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APPEARANCE AND GROOMING STANDARDS AS SEX DISCRIMINATION IN THE WORKPLACE

Allison T. Steinle

"It is amazing how complete is the delusion that beauty is goodness."

Since the inception of Title VII's prohibition against employment discrimination on the basis of sex, women have made remarkable progress in their effort to shatter the ubiquitous glass ceiling and achieve parity.
with their male counterparts in the workplace. In forty years, Title VII not only has successfully forged legal protections for women in traditional employment practices such as hiring, firing, and promotion, but also has been read broadly to prohibit sexual harassment and the unwelcome imposition of sex stereotypes on employees. Nevertheless, a stubborn truism continues to hinder gender equality in the workplace, safely evading Title VII's protections: sex sells.

The commercial appeal of “cool, yet seductive” teenage sales associates, “hot” women at cosmetics and lingerie counters, and waitresses

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6. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-67 (1986) (reading Title VII's coverage to include "hostile environment" sexual harassment regardless of whether or not it constitutes an "economic quid pro quo" that is tangibly linked to a condition of employment).

7. See infra Part I.C.

8. See infra Part II.

9. See NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 20-21 (1991) ("[I]deas about 'beauty' have evolved since the Industrial Revolution side by side with ideas about money, so that the two are virtual parallels in our consumer economy. . . . Beauty [is] no longer just a symbolic form of currency; it [has] literally be[co]me money."); see, e.g., Gregory J. Kamer & Edwin A. Keller, Jr., Give Me $5 Chips, a Jack and Coke—Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry, 7 GAMING L. REV. 335, 345 (2003) (observing that the retail entertainment industry has fully adopted the adage that “sex sells,” despite the fact that the industry remains in the primary business of selling “rooms, restaurants, and gaming,” rather than sexual titillation).


11. See Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123, 1127-28 (Cal. 2005) (involving the state sex discrimination claim of a female sales manager who was ordered by a male executive to fire a dark-skinned female sales associate and replace her with “somebody hot . . . a young attractive blonde girl, very sexy”); see also Shoppe v. Gucci Am., Inc., 14 P.3d 1049, 1054, 1068 (Haw. 2000) (involving the age discrimination and tort claims of a store manager who was told by a district manager to wear more makeup and alter her clothing and hair to reflect Gucci's "much younger look").
who resemble “scantily clad Barbie doll[s]” is clear. To survive in a competitive marketplace, employers understandably seek to tap into today’s “lookist” culture by ensuring their employees create a salable image. Often, this is achieved through hiring on the basis of personal attractiveness or requiring adherence to strict dress codes or grooming standards.

This “lookism” creates gross inequities in the workplace, including discrimination against those viewed as unattractive or overweight.

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14. See Zakrzewski, supra note 10, at 432-33; Stephanie Armour, Your Appearance, Good or Bad, Can Affect Size of Your Paycheck, USA TODAY, July 20, 2005, at IB; Michael Starr & Adam J. Heft, Appearance Bias, NAT’L J., June 20, 2005, at 16; Martin Wolk, Better Wealthy than Handsome? Why Not Both?: Good Looks Translate into Higher Pay, Study Finds, MSNBC, Apr. 7, 2005, http://www.msnbc.msn.com/id/7420983. Psychological and economic studies reveal that looks play an actual role in how people are evaluated at work. A study by Professor Daniel Hamermesh found that male attorneys who received “above-average beauty” ratings while in law school earned on average up to twelve percent more than those rated as “below-average.” Wolk, supra. Another study by Professor Dalton Conley found that female workers’ increased body mass resulted in lower family income and decreased job prestige. Armour, supra.


