# MAKEUP FOR SUCCESS: WHY *JESPERSEN V. HARRAH'S* STIFLES DIVERSITY BY PROMOTING STEREOTYPES IN EMPLOYMENT

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> It will be apparent to anyone that takes the trouble to read these opinions that... the dominant judicial, and I would say legal, attitude toward the study of sex is that "I know what I like" and therefore research is superfluous.[1]

## INTRODUCTION

Personal appearance matters a great deal. It is a method of self-expression, allowing us to convey a message to the world without uttering a word. At the same time, our appearance is used as a method of reinforcing social norms such as class, occupation, and educational pedigree, yet evokes from our audience varying degrees of respect. Yet, society's projected norms are preoccupied with the notion that our clothing must meet certain standards, and that society will crumble if our dress does not maintain a certain level of decorum. Most positions have uniforms of some sort: judges wear robes; male attorneys must wear suits and ties in court;[2] women—if they do wear a skirt suit—must usually wear pantyhose;[3] service employees wear uniforms; but why? In some contexts, these uniforms provide simple clues of rank and role, and make it easy for an audience to determine the players' roles—whether in terms of work, politics, social attitudes or gender. And certainly employers have an interest in regulating appearance to promote the appearance of a professional workforce, but how far can the employer take those

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1 RICHARD POSNER, SEX AND REASON 2 (1992).

2 The Court and Its Traditions, http://www.supremecourtus.gov/about/traditions.pdf (last visited on Feb. 3, 2006) (detailing the history of formal court apparel, including an anecdote where a young attorney in a grey coat was refused admission to the court until he borrowed a morning coat).

3 Career service guidelines suggest that appropriate business attire for women is "[a] skirt suit in a dark color. Black, charcoal, navy and other dark colors are appropriate. Pant suits and other styles may not be appropriate in some interview settings. - Conservative blouse - Mid-heel, closed-toe dress shoes and hose - Minimal jewelry, perfume and makeup." Available at http://www.jhu.edu/careers/jobs/attire.html (last visited Aug. 8, 2005). In 1991 the Committee on Professional Ethics in New York County issued an opinion concluding that "[t]he Code of Professional Responsibility does not prohibit a female lawyer from wearing appropriately tailored pant suits or other pant-based outfits in a court appearance." Martin Fox, *Bar Panel Tackles Sticky Issue of Appropriate Garb for Women*, N.Y.L.J., Dec. 23, 1991, at 5, col. 1.

regulations and how does this interact with gender and cultural norms? Courts have held that employers may regulate the hair length of their employees,[4] prohibit earrings,[5] proscribe uniforms,[6] and even require female employees to wear makeup.[7] But what purpose does this serve? Where are the limits of employers' power to determine the appearance of its employees? How does this affect employees' job opportunities? How do these appearance regulations differ according to gender? Do these appearance regulations reinforce acceptable societal standards? Should employers and courts be in the business of validating acceptable societal standards? Do we want our courts to evaluate our expression of self and weigh it against the gendered norm?

Courts have not been impressed with employees' interests in determining their own appearance, and have repeatedly legitimated employers' regulation of employee appearance. A recent decision by the Ninth Circuit Court of Appeals brought this issue back into attention,[8] and the attention that this case garners shows that personal appearance continues to matter. Moreover, people are surprised to discover that employers have extensive power to regulate employee appearance.[9]

This Note focuses on employer grooming regulations that apply gender-stereotyping appearance standards that require women to dress one way, and men to dress another. The analysis includes: a brief analysis of the history of appearance regulations, relevant civil rights history, arguments for regulating employees'—women in particular—appearance, and the affect of these perceptions on women—and to a limited extent, sexual minorities. This Note will conclude by synthesizing and applying case law and legal theory to the recent case of *Jespersen v. Harrah's*, illustrating how this case does not reach as far as it should in limiting the power of employers and courts to reinforce gendered norms through appearance.

## II. BACKGROUND MATERIAL

What we wear suggests many things about us, and employers do have an interest in having their employees convey certain messages. Our appearance is a

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[4] Kelley v. Johnson, 425 U.S. 238 (1976) (holding that the police regulation determining hair length for male officers was not barred by the Fourteenth Amendment).

[5] Rathert v. Peotone, 903 F.2d 510 (7th Cir. 1990). The court upheld a local police department policy that men could not wear ear studs making the statement that:

> [i]t is obvious from the record that plaintiffs not only caused an adverse impact on police discipline, esprit de corps and uniformity, factors found by the Supreme Court in *Kelley* to be of controlling consequence, but caused great public dissatisfaction as well. Plaintiffs totally fail to meet the burden imposed by *Kelley* of showing no rational connection between the male ear stud prohibition and their police responsibilities.

*Id.* at 516.

[6] Carroll v. Talman Fed. Sav & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979).

[7] Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (2006).

[8] *Id.*

[9] Lisa Carricaburu, *'Personal Best' Program is a Big Step Backwards*, Salt Lake Tribune, Jan. 5, 2005 *available at* http://www.nevadalabor.com/bulletins.html#foxoff (claiming that this story made it to People, Fox, and Oprah.).

performance of our identity, we use it to convey messages about our beliefs, associations, and values. At the same time, through this expression we reinforce our expression. Clothing conveys rank—judicial robes; legitimates authority—police uniforms; emphasizes consistency or homogeneity in an organization—both within and without the organization; or can provide cues to customers.[10] Clothing, and its expressive element, is so important to our sense of identity. One author suggests, as an experiment, that we try to challenge ourselves to wear something that goes against our inclination like "a narrow skirt when what you prefer is a loose shift of a dress. Torn-up black jeans when what you like are pin-striped wool trousers. See how far you can contradict your nature. Feel how your soul rebels."[11] If personal appearance is such a trivial right, as is commonly thought, why do people continue to challenge these regulations in court?[12]

The regulation of appearance has been used as a method of reinforcing social norms, expressing disapproval and differentiating between social classes and genders.[13] Appearance has been a source of strength and identity to individuals at least as far back as the story of Samson and Delilah, where Samson lost his power when Delilah cut his hair. Women's appearance in society at large has been regulated at least as far back as the sixteenth century where women who wore men's clothing were often executed.[14] In the second half of the nineteenth century, American cities were passing disguise laws which typically prohibited someone from "appear[ing] in any public place in a state of... dress not belonging to his or her sex...."[15] Part of the purpose of these laws was to discourage the women's movement, where the image of a woman wearing trousers outside of the home was an unacceptable step towards women's increased participation in the workforce and personal mobility.[16] At the turn of the century, popular attitudes towards gender bending became even less forgiving and this behavior became a dangerous sickness, labeled a sexual pathology.[17]

In a sense, appearance has also been regulated to maintain the categories of gender. If we conceptualize gender as being performative, how we dress signals what gender and consequently what role we play in society.[18] The disguise laws

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[10] *See* Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality* 92 MICH. L. REV. 2541, 2554 (1994).

[11] Jennifer L. Levi, *Clothes Don't Make the Man (or Woman)*, 15 COL. J.G.L. 90, 111-12 (2006) citing DAPHNE SCHOLINSKI, THE LAST TIME I WORE A DRESS XI (Riverhead Books ed., Penguin Publishing Inc. 1997).

[12] Mary Whisner, Note: *Gender-Specific Clothing Regulation: A Study in Patriarchy* 5 HARV. WOMEN'S L.J. 73 (1982) (citing L. FADERMAN, SURPASSING THE LOVE OF MEN 47-61 (1981)).

[13] *See* WILLIAM N. ESKRIDGE, JR., NAN. D. HUNTER, SEXUALITY, GENDER AND THE LAW 1423-25.(2d ed. 2004).

[14] Whisner, *supra* note 13 at 73-75.

[15] ESKRIDGE AND HUNTER, *supra* note 14 at 1423.

[16] *Id.* at 1424. *See generally* CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA (1985).

[17] ESKRIDGE AND HUNTER, *supra* note 14 at 1424-25.

[18] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 6-7, 22-23,

may have served this purpose. Today, employers regulate the appearance of employees to accentuate the roles these employees perform. Gendered employee appearance standards also serve this purpose. For example, a cocktail waitress might be required to wear a sexualized uniform and would be performing the role of a sexual object—in contrast to a waiter, who is not required to wear a sexualized uniform or perform a sexualized role. This gendered structure, with its propensity for the sexualization of women, while drawing attention away from their inherent ability to perform the job at hand, subordinates women and people who do not fit neatly into this gendered hierarchy.

Women's appearance has been managed to serve a number of additional purposes.

