Putting Teeth into Minnesota's Employment Discrimination Law: A Legislative Proposal Defining Gender Stereotyping

Kari Aamot-Snapp

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/1727
Stereotypes, like laws, usually persist even after the realities have changed.\footnote{Carol Tavris & Carole Offir, The Longest War: Sex Differences in Perspective 20 (1977).}

As employers become more sophisticated in masking their discriminatory motives, so too must the [law] become more sophisticated in crafting tests to detect it.\footnote{J. Cindy Eson, Casenote, In Praise of Macho Women: Price Waterhouse v. Hopkins, 46 U. Miami L. Rev. 835, 854 (1992).}

The work world has changed considerably since employers felt free to tell women\footnote{This Note focuses exclusively on discriminatory employer decision making based on gender stereotyping. Because employer stereotyping based on gender overwhelmingly penalizes women, this Note will refer to the plaintiff as "she" throughout. See Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 Hastings L.J. 471, 494 (1990) (citing various studies of common gender stereotypes). According to research, "women who exhibit\[ ] a high degree of 'feminine' traits . . . tend[ ] to be far less successful in their careers than those women who exhibit[ ] a balance of 'masculine' and 'feminine' traits, or in whom the 'masculine' traits predominate[.]." Id. at 496-97. See generally Margaret L. Andersen, Thinking About Women: Sociological Perspectives on Sex and Gender 101-39 (1994) (discussing social myths about women's work that influence women's role in economic life); Harriet Bradley, Men's Work, Women's Work: A Sociological History of the Sexual Division of Labour in Employment (1989) (discussing gender segregation and sex-typing of jobs); Francine D. Blau & Marianne A. Ferber, The Economics of Women, Men and Work (1986) (discussing traditional economic theory and traditional women's occupations and their impact on the status of women); infra note 83 (listing various gender stereotypes particularly relevant to work performance).} they would not be hired for "men's jobs."\footnote{Hardin v. Stynchcomb, a case decided twelve years ago, provides an example of blatant sexism. 691 F.2d 1364 (11th Cir. 1982) (class action suit alleging employment discrimination on basis of sex in county sheriff's department). Defendant, Sheriff of Fulton County, Georgia, when asked whether he was prejudiced against women, replied, "I will say I don't want a woman working and I give them the reason . . . . It is not discrimination but I got good
Unfortunately, the extinction of baldly expressed sexism has not meant the extinction of gender bias in the work place.\(^5\) Certain forms of bias, most commonly gender stereotyping,\(^6\) occur even in the absence of explicit reference to gender. Many employers still make gender-based decisions, particularly concerning high level promotions, but they cite “neutral” reasons for their decisions.\(^7\) The job no longer requires a man, per se, but it “requires” aggressiveness, detachment, firm leadership, single-minded commitment, even ruthlessness—traits that employers consistently find lacking in female candidates.\(^8\) At the same time, employers find aggressive, detached or ruthless female employees distastefully unfeminine, abrasive or overbearing.\(^9\) Thus employers trap female professionals in a “double bind,” judging them incompetent if they act like women and labeling them “difficult,” or worse, if they act like men.\(^10\)

\(^5\) DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 161 (1989) (“Women have more opportunities for economic independence than ever before in history, but certain obstacles persist . . . . Most female employees . . . have remained in relatively low-status, low-paying, female-dominated vocations.”); Alfred W. Blumrosen, Society in Transition II: Price Waterhouse and the Individual Employment Discrimination Case, 42 Rutgers L. Rev. 1023, 1028 (1990) (“There remain employers who have been impervious to legal pressures generated over twenty-five years to improve opportunities for minorities and women.”).

\(^6\) For an excellent discussion and definition of “the stereotyping process” in the work place, see Radford, supra note 3, at 489-503; see also infra part II.A-B (describing gender stereotyping in employment).


\(^8\) See Maxine N. Eichner, Note, Getting Women Work That Isn’t Women’s Work: Challenging Gender Biases in the Workplace Under Title VII, 97 Yale L.J. 1397, 1401-02 (1988) (“Large numbers of traditionally male jobs in our society are mischaracterized as requiring traits predominantly associated with men.”).

\(^9\) See generally Radford, supra note 3 (discussing employers’ attribution of these traits to female employees). The female worker “will not succeed . . . if she is too ‘masculine’ . . . because she will be perceived as engaging in deviant behavior unbecoming to her gender.” Id. at 503.

\(^10\) See id. at 500-03 (explaining that women with “female” or “male” attributes are discriminated against). Unable to win the employer acceptance crucial to advancement, large numbers of female employees collect in the lower levels of virtually every employment field. See Eichner, supra note 8, at 1404 (discussing the “double bind”); see also infra part II.B (explaining the “double
Minnesota has been a pacesetter in the protection of employee civil rights, but that position is slipping. Federal and various state courts have expressly addressed and prohibited gender stereotyping in employer decision making. Minnesota, by contrast, continues to use an employment discrimination framework that has not materially changed in two decades. The framework contains no language about gender stereotyping and cannot facilitate an effective examination of complex, controversial stereotyping claims.

This Note asserts that a legislative amendment to the Minnesota Human Rights Act defining illegal gender stereotyping would help Minnesota courts recognize and penalize such stereotyping in claims brought under Minnesota's current discrimination framework. Part I describes Minnesota's framework, making relevant comparisons to federal employment discrimination law. Part II describes the growing prevalence of gender stereotyping in the workplace, explains the gender stereotyping process, and analyzes the insensitivity of current Minnesota law and federal law to such stereotyping. Part III suggests that a legislative definition of illegal stereotyping would assist litigants.
and judges to more effectively analyze stereotype claims. This Note urges Minnesota to reestablish leadership in employment discrimination jurisprudence by breaking its silence on this issue and moving beyond the federal treatment of gender stereotyping to a more vigilant prohibition of this pervasive form of bias.

I. DISPARATE TREATMENT EMPLOYMENT DISCRIMINATION LAW: COMPLEX AND EVOLVING

A. THE MINNESOTA HUMAN RIGHTS ACT: A "BROAD REMEDIAL PURPOSE"15

Legislation provides the platform for all employment discrimination case law. At the federal level, Title VII of the 1964 Civil Rights Act prohibits discrimination in employment.16 The Minnesota Human Rights Act, enacted in 1955, made employment discrimination illegal on the state level.17 Section 363.03 of the Minnesota Act makes it an unfair and illegal employment practice for an employer to refuse to hire, discharge, or otherwise discriminate against an employee because of sex.18

In entrusting Minnesota courts with interpretation of the Act, the legislature cautioned against "narrowly construing" any of the statute's provisions.19 It emphasized the Act's "broad remedial purpose"20 of "secur[ing] for persons in this state[ ] freedom from discrimination."21 As plaintiffs brought cases under the Minnesota Act, Minnesota courts searched for a litigation framework to organize judicial analysis and effectively implement the Act's goals. Noting the remarkable similarity between

17. MNNN. STAT. § 363.03 (Supp. 1993).
18. Id., subd. 1(2). The statute also prohibits employment discrimination on the basis of "race, color, creed, religion, national origin, . . . marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age." Id.
19. United States Jaycees v. McClure, 305 N.W.2d 764, 766 (Minn. 1981) (en banc) (discussing legislative intent underlying the Minnesota Act). See MNNN. STAT. § 363.11 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.").
the Minnesota statute and Title VII, the Minnesota Supreme Court adopted the federal framework for Minnesota employment discrimination litigation.

B. MINNESOTA'S FRAMEWORK: THE THREE-STEP "PRETEXT" ANALYSIS

In the complex arena of employment discrimination law, courts examine allegedly discriminatory employment practices under different schemes depending on the particular facts of each case. If an employer practice or procedure impacts a certain protected class disparately, the case receives a "disparate impact" analysis. If an employer treats individual members of a protected group disparately, as they do when they apply gender stereotypes to employees, the case requires "disparate treat-

22. Danz v. Jones, 263 N.W.2d 395, 398-99 (Minn. 1978) (en banc). Title VII declares that:

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.


23. Danz, 263 N.W.2d at 398-99 (“This court has applied principles developed in court decisions under Title VII for purposes of construing [the Minnesota Human Rights Act].”).

24. The development of federal law, which parallels the development of most state law, has been continuous since Title VII was passed in 1964. See generally MARK A. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 234-59 (1991) (tracing the evolution of employment discrimination law). In early years, courts assumed plaintiffs would have direct evidence of their employer’s discrimination. As it became clear that such direct evidence was rare and becoming rarer, the United States Supreme Court created different frameworks for plaintiffs relying on circumstantial evidence. See id.; see also Radford, supra note 3, at 508 (“The manner in which disparate treatment cases are adjudicated has evolved as the courts, litigants and attorneys have become more sophisticated in dealing with employment decisions.”).

