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MADONNAS AND WHORES IN THE WORKPLACE

JESSICA FINK*

ABSTRACT

Much has been written about “lookism”—the preferential treatment given to those who conform to societal standards of beauty. But in a recent case before the Iowa Supreme Court, a sex discrimination plaintiff alleged “reverse-lookism,” claiming that her male employer terminated her long-term employment because she was too physically attractive, thus tempting the employer to consider entering into an extramarital affair. To the great surprise of many who followed this case, the Iowa Supreme Court sided with the employer, declining to find him liable for sex discrimination. As one might expect, uproar ensued, with the media, the public, and the academic community eviscerating the court for its failure to recognize and rectify sex discrimination. In story after story, reporters, academics, and pundits framed this decision as one involving an “irresistible woman” and a man’s “uncontrollable lust.” Though such characterizations made for catchy headlines, they were not quite true: The court’s decision did not hinge upon outmoded stereotypes regarding gender roles, but rather contained a plausible factual and legal basis for denying the plaintiff’s claim.

This Article expounds on the decision of the Iowa Supreme Court, exploring the complicated reasons behind this employee’s failure to win her case, and suggesting alternate theories under which a similarly situated employee could successfully challenge this type of termination. The Article also probes the reasons behind the vehement, and often misinformed, public reaction to this case. It explores the ways in which the media systematically misrepresents women, particularly in the context of suits involving workplace sex discrimination, and examines the consequences of these errors, arguing that attempts to force women in the public eye into one of two molds—either pure and pristine with muted sexuality, or sexually promiscuous and vilified—has dramatic consequences for other employees in the workplace, for policymakers, and for the public at large.

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INTRODUCTION

Appearance matters. In a variety of settings—social, professional, academic, and even familial—a person’s physical appearance impacts the treatment that he or she receives: conventional wisdom dictates that “the beautiful people” come out on top in these interactions—that those who comport with accepted standards of physical attractiveness generally receive preferential treatment.¹ Yet in a recent case before the Iowa Supreme Court, *Nelson v. Knight*,² a

1. See *infra* note 11 and associated text.

2. 834 N.W.2d 64 (Iowa 2013). Notably, this was the second opinion that the Iowa Supreme Court issued in this case. In December 2012, the Iowa Supreme Court first issued a decision affirming summary judgment to Knight. *Nelson v. Knight*, 2012 WL 6652747, at *1 (Iowa 2012). As discussed in greater detail below, the Iowa Supreme Court subsequently withdrew this initial decision and issued a second opinion in July 2013, in response to a petition for rehearing, but did so without any oral argument or re-briefing. *Nelson*, 834 N.W.2d at 65 n. 1; see also Jonathan Turley, *The Irresistible Woman Meets the Incurable Court: Iowa Supreme Court Issues New Opinion Upholding Firing in Irresistible Attraction Case*, JONATHANTURLEY.ORG (July 15, 2013), <http://jonathanturley.org/2013/07/15/the-irresistible-woman-meets-the-incorrigible-court-iowa-supreme-court-issues-new-opinion-upholding-firing-in-irresistible-attraction-case> [http://perma.cc/2SG9-HS9C].

plaintiff attempted to turn this conventional wisdom on its head, claiming that her married, male employer terminated her long-term employment because she was a woman and too physically attractive, thus tempting the employer to consider entering into an extramarital affair with her.³ To prove her case, the plaintiff not only cited her former employer's admission that he fired Nelson because "their relationship had become a detriment to [his] family,"⁴ but also provided evidence of numerous graphic and sexual comments that Knight had made to her during her employment⁵—comments that Knight did not deny making.⁶ Despite this evidence, however, the Iowa Supreme Court rejected the plaintiff's claim, declining to find Knight liable for sex discrimination.⁷ According to the court, Nelson was not terminated due to her sex, but rather due to the consensual relationship between herself and Knight—a reason that was not deemed to be "because of a gender-specific characteristic . . ."⁸

In the wake of this decision, observers from all facets of the legal and social landscape responded with ire: the media, the public, and the academic community all leveled harsh criticism at this—coincidentally, all-male—Iowa Supreme Court for its apparent failure to recognize and rectify sex discrimination.⁹ In story after story, reporters, academics and pundits framed this decision as one involving an "irresistible woman" and a man's "uncontrollable lust."¹⁰ Though this ire created a convenient story for the press—and a compelling way of framing this case—it ultimately was a misleading account of the court's decision. The Iowa Supreme Court's decision did not hinge upon outmoded stereotypes regarding gender roles, but rather contained a plausible factual and legal basis for denying the plaintiff's claim.

3. See *Nelson*, 834 N.W.2d at 66.

4. *Id.*

5. *Id.* at 65–66.

6. *Id.*

7. *Id.* at 65.

8. *Id.*

9. See *infra* Section III.A. The word "sex" generally refers to an "individual's biological identity," whereas the word "gender" generally refers to an "individual's social identity" (including "culturally traditional masculine and/or feminine characteristics"). See, e.g., Francine Tilewick Bazluke & Jeffrey J. Nolan, "Because of Sex": *The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361, 362 (2006). Courts, however, have frequently failed to properly distinguish between these two concepts, deeming such distinctions unnecessary under Title VII. See *id.* at 365 (quoting *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996)) ("'Because Congress intended that the term 'sex' in Title VII mean simply 'man' or 'woman,' there is no need to distinguish between the terms 'sex' and 'gender' in Title VII cases.'"). Whereas some academic writers have advocated for maintaining a distinction between these two terms, this Article does not comment on any ambiguity in the use of these terms in the court decisions cited herein. See *id.*

10. See *infra* Section III.A.

So why did everyone get this case so wrong? How did so many “experts” in the field and so many members of the media misunderstand, or perhaps willfully misrepresent, the nuanced reasons behind Nelson’s failure to win her case? This Article not only reexamines the facts at issue in *Nelson* and tries to frame the outcome of this case in a more logical and defensible light, but also endeavors to understand the reasons for the often-flawed coverage of this lawsuit. Part I of this Article provides a more thorough description of the *Nelson* case, explaining the court’s decision not in the simplistic and divisive terms adopted by the media and others in the wake of this ruling, but rather by citing the legal precedent and factual basis for the result. Part I also places this case in context by discussing other examples of women who have claimed they were penalized for being “too attractive” for their workplaces. Part II builds upon this broader context by examining how plaintiffs, like Nelson, who believe that they have been terminated due to their (attractive) appearance, might prevail in bringing sex discrimination claims, by providing several theories under which such plaintiffs might succeed. Part III examines the media’s role in the *Nelson* case, looking at the reasons behind the vehement—and often misinformed—public reaction that this lawsuit generated. Part IV explores the ways in which the media systematically misrepresents women, particularly in the context of suits involving workplace sex discrimination. It argues that women in the public eye ultimately are forced into one of two molds—either pure and pristine with muted sexuality, or sexually promiscuous and vilified. This Article argues that creating and perpetuating this false dichotomy has dramatic, negative consequences not only for women in the workplace, but also for other employees, for policymakers, and for the public at large.

I. “TOO HOT FOR THE WORKPLACE”: NELSON AND HER COUNTERPARTS

Most individuals do not complain about suffering harm due to being “too attractive.” Indeed, quite the opposite typically is true: study after study has revealed the advantages—both in and out of the workplace—for individuals who meet society’s definition of beauty.¹¹ For example, studies show that we ascribe a host of positive traits to physically attractive individuals, assuming that such individuals

11. See William R. Corbett, *Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law*, 60 CATH. U. L. REV. 615, 625 (2011); Enbar Toledano, *The Looking-Glass Ceiling: Appearance-Based Discrimination in the Workplace*, 19 CARDOZO WOMEN’S L.J. 683 (2013); see also Michael Kimmel, *Fired for Being Beautiful*, N.Y. TIMES, July 17, 2013, at A25; cf. Ashley Robin Brown, *Mirror, Mirror on the Wall, Who Are You to Say Who Is Fairest of Them All?*, 13 VA. SPORTS & ENT. L.J. 54, 57 (2013) (examining the weaknesses in the argument that more attractive individuals enjoy greater advantages).

“[are] happier, possess more socially desirable personalities, practice more prestigious occupations, and exhibit higher marital competence.”¹² We view beautiful people “as more competent and more socially graceful” than their less attractive peers.¹³ Physically attractive individuals tend to have more friends, more sex, and more money than those who lack such beauty.¹⁴

This “beauty advantage” often becomes particularly pronounced in the workplace. Employers tend to hire physically attractive job candidates more frequently than their less attractive peers and offer higher starting salaries to these more attractive individuals.¹⁵ Once on the job, attractive employees continue to garner benefits: they generally receive more favorable performance reviews,¹⁶ receive higher pay,¹⁷ and receive promotions at a more frequent rate than their less attractive counterparts.¹⁸ Attractive employees thus seem to climb the corporate ladder more quickly than their peers, placing one (well-manicured) foot in front of the other in a manner that may seem effortless to the casual observer.

This prevailing wisdom makes it easy to dismiss complaints like those lodged by Nelson—complaints that her gender, and by extension, her physical beauty, placed her at a *disadvantage* in the workplace, and ultimately led to her termination.¹⁹ Yet in both *Nelson* and in other similar cases, female employees have tried to allege unlawful sex discrimination on precisely this basis, arguing that they received adverse treatment for being too attractive for their jobs.

A. *Nelson v. Knight: Fired for Being “Too Hot” for Her Job?*

In 1999, Melissa Nelson began working as a dental hygienist for Iowa dentist James Knight.²⁰ Over the course of the next decade,

12. Toledano, *supra* note 11, at 692; *see also* Corbett, *supra* note 11, at 625 (“Recent research indicates that there is a high correlation between beauty and happiness, with a significant part of the happiness attributable to the beautiful person’s higher earnings, and the higher earnings of the beautiful person’s beautiful spouse.”); Toledano, *supra* note 11, at 683 (“[W]e not only value beauty in the abstract, but we also generally believe that beautiful people are, in fact, better people.”).

13. Kimmel, *supra* note 11.

14. *Id.*; *see also* Brown, *supra* note 11, at 57 (discussing the advantages of physical attractiveness, including higher earnings).

15. *See* Toledano, *supra* note 11, at 684, 694.

16. *See id.* at 694.

17. *See* Kimmel, *supra* note 11 (citing one economic study that “found a 5 percent bonus” for employees who fall within the top third of the “looks department” (as assessed by a set of observers), as compared to a “7 to 9 percent penalty” for those in the bottom nine percent).

18. *See* Toledano, *supra* note 11, at 684.

19. *See Nelson v. Knight*, 834 N.W.2d 64, 67 (Iowa 2013).

20. *Id.* at 65.

Nelson and Knight enjoyed a collegial relationship: Nelson apparently performed her work duties well, and Knight treated Nelson with respect and integrity.²¹ According to Nelson, however, in or around 2009, her relationship with Knight underwent changes.²² Knight began to complain about the clothing that Nelson wore to work, describing it as “too tight,” “revealing,” and “distracting.”²³ He told Nelson that it was not “good for [him] to see [Nelson] wearing things that accentuate her body.”²⁴ Knight and Nelson also began sending text messages to each other regarding “both work and personal matters.”²⁵ Both parties apparently played a role in initiating these text messages, and neither one ever objected to the other’s text messages.²⁶ Though many of these messages involved innocuous issues—such as discussions regarding their children’s activities—the messages eventually took on a more sexual tone.²⁷ Knight told Nelson that “if she saw his pants bulging, she would know her clothing was too revealing,”²⁸ and he texted Nelson to ask how often she experienced orgasms.²⁹ When Nelson once commented about the infrequency of her sex life, Knight told her, “[T]hat’s like having a Lamborghini in the garage and never driving it.”³⁰ Though Knight initiated the sexual content in these exchanges, Nelson apparently never asked Knight not to text her nor indicated that she was offended by these conversations.³¹ Nelson also admitted that she once texted Knight to tell him that “[t]he only reason I stay is because of you,”³² and she admitted that a coworker was jealous of the manner in which Nelson and Knight got along.³³

Knight’s wife—who also worked in her husband’s dental practice—eventually discovered that her husband and Nelson had been texting each other.³⁴ Stating that she viewed Nelson as “a big threat to our marriage,” Mrs. Knight demanded that her husband terminate Nelson’s employment.³⁵ After considering his wife’s request and conferring with their pastor, Knight eventually fired Nelson, telling

21. *See id.*

22. *See id.*

23. *Id.* (internal quotations omitted).

24. *Id.* (internal quotations omitted).

25. *Nelson*, 834 N.W.2d at 65.

26. *Id.*

27. *See id.* at 65–66.

28. *Id.* at 66.

29. *Id.*

30. *Id.* (internal quotations omitted).

31. *See Nelson*, 834 N.W.2d at 65–66.

32. *Id.* at 65–66. (internal quotations omitted).

33. *Id.* at 65.

34. *Id.* at 66.

35. *Id.* (internal quotations omitted).

Nelson that “their relationship had become a detriment to [his] family and that for the best interests of [himself] and his family and Nelson and her family, the two of them should not work together.”³⁶ When later pressed by Nelson’s husband, Knight admitted that Nelson was “the best dental assistant he ever had,”³⁷ and he acknowledged that Nelson “had not done anything wrong or inappropriate”³⁸ He also said that “he was worried he was getting too personally attached to [Nelson],” and that “he feared he would try to have an affair with her down the road if he did not fire her.”³⁹

Nelson sued Knight under Section 216.6(1)(a) of the Iowa Code, which prohibits an employer from discharging any employee because of that employee’s sex.⁴⁰ Just as under the comparable anti-discrimination language found within Title VII of the Civil Rights Act of 1964 (Title VII),⁴¹ the court noted that its inquiry involved determining whether sex was “a motivating factor” in any adverse action taken against the plaintiff.⁴² Knight argued that Nelson’s sex was not a motivating factor in her termination: he said that the nature of his relationship with Nelson and the threat this relationship posed to his marriage, rather than Nelson’s sex, were his motivations for terminating her employment.⁴³ Nelson, in contrast, adopted the view that neither this relationship “nor the alleged threat” it imposed “would have existed if she had not been a woman.”⁴⁴

In December 2012 and July 2013, the Iowa Supreme Court issued decisions affirming summary judgment for Knight.⁴⁵ In rendering these decisions, the Iowa Supreme Court drew upon cases that previously declined to find gender discrimination when employers had

36. *Id.*

37. *Nelson*, 834 N.W.2d at 66.

38. *Id.*

39. *Id.*

40. *Id.* at 67. As discussed in greater detail below, Nelson asserted only a sex discrimination claim related to her termination. *See infra* notes 64–66, 100–115 and accompanying text. She did not assert any claim of sexual harassment, despite the sexual and often graphic nature of Knight’s texts to her. *Nelson*, 834 N.W.2d at 67.

41. The *Nelson* court noted that in evaluating discrimination claims under Iowa Code Chapter 216, the court looks to federal law as guidance, including Title VII. *Nelson*, 834 N.W.2d at 67.

42. *Id.* (emphasis added) (“Generally, an employer engages in unlawful sex discrimination when the employer takes adverse employment action against an employee and sex is a motivating factor in the employer’s decision.”).