> Substantively, women's dress and appearance expectations objectify women and construct them as inferior, submissive, and less competent than men. Throughout European history, men's clothing has emphasized strength and competence, while women's clothing since the early nineteenth century has conveyed the message that its wearers are fragile, helpless, debilitated, armored, hobbled, decorative, nonthreatening, useless, and immobile.[19]

Government and business continue to regulate the appearance of both women and men. This regulated cohort continues to challenge the legality of these regulations, but is routinely rejected based on institutional power, state power and employer power to regulate appearance. Some of the reasons offered for regulating women's appearance are to protect women from sexual harassment, society from the corrupting influence of women, and men from distraction by scantily clad women.[20]

## III. CONSTITUTIONAL CASES

In *Kelley v. Johnson*,[21] the Supreme Court held a police regulation that controlled hair length for male officers was not barred by the officer's Fourteenth Amendment rights. The Court reasoned that the hair length restriction needed to be viewed in the context of the organization of the department and that this organizational structure is within the State's police power, entitling it to a presumption of legislative validity.[22] Furthermore, no court may weigh the policy arguments for or against such a regulation, they may only consider whether the

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24-25 (1990).

[19] Bartlett, supra note 10 at 2547.

[20] In finding that a school may not prohibited students from wearing blue jeans, the court went on to distinguish the prohibition on female students wearing provocative clothing: "[n]or does the Court see anything unconstitutional in a school board prohibiting scantily clad students because it is obvious that the lack of proper covering, particularly with female students, might tend to distract other pupils and be disruptive of the educational process and school discipline." Bannister v. Paradis, 316 F.Supp. 185, 188-189 (D.C.N.H. 1970).

[21] Kelley v. Johnson, 425 U.S. 238 (1976).

[22] *Id.* at 247.

regulation was arbitrary.[23] The Court rejected the appellate court's contention that the State needed to "'establish' a 'genuine public need' for the specific regulation."[24] Instead the Court adopted a test requiring the plaintiff to show that

> there is no rational connection between the regulation, based as it is on the county's method of organizing its police force, and the promotion of safety of persons and property.... [and] the constitutional issue... [before] these courts is whether petitioner's determination that such regulations should be enacted is so irrational that it may be branded 'arbitrary,' and therefore a deprivation of respondent's 'liberty' interest in freedom to choose his own hairstyle.[25]

The Court justified its deference to the regulation by citing the overwhelming prevalence of uniformed police officers, the desire to respect local authority, the importance of esprit de corps, and that the similarity in appearance of uniformed police officers is desirable, because it makes the officers more readily identifiable.[26] Although this analysis is limited in its application, because of the deference due state police power, it shows the Court's deferential analysis of appearance standards. In a dissenting opinion, Justice Marshall—joined by Justice Brennan—argues that the Fourteenth Amendment's "guarantee against deprivation of liberty extends... [t]o the full range of conduct which the individual is free to pursue."[27] Justice Marshall recognized the importance of personal appearance when he explained that "personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his attitude and lifestyle."[28] The majority's analysis makes short shrift of the officers' liberty interests in self-expression and does not meaningfully consider the significance of one's hairstyle or why short hair is preferred on men.

In *Rathert v. Peotone*,[29] the Seventh Circuit upheld a local police department policy that men could not wear ear studs while off-duty, making the statement that:

> [i]t is obvious from the record that plaintiffs not only caused an adverse impact on police discipline, *esprit de corps* and uniformity, factors found by the Supreme Court in *Kelley* to be of controlling consequence, but caused great public dissatisfaction as well. Plaintiffs totally fail to meet the burden imposed by *Kelley* of showing no rational connection

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[23] *Id.* at 247-48.

[24] *Id.* at 247.

[25] *Id.* at 247-48 (citation ommitted).

[26] *Id.* at 248. The dissent argues that these rationales do not make sense, where a uniform hair length does nothing to make a uniformed police force more identifiable to the public, and the esprit de corps would not be helped where the suit was brought by the president of the Patrolman's Benevolent Association in his official capacity, and the International Brotherhood of Police Officers filed an amicus brief arguing the regulation was unconstitutional. *Id* at 255.

[27] *Kelley*, 425 U.S. at 250.

[28] *Id.* at 250-51.

[29] Rathert v. Peotone, 903 F.2d 510 (7th Cir. 1990).

> between the male ear stud prohibition and their police responsibilities.[30]

This analysis relies on community preference, a factor that has been rejected in other contexts,[31] and makes short shrift of the officers' liberty interest in choosing their appearance, and instead relies on community evaluations of gender stereotypes of male authority. While *Kelley* makes it very difficult to bring this type of claim, it is nonetheless disturbing that a police department can regulate such a trivial detail of its officers' outside lives. And the justification for this regulation of off-duty conduct is community preference, a very subjective justification. This regulatory preference for men not wearing ear studs reinforces the "normal" view of male police officers, and subordinates men who are not comfortable—or find it unnecessary—to conform to this more masculine stereotype.

In *Goldman v. Weinberger*,[32] the Supreme Court deferred to a military policy promoting uniformity and discipline, by upholding Air Force regulations prohibiting any headgear indoors, even though this policy prohibited the petitioner—a clinical psychologist—from wearing his yarmulke. Although this case is distinguishable from general grooming cases because military regulations are entitled to great deference, even when balanced against claims of religious liberty, this case shows the Court's reluctance to consider challenges to dress codes. Although this case was later superseded by statute,[33] it demonstrates the hostility of the Court towards employee challenges to appearance regulation—even when opposed by deeply-held religious beliefs.

Justice Douglas, in a concurring and dissenting opinion in another case, offered this rationale for regulating hair length:

> Prejudices involving hair growth [are] unquestionably of a 'serious character.' Nothing is more indicative of the importance currently being attached to hair growth by the general populace than the barrage of cases reaching the courts evidencing the attempt by one segment of society officially to control the plumage of another.... The prejudices invoked by the mere sight of non-conventional hair growth are deeply felt. Hair growth is symbolic to many of rebellion against traditional society and disapproval of the way the current power structure handles

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30 *Id.* at 516.

31 *See generally* Wilson v. Southwest Airlines, 517 F. Supp. 292, (N.D. Tex. 1981).

32 Goldman v. Weinberger, 475 U.S. 503 (1986).

33 10 USCS § 774 (2005) which reads:

> (a) General rule.--Except as provided under subsection (b), a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force.
> (b) Exceptions.--The Secretary concerned may prohibit the wearing of an item of religious apparel—(1) in circumstances with respect to which the Secretary determines that the wearing of the item would interfere with the performance of the member's military duties; or (2) if the Secretary determines, under regulations under subsection (c), that the item of apparel is not neat and conservative.

> social problems. Taken as an affirmative declaration of an individual's commitment to a change in social values, nonconventional hair growth may become a very real personal threat to those who support the status quo. For those people, nonconventional hair growth symbolizes an undesirable life-style characterized by unreliability, dishonesty, lack of moral values, communal ('communist') tendencies, and the assumption of drug use.[34]

This rationale seems equally appropriate for any non-conformity in appearance. This analysis demonstrates how important appearance is in the formation of judgments about individuals, and if an individual does not meet society's expectations, negative value judgments are made. This same rationale probably applies to women who do not appear as women "should" and are most likely equally threatening in their challenge to authority, invoking similar negative value judgments.

## IV. TITLE VII

In 1964, Congress passed the Civil Rights Act, which made it illegal for private employers to discriminate on the basis of race, color, national origin, religion or sex.[35] This legislation was prophylactic, intending to remedy the problems of discrimination in this country—by removing discriminatory barriers to employment.[36] Different courts have taken the purpose of Title VII to be more or less expansive, while some courts interpret Title VII's purpose as strictly to eliminate discrimination in employment, others have found the purpose of Title VII to be more proactive, requiring that the law move to dismantle old stereotypes about discrimination—a meaning that gives Title VII a longer reach and may include more mutable characteristics.[37] Its passing was controversial and did not

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[34] Ham v. South Carolina 409 U.S. 524, 529-30 (1973) (Douglas, J. concurring in part and dissenting in part) (arguing that there was abuse of discretion where, during jury selection, the trial judge permitted questions about racial prejudice, but did not permit questions about appearance prejudice of the prospective jurors). *See also* Fagan v. Nat'l Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973) (citing Justice Douglas' opinion in Ham v. South Carolina).

[35] 42 U.S.C.A. § 2000e-2 (2000) (defining illegal employment practices as: "(a) Employer practices - It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.")

[36] Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544, (1971).