16. See Baron, supra note 15, at 365; Kamer & Keller, supra note 9, at 335.

17. See generally Kari Horner, Comment, A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination, 54 CATH. U. L. REV. 589, 589-93 (2005) (discussing obesity discrimination); Note, Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance, 100 HARV. L. REV. 2035, 2035-42 (1987) (discussing the history of “ugly laws” and other discriminatory acts against facially deformed persons). Neither facial appearance nor weight is explicitly protected under federal law. See Zakrzewski, supra note 10, at 444. While a select number of state and local laws do prohibit employment discrimination on the basis of personal appearance, they generally contain broadly worded exceptions for dress codes and personal hygiene concerns. See, e.g., CAL. GOV’T CODE §§ 12947.5, 12949 (West 2005) (prohibiting discrimination on the basis of gender identity and requiring employers to allow their employees to wear pants, but excepting uniforms, costumes, and all “reasonable workplace appearance, grooming, and dress standards . . . provided that an employer shall allow an employee to appear or dress consistently with the employee’s gender identity”); D.C. CODE ANN. §§ 2-1401.02(22), 2-1402.11(a) (2001) (prohibiting discrimination on the basis of “personal appearance,” but excepting all requirements or uniforms applied to a class of employees for “a reasonable business purpose”); MICH. COMP. LAWS § 37.2102 (2004) (prohibiting discrimination on the basis of height and weight, but not addressing mutable appearance); SANTA CRUZ,
imposes greater burdens on women. An onslaught of Title VII sex discrimination challenges to appearance-related employment decisions and policies have hit the courts in recent years. Potential defendants run the cultural and socioeconomic gamut, from the Hooters restaurant chain to legal employers. Casinos, clubs, bars, and other entertainment venues—where the lines between sex and service often blur—are particularly vulnerable to discrimination claims.

For example, in 2000, Harrah's Casinos enacted the "Personal Best" program in an effort to upgrade its image. Harrah's required all bever-

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18. See infra Part II. Appearance-related policies may also discriminate against other protected classes under Title VII. For examples of how appearance and grooming standards affect a specific race, see Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1113-14 (11th Cir. 1993), which involved African-American firefighters' challenge to a departmental no-beard policy that had a disparate impact on African-Americans, who are predisposed to pseudo-folliculitis barbae, a bacterial infection that occurs after shaving, and Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 266 (S.D.N.Y. 2002), which involved a challenge by an African-American employee to a policy prohibiting dreadlocks and other unconventional hairstyles. For examples of how appearance and grooming standards may affect a specific religion, see Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 128-30 (1st Cir. 2004), cert. denied, 125 S. Ct. 2940 (2005), which involved a challenge to Costco's prohibition against facial piercings by a member of the Church of Body Modification, and Carter v. Bruce Oakley, Inc., 849 F. Supp. 673, 673-75 (E.D. Ark. 1993), supp. opinion at 849 F. Supp. 677 (E.D. Ark. 1993), which involved a challenge to the company's no-beard policy by a Jewish employee.


21. See Shannon P. Duffy, Pantsuits Coming Out of the Closet? Philadelphia DA Tosses Skirts-Only Policy, LEGAL INTELLIGENCER, Dec. 1, 2003, http://www.law.com/jsp/article.jsp?id=1069801652231. Following employee complaints and recruiting difficulties, Philadelphia District Attorney Lynne Abraham chose to revoke her controversial no-pants policy for female attorneys in 2003. Id. The policy was largely predicated on the belief that judges and juries viewed pantsuits in the courtroom as "scandalous." Id. In contrast to employers who seek to capitalize on employee sexuality, conservative workplaces may enforce gender-specific appearance standards in order to keep female sexuality in check. See, e.g., Wislocki-Goin v. Mears, 831 F.2d 1374, 1376-77 (7th Cir. 1987) (involving the termination of a female teacher largely for her failure to reflect the conservative "Brooks Brothers look" a state juvenile detention facility had required for its employees); Tardif v. Quinn, 545 F.2d 761, 762-63 (1st Cir. 1976) (involving the termination of a young public high school teacher for wearing mid-thigh length skirts).

22. See Kamer & Keller, supra note 9, at 335.

23. Jespersen v. Harrah's Operating Co. (Jespersen I), 392 F.3d 1076, 1077-78 (9th Cir. 2004), aff'd on reh'g en banc, 444 F.3d 1104 (9th Cir. 2006); see also David B. Cruz, Making
age service employees to adhere to a meticulous appearance code: men and women were to be “well groomed, appealing to the eye, [and] firm and body toned”; men were to maintain short haircuts, trimmed nails, and clean faces; and women were to wear “teased, curled, or styled” hair, stockings, high heels, and makeup. Darlene Jespersen, a twenty-year veteran bartender and guest favorite at Harrah’s Reno, complained that the cosmetics made her feel “sick, degraded, exposed, and violated” and interfered with her ability to firmly manage unruly customers.

