

INTRODUCTION

As the Supreme Court, the Second Circuit, and many other federal courts have recognized, discrimination against an individual because she fails to conform to a gender stereotype constitutes unlawful sex discrimination. In part because women are the great majority of victims of domestic violence and in part because of domestic violence's relationship to beliefs that women must play a submissive role within the family, gender stereotypes are the basis for many judgments about and expectations of domestic violence victims, as courts, legal scholars, social scientists, and advocates have recognized. When a landlord acts on these stereotypes, and attempts to evict a tenant because she fails to conform to the landlord's gender-stereotyped notions of how a domestic violence victim should behave, the landlord commits unlawful sex discrimination in violation of the Fair Housing Act. This brief sets out the law and scholarship that compel this conclusion, in support of the motion by Plaintiffs Quinn Bouley and her minor children for summary judgment on their claim of sex discrimination in violation of the Fair Housing Act and in opposition to Defendant's motion for summary judgment on this claim.

I. JUDGMENTS AND EXPECTATIONS ABOUT DOMESTIC VIOLENCE VICTIMS ARE COMMONLY BASED ON GENDER STEREOTYPES.

The vast majority of individuals who experience domestic violence are women. According to the U.S. Department of Justice's Bureau of Justice Statistics, women were the victims in about 85 percent of crimes committed by intimate partners in 1998. Callie Marie Rennison & Sarah Welchans, U.S. Dep't of Justice, NCJ 178247, *Intimate Partner Violence* 1 (2000). Similarly, data collected by the National Institute of Justice and the Centers for Disease Control and Prevention indicate that women are significantly more likely than men to experience violence at the hand of an intimate partner. In addition, the greater likelihood that women will experience physical assault by an intimate partner increases as the seriousness of the assault

increases. For example, while women were two to three times more likely than men to report that an intimate partner threw something that could hurt them or pushed, grabbed, or shoved them, they were seven to fourteen times more likely than men to report that an intimate partner beat them up, choked them, tried to drown them, or threatened them with a gun or knife. Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, NCJ 181867, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Study* 17 (2000). Not only are women more likely than men to experience domestic violence, a significant percentage of women experience such violence. Nationally, 26 percent of women, compared to 8 percent of men, reported having been victimized by an intimate partner in their lifetime. Tjaden & Thoennes, *supra*, at 9. Nor are all women equally likely to experience such violence. For instance, women living in rental housing experience intimate partner violence at more than three times the rate of women who own their own homes. Rennison & Welchans, *supra*, at 5. In addition, poor women experience victimization by intimate partners at higher rates than women with higher household incomes; between 1993 and 1998, women with annual household incomes of less than \$7,500 were nearly seven times as likely as women with annual household incomes over \$75,000 to experience domestic violence. *Id* at 4.

In part because women are so much more likely than men to experience domestic violence, gender stereotypes often motivate judgments about and behavior toward victims of domestic violence. These stereotypes also arise because domestic violence occurs within the family and is closely tied to gender roles within the family; as the Supreme Court has recently affirmed, beliefs about women's appropriate role within the family are among the most powerful and persistent gender stereotypes. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736-38 (2003). Accordingly, courts have repeatedly recognized the gender stereotypes or gender

animus that can motivate behavior toward or judgments about female victims of domestic violence. For instance, the Ninth Circuit has held that blaming a woman for provoking domestic violence against her strongly suggests an animus against abused women and, thus, unlawful discrimination on the basis of sex. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990) (finding police officer's statement to a domestic violence victim that he did not blame her husband for hitting her because of the way she was carrying on likely sufficient to support a claim of sex discrimination under the Equal Protection Clause). Even more obviously, treatment of female victims of domestic violence reflecting a gender-stereotyped belief that a husband has a right to discipline his wife physically is a form of sex discrimination, as is a denial of outside assistance to a female victim of domestic violence based on the related notion that such violence should be worked out privately within the family. *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1528-29 (D. Conn. 1984) (denying motion to dismiss claim of sex discrimination in violation of the Equal Protection Clause based on City's failure to provide police assistance to women who complained of being abused by their husbands).