[37] *Compare* Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, 708 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (quoting Sprogis v. United Air Lines, 444 F.2d 1194, 1198 (7th Cir. 1971)), *with* Griggs v. Duke Power Co. 401 U.S. 424, 429-430, (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment

come easily. Sex was added to the statute at the last minute in an attempt to defeat its passage and was barely debated—leaving scarce information as to the intent of Congress.[38] In an attempt to balance the rights of employees and employers, an affirmative defense was added for employers, who could argue that the requested qualifications were not discriminatory but were necessary to the continuing operation of their business. This exception was only created for religion, national origin and sex—not race.[39] Analyses of disparate treatment claims under Title VII focus on the idea that Title VII only protects immutable characteristics—such as race, sex, national origin, or religion.[40] If an employer engages in a policy or practice that favors individuals based on their actions, or lack of actions, courts have deferred to the employer's right to engage in business as they see fit.[41] Courts' classic reasoning is that the protection of Title VII does not extend to grooming policies because these policies do not discriminate based on immutable characteristics, but based on an individuals compliance with these policies—an action that the employee takes—and is therefore a behavior that the employee can change.[42] These behavioral choices are irrelevant to the ability of an individual to do the job required, and depending on how broadly one interprets the purpose of Title VII, and the policy at issue—are forms of subtle discrimination against individuals who do not conform to the roles that employers and society set for them.

Historically, courts have not responded favorably to employees' challenges under Title VII to employer appearance regulations. Courts have demonstrated great deference to employers' preferences in grooming standards for employees and consider grooming standards a *de minimis* violation of employees' rights.[43] Further, Congress by enacting Title VII had "not planned that the Act was to be used to interfere in the promulgation and enforcement of the general rules of employment, deemed essential by an employer, where the direct or indirect

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opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

[38] Diaz v. Pan Am. World Airways, Inc. 442 F.2d 385, 386 (5th Cir. 1971) ("We note, at the outset, that there is little legislative history to guide our interpretation. The amendment adding the word 'sex' to 'race, color, religion and national origin' was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate."). Ironically, the amendment was introduced by Representative Howard Smith of Virginia, who had opposed the Civil Rights Act, and was accused by some of wishing to sabotage its passage by his proposal of the 'sex' amendment. *See* Peter F. Zeigler, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 968 (1972).

[39] 42 U.S.C.A. § 2000e-2 (2000) ("It shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.").

[40] Disparate treatment claims are claims based on section 1 (a) of Title VII.

[41] Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1978).

[42] *Id.*

[43] *See generally* Dodge v. Giant Food, 488 F.2d 1333 (1973); *Fagan*, 481 F.2d. 1115.

economic effect upon the employee was nominal or non-existent."[44] Furthermore, Congress did not mean to prohibit employer exercise of managerial responsibility in establishing grooming codes unless that exercise served to discriminate "because of immutable race, national origin, color or sex classification."[45] The Supreme Court however, in a later case found that discrimination based on evidence of gender stereotyping was sex discrimination, which is arguably —a mutable characteristic.[46]

Mutable characteristics are characteristics that we can control and are arguably behaviors or characteristics that we can alter to fit into society (or the workplace). Hair length and weight are classic examples of mutable characteristics. If it is a characteristic we can change through a simple hair cut or diligence, the argument is that these characteristics do not seriously affect one's employment prospects. However, if we limit Title VII to prohibit discrimination based on immutable characteristics, because race, sex and national origin are fixed, and therefore immutable, how do we account for religion being a prohibited condition? Perhaps the distinction we seek is that immutable characteristics are characteristics we are unwilling to require someone to change.[47] It is not clear whether Congress intended to only prohibit discrimination based on immutable characteristics in Title VII. Further, one could interpret Congress's intent was to prohibit discrimination and in choosing terms to define the protected class as "sex" and not "solely" because of sex, the intent of Congress was broad enough to encompass discrimination based upon stereotypes.[48]

## V. COVERING AND PASSING

Passing is when individuals from a "minority" group hide certain characteristics that may be traits of the group, or are traits that might make others uncomfortable.[49] This is essentially, "don't ask, don't tell."[50] Covering is when that individual modulates their conduct to minimize these characteristic traits to make these traits easier for others to disattend.[51] "Passing is about 'visibility,' while covering is about 'obtrusiveness.'"[52] For example, a gay person at work

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[44] *Fagan*, 481 F.2d at 1126 (internal citations omitted) (citing Baker v. Cal. Land Title Co., 349 F. Supp. 235, 237-38 (C.D.Cal.1972)).

[45] *Fagan*, 481 F.2d at 1125.

[46] *See infra* Part VIII. The Supreme Court has not ruled on the extent to which private employers may regulate employee appearance, nor on whether employee grooming codes violate Title VII.

[47] *See* Watkins v. U.S. Army, 847 F.2d 1329, 1348 (1988) (discussing immutability in determining whether sexual orientation is immutable).

[48] Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 781 (1987).

[49] Kenji Yoshino, *Covering*, 111 YALE L. J. 769, 772 (2002).

[50] *Id.* at 823.

[51] *Id.* at 837.

[52] *Id.* at 837 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 102 (1963)).

might not hide that they are gay, but they might pass by avoiding talking about their partner, expressing their interests (if those interests are perceived as gay), expressing concern about a gay colleague,[53] or they might cover by being discreet.[54] Passing and covering are audience sensitive, where the same action might be passing in one context, but covering in another—depending on the audience's ability to perceive the characteristic at hand.[55] In the same sense, an effeminate man, or a masculine woman may choose to dress differently than they may be comfortable, in an attempt to cover or pass themselves and be more acceptable at work. This serves to minimize individual expression, and to put off the acceptance of differences in individual behavior.[56] These smaller differences that are arguably behavior that one can change (if one wanted to, or we even want someone to change) are at the fringes of Title VII — dismissed as being *de minimis* violations of the law.[57] A case at the intersection of sex and race discrimination that illustrates just this point is *Rogers v. American Airlines*, where Renee Rogers challenged American's policy prohibiting "cornrows."[58] Rogers claimed that this hairstyle is "historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society."[59] While the policy was race and sex neutral,[60] it has a heavier burden on African American women who were associated with the hairstyle.[61] While the court did not articulate its analysis as a *de minimis* violation of Title VII, it did find that Title VII did not protect mutable characteristics.[62] But if we analyze this hairstyle as covering or passing, we are requiring African American women to minimize a trait characteristic of their race, and their pride in their race, identity and experience.[63] American Airlines justified this policy by their desire to "project a conservative and business-like image."[64] But by accepting this rational the court is accepting, and even reinforcing, that this hairstyle, associated with African-American women is unprofessional.[65] In this way we are requiring African American women to cover or pass, by minimizing their characteristics that are not associated with the majority. Instead we are validating stereotypes, rather than

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53 *Id.* at 823.

54 *Id.* at 838.

55 Yoshino, *supra* note 50 at 838.

56 *Id.* at 826.

57 *See generally* Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (2006).

58 Rogers v. American Airlines Inc., 527 F. Supp. 229, 232(1981). *See also* Yoshino, *supra* note 50 at 891-893 (discussing this case).

59 *Rogers*, 527 F. Supp at 232 (citing Plaintiff's Memo in Opposition to Motion to Dismiss, p.4).

60 *Id.* at 231.

61 Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379 (1991).

62 *Rogers*, 527 F. Supp. at 232.

63 *See* Yoshino, *supra* note 50.

64 *Rogers*, 527 F. Supp. at 233.

65 Michelle L. Turner, *The Braided Uproar: A Defense of my Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN'S L. J. 115, 138 (2001).

dismantling them. I argue that this is just the type of stereotype that we are concerned about dismantling and that the court is promulgating discriminatory stereotypes that are adverse to the success and integration of minorities, in this case African American women. The stereotype that the court is validating in this case is that a traditionally African American hairstyle does not have the same professional polish or cultural acceptability as a more "conventional" typically worn by white women.

## VI. EARLY TITLE VII CASES

In *Willingham v. Macon Telegraph Publishing Co.*, the court upheld the firing of a male employee for violating a company policy requiring male employees to have short hair stating "grooming codes or length of hair is related more closely to the employer's choice of how to run a business than to equality of employment opportunity."[66] This mode of analysis does not evaluate what messages the company policy sends, or what function the court should play in reinforcing gender stereotypes. Instead, the court reasoned that the employer could have a policy that distinguishes on some characteristic such as length of hair because this policy is more closely related to the employer's choice on how to run their business than to equality or equal opportunity.[67] In addition, the court distinguished discrimination based on the length of one's hair from "distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the manner in which an employer exercises his judgment as to the way to operate a business."[68] The court cited the legislative history of Title VII, and concluded that Congress did not intend the prohibition on discrimination because of sex to be broad reaching and found that Congress did not intend to interfere with business.[69] But, "[n]othing in the plain language of Title VII indicates that the statute protects against sex discrimination less than other prohibited forms of discrimination. Indeed, sex is listed alongside of race, color, religion, and national origin in the statutory provisions defining unlawful conduct."[70] In fact, this case and others like it became a hurdle for cases "that sought to connect the signs of gender to sex discrimination."[71]

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66 Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975).

