique to women”;⁴² what does it mean to be feminine? Perhaps easier to define is what femininity is not—for much of history the feminine has been described as a lack. “Aristotle called [women] defective males; Freud stressed that they were missing a penis; Lacanians identified the feminine as negativity.”⁴³ The “lack” of femininity is universal. Virtually all societies apply gender to things, behaviors, activities, and jobs; although not all societies apply gender in the same way.⁴⁴ However, it is universally accepted that what is gendered feminine is seen as less valuable than what is gendered male.⁴⁵ Determining the value of femininity, especially in sexual discrimination cases, has never been more important.

Currently, less than 25% of women in this country identify themselves as feminists.⁴⁶ Even among those women who so identify, a substantial portion have chosen to reclaim traditional feminine roles.⁴⁷ This means that more than 70% of American women have rejected Second Wave feminist ideology and embraced more traditional feminine roles. Thus, it

37. Sunish Gulati, Note, *The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177, 2178-79 (2010) (footnotes omitted) (quoting another source) (internal quotation marks omitted).

38. Meredith M. Render, *Gender Rules*, 22 YALE J.L. & FEMINISM 133, 138 (2010).

39. *Id.*

40. *Id.*

41. *Id.*

42. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 1.

43. Case, *supra* note 6, at 36 (footnotes omitted).

44. *Id.* at 33.

45. *Id.*

46. Alfano, *supra* note 24.

47. See Hains, *supra* note 26, at 1.

is more crucial than ever to look critically at courts' interpretations of the justness of feminine sexual stereotypes. Rejection of the traditionally feminine as an unjust stereotype would be a rejection of the preference of the large majority of American women. Furthermore, blatant preference for stereotypically masculine traits "raises issues of central concern to the equality of the sexes . . . the close association of the disfavored qualities with women and of other, favored, qualities with men may well not be accidental—it may in fact be because some qualities are associated with women that they are disfavored."⁴⁸

II. IT MAY BE BETTER TO BE A MASCULINE WOMAN THAN A FEMININE ONE: CASE STUDIES IN SEX STEREOTYPES UNDER TITLE VII

A. *Dothard v. Rawlinson*⁴⁹

Dianne Rawlinson was a 22-year-old female, recently graduated from college with a degree in correctional psychology. She was on the smaller side, notably, she weighed less than 120 lbs. The impetus for the case was the denial of her employment as a correctional counselor, or prison guard, in the Alabama penitentiary system. Rawlinson was initially denied employment for failing to meet the 120lb. weight requirement; however, after filing an initial complaint the Alabama Board of Corrections adopted gender specific criteria when hiring guards. Specifically all guards in "contact" positions—"positions requiring continual close physical proximity to inmates of the institution" must be male.⁵⁰ Rawlinson presented two main Title VII sex discrimination claims: First, the height and weight requirements have a disproportionate impact on female applicants; furthermore, they are not a business necessity.⁵¹ Second, the exclusion of females from contact positions explicitly discriminates against women on the basis of sex; moreover, being male is not a bona fide occupational qualification (BFOQ).⁵²

Dothard is particularly interesting as a sex stereotyping case because of the dichotomy in the court's ruling. The court found that the height and weight requirement were impermissible.⁵³ Specifically, the court found that strength, not dimensional requirements, was the necessary qualification; as such, the disparate impact on female applicants constituted sex

48. Case, *supra* note 6, at 34.

49. 433 U.S. 321 (1977).

50. *Id.* at 325.

51. *See id.* at 321.

52. *Id.*

53. *Id.* at 332.

discrimination under Title VII.⁵⁴ Notably, although the court recognizes the disparate impact on female applicants, it makes no further gender-based comment.

In stark contrast, the exclusion of females from contact positions is entirely based on the determination of sexual stereotypes. The court begins its discussion by stating that “federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes.”⁵⁵ However, the court then dismisses stereotypes with the invocation of the BFOQ:

We are persuaded . . . that the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex. In the particular factual circumstances of this case, however, we conclude that [the exclusion of females from contact positions] falls within the narrow ambit of the [BFOQ] exception.⁵⁶

Regardless of the court’s dismissal, sex stereotypes form the basis for the holding of this case. Most notably: men deprived of heterosexual sex will be overcome with lust, and become uncontrollable, when confronted with the inherent sexuality of any female; women need, or are more deserving of protection than their male counterparts; and finally, male sex is indicative of the ability to wield authority. Some of these generalizations seem more at home in a Victorian novel than the Supreme Court in 1977. Conscious of this, the Court inoculates with statements like, “In this environment of violence and disorganization, it would be an oversimplification to characterize Regulation as an exercise in ‘romantic paternalism,’”⁵⁷ and, “[m]ore is at stake in this case, however, than an individual woman’s decision to weigh and accept the risks of employment in a ‘contact’ position in a maximum-security male prison.”⁵⁸

What becomes clear is that the majority believes these generalizations are just or fair generalizations about both male and female sexes. Moreover, the BFOQ provides an opportunity to legitimize that belief. This is highlighted by Justice Marshall’s dissent—where the majority frames the discussion in gender, the dissent only briefly touches on gender, instead focusing on objective qualifications for prison guards.⁵⁹ While Dothard is not particularly concerned with questions of femininity, it is an important lesson in the power of the judicial system to legitimize sexual stereotypes.