Courts have also recognized that treatment of domestic violence victims that is intended to accomplish the goal of keeping women in a "stereotypic and predefined place" within the family constitutes sex discrimination. *Smith v. Elyria*, 857 F. Supp. 1203, 1212 (N.D. Ohio 1994) (internal quotation marks and citation omitted). Thus, the court in *Smith v. Elyria* refused to dismiss a sex discrimination claim under the Equal Protection Clause challenging a police policy for responding to domestic violence complaints when that policy assumed the complainant was an upset and irrational woman unlikely to press charges; further assumed that the alleged abuser was the wage earner for the family who had the right to exercise dominion and control over the victim's home; and required police to urge the victim to resolve her dispute with

the alleged abuser for the sake of the family's integrity. *Id.* The court recognized that a domestic violence policy based on these gender-stereotyped assumptions amounted to an attempt to impose gender stereotypes on female victims of domestic violence and that such an attempt, if proven, would constitute unlawful discrimination on the basis of sex. *Id.*; see also *Ziegler v. Ziegler*, 28 F. Supp. 2d 601, 607 (E.D. Wash. 1998) (acts that perpetuated gender stereotype of submissive role for female domestic violence victim demonstrated gender motivation).

Legal scholars and advocates for domestic violence victims have further explored the gender stereotypes that often underlie the perception and treatment of female victims of domestic violence. As their work has demonstrated, "women who do not fit the stereotype of the good woman may not fit the stereotype of the battered woman," Christine Noelle Becker, Note and Comment, *Clemency for Killers? Pardoning Battered Women Who Strike Back*, 29 Loy. L.A. L. Rev. 297, 319 (1995); in other words, female victims of domestic violence who deviate from stereotypically feminine gender norms often are not perceived to be real victims. As a result, they are not perceived as deserving of the sympathy or assistance to which true victims of domestic violence would be entitled.

... "[W]hether or not someone subject to domestic violence is considered to be a 'victim,' is intimately connected to . . . 'good girl/bad girl' stereotypes." Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 Colum. J. Gender & L. 1, 22 (1998). For instance, because assertiveness and strength are not characteristics associated with stereotypes of femininity, female victims of domestic violence exhibiting these characteristics are less likely to be seen as true victims meriting belief or sympathy. Becker, *supra* at 319; Fenton, *supra* at 24. Battered women are stereotyped as weak and passive, victimized, helpless, and dependent. Elizabeth M. Schneider, *Battered Women &*

Feminist Lawmaking 141, 171 (2000); *see also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 24-26, 38-42 (1991) (discussing stereotypes of battered women). Battered women who demonstrate anger and thus fail to conform to these stereotypes of feminine passivity are also often disbelieved, mistrusted, or blamed when they describe the battering that they have experienced. *See* Sharon Angella Allard, Note, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA Women's L.J. 191, 193-96 (1991). When a woman deviates from the stereotype of the battered woman, and from the stereotypes of femininity that underlie it, by demonstrating strength, capability, or assertiveness, she often will be seen as having a propensity for violence herself or as somehow having caused the violence against her. Schneider, *supra*, at 171; *cf.* *Balistreri*, 901 F.2d at 701 (blaming battered woman for provoking the violence against her demonstrates gender animus). Similarly, female victims of domestic violence who show sexual interest in men and so deviate from the stereotypical notion of the good woman are often understood to be something other than real victims. Fenton, *supra*, at 22. These women, who fail to conform to gender-stereotyped notions of what it means to be a victim of domestic violence, are often believed to have precipitated the violence against them or to like or deserve to be beaten. *Id.* at 27. The conclusions of these legal observers regarding the prevalence of gender stereotypes in judgments of domestic violence victims are consistent with those of social scientists who have studied perceptions of female victims of domestic violence, as the expert report submitted by Dr. Sharon Lamb in this case demonstrates.