25. For discussions of “protected class,” see Loving v. Virginia, 388 U.S. 1, 10 (1967) (containing one of the Supreme Court’s earliest articulations of “protected class”); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (referring to the traditionally protected classes: “ classifications based upon sex, like classifications based upon race, alienage, and natural origin are inherently suspect”). See also supra note 18 (listing the protected classes under Minnesota law, in addition to gender).

26. See generally ROTHSTEIN, supra note 24, at 234-59 (citing cases). Disparate impact discrimination occurs when an employer subjects its employees to a facially neutral selection process that in practice has an adverse effect on the employment opportunities of a “protected class.” Id. at 245. Disparate impact plaintiffs must introduce statistical evidence of discrimination, and case law focuses on this requisite showing. Id.
ment” analysis. In disparate treatment claims, courts must establish whether the employer acted with discriminatory intent, a requirement that adds complexity and subjectivity to disparate treatment litigation.

Minnesota courts consider disparate treatment claims under a three-step framework created in the 1973 United States Supreme Court case McDonnell Douglas Corp. v. Green. At the framework’s first stage, the plaintiff must establish a prima facie case of discrimination by showing that she belongs to a “protected class,” that she was qualified for, applied for, and was rejected from a position or promotion, and that her

27. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (distinguishing “disparate treatment” and “disparate impact”). Disparate treatment discrimination occurs when an individual employee suffers the impact of an adverse employment decision made by an employer motivated by “illegitimate factors,” as defined by Title VII. Rothstein, supra note 24, at 234.

28. See Teamsters, 431 U.S. at 335 n.15 (explaining that unlike disparate impact claims, “proof of discriminatory motive is critical” for disparate treatment claims).


32. See Minn. Stat. § 363.03, subd. 1(2) (listing as “protected classes” under the Minnesota Human Rights Act race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, and age).

33. Although disparate treatment employment discrimination cases most often involve an employment decision to terminate or refuse to promote an employee, the range of employment decisions subject to review under the Minnesota Human Rights Act or Title VII is very broad. As the Court explained in Meritor Savings Bank v. Vinson, for example, “the language of Title VII is not limited to economic or tangible discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.” 477 U.S. 57, 64 (1986) (quoting City of Los Angeles Dep’t of Water & Power v. Man-
employer continued to consider similarly qualified candidates after her rejection.  

Successful establishment of a prima facie case raises a presumption of discrimination that the employer, in the second phase of the McDonnell Douglas framework, must rebut to avoid liability. The employer may overcome the presumption of discrimination by articulating a "legitimate reason" for its adverse decision concerning the employee.

If the employer meets its rebuttal burden, the plaintiff proceeds in one of two ways: either by convincing the fact finder that the employer's proffered reason was a mere "pretext" for discrimination, or by offering direct evidence of discrimination. Thus, according to the Minnesota Supreme Court, plaintiffs may demonstrate discrimination by proving that "the reason advanced by [the employer] was 'pretextual' [sic] or that the 'discriminatory reason' more likely than not motivated" the employer's decision. Either showing entitles her to a finding of

34. Anderson, 417 N.W.2d at 623; McDonnell Douglas, 411 U.S. at 802 (outlining the requirements of a plaintiff's prima facie case under the McDonnell Douglas framework).

35. Anderson, 417 N.W.2d at 623; McDonnell Douglas, 411 U.S. at 802.

36. Anderson, 417 N.W.2d at 623; McDonnell Douglas, 411 U.S. at 802. If the employer meets this burden, the case advances to the third and most substantive step of the McDonnell Douglas test. Anderson, 417 N.W.2d at 623-24; McDonnell Douglas, 411 U.S. at 804.

37. The Supreme Court's original articulation of the McDonnell Douglas test contains an explanation of this term:

Title VII does not . . . permit [an employer] to use [an employee's] conduct as a pretext for [prohibited] discrimination . . . . [The plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover up for a . . . discriminatory decision.

McDonnell Douglas, 411 U.S. at 804-05.


39. See Anderson, 417 N.W.2d at 627. Because directly persuading the court that discrimination occurred is so often difficult, the McDonnell Douglas test ostensibly gives the plaintiff an important advantage by allowing her to disprove her employer's proffered reason. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) ("[P]lacing this burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.").

The federal courts' articulation of this burden was, until recently, very similar: the plaintiff could prevail "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. A 1993 Supreme Court decision, however, altered the
liability.40

C. MINNESOTA'S REJECTION OF A "MIXED MOTIVE" ANALYSIS

Minnesota still uses McDonnell Douglas exclusively in disparate treatment cases.41 Federal courts, by contrast, use two frameworks. In 1989, the United States Supreme Court held in Price Waterhouse v. Hopkins42 that McDonnell Douglas could not appropriately serve all federal cases of disparate treatment employment discrimination.43 The "pretext" framework, explained the Price Waterhouse plurality opinion, assumes that a discriminatory employer always has a single illegitimate motive, which it attempts to cover up by concocting a single facially legitimate motive.44 Employers, however, often act upon "a mixture of legitimate and illegitimate motives."45 Thus, the Price federal interpretation somewhat. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (en banc). In language that seems to directly contradict McDonnell Douglas and Burdine, Justice Scalia wrote for a five-justice majority that an employment discrimination plaintiff is not entitled to a directed verdict in a disparate treatment case merely by demonstrating that her employer's proffered reason was unbelievable. Id. at 2751-52. Instead, she must go on to demonstrate that the employer's reason was discriminatory. Id. In short, Hicks rejected the Burdine interpretation that McDonnell Douglas requires either a direct showing of discrimination or a showing of pretext. Id. at 2752. Instead, Hicks held that McDonnell Douglas requires both, at least in some cases. Id.

Although Hicks stops short of dismantling McDonnell Douglas, it does, to an extent that is presently unclear, weaken the previously powerful consequences of a pretext showing in a disparate treatment case. See David S. Tatel et al., Commentary, The 1992-93 Term of the United States Supreme Court and its Impact on Public Schools, 85 Educ. L. Rep. 397 (1993) (explaining impact of Hicks on plaintiff's burden of proof). Whether the Minnesota Supreme Court ought to follow Hicks's lead or distance itself from the federal decision is a question beyond the scope of this Note. If the Minnesota Supreme Court has made any indication of its inclination, the indication is that Minnesota will not follow Hicks. See McGrath v. TCP Bank Sav., 509 N.W.2d 365, 366 (Minn. 1993) (en banc) (holding that although a showing of pretext was one way of ensuring a plaintiff's victory in a disparate treatment case, the plaintiff may also prevail "if an illegitimate reason 'more likely than not' motivated the . . . decision") (citing Anderson, 417 N.W.2d at 627).

40. But see supra note 39 (discussing Hicks).
41. See supra note 30 and accompanying text (discussing the McDonnell Douglas three-step framework); see also infra note 55 (discussing application of McDonnell Douglas to disparate treatment claims).
42. 490 U.S. 228 (1989) (plurality opinion).
43. Id. at 247.
44. Id. The Price Waterhouse Court noted that, "the premise of [the McDonnell Douglas/Burdine "pretext" analysis] is that either a legitimate or an illegitimate set of considerations led to the challenged decision." Id.
45. Id. In such cases, according to the Court, the "pretext" analysis becomes inappropriate because "it simply makes no sense to ask whether [a] legit-
Waterhouse Court supplemented the "pretext" test with a second disparate treatment framework specially designed for "mixed motive" employment decisions.46

Although Price Waterhouse focuses on the debate between "mixed" and "single motive" decisions, the case is equally important because it is the first47 United States Supreme Court decision to extensively discuss employment discrimination in the form of gender stereotyping.48 Price Waterhouse plaintiff Ann Hopkins offered evidence that decision makers at the Price Waterhouse accounting firm denied her partnership because they found her too "macho"49 and thought she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"50 In upholding Hopkins' discrimination charge, the Supreme Court stated, "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."51

Many commentators, in part because of its ground breaking


47. Research reveals that no Supreme Court cases before Price Waterhouse comprehensively address gender stereotyping by employers. See Tracy L. Bach, Note, Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII, 77 Minn. L. Rev. 1251, 1264 (1993) (noting the significance of Price Waterhouse because "[f]or the first time, the Supreme Court explicitly discussed gender stereotyping"). But see Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) ("It is impermissible under Title VII to refuse to hire . . . on the basis of stereotyped characterizations of the sexes."); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (making passing but undeveloped declarations against discrimination in the form of stereotyping).