67 *Id.*

68 *Id.* The court was trying to distinguish the case at bar from cases finding "sex-plus" discrimination. *See* Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir. 1971), and Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

69 *Willingham*, 507 F.2d at 1090 ("Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.").

70 Peter Brandon Bayer, *Mutable Characteristics And The Definition Of Discrimination Under Title VII,* 20 U.C. DAVIS L. REV. 769, 849 (1987).

71 Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender* 144 U. PA. L. REV. 1, 77 (1995).

In *Carroll v. Talman Federal Sav. & Loan Asso.*,[72] the Seventh Circuit addressed whether an employer could require women to wear uniforms, where men were only required to maintain business attire. The employer's reasoning for this dissimilar treatment was that women could not be trusted to choose appropriate attire. More specifically, the employer was concerned about women following the fashion of the day by choosing skirts that were considered inappropriately revealing.[73] There is no evidence that this policy was required because women were wearing inappropriate attire, but merely because the employer feared that women would make an inappropriate choice.[74] The attorney for the defendant argued:

> that although the defendant trusts the business judgment of its female employees, 'the selection of attire, of clothing on the part of women is not a matter of business judgment. It is a matter of taste, a matter of what the other women are wearing, what fashion is currently. When we get into that realm... problems develop. Somehow, the women who have excellent business judgment somehow follow the fashion, and the slit-skirt fashion which is currently prevalent.... They tend to follow those (fashions) and they don't seem to equate that with a matter of business judgment.[75]

The court in its decision denounced this rational as "based on offensive stereotypes prohibited by Title VII."[76] In this case—and those that follow—the gravamen of the analysis seemingly focuses on not just the policy *per se*, but also the policy in its context. It is within this context that employer appearance policy is not categorically discriminatory and not outside of Title VII protection.[77] The problem with the female-only uniforms was that they subordinated and stigmatized women. The court found the dress code would be acceptable if it was "[with]in commonly accepted social norms and... reasonably related to the employer's business needs," implying that this policy would not be discriminatory under Title VII if it were more socially acceptable and related the employer's business needs.[78] This analysis does not focus on how the policy affects the women being required to wear the uniforms. How can female employees present an accomplished, professional projection of themselves, when they are denied the discretion to choose their own outfits? Meanwhile male employees are free to choose professional attire that represents themselves, especially in light of the association of uniforms with less professional employment.[79] But in this case where only women were required

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[72] Carroll v. Talman Fed. Sav. & Loan Asso., 604 F.2d 1028, 1029 (7th Cir. 1979).

[73] *Id.* at 1033.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Gerdom v. Continental Airlines, 692 F.2d 602, 606 (9th Cir. 1982).

[78] *Carroll*, 604 F.2d at 1032.

[79] "While there is nothing offensive about uniforms Per se, when some employees are uniformed

to wear uniforms, with the implication of lesser professional stature, the court could not ignore the cost to women of this policy.

In *Baker v. California Title Land Co.*,[80] the Ninth Circuit limited Title VII to immutable characteristics, excluding grooming policies based on its interpretation of the statute: "Since race, national origin and color represent immutable characteristics, logic dictates that sex is used in the same sense rather than to indicate personal modes of dress or cosmetic effects."[81] In discussing the Supreme Court's language in *Griggs v. Duke Power*,[82] the Ninth Circuit reasoned that "[o]bviously, it seems to us, the Court was not talking in terms of hair styles or modes of dress over which the job applicant has complete control. The Court was concerned about characteristics which the applicant, otherwise qualified, had no power to alter."[83] Although this case was decided before *Price Waterhouse v. Hopkins*, this reasoning is inconsistent with *Price Waterhouse*, where the traits that were at issue were Hopkin's aggressiveness and "macho" behavior, but these were characteristics that she had complete control over.[84]

In *EEOC v. Sage Realty Corp.*,[85] the district court held that the employer's policy of requiring female lobby attendants to wear a sexually revealing outfit is employment discrimination. The lobby attendants' job "included security, safety, maintenance, and information functions."[86] But as a result of the sexually revealing outfit that she was required to wear she was subjected to lewd comments and gestures and was sexually propositioned.[87] The court found that Sage Realty committed an unlawful employment practice where Sage Realty imposed "a term or condition of employment... and that this term or condition was imposed on the basis of sex."[88] The court did not deny employers the prerogative to impose

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and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes." *Id* at 1033.

[80] 507 F.2d 895 (9th Cir. 1974).

[81] *Id.* at 897.

[82] 401 U.S. 424 (U.S. 1971) (holding that employer was prohibited by Title VII from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs, where neither standard was shown to be significantly related to successful job performance, both requirements operated to disqualify Negroes at a substantially higher rate than white applicants, and jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites).

[83] *Baker*, 507 F.2d at 897.

[84] Baker was decided before Price Waterhouse, but the Ninth Circuit continues to rely on this limitation of Title VII in later cases. *See* discussion of Jespersen v. Harrah's *supra* Part XI.

[85] 507 F. Supp. 599, 608 (S.D.N.Y. 1981). Title VII is also violated when an employer requires a female employee to wear sexually suggestive attire as a condition of employment. Marantette v. Michigan Host, Inc., 506 F.Supp. 909, 911 (E.D. Mich. 1980); EEOC v. Sage Realty, 507 F. Supp. 599, 607. (S.D.N.Y.1981).

[86] *Sage*, 507 F. Supp. at 603.

[87] *Id.* at 605.

[88] *Id.* at 607. Title VII, 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) provides:

> [i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

reasonable grooming and dress requirements, however, the court did hold that this does not mean that "an employer has the unfettered discretion... to require its employees to wear any uniform the employer chooses, including uniforms which may be characterized as revealing and sexually provocative."[89] The court also rejected Sage's argument that its policy of requiring a sexually revealing outfit was a bona fide occupational qualification (BFOQ).[90]

In a similar case, *Priest v. Rotary*,[91] a woman was transferred from her position as a cocktail waitress to a position as a waitress at a coffee shop where she earned significantly less in tips.[92] When Priest was hired, her boss told her to wear "something low-cut and slinky, but he didn't want pantsuits."[93] The plaintiff objected, and was transferred to a nearby coffee shop, where she was required to wear a uniform and where she would make less in tips.[94] The court, relying on *Sage Realty*, found that Rotary had not established any legitimate non-discriminatory reason for requiring Priest to comply with his dress code.[95] The court seemed to be more sensitive to the effect of this requirement on Priest. It weighed the cost of complying with this requirement, and the effect of this requirement on her, with the employer's interest in having her appear as a sexy cocktail waitress. In light of the defendant's wholly inappropriate behavior—he sexually harassed and favored the women who tolerated his advances—it is clear that this appearance requirement subordinated and sexualized women. Perhaps the added impact of the related sexual harassment claim brought the issue of the cost of the policy on female employees into focus for the court, leading to the invalidation of the dressing requirement.

In *Craft v. Metromedia*,[96] the court held that a television station could fire an older female anchor, while retaining a similarly situated male anchor because the female anchor did not rate as well with viewers.[97] This decision was widely criticized because the court permitted the employer to evaluate the success of a female anchor differently than a male anchor by requiring the female anchor to be more feminine, and by placing a larger emphasis on her appearance. Karl Klare offered this analysis of the court's reasoning:

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because of such individual's race, color, religion, sex, or national origin.
42 U.S.C. § 2000e-2(a) (2000).

89 *Sage*, 507 F. Supp. at 609 (citing EEOC v. Sage Realty Corp., 87 F.R.D. 365, 371 (S.D.N.Y.1980)).

90 *Sage*, 507 F. Supp. at 611. A BFOQ is a "bona fide occupational qualification" pursuant to 703(d) of Title VII, at 22.

91 634 F. Supp. 571 (N.D.Cal.,1986)

92 *Id.* at 574 (there were also sexual harassment issues in this case where the defendant sexually harassed his female employees).

93 *Id.*

94 *Id.*

95 *Id.* at 581.

96 766 F.2d 1205 (8th Cir. 1985).