54. *Id.*

55. *Id.* at 333.

56. *Id.* at 334.

57. *Id.* at 335 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

58. *Id.*

59. *See id.* at 341 (Marshall, J., concurring in part and dissenting in part).

*B. Wislocki-Goin v. Mears*⁶⁰

This case revolves around the allegation of sex discrimination based on both disparate impact and disparate treatment. Prior to filing the case, Ms. Goin was employed as a teacher at the Juvenile Detention Center in Crown Point, Indiana. Ms. Goin has a bachelor's degree from Purdue in both elementary education and child psychology in addition to a master's degree in education with a certification in learning disabilities; she also has extensive employment experience. There is no indication that Ms. Goin was not a competent teacher, or that her teaching abilities were in any way connected to the decision to terminate her. Instead it was the "inappropriate behavior" exhibited by Ms. Goin during the course of her employment that is the subject of contention.⁶¹ The inappropriate behavior: wearing too much makeup, wearing her hair down, crying in front of a student, and writing a "Dear Santa" letter at a Christmas Party.

The Goin case is interesting for several reasons: First, this is a sexual discrimination claim brought by a female against another female. Second, the speed and nonchalance with which the Court dismissed both Goin's disparate impact and disparate treatment claims. There is no doubt that Goin's behavior is in line with traditional gender roles and stereotypes—dressing in a feminine manner, exhibiting emotions publicly, and acting in a maternal manner; however, the court never even mentions stereotypes.⁶²

The Court dismissed the disparate treatment claim for failure to state a *prima facie* claim⁶³—Goin failed to establish that she was treated differently from a similarly situated male. The Court is dismissive:

Although some evidence was presented that Ms. Goin was fired because of her gender,⁶⁴ there was more than ample evidence to support the district court's determination that she was discharged because she failed to follow her employer's instructions,⁶⁵ applied

60. 831 F.2d 1374 (7th Cir. 1987).

61. In fact, Ms. Goin was fired in spite of the recommendation from the review panel that she not be terminated.

62. I contend that creating the Dear Santa letter was a maternal act—Goin brought a piece of home, a sense of normalcy in the form of a Christmas tradition, to the students in her care while they were confined in a Juvenile Detention Center for the Christmas season.

63. *Wislocki-Goin*, 831 F.2d at 1379.

64. "Ms. Goin testified that she was told by Dr. Billy Williams, superintendent of the Juvenile Center, that 'if I had not been a woman, this would never have happened.'" *Id.* at 1379 n.4.

65. Goin's insubordination consisted of "continuing" to wear excessive makeup and her hair down. In the disparate impact claim the Court determines that the dress code applied equally to both males and females. *Id.* at 1380. However, there was no evidence that a man had ever received more than an oral reprimand for a dress code violation. Moreover, there was dispute over the number of times Ms. Goin violated the dress code. The Court agreed with the district court—rather than Ms. Goin—that she was reprimanded on two occasions, and that after having been reprimanded, she wore her hair down several times subsequently. *Id.* at 1376 n.1.

evenhandedly to males and females, with respect to a legitimate business concern.⁶⁶

Implicit in the Court's statement is that Ms. Goin was justifiably fired.

By dismissing the claims at their initial stages, the Court escapes confronting whether Ms. Goin was fired because she conformed to feminine stereotypes. That is, because a woman who behaves in a stereotypically feminine manner, is she unprofessional and therefore ill-suited to teach? This case does not provide an answer, although the tone of the Court gives some clue. While some of the fault could lie in an insufficient pleading by Ms. Goin, this case nonetheless illustrates the latent hostility toward females who bring sex discrimination cases based on conformity to stereotypical feminine norms.

C. *Price Waterhouse v. Hopkins*⁶⁷

Price Waterhouse is literally a text book example of sex stereotyping. Ann Hopkins was a senior manager for the accounting firm Price Waterhouse. After five years with Price Waterhouse, Hopkins was considered as a candidate for partnership.⁶⁸ Hopkins was well liked by the clients and had brought in several major accounts during her tenure with Price Waterhouse. She was described as:

"[A]n outstanding professional" who had a "deft touch," a "strong character, independence and integrity." Clients appear to have agreed with these assessments . . . [O]ne official from the State Department described her as "extremely competent, intelligent," "strong and forthright, very productive, energetic and creative." Another high-ranking official praised Hopkins' decisiveness, broadmindedness, and "intellectual clarity"; she was, in his

66. *Id.* at 1379. The legitimate business concern here is the professionalism of its employees. Implicit in this statement is that Ms. Goin's behavior was unprofessional.

67. 490 U.S. 228 (1989) (plurality opinion).