48. "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." Price Waterhouse, 490 U.S. at 251.

49. Id. at 235.

50. Id. (citing Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)). Hopkins introduced further evidence of employer statements that she was "a lady using foul language" and that she "overcompensated for being a woman." Id.

51. Id. at 250.
discussion of stereotyping, praised Price Waterhouse as a significant step for employment discrimination plaintiffs.\textsuperscript{52} The Minnesota Supreme Court, however, opined that the Price Waterhouse "mixed motive" framework might actually disadvantage employment discrimination plaintiffs.\textsuperscript{53} Minnesota therefore declined to adopt the federal framework\textsuperscript{54} and continues to litigate all disparate treatment claims under McDonnell Douglas.\textsuperscript{55}


\textsuperscript{53} Shortly before Price Waterhouse was decided, the Minnesota Supreme Court heard a similar case and rejected the "mixed motive" analysis. See Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 627 (Minn. 1988) (en banc). The Anderson court stated that the "same decision" element of the mixed motive framework, which allowed defendants "definitionally guilty" of discrimination to escape liability, "would defeat the broad remedial purposes of the Minnesota Human Rights Act." Id. at 626.

\textsuperscript{54} Although the problems with the Price Waterhouse "mixed motive" framework that the Minnesota Supreme Court diagnosed were arguably corrected at the federal level by the 1991 Civil Rights Act, see supra note 46, the Minnesota Supreme Court has not reconsidered adopting a mixed motive framework.

\textsuperscript{55} See Anderson, 417 N.W.2d at 626-27 ("Courts of this state should continue to apply the McDonnell Douglas analysis in employment cases involving claims of disparate treatment brought under the Minnesota Human Rights Act regardless of whether a claim has the label of being a 'single-motive' or 'mixed-motive' case."). See also McGrath v. TCF Bank Sav., 509 N.W.2d 365, 366 (Minn. 1993) (en banc) (applying McDonnell Douglas); Sigurdsen v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986) (en banc) (same); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 441-42 (Minn. 1983) (en banc) (same).
II. MINNESOTA AND FEDERAL DISPARATE TREATMENT LAW: INEFFECTIVE IN STEREOTYPE CASES

Minnesota's rejection of Price Waterhouse's framework is not in itself problematic.\textsuperscript{56} What is disturbing is Minnesota's failure to articulate a prohibition of sex stereotyping, like that in Price Waterhouse, within its preferred McDonnell Douglas jurisprudence, or to address stereotyping anywhere in its case law.

Minnesota courts have cited McDonnell Douglas in more than 100 cases.\textsuperscript{57} None contains a sustained discussion of gender stereotyping in the work place.\textsuperscript{58} This suggests either that Minnesota plaintiffs are not bringing stereotype cases,\textsuperscript{59} or that Minnesota judges are not recognizing and discussing the stereotype issues that do come before them.\textsuperscript{60}

The lack of judicial discussion of stereotyping is especially troubling given Minnesota's established leadership in civil rights law.\textsuperscript{61} Currently, Minnesota lags behind federal courts in

\textsuperscript{56} For a discussion of Price Waterhouse's limitations as a stereotyping case, see infra part II.D. But see McGrath v. TCF Bank Sav., 502 N.W.2d 801, 807 n.2 (Minn. Ct. App. 1993) (alluding to possible benefits to Minnesota case law of a Price Waterhouse "mixed-motive" analysis).

\textsuperscript{57} Research shows that the federal McDonnell Douglas decision is cited in 123 Minnesota cases. Search of Westlaw, MN-CS database (July 9, 1994).

\textsuperscript{58} Of the 123 Minnesota cases citing McDonnell Douglas, only three mention the word stereotyping, one time each. Search of Westlaw, MN-CS database (July 9, 1994); see Hengesteg v. Ecolab, Inc., No. C1-91-2156, 1992 WL 89647, at *1 (Minn. Ct. App. May 5, 1992) (plaintiff who offered evidence that her employer stereotyped her as "dependent" lost a disparate treatment challenge under McDonnell Douglas); Beaulieu v. Clausen, 491 N.W.2d 662, 666 (Minn. Ct. App. 1992) (mentioning "stereotypes" of AIDS victims in discrimination case against a dentist); Ridler v. Olivia Pub. Sch. Sys. No. 653, 432 N.W.2d 777, 783 (Minn. 1988) (citing a federal court's statement mentioning stereotyping to support its holding that men as well as women could sue under Title VII and the Minnesota Human Rights Act). None of these opinions contains sustained discussion of gender stereotyping in employment decisions, or a definition of illegal gender stereotyping.

\textsuperscript{59} Indeed, a study of the subject revealed that Minnesota plaintiffs do avoid state court, and may avoid litigation altogether, when they experience gender-based discrimination. See GENDER FAIRNESS REPORT, supra note 14, at 81 ("Most employment discrimination cases [in Minnesota] are handled in federal court.... This low number of cases in state courts... could indicate either the reluctance of victims to seek legal redress or a preference for other forums."). Furthermore, the study reports, "fewer than one-quarter of the state's judges have handled gender-based employment discrimination cases in state court within the last two years (1986-1988)." Id.

\textsuperscript{60} See infra part II.E.1 (analyzing judicial insensitivity to stereotyping issues).

\textsuperscript{61} "The scope of discrimination liability, and its consequences, is more onerous under our state laws than under Title VII." Carlson v. Independent Sch.
redressing gender stereotyping, and behind the many states that have incorporated Price Waterhouse's explicit prohibition against stereotyping into their employment discrimination case law. To regain its position as a pioneer in this area, Minnesota must go beyond the ultimately unsatisfying Price Waterhouse language to a more effective proscription of employment discrimination based on gender stereotyping.

Dist. No. 623, 392 N.W.2d 216, 221 (Minn. 1986) (en banc). See also United States Jaycees v. McClure, 305 N.W.2d 764, 766-67 (Minn. 1981) (en banc) noting, in reference to the legislative history of employment discrimination prohibition in the Minnesota Human Rights Act, that the Minnesota legislature extended "full and equal privileges" to "all persons within the jurisdiction of the state of Minnesota" fully "ten years before the United States Supreme Court [reversed] the 'separate but equal' fiction justifying the Jim Crow laws").

62. Federal courts have addressed the illegality of stereotyping while Minnesota courts have not. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 251 (1988) ("We take [Title VII] to mean that gender must be irrelevant to employment decisions. . . . [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ."); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 290 (1987) ("A statute based on such stereotypical assumptions would, of course, be inconsistent with Title VII's goal of equal employment opportunity."); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (citing Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971)); Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) ("But whatever the verbal formulation, the 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."). Federal courts' more explicit treatment of stereotyping may explain why most Minnesota disparate treatment cases are tried in federal, not state, court. Gender Fairness Report, supra note 14, at 81.

A. THE CHANGING COMPLEXION OF EMPLOYER DISCRIMINATION: STEREOTYPING GROWS PREVALENT AS BLATANT DISCRIMINATION BECOMES TABOO

Regardless of the framework used, employment discrimination law will be ineffective today unless judges and lawyers recognize and penalize gender stereotyping when it surfaces in discrimination claims. For a combination of reasons, stereotype-infused decision-making is becoming the most common form of employment discrimination against women. As a result, it is the central issue in most gender-based disparate treatment claims.

At the time McDonnell Douglas was decided, women were fighting employment discrimination to simply attain jobs.\(^6\) Disadvantage plaintiffs were not challenging the belief that they could not perform certain jobs well; rather, they were fighting for the right to work in certain jobs at all.\(^6\) Employers were resisting the presence of a woman anywhere in the office, not just the presence of women as partners and company presidents.\(^6\)

Today, by contrast, the numbers of women and men in the work force are nearly equal.\(^6\) Employment discrimination, however, has not disappeared. It has merely crept up the career ladder.\(^6\) Below the infamous "glass ceiling," women now have relatively equal employment opportunities, but the upper echelons...
Ions of most fields are still overwhelmingly populated by men, and several particularly prestigious or well paying professions remain largely or entirely closed to women.

