Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination claims Based on Sex-Stereotyped Interview Questions

Heather K. Gerken
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr
Part of the Civil Rights and Discrimination Commons, Labor and Employment Law Commons, Law and Gender Commons, and the Legislation Commons

Recommended Citation

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
NOTES

Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions

Heather K. Gerken

INTRODUCTION

During a job interview an employer asks a female applicant whether the position would interfere with her child care arrangements, her childbearing plans, or her relationship with her spouse. These questions represent sex stereotypes, that is, a "‘set of attributes ascribed to a group and imputed to its individual members because they belong to that group.’"¹ The employer does not pose these questions to male applicants and ultimately selects a well-qualified man for the position. The female applicant subsequently files a "mixed motives" discrimination claim, alleging that the employer based a hiring decision upon both discriminatory and legitimate considerations.²

Has this employer violated Title VII of the Civil Rights Act of 1964³

¹. Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 Hastings L.J. 471, 487 (1990) (quoting Madeline E. Heilman, Sex Bias in Work Settings: The Lack of Fit Model, 5 Res. in Organizational Behav. 269, 271 (1983)). Sex stereotypes may include assumptions that women are primarily responsible for child care, that a woman’s career is secondary to her husband’s career, or that a woman necessarily will marry. The well-established body of literature concerning the nature of sex stereotypes, see, e.g., infra notes 8-17, should assist a factfinder in determining whether comments rest upon sex stereotypes. See also Martha Chamallas, Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins, 15 VT. L. Rev. 89, 90 (1990) (concluding that the evidence presented in the Supreme Court’s most recent decision on sex stereotyping was “located squarely within the mainstream” of psychology). But see Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1118 (D.D.C. 1985) (noting that when evaluations do not, on their face, reflect sex stereotypes but merely represent negative comments about an employee, “it is impossible to label any particularly negative reaction as being motivated by intentional sex stereotyping”) modified, 490 U.S. 228 (1989). For a discussion of the Supreme Court’s review of Price Waterhouse, see infra notes 41-55 and accompanying text.


(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
by posing questions based on sex stereotypes to the female applicant during a job interview.  

In light of women's failure to achieve equality in the workplace, sex stereotyping remains an important issue in employment law. Decades after Title VII outlawed employment discrimination on the basis of sex, women still are concentrated in low-paying, low-status jobs. In the late 1980s, the average female college graduate earned less than the average white male with a high school diploma; she was also significantly less likely than a man to enjoy an advanced level of professional or financial achievement.

Sex stereotyping has played a significant role in limiting women's career opportunities. Studies reveal that sex stereotyping adversely
affects the evaluation of a woman's capabilities and performance. Sex-stereotyped notions of achievement cause employers to define success in masculine terms and to undervalue women's accomplishments. Anything that heightens an employer's awareness of a worker's femininity may adversely affect the employer's evaluation of her performance because it highlights the differences between her identity and the masculine qualities traditionally associated with success.
Sex-stereotyped interview questions focus an interviewer's attention upon the limitations stereotypically associated with an applicant's gender — whether her children or her husband will take precedence over her work, for example — instead of on the male characteristics that define leadership and achievement.13 The interview stage poses a particular risk that sex stereotyping will take place because the employer has only limited knowledge of the individual.14 Even women who exhibit the masculine characteristics traditionally associated with success suffer the effects of sex stereotyping because employers tend to perceive women negatively when they do not conform to feminine stereotypes.15 Women are thus caught in a "Catch-22": to succeed they must exhibit stereotypically masculine characteristics, yet doing so will often reduce their chances of success.16 Sex stereotyping, in turn, adversely affects women's job performance by lowering women's aspirations and providing negative feedback for those who defy stereotypes.17 Stereotyping thus creates barriers to women's advancement in the workplace, both by limiting a woman's achievements and by tainting an employer's evaluation of those accomplishments.

Although the federal courts have consistently recognized the discriminatory nature of sex stereotyping,18 they are divided in determining whether sex stereotyping is actionable under Title VII when it occurs during the interview stage of the hiring process.19 The Sec-

13. Cf. Chamallas, supra note 1, at 98 (noting that sex stereotypes lead employers to scrutinize women on "'feminine'" skills rather than "'masculine' task or performance measures").

14. See Lott, supra note 9, at 55 (noting that "negative evaluations of competent women are least likely in situations where persons are judging someone they know well, or with whom they have worked or interacted"). But see Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (sex stereotyping tainted the evaluations of a woman's longtime colleagues).

15. See Rhode, supra note 5, at 1219; Wilson, supra note 9, at 823-25; cf. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 75 (1987) (discussing this dilemma).

16. Price Waterhouse, 490 U.S. at 251; see also Rhode, supra note 8, at 1189.

17. See Radford, supra note 1, at 489, 500-01; Rhode, supra note 5, at 1221; Rhode, supra note 8, at 1189-90, 1192 n.156.

18. See, e.g., Price Waterhouse, 490 U.S. at 250-51; Barbano v. Madison County, 922 F.2d 139, 143 (2d Cir. 1990); King v. Trans World Airlines, Inc., 738 F.2d 255, 259 (8th Cir. 1984); Stukey v. United States Air Force, 790 F. Supp. 165, 170 (S.D. Ohio 1992). Even the courts that found that sex-stereotyped interview questions do not provide adequate proof for a Title VII claim characterized such inquiries as "discriminatory." Stukey, 790 F. Supp. at 170; cf. Bruno v. City of Crown Point, 950 F.2d 355, 362 (7th Cir. 1991) (noting that family oriented questions must be asked in a "neutral, nondiscriminatory manner of all applicants" and that the defendant failed to do so by posing such questions only to female candidates), cert. denied, 112 S. Ct. 2998 (1992).

Because the courts concur that this type of differential treatment is discriminatory, this Note will refer to sex stereotyping as "discriminatory." However, such references do not indicate that this type of discrimination is always actionable under Title VII.

19. Stukey, 790 F. Supp. at 169 (observing the disagreement between the Second, Eighth, and Seventh Circuits concerning this issue); see also Tracy L. Bach, Note, Gender Stereotyping in Employment Discrimination: Finding A Balance of Evidence and Causation Under Title VII, 77
ond and Eighth Circuits have found that sex-stereotyped interview questions are actionable under Title VII because they assume such inquiries necessarily taint the hiring decision. Conversely, the Seventh Circuit and the District Court for the Southern District of Ohio have held that sex-stereotyped questions standing alone do not support a Title VII claim; these courts require a plaintiff to provide explicit proof that the inquiries influenced the hiring decision. The Supreme Court has held that a promotion decision tainted by sex stereotyping may constitute employment discrimination, but it has declined to delineate what forms of sex stereotyping, standing alone, constitute Title VII violations.

Recent amendments to Title VII raise additional questions about intentional discrimination claims based on sex-stereotyped interview questions. In enacting the Civil Rights Act of 1991, Congress established new guidelines for analyzing mixed motives cases and explicitly rejected portions of Price Waterhouse v. Hopkins, the most recent Supreme Court decision concerning sex stereotyping in the workplace. Therefore, a thorough understanding of Congressional intent in amending Title VII is necessary to resolve issues concerning sex-stereotyped interview questions.

This Note analyzes the Civil Rights Act of 1991 and relevant case law to determine whether posing sex-stereotyped interview questions is actionable conduct under Title VII. It questions whether proof of discrimination during a phase in the hiring process, specifically during the interview stage, supports a Title VII claim without other in-

---

20. Barbano, 922 F.2d at 143.
22. Bruno, 950 F.2d at 362.
27. 490 U.S. 228 (1989).
dependent evidence that the hiring decision was discriminatory. Part I explains that the circuit courts have envisioned the impact of discrimination during the hiring process differently and, as a result, are divided in determining whether sex-stereotyped interview questions are actionable under Title VII. Part II examines the legislative history of the Civil Rights Act of 1991 to gauge Congress' intent in establishing a framework to analyze mixed motives claims. It concludes that the language, structure, and legislative history of the Act provide evidence of congressional intent to impose Title VII liability for a discriminatory phase in the hiring process as long as that discrimination bears a minimal causal connection to the hiring decision. Part II further concludes that sex-stereotyped interview questions are sufficiently related to the hiring decision to satisfy this causal requirement. Part III proposes a two-prong test to facilitate consistent adjudication of claims based on sex-stereotyped interview questions that promotes the goals of Title VII as amended by the Civil Rights Act of 1991. This Note concludes that if a plaintiff proves that an employer posed sex-stereotyped questions during an interview, a court should find that the employer violated Title VII unless the defendant introduces objective evidence that the interviewer posed similar questions to both men and women and that the sex stereotyping did not affect the hiring decision.