Harrah’s


24. See Jespersen I, 392 F.3d at 1077. The relevant portion of the “Personal Best” policy reads in full:

All Beverage Service Personnel . . . 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.

Overall Guidelines (applied equally to male/female):
- Appearance: Must maintain Personal Best image portrayed at time of hire.
- 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 dress style.

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.
- Make up (face powder, blush, and mascara) must be worn and applied neatly in complementary colors. Lip color must be worn at all times.
- Shoes will be basic black pumps with 1-inch minimum heel height and closed heel and toe.

Harrah’s Casinos Beverage Service Personnel Appearance and Grooming Guidelines and Position Descriptions (copy on file with author). Employees were trained by a professional image consultant, tested on their image “proficiency,” had photographs placed in their personnel file to be used as “appearance measurement tools,” and signed “Personal Best” contracts. Id.

25. See Jespersen I, 392 F.3d at 1077; Cruz, supra note 23, at 242. Jespersen’s deposition is particularly telling:

Q. And after [the image consultant] applied makeup on half your face and left the other half normal, did there come a time when you looked in the mirror?
A. Yes.
Q. And tell me your reaction.
eventually fired Jespersen for her refusal to conform to the program. 26 Jespersen brought suit against Harrah’s, alleging sex discrimination. 27

Although many employers compromise 28 or settle out of court 29 when unhappy employees challenge their appearance policies, some employers also have successfully defended their practices in court. 30 Such was the unfortunate result for Jespersen. 31 The United States District Court for the District of Nevada granted summary judgment for Harrah’s, 32 and the Ninth Circuit affirmed. 33

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A. I felt very degraded and very demeaning [sic]. I actually felt sick that I had to cover up my face and become pretty or feminine . . . to keep my job or to do my job. I actually felt ill and I felt violated.

Q. Did you attempt thereafter to actually wear makeup . . . ?


Q. What was that experience like?

A. It was—I felt that it—it prohibited me from doing my job. I felt exposed. I actually felt like I was naked. I mean, I—I felt that I was being pushed into having to be revealed or forced to be feminine to do that job, to stay employed, when it has nothing to do with the making of a drink. I felt that I had become dolled up and that I was a sexual object.

... It affected my self-dignity. It portrayed me in a role that I wasn’t comfortable, that I wasn’t taken seriously as myself.

I also felt that it took away my credibility as an individual and as a person. I was—it was demanded that—that my job performance was based on how I look and not on how I did my work.


26. See Jespersen I, 392 F.3d at 1078.
28. See Kamer & Keller, supra note 9, at 346. Kamer and Keller, both experienced labor and employment attorneys in Las Vegas, advise their clients to carefully investigate every employee complaint that may arise out of an appearance policy and “be flexible enough to make reasonable accommodations.” Id.
30. See, e.g., infra Part II.
31. See infra notes 32-33 and accompanying text.
32. See Jespersen v. Harrah’s Operating Co., 280 F. Supp. 2d 1189, 1195 (D. Nev. 2002), aff’d, 392 F.3d 1076 (9th Cir. 2004), aff’d on reh’g en banc, 444 F.3d 1104 (9th Cir. 2006).
33. See Jespersen v. Harrah’s Operating Co. (Jespersen II), 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc); Jespersen v. Harrah’s Operating Co. (Jespersen I), 392 F.3d 1076, 1083 (9th Cir. 2004), aff’d on reh’g en banc, 444 F.3d 1104 (9th Cir. 2006).
Courts rarely interfere with employers’ business judgments to impose gender-differentiated appearance and grooming standards on their employees unless these standards bear a clear and unequivocal relationship to a protected class. Absent evidence that a policy places a calculable unequal burden on one gender over the other, Title VII is unlikely to provide a remedy for parties who believe they have been treated adversely “because of . . . sex.”