Such gender stereotypes about battered women are not only inaccurate, they are also harmful to women who have experienced domestic violence. The belief that it is women's responsibility to keep their families intact, for the sake of their husbands and their children,

pressures many women to stay in dangerous and violent relationships. *Cf. Smith*, 857 F. Supp. at 1212; *Thurman*, 595 F. Supp. at 1528-29. Stereotyped beliefs that real battered women are passive and do not express anger mean that when women who have experienced domestic violence take the assertive steps necessary to end the violence and keep themselves and their children safe, they are often disbelieved or blamed for provoking the violence against them. *See, e.g., Schneider, supra*, at 171 (“For example, women have lost custody of their children because of their ‘propensity for violence’—behavior that in actuality was an aggressive show of self-defense”); *Mahoney, supra*, at 48-49 (“[Battered women with children] need to be strong, resourceful, effective as a parent, meeting the needs of the children when we appear in court. On the other hand, if [they] do that too well, the court may disbelieve [their] stories because of stereotypes held by judges or psychologists.”). Unfortunately, these gender stereotypes are not only harmful, but also persistent. While domestic violence is relatively common, and many people have experienced it or know someone who has, such personal experience with domestic violence does not necessarily dispel gender stereotypes about domestic violence victims. Just as someone who has experience with women’s roles within a family or who has filled some of those roles herself can nevertheless hold inaccurate or old-fashioned gender stereotypes about women’s family roles and responsibilities, so someone who has herself experienced or observed domestic violence can have gender-stereotyped ideas about battered women. *See id.* at 13-19 (discussing misleading images of domestic violence victims that persist both despite and because of the fact that many have personal experience of domestic violence); *cf. Castaneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (“Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to dissociate

themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority.").

As Ms. Bouley explains in her brief and as the supporting expert declaration confirms, the evidence in the present case demonstrates that Defendant and her property manager and agent likely relied on multiple gender stereotypes about women who experience domestic violence in forming judgments about Ms. Bouley after she was assaulted by her husband; when Ms. Bouley failed to conform to these stereotypes, Defendant sought to evict her. The gender stereotypes that formed the basis for the attempted eviction included the stereotypes that battered women must not express anger, that battered women must not be assertive, that battered women should not receive attention from men who are not their husbands, and that battered women should sacrifice themselves in order to preserve their families. When Ms. Bouley expressed anger and assertiveness, demonstrated little concern about her husband upon his arrest, and sought his removal from her home, Defendant and her agent concluded that she was not a true victim and that she must have provoked and participated in the violence against her. Defendant therefore sought to evict Ms. Bouley. Thereafter, Defendant and her agent kept careful records of all Ms. Bouley's male visitors, claiming that they were concerned for the safety of her children, again demonstrating a gender-stereotyped belief that women who appear to show interest in men are not real battered women and that women who experience domestic violence endanger their children when they do not seek to mend the relationship with their batterers. The evidence in this case strongly supports the conclusion that Defendant retaliated against Ms. Bouley based on her failure to meet Defendant's gender-stereotyped expectations of a female domestic violence victim.

II. PUNISHING AN INDIVIDUAL FOR HER FAILURE TO CONFORM TO A GENDER STEREOTYPE CONSTITUTES SEX DISCRIMINATION UNDER THE FAIR HOUSING ACT.

Clear and well-established law holds that actions taken against an individual because of his or her failure to conform to a gender stereotype discriminate on the basis of sex. Interpreting Title VII, 42 U.S.C. §§ 2000e *et seq.*, the Supreme Court has held that “[i]n forbidding [discrimination] against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971)). In 1989, the Supreme Court reaffirmed this holding when it reviewed a case in which a woman alleged that she had been denied promotion because her superiors believed that she was too aggressive and that she should behave and appear more femininely. “As to the legal relevance of sex stereotyping,” the Court stated, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). The Court further made clear that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250. Since that decision, lower courts have followed the Supreme Court’s lead in holding that discrimination against a woman because she is too “aggressive” can constitute sex discrimination, because such discrimination punishes a woman for failing to conform to a stereotyped expectation of femininity. *See, e.g., Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 981-93 (W.D. Wisc. 2003); *Greenbaum v. Handelsbanken*, 67 F. Supp. 2d 228, 252-53 (S.D.N.Y. 1999).