I. THE CASE LAW

The federal courts have split in determining whether sex-stereotyped interview questions are actionable under Title VII without other independent evidence that the hiring decision was discriminatory. Some courts recognize a link between sex-stereotyped interview questions and the hiring decision while other courts require explicit proof of this causal connection. This Part analyzes the disagreement among the federal courts over whether discrimination during a phase of the hiring process, as evidenced by sex-stereotyped interview questions, supports a Title VII claim. Section I.A defines mixed motives claims. Section I.B examines Price Waterhouse v. Hopkins, the Supreme Court's most recent decision on sex stereotyping, and finds that it provides little guidance for determining whether sex-stereotyped interview questions are actionable under Title VII as currently amended. Section I.C analyzes the division among the lower courts and argues that the circuit split hinges upon whether, to establish a Title VII claim, a plaintiff must provide additional proof that demonstrates an explicit causal connection between the sex stereotyping which takes place during the interview and the final hiring decision. While some courts have assumed this connection exists, other courts have required a plaintiff to provide additional evidence of a causal link between sex stereotyping and the hiring decision. See infra section I.C.

29. Independent evidence requires a plaintiff to provide additional proof that demonstrates an explicit causal connection between the sex stereotyping which takes place during the interview and the final hiring decision. While some courts have assumed this connection exists, other courts have required a plaintiff to provide additional evidence of a causal link between sex stereotyping and the hiring decision. See infra section I.C.

30. 490 U.S. 228 (1989).
claim, the court required independent proof that the hiring decision was discriminatory. While some courts assume that discrimination during the interview is sufficiently connected to the hiring decision to justify imposing Title VII liability, other courts require the plaintiff to produce evidence of this causal connection. This Part concludes that the circuit split can only be resolved by thoroughly analyzing the Civil Rights Act of 1991, which rejected key portions of *Price Waterhouse* and created a new framework to analyze mixed motives discrimination claims.

**A. Mixed Motives Analysis: An Overview**

Mixed motives claims allege that an employer has disparately treated an applicant by basing an employment decision upon both illegitimate and legitimate considerations. To prove disparate treatment under Title VII, a plaintiff must demonstrate that an employer intended to discriminate on the basis of a bias prohibited by the Civil Rights Act of 1964. Although traditional disparate treatment analysis assumes that hiring decisions are based upon either wholly discriminatory or wholly legitimate considerations, mixed motives analysis reflects the reality that a hiring decision is seldom based solely upon bias. Courts have applied this insight to discrimination claims by finding that an employer violates Title VII if discriminatory animus influences the hiring decision to a certain degree. The Supreme


32. The Supreme Court has noted that *disparate treatment* is "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The Court distinguished *disparate treatment* from *disparate impact* claims, which "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory." *International Bhd. of Teamsters*, 431 U.S. at 336 n.15 (citations omitted). This Note involves disparate treatment claims because the sex-stereotyped questions it considers are asked only of women. Arguably, one could bring a disparate impact claim against an employer who asked sex-stereotyped questions to both men and women if the sex-stereotyping had a greater effect upon female candidates. *See infra* note 125 (discussing disparate impact analysis within the context of this Note's two-prong test for analyzing disparate treatment questions).


33. *See Radford, supra* note 1, at 514.

34. *Id.*

35. The courts are divided, however, in determining to what extent discriminatory animus must influence the hiring decision to constitute a Title VII violation. *See infra* note 101 and accompanying text.
Court has endorsed this method of analyzing some Title VII claims.\textsuperscript{36} The Court, however, has not reviewed an intentional discrimination claim based solely upon sex-stereotyped interview questions,\textsuperscript{37} nor have the federal courts reached a consensus in applying the tools of mixed motives analysis to such claims.\textsuperscript{38}

B. \textit{Mixed Motives Analysis in Recent Supreme Court Decisions}

The Supreme Court has provided little guidance concerning whether sex-stereotyped interview questions, standing alone, may establish a Title VII violation. In its only treatment of a Title VII claim based on such questions, the Court in \textit{Anderson v. City of Bessemer}\textsuperscript{39} held that such questions, when combined with separate proof of highly discriminatory comments and the plaintiff's superior qualifications, provided evidence to support a Title VII claim. Because sex-stereotyped interview questions constituted only a small part of the plaintiff's case,\textsuperscript{40} the Court's reasoning merely confirms that such inquiries provide evidence of discriminatory intent. The \textit{Anderson} Court did not indicate whether sex-stereotyped interview questions alone provide sufficient support for a Title VII claim, nor did it clearly distinguish between discrimination during the interview stage of the hiring process and bias in the hiring decision.

At first glance, \textit{Price Waterhouse v. Hopkins},\textsuperscript{41} the Court's most recent analysis of sex stereotyping, indicates that courts should only consider discrimination in the ultimate employment decision when adjudicating mixed motives claims. The plaintiff in \textit{Price Waterhouse} alleged that Price Waterhouse had denied her partnership on the basis of gender; she established that gender had played a role in the employment decision by demonstrating that sex stereotyping tainted the evaluations used to determine partnership.\textsuperscript{42} \textit{Price Waterhouse} resolved a split within the circuits concerning the proper allocation of the burdens of proof when a plaintiff presents evidence that illegitimate factors influenced the employment decision.\textsuperscript{43} The plurality asserted that

\textsuperscript{36} See, e.g., \textit{Price Waterhouse}, 490 U.S. at 232, 241-42.
\textsuperscript{37} The Supreme Court did, however, consider a case in which sex-stereotyped interview questions represented part of a Title VII claim. See infra notes 39 & 40 and accompanying text (discussing Anderson v. City of Bessemer, 470 U.S. 564 (1985)).
\textsuperscript{38} In addition, the circuit courts have not consistently analyzed mixed motives claims based on other forms of discrimination. Radford, supra note 1, at 518, 523; see also infra note 101 and accompanying text (discussing the standards used by the federal courts to analyze mixed motives questions).
\textsuperscript{39} 470 U.S. 564, 580 (1985).
\textsuperscript{40} See 470 U.S. at 569, 579-80.
\textsuperscript{41} 490 U.S. 228 (1989) (plurality opinion).
\textsuperscript{42} 490 U.S. at 255-58.
\textsuperscript{43} 490 U.S. at 238 n.2 (noting the division within the circuits). Some circuit courts required the plaintiff to prove that, "but for" her gender, the defendant would have hired the plaintiff in order to establish a Title VII violation. See, e.g., McQuillen v. Wisconsin Educ. Assn. Council,
"[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision."44 The plurality held, therefore, that sex stereotyping during a partnership evaluation process constituted a Title VII violation only if the sex-stereotyping played a "motivating part" in the "employment decision."45 This language indicates that sex-stereotyped interview questions alone cannot provide sufficient support for a Title VII claim.

Closer analysis, however, reveals that Price Waterhouse may support the position that sex stereotyping during an interview is actionable under Title VII.46 Despite the plurality's assertion that the plaintiff must demonstrate that discrimination was a motivating factor for the employer's actions "at the moment of the decision,"47 the plurality assumed a causal connection between a discriminatory evalua-

830 F.2d 659, 664-65 (7th Cir. 1987), cert. denied, 485 U.S. 914 (1988); Peters v. City of Shreveport, 818 F.2d 1148, 1151 (5th Cir. 1987), cert. dismissed, 485 U.S. 930 (1988); Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (3d Cir. 1985), cert. denied, 475 U.S. 1035 (1986); Ross v. Communications Satellite Corp., 759 F.2d 355, 365-66 (4th Cir. 1985). Other courts held that, once the plaintiff established that discrimination was a substantial or motivating factor in the employment decision, the defendant may avoid Title VII liability by proving that the employer would have made the same decision even in a nondiscriminatory hiring process. Berl v. County of Westchester, 849 F.2d 712, 714-15 (2d Cir. 1988); Terbovitz v. Fiscal Court, 825 F.2d 111, 115 (6th Cir. 1987); Fields v. Clark Univ., 817 F.2d 931, 936-37 (1st Cir. 1987), cert. denied, 113 S. Ct. 976 (1993); Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983) cert. denied, 467 U.S. 1204 (1984). Finally, the Eighth and Ninth Circuits imposed liability upon the defendant whenever the plaintiff proved that discrimination had played a role in the hiring decision, but they allowed the defendant to limit the plaintiff's remedy by proving that the employer would not have hired the plaintiff even in a nondiscriminatory hiring process. Bibbs v. Block, 778 F.2d 1318, 1320-24 (8th Cir. 1985) (en banc); Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1165-66 (9th Cir. 1984).