43. *Id.*

44. *Id.*

45. As described in greater detail above (*see supra* note 2 and accompanying text), the court initially issued a decision in December 2012, and then issued another opinion in July 2013, which withdrew the court’s first opinion and which was substituted as the opinion of the court. Whereas the differences between the two opinions issued by the court are discussed in greater detail later in this Article, the analysis in this section focuses on the court’s reasoning in its second, July 2013 opinion, as that remains the opinion of record.

fired female employees who were involved in consensual personal relationships that may have triggered some jealousy in others.⁴⁶ According to the court, it did not matter that the relationships—and the jealousy that resulted—likely “would not have existed if the [plaintiffs] had been male.”⁴⁷ In one Eighth Circuit case relied upon by the *Nelson* court, for example, a male business owner had fired a female employee because the owner’s wife saw this employee as a threat to her marriage.⁴⁸ Citing authority that previously had recognized that “sexual favoritism” does not violate Title VII,⁴⁹ the Eighth Circuit opined that if instances “of sexual *favoritism*” did not violate Title VII (i.e., because such decisions resulted from *conduct* rather than gender), then “treating an employee *unfavorably* because of” this type of special relationship likewise would not violate the law.⁵⁰ The Eighth Circuit held that employment decisions that are made based upon consensual sexual relationships should not be seen as flowing from the *gender* of the parties, but rather as flowing from the relevant employees’ *conduct*.⁵¹

Whereas the district court in *Nelson* deemed this Eighth Circuit precedent persuasive, *Nelson* attempted to distinguish her situation: she argued that in the Eighth Circuit case, the plaintiff-employee had played an *active role* in creating and encouraging the threatening relationship with her employer by pinching his rear end and writing him “notes of a sexual [and] intimate nature.”⁵² *Nelson*, in contrast, claimed that she had done nothing to create her precarious workplace situation, never flirting with Knight or initiating any sort of sexual or intimate relationship with him.⁵³ In *Nelson*’s eyes, she was guilty of little more than simply “exist[ing] as a female” at work.⁵⁴

46. *Nelson*, 834 N.W.2d at 67–68.

47. *See id.* at 67.

48. *Id.* at 67–68 (citing *Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903, 905–06 (8th Cir. 2006)).

49. *Id.* at 68; *see also id.* at 79 n.13 (Cady, J., concurring) (citing precedent that held that, “[Romantically motivated] favoritism is not based on a belief that women are better workers, or otherwise deserve to be treated better, than men; indeed, it is entirely consistent with the opposite opinion.”) (parentheticals in original) (internal quotations omitted).

50. *Id.* at 68. This line of cases assumed, however, that the conduct in question did not result “from unwelcome sexual advances or [other aspects of] a hostile work environment.” *Id.*

51. *Id.*

52. *See Nelson*, 834 N.W.2d at 67–68 (internal quotations omitted).

53. *Id.* at 65.

54. *Id.* at 69 (internal quotations omitted); *see also id.* at 65 (framing the question for the court as “whether an employee who has *not engaged in flirtatious conduct* may be lawfully terminated simply because the boss’s spouse views the relationship between the boss and the employee as a threat to her marriage”) (emphasis added). The court also discussed an Eleventh Circuit opinion, *Platner v. Cash & Thomas Contractors, Inc.*, where a male business owner “terminate[d] a female employee who worked on the same crew

The Iowa Supreme Court, however, rejected Nelson's argument.⁵⁵ Upholding the district court's grant of summary judgment for Knight, the court found a distinction between an "employment decision based on personal relations," like that between Knight and Nelson (assuming that there was "no coercion or quid pro quo" involved), and "a decision based on gender itself."⁵⁶ According to the court, this distinction would exist even when the personal relationship at issue would not have arisen had "the employee . . . been of the opposite gender"⁵⁷ In other words, even if it was likely that Knight would not have developed a personal relationship with Nelson had she been a male employee—and even if Knight's wife may not have become jealous of a close relationship between her husband and a male employee—termination based upon this relationship and the jealousy it caused was not the same as termination based upon gender.

The Chief Justice of the Iowa Supreme Court, concurring in the result, elaborated on this point, asserting that although "differential treatment based on an employee's status as a woman constitutes sex discrimination . . . differential treatment on account of conduct resulting from the sexual affiliations of an employee does not form the basis for a sex-discrimination claim."⁵⁸ The Chief Justice thus noted that "an adverse employment consequence experienced by an employee because of a voluntary, romantic relationship does not form the basis of a sex-discrimination suit"⁵⁹ and emphasized that this rule extended beyond relationships with actual sexual intimacy to include "consensual affiliations involving sexually suggestive conduct."⁶⁰ Applying this analysis to the instant case, the Chief Justice found that whereas "the absence of sexually suggestive behavior on the

as the business owner's son, after the wife of [this] son became . . . 'jealous' of [the female employee]." *Id.* at 69 (citing *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 903 (11th Cir. 1990)). Just as Nelson claimed in her case, the female employee in *Platner* had not played an active role in fostering anyone's jealousy, yet the Eleventh Circuit still declined to find the defendant liable for gender discrimination. *See id.* ("It is evident that Thomas, faced with a seemingly insoluble conflict within his family, felt he had to make a choice as to which employee to keep. He opted to place the burden . . . on Platner, to whom he was not related [T]he ultimate basis for Platner's dismissal was not gender but simply favoritism for a close relative.") (quoting *Platner*, 908 F.2d at 905)).

55. *See Nelson*, 834 N.W.2d at 70–73.

56. *Id.* at 70; *see also id.* at 75 (Cady, J., concurring) (noting that "differential treatment based on an employee's status as a woman constitutes sex discrimination, while differential treatment on account of conduct resulting from the sexual affiliations of an employee does not form the basis for a sex-discrimination claim").

57. *Id.* at 67, 70.

58. *Nelson*, 834 N.W.2d at 75 (Cady, J., concurring).

59. *Id.* (Cady, J., concurring).

60. *Id.* at 75–76 (Cady, J., concurring) ("When employees are terminated due to consensual, romantic or sexually suggestive relationships with their supervisors, courts generally conclude the reason does not amount to sex discrimination . . .").

part of Nelson, does factually distinguish this case from . . . cases [rejecting sex-discrimination claims] based on a consensual, romantic relationship,”⁶¹ the threat to the Knights’ marriage here still resulted from the consensual personal relationship between Nelson and Knight.⁶² Accordingly, he found no evidence indicating that either the relationship between Knight and Nelson or the decision to terminate Nelson flowed from sex-based animus.⁶³

Significantly, both the majority and concurring justices in *Nelson* took great pains to emphasize the very limited nature of their decision (particularly in their second, July 2013 opinion).⁶⁴ For example, the court repeatedly highlighted Nelson’s failure to assert a sexual harassment claim in this case—a decision that the court seemed to find surprising given the nature of Knight’s graphic communications with Nelson.⁶⁵ Indeed, at several points throughout the opinion, the court implied that had Nelson alleged sexual harassment, the court might have reached a different conclusion in this case.⁶⁶

Moreover, in finding no gender discrimination related to Nelson’s termination, the court made much of the *consensual* nature of the relationship between Knight and Nelson, including within both

61. *Id.* at 79 (Cady, J., concurring); *see also id.* at 80 (Cady, J., concurring) (“[A] critical aspect of the entire analysis centers on the consensual and voluntary nature of the personal relationship.”).

62. *See id.* at 79 (Cady, J., concurring).

63. *Id.* (Cady, J., concurring).

64. *See Nelson*, 834 N.W.2d at 65 (stating, in the opinion’s opening lines, “[w]e emphasize the limits of our decision.”).

65. *See id.* at 72 n.7 (observing that although the “record indicates that Dr. Knight made a number of inappropriate comments toward Nelson that are of a type often seen in sexual harassment cases . . . Nelson does not allege . . . that she was a victim of sexual harassment”); *see also id.* at 65 (“The employee did not bring a sexual harassment or hostile work environment claim; we are not deciding how such a claim would have been resolved in this or any other case.”); *id.* at 67 (“Nelson does not contend that her employer committed sexual harassment.”); *id.* at 78 (Cady, J., concurring) (acknowledging that Knight’s “comments would commonly be viewed as inappropriate in most any setting and, for sure, beyond the reasonable parameters of workplace interaction,” but noting that “they nevertheless were an undeniable part of the consensual personal relationship enjoyed by Nelson and Dr. Knight”).

66. *See id.* at 65 (clarifying that the court was not deciding how “a sexual harassment or hostile work environment claim” would be resolved on these facts); *see also id.* at 72 n.7 (indicating that “inappropriate comments” like those made by Knight in this case frequently support sexual harassment claims). Other observers of this case more explicitly questioned Nelson’s decision not to allege harassment in the wake of the court’s decisions. *See* Press-Citizen Editorial Board, *Firing Just for Being ‘Too Hot’ Is Discrimination*, IOWA CITY PRESS-CITIZEN (Dec. 29, 2012, 3:20 PM), <https://archive.presscitizen.com/article/20130103/OPINION03/301030003/Our-View-Firing-being-too-hot-discrimination> [<http://perma.cc/7FR5-U6NA>] (responding to the initial opinion issued by the Iowa Supreme Court, stating “we can’t understand why Nelson filed suit based on gender discrimination rather than sexual harassment. It seems she could have made a stronger case for Knight having created a hostile work environment.”).

the majority and concurring opinion, reams of references to this consensual relationship and specifically noting that it would have reached a different conclusion had Nelson's relationship with Knight *not* been consensual.⁶⁷ The Chief Justice characterized the consensual nature of this relationship as "a critical aspect of the [court's] entire analysis,"⁶⁸ deeming "the consensual aspect of [the] relationship" to be "pivotal to the analysis of the claim of discrimination based on a

67. See *Nelson*, 834 N.W.2d at 65 ("We emphasize the limits of our decision. The employee did not bring a sexual harassment or hostile work environment claim; we are not deciding how such a claim would have been resolved in this or any other case."); see also *id.* at 65 (observing that "[b]oth parties initiated texting" and that "[n]either objected to the other's texting"); *id.* at 66 (relaying Nelson's admission that she "[did] not remember ever telling Dr. Knight not to text her" nor indicated that she found his texts offensive); *id.* at 67 (citing precedent that "[A]n employer does not engage in unlawful gender discrimination by discharging a female employee who is involved in a *consensual* relationship that has triggered personal jealousy") (emphasis added); *id.* at 70 (finding a distinction between decisions based upon gender and "an isolated employment decision based on personal relations (*assuming no coercion or quid pro quo*)") (emphasis added); *id.* (relying on federal case law to establish that "adverse employment action stemming from a *consensual* workplace relationship (absent sexual harassment) is not actionable under Title VII") (emphasis added); see also *Nelson*, 834 N.W.2d. at 75 (Cady, J., concurring) (articulating "the general legal principle that an adverse employment consequence experienced by an employee because of a *voluntary*, romantic relationship does not form the basis of a sex-discrimination suit," whether the relationship involves sexual intimacy or simply sexually suggestive conduct) (emphasis added); *id.* at 76 (Cady, J., concurring) ("When employees are terminated due to *consensual*, romantic or sexually suggestive relationships with their supervisors, courts generally conclude the reason does not amount to sex discrimination because the adverse employment consequence is based upon sexual activity rather than gender.") (emphasis added); *id.* at 78 (Cady, J., concurring) ("The fact of the matter is Nelson was terminated because of the activities of her *consensual* personal relationship with her employer, not because of her gender.") (emphasis added); *id.* (Cady, J., concurring) (referencing the "consensual personal relationship" between Knight and Nelson and observing that this relationship "extended well beyond the workplace"); *id.* (Cady, J., concurring) (characterizing Knight's sexual banter as "an undeniable part of the consensual personal relationship enjoyed by Nelson and Dr. Knight."); *id.* at 79 (Cady, J., concurring) ("[A] sex discrimination claim predicated on physical appearance *accompanied by a consensual personal relationship* between the employee and employer requires proof that the physical appearance of the plaintiff was a gender-based reason for the adverse employment action.") (emphasis added); *Nelson*, 834 N.W.2d at 79–80 (Cady, J., concurring) (noting that "[t]he relationship . . . included enough activity and conduct to support a determination . . . that Nelson was terminated as a response to the consensual personal relationship she maintained with Dr. Knight," and that "there was insufficient evidence tending to show that Nelson's status as a woman was also a motivating reason"); *id.* at 80 (Cady, J., concurring) ("It is important to observe that a critical aspect of the entire analysis centers on the consensual and voluntary nature of the personal relationship."); *id.* (Cady, J., concurring) ("[T]he consensual aspect of a relationship is pivotal to the analysis of the claim of discrimination based on a personal relationship. In this case, it is undisputed the relationship was consensual."); *id.* at 80–81 (Cady, J., concurring) ("There was insufficient evidence offered by Nelson *in light of the undisputed evidence of a consensual personal relationship* that would permit a reasonable fact finder to conclude . . . that Dr. Knight terminated Nelson based on her status as a woman.").

68. *Id.* at 80 (Cady, J., concurring).

personal relationship.”⁶⁹ The court made clear that it was this consensual relationship—*conduct* on the part of both Knight and Nelson—that formed the basis for Nelson’s termination, and not merely Nelson’s sex or “existence” as a female.⁷⁰ Neither Nelson’s appearance nor her sex alone were enough to get her fired; rather, it was the manifestation of her attractive, feminine appearance in a consensual personal relationship with Knight—a relationship that evoked jealousy in Knight’s wife—that led to her termination.

B. Other Employees Who Have Claimed to Be “Too Hot” for Their Jobs

Nelson is not alone in claiming to have suffered adverse treatment at work due to her attractive appearance. Indeed, despite the fact that Nelson’s claim seemed to fly in the face of extensive research that has shown the workplace *advantages* of physical beauty,⁷¹ other employees similarly have claimed to have experienced adverse treatment due to their good looks: in 2009, for example, a banker named Debralee Lorenzana was fired from her position at Citibank, a termination that Lorenzana claimed was due to her “curvaceous figure” and her propensity to dress in a manner that accentuated her body.⁷² In the lawsuit that she filed against her former employer—which ultimately was dismissed due to the presence of an arbitration agreement⁷³—Lorenzana claimed that her superiors had asked her to refrain from wearing various items of clothing (including turtleneck tops, pencil skirts, fitted business suits, and other tailored clothing) because “as a result of the shape of her figure, such clothes were purportedly ‘too distracting’ for her male colleagues and supervisors

69. *Id.* (Cady, J., concurring).

70. *See id.* at 78 (Cady, J., concurring).

71. *See* Brown, *supra* note 11, at 57 (specifying that attractive individuals have less difficulty securing employment, receive benefits and opportunities because of their attractiveness, and ultimately have a greater earning potential); Corbett, *supra* note 11, at 625 (indicating a positive correlation between an individual’s level of attractiveness and their earnings); Toledano, *supra* note 11, at 694 (stating that attractive individuals are perceived as more capable employees, receive better salaries, and are evaluated more favorably than less attractive co-workers); Kimmel, *supra* note 11 (declaring that studies indicate that attractive individuals receive many workplace benefits, including bonuses whereas less attractive workers receive penalties for their appearances).

72. *See* Complaint at 2, *Lorenzana v. Citigroup Inc.*, 2009 WL 4241578, *2–3 (N.Y. Sup. Ct. Nov. 20, 2009) (No. 09116382) [hereinafter *Lorenzana Complaint*]; *see also* Ed Pilkington, *New York Banker Claims She Was Fired for Being Attractive*, THE GUARDIAN (June 4, 2010, 11:57 AM), <http://www.theguardian.com/world/2010/jun/04/debralee-lorenzana-too-distracting-lawsuit> [<http://perma.cc/5QTK-HVWQ>]; Corbett, *supra* note 11, at 616, 619.