Courts have also made clear that discrimination against women because they are aggressive is only one example of unlawful discrimination based on gender stereotype. For instance, discrimination against a woman based on stereotypes about women's obligation to their families and women's duty to subordinate themselves to their family responsibilities is also sex discrimination. Thus, the Second Circuit and other courts have held that when employers conclude that women's obligations to their children should or must come before their employment obligations, they discriminate on the basis of sex. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004) (stereotype that a woman could not be a good mother and work long hours discriminatory on the basis of sex); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 341-42 (10th Cir. 1986) (supervisor's scolding of plaintiff for attempting to achieve her career goals while having two children at home demonstrated sex discrimination) *Lust*, 277 F. Supp. 2d at 991-93 (denial of a promotion based on a stereotypical belief about a woman's obligation to her family constituted discrimination on the basis of sex); *Eslinger v. U.S. Central Credit Union*, 866 F. Supp. 491, 497-98 (D. Kan. 1994) (statement that women were better workers before they had children evidence of discrimination); *EEOC v. Northwestern Mem. Hosp.*, 858 F. Supp. 750, 766-67 (N.D. Ill. 1994) (supervisor's statement that women who had babies should stay at home and he did not understand why plaintiff did not want to evidence of sex discrimination); *Plaetzer v. Borton Automotive, Inc.*, No. Civ. 02-3089, 2004 WL 2066770, at *1, *6 (D. Minn. Aug. 13, 2004) (statement that female employee should "do the right thing" and stay home with her children evidence that employer discriminated against employee on the basis of her sex). The Second Circuit has also held that when an employer denies a woman a job because that job requires her to travel with men and because the employer would not want his wife to undertake such travel, the employer discriminates on the basis of sex.

Barbano v. Madison County, 922 F.2d 139, 143 (2d Cir. 1990); *see also Stukeley v. United States Air Force*, 790 F. Supp. 165, 167, 170 (S.D. Ohio 1992) (questions of plaintiff focused on her feelings about traveling with men and her child care arrangements for such travel discriminatory). Similarly, actions taken against a woman because her intimate relationships do not conform to a stereotyped notion of what sort of relationships are appropriate for a woman discriminate on the basis of sex. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

While these rulings arose in the context of employment discrimination, they are directly relevant to interpreting the Fair Housing Act's prohibition of discrimination on the basis of sex. *See* 42 U.S.C. §§ 3601 *et seq.* The Second Circuit has "pointedly accepted" the relevance of Title VII interpretation to the Fair Housing Act, *Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff'd* 488 U.S. 15 (1988), recognizing the parallel between the antidiscrimination objectives of Title VII and the Fair Housing Act, *U.S. v. Starrett City Assocs.*, 840 F.2d 1096, 1101 (2d Cir. 1988). In doing so, it has acted consistently with the other federal Courts of Appeals that have addressed this issue. *See, e.g., Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) ("We apply Title VII discrimination analysis in examining Fair Housing Act . . . discrimination claims."); *Larkin v. Michigan Dep't of Social Servs.*, 89 F.3d 285, 289 (6th Cir. 1996) ("Most courts applying the FHA . . . have analogized it to Title VII of the Civil Rights Act of 1964 . . . which prohibits discrimination in employment."); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987 (4th Cir. 1984) ("We and other courts of appeals have recognized the parallel objectives of Title VII and Title VIII."). Interpretation of what constitutes discrimination on the basis of sex in the Title VII context is thus undoubtedly relevant to determining what constitutes discrimination on the basis of sex in other contexts,

including the Fair Housing Act. Indeed, other courts, including the Second Circuit, have consistently recognized that punishing an individual for failing to conform to a gender stereotype constitutes sex discrimination not only under Title VII, but also under other laws prohibiting sex discrimination. *See, e.g., Back*, 365 F.3d at 119-20 (applying analysis in Equal Protection Clause case); *Rosa v. Park West Bank & Trust Co.*, 314 F.3d 213, 215-16 (1st Cir. 2000) (applying analysis in Equal Credit Opportunity Act case); *Montgomery v. Ind. Sch. Dist.*, 109 F. Supp. 2d 1081, 1092 (D. Minn. 2000) (applying analysis in Title IX case).