The Court adopted the analytical framework of the First, Second, Sixth, and Eleventh Circuits. The plurality held:

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.

490 U.S. at 258 (plurality opinion).

44. 490 U.S. at 251 (plurality opinion). Although the Price Waterhouse decision concerned a denial of a promotion, the Court used general language to describe the defendant's action as an "employment decision." See, e.g., 490 U.S. at 250-52 (plurality opinion). The case concerned evaluations during a promotion decision, but the Court discussed sex stereotyping in sufficiently general terms to apply Price Waterhouse to claims based on sex-stereotyped interview questions.

45. 490 U.S. at 258 (plurality opinion) (emphasis added). In their concurring opinions, Justices White and O'Connor narrowed the plurality holding by creating a heightened standard for the plaintiff to prove a prima facie case under Title VII. Under their concurring opinions, the Price Waterhouse standard requires that the discrimination play a "substantial" role in the employment decision. 490 U.S. at 259 (White, J., concurring in the judgment); 490 U.S. at 278 (O'Connor, J., concurring in the judgment). Two of the House Reports accompanying the Act interpreted the Court's holding to mean "that evidence of sex stereotyping is sufficient to prove gender discrimination." H.R. REP. No. 40, supra note 28, pt. 1, at 45 n.39 reprinted in 1991 U.S.C.C.A.N. at 583 n.39; H.R. REP. No. 644, supra note 28, pt. 1, at 29 n.17.

46. Cf. Radford, supra note 1, at 525 (observing that the lack of clarity in the decision makes it "difficult to articulate the effect of the [Price Waterhouse] opinions").

47. Price Waterhouse, 490 U.S. at 250 (emphasis added).
tion process and the employment decision on the facts of the case. Because the Court assumed that sex-stereotyped evaluations had influenced the employment decision, Price Waterhouse suggests that discrimination during the hiring process may be sufficiently connected to an adverse employment decision to justify imposing Title VII liability without further proof that the final hiring decision was discriminatory. This interpretation is further strengthened by the fact that the Court arguably discussed the motivating factor standard only to distinguish "stray remarks" in the workplace from sex stereotyping during the partnership evaluation process. The plurality found that, unlike sex-stereotyped evaluations, random sexist comments from people outside the evaluation process are unlikely to affect the employment decision and therefore cannot establish a Title VII violation. Consequently, under the Court's analysis, sex stereotyping during the hiring process may be sufficiently connected to the hiring decision to support a Title VII claim.

Justice O'Connor's concurring opinion further undercuts the view that under Price Waterhouse a plaintiff must demonstrate an explicit causal connection between a discriminatory interview and the hiring decision. O'Connor found that the plaintiff in Price Waterhouse "had taken her proof as far as it could go. She had proved [that] discriminatory input into the decisional process . . . had been a substan-

48. The plurality rejected the defendant's argument that the plaintiff had not produced evidence that sex stereotyping played a role in the employment decision. 490 U.S. at 256-57. Because sex stereotyping tainted the evaluations upon which the defendant relied in making the decision at issue, the Court found that it was "a plausible — and, one might say, inevitable — conclusion to draw from this set of circumstances that the [defendant] in making its decision did in fact take into account . . . comments that were motivated by stereotypical notions." 490 U.S. at 256; see also Radford, supra note 1, at 517 (noting that the plurality opinion assumed a causal connection between the discrimination and the hiring decision). It is unclear, however, whether the Supreme Court would assume this type of causal connection if the connection between the hiring decision and the discriminatory hiring process had been more attenuated. Cf. 490 U.S. at 251-52.

49. 490 U.S. at 256-57 (plurality opinion).

50. 490 U.S. at 251 (plurality opinion).

51. Although the plurality did not elaborate upon its definition of "stray remarks" in the workplace, 490 U.S. at 251, Justice O'Connor noted that both "stray remarks" and "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process" do not provide adequate evidence to establish a Title VII violation. 490 U.S. at 277 (O'Connor, J., concurring in the judgment). But see Charles A. Sullivan, Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII, 56 BROOK. L. REV. 1107, 1150-51 (1991) (arguing that the statements of subordinates and coworkers may be "critical" for Title VII claims).

52. 490 U.S. at 261 (O'Connor, J., concurring in the judgment). Justice O'Connor would require the plaintiff to demonstrate that discrimination played a "substantial" role in the employment decision, see supra note 45, but she supported the plurality's requirement that the defendant prove that the discrimination did not influence the employment decision once the plaintiff had made such a showing. Although O'Connor disagreed with the broad scope of the plurality's analysis of causation under Title VII, she recognized that requiring the plaintiff in this case to demonstrate an explicit causal connection between the discrimination and the employment decision would be "tantamount to declaring Title VII inapplicable to such decisions." 490 U.S. at 273.
tial factor in the decision."

Although O'Connor did not adopt the "motivating factor" test of the plurality opinion, she argued against forcing the plaintiff to demonstrate an explicit causal connection between the sex stereotyping and the employment decision, noting that many lower courts have determined that "placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate criterion makes sense as a rule of evidence and furthers the substantive command of Title VII."

Ultimately, *Price Waterhouse* provides conflicting guidelines for determining whether sex-stereotyped interview questions are actionable under Title VII. The opinion's explicit language requires courts to examine only the employment decision to determine whether a Title VII violation has occurred, but the Court's analysis suggests that discrimination during the evaluation stage of a hiring or promotion process may in itself be actionable under Title VII whenever it is closely intertwined with the employment decision.

### C. The Circuit Split

The federal courts agree that a discriminatory hiring decision violates Title VII. They have not reached a consensus, however, in determining whether sex-stereotyped interview questions are actionable under Title VII absent independent proof that this discrimination influenced the hiring decision. In *Bruno v. City of Crown Point*, the Seventh Circuit reversed a jury finding that an employer had discriminated when he asked the plaintiff about child care, her future childbearing plans, and her husband's opinion of her application for a paramedic position. While acknowledging that these questions were based on sex stereotypes, the Seventh Circuit relied upon *Price Waterhouse* in holding that "[t]he fact that family-oriented questions are asked only of female applicants . . . is not in itself sufficient evidence to support a finding of intentional sex discrimination . . . . [because] [t]he plaintiff must prove that the employer based his decision on the sex stereotypes implicit in such questions . . . ."

---

53. 490 U.S. at 272 (O'Connor, J., concurring in the judgment).
54. See supra note 45.
55. 490 U.S. at 273 (O'Connor, J., concurring in the judgment).
57. 950 F.2d at 362.
58. 950 F.2d at 365. The *Bruno* court reached its decision after examining evidence that the employer had been satisfied with the plaintiff's responses to the sex-stereotyped questions. 950 F.2d at 362. Judge Easterbrook dissented, finding this reasoning unpersuasive because "[t]hese paternalistic questions, asked only of women, show that [the employer] thought about men and women differently and allowed the jury to infer that he believes a woman's place is in the home." 950 F.2d at 365; see also infra notes 115-20 and accompanying text (arguing that women whose answers satisfy an employer also may suffer from the effects of sex-stereotyped questions).
The United States District Court for the Southern District of Ohio adopted this reasoning in *Stukey v. United States Air Force.* In *Stukey,* the employer asked the plaintiff about her marital status, her ability to work and travel with men, and her child care arrangements but did not pose these questions to male applicants. After examining appellate decisions on both sides of the question, the *Stukey* court concluded that the plaintiff had not proven that the final hiring decision was tainted by bias, even though the interview was discriminatory, and therefore denied motions for summary judgment.

Both the *Bruno* and *Stukey* courts seemed to envision the events leading to the employer’s refusal to hire the plaintiff as two discrete, unrelated phases — the interview phase and the hiring decision. Their analyses reflect the belief that only the employment decision falls under the protection of Title VII. After reviewing the plaintiff’s evidence in *Bruno,* the Seventh Circuit found that proof of sex stereotyping during the interview did not provide adequate evidence of employment discrimination because the plaintiff had not proven that “gender played a part in a particular employment decision.” Similarly, in adopting the *Bruno* holding, the district court held that, although the hiring “subcommittee subjected [the plaintiff] to a discriminatory interview[,] . . . a question of fact exists as to whether the Defendants made a discriminatory employment decision.”