73. Corbett, *supra* note 11, at 620; *see also* Docket Entry, *Lorenzana v. Citigroup Inc.*, No. 116382/2009 (N.Y. Sup. Ct. Feb. 2, 2010).

to bear.”⁷⁴ Moreover, Lorenzana alleged that, in response to her complaints that other female employees wore these prohibited clothing items, Citigroup management had advised Lorenzana that the other female employees could wear what they wished because “[their] general unattractiveness rendered moot their sartorial choices,”⁷⁵ whereas Lorenzana could not allow her “shapeliness” to be “heightened by beautifully tailored clothing.”⁷⁶

Similarly, in *Willingham v. Regions Bank*, the plaintiff—also an attractive female banker—claimed to have been terminated due to her attractive appearance and argued that her termination constituted sex discrimination.⁷⁷ Willingham’s employer, in contrast, claimed that she was terminated for violating the company’s Code of Conduct after she appeared in a publication as “Ms. Cruzin’ South August 2008,” on both the cover and in photos wearing a bikini and sitting on motorcycles and cars, and then distributed copies of this magazine at work.⁷⁸ In alleging that her termination resulted from sex discrimination,⁷⁹ Willingham argued, *inter alia*, that the bank treated her in a different, more negative manner than a similarly situated male employee.⁸⁰ She specifically pointed to a photograph of a male employee who had not been fired after appearing shirtless and dressed in “skimpy running shorts” on a web site related to a road race.⁸¹ The court, however, rejected her claim, granting summary judgment in favor of the bank.⁸²

In 2010, Amy-Erin Blakely, a former assistant executive director at a nonprofit organization called The Devereux Foundation, sued her former employer for sex discrimination after her termination by the nonprofit.⁸³ Before being terminated, Blakely had filed two internal grievances against her employer alleging adverse treatment due to her attractive physical appearance.⁸⁴ Among her allegations, Blakely claimed that, prior to her termination, she had been told that other employees could not concentrate in meetings with

74. Lorenzana Complaint, *supra* note 72, at 2; Pilkington, *supra* note 72.

75. Lorenzana Complaint, *supra* note 72, at 3.

76. *Id.*

77. 2010 WL 2650727, at *1–3 (W.D. Tenn. 2010).

78. *Id.* at *1–2, *4.

79. *See id.* at *2.

80. *See id.* at *5.

81. *Id.* (internal quotations omitted).

82. *Id.* at *5–6.

83. *See, e.g.,* Lisa Johnson Mandell, *Amy-Erin Blakely Busts Devereux Foundation with Large Breasts Lawsuit*, AOL JOBS (Nov. 17, 2010, 5:42 PM), <http://jobs.aol.com/articles/2010/11/17/amy-erin-blakely-busts-devereux-foundation-with-large-breasts-la> [<http://perma.cc/TF24-HE6G>].

84. *See id.*

her “because all they saw were her ‘big breasts,’”⁸⁵ “that she had been nicknamed ‘Big Tittie Baby,’”⁸⁶ “that a high level executive [wanted] to play tennis with her so . . . he could [see] her in [a] tennis skirt and ‘see her big titties bouncing around,’”⁸⁷ and that she was “too sensual” for promotion into the position of executive director, among other comments.⁸⁸

Notably, these types of claims by female plaintiffs alleging adverse treatment due to their attractive physical appearance seem not to be limited to the corporate workplace. Even employees who work at job sites where one would expect tolerance (and perhaps even a preference) for physical attractiveness or sensual attire have complained of discrimination based upon their good looks: in 2012, for example, a data entry employee at a wholesale lingerie company claimed to have been fired one week into her employment due to her busty figure and allegedly racy attire.⁸⁹ The employee claimed that she was asked to “tape her breasts down to make them look smaller” and that she was told that she was “just too hot for this office”⁹⁰—despite her assertion that her wardrobe was “appropriate for a business that sells ‘thongs with hearts placed in the female genital area and boy shorts for women that say “hot” in the buttocks area.’”⁹¹ Similarly, in 2013, a New York yoga teacher claimed that she was fired from a husband-and-wife-owned chiropractic clinic where she worked after the husband told the employee that “his wife might become jealous of her on account of being ‘too cute.’”⁹²

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (internal quotations omitted). The parties eventually settled this case after it was removed to federal court. Notice of Removal at 5, *Blakely v. The Devereux Found., Inc.*, No. 6:10-cv-01808-MSS -KRS (M.D. Fl. Dec. 6, 2010); *see also* Mediation Report at 1, *Blakely v. The Devereux Found., Inc.*, No. 6:10-cv-1808-ORL-35-KRS (M.D. Fla. Aug. 16, 2011) (noting the settlement of the case); Order of Dismissal with Prejudice, *Blakely v. The Devereux Found., Inc.*, No. 6:10-cv-1808-ORL-35-KRS (M.D. Fla. Sept. 13, 2011) (dismissing the case with prejudice).

89. *See, e.g., Lauren Odes, Former Native Intimates Employee, Claims She Was Fired over ‘Too Hot’ Appearance*, HUFFINGTON POST (May 22, 2012, 8:57 AM) [hereinafter *Lauren Odes Too Hot Appearance*], http://www.huffingtonpost.com/2012/05/22/lauren-odes-native-intimates-fired_n_1535498.html [<http://perma.cc/YST3-7YKH>]; Chris Francescani, *Fired for Being “Too Hot,” New Jersey Woman Claims* (May 21, 2012, 7:06 PM), <http://www.reuters.com/article/2012/05/21/us-newyork-lingerie-hot-idUSBRE84K18220120521> [<http://perma.cc/8VWX-YGBM>].

90. *Lauren Odes Too Hot Appearance*, *supra* note 89 (internal quotations omitted).

91. Francescani, *supra* note 89.

92. *See, e.g., Marisa Meltzer, You’re Cute and Fired*, N.Y. TIMES (Nov. 29, 2013), http://www.nytimes.com/2013/12/01/fashion/Some-women-are-fired-for-being-too-attractive.html?_r=0 [<http://perma.cc/Y9ZL-F9A8>]. Adding an additional twist to this tale, the wife was herself a former Playboy Playmate. *See* Lorena Mongelli & Bruce Golding, *Fired for Being Too Cute’ by Ex-Playmate Boss*, N.Y. POST (Nov. 20, 2013, 10:51 PM), <http://nypost.com/2013/11/20/fired-for-being-too-cute-by-ex-playmate-boss.html> [<http://perma.cc/28EB-BZJD>].

What is interesting about all of these claims is the double-edged sword that they illustrate: in many cases, these female plaintiffs—like other women in the workplace—may garner a wealth of benefits from their attractive physical appearance, in terms of hiring, promotion, compensation, and other feedback.⁹³ Yet their attractiveness can also create problems for them at work, placing them “between a rock and a hard place. Insulted and not hired if they aren’t attractive, fired if they are too attractive.”⁹⁴ Compounding the problem, once these women are faced with this alleged unfairness at work—purportedly receiving adverse treatment due to their appearance—they may receive *less* sympathy from their peers and from the general public due to their physical beauty.⁹⁵ Observers “may or may not be moved by a claim that can be restated as ‘Don’t hate me because I’m beautiful.’”⁹⁶ In this respect, attractive employees may see the negative consequences of their physical appearance as eventually outweighing the benefits produced by their appearance.

II. ANOTHER PATH? HOW NELSON AND OTHER “ATTRACTIVE EMPLOYEES” MIGHT PREVAIL IN SIMILAR CASES

Cases like *Nelson* thus present quite a puzzle: although countless studies establish that attractive employees enjoy significant *advantages* at work,⁹⁷ Nelson and her counterparts claim that their attractive looks undermined their jobs. Although Nelson’s straightforward theory of sex discrimination—that she “did not do anything to get herself fired except exist as a female”⁹⁸—did not lead to victory, there are other paths that she, and others like her, might successfully pursue if they believe that they were fired as a result of their good looks.

A. The Missing Harassment Claim as One Possible Route to Future Success

One obvious route that was available to Ms. Nelson—yet one that she elected not to pursue—was a sexual harassment claim against

93. See *supra* note 71.

94. Pepper Schwartz, *Fired Because a Man Can’t Control Himself*, CNN (July 16, 2013, 7:57 AM), <http://www.cnn.com/2013/07/16/opinion/schwartz-fired-looks> [http://perma.cc/5V4C-YVRB].

95. See, e.g., Corbett, *supra* note 11, at 632 (“If Lorenzana were an unattractive person suing for unfair termination, she likely would evoke sympathy, but, ironically, not nearly as much publicity. However, with an attractive woman, this story may have the opposite effect.”).

96. See, e.g., Corbett, *supra* note 11, at 632.

97. See, e.g., Toledano, *supra* note 11, at 683–84; Kimmel, *supra* note 11.

98. *Nelson v. Knight*, 834 N.W.2d 64, 69 (Iowa 2013) (internal quotations omitted).

Knight. Knight's behavior seemed to provide ample ammunition for a viable sexual harassment claim.⁹⁹ As discussed above, he engaged in explicit, seemingly one-sided sexual banter with Nelson, made suggestive comments regarding her clothing and her sex life, and described to Nelson, in graphic terms, the extent to which she made him feel sexually aroused.¹⁰⁰ Despite this evidence, Nelson's counsel chose not to pursue a harassment theory, and stuck only to a theory of sex discrimination.¹⁰¹ This failure to allege harassment allowed the Iowa Supreme Court repeatedly to characterize the relationship between Knight and Nelson as "consensual" in nature,¹⁰² and led the court specifically to observe that the lack of a harassment claim limited its decision in this case.¹⁰³ From this perspective, Nelson's loss may appear more as an example of a missed opportunity by her attorney than as a misinterpretation of the law by the court.

To prevail in a sexual harassment claim, a plaintiff generally must show that she either was subjected to unwelcome sexual harassment that was sufficiently severe and pervasive to alter the terms and conditions of employment, or that she suffered some "tangible employment action" (i.e., a termination, demotion, etc.) as a result of her failure "to submit to a [superior's] sexual demands"¹⁰⁴ Here, much of Knight's undisputed conduct seems to provide an ample basis for both types of sexual harassment: Nelson either could argue that Knight's sexually explicit texts and comments created a hostile work environment, or she could claim that, regardless of whatever atmosphere his comments created, her termination resulted from her rebuff of his overtures.¹⁰⁵ Yet Nelson never alleged, in either her formal court filings or any press statements, that Knight's conduct constituted sexual harassment.¹⁰⁶

So why did Nelson refrain from bringing this claim? As the court repeatedly noted, Nelson never objected to Knight's overtures, and apparently viewed her close and personal relationship with Knight as *consensual* in nature.¹⁰⁷ Nelson's own attorney stated that Nelson

99. *Id.* at 65–66 (describing Knight's overtures to Nelson).

100. *Id.* (describing Knight's sexually graphic communications with Nelson); *see also id.* at 72 n.7 ("Dr. Knight made a number of inappropriate comments toward Nelson that are of a type often seen in sexual harassment cases.").

101. *See, e.g., id.* at 65, 72 n.7.

102. *See, e.g., id.* at 80–81 (Cady, J., concurring) (referencing the consensual nature of the relationship between Knight and Nelson).

103. *Id.* at 65.

104. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752–54 (1998).

105. *See id.*; *see also Nelson*, 834 N.W.2d at 65–66 (describing Knight's communications with Nelson).

106. *See Nelson*, 834 N.W.2d at 65, 72 n.7 (referencing Nelson's failure to assert a sexual harassment claim).

107. *See id.* at 65–66; *see also id.* at 78–79 (Cady, J., concurring).

declined to bring a harassment claim “because Knight’s conduct may not have risen to that level and didn’t particularly offend [Nelson].”¹⁰⁸ Although Nelson felt “shocked” and “betrayed” by Knight’s conduct, she chalked these exchanges up to “social[] awkward[ness]” on his part as opposed to harassment.¹⁰⁹ Moreover, whereas Knight adopted the role of the initiator of these sex-fueled communications, with Nelson maintaining a more passive role—receiving his graphic overtures but apparently never responding with any sexual comments of her own¹¹⁰—she never took any steps to terminate these communications (including the most obvious one, asking Knight to stop).¹¹¹

Of course, even Nelson’s “consent” to these conversations—or, at a minimum, her failure explicitly to object—should not necessarily have stymied a harassment claim. Where, as here, there is a significant power differential between the parties in a relationship, courts may be skeptical of the “consensual” nature of that relationship.¹¹² At least one court has recognized that a plaintiff reasonably

108. Press-Citizen Editorial Board, *supra* note 66; *see also* Agence France Presse, *Irresistible’ Iowa Woman Fired for Being Too Sexy*, BUS. INSIDER (Dec. 25, 2012, 6:11 AM), <http://www.businessinsider.com/melissa-nelson-fired-for-being-too-sexy-2012-12> [<http://perma.cc/54CN-JYBQ>] (“Nelson did not consider Knight’s behavior to be sexual harassment . . .”); Jeff Eckhoff, *Top Iowa Court’s Do-Over: ‘Irresistible Employee’ Fired Legally for Personal Reasons*, DES MOINES REGISTER, July 13, 2013, 2013 WLNR 17075810 (noting the court’s emphasis that Nelson’s lawsuit “stressed improper behavior by Knight but alleged sexual discrimination and not harassment”); Mary Sanchez, *Another View: Iowa Court Shows that Equality Between the Sexes Really Isn’t*, DES MOINES REGISTER, Jan. 2, 2013, 2013 WLNR 93954 (stating that Nelson’s case “did not meet guidelines for ‘a hostile work environment’ or ‘abusive atmosphere’”).

109. Interview with Paige Fiedler, Attorney for Melissa Nelson (June 2, 2014) (notes on file with author). Knight’s attorney has echoed this view, stating that Nelson admitted during a deposition that she never felt harassed, never was offended, and that she respected Knight. Interview with Stuart Cochrane, Attorney for James H. Knight (May 29, 2014) (notes on file with author). Indeed, according to Nelson’s attorney, Nelson did not allege sexual harassment because in her view “Knight’s conduct may not have risen to that level and didn’t particularly offend [Nelson].” Press-Citizen Editorial Board, *supra* note 66; *see also* Interview with Paige Fiedler, Attorney for Melissa Nelson (June 2, 2014) (notes on file with author) (confirming that Nelson felt shocked and betrayed by Knight’s conduct but did not view it as harassment).

110. *Nelson*, 834 N.W.2d at 65–66.

111. *Id.* at 66 (“Nelson does not remember ever telling Dr. Knight not to text her or telling him that she was offended.”); *see also id.* at 65–66 (noting that Nelson once texted Knight, “[t]he only reason I stay is because of you” (internal quotations omitted)).