At the same time, however, Title VII jurisprudence speaks loudly against the attitudes that appearance policies such as Harrah’s’ embody. Courts have long rejected sex and sex appeal as legitimate business necessities subject to the “bona fide occupational qualification” (BFOQ) exception to Title VII.37 More importantly, the Supreme Court has held the use of sex stereotyping in the workplace to be a violation of Title VII.38 Surprisingly, however, the Supreme Court has never heard a Title VII case involving a gender-differentiated dress or appearance code.39

By siding with employers in favor of judicial and economic efficiency, courts deprive Title VII of its teeth at a time when sex discrimination is

34. See infra Part II.
36. See infra Part I.
37. See infra Part I.A.
38. See infra Part I.C.
39. Cruz, supra note 23, at 243. In Kelley v. Johnson, 425 U.S. 238, 239-40 (1976), the Supreme Court heard a constitutional challenge to a gender-differentiated appearance regulation for male police officers that prohibited beards and required trimmed hair, sideburns, and mustaches. The Court held that such regulations did not deprive officers of a liberty interest in their choice of personal appearance in violation of the Fourteenth Amendment. Id. at 249. However, the plaintiff did not raise and the Court did not address any claims, constitutional or otherwise, related to the sex-specific nature of the regulations. See id. at 240-41.
40. See, e.g., Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring):

[T]here is a difference . . . between, on the one hand, using evidence of the plaintiff’s failure to wear nail polish (or, if the plaintiff is a man, his using nail polish) to show that her sex played a role in the adverse employment action of which she complains, and, on the other hand, creating a subtype of sexual discrimination called “sex stereotyping,” as if there were a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the waist in hot weather.

. . .

. . . To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction. It is also to saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process. . . . To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy.
See also Barro, supra note 15 (arguing that hindering employers from hiring on the basis of physical appearance would greatly affect the national product).
rarely overt or straightforward. 41 This is particularly alarming in a sexually charged society where "more and more women embrace Botox and implants and stretch and protrude to extreme proportions to satisfy male desires[.] . . . technology is biology, [and] all women can look like inflatable dolls." 42 As the image-conscious, "porn-chic" mentality permeates society and hence the workplace, working women like Jespersen end up on the receiving end of a particularly noxious form of sex stereotyping, with only questionable protection from Title VII. 43

This Comment addresses the question of when an employer may permissibly impose a gender-specific appearance or grooming standard on an employee in light of Title VII's prohibition against sex discrimination. Part One turns to traditional Title VII analysis. Section A examines the historic application of the BFOQ defense to gender-specific employment decisions. Section B looks to the disparate treatment claim with appearance and grooming standards in mind. Section C then examines the Supreme Court's landmark recognition of sex stereotyping in Price Waterhouse v. Hopkins.

Using Price Waterhouse as a foundation, Part Two looks to the Ninth Circuit's systematic exclusion of mutable appearance from Title VII's coverage and its subsequent holding in Jespersen v. Harrah's Operating

41. See Audrey J. Lee, Note, Unconscious Bias Theory in Employment Discrimination Litigation, 40 HARV. C.R.-C.L. L. REV. 481, 488 (2005) ("[U]nconscious discrimination is the 'most pervasive and important form of bias' today as 'overt bigotry has waned in response to antidiscrimination laws and evolving social mores.'" (quoting Amy L. Wax, Discrimination as Accident, 74 IND. L.J. 1129, 1130 (1999))).

42. Maureen Dowd, What's a Modern Girl to Do?, N.Y. TIMES, Oct. 30, 2005, § 6 (Magazine), at 50, 55; see also Naomi Wolf, The Porn Myth, N.Y. MAG., Oct. 20, 2003, available at http://nymetro.com/nymetro/news/trends/n_9437/ (discussing the broader social consequences of a society in which "starlets in tabloids boast of learning to strip from professionals; the 'cool girls' go with guys to the strip clubs, and even ask for lap dances; [and] college girls are expected to tease guys at keg parties with lesbian kisses à la Britney and Madonna").