97 *Id.*

> The court rejected Craft's argument that the employer's appearance standards intrinsically discriminated against women by requiring women to conform to stereotypical images preferred by viewers. On-air women were to have "feminine touches" such as bows and ruffles, to avoid appearing too aggressive (or too soft), to be elegant, and to change their outfits more frequently than men. But the court held that any employer reliance on sex stereotypes was at most incidental, pursuant to a focus on lawful considerations such as the "conservatism thought necessary in the Kansas City market," and technical matters such as color coordination and studio lighting effects. The court concluded that the employer's appearance requirements did not impose a special burden on women and did not reflect an impermissible expectation that appealing appearance is a more important asset for women than men. [98]

The court then noted, "[t]hese criteria do not implicate the primary thrust of Title VII, which is to prompt employers to discard outmoded sex stereotypes posing distinct employment disadvantages for one sex," even if these outmoded sex stereotypes required much more complicated regimes for women to maintain a professional business-like appearance than men.[99]

While the court makes reference to the line of cases that stand for the proposition that customer preference doesn't matter, it seems a rather fine distinction in this case for the court to define Craft's appearance regime as "concerns [that] were incidental to a true focus on consistency of appearance, proper coordination of colors and textures, the effects of studio lighting on clothing and makeup, and the greater degree of conservatism thought necessary in the Kansas City market,"[100] while failing to find that the regime was impermissible sex discrimination based on the gender stereotype that women's appearance is of primary importance, and should fit within Kansas City's feminine ideals.

## VII. COMMUNITY NORMS AND STEREOTYPES

Courts take community and business norms into account in when evaluating whether grooming policies are appropriate. These standards are used as signposts, to provide insight into whether the guidelines are in some way excessive or within a normal range of appearance. The community standards have also been analyzed as normative stereotypes; a normative "stereotype is not a view about how members of the group behave simpliciter: It is grounded in a social consensus about how they ought to behave in order to conform appropriately to the norms

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[98] Karl E. Klare, *Power/Dressing Regulation of Employee Appearance*, 26 NEW ENG.L. REV. 1395, 1424-25 (1992) citing Craft, 766 F.2d 1205.

[99] *Craft*, 766 F.2d at 1212-15 (including more details of what clothing guidance male and female on-air personnel were given).

[100] *Id.* at 1215.

associated with membership in their group."[101] While there may be statistical correlation in behavior to the norms associated with that group, that does not make this behavior true for every individual in the group, nor does this address the value of the behavior.[102] Karl Klare offers the example that while we do not condone requiring women to work at less demanding jobs because people think women are intellectually inferior, we consider it okay to require women to wear skirts, because that is what professional women do.[103] While labeling women intellectually inferior is offensive, Klare argues that the skirt requirement is "based almost entirely on sex stereotypes: that women are less capable than men, that they are better suited for less active or assertive roles, that women must do more than men to appear serious and business-like, that a woman in pants at work is sexually provocative and therefore disruptive, that women's clothing—skirts—should enhance their allure as sex objects, and so on."[104]

For a court to analyze a grooming policy, and determine only whether the policy is within the norm, the court does not attempt to analyze whether courts are in fact reinforcing "stereotypical, gendered views about appearance."[105] In this way, by deferring to community norms, courts are acting to reinforce these norms, where they should be scrutinizing them. While the court should consider community standards in its analysis, it might consider thinking more about the messages and implications of these grooming requirements and asking at what cost to employees, not just testing whether these requirements are within the normal range of social convention. For example, if we require waitresses—but not waiters—to wear a sexy outfit, what message does this send? Are we valuing the waitress for her appearance, but not for her ability to provide courteous and effective service, but not evaluating the waiter by the same standard? Arguably, a restaurant may desire a more attractive wait staff where this may increase business and therefore profit. But if the purpose of all business is to make profit, this does not defeat the discriminatory effect of the regulation that promotes the stereotype that women are more valued for their attractiveness than for their ability to perform their job. This was a major criticism of the *Craft* decision.[106] "It is difficult to reconcile cases which enforce a standard of 'commonly accepted social norms,' thus perpetuating the notion that men are naturally masculine and women are naturally feminine, with a legislative mandate intended 'to strike at the entire spectrum of disparate treatment of men and women' resulting from sex stereotypes."[107] Some of the ways that gender bias can operate are by:

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[101] K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 48 (2000).

[102] *Id.*

[103] Klare, *supra* note 99, at 1419.

[104] *Id.*

[105] *Id.* at 1420.

[106] *See* discussion of Craft v. Metromedia, *infra* p. 19-20.

[107] Franke, *supra* note 72 at 80.

> (1) prototypes, the images associated with members of a particular occupation; (2) schema, the personal characteristics and situational factors that are used to explain conduct; and (3) scripts, definitions of appropriate behavior in a given situation. Thus, when a female applicant for a given position (e.g., litigator) does not fit the evaluator's prototype (e.g., aggressive male), her credentials will be judged with greater skepticism.[108]

When a woman deviates from the script provided for her gender role:

> [t]hose who deviate from their accustomed role provoke negative evaluations. Once again, these perceptual prejudices create a double bind: Women who conform to accepted stereotypes will appear to have less to contribute and less leadership potential than their male colleagues, while women who take a more assertive stance risk appearing arrogant, aggressive, and abrasive. How to seem "demure but tough" is particularly difficult when standards vary among those whose opinions are most critical. In male-dominated cultures, women are subject to criticism for being "too feminine" and not "feminine enough."[109]

These standards leave women, and men, in a difficult position where they are trapped by these expectations and not conforming to others' expectations leads to negative evaluations. This leads to trait discrimination, where an employer is evaluating the employee based on whether the traits they are presenting conform to the gendered expectations of that individual. [110] For example, an employer might find a crew cut on a woman to be an objectionable trait, but not for a man.[111]

## VIII. PRICE WATERHOUSE AND TITLE VII

In *Price Waterhouse v. Hopkins*,[112] the Court found that Title VII prohibited discrimination against women based on gender stereotypes, but only for immutable characteristics. In *Price Waterhouse*, Ann Hopkins was selected for potential partnership at Price Waterhouse, but was later denied.[113] Hopkins was a successful

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[108] Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1188 (1988).

[109] *Id.* at 1189. Another way appearance standards create a double bind:

> [a] woman can be neither too much like a woman nor not enough like one; she must appear competent -- and thus formal, covered, and neutered -- but not too assertive or manly -- and thus soft, frilly, and ornamental. She must not distract others with her sexiness, and thus must be wrapped tight and inaccessible, but she cannot be too independent, and thus should be appropriately exposed (legs), painted (eyes, lips, cheeks, hair), elevated (high-heeled shoes), and vulnerable (clothes that prevent easy movement or escape).

Bartlett, *supra* note 10 at 2547.

[110] Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX L. REV. 167 (2004).

[111] *Id.*

[112] 490 U.S. 228 (1989).

[113] *Id.* at 231-2.

manager who brought substantial business to Price Waterhouse, and was highly regarded by her clients and partners. Nevertheless, some partners—and previous performance evaluations—argued that she needed to improve her interpersonal skills with staffers and could be too aggressive and difficult with staff members.[114] Many of the partners who objected to Hopkins' candidacy for partnership did so in relation to her aggressive, macho personality, and her use of profanity.[115] When Hopkins was rejected, she was told that in order to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[116] Price Waterhouse was evaluating Hopkins on a different standard based on her gender, requiring female partnership candidates to be tough effective managers who got more business for the company, and at the same time, maintained an acceptable degree of femininity.[117] The Court determined that Price Waterhouse used gender-stereotyping in its evaluation of Hopkins for partnership "[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."[118] Further,

> as for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[119]

The Court found two theories under which Price Waterhouse discriminated against Hopkins: gender stereotyping, a performative notion of behavior linking sex to gender, and the impermissible catch-twenty-two, be tough yet feminine, that Hopkins was placed in.[120] *Price Waterhouse* has been a difficult case for courts to apply. Excluding behavior and stereotyping related to gender, courts have declined to extend *Price Waterhouse* to mutable characteristics.[121] But if we interpret sex to include gender in Title VII, then we would be protecting effeminate men and masculine women—which are cases that have not been traditionally recognized.[122]

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[114] *Id.* at 234-5.

[115] *Id.* at 235.

[116] *Id.* at 235 (citing lower court decision 618 F. Supp., at 1117).

[117] *Id.* at 251. ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.").

[118] *Hopkins*, 490 U.S. at 250.

[119] *Id.* at 251 (citing Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13, 98 S. Ct. 1370, 1375, n. 13, 55 L. Ed. 2d 657 (1978), quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

[120] Yoshino, *supra* note 50, at 917.

[121] *See* discussion of *Nichols infra* p. 32-33, and *Jespersen infra* Part XI.

[122] Yoshino, *supra* note 50, at 919. *See generally* Nichols v. Azteca 256 F.3d 864 (9th Cir. 2001)

I argue that the Court's decision in Price Waterhouse extends the definition of sex in Title VII to encompass gender stereotyping because the Court recognized the broad range of sex discrimination Title VII was meant to prohibit and the necessity of dismantling these outmoded stereotypes of gender.