112. *See, e.g.,* *Simmons v. Miami Valley Trotting, Inc.*, 2006 WL 1000076, *5–6 (S.D. Ohio 2006) (finding that plaintiff’s failure to confront her manager regarding the unwelcome sexual conduct was plausible “in light of the disparity of power between a lower-level maintenance employee and the owner of the business”); *Hernandez v. Miranda Velez*, 1994 WL 394855, *3 (D.P.R. 1994) (“[A]buse of power in the supervisory-underling relationship is the essence of the ‘classic’ definition of sexual harassment in any setting”); *see also* Billie Wright Dziech et al., *‘Consensual’ or Submissive Relationships: The Second-Best Kept Secret*, 6 DUKE J. GENDER L. & POL’Y 83, 85 (1999) (“[C]onsent cannot exist in conjunction with unequal distribution of authority . . . power

may refrain from telling a supervisor that sexual comments are unwelcome if he or she fears that objecting might cost the plaintiff his or her job, citing the “disparity of power between a lower-level . . . employee and the owner of the business.”¹¹³ Indeed, in rendering his concurring opinion in *Nelson*, the Chief Justice acknowledged that a “personal relationship between an employer and subordinate can give rise to subtle issues of power and control that may make the line between consensual and submissive relationships difficult to draw.”¹¹⁴ In this case, however, the Chief Justice noted that “Nelson made no legal or factual claim that a relationship with Dr. Knight was submissive, objectionable, or harassing in any way, and there was no evidence in the record to hint the relationship was not jointly pursued.”¹¹⁵

Whereas Nelson elected not to pursue a sexual harassment claim in this case,¹¹⁶ other plaintiffs alleging adverse treatment due to their attractive physical appearance perhaps would have a basis for asserting this theory as part of a wrongful termination claim. As the *Nelson* court observed, the consensual nature of Knight and Nelson’s sexually charged (but unconsummated) relationship was rather unusual.¹¹⁷ In many cases, the comments directed toward a plaintiff who claims to have been “too attractive” for a workplace likely will involve the sort of graphic or sexually charged language

and status disparities place subordinates in untenable positions from which some lack the fortitude and support to extricate themselves . . .”). *But see, e.g.*, *Olsen v. Marshall Ilsley Corp.*, 2000 WL 34233699, *1, *17 (W.D. Wis. 2000) (disputing the notion that a relationship between a subordinate and a supervisor establishes conclusive evidence of sexual harassment and emphasizing the need to show “unwilling consent” to establish harassment claim (internal quotations omitted)).

113. *Simmons*, 2006 WL 1000076 at *2.

114. *Nelson*, 834 N.W.2d at 80 (Cady, J., concurring).

115. *Id.*; *see also id.* at 65–66 (majority opinion), 79–80 (Cady, J., concurring) (referencing the consensual nature of the relationship between Knight and Nelson). Notably, despite the wealth of evidence indicating the consensual nature of the relationship between Knight and Nelson, Nelson did endeavor to distinguish her situation from those in other cases involving consensual workplace relationships between (terminated) employees and their bosses. *Id.* at 67–68. In at least one other case cited by the court, the terminated plaintiff had played an active role in creating the jealousy-inducing relationship (for example, by pinching her boss’s rear and by writing notes of a sexual nature to the owner and leaving them in locations where others could find them). *Id.* (discussing plaintiff’s actions in *Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903, 905–06 (8th Cir. 2006)). Nelson, in contrast, argued that she never flirted with Knight or encouraged his overtures, arguing that “she ‘did not do anything to get herself fired except exist as a female.’” *Id.* at 65, 69.

116. *See, e.g., id.* at 65.

117. *Id.* at 78 (Cady, J., concurring). At least one local editorial regarding this case commented on the strangeness of Nelson’s failure to bring a sexual harassment claim based upon this set of facts, with the authors stating that they “[couldn’t] understand why Nelson filed suit based on gender discrimination rather than sexual harassment [S]he could have made a stronger case for Knight having created a hostile work environment.” Press-Citizen Editorial Board, *supra* note 66.

that can support a claim of sexual harassment.¹¹⁸ Moreover, most employees receiving such sexually graphic communications from an employer likely would object to such comments—either explicitly at the time they are made or, at least, by later arguing that a subordinate position in the workplace prevented him or her from raising such contemporaneous objections.¹¹⁹ Thus, even if other plaintiffs similarly situated to Nelson might not prevail in alleging sex discrimination based upon an employer firing them due to their (attractive) physical appearance, they most likely would have a strong basis for characterizing their termination and/or any other adverse action as an example of unlawful sexual harassment.

B. The Attractive Employee as a Victim of Gender Stereotyping: Applying Price Waterhouse to the “Too Hot” Employee

Whereas some plaintiffs similarly situated to Nelson might find success simply by adding an allegation of sexual harassment to their complaints, others may wish to pursue sex discrimination claims separate from any allegations of harassment. Success also might be possible for this group of plaintiffs, under an interpretation of anti-discrimination law that deals with “sex stereotyping” at work.

Until the late 1980s, the courts interpreted “sex discrimination,” under Title VII,¹²⁰ in a fairly straightforward manner by construing the term “sex” in Title VII to apply only to anatomical sex, and not to gender (i.e., whether someone demonstrates qualities that society deems masculine or feminine).¹²¹ In 1989, however, the U.S. Supreme Court issued its landmark decision in *Price Waterhouse v. Hopkins*, finding for the very first time that sex stereotyping in the workplace was a prohibited form of sex discrimination.¹²²

118. See, e.g., Mandell, *supra* note 83 (discussing sexually graphic comments made to former nonprofit executive Amy-Erin Blakely).

119. See, e.g., *Simmons*, 2006 WL 1000076 at *5 (finding that plaintiff did not tell her supervisor that his comments were unwelcome because she feared losing her job); *Hernandez v. Miranda Velez*, 1994 WL 394855, *1 (D.P.R. 1994) (alleging that she told her supervisor about unwelcome conduct but no action was taken); *Nelson*, 834 N.W.2d at 80 (Cady, J., concurring) (noting issues of power and control that arise in such situations); cf. Dziech et al., *supra* note 112, at 85 (explaining that consent cannot exist with the unequal distribution of authority in a superior/subordinate relationship).

120. Title VII bars employers from depriving individuals of employment opportunities or otherwise adversely impacting an individual’s employment because of that individual’s sex, among other protected characteristics. 42 U.S.C. § 2000e-2(a) (1964).

121. See Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 394–96 (2001).

122. 490 U.S. 228, 250–51 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m)).

The circumstances under which *Price Waterhouse* arose present an interesting contrast to *Nelson*. Ann Hopkins was serving as a Senior Manager in an office of the accounting firm Price Waterhouse “when she was proposed for partnership in 1982.”¹²³ During the firm’s consideration of her partnership, Hopkins’s colleagues praised her character and her many professional accomplishments,¹²⁴ although they simultaneously criticized some of her personality traits.¹²⁵ For example, some partners expressed concern about Hopkins’s “aggressiveness” and “abrasiveness” when dealing with staff.¹²⁶ “One partner described [Hopkins] as ‘macho,’ . . . [and] another suggested that she ‘overcompensated for being a woman.’”¹²⁷ Hopkins was told that she should “take ‘a course at charm school,’”¹²⁸ and she was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹²⁹ Hopkins was ultimately denied partnership,¹³⁰ and thereafter sued for sex discrimination under Title VII.¹³¹

In finding Price Waterhouse liable for violating Title VII in this case, the Supreme Court emphasized that, although employers retain broad latitude in making their employment decisions, such decisions cannot be made on the basis of gender.¹³² In cases where gender seems to play *some* role in a decision—perhaps in conjunction with other characteristics, unrelated to gender—an employer must be able to show that gender was not a motivating factor (i.e., that it would have made the same decision anyway, even if it had not taken gender into account).¹³³ More importantly, the Court held that employers who make employment decisions on the basis of sex-based stereotypes are inherently engaging in sex discrimination.¹³⁴ The Court stated,

123. *Id.* at 231.

124. *Id.* at 234.

125. *Id.* at 234–35.

126. *Id.* at 234.

127. *Id.* at 235.

128. *Price Waterhouse*, 490 U.S. at 235.

129. *Id.* (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985), *aff'd in part, rev'd in part*, *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (internal quotations omitted)).

130. *Id.* at 231–32 (noting that Hopkins initially “was neither offered nor denied” partnership, but rather had her candidacy held for reconsideration the following year, and that partners “in her office later refused to repropose her for partnership”).

131. *Id.* at 232.

132. *Id.* at 239–40.

133. *Id.* at 244–45. “We conclude that the preservation of [the employer’s] freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.” *Id.* at 242.

134. *Price Waterhouse*, 490 U.S. at 251; *cf.* Allegra C. Wiles, *More Than Just a Pretty Face: Preventing the Perpetuation of Sexual Stereotypes in the Workplace*, 57 SYRACUSE

“[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,”¹³⁵ and noted that “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.”¹³⁶ In other words, by basing its decisions regarding Hopkins’s potential partnership on assumptions about how a woman *should* behave at work—and by denying Hopkins partnership for not complying with these assumptions—Price Waterhouse had engaged in gender discrimination.¹³⁷

This theory of “sex stereotyping” gender discrimination has direct application to cases like *Nelson* and could provide a possible route to success for other plaintiffs who claim to have received adverse treatment due to their attractive appearance.¹³⁸ Just as Hopkins claimed to have suffered adverse treatment for not matching her colleagues’ expectations of a woman,¹³⁹ Nelson could have argued that she suffered from a similar failure to meet expectations as to how a female should look and behave, in that she claimed that she was *too* sexy and feminine for her workplace—at least according to her employer.¹⁴⁰ From the way that she dressed to her willingness to tolerate (or perhaps engage in) sexual discussions with Knight, Nelson could argue that she fell outside of the expected norm for a woman at work.¹⁴¹

Tellingly, even the Iowa Supreme Court seemed to recognize the potential for this type of claim in *Nelson*: the court explicitly discussed the gender stereotyping framework established by *Price Waterhouse* and stated, “[i]f Nelson could show that she had been terminated because she did not conform to a particular stereotype, this might be a different case.”¹⁴² Whereas Nelson failed to provide evidence to support this theory,¹⁴³ others who claim to have suffered adverse action due to their attractive physical appearance might be

L. REV. 657, 660 (2007) (“[S]ex stereotyping involves generalizing from the characteristics of a group to those of an individual and making assumptions, which may or may not be true, about an individual because of that person’s gender.”).

135. *Price Waterhouse*, 490 U.S. at 251.

136. *Id.* at 250.

137. *See id.* at 256–58.

138. Others have discussed using a “gender stereotyping” theory of gender discrimination to address “appearance discrimination.” *See, e.g., Corbett, supra* note 11, at 635–37; Wiles, *supra* note 134, at 660.

139. *Price Waterhouse*, 490 U.S. at 236–37 (citing the district court judge’s view that “some of the partners’ remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women”).

140. *See Nelson v. Knight*, 834 N.W.2d 64, 65–66.

141. *See id.*

142. *Id.* at 71.

143. *See id.*

able to gather sufficient evidence to show that by violating gender norms regarding how female employees should dress and act at work, they ventured outside of the “cabined view of the proper behavior [for] women” that their employers imposed in the workplace.¹⁴⁴

Moreover, even under the theory that Nelson was terminated *not* for her appearance, but rather due to the jealousy-inducing relationship that she had with her boss,¹⁴⁵ Nelson still arguably could have supported a stereotyping theory of gender discrimination. Perhaps the “norm” that Nelson failed to satisfy was not simply a failure to dress in the manner in which the Knights believed a working woman should dress or to appear in the manner in which the Knights believed a working woman should appear. Rather, perhaps the norm at issue involved Nelson’s *behavior*—her failure to behave in the manner in which Mrs. Knight thought a working woman should behave. To the extent that one might not expect a married woman to form a close, personal relationship with a male coworker or boss,¹⁴⁶ the jealousy-inducing “relationship” that formed the basis for Nelson’s termination could be seen as its *own* violation of gender expectations. Although the court largely ignored this theory in its opinion, there is at least some evidence to support this analysis: the court noted that Mrs. Knight had deemed it “strange that after being at work all day and away from her kids and husband that [Nelson] would not be anxious to get home *like the other [women] in the office.*”¹⁴⁷ Although the court acknowledged that “[v]iewed in isolation, this statement could be an example of a gender-based stereotype,”¹⁴⁸ it gave this argument only cursory attention and quickly concluded that, in the broader context of other statements made by Mrs. Knight, this

144. *Price Waterhouse*, 490 U.S. at 237; cf. Kimmel, *supra* note 11 (“Discrimination based on beauty is rooted in the same sexist principle as discrimination against the ugly. Both rest on the power of the male gaze—the fact that men’s estimation of beauty is the defining feature of the category.”).

145. *Nelson*, 834 N.W.2d at 66.

146. See, e.g., Kristi Gustafson Barlette, *Can Men and Women Be Friends (At Work)?*, TIMES UNION (Sept. 4, 2012, 11:57 AM), <http://blog.timesunion.com/ontheedge/can-men-and-women-be-friends-at-work/50781> [<http://perma.cc/TT6U-NJ7X>]; Bethany Ramos, *Your Work Husband Is Ruining Your Marriage*, MOMMYISH.COM (Mar. 17, 2014), <http://www.mommyish.com/2014/03/17/work-husband> [<http://perma.cc/D68B-E22P>]; Leslie Rasmussen, *Can Married Women Have Straight Male Friends?*, ROLE REBOOT (Jan. 24, 2013), <http://www.rolereboot.org/sex-and-relationships/details/2013-01-can-married-women-have-single-male-friends> [<http://perma.cc/P8NU-E7ZD>]; cf. Jana Kasperkevic, *Why Women Can’t Have Business Dinners with Men*, THE GUARDIAN (Dec. 18, 2013, 8:00 AM), <http://www.theguardian.com/money/us-money-blog/2013/dec/18/women-business-dinners-men> [<http://perma.cc/3LJT-52WX>].

147. *Nelson*, 834 N.W.2d at 66 (emphasis added); *id.* at 71 n.5.

148. *Id.* at 71 n.5.

statement instead simply evidenced Mrs. Knight's (non-stereotype-based) concerns about Nelson's relationship with Knight.¹⁴⁹

Whereas Nelson did not succeed in providing support for this type of gender stereotyping sex discrimination claim, other plaintiffs alleging adverse treatment due to their attractive physical appearance might have more success with this theory. Indeed, even a cursory examination of the facts in other situations where employees have alleged adverse treatment due to their beauty indicates that this theory could play out differently in other cases: in the *Willingham* case, for example—where the plaintiff was terminated after she appeared as “Ms. Cruzin’ South August 2008,” as well as in sexually suggestive photos in another publication¹⁵⁰—*Willingham* specifically alleged that “her physical appearance in a non-work related magazine did not comport with [the employer’s] preferred feminine stereotype which . . . required her to dress or appear “conservatively” at all times.”¹⁵¹ The court, however, rejected this argument, finding that the out-of-work nature of the conduct rendered a *Price Waterhouse* argument inapplicable here.¹⁵² Concerns about gender stereotypes, likewise, could be seen underlying the claims of Debralee Lorenzana, the Citibank banker who claimed to have been fired because her figure and clothes were “too distracting” to her male colleagues.¹⁵³ Presumably, had Lorenzana fit the mold of the typical banker—conservatively and expensively but modestly attired¹⁵⁴—her male colleagues would not have noticed and/or been distracted by her appearance.¹⁵⁵

149. See *id.*; see also *id.* at 77 n.11 (Cady, J., concurring) (“As to the discriminatory stereotype that attractive women who work closely with married men are a threat to the man’s marriage . . . a threat derived from an actual, ongoing, personal relationship is not a stereotype.”).

150. *Willingham v. Regions Bank*, 2010 WL 2650727, *1–2 (W.D. Tenn. 2010).

151. *Id.* at *3 (emphasis added) (ellipses in original) (internal quotations omitted).

152. See *id.* at *3 (stating that *Willingham*’s sex stereotyping claim “fails because [she] has failed to allege that [she] did not conform to traditional gender stereotypes in any observable way at work”) (emphasis and parentheticals in original) (internal quotations omitted).