68. "At Price Waterhouse . . . 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 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." *Id.* at 232-233.

words, “a stimulating conversationalist.” . . . 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.”⁶⁹

Yet, Hopkins had problems. Her aggressiveness often translated to abrasiveness, especially with members of her staff.⁷⁰ Moreover, as a woman, Hopkins’ personality rubbed some partners the wrong way.

One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” 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.” 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.” . . . [However] the *coup de grace*: [came from Thomas Beyer who advised Hopkins] 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.”⁷¹

Hopkins was not selected for partnership, although her application was held for reconsideration the following year.⁷² At the time Price Waterhouse had 662 partners, only 7 of whom were women. Hopkins was the only female out of 88 candidates for partnership.⁷³

When Hopkins brought her case, she claimed that because she had so little contact with many of the voting partners their decision was based on sexual stereotypes.⁷⁴ The court ultimately agreed:

69. *Id.* at 234.

70. “[S]upporters and opponents of her candidacy . . . indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.” *Id.* at 235 (internal quotation marks omitted) (citing another source).

71. *Id.*

72. “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.” *Id.* at 233 n.1.

73. Forty-seven applicants were admitted to partnership, 21 were rejected, and 20, including Hopkins, were held for reconsideration. *Id.*

74. “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 com-

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.⁷⁵

The Court did not deny that Hopkins had communication problems, especially with her staff.⁷⁶ However, the Court found that Price Waterhouse gave little weight to Hopkins' communication issues.⁷⁷ Moreover, the Hopkins plurality “placed a great deal of weight on the doubleness of Hopkins's bind: ‘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.’”⁷⁸ Finally, the Court emphasized that past female candidates had been evaluated on their conformity to traditional gender roles.⁷⁹

Hopkins won, that much is clear. What is unclear, is the role gender and sex play in this decision. The Court laid out gender norms or stereotypes for both males and females. Hopkins claims that she was discriminated against because she was a woman—because of her sex. However, while Hopkins' sex was an important factor, more important was the gender she emulated—male. Not that Hopkins was trying to be male, rather her personality traits were traditionally gendered male. The Court was strangely protective of her right to behave in a typically male manner. After all, “[f]or most jobs, especially those offering high status and high pay, masculine qualities were seen as more desirable.”⁸⁰

ments 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, and another described her as ‘consistently annoying and irritating’; yet these were people who had had very little contact with Hopkins. According to 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.” *Id.* at 235-36 (citations omitted).

75. *Id.* at 256.

76. *Id.* at 234-35.

77. Judge Gesell found that male candidates who had similar problems and were still admitted to partner, had additional positive traits that Hopkins did not possess. *Id.* at 236 (quoting another source).

78. Case, *supra* note 6, at 45 (quoting *Price Waterhouse*, 490 U.S. at 251).

79. “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.’” *Price Waterhouse*, 490 U.S. at 236 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

80. Case, *supra* note 6, at 31.

Do the Court's actions signal an acceptance of Catharine Mackinnon's theory that there is only one standard, the male standard, and the best women can hope for is to measure up? What does this say about the seven women who had become partners by conforming to traditional gender roles?

III. THE OTHER WOMAN

The *Price Waterhouse* Court clearly fell into step with the second wave of feminism: "[H]aving to be the same as men to be treated equally remains the standard . . . [Hopkins won] for meeting the male standard, a victory against holding her to a 'femininity' standard."⁸¹ However, the majority of modern American women are choosing to embrace their femininity, women who refuse to choose between success and femininity—women like the seven partners who overcame the "intolerable and impermissible catch-22."⁸² They achieved the same level of success as their male counterparts, they achieved the male standard, but they did it while still conforming to traditional gender roles.

The subtext, the language, used by the Court in *Dothard*, *Goin*, and *Price Waterhouse* clearly indicate a continuing devaluation of the traditionally feminine: the other female partners conformed, Goin's femininity was unprofessional, and Rawlinson was unable to effectively wield authority because of her sex. While Hopkins concededly won a sex discrimination suit, the holding continues to place value only on the traditionally masculine. The other women are a footnote in *Price Waterhouse*,⁸³ a prop to illustrate the pervasiveness of gender in the partnership committee's decision-making process. In fact, the Court is more willing to set new precedents in sex stereotyping jurisprudence—ascribing Hopkins aggressiveness and subsequent communications problems to a refusal to conform to feminine stereotypes—rather than admit completely apart from her sex that she may have simply had flaws. Flaws, ones that could reasonably have kept her from achieving partner status. "It may now even perhaps be viewed as better to be a masculine woman than a feminine one."⁸⁴

In a society where the majority of women conform at least in some way to traditional notions of femininity—where a significant proportion are choosing to embrace their femininity—it is imperative that the judiciary become conscious of its devaluation of the traditionally feminine gender roles. While there may only be one measuring stick, its traditionally

81. *Id.* at 32 (quoting another source).

82. *Price Waterhouse*, 490 U.S. at 252.

83. *See id.* at 236.

84. Case, *supra* note 6, at 31.

masculine gender does not preclude acknowledging the value in the traditionally feminine.