## IX. BONA FIDE OCCUPATIONAL QUALIFICATIONS UNDER TITLE VII

In *Dothard v. Rawlinson*,[123] a woman was denied a position as a prison guard because she did not meet the height and weight requirements of the job. The district court found that Rawlinson had created a prima facie case of discrimination; held that the height and weight requirements were not sufficiently job related and were discriminatory proxies for the true job requirement: strength.[124] In rebuttal, the prison argued that the height and weight requirements were a BFOQ and, therefore, permissible. The court rejected this argument, finding that the prison could have adopted a more narrowly tailored strength test, instead of discriminatory height and weight guidelines.[125]

In *Western Airlines, Inc. v. Criswell*,[126] the Supreme Court addressed the BFOQ standard as applied to age discrimination of airline pilots. The Court held that the safety BFOQ defense is a two-part inquiry:

> (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.[127]

This interpretation is based on the Americans with Disabilities Act "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."[128] The statutory language in Title VII is the same,[129] but is unclear as to what extent this test controls the BFOQ analysis where safety is not implicated.

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123 Dothard v. Rawlinson, 433 U.S. 321, 333-35 (1977).

124 *Id*, at 331.

125 *Id.* at 332-34. In analyzing the BFOQ exception, the court said:

> [b]ut whatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes, and the District Court in the present case held in effect that Regulation 204 is based on just such stereotypical assumptions.

*Id.*

126 Western Airlines v. Criswell 472 U.S. 400, 413 (1985).

127 *Id.* at 417 (citing 29 CFR §1625.6(b) (2005).

128 29 U.S.C.S. § 623 (2000).

129 The language from Title VII is "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" 42 U.S.C.S. § 2000e-2 (2000).

In *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*,[130] the Court had the opportunity to apply BFOQ analysis to a policy denying women the opportunity to work in jobs involving actual or potential lead exposure exceeding health and safety guidelines, unless those women could provide documentation of their infertility.[131] Men of reproductive age were not prohibited from these positions.[132] This policy led to a decrease in compensation for some women, one woman was fired, and the denial of leave of absence for a male employee who wanted to decrease his lead level to become a father.[133] The employees had made a prima facie case of discrimination, but the Court rejected Johnson Control's BFOQ defense:

> [w]e conclude that the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. We reiterate our holdings in *Criswell* and *Dothard* that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" of the particular business.[134]

The Court focused its analysis on the ability of women to do the job, not on an employer's moral or ethical concerns about health, fertility or future generations. This narrow reading of the BFOQ defense reiterates that employers must limit their policies that discriminate on the basis of sex to policies necessary to the essence of the business, not concerns that are reasonably related to their business.[135]

Even when safety is not the reason for a BFOQ, the courts have construed the BFOQ exception narrowly to prohibit forms of sex discrimination. The Ninth Circuit Court of Appeals, in *Fernandez v. Wynn Oil Co.* held that sex is not a BFOQ for a sales position in a market where customer preference is for male sales associates; [136] "stereotypic impressions of male and female roles do not qualify gender as a BFOQ."[137] Similarly, the Fifth Circuit in *Diaz v. Pan Am World Airlines* held that customer preference may not be the basis of a BFOQ, the court rejected Pan Am's argument that "customers' preferences are not based on 'stereotyped thinking,' but on the ability of women stewardesses to better provide the non-mechanical aspects of the job. Again, as stated above, since these aspects

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130 Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc 499 U.S. 187 (U.S. 1991).

131 *Id.* at 192.

132 *Id.*

133 *Id.* at 193.

134 *Id.* at 206.

135 *Id* at 195 (Johnson Control argued that BFOQs only needed to be reasonably related to their business).

136 Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981).

137 *Id.* at 1276.

are tangential to the business [and are not the essence of the business and] the fact that [the] customers prefer [women] cannot justify sex discrimination."[138]

In a case before a district court in Texas, *Wilson v. Southwest Airlines*,[139] the court found that sex was not a BFOQ for flight attendants, despite Southwest's advertising campaign showcasing the sex appeal of its flight attendants. The court limited the essence of Southwest's business to transporting passengers in a safe and efficient manner between locations, and the essential function being performed by the flight attendants and ticketing agents was dominated by non-mechanical aspects—ticketing passengers, checking baggage, serving cocktails, and instructing passengers on safety protocols—and the manner in which these tasks are performed—"with love"—was secondary.[140] This court's interpretation of the business essence test focuses on the "particular service provided and the job tasks and functions involved, not the business goal. If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order."[141] Wilson stands for the proposition that it is not sufficient that customers enjoy the sexual gratification that they receive in addition to the business's primary purpose, but that the sexual subordination or sexualization of women cannot be justified to gain competitive advantage.[142] Kimberly Yuracko argues that the essence can be interpreted in four ways "(1) essence as inherent meaning, (2) essence as shared social meaning, (3) essence as employer-defined, and (4) essence as customer-defined."[143] There is some criticism that can be raised to this decision, in the court's narrow interpretation of the essence of the business, but it seems likely that the court's determination that the essence of the business is solely the transportation, regardless of its marketing campaign, is a response to the fear that employers will sexualize all jobs, in an attempt to have a competitive edge. This reluctance of the court to accept the employer's definition of the essence of the business does seem justified here.

There are situations where sex-based BFOQs are appropriate. In cases where privacy concerns are implicated, courts have interpreted the essence of the business to include providing care and comfort to their clients. In the health care setting:

> Since it is clear that a substantial portion of the female guests will not consent to such care, it follows that the sex of the nurse's aides at the Home is crucial to successful job performance. In this sense the hiring of male nurse's aides would directly undermine the essence of the

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138 Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971).

139 Wilson v. Southwest Airlines, 517 F. Supp. 292, 293-94 (N.D. Tex. 1981).

140 *Id.* at 302.

141 *Id.*

142 Bartlett *supra* note 11, at 2578-79

143 Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 152, 161-164 (2004).

> Home's business and its belief to that effect in 1973 had a factual basis.[144]

But to some extent this distinction may be dubious; where men are capable of being care givers, we do not want to sanction the stereotype that men are not capable of being care givers. BFOQs have also been found where the function of the job is to provide sexual titillation, not goods or services *and* sexual titillation:

> A business must show that its primary purpose is to provide sexual stimulation rather than food, drink, or some other service for which sex is not an essential component. This it has a perfect right to do, although to defend its right to discriminate on the basis of sex, a business will not be able to hide behind the legitimacy of ordinary business purposes the public deems more "respectable"—flying passengers, serving food, and so on. Once it attempts to defend its business in nonsexual terms, the BFOQ exception is no longer available to protect sex-specific requirements. The rule of thumb at the end of the day is simple: sex bars may subordinate women, but airlines and restaurants may not.[145]

## X. RECENT CASES ADDRESSING GENDER-STEREOTYPING

In *Smith v. City of Salem*,[146] Smith, a firefighter, was a transsexual diagnosed with sexual identity disorder and as part of his treatment worked while maintaining a more effeminate appearance.[147] After Smith informed his superior of his condition, he was later suspended for a minor infraction of department regulations.[148] The Sixth Circuit's opinion addresses the different interpretations of sex in Title VII, and finds that in *Price Waterhouse*, "the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women and gender discrimination, understood as discrimination based on a failure to conform to stereotypical gender norms."[149] The court also rejected the limitations on the construction of gender imposed by pre-*Price Waterhouse* cases, and found that an employer cannot discriminate against a man for not acting like a man, or a woman for not acting like a woman. This more expansive view of sex—to include gender—prohibited the City of Salem

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144 Fesel v. Masonic Home of Del., Inc. 447 F. Supp. 1346, 1353 (D.C.Del. 1978). (This privacy concern is implicated in hospitals, nursing homes and prisons).

145 Bartlett, *supra* note 11 at 2579.

146 378 F.3d 566 (2004).

147 *Id.* at 568.

148 *Id.* at 569 (finding that Smith's superiors met and: "agreed to arrange for the Salem Civil Service Commission to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, defendants reasoned, they could terminate Smith's employment on the ground of insubordination.").