153. Pilkington, *supra* note 72.

154. See *Stereotypes of Traders and Bankers*, WALL STREET OASIS (June 2, 2011, 7:24 PM), <http://www.wallstreetoasis.com/forums/stereotypes-of-traders-and-bankers> [<http://perma.cc/GSS3-3W6U>] (citing Yale finance professor Robert Shiller’s observation that “investment bankers tend to be well dressed; they tend to be patrician in their appearances and manner”).

155. In some circumstances, other types of stereotypes beyond those associated with gender (such as religious stereotypes) also arguably might play a role in adverse action. See, e.g., Francescani, *supra* note 89 (quoting a female data entry employee fired from her position at a lingerie warehouse owned by Orthodox Jews as stating, “I understand that there are Orthodox Jewish men who may have their views about *how a woman should dress* . . . but I do not feel that any employer has the right to impose their religious beliefs on me”) (emphasis added).

Notably, to bring this type of sex stereotyping claim, a plaintiff need not demonstrate that the defendant harbored hostility toward the protected group.¹⁵⁶ In other words, neither Nelson nor any other plaintiff would have to show that their employer demonstrated ill will toward women in general.¹⁵⁷ Rather, these employees only would have to show that men and women were “intentionally treated differently” in the workplace, even if the stereotypes underlying this treatment were benign.¹⁵⁸

At the same time, however, these cases involving gender stereotyping expose the “double bind” that many women face in the workplace.¹⁵⁹ They must be *feminine enough* to satisfy their employers’ expectations regarding how a woman should appear and behave at work,¹⁶⁰ but not so overtly sexual and overly feminine so as to distract their fellow employees.¹⁶¹ For Hopkins, this created an obvious catch twenty-two: she needed to be aggressive and forceful to excel in her job, but she was denied the pinnacle of recognition for workplace success (i.e., partnership) precisely *because* she exhibited these traits.¹⁶²

Admittedly, for other female employees, this argument plays out somewhat differently than it would have in *Hopkins*. Unlike Hopkins—who was required to be assertive in order to make partner, then penalized for meeting this expectation—the female plaintiffs in cases like *Nelson*, *Willingham*, or *Lorenzana* are not being asked to mute characteristics that are essential to performing or excelling in their job duties.¹⁶³ These women did not hold positions (dental assistant, bankers) in which the attribute for which they purportedly were penalized—their physical attractiveness—enhanced

156. See Wiles, *supra* note 134, at 670.

157. In this respect, the court’s observations that Knight employed many women in his practice, and that all of his dental hygienists (including the one who ultimately replaced Nelson) had been women, might have limited relevance. *Nelson v. Knight*, 834 N.W.2d 64, 66 (Iowa 2013). Although Knight may have harbored positive feelings toward women in general, this would not excuse his decision to take action against Nelson based on a stereotype regarding how females should behave in the workplace.

158. See Wiles, *supra* note 134, at 670.

159. Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibitions at Work*, 161 U. PA. L. REV. 757, 762 (2013).

160. See *id.*; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, at 251. *But see* *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1105–06 (2006) (affirming summary judgment for the employer where the employee alleged gender discrimination after termination from a bartender position for refusing to wear cosmetics and style her hair in accordance with employer’s dress code).

161. See Yuracko, *supra* note 159, at 762; see also *Price Waterhouse*, 490 U.S. at 251 (describing the dilemma that exists when an employer objects to aggressiveness, but the position requires that specific trait).

162. See *Price Waterhouse*, 490 U.S. at 251; Yuracko, *supra* note 159, at 762.

163. Yuracko, *supra* note 159, at 762; *Nelson v. Knight*, 834 N.W.2d 64, 65 (Iowa 2013); *Willingham v. Regions Bank*, 2010 WL 2650727, *3 (W.D. Tenn. 2010); *Lorenzana Complaint* at 2, *Lorenzana v. Citigroup Inc.*, No. 11Civ.6153(JFK) (S.D.N.Y. 2012).

their performance in any obvious way. Yet despite this distinction, even plaintiffs in these “too hot” cases may be able to draw upon the underlying tenets of *Price Waterhouse* to argue that they suffered gender discrimination due to the application of sex stereotypes.¹⁶⁴

III. THE ROLE OF THE MEDIA IN MISREPRESENTING THESE CASES: THE QUEST TO MAINTAIN THE “MADONNA-WHORE” PARADIGM

Despite the possible routes to success that may have existed for Nelson—from her neglected sexual harassment claim to a possible “gender stereotyping” claim—Nelson ultimately failed to prevail in her claim against Knight.¹⁶⁵ Given the salacious facts in this case,¹⁶⁶ some amount of media attention—and, perhaps, some critiquing of the result—was to be expected. In the wake of the Iowa Supreme Court’s decision in *Nelson*, however, the media unleashed an onslaught of condemnation toward this decision, eviscerating the court’s conclusion in this case. From small, local outlets to national news organizations, the media almost uniformly described this case in simple (and often inaccurate) terms—as one involving a woman who had been fired solely based upon her appearance, and involving an all-male court with no concept of women’s rights, without addressing the complicated relational circumstances that underlay this case or the precedent that actually controlled the court’s decision.

A. Snapshot of a Hyperbolic Media

The reporting in the wake of the *Nelson* decision—following both the initial, December 2012 decision and the subsequent July 2013 decision—abounded with examples of the media presenting this decision in simplistic, hyperbolic, and often flatly incorrect terms: shortly following the court’s initial decision in this case, *Business Insider* headlined its coverage, “‘Irresistible’ Iowa Woman Fired for Being Too Sexy,”¹⁶⁷ and reported that “[a]n ‘irresistible’ Iowa dental assistant [who was] fired for threatening her boss’s marriage—even though she turned away his advances—has lost her discrimination lawsuit.”¹⁶⁸

164. See *Price Waterhouse*, 490 U.S. at 251.

165. See *Nelson*, 834 N.W.2d at 65.

166. See *id.* at 65–66.

167. Agence France Presse, *supra* note 108.

168. *Id.* This conclusion was reached even though nothing in the record indicates that Nelson ever rejected Knight’s advances and even though Nelson’s *failure* to bring a harassment claim seems to *contradict* such a characterization of her stance toward her boss. See *Nelson*, 834 N.W.2d at 65, 72 n.7.

A CNN story following the court's second decision described this case as one in which a woman was "[f]ired because a man can't control himself."¹⁶⁹ The story blasted the "all-male Iowa Supreme Court" for allegedly holding "that men are so controlled by their gonads that they can fire an employee at will for being able to incite attraction, sex, love, whatever,"¹⁷⁰ and for finding that "[n]o matter that she is going about her job or being a stellar employee; if she's got a cute butt or a nicely turned nose, her job is history."¹⁷¹ According to the CNN commentator, "the Iowa Supreme Court guys . . . saw the issue, at least in part, as protecting the institution of marriage rather than an infringement on a woman's right to work."¹⁷² Nowhere did this story mention that the Iowa Supreme Court was relying upon Eighth Circuit precedent, which previously had held that "an employer does not engage in [sex] discrimination by discharging a female employee who is involved in a consensual [personal] relationship that has triggered personal jealousy."¹⁷³ Nowhere did the story mention the extent to which the Iowa court's decision rested on the *consensual* nature of the relationship between Knight and Nelson.¹⁷⁴ Nowhere did this reporter explain the limited nature of the court's decision—the fact that the court repeatedly had noted Nelson's failure to bring a sexual harassment claim or otherwise to characterize Knight's conduct as "unwelcome."¹⁷⁵

Additionally, there was the *New York Times* editorial that seemed to set the bar for sensationalizing the Iowa Supreme Court's decision: in a piece entitled *Fired for Being Beautiful*, the writer joined the media chorus in slamming the court's holding.¹⁷⁶ The author compared the Iowa Justices to Islamic fundamentalists, observing, "[y]es, like some Midwestern Taliban tribunal, the Iowa Supreme Court permitted a male boss to fire anyone who might conceivably tempt him. Mullah Omar would approve."¹⁷⁷ The writer went on to suggest that "[m]aybe . . . the Iowa Supreme Court should require all beautiful women to wear burquas" and opined that "[w]ith Ms. Nelson completely covered, Mr. Knight could pay full attention to his patients' dental concerns—while ignoring the ethical cavity that

169. Schwartz, *supra* note 94.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Nelson*, 834 N.W.2d at 67.

174. *See id.* at 65–66 (referencing the consensual nature of Knight and Nelson's relationship).

175. *See id.* at 72 n.7.

176. *See* Kimmel, *supra* note 11.

177. *Id.*

mars discrimination law in Iowa.”¹⁷⁸ Once again, nowhere in the article did the author mention the unusual factual circumstances under which this case arose. Nowhere in his evisceration of Knight—with “his willpower so limp, his commitment to his wife so weak, that he must be shielded from the hot and the beautiful”¹⁷⁹—did the writer note the apparently *consensual* nature of the relationship between Knight and Nelson or the significant role that this relationship played in the court’s decision.¹⁸⁰

Local outlets likewise played a role in simplifying and hyperbolizing the results in this case, particularly in editorials and other opinion pieces: in the wake of the Iowa Supreme Court’s initial decision, one local editorial identified Knight’s attraction to Nelson and fear that he might act unprofessionally toward her as “the *lone* reason” for Nelson’s termination.¹⁸¹ Although the editorial mentioned prior precedent that “upheld an employer’s right to fire for relationships that cause jealousy and tension within a business owner’s family,”¹⁸² the editorial again failed to note the limited nature of the court’s decision, with its emphasis on the *consensual* nature of the relationship between Knight and Nelson.¹⁸³ Another editorial more explicitly argued both sides of the issue: although the piece acknowledged that finding in Nelson’s favor would “force[] an employer in [Knight’s] situation to keep an employee whose continued employment could lead to a sexual-harassment lawsuit, a divorce or both,”¹⁸⁴ its headline trumpeted that “*Iowa law allows men to be jerks.*”¹⁸⁵ Yet another editorial instructed its readers, “[t]hat’s right, ladies. If the boss finds you too hot, you can be fired,”¹⁸⁶ neglecting to inform readers of the full, nuanced scope of the court’s decision—that if your boss “finds you too hot,” *and* you engage in a consensual relationship with him that causes jealousy, *and* you fail ever to allege that his comments about your “hotness” were unwelcome or harassing, then you can be fired.¹⁸⁷ This local criticism continued in the wake of the court’s second opinion in this case: a piece tellingly titled in part *Court Backs the Lusty Boss Over the Innocent Employee* described

178. *Id.*

179. *Id.*

180. *Nelson*, 834 N.W.2d at 67–68 (comparing Nelson’s case to other Eighth Circuit cases involving “consensual relationship[s] that . . . triggered personal jealousy”).

181. Press-Citizen Editorial Board, *supra* note 66 (emphasis added).

182. *Id.*

183. *Nelson*, 834 N.W.2d at 65–66.

184. *The Register Editorial: Unfortunately, Iowa Law Allows Men to Be Jerks*, DES MOINES REGISTER, Dec. 28, 2012, 2012 WLNR 28051945.

185. *Id.*

186. Sanchez, *supra* note 108.

187. *Nelson*, 834 F.2d at 65, 67, 73.

this case in similarly simplistic terms, electing simply to blast the court's "adolescent rationale" and "idiotic conclusion" instead of explaining the nuances of the decision to its readers.¹⁸⁸

To be sure, in all of these articles, there was a sizable kernel of truth in the media's reporting: to the extent that the stories portrayed the *Nelson* case as one where an employer was permitted to terminate an employee because her physical attractiveness led to a consensual relationship between them and such relationship rendered her a threat to the employer's marriage (at least, in the employer's wife's view),¹⁸⁹ these reporters correctly portrayed at least *part* of the story. Virtually none of the stories reporting this decision provided the proper context for the case—explaining the Iowa precedent that exempts from discrimination liability terminations resulting from consensual personal relationships that cause jealousy,¹⁹⁰ or noting the extent to which the outcome here rested upon a very narrow set of facts, in which the terminated employee specifically declined to allege that her employer's conduct and comments were unwelcome or harassing.¹⁹¹ Whereas it may have made for better news to portray the justices of the Iowa Supreme Court as a rogue group of misogynistic bigots, a more accurate report regarding this case would have included these less sensationalistic, but legally significant, facts.

Interestingly, even the Iowa Supreme Court itself may have sensed the potential for the media and the public to misunderstand the nature of the *Nelson* case: as noted above, the Iowa Supreme

188. *What Others Are Saying: Court Backs the Lusty Boss Over the Innocent Employee*, DES MOINES REGISTER, July 18, 2013, 2013 WLNR 17496269. Notably, at least one Iowa paper reported this decision in what appeared to be a fair, accurate and non-sensationalized manner (despite a headline foreshadowing to the contrary). In *Top Iowa Court's Do-Over: Irresistible Employee Fired Legally for Personal Reasons*, Jeff Eckhoff of the Des Moines Register accurately noted that in the Iowa Supreme Court's first decision in this case, it had "cit[ed] prior legal precedent" to rule that "Knight's conduct was legal because it was based on specific emotions tied to a specific relationship and not based on his attitude toward an entire gender." Eckhoff, *supra* note 108. Describing the court's follow-up decision on reconsideration, the article reported that "Nelson was terminated because of the activities of her consensual personal relationship with her employer, not because of her gender." Eckhoff, *supra* note 108 (quoting *Nelson v. Knight*, 834 N.W.2d 64, 78 (Iowa 2013) (Cady, J., concurring) (internal quotations omitted)). Eckhoff cited the Justices' view that "Nelson was fired because of her behavior, not her gender." Eckhoff, *supra* note 108. To be sure, the greater depth of analysis, thoroughness, and balanced nature of this article as compared to others cited herein might be due to the fact that it was a news article, and not an editorial or opinion piece. Nonetheless, the contrast between this article and others appearing in reputable media outlets is notable.

189. *Nelson*, 834 N.W.2d at 66.

190. *Id.* at 67–68.

191. *Id.* at 65.

Court issued two decisions in this case—first issuing a unanimous opinion granting summary judgment to Knight on December 21, 2012,¹⁹² and later substituting a second opinion in July 2013 (doing so without having any new evidence presented to the court or any additional oral argument).¹⁹³ Although this second opinion again affirmed summary judgment for Knight,¹⁹⁴ it differed from the court’s initial opinion in some significant respects: first, though all of the Justices had signed onto the court’s December 2012 opinion,¹⁹⁵ the July 2013 opinion included a lengthy concurrence authored by the Chief Justice of the court.¹⁹⁶ This concurring opinion contained a more extensive explanation of the “basis and rationale” for the court’s decision than that which had been issued previously.¹⁹⁷ Among other points, the Chief Justice emphasized that Nelson *had* stated a claim for sex discrimination (or, perhaps, several possible claims for sex discrimination) under Iowa law,¹⁹⁸ arguing that she simply had failed to articulate sufficient facts to support her claim,¹⁹⁹ particularly in light of the *consensual* nature of her relationship with Dr. Knight.²⁰⁰ Withdrawing a unanimous opinion only to substitute another that reaches the same result (only with somewhat more extensive analysis), is not a common action for an already overburdened court. Indeed, issuing such an opinion without seeking additional briefing from the parties or additional oral argument seems even more unusual.²⁰¹ Perhaps, faced with such tremendous—and possibly unexpected—media backlash in the wake of the court’s initial decision, the Justices felt compelled to clarify their reasoning.²⁰²

192. *Nelson v. Knight*, 2012 WL 6652747, *16 (Iowa 2012).