Consequently, today's discrimination plaintiffs bring fewer

---

69. See Radford, supra note 3, at 490-93 (explaining the concentrations of women in lower paying, less powerful or less prestigious work); Rhode, supra note 5, at 161 ("Women have more opportunities for economic independence than ever before in history, but certain obstacles persist. . . . Most female employees . . . have remained in relatively low-status, low-paying, female-dominated vocations."); see also Blau & Ferber, supra note 3, at 153 ("[W]omen who have succeeded in reaching the highest levels in business, unions, government, or academia are still extremely rare."); Andersen, supra note 3, at 119 ("[W]ithin the professions, women are concentrated in the lower ranks and in less prestigious specialties."); Lyon, supra note 68, at 169 ("The female sector of the labor market . . . is predominantly associated with lower and middle status work in less prestigious firms."). See generally Susan Faludi, Backlash: The Undeclared War Against American Women 363-99 (1991) (citing numerous statistics of the current, discouraging situation of women within the American work force).

Indeed, there is every indication that discriminatory forces are still operating in Minnesota work places. See, e.g., Bob von Sternberg, Women, Minorities Mostly at Bottom of Metro Job Market, Star Trib. (Mpls.), Dec. 6, 1992, at 1A (reporting the results of a Minnesota census as showing that, "[w]omen and minorities in the Twin Cities have made considerably less headway in cracking several employment bastions traditionally held by white men than they have in the nation as a whole"); Richard Chin, Women Secured Job Gains in '80s, Large Number Move Up to Management Ranks, St. Paul Pioneer Press, Nov. 15, 1992, at 1A (reporting a study of Minnesota women in the work force as showing that "[m]any traditionally female jobs—secretaries, telephone operators, elementary school teachers—are still dominated by women. And women have made only small inroads into some traditionally male jobs . . . . What is more, even where the gains were made, they often were in the lower-paying end of job categories."); Donna Halvorsen, Women Lawyers Paid Less, Face Job Discrimination, Study Says, Star Trib. (Mpls.), Oct. 27, 1989, at B7 ("[A] study commissioned by Minnesota Women Lawyers raises important questions about whether the recent influx of women law graduates is being assimilated into the profession.").

70. Social scientists call this phenomena "occupational segregation," distinguishing it from the "hierarchical segregation" that operates to confine women to lower jobs within an occupation. In America, certain occupations are clearly segregated by sex; for example, 96% of all electrical and electronic engineers are male. See Bradley, supra note 3, at 17. Bradley cites other statistics: "In traditional blue-collar areas women are particularly poorly represented, being in 1982 less than 2 per cent of carpenters, masons, plumbers, electricians, truck drivers and automobile mechanics." Id. By contrast, "in the early 1980s [women] were 99 percent of typists, secretaries and telephone operators, 97 per cent of household service workers, [and] 94 per cent of keypunchers." Id. See also Lyon, supra note 68, at 161 ("Women and men are still largely concentrated in different industries and occupations—those most compatible with traditional notions of sex-appropriate work."); Blau & Ferber, supra note 3, at 160, 167 (charting the percentage of female workers in selected professional
GENDER STEREOTYPING

claims contesting hiring decisions, and more claims challenging promotion and partnership decisions. Upper level employment decision-making processes are more complex than hiring procedures because they almost always include an extensive subjective evaluation of the employee's qualifications and personality. Such evaluations are inherently prone to the use of gender stereotypes. Predictably, then, as the percentage of discrimination claims challenging upper level decisions increases, judges encounter more stereotyping issues in the courtroom.

Additionally, women's progress toward equal opportunity in employment and increased legal regulation of employment decisions have heightened employer awareness of discrimination since the 1960s and '70s. The presence of women at work and

occupations); Linda L. Lindsey, Gender Roles: A Sociological Perspective 187-89 (1980) (discussing the “occupational distribution of women”).

One particularly harmful consequence of occupational segregation is that the jobs largely performed by men uniformly pay better than jobs largely performed by women, even when both jobs require comparable skill and education. See Andersen, supra note 3, at 115, 117 (“W]omen are most heavily concentrated in those jobs that have been the most devalued—both economically and socially. . . . [O]ccupations most populated by women workers are the lowest paid of all occupations.”). In 1990, women employed full time and year round earned only 71% of salaries earned by men employed full time and year round. Id. at 101. Andersen goes on to note that “[w]omen college graduates, on the average, earned the equivalent of men with only a high school education.” Id. See generally Lindsey, supra, at 189-90 (discussing and charting the “wage gap” between men and women).

71. See Cava, supra note 64, at 55 (describing the “second generation” of employment discrimination law suits).

72. See Radford, supra note 3, at 484 (“[A]s women attempt to rise to positions of power, a new set of evaluation standards, based on intangible personal assets, is applied. When looking for leaders . . . decision makers search for more than just physical ability or technical competence. Personal attributes take on prime importance.”); Cava, supra note 64, at 55 (noting that upper level evaluation focuses on personality and the “over-all picture of the person”).

73. See The Supreme Court, 1988 Term—Leading Cases, 103 Harv. L. Rev. 340, 345 (1989) (“[W]hen employment decisions [are] . . . subjective rather than objective . . . ambiguous criteria for success often lead to the evaluation of a candidate based on personal impressions. As a result, these procedures are particularly vulnerable to the influence of gender bias through sex-role stereotyping.”); Radford, supra note 3, at 474 (“The question . . . [is] whether females suffer disproportionately from this evaluative device, which, although neutral on its face, is affected profoundly by preconceived notions of the ‘appropriate’ roles and traits of women and men.”); Eson, supra note 2, at 848-49 (“Evaluations that are subjective are more likely to be tainted by . . . male bias because they reveal the evaluator’s unreflective perceptions of the employee's performance—perceptions that cannot be reduced to a standardized measure.”).

74. See Rhode, supra note 5, at 168 (“Before passage of antidiscrimination legislation in the early 1960s, many employers were surprisingly public about
costly gender discrimination suits are just two circumstances employers did not face a few decades ago. Consequently, today's employers couch discriminatory treatment of all kinds in subtle terms. Rather than citing gender as a factor in an employment decision, an employer describes the employee's failure to meet subjective job qualifications, or a particular personality problem, as grounds for a negative evaluation.

Finally, as women move into higher, more powerful positions, resistance against that movement intensifies. The entry of women into the top echelons of various fields is more threatening to male control than their entry into low paying and low prestige jobs. A largely male law firm is likely to resist a female partner more strenuously than a female law clerk, just as a male dominated company is more likely to resist a female president than a female secretary. Increased resistance means in-

their private biases . . . . [However,] changing attitudes and statutory mandates have made such overt discrimination increasingly rare.

75. Id. Rhode describes the work world before the mid-1960s: "[S]ome job advertisements openly specified 'males preferred,' and many workplaces had separate job titles, pay scales, and promotion channels for men and women performing substantially the same work." Id.

76. William L. Kandel, Current Developments in Employment Litigation, 15 EMPLOYEE REL. L.J. 101, 113 (1989) (commenting that employers are unlikely twenty-five years after the enactment of Title VII to allow courts to receive smoking gun evidence of gender discrimination).

77. Of course, employers who discriminate blatantly still surface. See, e.g., Walsdorff v. Board of Comm'rs, 857 F.2d 1047, 1053 (5th Cir. 1988) (examining a witness's testimony that the defendant employer stated concerning the plaintiff's bid for a position, "ain't no bitch gonna get this job. My man's already picked out and that's the way it's going to be," to which the court responded, "[t]here may exist a more unequivocal way to express an intent to exclude women from consideration for a promotion, but none come readily to mind").

78. For an illuminating discussion of power, the advancement of women into higher level positions, and increased male resistance, see Radford, supra note 3, at 475-84.

79. Author Christine Littleton describes "male control" as "concentrated in the hands of a few men who are at or near the top of intersecting hierarchies of sex, race, and class . . . ." Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279, 1317 (1987).

80. Radford comments that the entrance of women into the "club of the powerful" at the upper levels of professional employment "is not accomplished as easily as was the movement by women into the workplace." Radford, supra note 3, at 483. "Unlike entry-level positions, which pose no threat to those already in power, the promotion of women to positions involving prestige and influence is a direct threat to male decision makers. In other words, women do not just want jobs—they want their jobs." Id. at 484. See also Cava, supra note 64, at 55 (explaining that the enforcement of employment discrimination law is becoming more difficult as employees begin to challenge "decision making by professionals about professionals").

81. Radford, supra note 3, at 484.
increased reliance on anything that weeds women out of competition for such jobs, including gender stereotyping.\footnote{82} Thus, this shift in the dynamics of the work world has made stereotyping a common current form of discrimination against female employees.