The Second and Eighth Circuits have adopted a different approach to analyze mixed motives claims based on sex stereotyping during the interview phase of the hiring process. These courts hold that a demonstration that an employer posed sex-stereotyped questions during an interview is sufficient to prove a Title VII claim; they infer that a discriminatory hiring process will result in a discriminatory hiring decision. In *King v. Trans World Airlines, Inc.* the Eighth Circuit found that the plaintiff met her burden of persuasion in a Title VII claim by demonstrating that the interviewer asked her questions about pregnancy, childbearing, and child care and did not pose similar questions.

---


60. 790 F. Supp. at 168-170. In the final decision, the court used the model outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), to determine whether the employer had violated Title VII. *Stukey,* 790 F. Supp. at 168-70. While emphasizing that sex-stereotyped interview questions standing alone did not constitute violations of Title VII, the court in later proceedings found these inquiries indirectly supported the plaintiff’s claim under the *McDonnell Douglas* framework by helping her to prove that the employer’s justification for its hiring decision was a pretext. *Stukey v. United States Air Force,* 809 F. Supp. 536, 542-44 (S.D. Ohio 1992).

61. *Bruno,* 950 F.2d at 362 (quoting *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251 (1989) (plurality opinion)) (emphasis added). The court reached this holding in light of evidence that the defendant had not been concerned about plaintiff’s responses to these questions. *But see infra* notes 115-20 and accompanying text.


63. 738 F.2d 255 (8th Cir. 1984).
to other applicants. 64 The King court explicitly noted that its holding turned upon the plaintiff’s claim that she was treated differently during the hiring process, 65 despite the lack of additional evidence that the discrimination had tainted the hiring decision. Sex-stereotyped interview questions “raised the inference that this difference in treatment at the interview stage of the hiring process was at least in part the product of unlawful discrimination.” 66 The court concluded that “it is clear that an employer cannot have two interview policies for job applicants . . . one for men and one for women.” 67

The Second Circuit has adopted a similar approach to adjudicating claims based on sex-stereotyped interview questions. In Barbano v. Madison County, 68 the court held that asking a woman about her family plans and her husband’s opinion of her job application during an interview provided sufficient proof of a Title VII violation. 69 In contrast to the Stukey and Bruno courts, the Second Circuit found that sex stereotyping during the interview had tainted the hiring decision without further proof of its connection to the final decision. After finding that the “interview itself was discriminatory,” 70 the court noted that when a judge “could find that the evaluation of [a candidate] was biased by gender discrimination, the judge could also find that the [interviewers’] recommendation to hire [a man] . . . was necessarily tainted by [the] discrimination.” 71

The division within the lower federal courts in adjudicating claims based on sex-stereotyped interview questions hinges upon the courts’ judgments of whether discrimination during the interview phase of the hiring process necessarily results in a tainted employment decision.

64. 738 F.2d at 258-59. The court then held that, once the plaintiff had proved a Title VII violation, the employer could limit her remedy by proving that the plaintiff would not have been hired even if the hiring process had been nondiscriminatory. 738 F.2d at 257-59.
65. 738 F.2d at 257.
66. 738 F.2d at 258 (emphasis added).
67. 738 F.2d at 258-59. The Eighth Circuit affirmed its adoption of the King analysis and shed additional light upon its reasoning in an en banc decision one year later. Bibbs v. Block, 778 F.2d 1318, 1323 (8th Cir. 1985). In Bibbs, the Eighth Circuit noted that its analysis of mixed motives questions required a minimal causal connection to exist between the discrimination which occurred during a stage in the hiring process and the final hiring decision in order to impose Title VII liability. Bibbs, 778 F.2d at 1325, 1328 (Lay, C.J., joined by Heany & McMillan, JJ., concurring). Although the Bibbs decision does not address a claim based on sex-stereotyped interview questions, it more clearly explains the Eighth Circuit’s two-tiered framework for analyzing such claims, which splits the questions of liability and remedy. See Schott, supra note 2, at 179 (arguing that the Bibbs decision represents an extension of the King analysis).
68. 922 F.2d 139 (2d Cir. 1990).
69. 922 F.2d at 141, 145.
70. 922 F.2d at 143.
71. 922 F.2d at 143. In Barbano, the Second Circuit focused not only on the existence of discrimination during the interview phase, but on the connection between that discrimination and the employer’s hiring decision. The King court did not explicitly make this connection. However, the Eighth Circuit’s affirmation of King, see supra note 67, underlines the similarities between the approaches of the two circuits.
Courts that recognize this link, like the Second and Eighth Circuits, find a Title VII violation upon proof that an employer posed sex-stereotyped questions during an interview. Other courts, such as the Seventh Circuit, will not find a violation on the same facts unless the plaintiff presents independent evidence that the hiring decision was discriminatory. These conflicting views on the discriminatory impact of sex-stereotyped interview questions lead to inconsistent results for similar Title VII claims.

II. SECTION 107 OF THE CIVIL RIGHTS ACT OF 1991

Proper resolution of the circuit split concerning claims based on sex-stereotyped interview questions requires a thorough understanding of the 1991 amendments to Title VII.\textsuperscript{72} The Civil Rights Act of 1991 established a new framework for mixed motives analysis and explicitly rejected the Supreme Court's interpretation of mixed motives Title VII claims under \textit{Price Waterhouse}.\textsuperscript{73} In creating the new mixed motives framework, Congress was aware that the Civil Rights Act of 1991 would affect future courts' analyses of claims based on discrimination during the hiring process.\textsuperscript{74} Indeed, Congress explicitly approved of \textit{King v. Trans World Airlines, Inc.} and four related cases concerning discrimination during the hiring process\textsuperscript{75} to explain the Act's new analytical framework. Thus, Congress' intent in passing section 107 of the Civil Rights Act of 1991 provides important guidance in determin-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{72} The \textit{Stukey} and \textit{Bruno} decisions were decided after the enactment of the Civil Rights Act of 1991, which was intended to take "effect upon enactment." Pub. L. No. 102-166, § 402(a), 105 Stat. 1071, 1099 (1991). The legislative history of the Act did not clearly indicate whether the legislation should be applied retroactively, however. Michele A. Estrin, \textit{Note, Retroactive Application of the Civil Rights Act of 1991 to Pending Cases}, 90 Mich. L. Rev. 2035, 2050-55 (1992). The courts seemed to ignore the Civil Rights Act of 1991 in reaching their decisions. It appears that the courts have not yet applied the provisions of the Act to claims based on sex-stereotyped interview questions.
\item \textsuperscript{73} See \textit{infra} section II.B. for an analysis of the connection between discrimination during the hiring process and the language and structure of the Act.
\end{itemize}
\end{footnotesize}
ing (1) whether intentional discrimination during a phase in the hiring process is actionable under Title VII without independent evidence that the hiring decision was discriminatory and, if so, (2) whether posing sex-stereotyped questions during the interview stage constitutes intentional discrimination.

This Part analyzes the language and legislative history of section 107 of the Civil Rights Act of 1991 to determine the answer to these questions. Section II.A argues that Congress intended to hold an employer liable for discrimination under section 107 whenever a nexus exists between the discrimination and the final hiring decision, even if the employer would not have hired the plaintiff in a nondiscriminatory hiring process. Section II.B examines the mechanics, language, and legislative history of section 107 to gauge the intended scope of the provision. Section II.B argues that discrimination during a phase of the hiring process may constitute intentional discrimination under the Civil Rights Act of 1991 whenever the discrimination bears a minimal causal connection to the hiring decision. Section II.C describes the legislators' views of the Act's framework for analyzing mixed motives claims and gleans a general definition of that causal requirement: the "motivating factor" standard. It then uses the motivating factor test to examine claims based on sex-stereotyped interview questions and to determine whether discrimination during a job interview is sufficiently connected to the hiring decision to establish a disparate treatment claim under section 107. This Part concludes that sex-stereotyped interview questions meet the causal requirements of the motivating factor standard and therefore support a Title VII claim.