193. *See Nelson*, 834 N.W.2d at 64, 65 n.1; *see also* Eckhoff, *supra* note 108 (characterizing the justices’ decision to reconsider the case without any new evidence being presented as a “rare move”).

194. *Nelson*, 834 N.W.2d at 64, 73.

195. *Nelson*, 2012 WL 6652747.

196. *Nelson*, 834 N.W.2d at 73–81 (Cady, J., concurring).

197. *Id.* (Cady, J., concurring).

198. *Id.* at 76–77 (Cady, J., concurring); *see also id.* at 76 n.11, 78 (Cady, J., concurring).

199. *Id.*

200. *Id.* (Cady, J., concurring).

201. *See Ruling No Better After Further Explanation*, IOWA CITY PRESS-CITIZEN, July 23, 2013, 2013 WLNR 17075823.

202. *Id.* (questioning whether Chief Justice Cady’s motivation for drafting a special concurrence in the second opinion was related to the extensive criticism that the initial decision had received, including from various late-night comedians); *see also* Eckhoff, *supra* note 108 (quoting Ryan Koopmans, a Des Moines attorney, who speculated that “some of the justices were concerned that the public misunderstood their original decision . . . [s]o they clarified it.” (internal quotations omitted)); *What Others Are Saying: Court Backs the Lusty Boss Over the Innocent Employee*, DES MOINES REGISTER, July 18, 2013, 2013 WLNR 17496269 (noting that the court had agreed “to reconsider its much-mocked ruling”).

The court's second opinion also framed the key question in this case in a manner that differed from the first opinion in a significant way: in its initial, December 2012 opinion, the court framed the question that it faced as "whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss views the employee as an *irresistible attraction*."²⁰³ In its July 2013 opinion, the court framed the question somewhat differently by asking "whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the *boss's spouse views the relationship between the boss and the employee as a threat to her marriage*."²⁰⁴ In this way, the court shifted its focus from looking at *Knight's* conduct—his potential inability to resist a sexual relationship with Nelson—to a focus on the *relationship* between Knight and Nelson. The former framing of the question opened the door to the type of subjective analysis and gender warfare characterizations that emerged in many of the media stories regarding this case, making it easy for reporters and other commentators to blast Knight for his uncontrollable lust and weak will-power.²⁰⁵ Indeed, many of the articles that came out in the wake of the court's initial decision seized on the "irresistible" language in the opinion as a way of framing this case.²⁰⁶ The question is how one finds a legal or factual basis for determining whether an employee is sufficiently "irresistible" to justify her termination (assuming that such "irresistible-ness" ever can serve as a justification for termination). In contrast, by framing the question before the court in terms of the *consensual relationship* between Nelson and Knight,²⁰⁷ the court not only could provide a stronger factual basis for its decision given the wealth of evidence regarding this relationship, but it also could tie its decision to relevant precedent—precedent that previously had held that terminations related to consensual relationships that cause jealousy do not violate Title VII.²⁰⁸ This revised framing of the question thus may have allowed the court to provide a stronger legal and factual basis

203. *Nelson v. Knight*, 2012 WL 6652747, *9 (Iowa 2012) (emphasis added).

204. *Nelson*, 834 N.W.2d at 69 (emphasis added).

205. See, e.g., *The Register Editorial: Unfortunately, Iowa Law Allows Men to Be Jerks*, *supra* note 184 ("Nelson suffered because Knight couldn't control his libido . . ."); Press-Citizen Editorial Board, *supra* note 66 (arguing that the lone reason Nelson was terminated was because Knight found Nelson sexually attractive and worried that he might act unprofessionally toward her).

206. See, e.g., Agence France Presse, *supra* note 108; Eckhoff, *supra* note 108; Press-Citizen Editorial Board, *supra* note 66; Schwartz, *supra* note 94; Turley, *supra* note 2 (titling blog post "The Irresistible Woman Meets the Incurable Court: Iowa Supreme Court Issues New Opinion Upholding Firing in 'Irresistible Attraction' Case").

207. See *Nelson*, 834 N.W.2d at 65–66.

208. *Id.* at 67.

for its decision—and perhaps one that would seem more palatable to the public.²⁰⁹

B. Sexiness Sells: The Media's Sensationalism Bias

Given the legal and factual basis for the ultimate result in *Nelson*, many in the media still got the *Nelson* case wrong, even after the court issued its second decision. The media ignored the complicated and nuanced background of this case and instead reported the dispute as one simply involving a woman allegedly fired for being “too hot” for her employer. This result stemmed from fundamental flaws in the media’s method of reporting issues—and particularly in reporting on legal issues.

Whereas inaccurate or otherwise skewed reporting by the media inevitably provides some cause for concern, the notion that the media gets things wrong likely is not shocking to the average observer of the news. Indeed, the media seems to make errors all the time—oversimplifying complex issues, exaggerating events, and sensationalizing stories at every opportunity.²¹⁰ As one commentator observed, “[m]ass media will oversimplify and dumb down discussions of public issues, substitute sensationalism and amusement for deliberation about public questions, and transform news and politics into forms of entertainment and spectacle.”²¹¹ Far from the ideal of serious reporting on important issues, the media has evolved into an amalgamation of “newszak, bonk journalism, infotainment, or simply tabloid news.”²¹²

Although it may be accepted wisdom that the media generally prioritizes entertainment over information, this misplacement of reporting priorities seems particularly problematic in the context of legal reporting—in stories focusing on the criminal or civil liability

209. At least one major media outlet—the New York Times—picked up on and accurately reported about this change in the framing of the question before the court. See *Iowa: Court Reaffirms Dentist's Firing of Woman He Found Too Attractive*, N.Y. TIMES (July 12, 2013), http://www.nytimes.com/2013/07/13/us/iowa-court-reaffirms-dentists-firing-of-woman-he-found-too-attractive.html?_r=0 [<http://perma.cc/JY3G-HEJE>] (reporting that the court’s second opinion had eliminated references to Knight’s alleged “irresistible attraction” to Nelson, instead asking whether Nelson was fired “because of the activities of her consensual personal relationship” (quoting *Nelson*, 834 N.W.2d at 77 (Cady, J., concurring) (internal quotations omitted))).

210. See Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 30 (2004) (citing as one worry associated with the potential conflict between mass media and democratic self-governance the fear that the mass media “reduce[s] the quality of public discourse in the drive for higher ratings and the advertising revenues and other profits that come with them.”).

211. *Id.*

212. ROSALIND GILL, *GENDER AND THE MEDIA* 132 (1st ed. 2007) (internal quotations omitted).

of individuals or corporations. In an empirical project that surveyed the views of general counsels working at S&P 500 companies, law firm partners, and public relations executives,²¹³ the media's failure to accurately report on legal issues represented one significant concern (among many others) of those responding.²¹⁴ Many lawyer interviewees complained that the media "tends to oversimplify complex issues and get the facts and details wrong."²¹⁵ As one participant noted, "[the media] want[s] for me to get down to the sound bite, and I wanna push back and say, 'It's not a sound bite.'"²¹⁶

The U.S. Supreme Court has decried the extent to which the media misrepresents and distorts outcomes in matters of law. For example, shortly after Justice Alito joined the Court, he noted in a speech that "news media typically oversimplifies and sensationalizes."²¹⁷ Justice Ginsburg has expressed similar concerns, arguing that the press often "overinterprets unimportant actions," inappropriately forecasts outcomes, and overstates the significance of certiorari denials.²¹⁸ The headlines chosen by the press, according to Justice Ginsburg, are "more eye-catching than significant."²¹⁹ Equally vociferous in his criticism of the media, Justice Scalia has observed that

[t]he press is never going to report judicial opinions accurately They're just going to report, who is the plaintiff? Was that a nice little old lady? And who is the defendant? Was this, you know, some scuzzy guy? And who won? Was it the good guy that won or the bad guy?²²⁰

Such complaints about the media may seem mundane—even when lobbed by the highest judicial officers in the land. Yet the public is

213. Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259, 1259 (2009).

214. *See, e.g., id.* at 1268–69, 1280–81.

215. *Id.* at 1281 (internal quotations omitted).

216. *Id.*

217. John Heilprin, *Scalia Sees Shift in Court's Role*, WASH. POST (Oct. 23, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/22/AR2006102200965.html> [<http://perma.cc/Y2VR-J6LQ>].

218. Frank J. Murray, *Ginsburg Finds Full Court Press Lacking in Clarity*, WASH. TIMES (Feb. 13, 1995), 1995 WNL 314319.

219. *Id.* (quoting Justice Ginsburg) (internal quotations omitted).

220. Heilprin, *supra* note 217 (internal quotations omitted). Justice Thomas has been even more direct in his vilification of the media, publically referring to members of the media as "smart-aleck commentators," "snot-nosed brat[s]," "talking heads who shout at each other," and "snotty-nosed smirks." *Justice Thomas Complains Nation 'Awash in Cynicism'*, CHI. TRIBUNE (Sept. 15, 1998), http://articles.chicagotribune.com/1998-09-15/news/9809150138_1_fight-cynicism-white-house-intern-monica-lewinsky [<http://perma.cc/6MTJ-F9MB>] (internal quotations omitted).

so complacent about a media that exaggerates, spins, flattens and misleads. Particularly when the media reports on stories of legal significance, perhaps this failure to “get it right” should be greater cause for alarm.

C. Bias on Steroids: The Need for a Script in Stories Involving Women

Whereas the media’s tendency simultaneously to hyperbolize and oversimplify legal stories hardly comes as a surprise, this inability to present the news in an accurate and unbiased manner is especially pronounced in stories involving female protagonists: news stories about women invariably focus on their physical appearance to a far greater degree than stories about their male counterparts.²²¹ According to one scholar, “many newspaper editors seem incapable of printing a story featuring a woman without some evaluation of her attractiveness, or at least a description of her age and her hair colour.”²²² Men, in contrast, rarely are described in terms of their physical appearance. On those rare occasions when a man’s appearance does make its way into a news story, it is generally reported in a more objective, “meta-level” manner, such as by discussing the *phenomenon* of a male star’s sex symbol status, as opposed to the star’s physical appearance itself.²²³

More disturbing is the *manner* in which female appearance makes its way into these stories: regardless of her identity or status, a woman in the news tends to be represented “in one of two ways—in terms of her domestic role or her sexual attractiveness.”²²⁴ In this vein, women who fail to conform to the media’s physical expectations find themselves subject to vilification and scorn.²²⁵ From the media’s reporting on President Clinton’s relationship with Monica Lewinsky (“a chorus of ‘ugh—how could he,’ rather than any political or ethical debate about [the President’s behavior]”),²²⁶ to the British press’s vicious attacking of Duchess Sarah Ferguson’s (“Fergie’s”) appearance (including a telephone poll inviting male participants to rate whether they would rather “date . . . Fergie or a goat”),²²⁷ to attacks on actress Kate Winslet following her appearance in the movie *Titanic*

221. See GILL, *supra* note 212, at 115–16.

222. *Id.* at 115.

223. *Id.* at 116.

224. *Id.* at 115–16.

225. See *id.* at 116 (“The viciousness with which women are attacked if they do not meet the normative modes of attractiveness demanded by the press is chilling.”).

226. *Id.*

227. GILL, *supra* note 212, at 116.

(printing diet plans for her to follow and dubbing her “Titanic Kate,” instead of focusing on the merits of her Oscar nominated performance),²²⁸ this focus on female physical appearance over substance seems to apply across subject matters.

Surprisingly, even well established women, whose place in the public eye seemingly has no link to their appearance, find themselves judged by these same beauty standards: a study of female parliamentarians in Britain, South Africa, and Australia revealed numerous examples of a media fixated on the appearance of these female politicians,²²⁹ with at least one respondent commenting:

[W]omen are never the right age. We are too young, we’re too old. We are too thin, we’re too fat. We wear too much makeup, we don’t wear enough. We are too flashy in our dress, we don’t take enough care. There isn’t a thing we can do that is right.²³⁰

Closer to home, former Secretary of State Hillary Clinton received similar, appearance-focused coverage both during and after her run for the White House: on the presidential campaign trail, Clinton’s appearance was “a common topic of conversation” in coverage of her campaign,²³¹ with observers commenting on everything “[f]rom the color of her suit to her latest . . . hairstyle.”²³² Even one of Clinton’s male rivals on the campaign trail, former Senator Fred Thompson, noted the different standard to which Clinton was held and sympathized that “Clinton has to look matronly without looking beautiful, tough without looking harsh.”²³³ During her tenure as Secretary of State, Clinton’s decision to appear wearing glasses (as opposed to contact lenses) and with “no cosmetics other than lipstick” drew national attention, along with a front-and-center place on the well-known Drudge Report.²³⁴ Whereas some in the media expressed outrage that Clinton’s appearance without makeup might qualify as

228. *Id.*

229. *Id.* at 117 (citing study).

230. *Id.* at 117–18.

231. Emily Friedman, *Is Clinton Scrutinized About Her Looks Too Much*, ABC NEWS (Jan. 28, 2008), <http://abcnews.go.com/Politics/Note2008/story?id=4193461> [<http://perma.cc/A4FL-XFRA>].

232. *Id.*

233. *Id.*

234. Martha T. Moore, *Focus on Hillary Clinton’s Appearance Sparks Criticism*, USA TODAY (May 10, 2012, 9:02 AM), <http://usatoday30.usatoday.com/news/washington/story/2012-05-09/hillary-rodham-clinton/54860282/1> [<http://perma.cc/E4Z5-P2BU>]; see also Erin Gloria Ryan, *What We’re Really Talking About When We Talk About Hillary Clinton Without Makeup*, JEZEBEL (May 9, 2012, 11:20 AM), <http://jezebel.com/5908712/what-were-really-talking-about-when-we-talk-about-hillary-clinton-without-makeup> [<http://perma.cc/9VK8-HTE2>] (reporting on the Drudge Reports’ shaming of Hillary Clinton).

“news,” others defended Clinton’s appearance in these same gendered terms—arguing that she looked “fresh-faced” in the pictures and that she looked “good” in the photos.²³⁵ Rather than focus on the content of the visit during which these photos were taken—a diplomatic stop in Bangladesh—these stories continued the pattern of characterizing a woman in the news according to her appearance.²³⁶

Despite working in a profession in which physical appearance seems to lack any relevance, even women in the military find themselves confronted by a “beauty bias”—albeit, perhaps in a manner somewhat different from that faced by other women in the news: one female soldier recently found herself receiving the brunt of a female superior’s ire after her photo appeared in a military publication showing her “wearing carefully applied eyeliner and lip gloss.”²³⁷ According to the superior officer, the photo “undermine[d] the rest of the message [about gender parity in combat] (and may even make people ask if breaking a nail is considered hazardous duty).”²³⁸ In this officer’s view—and contrary to the conventional wisdom (in which those who satisfy societal standards of physical beauty find themselves with many advantages as compared to other “less attractive” peers)²³⁹—“ugly women are perceived as competent while pretty women are perceived as having used their looks to get ahead.”²⁴⁰ Thus, to a great degree, the women portrayed in these stories find themselves in a no-win situation: women who are not sufficiently physically attractive face an onslaught of criticism and belittlement,²⁴¹ but those who seem “too beautiful” may find themselves stereotyped and written off in other ways.²⁴² In the words of one

235. Ryan, *supra* note 234 (internal quotations omitted).

236. See *Daily Mail: Hillary Forgets Her Makeup?*, FOX NEWS (May 7, 2012), <http://nation.foxnews.com/hillary-clinton/2012/05/07/hillary-forgets-her-makeup> [<http://perma.cc/PYA7-2LV6>].