B. \textbf{How Gender Stereotyping Operates Against Professional Women: The "Double Bind"}

Employers stereotype women in two fundamental ways.\footnote{83}

\footnotetext{82}{\textit{Id.}}

\footnotetext{83}{For a general discussion of stereotyping, see Radford, \textit{supra} note 3, at 489 (describing the two-step stereotyping process of categorizing people into groups and then attributing certain traits to the groups). A 1972 study of traits attributed to the two sexes is revealing:

In what has been referred to as the "definitive work on sex-role stereotypes," Broverman measured the degree to which various personality traits were perceived as typical of men or of women. Adjectives that consistently were viewed as describing "male" traits included the following: aggressive, independent, unemotional, objective, not easily influenced, dominant, calm, active, competitive, logical, worldly, skilled in business, direct, adventurous, self-confident, ambitious. Adjectives representing "female" traits included: talkative, does not use harsh language, tactful, gentle, aware of other's feelings, religious, neat, quiet, easily expresses tender feelings, very strong need for security. \textit{Id.} at 494 (citing Inge K. Broverman et al., \textit{Sex-Role Stereotypes: A Current Appraisal}, 28 J. Soc. Issues 59 (1972)). \textit{See also} SUSAN T. FISKE \& SHELLEY E. TAYLOR, \textit{Social Cognition} 53-55 (1984) ("That stereotypes of men are more positive than those of women is unquestionably true. Stereotypically, men are active, independent, competitive, and ambitious, while women are passive, dependent, intuitive, and uncompetitive."). Dr. Fiske testified as an expert witness on stereotyping before the United States Supreme Court in \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228 (1989).

These researchers put the different traits associated with men and women in an employment context:

Judged on the basis of statements employers themselves make... beliefs regarding differences in average ability or behavior by sex are quite common. For example, in one study male managers and administrators compared men and women with respect to a variety of traits that are likely to be related to productivity. Men as a group were rated more highly on understanding the "big picture," of the organization; approaching problems rationally; getting people to work together; understanding financial matters; sizing up situations accurately; administrative capability; leadership potential; setting long-range goals and working toward them; wanting to get ahead; standing up under fire; keeping cool in emergencies; independence and self-sufficiency; and aggressiveness. Women [were rated] more highly on clerical aptitude; being good at detail work; and enjoyment of routine tasks. \textit{Blau \& Ferber, \textit{supra} note 3, at 252. One researcher made an even more startling discovery in a study of how the sex of a job applicant interacts with that applicant's ability in affecting employer judgments of occupational suitability: "[R]emarkably,... the sex-appropriateness variable was much more powerful than the qualifications variable; poorly qualified people of one sex were judged...\textit{Id.} at 252.}

\textit{Id.} at 227
In the first type of stereotyping, an employer evaluates or criticizes an employee based on the employee's gender. For example, an employer demotes an employee for unacceptable "abrasiveness," but closer examination reveals that the employee is not "abrasive" as an objective matter, but is abrasive "for a woman." Differing standards of "acceptable" work conduct for men and women constitute disparate treatment if adverse consequences attach to female employees' failure to meet the stricter female standard. Put differently, when behavior is tolerable or admirable when displayed by male employees, but unacceptable when displayed by female employees, the employer is discriminating through "disparate evaluation" stereotyping.

In the second kind of stereotyping, employers impose discriminatory employment criteria upon employees based on stereotyped notions about the demands of the job. An employer more suitable for same-sex occupations than highly qualified persons of the other sex.”

84. See generally Radford, supra note 3, at 499-501 (describing the stereotyping of “masculine” women in the work place).

85. Abrasiveness and aggressiveness are personality traits that often surface in “disparate evaluation” stereotyping. See id.; see also, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 234 (1989) (describing the employer accounting firm's evaluation of the employee: “[O]n too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness.... [The evaluating partners indicated] that she was sometimes overly aggressive and unduly harsh.”).

86. See Radford, supra note 3, at 501 (noting that “even when men and women engage in the same power strategies, women using these strategies are viewed as . . . less likeable than the men”).

87. Stereotyping of this type usually occurs when the employer cites, as its proffered reason for demoting or not hiring a female employee, personality traits traditionally considered “masculine.” See Eson, supra note 2, at 845 (“[Aggression, like other characteristics attributed to males, is negatively evaluated when displayed by women.”); Heather K. Gerken, Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions, 91 Mich. L. Rev. 1824, 1827 (1993) (“[W]omen 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.”); Radford, supra note 3, at 501 (“[W]omen who use power strategies typically associated with [men] may be deemed to be engaging in a type of behavior which is ‘unnatural.’”).

88. See generally Fiske & Taylor, supra note 83, at 53-55 (“When a man and a woman perform exactly the same behavior, a man’s performance may be evaluated more favorably than a woman’s.”).

89. Many employers, for example, unreasonably believe that certain jobs demand certain character traits more predominant in men. See Eichner, supra note 8, at 1398-99 (“[J]ob descriptions . . . that have been adapted to male incumbents continue to bar women from those sectors of the labor market from
using this form of stereotyping harbors unrealistically narrow or biased standards for effective job performance that exclude women from those jobs.\textsuperscript{90} For example, an employer refuses an employee's promotion bid, finding her "too emotional" for a high level position, but the employer's assessment is not relevant to the demands of the job.\textsuperscript{91} Rather, the "stoicism" requirement is rooted in gender bias existing in the employer's thought process: men have performed this job in the past, men are stoic, therefore this job requires stoicism.\textsuperscript{92}

"Disparate criteria" discrimination is difficult for female employees to prove in court because the employer applies the same job requirements to its male and female employees, creating the illusion of equal treatment on the job.\textsuperscript{93} Because all the "necessary"\textsuperscript{94} criteria are "masculine,"\textsuperscript{95} however, many more women

\textsuperscript{90} See Eson, supra note 2, at 846 (listing typical "masculine" traits that most employers uniformly demand of upper level professionals: "persistence and drive, personal dedication, aggressiveness, emotional detachment, and a kind of sexless matter-of-factness equated with intellectual performance").

\textsuperscript{91} One author notes how common this is:

Many jobs in today's labor market require traits ... generally associated with men. Although such job demands typically are perceived as necessary for optimal job performance, often they are unconnected to the actual needs of the job itself. Instead, these requirements are based on the faulty supposition that the job must be performed as it has always been performed . . . .

Eichner, supra note 8, at 1401. As one successful businesswoman's employer allegedly phrased this stereotype-based demand for masculine behavior from female employees: "I'm not going to pay you like a broad, and I'm not going to treat you like a broad, so don't act like a broad." Jane Gross, Against the Odds: A Woman's Ascent on Wall Street, N.Y. Times Mag., Jan. 6, 1985, at 16. The employer seems not to have entertained the possibility that a woman might be paid and treated like male employees without acting like them.

\textsuperscript{92} See Eichner, supra note 8, at 1401.

\textsuperscript{93} For an excellent discussion of the difficulty women have making courts acknowledge this kind of gender discrimination, see CATHARINE A. MACKINNON, Toward a Feminist Theory of the State 215-34 (1989).

\textsuperscript{94} Studies show that currently required "masculine" traits are, in fact, not at all "necessary" for the performance of traditionally male jobs. See SAMUEL COHN, The Process of Occupational Sex-Typing: The Feminization of Cler-
than men are excluded under the employer's evaluation process. The two breeds of stereotyping do not occur independently. Their operation is simultaneous, and traps professional women in a double bind. Female employees who display a personality matching gender stereotypes of women are perceived to be "too feminine" for the job under "disparate criteria" stereotyping, and those who display a personality matching male stereotypes are considered "too masculine" for employer tastes under "disparate evaluation" stereotyping. The Supreme Court in Price Waterhouse illustrates this trap, using the specific trait of aggressiveness: "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."
C. THE INEFFECTIVENESS OF MINNESOTA'S MCDONNELL DOUGLAS FRAMEWORK IN STEREOTYPE CASES

Despite the societal changes in the work force described earlier that have made stereotyping the predominant form of employment discrimination,100 Minnesota courts continue to use a disparate treatment employment discrimination framework that makes no reference to stereotyping101 and was not created for stereotype cases. Under McDonnell Douglas, the disparate treatment plaintiff may choose between two strategies. She may attempt to prove either that “the reason advanced by [her employer] was ‘pretextual’” or that “[a] ‘discriminatory reason’ more likely than not motivated [the employer’s decision].”102 Neither option, unaided, lends itself to a theoretically synthesized discussion of stereotype issues. To be effective, the law’s prohibition of stereotyping cannot be “interpreted into” a twenty year old framework; it must be explicit and specific.