A defendant need not have gender animus or conscious malicious intent to engage in gender discrimination based on stereotypes. Gender stereotypes are deeply ingrained and often nearly unconscious. Nevertheless, unthinking stereotypes or biases about the proper roles and behaviors of men and women are unlawful bases for negative treatment of a tenant by a landlord or of an employee by an employer, even if the landlord or employer is not acting with any form of conscious hostility toward women. Bans of discrimination on the basis of sex, such as those found in the Fair Housing Act and Title VII, “prohibit[] ‘the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,’ even where the stereotypes are benign or not grounded in group animus.” *EEOC v. Joe’s Stone Crab*, 220 F.3d 1263, 1284 (11th Cir. 2000) (quoting *Manhart*, 435 U.S. at 708 n.13). “In other words, ill will, enmity, or hostility are not prerequisites of intentional discrimination.” *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473 n.7 (11th Cir. 1999); *sec also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (union could be liable for intentional racial discrimination when it refused to assert members’ race discrimination claims although “there was no suggestion [] that the [defendant] held any racial animus against or denigrated blacks generally”). Thus, “[i]t is clear that a defendant who acts with no [gender] animus but acts, whether consciously or unconsciously, on the basis of

[gender] stereotypes or preconceived notions about [women] can be held liable for intentional discrimination.” *Kelly v. Bank Midwest, N.A.*, 177 F. Supp. 2d 1190, 1204-05 (D. Kan. 2001); see also *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999) (decision is improperly based on race “regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias”). Federal civil rights laws’ prohibitions of sex discrimination were intended to remove artificial barriers based on sex. Because these statutes, including the Fair Housing Act, are by their nature remedial, rather than punitive, they reach such unconscious stereotyping, “as unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination” and pose an equivalent barrier to women’s advancement. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469 (1987), *aff’d in relevant part*, 490 U.S. 228. The fact that an individual may be unaware of the stereotypes underlying her own discriminatory motivation “neither alters the fact of the [discriminatory motivation’s] existence, nor excuses it.” *Id.*; see also *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981) (“Other [beliefs] reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts’ task of scrutinizing attitudes and motivation, in order to determine the true reason for [defendants’] decisions, more exacting.”). A defendant may well believe the stereotypes that he or she holds to be accurate reflections of reality, rather than recognizing them as gender discriminatory; this misperception, however, does not somehow function to remove the taint of discrimination from actions based on those stereotypes. See *Back*, 365 F.3d at 130.

Courts have established several principles that should guide analysis of cases of discrimination on the basis of stereotypes. First, in determining whether a defendant has

discriminated on the basis of gender stereotype, the question is not whether the defendant's perception of the plaintiff is accurate. It is whether the defendant's negative reactions to a plaintiff are motivated by an individual's failure to conform to the stereotypes related to her gender. Thus, in *Price Waterhouse*, the Supreme Court responded to the defendant's attempt to prove that the plaintiff was in fact aggressive and occasionally rude in the workplace by explaining that the appropriate question was not whether the plaintiff was aggressive or rude: the issue was simply whether the defendant "reacted negatively to her personality because [the plaintiff] is a woman." 490 U.S. at 258. For this reason, even if the gender stereotype is a positive stereotype, discriminating against a woman for failing to conform to the heightened expectations of the stereotype, when one would not have the same negative reaction to a man who failed to conform to these heightened expectations, is unlawful. See *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002).