237. Meltzer, *supra* note 92.

238. *Id.* (internal quotations omitted).

239. Toledano, *supra* note 11, at 283–84; see also Kimmel, *supra* note 11 (defining “lookism” as “the preferential treatment given to those who conform to social standards of beauty”).

240. Meltzer, *supra* note 92 (internal quotations omitted); see also Brown, *supra* note 11, at 58 (“Attractive women are more likely to be subjected to stereotypes, harassment, and scrutiny, and are often pigeonholed in jobs that encourage them to use their looks for gain without regard to any other skills they possess.”).

241. See *supra* notes 223–25 and accompanying text.

242. See Brown, *supra* note 11, at 58 (“People generally have higher expectations of beautiful people, and when [they] fail to measure up, they face greater consequences for their failure. [Attractive people] may also face adversity in hiring and promoting because their intelligence is often doubted, and people have less desire for future interactions with attractive people of their own sex.”).

commentator, “[y]ou have to be beautiful to matter, but beauty can and will be used against you.”²⁴³

These no-win restrictions that women face with respect to their appearance actually extend much further than skin deep. In creating a dichotomy for portraying women in the news, the media seems focused not only on their subjects’ physical beauty, but also often amplifies appearance into *behavior*: women not only must fit into a particular “box” with respect to the way that they look, but they also must fall into a predetermined role related to their sexuality (or lack thereof). Here too, women fall into one of two roles—either that of the Madonna (pure, pristine, and sexually muted), or that of the whore (sexually promiscuous and often vilified).²⁴⁴ From popular music,²⁴⁵ to literature,²⁴⁶ to movies,²⁴⁷ to children’s animated films,²⁴⁸ women are portrayed as either virtuous and pure or as desire-driven and cunning, with virtually no room for any grey area in between.

This crabbed view regarding how women are portrayed in public extends beyond fictional depictions in books, movies, and the like. Indeed, “real” women portrayed in the news may find themselves shoved into this same storyline. Few events in recent media history illustrate the Madonna/whore dichotomy faced by women in the news more than the late 1980s sex scandal involving televangelist Jim Bakker and former church secretary Jessica Hahn.²⁴⁹

In December 1980, renowned televangelist Jim Bakker, head of the Praise the Lord (PTL) Ministries, had a sexual encounter with former church secretary Jessica Hahn in a Florida hotel room.²⁵⁰

243. Meltzer, *supra* note 92 (internal quotations omitted).

244. Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN’S L.J. 457, 461, 461 n.19, 462 (1996) (“Mythic generalizations often reduce women to one of two archetypes: madonna or whore.”).

245. See *Madonna—Whore Complex*, TVTROPES.COM, <http://tvtropes.org/pmwiki/pmwiki.php/Main/MadonnaWhoreComplex> [<http://perma.cc/6W4A-GVWJ>] (documenting use of this dichotomy by Taylor Swift, Madonna, Justin Timberlake, and others).

246. See *id.* (citing such classics as *PORTRAIT OF AN ARTIST AS A YOUNG MAN*, *A TALE OF TWO CITIES*, and *TESS OF THE D’URBERVILLES*).

247. See *id.* For example, when the topic of sex is brought up in *THE BREAKFAST CLUB*, Claire narrates, “Well, if you say you haven’t, you’re a prude. If you say you have you’re a slut. It’s a trap. You want to but you can’t, and when you do you wish you didn’t, right?” *Id.* (noting similar examples from *AMERICAN PIE*, *CRUEL INTENTIONS*, and *SATURDAY NIGHT FEVER*).

248. See *id.* (finding examples of the Madonna-Whore complex presented, *inter alia*, in both *SNOW WHITE AND THE SEVEN DWARFS* and *SLEEPING BEAUTY*, “where the ‘good’ princess is pure and virginal and the ‘evil’ villainess is an older woman with more sexuality”).

249. See Joshua Gamson, *Jessica Hahn, Media Whore: Sex Scandals and Female Publicity*, 18 CRITICAL STUD. IN MEDIA COMM’N 157, 157 (June 2001) (discussing, *inter alia*, Hahn’s portrayal in the media in the wake of her sex scandal with Bakker).

250. See *id.*; see also Leslie Berkman & Peter H. King, *Felt Like Discarded ‘Hamburger’*:

When news of their encounter became public in 1987, Bakker and Hahn each told different stories about what had happened during this encounter: according to the original version of the story (the version told both by Hahn and by the national press), Hahn had been a modest, 20-year-old woman who initially cleaned toilets at the church, eventually became the church's secretary, and exhibited total devotion to her job, including praying by phone with those in need.²⁵¹ Despite her physical attractiveness, Hahn had only been on a handful of dates.²⁵² Her sex education had come from library books as opposed to life experience, and she had vowed to "remain a virgin until marriage."²⁵³

In the immediate wake of the scandal, when Hahn's relationship with Bakker first became public, Hahn's portrayal in the media epitomized the innocent Madonna: she was depicted as the "ruined-innocent, good-girl character: weeping after a phone call to her parents . . . reading the Bible . . . demure and unprepossessing."²⁵⁴ She claimed never to have wanted money from Bakker as a result of this encounter (despite eventually collecting a settlement of \$265,000 from his church),²⁵⁵ but rather claimed only to have wanted an opportunity to vent her grievances and perhaps receive an apology from Bakker.²⁵⁶

Hahn's reprieve in the media limelight, however, proved to be short lived. The media soon was reporting on the large financial settlement that Hahn had received and implied that "good girls, even if they do actually have sex, and even if they're forced to, don't get paid for it . . ." ²⁵⁷ The press mentioned her "shiny lipstick and Porsche sunglasses, her 'boots, tight jeans and tight sweaters.'" ²⁵⁸ Eventually, after the million-dollar payout for her appearance in *Playboy* became public, the media and its consumers quickly abandoned any allegiance with or sympathy for Hahn.²⁵⁹ In the eyes of both the media and the public at large, Hahn became just another "loose' woman," a seductress, willing to sell her chastity to the highest bidder.²⁶⁰ Indeed, in the words of one observer, "it[] [was] as

Woman's Story of Bakker Tryst Told for First Time, L.A. TIMES (Mar. 27, 1987), http://article.latimes.com/1987-03-27/news/mn-315_1_jim-bakker [<http://perma.cc/Y9B4-H4BH>].

251. Gamson, *supra* note 249, at 164.

252. *Id.*

253. *Id.* (internal quotations omitted).

254. *Id.* (internal quotations omitted).

255. *Id.* at 165.

256. *See id.* at 157–58; *see also* Berkman & King, *supra* note 250.

257. Gamson, *supra* note 249, at 165.

258. *Id.* at 164.

259. *See id.* at 165.

260. *See id.*

though Hahn reached behind her head and slowly peeled off the face of the virginal church secretary to reveal—gasp!—her evil, nymphomaniacal, come-and-get-it twin.”²⁶¹

In many ways, Hahn’s transformation was typical. This need to force Hahn into a particular persona, victim or vamp, falls squarely within the media’s usual *modus operandi*.²⁶² As one commentator has observed, this dichotomy—this “axis of sexually ‘pure’ or sexual[ly] ‘ruined,’ of virgin or whore, of loose woman or bad girl . . . continues to be[] one of the central axes along which women’s positioning in the public sphere has run.”²⁶³ Hahn’s ability to straddle both stereotypes, to act as both “[g]ood girl and her evil twin, trusting, naïve ruined woman and calculating, sex-drenched golddigger, victim and vamp,” has cast her as what some have called “the best summary we have of the sex-scandal icon.”²⁶⁴

Whereas the media’s desire to characterize Hahn as fitting into one of two boxes might not come as a surprise given the media’s tendency to oversimplify and typecast, the speed and fierceness with which the media and the public turned on Hahn—rejecting her claims of innocence and virginity and chastising her as a loose woman and media whore—does raise questions. Almost from the moment that Hahn’s encounter with Bakker became public, one sensed the media struggling with how to characterize her tale: even the earliest descriptions of Hahn “swing between the dog-loving, Bible-reading, small-town virgin and her alter ego, the big-haired, gum-chomping, knowing tease.”²⁶⁵ From this perspective, it would not take much—merely the slightest push in one direction or the other, toward Madonna or whore—to vault Hahn more permanently into one of these two camps.

Admittedly, Hahn made it easy for members of the media to describe her in hyperbolic terms. She provided ample fodder for the press to cast her as either the “[p]ower-hungry temptress of powerful man (busty, licking her lips)”²⁶⁶ or the “chaste beauty ruined by powerful man (young, smooth skinned, eyes cast down but glancing up with hints of desire) . . .”²⁶⁷ Yet, it is possible that Hahn, like most women, was a woman with a complex personality and nuanced

261. *See id.* (“[A]fter brief press time as a good girl, Hahn rapidly shape-shifted to a self-promoting sexual object.”).

262. *See id.* at 158 (“On its own, while certainly appalling, the persistence of sexual objectification, sexual double standards, and a virgin-whore dichotomy is not surprising news.”).

263. Gamson, *supra* note 249, at 158 (quotations in original).

264. *Id.*

265. *Id.* at 164.

266. *Id.* at 158.

267. *Id.*

sexuality and was not simply a one-dimensional cartoon character. By shoving Hahn consecutively into these two boxes, first that of virgin, then that of whore, the media oversimplified what was likely a much more complex tale.

In this way, the media's portrayal of Hahn can provide insight into the flawed coverage of *Knight v. Nelson*. Perhaps, just as the media seemed so eager to cement Hahn into a particular mold, so too did they desire similarly to define Nelson—to characterize Nelson as either “Madonna” or “whore.” Yet Nelson also did not fit cleanly into either of these categories. As a (mostly) passive target of Knight's amorous proclamations—the mere recipient of his explicit communications²⁶⁸—Nelson hardly could be characterized as a whore. Knight, not Nelson, seemed to initiate and foster their inappropriate relationship.²⁶⁹ At the same time, however, Nelson's behavior seemed not quite virginal. As the Iowa Supreme Court repeatedly noted in its opinion, not only did Nelson never object to Knight's overtures, but she also apparently did not even deem them harassing in nature.²⁷⁰ Perhaps the court believed that a “true” virgin would have responded less passively to such graphic statements from a man other than her husband or partner.²⁷¹

Thus, faced with a protagonist who could not fit squarely into a predetermined role, the media found itself faced with a choice regarding how *it* wanted to characterize Nelson in this story—and it chose the Madonna persona: whether driven by an inherent sympathy for the underdog plaintiff,²⁷² by a desire to tell a more sensational story,²⁷³ or by other forces altogether, the media by and

268. *Nelson v. Knight*, 834 N.W.2d 64, 65–66 (Iowa 2013) (noting the sexual nature of several instances of communication between Nelson and Knight).

269. *See id.* at 66.

270. *See id.* at 65, 67, 72 n.7.

271. *See id.*; *see also* *Simmons v. Miami Valley Trotting, Inc.*, 2006 WL 1000076, *5 (S.D. Ohio 2006) (“[P]laintiff Singleton did not tell Nixon his comments were unwelcome . . .”). Of course, the inherent power differential between Knight as employer and Nelson as employee may well have inhibited Nelson's response to Knight's comments. Yet the court made much of the fact that even *after* Knight terminated her employment, Nelson never alleged that she had felt bothered by Knight's statements and simply was frightened to speak out. *Nelson*, 834 N.W.2d at 72. To the contrary, even in the context of pursuing her gender discrimination suit, Nelson never claimed that she was offended by Knight's communications or that she viewed such statements as harassing or unwelcome. *Id.*

272. *See* Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 243 (2004) (“By portraying employment discrimination lawsuits as those in which plaintiffs consistently and uniformly prevail, the media may be contributing to its readership's formation of an expectation of a certain outcome that is rarely met.”).

273. *See* Balkin, *supra* note 210, at 30 (“Mass media will oversimplify and dumb down discussions of public issues [and] substitute sensationalism and amusement for deliberation about public questions . . .”); *see also* Heilprin, *supra* note 217 (“[P]eople understand the courts through a news media that typically oversimplifies and sensationalizes.”).

large opted to portray the *Nelson* case as one in which a (largely) innocent employee “suffered because Knight couldn’t control his libido”²⁷⁴ Yet by forcing Nelson into a cloak that didn’t quite fit, the media inevitably skewed its coverage of her story. It could not report on Nelson’s passivity in the face of Knight’s graphic overtures without tarnishing Nelson’s pure and pristine appearance. It could not describe the legal nuance in the Iowa court’s decision—the precedent permitting terminations based on relationships that create jealousy,²⁷⁵ or the court’s surprise at Nelson’s failure to allege sexual harassment,²⁷⁶ or the limited scope of the opinion itself²⁷⁷—without weakening the power of the broader narrative. Better to portray a simple tale of a female employee twice wronged—first by her lust-ridden employer and then by an out-of-touch, misogynistic court—than to convey the true complexities that underlie this case.

D. A Perfect Storm: Media Sensationalism & Gender Stereotyping Leads to Skewed Reporting in Sex Discrimination Cases

Whereas the *Nelson* case provides one insight into how the media need to oversimplify and stereotype female protagonists leads to skewed reporting and misinformation, this case sadly represents but one example of a much broader trend. In fact, as already discussed, the media’s need to place female protagonists in a particular box (either pure and pristine or sexually promiscuous), combined with the media’s general tendency to sensationalize and oversimplify, may lead to skewed reporting in a whole class of stories—those involving sex discrimination claims brought by female plaintiffs.

In their 2004 study of print media accounts of employment discrimination cases from 1990 to 2000, Laura Beth Nielsen and Aaron Beim found that the print media depicts employment discrimination plaintiffs in a significantly more favorable light than reality warrants.²⁷⁸ Their research indicated that the manner in which the media portrays outcomes in sex discrimination cases vastly misrepresents reality in a manner highly favorable to discrimination plaintiffs.²⁷⁹ Specifically, among other misrepresentations, the media depicts higher

274. *The Register Editorial: Unfortunately, Iowa Law Allows Men to Be Jerks*, *supra* note 184. Indeed, as previously mentioned, at least one editorial framed this case in precisely those terms. *What Others Are Saying: Court Backs the Lusty Boss over the Innocent Employee*, *supra* note 188.

275. *See Nelson*, 834 N.W.2d at 68–69.

276. *See supra* notes 65–66 and accompanying text.

277. *See Nelson*, 834 N.W.2d at 65.

278. *See Nielsen & Beim*, *supra* note 272, at 239.

279. *See id.* at 239, 257.