43. See Baldas, supra note 19 (pointing to escalating tensions between appearance policies and the increasingly heterogeneous workforce); Wolf, supra note 42 (comparing young women's sexual attitudes with those forty and over, and concluding that the generations are pitted against each other, with both ultimately harmed by the increasing objectification of women). More recent casino appearance policies make the "Personal Best" requirements look innocuous. In 2003, the Rio Casino in Las Vegas replaced all eighty of its aging cocktail waitresses with young, attractive "Bevertainers" dressed in "bikinilike outfits with string backs." Rod Smith, Rio to Replace Cocktail Servers, LAS VEGAS REV.-J., Feb. 20, 2003, at 1A. Also in 2003, the Borgata Casino in Atlantic City transformed its cocktail waitresses into "Borgata babes." Judy DeHaven, Reflecting on Weighty Matters: 'Borgata Babes' Policy Attracts Rights Inquiry, NEWARK STAR-LEDGER, Apr. 26, 2005, at 13. According to Borgata's policies, waitresses are subject to beauty treatments, personal trainers, "diet cops" at meal breaks, a weigh-in policy where they are given a ninety day suspension and eventually fired if they gain more than seven percent of their initial body weight, and are allegedly encouraged to have breast implants. Id.

44. See infra Part II.
Co. that separate but equal appearance and grooming programs do not discriminate against female employees. Part Three argues that the application of Price Waterhouse to discrimination on the basis of mutable appearance is consistent with Title VII, precedent, and equitable considerations of justice. In conclusion, this Comment posits a legal standard of sex stereotyping that applies to both immutable and mutable sex discrimination and calls for a judicial reevaluation of the existing distinction between the two.

I. APPLYING TITLE VII TO GENDER-SPECIFIC EMPLOYER PREFERENCES

A. Sex and Sexuality as “Bona Fide Occupational Qualifications”

Title VII notably does not prohibit all discrimination on the basis of sex. Rather, Congress created a “bona fide occupational qualification” exception to the statute that applies to employers who find an otherwise prohibited discriminatory action “reasonably necessary to the normal operation of that particular business or enterprise.”

An employer may, for example, permissibly discriminate on the basis of sex when hiring for certain gender-sensitive positions such as midwife or personal caregiver. This exception provides important protections for employers by permitting them to conform to social norms, and for customers by protecting privacy interests.

Although the BFOQ exception’s scant legislative history suggests that Congress intended for it to have a relatively broad application, the Equal Employment Opportunity Commission (EEOC) has taken the opposite stance. The EEOC’s “Guidelines on Discrimination Because of Sex” provide that labels and assumptions as to what constitute “[m]en’s jobs” and “[w]omen’s jobs” do not function as BFOQs. The guidelines explicitly reject “stereotyped characterizations of the sexes” as

47. See Yuracko, supra note 45, at 156.
49. See Yuracko, supra note 45, at 154-55 (citing Interpretive Memorandum on Title VII of H.R. 7152, 110 CONG. REC. 7212 (1964)). Sponsors of Title VII provided examples of BFOQs that would have permitted employers to make broad presumptions regarding a protected status’s relation to a particular skill, including a restaurant hiring only French chefs and a professional sports team hiring only male athletes. Id.
50. See infra notes 51-53 and accompanying text.
51. 29 C.F.R. § 1604.2(a) (2005).
employer considerations warranting the BFOQ exception. 52 According to
the EEOC, BFOQs must be "necessary for the purpose of authenticity or
genuineness" of a business. 53

Courts have further narrowed the EEOC's interpretation, 54 particularly
regarding sexual titillation. 55 Although there have been no known Title
VII challenges to the occupations of legal prostitution or stripping, 56 any
profession where "a particular body is needed and used physically for the
sexual gratification of another person" would arguably fall within the
BFOQ exception for gender specificity. 57

The threshold case involving sex as a BFOQ for employment arose out
of the Playboy Clubs' hiring of female Bunnies in the 1970s. 58 In a 1971
ruling, the New York State Division of Human Rights concluded that
"womanhood" was indeed a BFOQ for Playboy Bunnies under the New
York analog to Title VII. 59 Analogizing Playboy waitressing jobs to
"part[s] in a theatrical production," the Appeals Board found that the
Bunnies' primary task was to provide sex appeal as opposed to simply
serving cocktails. 60 Thus, single-sex hiring was found to be reasonably
necessary to carry out the normal operations of the Playboy Clubs. 61