Second, the law is clear that actions based on gender stereotype are unlawful even if the stereotype involves a subset of women, rather than all women. For instance, if an employer refused to hire all women with small children because the employer believed that women with small children should not work outside the home, the employer would be engaging in unlawful sex discrimination, even if it did not hold the same stereotyped belief about women without small children. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (per curiam) (Title VII's prohibition of employment discrimination does not permit one employment policy for women with preschool-aged children and a separate policy for men with preschool-aged children); *Back*, 365 F.3d at 117-122. Similarly, if a landlord discriminated against those women who had experienced domestic violence and expressed anger that a landlord believed was inappropriate for a battered woman, but did not discriminate against women who had not

experienced domestic violence, the landlord would be engaging in unlawful sex discrimination. For this reason, a plaintiff alleging discrimination on the basis of failure to conform to a gender stereotype need not show that the defendant discriminated against *all* women, and her claim is not disproved by evidence that some women were not discriminated against by the defendant. Indeed, even if the defendant did not discriminate against other women in the plaintiff's subset—for instance, if the employer did not discriminate against all women with small children or the landlord did not discriminate against all women who had experienced domestic violence—this does not itself defeat a plaintiff's claim. “[C]ourts have consistently emphasized that the ultimate issue is the *individual plaintiff's* treatment and not the relative treatment of different groups” by the defendant. *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001); *see also Back*, 365 F.3d at 122 (finding that defendants' evidence that many of their employees were mothers did not disprove plaintiff's allegation that she was discriminated against because of gender-stereotyped beliefs about her inability to fulfill her roles as mother and employee). Thus, “whether a [defendant] discriminates against only a subset of a protected class, or discriminates inconsistently,” the Fair Housing Act “nevertheless protects any individual so long as that individual is mistreated because of her sex.” *Brown*, 257 F.3d at 253.

Third, and similarly, because the crucial question is whether a gender stereotype motivated the treatment accorded the individual plaintiff, rather than how the defendant treated men and women as groups, the plaintiff is not required to demonstrate that a defendant treated a similarly situated male differently in order to prove that the treatment she received was unlawfully based on a gender stereotype. *Back*, 365 F.3d at 121. She must simply show that the stereotype relied on by the defendant in its treatment of her was in fact a stereotype based on

gender. While evidence of how similarly situated men were treated can help in this showing, it is by no means necessary.

Finally, an individual who discriminates on the basis of gender stereotype can be of the same sex as the person whom she is discriminating against. No presumption of nondiscrimination arises simply because the plaintiff and the defendant are of the same sex. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of ‘discrimination because of . . . sex’ merely because the plaintiff and the defendant . . . are of the same sex.”); *see Castaneda v. Patrida*, 430 U.S. 482, 499 (1977) (“Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.”). Thus, liability attaches when a landlord has discriminated against a tenant of the same sex as a result of the tenant’s failure to conform to a gender stereotype. *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 269 n.4 (1st Cir. 1999); *Montgomery*, 109 F. Supp. 2d at 1092 (D. Minn. 2000).

Clearly established law thus demonstrates that when a landlord attempts to evict a woman who has experienced domestic violence or otherwise imposes negative terms and conditions on the tenancy of a woman who has experienced domestic violence because that woman has failed to conform to the landlord’s gender-stereotyped views of how battered women should behave, a landlord has violated the Fair Housing Act’s prohibition of sex discrimination. The landlord need not consciously be acting with any malicious intent toward women generally or battered women specifically in order to discriminate in violation of the Fair Housing Act. Indeed, a landlord need not recognize that she is acting on the basis of a gender stereotype at all in order

for liability to attach. In the particular context of domestic violence, many individuals in fact are unaware of the stereotypes that underlie their perceptions of and reactions to women who have experienced domestic violence. As discussed above, even individuals who have themselves witnessed or experienced violence in their families may be affected and motivated by these stereotypes. These stereotypes are nonetheless improper bases for a landlord's action against a tenant. All that the tenant must show to establish a violation of the Fair Housing Act is that the gender stereotype, whether consciously or unconsciously held, did in fact motivate the landlord.