149 *Id.* at 573.

from taking action against Smith.[150] The opinion continued by criticizing cases where courts separated immutable characteristics from behavior to deny Title VII relief:

> [y]et some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination "because of... sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.[151]

This case has important ramifications for Title VII jurisprudence and one commentator suggests:

> Smith correctly disaggregates concepts of sex from gender so as to bring equal opportunity and autonomy for individuals in the workplace. It recognizes that sex discrimination generally does not focus on biological parts, but rather on socially constructed gender attributes. By recognizing biological sex as separate from gender performance, the court truthfully confronts the essence of sex discrimination—gender stereotyping. Correctly applying the logic of Price Waterhouse, Smith breaks down the biological definitions, Community Norms doctrine, and labeling loopholes that have rationalized an unprincipled application of sex anti-discrimination law. This reading of Title VII and related doctrines promises to increase respect and protections for transsexuals, women and sexual minorities generally.[152]

In another recent Sixth Circuit case, *Barnes v. City of Cincinnati,*[153] the court followed *Smith*, and held that the city had engaged in Title VII sex stereotyping by discrimination against a pre-operative transsexual.[154] The Supreme Court denied certiorari on this case.[155]

Every circuit court addressing different hair-length policies for men and women has found that these policies are not examples of discrimination under Title

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150 *Id.*

151 *Id.* at 573-74.

152 Thomas Ling, *Recent Development: Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277, 280 (2005).

153 401 F.3d 729 (2005), *cert. denied*, 126 S.Ct. 624 (2005).

154 *Barnes*, 401 F.3d at 737.

155 Barnes v. City of Cincinnati 126 S.Ct. 624 (2005).

VII.[156] In *Wiseley v. Harrah's Entm't, Inc.*,[157] the New Jersey District Court refused to find that requiring male bartenders to keep short hair violated Title VII.[158] The court's analysis hinged on the idea that the policy at hand did not substantially limit the plaintiff's opportunities for employment and was therefore outside of Title VII and New Jersey law.[159] The court declined to apply the "but-for" test used in cases in which employees are denied various privileges of employment as the sole result of their gender, a condition that they did not choose.[160] The court concluded that this test did not apply because "hair length was not a fundamental aspect of his gender, nor was it an immutable characteristic outside of his power to alter."[161] The court distinguishes *Price Waterhouse v. Hopkins* by describing *Price Waterhouse's* facts as denying a woman an opportunity for advancement based on her status as a member of a protected class, instead of applying *Price Waterhouse* as making impermissible the use of gender-stereotype evaluations to the success of an employee.[162] However, this is a very narrow interpretation of *Price Waterhouse*, which ignores the court's prohibition on requiring someone to conform to gender stereotypes.[163]

In *Nichols v. Azteca Rest. Enters.*,[164] the Ninth Circuit held that "the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine."[165] By coming to this conclusion, the Ninth Circuit was overruling its earlier decision in *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*,[166] where the court held that discrimination based on gender stereotypes, "that a man should act like a man," did not fall under the purview of Title VII.[167] This holding, however, predates and conflicts with the Supreme Court's decision in *Price Waterhouse*, and in this direct conflict, the Ninth Circuit overruled *DeSantis*.[168] In *Nichols*, the court included this footnote, "[w]e do not imply that all gender-based distinctions are actionable under Title

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[156] Tavora v. New York Mercantile Exchange, 101 F.3d 907 (2d Cir. 1996); see also Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Knott v. Missouri Pac. Ry. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1092 (5th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046, 45 L. Ed. 2d 699 (1975); Dodge v. Giant Food, Inc., 160 U.S. App. D.C. 9, 488 F.2d 1333, 1337 (D.C. Cir. 1973).

[157] Wiseley v. Harrah's Entm't Inc., 2004 U.S. Dist. LEXIS 14963, 10-11 (D.N.J. 2004); *also available at* 94 Fair Empl. Prac. Cas. (BNA) 402).

[158] *Id.*

[159] *Id.*

[160] *Id.* at 18 (citing Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983)).

[161] *Id.*

[162] *Id.* at 16.

[163] *See* discussion of Price Waterhouse *supra* Part VIII.

[164] Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir. 2001).

[165] *Id* at 874. *See also* Rene v. MGM Grand, 305 F.3d 1061, 1068 (9th Cir. 2002).

[166] DeSantis v. Pacific Telephone & Telegraph Co., Inc., 608 F.2d 327 (9th Cir, 1979).

[167] *Nichols*, 256 F.3d at 874.

[168] See discussion *supra* Part VIII, *Nichols*, 256 F.3d at 874-5.

VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."[169] This footnote is dicta, and while it says that sex differentiated appearance regulations may not be actionable, it doesn't preclude all sex differentiated appearance challenges. Is a sex-differentiated appearance regulation "reasonable" if it requires women or men to conform to stereotypical behaviors associated with their gender? If appearance regulations require men to act like men, or women to act like women, do they it fall within the holding of *Nichols*, regardless of the language in the footnote?

In *Frank v. United Airlines*,[170] flight attendants challenged the weight tables the airline had adopted for flight attendants:

> The uncontroverted evidence shows that United chose weight maximums for women that generally corresponded to the medium frame category of MetLife's Height and Weight Tables. By contrast, the maximums for men generally corresponded to MetLife's large frame category. The bias against female flight attendants infected United's weight maximums for all age groups. Because of this consistent difference in treatment of women and men, we conclude that United's weight policy between 1980 and 1994 was facially discriminatory.[171]

Because these tables were discriminatory on their face, they could only be defended as a BFOQ.[172] The court relying on *Gerdom v. Continental Airlines*, also decided by the Ninth Circuit, said, "[w]here a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender... a plaintiff need not otherwise establish the presence of discriminatory intent."[173]

> Even if United's weight rules constituted an appearance standard, they would still be invalid. A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ. Thus, an employer can require all employees to wear sex-differentiated uniforms, but it cannot require only female employees to wear uniform....United may not impose different *and more burdensome* weight standards without justifying those standards as BFOQs. United is thus entitled to use facially discriminatory weight charts only if it can show that the difference in treatment between female and male flight attendants is justified as a BFOQ.[174]

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169 *Nichols*, 256 F.3d at 874-75 n.7.

170 216 F.3d 845 (9th Cir. 2000)

171 *Id.* at 854.

172 *Id.* at 853.

173 *Id.* at 854 (citing Gerdom v. Continental Airlines, 692 F.2d 602, 608 (9th Cir.1982) (en banc)).

174 *Id.* at 855 (citing Carroll v. Talman Fed. Sav. & Loan Asso., 604 F.2d 1028 (7th Cir. 1979)).

The court found that United had not made a showing that these heightened weight standards for women were reasonably necessary to the essence of United's business.[175]

## XI. JESPERSEN V. HARRAH'S

In a recent case in the Ninth Circuit, *Jespersen v. Harrah's Operating Co.*,[176] Darlene Jespersen, an outstanding employee and bartender for twenty years at Harrah's Casino was fired for not complying with Harrah's Personal Best Grooming Policy.[177] This policy had gender neutral guidelines requiring good grooming, but also contained gender specific guidelines.[178] Male employees were prohibited from wearing makeup and colored nail polish, and were required to keep their hair and nails short.[179] Female employees were required to wear stockings, colored nail polish and to wear their hair "teased, curled or styled."[180] In implementing its Personal Best Program, Harrah's brought in "Personal Best Image Facilitators," who trained employees on how to adhere to the guidelines and after the culmination of this training, photographs of each employee at their

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[175] *Id.*

[176] Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

[177] *Jespersen*, 392 F.3d. at 1077-1078.

[178] *Id.* at 1077.

[179] *Id.*.

[180] The text of the appearance standards provides, in relevant part, as follows:

> All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.
> * * *
> Beverage Bartenders and Barbacks will adhere to these additional guidelines:
> Overall Guidelines (applied equally to male/female):
> • Appearance: Must maintain Personal Best Image portrayed at time
> • Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
> • No faddish hairstyles or unnatural colors are permitted.
> Males:
> • Hair must not extend below top of shirt collar. Ponytails are prohibited.
> • Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
> • Eye and facial makeup is not permitted.
> • Shoes will be solid black leather or leather type with rubber (non skid) soles.
> Females:
> • Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
> • Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
> • Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
> • Shoes will be solid black leather or leather type with rubber (non skid) soles).

*Id.* at 1077 n.1.

personal best were placed in their personnel file.[181] Shortly after the program started, it was amended, adding a requirement for women that "[m]ake up (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors," and that "[l]ip color must be worn at all times."[182] After Jespersen did not comply with the policy, and did not apply for a transfer to a non-makeup position, she was fired.[183]

In its equal burden analysis, the court relied on its holdings in *Gerdom*,[184] and *Frank*.[185] The court distinguished the policy at issue here from the policies in the airline cases, where the policy "applied less favorably to one gender, and the burdens imposed upon that gender were obvious from the policy itself."[186] In analyzing the Personal Best policy, the court viewed the policy as a whole and as applied to both genders, without analyzing the components of the policies in closer detail.[187] By viewing the policy as a whole, the court was able to minimize the impact of the makeup requirement on women and dismiss the "subjective" discomfort Jesperson felt as irrelevant to its burden analysis.[188] The court was not willing to take judicial notice of the extra burden of both time and cost of the makeup requirement.[189] In Judge Kozinski's dissent, he states:

> ... it [is] perfectly clear that Harrah's overall grooming policy is substantially more burdensome for women than for men. Every requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. "teased, curled, or styled" hair; clean trimmed nails v. nail length and color requirements; black leather shoes v. black leather shoes. The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the "overall policy" more burdensome for the former than for the latter. The only question is how much.[190]

Both men and women would have been required to spend time and money maintaining their hair and nails, and men would need to maintain their facial hair—regardless of whether they are clean-shaven or had a beard. However, above and beyond this, women would have to select—not always a simple proposition where

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181 *Id.* at 1078.