1. The McDonnell Douglas Pretext Challenge: Semantically Misleading in Stereotype Cases

The employee’s first option under McDonnell Douglas, showing that any legitimate motives proffered by her employer are “pretextual,”103 cannot accommodate a meaningful inquiry into stereotype issues. The pretext challenge becomes awkward in stereotyping cases because it does not allow the plaintiff to rise to the top levels of male dominated professions. “Stereotyping... creates barriers to women’s advancement in the work place, both by limiting a woman’s achievements and by tainting an employer’s evaluation of those accomplishments.” Gerken, supra note 87, at 1827. The majority remain pooled in low or perhaps middle level careers, excluded from higher paying, more prestigious employment. See Seager & Olson, supra note 66, at 18 (offering research that in the United States a vast majority of women who work outside the home work in the job “ghettos” of low level teaching, sales, nursing, child care, or bank telling); Deborah L. Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163, 1189 (1988) (“[Sex stereotyping] entrench[es] gender hierarchies.”); Nadine Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C. L. Rev. 345, 349 (1980) (“[Sex stereotyping constitutes] a primary obstacle to equal employment opportunity.”).

100. See supra part II.A (discussing these changes).


103. See supra notes 37, 39 and accompanying text (discussing the pretext challenge).
challenge the legitimacy, as opposed to the truth, of an employer motive allegedly affected by gender bias.

The option of challenging employer statements as pretextual invites the plaintiff to contest the truth of defendants' proffered motives.\textsuperscript{104} This challenge will succeed only if an employer's motive is not true, that is, if it is an intentional "cover up" for a discriminatory motive.\textsuperscript{105} In a stereotype case, however, the plaintiff contests not the truth of the employer's motive, but the legitimacy of the motive. The stereotype plaintiff concedes that the employer did not fabricate a motive, or that the motive as articulated by the employer is its "real" motive, but argues that the motive is discriminatory because it is based on stereotyping.

The distinction between contesting the truth of an employer's motive, as the plaintiff does in a pretext challenge, and contesting the legitimacy of the motive is a subtle but important one.\textsuperscript{106} On the surface, it seems as if stereotype cases could be litigated under a pretext analysis. The plaintiff in a stereotype case could use her evidence to show that her employer was "really" motivated by gender bias, using the language of the pretext framework.\textsuperscript{107} The plaintiff's claim, however, would inevitably suffer because the precise challenge in a stereotype case is not that the employer was "really" motivated by something else, it is

\textsuperscript{104} Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981) (stating that under the "pretext" challenge: "[plaintiff must] show[ ] that the employer's proffered explanation is unworthy of credence").

\textsuperscript{105} McDonnell Douglas, 411 U.S. at 805 ("[O]n the retrial respondent must be given an... opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a... discriminatory decision.").

\textsuperscript{106} See generally Eileen M. Fields, 1985-1986 Annual Survey of Labor Relations and Employment Discrimination Law, 28 B.C. L. Rev. 170, 176-81 (1986) (discussing the shortcomings of the McDonnell Douglas "pretext" analysis in stereotype cases). A plaintiff makes a "pretext" attack, or disputes the truth of an employer's motive, when she argues that the employer was not really motivated by its proffered motivation. \textit{See McDonnell Douglas}, 411 U.S. at 805. The "pretext" challenge implies that if the employer \textit{had} been motivated by its proffered reason, its decision would not have been discriminatory. \textit{Id}. Thus, in a pretext challenge, the reason challenged is itself legitimate; the illegitimacy of the decision stems from the employer's \textit{use} of the reason as a coverup.

In a stereotype case, the employee does not dispute whether the employer was "actually motivated" by its proffered reason. Rather, the employee agrees that the motive articulated by the employer led to its decision. The employee introduces evidence, however, that the motive itself is based on stereotyping and therefore discriminatory.

\textsuperscript{107} \textit{See McDonnell Douglas}, 411 U.S. at 804 (plaintiff in a "pretext" case shows that employer's explanation is unworthy of credence).
that the employer's motive "really" is gender bias.\textsuperscript{108} In the words of the Supreme Court, "it simply makes no sense to ask," in stereotype cases, whether the reason actually relied on by the employer was its "true reason."\textsuperscript{109} Requiring her to twist her evidence into the malfitting "pretext" language distorts crucial elements of the stereotype plaintiff's claim. Thus, the \textit{McDonnell Douglas} "pretext" challenge is not an effective legal platform for stereotype cases.

2. The Existing but Weak Option of Proving Discrimination Directly in Stereotype Cases

Although she cannot present her evidence within a pretext challenge, the gender stereotype plaintiff may introduce that evidence as part of a direct showing that discrimination "more likely than not motivated" her employer's decision.\textsuperscript{110} The Minnesota Supreme Court articulates this second option under \textit{McDonnell Douglas} in terms so broad as to permit, presumably, the introduction of stereotype evidence in disparate treatment claims.\textsuperscript{111}

Yet, simply because the second alternative of \textit{McDonnell Douglas} does not entirely preclude the introduction of stereotyping evidence does not mean that this "catch-all" option is capable of the kind of specific analysis necessary to examine complex stereotyping issues.\textsuperscript{112} Stereotyping is a difficult, developing, and controversial breed of employment discrimination.\textsuperscript{113} Under these circumstances, plaintiffs and their lawyers are un-

\begin{itemize}
\item \textsuperscript{108} In stereotype cases, the employer's proffered motive and the alleged gender bias are one entity, one is not a "pretext" for the other. It is illogical to accuse an employer who has admitted to an arguably illegitimate motive of using that motive as a "pretext" or coverup.
\item \textsuperscript{110} \textit{Anderson v. Hunter, Keith, Marshall & Co.}, 417 N.W.2d 619, 627 (Minn. 1988) (en banc). \textit{See also} \textit{Texas Dep't of Community Affairs v. Burdine}, 450 U.S. 248, 256 (1981) (explaining that under \textit{McDonnell Douglas} the plaintiff's second option is to "directly" persuade the court of discrimination).
\item \textsuperscript{111} \textit{McGrath v. TCF Bank Sav.}, 509 N.W.2d 365, 366 (Minn. 1993) (en banc) (explaining that even if a plaintiff cannot demonstrate pretext, "[s]he may nevertheless prevail if an illegitimate reason 'more likely than not' motivated the discharge decision") (citing \textit{Anderson}, 417 N.W.2d at 627).
\item \textsuperscript{112} The dearth of plaintiffs filing stereotype cases in Minnesota seems to indicate this inadequacy. \textit{See Gender Fairness Report}, \textit{supra} note 14, at 81 (hypothesizing about the "reluctance of [Minnesota] victims to seek legal redress" in gender discrimination cases).
\item \textsuperscript{113} \textit{See generally supra} part II.A-B (discussing stereotyping).
\end{itemize}
derstandably hesitant to litigate their claims unless the law explicitly addresses and prohibits stereotyping in the workplace. The direct method of proof under \textit{McDonnell Douglas} merely invites the plaintiff to show that discrimination “more likely than not” motivated her employer; it does not contain a specific prohibition against stereotyping, or any language about stereotyping whatsoever. The absence of such language weakens the effectiveness of Minnesota’s framework in the many instances of employment discrimination in which gender stereotyping is the predominant or sole issue. In sum, neither option of \textit{McDonnell Douglas} adequately serves stereotype plaintiffs.

\textbf{D. \textit{Price Waterhouse}: Not a Satisfying Option}

Even though \textit{Price Waterhouse} is considered a “stereotype case,” adopting a \textit{Price Waterhouse} framework in addition to, or instead of, the \textit{McDonnell Douglas} framework would not greatly advance Minnesota’s approach to stereotyping cases. The \textit{Price Waterhouse} Court’s definition of gender stereotyping greatly underestimates the wide range of employer decision making infected with gender stereotypes. \textit{Price Waterhouse}’s analysis focuses on causation, on the amount of stereotyping that will be tolerated before an employment decision will be deemed illegal. It deemphasizes the

\begin{enumerate}
\item See \textit{Anderson}, 417 N.W.2d at 623-24 (describing the direct method of proof option under \textit{McDonnell Douglas}).
\item See \textit{Bach}, supra note 47, at 1264; see \textit{also} supra note 52 (describing the critical reception of \textit{Price Waterhouse}).
\item See \textit{Price Waterhouse}, 490 U.S. 228, 258 (1989) (stating the holding of the case). In fact, many courts outside Minnesota that have addressed stereotyping, both state and federal, have focused on articulating guidelines for determining how much stereotyping must taint an employment decision before the employer is liable, rather than on a definition of the term “stereotyping” itself. \textit{See generally Robert Belton, Causation in Employment Discrimination Law,} 34 Wayne L. Rev. 1235, 1237-38 (1988) (“[Causation] tests [articulated by courts] require that the party with the burden of proof on causation prove that the unlawful discrimination was either ‘a factor,’ ‘a motivating factor,’ ‘the or a
root problem of defining illegal stereotyping itself. Moreover, when the opinion does turn to identifying, rather than quantifying, stereotyping, it fails to recognize all but the most blatant examples of stereotyping at work in employer decisions. Worse, the Court also comments that identifying the stereotyping in Hopkins’ claim was easy, opining that “[i]t takes no special training to discern sex stereotyping” of the kind perpetrated against Ann Hopkins. The message of Price

determinative factor,’ ‘a substantial factor,’ ‘a significant factor,’ ‘a discernible factor,’ or the ‘but for’ cause.”); Mark S. Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 COLUM. L. REV. 292 (1982) (weighing the benefits of various standards). For two compelling discussions of causation issues specific to stereotype cases, see Sam Stonefield, Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law, 35 BUFF. L. REV. 151-61 (1986) (arguing that “language discrimination” or stereotyping should be illegal even if it is not determinative of a certain adverse employment decision); Struth, supra note 7, at 708 (“Since quantifying the degree to which sexual stereotyping had an effect on the employment decision is an impracticable task, a violation . . . is certainly made out when the employee proves that the stereotyping was relied upon in reaching the adverse employment decision.”).