The discrimination is not lessened or negated if the landlord did not discriminate against all women, or even if the landlord did not discriminate against all battered women. The discrimination is not disproved if there is no similarly situated male tenant who has experienced domestic violence and whom the landlord has not discriminated against. Nor does it matter if the landlord is herself a woman, as women can and do hold gender stereotypes and can and do act on the basis of these stereotypes. If an individual's failure to conform to a gender stereotype motivated the treatment of that particular individual, the landlord has violated the Fair Housing Act.

In this case, the evidence demonstrates that Defendant retaliated against Ms. Bouley when Ms. Bouley did not behave in a way consistent with the gender-stereotyped expectations Defendant and her agent had of appropriate behavior for a domestic violence victim. As set out in Ms. Bouley's brief and the accompanying expert report, when Ms. Bouley came to apartment manager Windee Young's door on the night of the attacks, Ms. Young concluded that Ms. Bouley likely hadn't really experienced domestic violence both because while she seemed upset, she was not in shock, and was still able to function and because she didn't appear concerned about her husband or interested in reconciling with him and resolving the violence within the

privacy of the family. (Young dep. at 34-35, 43-44.) Ms. Young explained she also was suspicious of Ms. Bouley's claim that she had been abused because Ms. Bouley had previously received attention from men, in the form of gifts from male customers at her workplace, which Ms. Young found inappropriate, and because shortly after the attack, she saw Ms. Bouley in the company of a male visitor. (*Id.* at 116-18.) Because Ms. Bouley demonstrated competence and assertiveness, she did not conform to Ms. Young's gender-stereotyped expectation that a battered woman would be passive, in shock, and unable to function. Because Ms. Bouley called the police for assistance, sought the arrest of her husband, did not express interest in her husband's motivation for assaulting her, did not show concern for her husband, did not express a desire to resolve the conflict and reconcile with her husband, and expressed an intention to get a divorce, she did not conform to Ms. Young's gender-stereotyped belief that a battered woman should attempt to calm, comfort, and take care of her batterer, in order to understand what motivated the violence and prevent it from happening again, while keeping the family intact. And because Ms. Bouley received gifts and visits from other men before and after the attack that Ms. Young found inappropriate, Ms. Bouley also did not conform to Ms. Young's gender-stereotyped belief that a real victim of domestic violence does not demonstrate interest in men other than her husband. As a result of Ms. Bouley's failure to conform to these stereotypes, Ms. Young concluded that Ms. Bouley was likely exaggerating and "didn't fit the role of a victim of domestic violence." (Young dep. at 117.) She passed her judgments on to Defendant, who acknowledged crediting her agent's impressions. (Young-Sabourin dep. at 53-54.)

When Defendant met with Ms. Bouley, because Ms. Bouley reacted with anger to Defendant's inquiries about her religion, Defendant concluded that Ms. Bouley, rather than being a victim of domestic violence, had likely provoked or participated in the violence and that if she

were permitted to remain in the apartment, violence would therefore likely continue. (Young-Sabourin dep. at 82-83.) She concluded this because she did not believe Ms. Bouley acted “normal for a woman who had been victimized” (Young-Sabourin dep. at 95); in other words, Ms. Bouley did not conform to Defendant’s gender stereotype that real battered women do not express anger and that women who do express anger likely either provoked or participated in any violence against them. Based on this failure to conform to a gender stereotype, and based on the gender-stereotyped judgments of her property manager set out above, Defendant sought to evict Ms. Bouley. She thus discriminated on the basis of gender stereotype, whether or not she was aware of the stereotyped nature of her judgments and the judgments of her property manager, and violated the Fair Housing Act’s prohibition of sex discrimination.

CONCLUSION

The Fair Housing Act protects tenants from being punished for failing to conform to a landlord’s stereotyped assumptions about how women or men should behave. By prohibiting discrimination on the basis of sex, the law makes clear that a tenant’s gender must be irrelevant to a landlord’s treatment of the tenant. When a landlord retaliates against a tenant who has experienced domestic violence because that tenant does not behave in the way that the landlord’s gender stereotypes suggest that female victims of domestic violence must, the landlord violates the law.

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