A. The Passage of the Civil Rights Act of 1991

Congress adopted the Civil Rights Act of 1991 to overturn a series of Supreme Court decisions that had limited civil rights protections in the employment setting. Legislators intended the Act to strengthen existing protections and remedies available under federal civil rights laws. Congress created section 107 to overturn Price Waterhouse in order to prevent it from "undermin[ing] Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination." 

Section 107 of the Civil Rights Act of 1991 specifically rejects Price Waterhouse's holding that, once a plaintiff makes an initial showing of


intentional discrimination, a defendant may avoid liability for a Title VII violation by demonstrating that the plaintiff would not have been promoted or hired even through a nondiscriminatory evaluation process. Instead, the Act requires that, once a plaintiff demonstrates that discriminatory animus was a “motivating factor” for an employment practice, a court must find that the defendant violated Title VII. According to the reports accompanying the Act, the section 107 test requires there to be a “nexus . . . between the conduct or statements and the employment decision at issue.” Based on this finding, a court may award the plaintiff declaratory relief, injunctive relief, attorney’s fees, and costs directly associated with pursuit of the claim. However, the defendant still may limit the plaintiff’s other Title VII remedies, including back pay awards and reinstatement, by proving that the defendant would not have hired or promoted the plaintiff even if the evaluation process had been nondiscriminatory. By splitting analysis of liability and calculation of remedy for mixed motives claims, Congress intended to deter discrimination without awarding plaintiffs an undeserved windfall.

81. See, e.g., H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess. 18-19 (1990). The Report notes that “any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability. Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue.” Id. The language of the reports accompanying the Act did not precisely mirror the language of the statute. The 1991 House Report distinguishes between “conduct or statements” and the “employment decision”; the statute notes the difference between the “employment practice” and the employer’s “action.” See infra notes 82-83 & section II.B (discussing the language of the statute).
82. Section 107 states: “Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991).
83. Section 107 provides:
On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible factor, the court —
(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and
(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).
B. The Language and Legislative History of Section 107

The language, structure, and legislative history of section 107 suggest that Congress intended discrimination during a phase in the hiring process to constitute intentional discrimination whenever that discrimination bears a minimal causal connection to an adverse hiring decision. Section 107 has a two-tiered framework which splits analysis of liability from determination of remedy. The first part of section 107 states that a Title VII violation should be found when discriminatory animus was "a motivating factor for any employment practice." According to the reports accompanying the Act, the section 107 test requires a "nexus between the conduct or statements and the employment decision at issue." Under the second tier of the section 107 framework, a defendant may limit plaintiff's remedy by demonstrating that the defendant "would have taken the same action in the absence of the impermissible motivating factor." By distinguishing between the Title VII violation that occurs when discrimination taints any employment "practice" and the remedial implications that arise from a specific employment "action," the language of the statute reveals that discrimination during a phase in the hiring process, not just a biased hiring decision, may constitute a Title VII violation when it meets the requirements of the motivating factor standard. The two-tiered structure of section 107 also supports the inference that Congress intended that discrimination during a phase in the hiring process may violate Title VII even without independent evidence that the hiring decision was discriminatory. If the Title VII violation depended solely upon the hiring decision, the inquiries could occur simultaneously, and there would have been no need to adopt the bifurcated structure of section 107.

An examination of the legislative history of the Act reinforces the conclusion that discrimination during one step of the hiring process may establish a Title VII violation when it bears some connection to the hiring decision. In discussing the section 107 framework, reports

86. See infra section II.C. (defining the motivating factor test).
88. See, e.g., H.R. CONF. REP. No. 856, supra note 81, at 18-19.
90. See infra section II.C.
91. One might argue Congress intended to find liability for a small amount of discrimination during the hiring decision and to require a remedy only when the discrimination actually altered the hiring decision, but the cases explicitly cited in the House and Senate reports significantly undercut this argument. See infra note 94 and accompanying text.
92. But see 47 CONG. Q. ALMANAC 257 (1991) (statement of Senator Danforth) ("Any judge who tries to make legislative history out of the free-for-all that takes place on the floor of the Senate is on very dangerous grounds."). Nevertheless, much of the controversy concerning the Civil Rights Act of 1991 concerned the standards for establishing disparate impact under Title VII; it is relatively easier to derive a consistent understanding of section 107 from the legislative history of the Act than it is to make sense of the statements regarding disparate impact.
accompanying the Act explicitly approved of five cases, including *King v. Trans World Airlines, Inc.* which focused on discrimination during a phase in the hiring process rather than on bias within the hiring decision. Congress endorsed the analytical framework used by courts that explicitly impose liability upon a defendant when the plaintiff demonstrates that discrimination tainted the hiring process without requiring further evidence that the hiring decision was discriminatory. By relying upon cases that focused upon discrimination during a phase in the hiring process as the sole basis for a Title VII claim, Congress reinforced the inferences which may be drawn from the language and two-tiered framework of the statute.

**C. The Motivating Factor Test**

As illustrated, discrimination during a phase in the hiring process constitutes intentional discrimination when it bears a causal connection to the hiring decision. Therefore, proper adjudication of claims based on sex-stereotyped interview questions requires a thorough understanding of the motivating factor standard, which evaluates that causal connection. This section analyzes claims based on sex-stereotyped interview questions under the section 107 framework. Subsection II.C.1 analyzes the legislative history of section 107 and

---

93. 738 F.2d 255 (8th Cir. 1984).


95. *See supra* note 94 (listing the Eighth and Ninth Circuit cases whose analytical approach Congress endorsed in reports accompanying the Act). Using this analytical approach to examine mixed motives claims, the Eighth and Ninth Circuits did not require a plaintiff to demonstrate an explicit causal connection between discrimination during the hiring process and the final hiring decision. See, e.g., Fadhil v. City and County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984) (noting that “where employment discrimination affects . . . the evaluative process,” a court may find that “sex was a significant factor in the [employment] decision” and impose Title VII liability upon an employer); *King*, 738 F.2d at 257 (observing that the success of the plaintiff’s claim hinged upon allegations that the hiring process, not the hiring decision, was discriminatory); cf. Radford, *supra* note 1, at 516 n.200 (arguing that, in previous circuit cases concerning mixed motives claims based on sex stereotyping, “there seemed to be little question as to whether a link existed between the remarks and the employment decision”).

96. *See supra* section II.B.

97. As noted previously, a Title VII violation has occurred under section 107 when an unlawful bias was “a motivating factor for any employment practice.” Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (1991).
concludes that Congress intended the motivating factor test to require plaintiffs to demonstrate only a minimal causal connection between discrimination during the hiring process and the employment decision. Subsection II.C.2 applies the motivating factor test to claims based on sex-stereotyped interview questions and concludes that such inquiries constitute intentional discrimination under Title VII.

1. Definition of the Motivating Factor Standard

The reports accompanying the Civil Rights Act of 1991 defined the section 107 test to require a plaintiff to show a "nexus between the conduct or statements and the employment decision at issue." To illustrate this requirement, Congress noted that comments by individuals uninvolved in the hiring process do not meet the motivating factor test because no causal connection exists between the remarks and the hiring decision. Congress did not elaborate upon its definition of the nexus requirement, however, nor did it provide any other examples of discrimination which would fall below the motivating factor threshold. While decisions prior to Price Waterhouse helped illustrate the structure of section 107, they provide little assistance in defining the motivating factor standard. In addition, because the circuit courts


100. Because the 1991 House Report states that Congress intended section 107 to restore the analytical framework "applied by the majority of the circuits prior to the Price Waterhouse decision," H.R. Rep. No. 40, supra note 28, pt. 2, at 18, one might argue that the legislative history of section 107 requires courts to use pre-Price Waterhouse decisions to define the motivating factor standard. Courts should avoid placing undue emphasis upon this statement, however. First, the report referred to the majority of circuit cases to emphasize Congress' intention that "any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability" under section 107. Id. Before Price Waterhouse, three circuits held that a plaintiff could only prove Title VII liability by demonstrating that discrimination was a "but for" cause of the decision not to hire the plaintiff. The majority of circuits imposed liability upon the defendant once the plaintiff demonstrated that illegitimate motives influenced the hiring decision. Some of those courts allowed the defendant an affirmative defense for the violation if the defendant could prove that the employer would have made the same hiring decision even if it had not considered the plaintiff's race, sex, or national origin. Other courts only allowed the defendant to limit the plaintiff's remedy by making such a showing. For discussion of these cases, see supra note 43. The cases explicitly endorsed in the report support the conclusion that Congress referred to previous case law to illustrate the burden-shifting framework of section 107 rather than to explain the nuances of the motivating factor standard. All of the cases cited in the report shifted the burden of persuasion to the defendant once the plaintiff proved that discrimination had influenced the hiring decision; none used the motivating factor test. Thus, it is likely that the report referred to the majority of the circuits only to illustrate the proper method of allocating the burden of proof and granting relief under section 107.