182 Jespersen, 392 F.3d at 1078 n.2.

183 *Id.* at 1078.

184 See discussion *infra* at 33.

185 *Id.*

186 *Jespersen*, 444 F.3d at 1109 (alterations and internal citations omitted) (citing Frank v. United Airlines, Inc.,216 F.3d 845, 854 (9th Cir. 2000) (citing Gerdom v. Continental Airlines, 692 F.2d 602, 608 (9th Cir. 1982))).

187 *Jespersen*, 444 F.3d at 1109-10.

188 *Id.* at 1113.

189 *Id.* at 1110.

190 *Id.* at 1117.

color, style, and trial and error may be required—purchase, apply, and remove makeup every day.[191]

The court's decision improperly began by analyzing the policy to determine whether it imposed an unequal burden on women.[192] This is the wrong question to begin with because it presumes that the goal of the policy is valid, and skips ahead to analyzing the implementation of the policy. I argue that the court should begin by analyzing the purpose of the policy, and whether this purpose prohibits sex discrimination. Instead, the court analyzed the burdens imposed by the policy, and then analyzed whether the policy constituted unlawful gender stereotyping.

In its analysis, the court stated that "grooming standards that *appropriately* differentiate between the genders are not facially discriminatory."[193] In supporting its contention that Harrah's policy was appropriate, the court cites to a slew of cases where employer grooming policies were upheld. However, all of these decisions were decided before *Price Waterhouse* and should be reevaluated in light of *Price Waterhouse's* prohibition on gender stereotyping.[194] The court interpreted *Price Waterhouse v. Hopkins* narrowly, limiting its holding to the catch-22 that Hopkins was trapped in.[195] The court specifically found that there was:

> no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.[196]

I think this is a dubious conclusion because there may not be the need for additional evidence that the policy was intended to force women to conform to a stereotype. The policy on its face, in the specific requirements it imposes on women's faces, is evidence of a stereotype. The specificity of the makeup applied to women's faces is a certain stereotype of womanhood: the woman as a decorative object. The policy does not require that women maintain a professional complexion and/or prohibit any unusual looks—as it did with jewelry and hair style—which would have allowed women to wear little to no makeup, or a full face of makeup if they so desired, but allows Harrah's to maintain a professional-looking staff. Instead Harrah's required women to wear foundation, blush, mascara

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[191] This is assuming that the application of makeup does not have any adverse health affects on the skin such as increasing blemishes or sensitivity. This also does not account for whether appropriate makeup is available where women of different ethnicities need different kinds of makeup for the complexion and character of their skin.

[192] *Jespersen*, 444 F.3d at 1108-9.

[193] *Id.* (emphasis added).

[194] *See* discussion of Price Waterhouse *supra* Part VIII.

[195] *Jespersen*, 444 F.3d at 1111.

[196] *Id.* at 1112.

and lip color—a very specific image of female beauty. Additionally, if Harrah's was willing to bring in personal style consultants to help each individual employee, Harrah's could have had an individualized "personal best" appearance for each employee that would have not required conformity to gender stereotypes nor infringed on an employee's personal expression.

The court should have updated its *Price Waterhouse* analysis and the dissent correctly points out that "*Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves, not only as to how they should behave."[197] This analysis is paralleled in other recent cases such as *Smith v. City of Salem,*[198] and *Nichols v. Azteca.*[199] This is a particularly significant interpretation of *Price Waterhouse* because this interpretation recognizes that gender is performative and by allowing employers to evaluate employees on their adherence to gender stereotypes, we are reinforcing gender roles and perpetuating discrimination. In addition, we need to be especially sensitive to gender stereotyping that promulgates rigid gender roles, where these rigid gender roles promote conformity to gender norms, subsequently discouraging gender non-conformists or gender minorities by requiring them to cover up or pass completely in order to be accepted in the workplace.

Furthermore, the dissent points out that "the majority's approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate non-discriminatory requirement that applies to both men and women."[200] This interpretation would permit employers to continue to enforce gender-stereotyping policies on both men and women—so long as those policies do so equally. This rule would still promote sex discrimination and reinforce gender roles in the workplace and society.

The court should have started by analyzing the effect of the policy in question. The impact of the personal grooming policy, as a whole, was to promote a professional image for Harrah's workforce. This is a perfectly legitimate and reasonable goal. However, in looking at the policy in greater detail, what is the purpose of the gender differentiated aspects of the policy? This very specific gender differentiation was intended to force women to achieve a certain look, but did not impose such specific requirements on the male bartenders. Furthermore, the full face of makeup that was required is not a neutral female stereotype, it exemplifies a woman who is decorative, whose naked face is not professional workplace attire, and taken to the extreme is a sex object. This decorative object is not valued for her ability to tend bar but for her ability to present an "attractive" face.

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197 *Jespersen*, 444 F.3d at 1114, citing *Price Waterhouse*, 490 U.S. at 277.

198 *See* discussion of Smith v. City of Salem *supra* p. 29-31.

199 *See* discussion of Nichols v. Azteca *supra* p. 32-33.

200 *Jespersen*, 444 F.3d at 1116.

If the court had correctly decided that the policy was discriminatory, it should have then evaluated the policy, as Jespersen argued, as a BFOQ.[201] It seems unlikely that the court would have accepted the policy as a BFOQ. Given the narrow interpretation courts have given to the "essence of the business," and the courts general reluctance to expand this exception, the court would have been rejected any expansion of the BFOQ exception to include this grooming policy. It especially would have where there was a less discriminatory means of ensuring a professional appearance by their employees, for example, by writing the policy to prohibit unusual makeup—while requiring a good complexion. The stereotypical nature of this policy should make the courts reluctant to approve it because they will be permitting employers to enforce gendered grooming policies and define employee appearance as necessary to the essence of their business.

The court didn't explicitly discuss the discrimination at issue here as being a de minimis violation of Title VII, but it is implicit that the court felt that the burdens imposed by the Personal Best policy had a minimal impact on employee's potential for employment. The court seemed to find the grooming policy within community norms and therefore unobjectionable without considering how the policy made any individual feel. By permitting stereotyped grooming regulations, we are only protecting members of a protected group who conform to society's expectations for that group, and promulgating the very stereotypes that limit individuals. The application of these grooming policies favor women (or men) who act as men should, and disfavor women who do not conform to these stereotypes, we then require non-conforming women to act in compliance with these stereotypes and are forcing them to cover (by acting and dressing more feminine) in order to have these employment opportunities. In this way we continue to limit the acceptance of and opportunities for non-conformists and continue to reinforce the very stereotypes that we hope to move beyond.

## XII. CONCLUSION

Courts have continued to rubber stamp employee grooming policies to the detriment of society. In rejecting employee challenges to grooming policies, courts have condoned policies that stereotype employees, so long as these policies do not stray from what judges consider to be "normal" stereotypes. In the rare cases where employees have succeeded in challenging these grooming codes, courts have been able to discern the obvious negative effects from these policies—usually sexual harassment by employers or clients. Taken together these mixed results have had a subordinating and stigmatizing effect on those who do not identify with societal norms and demonstrate that courts continue to have great difficulty in weighing the impact of grooming standards on individuals and their identity. While these grooming policies may seem like de minimis violations of individual identity and

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[201] *Id.* at 1109.

expression thereof, these policies take a tremendous toll on individuals by forcing them to conform to gender stereotypes in order to be accepted in the workplace. Gender stereotypes and roles are perpetuated by limited judicial review that does not truly account for the effect on individual identity of these policies. The covering and passing required of individuals, and the continued subversion of their identity continues to reinforce gender stereotypes, stifle identity and discourage acceptance in the workplace and society. It is only with greater scrutiny of these policies, and more critical analysis of the message that these policies indoctrinate, that we will continue to dismantle stereotypes that perpetuate discrimination. While employers do have an interest in maintaining a professional appearance of their work force to the public, these appearance policies should be strictly tailored, and be scrutinized under the narrowest of BFOQ exceptions, after a careful weighing of the impact of these policies on the performance of the individual.