118. “[T]he [Price Waterhouse] Court does not clearly address what constitutes stereotyping.” Cava, supra note 64, at 53.

119. The Court attempts to draw a line between legal decision making and illegal stereotyping, but that line merely separates the statement “Hopkins is too macho” from the statement “Hopkins is too aggressive.” The Court slips by not recognizing that the difference between such statements is semantic and superficial. See Price Waterhouse, 490 U.S. at 234-35 (categorizing adjectives used by employers such as “macho” and “masculine” as indications of stereotyping, but adjectives such as “aggressive,” “abrasive,” “brusque,” “harsh,” and “difficult” as legitimate, negative evaluations of Hopkins). See also Radford, supra note 3, at 526-27 (describing as a “flaw” in Price Waterhouse the Court’s failure to recognize that evaluations “of an individual’s ‘interpersonal skills’” like the evaluation made of Hopkins are “exactly the type of judgement prone to stereotyped conclusions”); Eson, supra note 2, at 838-39, 850-51 (discussing the Supreme Court’s failure to address subtle forms of gender discrimination). According to Eson, the Supreme Court in Price Waterhouse affirmed the district court’s findings that:

Price Waterhouse legitimately emphasized interpersonal skills in its partnership decision, an area in which Hopkins received harsh criticism. . . . The court had little difficulty acknowledging . . . that remarks characterizing Hopkins as . . . “overcompensating for being a woman” were tainted by sex stereotyping. . . . Yet for all the Court’s ability to recognize the more obvious sex stereotyping in the evaluation process, it failed to reach the more subtle discrimination that tainted the assessment of Hopkins’ personality. The Court unquestioningly accepted the firm’s harsh evaluation of Hopkins’ personality . . . without further examining the employment context in which the appraisal was made.

Id.

120. Price Waterhouse, 490 U.S. at 256. The Court goes on to say: [E]xpert testimony [on issues involved in gender stereotyping] was merely icing on Hopkins’ cake. . . . [I]t does not require expertise in
Waterhouse is that gender stereotyping is both blatant and easily recognized. In fact, it is rarely either of these. Because Price Waterhouse fails to identify and prohibit all forms of gender discrimination based on stereotyping, both subtle and overt, its adaptation would not advance Minnesota disparate treatment jurisprudence as far as necessary. Because it implies that judges can and do easily spot gender stereotyping in discrimination claims, it presents a danger to Minnesota courtrooms. Thus, Price Waterhouse is not a solution to Minnesota's need for law that addresses stereotyping.

E. BIGGER THAN THE FRAMEWORKS: OTHER WEAKNESSES OF DISPARATE TREATMENT LAW IN STEREOTYPE CASES

1. Judicial Insensitivity to Gender Stereotyping

Gender stereotyping in employment discrimination is extremely burdensome to prove in litigation, in part because evidence of stereotyping is sensitive, subjective in form, and easily denied by employers. In light of these complexities, courts must not assume, like the Price Waterhouse Court did, that stereotype-based bias in employment discrimination claims will be obvious or easily identifiable. Not only do judges sometimes

... 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.

Id.

121. Indeed, commentators stress that evidence of stereotyping like that presented by Hopkins is extremely rare. See, e.g., Kandel, supra note 76, at 101, 113 ("[Price Waterhouse] relates to those few cases that present 'smoking gun' evidence of employment discrimination. . . . Twenty-five years after the enactment of Title VII, it is hard to conceive of employers offering plaintiffs and courts the opportunity to decide [a second case like Price Waterhouse].").

122. Because Price Waterhouse is ultimately ineffective in stereotype cases, the proposition that Minnesota plaintiffs have the option of bringing their disparate treatment claims in federal rather than state court is weak justification for preserving the current state of Minnesota's law. See Cava, supra note 64, at 53 (arguing that Price Waterhouse fails to demonstrate "how those subject to [gender stereotyping at work] can prove its effect" in court).

123. Judges must be more, not less, careful about recognizing stereotyping in employer decisions. See infra part II.E.1.

124. See GENDER FAIRNESS REPORT, supra note 14, at 82 (discussing gender discrimination claims in general and stating that, "about half the judges [in Minnesota] agree that these claims are more difficult to prove than other civil cases. Employment discrimination cases are complex and frequently turn on the credibility of one person.").

125. Unfortunately, many courts do take the identification of stereotyping for granted. "Court opinions use the word [stereotyping] without defining it." Cava, supra note 64, at 28. "While neither explicitly stating it, courts appear to
fail to recognize gender stereotyping in such claims, often the judges themselves use stereotypes against female litigators and parties in their courtrooms. If some judges are unaware of their own biases, or unconcerned about those biases, they may not sensitively identify and condemn similar biases in employers. Explicit, proscriptive legal language addressing this is-

treat stereotyping as something 'so commonly known in the community as to make it unprofitable to require proof, and so certainly known as to make it indisputable among reasonable men.' Id. at 40 (quoting Mccormick on Evidence 992 (E. Cleary ed., 1984)). Cava continues, "Courts have never studied and mastered the issue, nor devoted energy to understanding the large psychological and sociological implications of stereotyping. Rather, the operative measure for handling stereotyping claims seems to be: We can't define it, but we know it when we see it." Id. at 55. Cf. Castellano v. Linden Bd. of Educ., 400 A.2d 1182, 1188-89 (N.J. 1979) (Handler, J., concurring in part, dissenting in part) ("Not everyone has a nose for discrimination, especially in its most subtle forms . . . . Discrimination often goes uncorrected because it is undetected.").

126. "[H]ope that the courts ([I] currently male dominated) [will] even be able to recognize sex stereotyping has been somewhat dim." Radford, supra note 3, at 485 n.56. Radford's lament was prompted by the following passage from a district court opinion explaining why a stereotype plaintiff should not have a cause of action against the law firm refusing her partnership:

In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a "business marriage" for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all.

Id. (citing Hishon v. King & Spalding, 24 Fair Employment Prac. Cas. (BNA) 1303, 1305 (N.D. Ga. 1980)).


128. Indeed, the law's seeming inability to affect the sluggish progress of women to the top levels of most professional fields, see supra note 69, indicates that perhaps judges and juries are not correctly identifying and proscribing stereotyping when it surfaces in discrimination claims. See Round, supra note 127, at 2194 ("Gender bias must be eliminated in the judicial system not only because it influences the perception of women in the courtroom, but also because it undermines the manner in which courts apply the law and thus affects the substantive rights of the litigants."). See also Radford, supra note 3, at 534 ("[S]ex stereotypes are so deeply entrenched that the judicial system . . . has[ ] not yet appreciated their most insidious forms.").
sue would aid discrimination plaintiffs by sharpening judicial perception in stereotype claims.

2. The “Intent Requirement” Problem

The stereotype plaintiff who brings her case as a disparate treatment claim must prove that her employer acted with discriminatory intent.\(^{129}\) Courts have updated the intent requirement to keep pace with more sophisticated employer motives; unfortunately, that evolution has not been toward a definition of “intent” helpful to stereotype plaintiffs. Courts recognized that discrimination may be one of several motives in an illegal employment decision, a recognition that aids “mixed motive” plaintiffs.\(^{130}\) Courts have not, however, recognized that employers often consciously or unconsciously\(^ {131}\) allow discrimination to taint an employment decision, and that such decisions should also be illegal. Without the second recognition, stereotype plaintiffs often fail to meet the disparate treatment intent requirement.\(^ {132}\)

Currently, courts hesitate to hold employers liable for stereotyping that is not overt, finding that employers may not have “intended” subtle discrimination. This hesitancy confuses “intent” with “consciousness.”\(^ {133}\) Employers may intend to hold a

\(^{129}\) International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); see Rothstein, supra note 24, at 234.