Second, in order to clarify that section 107 did not impose liability for discriminatory thoughts, see infra note 111, the House amended its version of section 107 to propose the "contributing factor" test as the appropriate standard for mixed motives analysis. Despite this difference in language, the reports accompanying both versions of the provision contained virtually identical descriptions of the provision, including Congress' instruction to rely upon the decisions prior to Price Waterhouse. Compare H.R. Rep. No. 40, supra note 28, pt. 1, at 18 reprinted in
did not consistently apply the same causal standards to mixed motives cases prior to the passage of the Civil Rights Act of 1991, it would be extremely difficult to garner a consistent definition of the motivating factor test from existing case law.

Congress’ failure to provide examples of discriminatory actions that would not satisfy the motivating factor requirement stems, in part, from the low threshold of the standard itself. Congressional debates concerning the requirements of the motivating factor test reveal a consensus among supporters and opponents of the legislation that its threshold was extremely low. In defining the causation requirements of section 107, both the House and Senate reports, as well as the many supporters of the bill, repeatedly emphasized that any reliance

---

101. Price Waterhouse, 490 U.S. at 238 n.2 (plurality opinion) (noting that the law concerning this issue “left the Circuits in disarray”); Radford, supra note 1, at 523 (observing that the courts have “created standards of causation ranging from the impermissible factor playing ‘any’ part in an employment decision, to the factor playing a ‘discernible’ or ‘motivating’ part, to the factor playing a ‘substantial’ part, and finally to requiring the factor to play the determinative part in the decision”). Reliance upon these decisions to define the causal requirement of section 107 would be problematic because no clear majority emerges among the courts in analyzing the connection that must exist between the discriminatory hiring process and the hiring decision under Title VII. See, e.g., Berl v. County of Westchester, 849 F.2d 712, 714 (2d Cir. 1988) (requiring discrimination to be a “substantial part” of the decision); Spears v. Board of Educ., 843 F.2d 882, 883 (6th Cir. 1988) (using the “motivating factor” standard); McQuillen v. Wisconsin Educ. Assn. Council, 830 F.2d 659, 664 (7th Cir. 1987) (requiring “but for” causation), cert. denied, 485 U.S. 914 (1988); Peters v. City of Shreveport, 818 F.2d 1148, 1161 (5th Cir. 1987) (requiring “but for” causation for Equal Pay Act claim), cert. dismissed, 485 U.S. 930 (1988); Fields v. Clark Univ., 817 F.2d 931, 937 (1st Cir. 1987) (using the “motivating factor” test), cert. denied, 113 S. Ct. 976 (1993); Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) (using the “discernible factor” test); Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 179 (3d Cir. 1985) (requiring “but for” causation), cert. denied, 475 U.S. 1035 (1986); Ross v. Communications Satellite Corp, 759 F.2d 335, 366 (4th Cir. 1985) (requiring “but for” causation); Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984) (using the “significant factor” test), cert. denied, 477 U.S. 1034 (1985); Cuddy v. Carmen, 694 F.2d 853, 857 (D.C. Cir. 1982) (using the “determining factor” standard for an age discrimination case); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982) (using the “motivating factor” test).

102. See Paul J. Gudel, Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 Texas L. Rev. 17, 69 (1991) (arguing that the Civil Rights Act of 1991 “will incorporate into Title VII a concept, ‘motivating factor,’ which has not been given . . . any meaningful content [by the courts]”).


104. See, e.g., 136 CONG. REC. H6774 (daily ed. Aug. 2, 1990) (statement of Rep. Traficant) (“If the Price Waterhouse decision is not overturned, then we send the message that there is nothing wrong with a little overt racism or sexism . . . . We must reaffirm the principle that title VII tolerates no discrimination.”); id. at H6782 (daily ed. Aug. 2, 1990) (statement of Rep. Collins) (the bill “makes it clear that intentional discrimination is never acceptable, whether as a primary factor or otherwise”); 137 CONG. REC. S15,464 (daily ed. Oct. 30, 1991) (statement of
on discrimination by an employer would constitute a Title VII violation. Senator Kennedy, a key sponsor of the bill, noted that the intention of the Act was to "tell[ ] employers and employees that in this Nation, a little discrimination is not OK." 105 Both the Senate and the House rejected amendments that would have strengthened the standard by requiring a showing that discrimination was a "major contributing factor" for the hiring decision. 106 Two House Reports suggested that sex stereotyping in itself is sufficient to prove gender discrimination under the motivating factor standard without any reference to the phase of the hiring process in which such stereotyping takes place. 107 Thus, supporters of the bill clearly intended section 107 to establish a relaxed threshold for proving intentional discrimination.

In attacking the section 107 framework, the opponents of the bill also emphasized that the causal requirement was minimal. 108 The Minority View of the House Report stated that the standard "makes it exceedingly easy for the plaintiff to be a prevailing party . . . ." 109 Some opponents attacked the bill as a "thought control" bill that would punish employers for the discriminatory thoughts of their employees, even when those thoughts did not affect the hiring decision. 110 The debate concerning "thought control" prompted Congress to clarify its intention that section 107 was not to be interpreted to find a Title VII violation for coworkers' stray remarks; this opposition, however, did not lead Congress to impose more stringent proof requirements upon plaintiffs seeking to establish a mixed motives claim. 111

Sen. Dodd) (the bill "overturns the Price Waterhouse decision thus making any reliance on prejudice illegal"); id. at H3948 (daily ed. June 5, 1991) (statement of Rep. Cardin) ("The civil rights bill specifies that it is illegal for intentional discrimination to be any factor in the employment process.").


109. Id. at 124 (1990).

110. See, e.g., 136 CONG. REC. S9939 (daily ed. July 18, 1990) (statement of Sen. Hatch) (terming section 107 "a 'thought control bill' that punishes people on the basis of what they think, even if what they do is completely legal"); id. at S9964 (daily ed. July 10, 1990) (statement of Sen. Grassley) (arguing that under the bill "[a]n employer would be liable for the mere 'bad thoughts' of his . . . employees without any proof that these thoughts had anything to do with discrimination"); S. REP. No. 315, supra note 28, at 99 (minority view).

Thus, a consistent definition of the motivating factor standard emerges among supporters and opponents of section 107. Both the floor debates and the reports accompanying the Act indicate that Congress interpreted section 107 to require plaintiffs to demonstrate only a minimal causal connection between the discrimination that occurs during a phase in the hiring process and the employment decision in order to prove a Title VII violation.

2. Application of the Motivating Factor Test

Analysis of claims based on sex-stereotyped interview questions under the motivating factor test reveals that the causal connection between discriminatory interview questions and an adverse hiring decision justifies finding that such inquiries are actionable under Title VII. Unlike random remarks at the office, sex-stereotyped interview questions — and the applicant’s subsequent responses — clearly serve as a basis for an employer to evaluate a candidate.112 Employers use sex-stereotyped interview questions to obtain information that they may not legally consider in making hiring decisions.113 Thus, there is a clear “nexus between the conduct . . . and the employment decision at issue.”114 Sex-stereotyped interview questions also may harm even those women whose answers do not seem to affect the employer’s evaluations,115 such inquiries reinforce negative stereotypes about women

---

112. Sullivan, supra note 51, at 1152.
113. See supra note 4 and accompanying text.
in the work force. Because hiring decisions inevitably involve a comparison of candidates, distinctions based on gender during the interview process prevent a woman from competing fairly for a position. Sex-stereotyped questions focus the employer’s attention upon the limitations stereotypically associated with the applicant’s gender instead of upon her achievements or qualifications. Given the employer’s limited knowledge of the applicant, sex stereotyping will likely taint the interviewer’s evaluation of the candidate. The close connection between a discriminatory interview and the hiring decision reveals that sex-stereotyped inquiries satisfy the requirements of the motivating factor test and constitute intentional discrimination under section 107.