Following this rationale, courts adopted a primary purpose analysis in
evaluating whether a "plus-sex" business 62 can properly invoke a BFOQ
defense. 63 Unless sexuality is the primary purpose of a business, and thus
reasonably necessary to its daily operations, employers are barred from
using the BFOQ provision. 64 For example, in Guardian Capital Corp. v.
New York State Division of Human Rights, 65 a New York appellate court
ruled that an employer's efforts to transform a hotel restaurant into a
cabaret-themed nightclub by hiring exclusively female servers and requir-

52. Id. § 1604.2(a)(1)(ii).
53. Id. § 1604.2(a)(2).
54. See generally International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187,
200-01 (1991) (adopting the EEOC's narrow interpretation of the BFOQ provision and
holding that the exception only applies to "objective, verifiable requirements [that] con-
cern job-related skills and aptitudes").
55. See infra notes 58-84 and accompanying text.
56. See Yuracko, supra note 45, at 157.
57. Id.
58. See WOLF, supra note 9, at 32-33.
59. Guardian Capital Corp. v. N.Y. State Div. of Human Rights, 360 N.Y.S.2d 937,
60. Id.
61. Id.
62. See Yuracko, supra note 45, at 158 (defining "plus-sex" businesses as those that
"seek to sell sexual arousal, generally through the provision of gaze objects, along with
some other nonsexual good or service").
63. Id. at 172.
64. Id.
ing them to wear “alluring costumes” did not warrant a BFOQ defense. Distinguishing the case from the Playboy Clubs ruling, the court warned that the employer could not engage in discriminatory hiring practices simply to offer customers sexual titillation alongside food.

Wilson v. Southwest Airlines Co. clarified the distinction between the primary purpose of a business and an employer’s efforts to promote that business. Facing financial difficulty, Southwest launched the “‘Love’ campaign” in the early 1970s. For nearly a decade, the airline hired exclusively female ticket agents and flight attendants, outfitted them in hot pants and go-go boots, and adopted an advertising campaign targeting male business passengers.

Conceding it was discriminating against male applicants for customer-oriented positions, Southwest argued that the policy was “crucial to the airline’s continued financial success” and thus a BFOQ reasonably necessary to the operation of the business. The United States District Court for the Northern District of Texas rejected this argument. Finding as an evidentiary matter that “love” was not the only factor in passenger choice, the court went on to carefully differentiate Title VII’s use of the term “business necessity” from mere business convenience:

For purposes of BFOQ analysis . . . the business “essence” inquiry 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.

Applying the above standard, the court concluded that Southwest was in the primary business of selling air transport rather than sexual titilla-

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66. Id. at 938.
67. Id. at 939. But see id. at 940 (Reynolds, J., concurring) (questioning the difference between cabaret girls and Playboy Bunnies).
69. See id. at 302-03.
70. Id. at 294. The campaign was the brainchild of the Bloom Agency, hired to develop a marketing strategy for the failing airline. Id. The Bloom Agency concluded that Southwest should “break away from the conservative image of other airlines and project to the traveling public an airline personification of feminine youth and vitality.” Id.
71. See id. at 294-95. In keeping with the “love” theme, Southwest flew passengers out of Dallas’s Love Field, served “love bites” and “love potions,” and ticketed at the “quickie machine” (an electronic ticketing system) for “instant gratification.” Id. at 294 & n.4. Not surprisingly, these tactics succeeded, making Southwest an overnight industry leader while other airlines suffered significant losses. Id. at 295 n.6.
72. Id. at 293.
73. Id. at 304.
74. Id. at 295-96.
75. Id. at 302 n.25.
tion and therefore not entitled to a BFOQ exception.\footnote{76} Wilson definitively established that only "in jobs where sex or vicarious sexual recreation is the primary service provided...[does a] job automatically call[] for one sex exclusively."\footnote{77}

Courts also have addressed BFOQs in relation to mutable genderson-specific uniform requirements.\footnote{78} Many of these cases are sexual harassment claims stemming from employers requiring female employees to wear sexually suggestive attire in the interest of customer preference.\footnote{79} Courts consistently hold that dress and appearance codes that place employees at risk for sexual harassment create actionable claims under Title VII.\footnote{80} Consistent with holdings involving immutable sex discrimination,