\(^{130}\) See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 251-52 (1989) (establishing the federal “mixed motive” analysis); see also supra note 62 (citing states that have adopted the Price Waterhouse “mixed motive” framework).

\(^{131}\) For an excellent discussion of the difference between “intent” and “consciousness” in disparate treatment cases, see Fields, supra note 106, at 177-81.

\(^{132}\) “Because discrimination through sex role stereotyping may not take the form of overtly sex-biased statements, but rather of ‘neutral’ criticism of a woman’s job performance, a plaintiff may be unable to demonstrate the causal role played by the illegitimate motives... despite the prevalence of this type of gender discrimination.” The Supreme Court, 1988 Term, supra note 73, at 348-50 (citations omitted).

\(^{133}\) Fields uses the Price Waterhouse facts to make this point:

[T]he [C]ourt was incorrect in concluding that... unconscious sexual stereotyping by the evaluators was not sufficient to establish discriminatory motive. ... In [Price Waterhouse], regardless of whether the partners were “conscious” that their comments resulted from stereotypical assumptions, the partners “intended” to judge the plaintiff in terms of appropriate “feminine” behavior.

Fields, supra note 106, at 179 (analyzing the district court decision in Price Waterhouse). See also Rhode, supra note 5, at 162 (“Too much concern [in employment discrimination law] has focused on the conscious motivations of decision makers and too little on the cumulative disadvantages that their actions impose.”). Unconscious sexism is no more comforting to women than intentional sexism.
female employee to stereotypical notions of femininity without realizing that such behavior is discriminatory.\textsuperscript{134} As author Eileen Fields states, "basing employment decisions on . . . stereotyping, whether conscious or unconscious, clearly constitutes disparate treatment, since women employees are being judged on the basis of their sex, rather than on the basis of individual merit."\textsuperscript{135}

Defining gender stereotyping in the law would assist stereotype plaintiffs to hurdle the "intent" obstacle. An official, specific definition of stereotyping would undermine the credibility of employers who claim to be unaware that certain notions applied to female employees are stereotypical.\textsuperscript{136} Employers would be forced to scrutinize their decision making for conscious and latent gender bias, and to reject both.\textsuperscript{137}

III. LEGISLATIVELY DEFINING GENDER STEREOTYPING: SUGGESTIONS FOR AN EFFECTIVE STATUTE

Ironically, as long as the inadequate \textit{McDonnell Douglas} framework regarding stereotyping discourages stereotype plaintiffs from bringing claims,\textsuperscript{138} the Minnesota Supreme Court will be unable to articulate an effective definition of illegal stereotyping. Courts may only create or articulate law based on the facts of cases before them. Thus, the shortage of plaintiffs filing stere-
otype cases makes an imminent judicial definition of illegal stereotyping unlikely.

Instead, the legislature must act. Minnesota law makers should create a legislative definition of illegal gender based stereotyping. Such a definition would encourage wary plaintiffs to bring stereotype cases, warn employers that stereotype-based discrimination is intolerable, and give judges guidance on stereotype issues in court. Most importantly, the statute would provide an official statement that gender based stereotyping constitutes unlawful discrimination.

In defining stereotyping, the Minnesota legislature must be specific. A statute that merely prohibits "gender stereotyping by employers" without defining stereotyping in explicit terms will provide courts with no greater guidance than they currently have in recognizing stereotyping, and will afford plaintiffs little security in the law's competence in this area. The language chosen must capture the varied dynamics and circumstances of gender stereotyping, so that courts will be able to recognize stereotyping when it surfaces in the plaintiff's evidence. Finally, the statute must separately address "disparate evaluation" stereotyping and "disparate job criteria" stereotyping to ensure that the two are not confused, nor one ignored, but also so that both are specifically defined and proscribed.

A "disparate job criteria" stereotyping plaintiff should be able to demonstrate stereotyping under the statute by meeting two requirements. The statute should first require convincing evidence that the plaintiff's employer had unreasonably narrow standards of behavior or character for a particular employment opportunity that were unrelated to her ability to perform the job and that arose out of preconceptions based on the reality that the job is usually or traditionally performed by male employees. The statute should further require the plaintiff to show that such unreasonable standards adversely influenced an employment decision concerning her.

139. See supra note 58 (discussing statistics on Minnesota employment discrimination claims).
140. Legislative action to correct or supplement case law has been an effective tool in employment discrimination law at the federal level. See, e.g., supra note 46 (noting the effect of the 1991 Civil Rights Act on federal disparate treatment law). See generally Gould, supra note 52 (discussing congressional reaction to the Supreme Court's decision in Price Waterhouse and other recent employment discrimination cases); Sandra Hemeryck et al., Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990, 25 Harv. C.R.-C.L. L. Rev. 475 (1990) (same).
141. See supra part II.B.
The statute should similarly set forth two requirements for the “disparate evaluation” plaintiff. It should require her to demonstrate that her employer made an evaluation of her behavior or character that a male employee displaying similar behavior or character would not have received. It should also require her to show that the stereotyped evaluation influenced the employer’s decision.142

If a discrimination plaintiff meets the statute’s require-

142. This sample amendment to the “Unfair Discriminatory Practices Act” of the Minnesota Human Rights Act incorporates the suggestions outlined in part III:

It shall be an unlawful employment practice under section 363.03, subd. 1(2)(a)-(c) of this chapter, for an employer to undertake any action which adversely affects an employee’s employment status when at least one of the following factors motivates the decision to take such action:

Subdivision 1. Unreasonable standards or criteria. The employer subjects a female employee to unreasonable standards of job performance or unnecessary job criteria that are unrelated to the employee’s ability to perform the reasonable duties of her position. Such illegal standards or criteria include, but are not limited to, an employer’s demand or expectation:

(a) That the employee display any personality traits or other qualifications not demanded by the position she holds, regardless of the personality traits or qualifications displayed by past or other employees; or

(b) That the employee not display any trait, habit, or manner, the manifestation of which is not detrimental to her performance of the position she holds, regardless of the traits, habits or manners displayed or not displayed by past or other employees; or

(c) That the employee demonstrate commitment to her job by working unreasonable hours, or by making herself available for travel or particular work scheduling or extra-employment activities, when such hours or availability or activity are not an essential requirement of the position she holds, regardless of the schedule kept or availability or participation of past or other employees.

Subdivision 2. Unreasonable disparate evaluation. The employer disparately evaluates a female employee’s qualifications or behavior or personality if a male employee displaying similar qualifications, behavior, or personality traits would not be similarly evaluated. Such illegal evaluations shall include, but not be limited to, evaluations that characterize a female employee as:

(a) Overly aggressive, authoritative, ruthless, or brisk when a male employee displaying similar behavior or personality traits would not be evaluated as overly aggressive, authoritative, ruthless, or brisk; or

(b) Unacceptably unconcerned about her appearance, when a male employee displaying similar concern for his appearance would not be evaluated as unacceptably unconcerned with his appearance; or

(c) Unacceptably using unprofessional or offensive language, when a male employee using similar language would not be evaluated as unacceptably using unprofessional or offensive language; or

(d) Too unemotional, detached, cold, or undemonstrative when a male employee displaying similar behavior or personality traits would
ments for either "disparate job criteria" stereotyping or "disparate evaluation" stereotyping, the court should find that impermissible consideration of gender in the form of gender stereotyping influenced the employer's decision regarding the plaintiff, and find the employer liable for employment discrimination under the Minnesota Human Rights Act.

CONCLUSION

For too many years, this country has boasted the near extinction of openly manifested gender discrimination while generating deplorable statistics of women's advancement in professional fields. A new wave of attack against employer perpetrated gender bias is overdue. A statute meeting the above requirements would begin such an attack by equipping courts with specific legal definitions with which to measure and frame stereotype evidence. The statute would help close the widening gap between the twenty-year-old language of *McDonnell Douglas* and the concrete, current struggles of working women against much subtler forms of bias. It would move beyond the deficient treatment of stereotyping in *Price Waterhouse*, sharpen judicial analysis of stereotype claims, and help correct the misconstruction of the disparate treatment "intent" requirement of stereotype cases, thereby repositioning Minnesota ahead of federal law in this important area of civil rights jurisprudence.