Congress also may have contemplated the harm arising from sex-stereotyped interview questions. Explicit statements in the House and Senate reports suggest that Congress intended section 107 to hold an employer liable under Title VII for subjecting an applicant to such inquiries. Congress cited King v. Trans World Airlines, Inc., which held that sex-stereotyped interview questions violated Title VII, as an example of the proper analysis of mixed motives claims. In addition, two House reports stated that sex stereotyping constitutes intentional discrimination, though both failed to specify when or in what form the sex stereotyping must occur. These statements demonstrate Congress’ awareness and approval of the conclusion that the section 107 framework allows courts to find an employer has violated Title VII if it poses sex-stereotyped questions to an applicant during a job interview. Indeed, the legislative history of the Act implies that a

116. Taub, supra note 8, at 357-58 (discussing studies which demonstrate that references that heighten the employer’s awareness of the worker’s gender will interfere with an evaluation of the employee); see supra notes 12-17 and accompanying text; cf. Price Waterhouse v. Hopkins, 490 U.S. 228, 257 (1989) (plurality opinion) (finding it is irrelevant whether sex-stereotyped comments during an evaluation process were made in support of a candidate because any stereotyped comment “may influence the decisionmaker to think less highly of the candidate”).


119. See supra notes 12-13 and accompanying text.

120. See supra note 14 and accompanying text.

121. See supra note 75; see also supra notes 63-67 and accompanying text (describing King).

court that holds otherwise ignores Congress' clearly articulated intention that any reliance on discrimination violates section 107 of the Civil Rights Act of 1991.  

III. PROPOSED FRAMEWORK

Cases arising under the 1991 amendments to Title VII will provide the federal courts with an opportunity to adopt a consistent approach to adjudication of intentional discrimination claims based on sex-stereotyped interview questions. This Part proposes a framework for analyzing such claims. Section III.A describes the framework and argues that it both meets the requirements of section 107 and addresses broader concerns of judicial fairness. Section III.B demonstrates that the framework promotes the policies behind Title VII as amended by the Civil Rights Act of 1991 by deterring employment discrimination. Section III.C anticipates and responds to criticisms of the proposal. This section argues that the framework avoids punishing employers for the "bad thoughts" of their employees, does not unduly burden employers, and appropriately balances the potential costs of litigating section 107 claims against the benefits derived from deterring employment discrimination. This Part concludes that if a plaintiff proves that an employer posed sex-stereotyped questions during a job interview, the court should find a Title VII violation under section 107 unless the defendant introduces objective evidence that the interviewer posed the same questions to men and women and that the sex stereotyping did not affect the hiring decision.

A. Meeting the Requirements of Section 107

Under the proposed framework, when a plaintiff has asked questions based on sex stereotypes during an interview, a strong presumption arises that the employer has violated section 107 of the Civil Rights Act of 1991. The employer may rebut the inference of discrimination by providing objective evidence124 that


124. See The Supreme Court — Leading Cases, 103 HARV. L. REV. 137, 350 (1989) [hereinafter The Supreme Court — Leading Cases] (arguing that "[i]f an employer can escape liability by pointing generally to perceived problems with an employee's interpersonal skills, subtle but pervasive forms of discrimination will remain unchecked"). In order to present such objective
it posed these questions to both men and women\textsuperscript{125} and that the final decisionmaker deliberately disregarded any evaluations tainted by sex stereotyping.\textsuperscript{126} The employer must meet both parts of this test in order to avoid a finding of liability under Title VII. Merely requiring the defendant to prove that the interviewer asked men and women the same questions may not prevent sex stereotyping from tainting the hiring decision; posing the same questions to male and female applicants can be a mere formality unless it is clearly related to the position in question.\textsuperscript{127} In addition, studies suggest that sex stereotyping affects women more than men.\textsuperscript{128} Conversely, failing to require a defendant to demonstrate that it did not rely upon sex-stereotyped comments in making a hiring decision would allow an employer to continue treating men and women differently during the interview process, thus deterring women applicants from applying for positions and reinforcing inequality in the workplace.\textsuperscript{129}

If the employer cannot meet this two-prong test, the court should find that gender bias was a motivating factor for the hiring decision evidence, an employer may not merely assert that it did not discriminate against the plaintiff. For example, the court may require an employer to produce testimony from male candidates that the interviewer posed similar questions to them or to produce documents indicating that the employer formally disregarded a tainted evaluation (perhaps by interviewing the candidate again or by eliminating the original interviewer's comments from the candidate's evaluations).

\textsuperscript{125} The Supreme Court in International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), noted that discriminatory intent sometimes may be inferred solely from significant differences in the treatment of employees. While it is unlikely that posing different questions to men and women is sufficiently egregious to establish a Title VII violation under Teamsters, it is appropriate to require the defendant to explain differences in the treatment of men and women once a plaintiff has established a prima facie case of discrimination under section 107. See \textsuperscript{126} King v. Trans World Airlines, Inc., 738 F.2d 255, 257-59 (8th Cir. 1984); cf. McKinney v. Dole, 765 F.2d 1129, 1138-39 (D.C. Cir. 1985) (observing that many courts have held that any differential treatment in "conditions of employment" on account of sex violates Title VII).

Arguably, one could bring a disparate impact claim against an employer for posing sex-stereotyped interview questions to both men and women if this sex stereotyping had a greater effect upon the hiring rate for female candidates. However, under this Note's two-prong test for adjudicating claims based on sex-stereotyped interview questions, an employer who poses similar questions to men and women and deliberately disregards evaluations tainted by sex stereotyping could not be held liable under a disparate impact theory because the sex stereotyping could not have influenced the employer's hiring decisions.

\textsuperscript{126} Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion); Barbano v. Madison County, 922 F.2d 139, 145 (2d Cir. 1990). But see \textsuperscript{127} Price Waterhouse, 490 U.S. at 294 (Kennedy, J., dissenting) (arguing that "[o]ur cases do not support the suggestion that failure to 'disclaim reliance' on stereotypical comments itself violates Title VII").

\textsuperscript{127} Cf. Taub, supra note 8, at 367 (noting that a legal analysis that insists on symmetry is unlikely to recognize the detrimental effects of harassment on women in particular).

\textsuperscript{128} \textit{id.} at 357-59 (noting that studies demonstrate that references that heighten the employer's awareness of the worker's gender will interfere with an evaluation of the employee); see also supra note 8 and accompanying text.

\textsuperscript{129} Cf. Stonefield, supra note 32, at 150 (arguing that treating minority applicants badly during the interview process will discourage them from applying for jobs); see also supra notes 117-19 and accompanying text (discussing the detrimental effects of posing sex-stereotyped interview questions solely to women applicants).
and hold the employer liable for intentional discrimination.\textsuperscript{130} The court also may award the plaintiff attorney’s fees under section 107.\textsuperscript{131} The defendant, however, may limit the plaintiff’s other remedies, including back pay and reinstatement, by proving that the employer would not have selected the plaintiff had it used a nondiscriminatory hiring process.\textsuperscript{132}

This analytical framework meets the requirements imposed by the framers of the Civil Rights Act of 1991. The proposal holds an employer liable for conducting a discriminatory interview that harms a plaintiff’s opportunity to compete fairly for a position, as required by the language and legislative history of the Act.\textsuperscript{133} In doing so, this framework also preserves the integrity of the motivating factor test.\textsuperscript{134} Because an employer may rebut the inference of discrimination which arises from sex stereotyping during the interview, this Note’s framework imposes liability only when a nexus exists between the discriminatory interview questions and the hiring decision.\textsuperscript{135}

In addition, the proposal addresses the requirements of judicial fairness. The framework enables victims of discrimination to vindicate their claims in court\textsuperscript{136} without imposing unduly burdensome proof requirements upon them. Due to the difficulties involved in providing direct proof of a causal connection between sex stereotyping during the hiring process and a discriminatory hiring decision,\textsuperscript{137} requiring a plaintiff to provide further proof of this causal connection would discourage the pursuit of worthy claims.\textsuperscript{138} Once a plaintiff has established that the defendant posed sex-stereotyped questions during the interview, this framework requires the defendant to rebut the plaintiff’s claim because the employer has the best access to information that would contradict the plaintiff’s assertions.\textsuperscript{139} Further, adopting

\textsuperscript{130} Under section 107, once a plaintiff proves that gender was a motivating factor for the hiring decision, the court must find that the employer violated Title VII. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (1991). \textit{But see} Bach, supra note 19, at 1275-81 (proposing a different framework for analyzing claims based on sex-stereotyped interview questions that uses direct evidence analysis and does not rely on the legislative history of the Civil Rights Act of 1991).