\footnote{76. Id. at 302-03. At the same time, however, the court foreshadowed a slippery slope effect in challenges to "plus-sex" employment practices: Rejecting a wider BFOQ for sex does not eliminate the commercial exploitation of sex appeal. It only requires, consistent with the purposes of Title VII, that employers exploit the attractiveness and allure of a sexually integrated workforce. ... This case has serious underpinnings, but it also has disquieting strains. These strains, and they were only that, warn that in our quest for non-racist, non-sexist goals, the demand for equal rights can be pushed to silly extremes. Id. at 304-05.}

\footnote{77. Id. at 301. Unfettered by Wilson, some in the airline industry have continued to follow the Southwest model. In 2003, Hooters branched out into Hooters Air, which provided flights from locations such as Gary, Indiana and Newark, New Jersey to the Bahamas, Las Vegas, and Myrtle Beach, advertising "a great experience that enlivens the senses and puts the fun back in flying!" with "two Hooters Girls on every flight!" Advantages to Flying Hooters Air, http://www.hootersair.com/about/advantages (last visited Sept. 23, 2006); Hooters Air Flight Schedules, http://www.hootersair.com/flight_schedules (last visited Sept. 23, 2006). In an irreverent nod to its earlier campaign, Southwest recently launched an advertisement campaign featuring pre-Wilson "love airlines" stewardesses cheekily lamenting, "the hot pants had to go." MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 324 (5th ed. 2003).}

\footnote{78. See infra notes 79-84 and accompanying text. It should be noted that the plain language of the BFOQ provision only excepts decisions to hire or employ, and does not address terms or conditions of employment. See Cruz, supra note 23, at 244-45. However, only one federal court has adopted such a narrow reading of the provision, with the remainder reading the exception to mirror the central clause of Title VII. See id. (citing Hodgson v. Robert Hall Clothes, Inc., 326 F. Supp. 1264, 1270 (D. Del. 1971)).}

\footnote{79. See Yuracko, supra note 45, at 198 & n.190 (collecting cases); see also infra note 80.}

\footnote{80. See Marentette v. Mich. Host, Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980): [T]here is a difference between reasonable employment decisions based on factors such as grooming and dress, and unreasonable ones. ... [T]he Court believes that some form of dress code could violate and, thus, fall within the provisions of Title VII. The Court believes that a sexually provocative dress code imposed as a condition of employment which subjects persons to sexual harassment could well violate the true spirit and the literal language of Title VII. See also EEOC v. Newtown Inn Assocs., 647 F. Supp. 957, 958-60 (E.D. Va 1986) (upholding the EEOC's finding that female cocktail waitresses had a Title VII claim after being required to dress in provocative clothing and participate in sexually-oriented theme nights such as "Bikini Night," "P.J. Night," and "Whips and Chains Night"); Priest v. Rotary, 634}
the BFOQ defense rarely applies.\textsuperscript{81}

For example, in \textit{EEOC v. Sage Realty Corp.},\textsuperscript{82} the United States District Court for the Southern District of New York held that requiring a lobby attendant to wear a revealing "Bicentennial uniform," which elicited unwelcome sexual comments and innuendoes, violated Title VII.\textsuperscript{83} The court held that suggestive dress clearly was not a BFOQ for lobby guards; rather, the inviting uniform hindered the position's primary security and safety functions.\textsuperscript{84}

**B. McDonnell Douglas Disparate Treatment**

If a BFOQ defense is unavailable, employees who allege that their employer acted with discriminatory intent or motive may bring a Title VII disparate treatment claim.\textsuperscript{85} In order to set out a prima facie case of disparate treatment, an employee must satisfy the test the Supreme Court articulated in \textit{McDonnell Douglas Corp. v. Green}.\textsuperscript{86} This requires proof that the plaintiff: (1) is part of a protected class; (2) is qualified for the position in question; (3) was subject to a materially adverse employment action despite being so qualified; and (4) can provide the court with indicia that the employer was acting with a discriminatory motive.\textsuperscript{87}

Once the plaintiff establishes a prima facie case, the defendant may present evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason.\textsuperscript{88} If the defendant meets this bur-

\textsuperscript{81} F. Supp. 571, 574, 581 (N.D. Cal. 1986) (holding a cocktail waitress established a prima facie case of Title VII discrimination by demonstrating that she was terminated for her refusal to wear "something low-cut and slinky" at the request of the defendant supervisor).