“win rates and higher award amounts” for plaintiffs in these suits than is actually the case in federal court outcomes.²⁸⁰

Nielsen and Beim found that during the period relevant to their study, plaintiffs were portrayed in the media as prevailing “in [eighty-five percent] of all adjudicated cases” (meaning that in those media stories that specified a winner, plaintiffs prevailed eighty-five percent of the time).²⁸¹ The actual “win rate” for plaintiffs in district courts during this period, however, was thirty-two percent, less than half of the plaintiff win rate reflected in media accounts.²⁸² When the study focused specifically on media coverage of *jury trials* (a sample which itself is skewed with respect to outcomes, given the large number of cases that settle), the media reported plaintiff victories in almost ninety-eight percent of the trials covered, as compared to an “actual” win rate of almost forty-one percent for jury trial plaintiffs.²⁸³ Media reports of discrimination cases tried as bench trials similarly depicted prevailing plaintiffs in sixty-eight percent of all reports of concluded cases, as compared to an actual win rate of twenty percent for discrimination plaintiffs who opted for a bench trial.²⁸⁴

Nielsen and Beim also found that the media inflated the size of awards in employment discrimination cases during this period. In stories regarding jury trials, “the median jury award reported . . . [was] \$1,100,000.”²⁸⁵ The actual median jury award in discrimination cases during this period was \$150,000, less than seven times the reported amount.²⁸⁶ As the authors of this study concluded, “[t]hese data demonstrate dramatic differences between media accounts of employment discrimination cases and the actual dynamics and outcomes of litigation.”²⁸⁷ The authors worried that “[b]y portraying employment discrimination lawsuits as those in which plaintiffs consistently and uniformly prevail, the media may be contributing to its readership’s formation of an expectation of an outcome that is rarely met.”²⁸⁸

Admittedly, Nielsen and Beim’s focus was on discrimination cases generally, as opposed to solely on cases involving sex discrimination.²⁸⁹ Yet statistics indicate that sex discrimination claims consistently

280. *See id.* at 251.

281. *See id.*

282. *See id.*

283. *See id.* at 252.

284. *See Nielsen & Beim, supra* note 272, at 253.

285. *See id.*

286. *See id.*

287. *Id.* at 257.

288. *Id.* at 243.

289. *See id.* at 239.

have made up a significant portion of all charges filed with the Equal Employment Opportunity Commission (EEOC), comprising roughly one-third of all charges filed with the agency between 1992 and 2014.²⁹⁰ Whereas there is admittedly a difference between charges merely filed with the EEOC and cases that eventually make their way into district court (i.e., the latter being the basis of Nielsen and Beim's analysis), there is no reason to believe that sex discrimination charges settle or are otherwise resolved at any greater or lesser rate than other types of charges. Thus, one can assume that Nielsen and Beim's findings regarding misrepresentations with respect to discrimination claims will generally be similarly reflected in any data with respect to sex claims specifically.

By carrying over this unrealistic expectation specifically into lawsuits involving sex discrimination—cases in which women most frequently serve as plaintiffs²⁹¹—the media not only may be skewing the public's understanding of these types of claims, but also, as discussed below, may be altering expectations regarding the role of women in the workplace more generally. Indeed, by portraying the vast majority of female plaintiffs in these cases as “innocent victims” to an extent that belies reality, the media continues to exacerbate the stratification that women already face in the workplace and beyond: “true” victims of sex discrimination must comport with the image of the Madonna, pure and pristine, whereas those women who happen to fall outside of this box may be treated more harshly and vilified.

IV. HIGH STAKES ERRORS: THE RAMIFICATIONS OF MEDIA BIAS IN STORIES INVOLVING WORKPLACE SEX DISCRIMINATION

As already noted, there is nothing shocking about the proposition that the media misrepresents, hyperbolizes, sensationalizes and oversimplifies. Although many may wish that the media would do a better job—particularly when reporting on legal matters—the fact that

290. See *Charge Statistics FY 1992 Through FY 1996*, EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> [<http://perma.cc/X2E4-L4GY>]; *Charge Statistics FY 1997 Through FY 2013*, EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<http://perma.cc/E2ZL-D76Y>].

291. Rachel H. Yarkon, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOT. L. REV. 165, 167 (1997) (citing attorney's assertion that a majority of plaintiffs in gender discrimination cases are female employees). *But see* Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 38 (1993) (noting that women serve as plaintiffs in the majority of sexual harassment cases, but that men frequently bring gender discrimination claims).

these general problems carry over into the legal context likely comes as no surprise to the average consumer of the news. Indeed, the media's very ability to skew the public's understanding of women in the workplace, particularly when it comes to claims of sex discrimination, flows from the fact that most lay individuals have quite limited knowledge of employment law. For example, most individuals fail to appreciate the meaning of the "employment at will" doctrine, which permits an employer to terminate a worker's employment at any time, "for any reason."²⁹² When members of the public hear stories about employees being treated *unfairly*, many automatically assume that such conduct is illegal.²⁹³

It is equally unsurprising to discover that the media often portrays female protagonists in a manner that favors stereotype and caricature over complexity and precision. The "Madonna"/"whore" labels encompass roles that have long-been associated with women both inside and outside of the workplace.²⁹⁴ Whether the subject is a celebrity, a political figure, or any ordinary citizen, the media defaults to descriptions grounded in a woman's physical appearance or sexuality.²⁹⁵

When the media not only glosses over details or otherwise skews the facts in legal stories involving female plaintiffs, but also adheres to this Madonna/whore dichotomy, the errors have a broad impact on women, both within the workplace and beyond. By telling the "stories" about discrimination cases in a way that is inaccurate, and that further perpetuates stereotypes regarding the role of women, the media may unwittingly be altering how the broader public views women both in and out of work. Moreover, this change in how the broader public understands the roles of women may have several significant ramifications.

First, inaccuracies in the media regarding how women are portrayed (i.e., as Madonna or whore, as physically desirable or useless), may impact the public's priorities with respect to policy and legislation. The media has a direct impact on how lay individuals understand the law.²⁹⁶ As one legal scholar has observed, "[m]uch of

292. Corbett, *supra* note 11, at 659.

293. *Id.* (noting that people who hear stories about appearance-based discrimination often assume that such conduct is illegal, even when the conduct does not violate Title VII or any other statute); *cf.* Nelson v. Knight, 834 N.W.2d 64, 73 (Iowa 2013) ("[T]he issue before [the court] is not whether a jury could find that Dr. Knight treated Nelson badly . . . [but rather] only if a genuine fact issue exists as to whether Dr. Knight engaged in unlawful gender discrimination . . .").

294. See *supra* Section III.C.

295. See *supra* Section III.C.

296. Nielsen & Beim, *supra* note 272, at 257.

what Americans know, or only think they know, about legal issues comes from media portrayals.”²⁹⁷ The media impacts which issues their audiences take seriously: by ignoring some problems and paying attention to others, the media helps to shape the legal and policy priorities of the general public.²⁹⁸ When the media consistently repeats certain stories and frameworks, individuals come to understand the law primarily through these frameworks—especially if the individuals are starting from a point of relative naïveté and thus are less capable of challenging what is reported.²⁹⁹ If the story that media consumers see again and again is one where female plaintiffs almost always prevail in employment discrimination lawsuits and receive enormous damage awards, and one in which female plaintiffs must fit into a particular template with respect to their appearance and sexuality, this may alter the lens through which employers, human resource professionals, employees, judges, and other policy makers view the workplace.³⁰⁰ Rather than being viewed as an arena where discrimination claims are rare and where such claims are evaluated objectively according to the facts, the workplace becomes akin to a battlefield, where employers must remain on guard against unfounded claims by scheming vixens (as well as perhaps some legitimate claims brought by truly victimized females), both of which will cost the employer dearly.³⁰¹ An employer focused on maintaining this defensive crouch may prioritize guarding against discrimination liability in an unnecessarily high position and overlook other important tasks that are key to running a successful business.³⁰²

297. *Id.* at 258 (quoting Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1347 (2002) (internal quotations omitted)).

298. *Id.* at 258.

299. *Id.*

300. *Id.* at 260.

301. See Jon Hyman, *How Much Does It Cost to Defend an Employment Lawsuit?*, WORKFORCE.COM (May 14, 2013), <http://www.workforce.com/blogs/3-the-practical-employer/post/how-much-does-it-cost-to-defend-an-employment-lawsuit> [<http://perma.cc/4SUL-3FEL>] (“[T]he employer can expect to spend a total of \$175,000 to \$250,000 to take a case to a jury verdict at trial.”); see also Susan M. Heathfield, *Prevent Employment Discrimination and Lawsuits*, ABOUT.COM, <http://humanresources.about.com/od/discrimination/qt/prevent-employment-discrimination.htm> [<http://perma.cc/FSS5-6J9R>] (last visited Dec. 11, 2015) (discussing how, in addition to the average defense cost of \$250,000 and jury verdict of \$200,000, an employer incurs other types of costs, such as distraction of staff, loss of employee morale, reputation harm, and attorneys’ fees).

302. See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964, 985 (1999) (describing a host of “litigation avoidance strategies” used by employers); see also Catherine Rampell, *More Workers Complain of Bias on the Job, a Trend Linked to Widespread Layoffs*, N.Y. TIMES (Jan. 11, 2011), <http://www.nytimes.com/2011/01/12/business/12bias.html> [<http://perma.cc/VH2Y-4FH7>] (discussing the increase in discrimination charges during difficult economic times and citing management lawyers’ observation that employers take potential discrimination litigation into account in structuring layoffs and workforce

In addition to impacting the priorities that are set with respect to the relative importance of “women’s issues,” these misrepresentations of women in the public eye can also have a concrete impact on policies and practices in the business world: when the media paints a picture in which discrimination plaintiffs overwhelmingly prevail, and then characterizes the female plaintiffs who may initiate these cases as either innocent victims or conniving vamps, it fuels an excessive fear among employers regarding employment discrimination lawsuits.³⁰³ This excessive fear, in turn, may have a direct impact on personnel decisions—who to hire and who to fire.³⁰⁴ Indeed, research has shown that human resource professionals often overestimate—and thus overcompensate for—the risk of liability from employment-related litigation.³⁰⁵ In some cases, these perceived threats of liability might discourage employers from hiring women (or members of other protected groups) out of fear of potential liability if adverse action must be taken against such individuals down the road.³⁰⁶ In other words, employers may be less likely to hire women if they fear that a female employee who later is fired, or denied a raise, or misses out on a promotion is likely not only to sue for sex discrimination, but also to win (and to receive a significant award). In this way, the skewed image of women presented by the media may have an impact on the composition of the workforce.³⁰⁷

This increased fear of liability that many employers may have regarding having women in the workplace may also create a market for certain types of liability insurance. “‘Employment Practices Liability Insurance’ (EPLI) insures employers against” liability for employee claims of “wrongful employment practices,” including wrongful termination.³⁰⁸ Thus, media accounts that tout victories by discrimination plaintiffs beyond those reflected in reality or that publicize improbable substantial awards, may create an artificial market for this expensive product.³⁰⁹ This fear of liability also likely promotes job

reductions). Indeed, employers may even retain underperforming employees to avoid a potential claim of discrimination. See Hyman, *supra* note 301 (“Most employers, if acting rationally, will chose [sic] to retain an employee instead of assuming the risk of a \$250,000 legal bill with an uncertain outcome.”).

303. Nielsen & Beim, *supra* note 272, at 258.

304. *See id.* at 261.

305. *See id.*

306. *See id.*; see also Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333, 345–46 (2008) (describing the extent to which Title VII litigation may create disincentive for employers to hire workers from protected classes).

307. Nielsen & Beim, *supra* note 272, at 261.

308. *Id.* at 262.

309. *Id.* Although outside the scope of this Article, one area for future inquiry might

security for the human resources staff within a company: employers who believe that they are merely one employment decision away from the receiving end of a risky and high-stakes discrimination lawsuit are perhaps likely to feel a greater need to retain the human resources professionals charged with guiding these decisions.³¹⁰

Finally, media distortions regarding both the role of women in the workplace and their potential to prevail in discrimination lawsuits may have a substantial negative impact on workplace morale.³¹¹ Research indicates that workers who claim to have experienced discrimination in the workplace often are viewed by colleagues as “troublemakers.”³¹² In the context of race discrimination complaints, for example, workers who claim to have experienced adverse treatment due to their race frequently are viewed as “making excuses” for their own workplace deficiencies or as trying to use the legal system to grab an unearned cash award.³¹³ Notably, this type of negative response toward complaining individuals has been found to occur even when clear evidence indicates that the complaining individuals, in fact, had experienced discrimination.³¹⁴

A female employee who complains that she has experienced sex discrimination due to her appearance may not only find herself shoved into a particular box—labeled as the innocent victim or the conniving temptress—but also may be seen as creating this problem, perhaps by dressing in a certain manner or devoting excessive time to honing her feminine appearance. Indeed, *Nelson* and similar “too hot” cases support this “blame the victim” mentality: the *Nelson* court noted a factual dispute regarding whether Nelson’s attire was *actually* “too tight and revealing” or whether it was appropriate, as Nelson alleged.³¹⁵ Media stories regarding Lauren Odes, terminated wholesale lingerie employee, raised similar concerns, discussing whether her “simple tee-shirt and jeggings” had been deemed “too distracting” for her employer.³¹⁶ In neither of these discussions did the court, or the media, assert that Nelson or Odes’s choice of clothing was *irrelevant* to the discussion—that no matter what attire

involve determining whether businesses that employ a greater percentage of women or members of other protected groups tend to maintain more robust EPLI.

310. This same argument likely would apply with respect to the job security of in-house and/or outside employment counsel.

311. Nielsen & Beim, *supra* note 272, at 262.

312. Fink, *supra* note 306, at 341 (internal quotations omitted).

313. Nielsen & Beim, *supra* note 272, at 262 (internal quotations omitted).

314. *See id.* at 262 n.110 (“[W]hite women and people of color are loathe to define a negative outcome as discrimination even when the event objectively amounts to discrimination.”).

315. *See Nelson v. Knight*, 834 N.W.2d 64–65, 65 n.3 (Iowa 2013).

316. *See Lauren Odes Too Hot Appearance*, *supra* note 89.

either woman chose to wear, it would not justify adverse treatment from her employer. As other employees (particularly female employees) observe this dynamic, in which a colleague claims to have been penalized due to her gender, and then is *herself* characterized as possibly creating her own problems, they not only may hesitate before voicing their own concerns about adverse treatment at work, but also may question whether their physical appearance is undermining their ability to succeed in their jobs.

CONCLUSION

Although it is easy to downplay the role of the media in shaping public views—to write the media off as no more than an infotainment-providing distraction—the media in fact plays a substantial role in setting the agenda for public discourse, informing citizens of facts that will shape their beliefs, and promoting the policies and practices that employers, judges, and legislators may adopt. Significant negative ramifications may arise when women in the public eye are portrayed in a misleading or otherwise inaccurate manner—when evaluations of their physical attractiveness imbues articles in which appearance otherwise should play no role, or when their sexuality is generalized into one of two roles: Madonna or whore. The *Nelson* case presents a prime example of how easy it is for the media, through even minimal skewing of its coverage, to drastically alter the way in which a story is portrayed, which often results in misdirected ire from the public at large.

To be sure, the actual decision in *Nelson* provided much to critique: one could understandably and reasonably lament a decision that allows the jealousy of an employer's spouse to justify an employee's termination (particularly when the employee played a lesser, more passive role in fostering the relationship that led to the jealousy). One could also question whether the court's attempt to limit this case by placing so much emphasis on the "consensual" nature of the relationship between Knight and Nelson accurately reflects the realities of most worksites, where subordinate employees might hesitate before objecting to or deterring the advances of a boss or other superior. Indeed, if carefully and accurately reported, a case like *Nelson* could open the door to important, broader discussions: discussions about gender dynamics in the office and the role of women in the workplace; discussions about how employers and employees properly should navigate relationships that extend beyond the workplace; and discussions about the stereotypes and standards that society unwittingly imposes on employees based on their sex.

Yet, by oversimplifying this case—by portraying it as one simply about a lust-filled male employer and his blameless, pure female employee—the media obscured the relevance of these other points. Whereas many portrayed *Nelson* as an example of an out-of-touch court gone awry, perhaps the case could better be understood as a missed opportunity for engaging in these important conversations.