\textsuperscript{133} \textit{See} supra section II.B.

\textsuperscript{134} \textit{See} supra section II.C. (describing the motivating factor standard).

\textsuperscript{135} \textit{See}, e.g., H.R. CONF. REP. No. 856, supra note 81, at 18.

\textsuperscript{136} \textit{Cf.} Stonefield, supra note 32, at 169 (arguing that “[r]equiring people to endure ... workplace indignities without redress undermines the intrinsic purposes of the laws”).

\textsuperscript{137} \textit{See} Price Waterhouse v. Hopkins, 490 U.S. 228, 272-73 (1989) (O’Connor, J., concurring in the judgment); \textit{The Supreme Court — Leading Cases}, supra note 124, at 349; \textit{cf.} Taub, supra note 8, at 393 (noting that it is difficult to prove that a hiring practice is not neutral).

\textsuperscript{138} \textit{See} 490 U.S. at 272-73 (O’Connor, J., concurring in the judgment); \textit{The Supreme Court — Leading Cases}, supra note 124, at 349; \textit{cf.} Taub, supra note 8, at 393 (noting that it is difficult to prove that a hiring practice is not neutral).

\textsuperscript{139} \textit{See} 490 U.S. at 273 (O’Connor, J., concurring in the judgment). \textit{But see} 490 U.S. at 292 (Kennedy, J., dissenting) (arguing that the liberal rules of discovery should discourage courts from placing this burden on the defendant).
this well-accepted method of allocating the burdens of proof does not unfairly encumber the employer. As Justice O'Connor observed in *Price Waterhouse*, an employer should bear the risk at trial when the employer's own actions during the hiring process have made it difficult to determine whether discrimination tainted the hiring decision.

**B. Furthering the Policies Behind Title VII as Amended by the Civil Rights Act of 1991**

By deterring sex discrimination, the proposed framework fulfills the goals of Title VII as amended by the Civil Rights Act of 1991. Because this framework allows plaintiffs in mixed motives cases to recover attorney's fees, it encourages women to act as "private attorney general[s]" on behalf of the government to fight sex stereotyping in employment. This threat of increased litigation provides an incentive for employers to eliminate sex stereotyping during the hiring process and to train employees to avoid it when conducting job interviews. Increased training, in turn, will raise employees' consciousness of the problems created by sex stereotyping and therefore help decrease sex discrimination in the workplace.

By allowing employers to avoid liability if they can present objective evidence that the discrimination during the interview did not taint the hiring decision, the proposal creates a strong incentive for employ-
ers to monitor the hiring process closely and to maintain adequate records. By allowing an employer to rebut the inference of discrimination arising from sex-stereotyped interview questions, however, the proposal protects an employer who has taken steps to prevent discrimination from tainting the hiring process. Thus, this approach only holds defendants liable under section 107 when sex-stereotyped interview questions have actually harmed a plaintiff's chances to compete fairly for a position. Still, the framework provides this protection without unduly weakening the effects of section 107 or contradicting the clearly articulated intentions of Congress to impose liability when an employer places any reliance upon discriminatory animus.

Prior to passage of the Act, critics also asserted that section 107 would impose burdensome costs upon employers to educate their employees and to pay attorney's fees to plaintiffs who prove a violation.

147. See Taub, supra note 8, at 360-61, 394; Schott, supra note 2, at 185-86; The Supreme Court — Leading Cases, supra note 124, at 350.

148. See Schott, supra note 2, at 185-86; cf. Taub, supra note 8, at 360-61 (supporting internal methods for employers to identify and, if necessary, correct attitudinal biases of employees).

149. See supra notes 8-17 and accompanying text.

150. "Bad thoughts" are those discriminatory biases which have not influenced the hiring decision. See, e.g., Irving M. Geslewitz, Understanding the 1991 Civil Rights Act, FRAC. LAW. Mar. 1992, at 57, 65-66.

151. In doing so, this framework effectuates the interpretation of Title VII offered by the minority view in the 1990 House Report accompanying passage of the Act: "[T]he goal of Title VII should be to lead employers to establish an employment process with an effective system of checks and balances that prevents decisions from being made for illegal reasons." H.R. REP. No. 644, supra note 28, pt. 1, at 124 (minority view) (citation omitted).

152. Cf. Taub, supra note 8, at 378 (arguing that courts should hold employers responsible for the actions of their employees in order to eradicate discrimination in the workplace).

153. See supra notes 103-07 and accompanying text.

154. Cf. S. REP. No. 315, supra note 28, at 99 (minority view) (noting that it will be difficult for employers to control the thoughts of their employees).
of section 107.155 These assertions, however, overestimate the costs imposed by section 107. First, educating employees about sex-stereotyped interview questions imposes only a marginal cost upon employers; most employers covered by Title VII already have developed training programs for employees involved in hiring decisions due to developments in other areas of Title VII litigation.156 The proposed framework would therefore require only a minimal additional investment by employers to train employees effectively. As a result, the benefits society derives from fairer treatment of job applicants and an increased awareness of the dangers of sex stereotyping157 may be achieved at a relatively low cost to the employer.158

Second, when balanced against the harms created by sex stereotyping, payment of attorney's fees represents a modest burden159 to place upon an employer who has discriminated against a job applicant during the hiring process. By allowing, and thus sanctioning, sex stereotyping during a job interview, employers limit the advancement of women in the workplace.160 The award serves both as a punishment for employers and as an incentive for plaintiffs to pursue worthy claims against employers who have allowed sex stereotyping to taint the hiring process.161 Aggressive pursuit of these claims, in turn, deters such discrimination and enables future applicants to compete fairly for job opportunities.162

The proposal provides a flexible framework which promotes equality in employment without unduly burdening employers. The framework only holds employers liable for discrimination when sex-stereotyped interview questions preclude a plaintiff from competing fairly for a job opportunity. The proposal properly allocates the burdens of proof among the parties. It balances the costs the Civil Rights Act of 1991 imposes upon employers against the societal benefits arising from the pursuit of worthy discrimination claims. Finally, the proposed framework creates important incentives for employers to monitor the hiring process and thus to ensure equality of opportunity for women in the workplace.

155. See, e.g., 136 Cong. Rec. S9330 (daily ed. July 10, 1990) (statement of Sen. Hatch) ("[Section 107 is] a litigation bonanza . . . . Wait until you see what employment practice is going to cost us. [It] is the most ridiculous section I have seen yet.").
156. See Stonefield, supra note 32, at 150.
157. See supra notes 142-49 and accompanying text.
158. See Taub, supra note 8, at 379 n.159.
159. See Schott, supra note 2, at 184.
160. See supra notes 8-17 and accompanying text.
161. See Brodin, supra note 32, at 324 n.130 (citing Carey v. Piphus, 435 U.S. 247, 266 (1978)).
162. See supra notes 142-49 and accompanying text.
CONCLUSION

The Civil Rights Act of 1991 provides an opportunity for federal courts to adopt a consistent approach to analyzing Title VII claims based on sex-stereotyped interview questions. Before passage of the Act, courts adjudicated such claims in an inconsistent manner. Some courts recognized a connection between sex-stereotyped interview questions and a biased hiring decision; other courts, when presented with evidence that an employer posed such questions during an interview, required plaintiffs to produce independent evidence that the hiring decision was discriminatory. The disagreement among the circuits hinged upon whether the court assumed that discrimination during the interview phase of the hiring process necessarily tainted the employment decision.

The 1991 amendments to Title VII clarify the proper approach to mixed motives analysis and help resolve the division within the federal courts. An examination of the language, structure, and legislative history of the Civil Rights Act of 1991 reveals that discrimination during a phase in the hiring process is actionable under Title VII whenever that discrimination bears a minimal causal connection to the hiring decision. Because a causal nexus exists between sex-stereotyped interview questions and the hiring decision, courts should find a Title VII violation whenever an employer poses such questions. The employer may avoid liability only by demonstrating that the interviewer posed similar questions to male applicants and that the final decisionmaker deliberately disregarded any evaluations tainted by sex stereotyping. By adjudicating claims based on sex-stereotyped interview questions in this manner, a court will effect the intent of Congress, address the requirements of judicial fairness, and discourage employment discrimination.