\textsuperscript{82} See \textit{Yuracko}, supra note 45, at 198.


\textsuperscript{84} \textit{Id.} at 602-05, 607-08.

\textsuperscript{85} \textit{Id.} at 611.

\textsuperscript{86} \textit{Rothstein & Liebman, supra} note 77, at 281-82; \textit{Black’s Law Dictionary} 504 (8th ed. 2004). Alternatively, a disparate impact claim is appropriate when employees feel a facially neutral employment practice has a discriminatory effect. \textit{Rothstein & Liebman, supra} note 77, at 281-82; \textit{Black’s Law Dictionary, supra}, at 504; \textit{see also Griggs v. Duke Power Co.}, 401 U.S. 424, 430 (1971). Disparate impact claims are rare because the approach requires plaintiffs to explicitly pinpoint the particular action that caused the discriminatory effect, a task that is virtually impossible in "nuanced" employment situations. \textit{See Lee, supra} note 41, at 491, 494. Because the appearance and grooming standards at issue here are read within the framework of intentionally imposed sex stereotypes, disparate impact analysis is outside the scope of this Comment. For a discussion of how Title VII disparate impact claims and defenses may be applied to appearance-based discrimination, \textit{see Zakrzewski, supra} note 10, at 440-42.

\textsuperscript{87} 411 U.S. 792, 802 (1973).

\textsuperscript{88} \textit{Id.}
den, the plaintiff may rebut the employer's assertion with evidence that the articulated reason is mere pretext hiding a truly discriminatory motive. The court then is charged with weighing the evidence to determine, as a matter of fact, whether the plaintiff has been subjected to discrimination. Thus, the plaintiff bears the ultimate burden of persuading the finder of fact by a preponderance of the evidence that the defendant acted with a prohibited intent.

Mixed motive cases occur when the plaintiff is only able to present evidence that a discriminatory bias was one of multiple reasons for an adverse employment action. Mixed motive cases are particularly salient for employees alleging discrimination on the basis of an appearance or grooming standard, as employers at least partially enforce standards for nondiscriminatory reasons, including promoting business and establishing uniformity.

Mixed motive cases present specific evidentiary problems. First, mixed motive plaintiffs bear a higher burden of proof in establishing a prima facie case. In Desert Palace, Inc. v. Costa, the Supreme Court clarified the evidentiary standard used in mixed motive cases. The Court held that although direct evidence of a discriminatory motive is not necessary to establish a prima facie case, the plaintiff must still prove by a preponderance of the evidence that discriminatory bias was a motivating factor in the employment practice. Second, mixed motive defendants may present a "same decision" defense if they can show by a preponderance of the evidence that the adverse action would have still taken place.

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89. Id. at 804. Factors that the Court lists as indicative of pretext include: the presence of similarly situated comparators of a different protected class who have not experienced the same treatment; past adverse treatment towards the plaintiff; retaliatory behavior by the employer; and the employer's past and present equal employment policies and practices. Id. at 804-05; see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 514-15 (1993) (applying similar standards for revealing pretext).

90. See Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982) (holding that a determination as to whether or not discriminatory intent existed is a factual finding).

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


94. See id.

95. See id. at 489-90.


97. See id. at 101.

98. Id. This language must often then be reconciled with lower court precedent stating that the discriminatory motive must have been a "determinative factor" in the challenged practice. See Skojec, supra note 92, at 271.
absent the discriminatory motive. As such, McDonnell Douglas raises significant challenges for employees who may be unable to conclusively establish that a particular appearance or grooming standard is imposed “because of . . . sex.”

C. Price Waterhouse Sex Stereotyping

In 1989, the Supreme Court substantially expanded the scope of Title VII in Price Waterhouse v. Hopkins. Specifically, the Court read the statute as prohibiting employers from forcing their employees to conform to gender stereotypes as a condition of employment. By looking beyond the plain language of Title VII to the legislative intent of the phrase “because of . . . sex,” Price Waterhouse clashed with lower court rulings allowing employers to exploit women for the purposes of commercializing sex, provided that it was done on an equal opportunity basis.

The plaintiff in Price Waterhouse, Ann Hopkins, was a candidate for partnership with the firm. Of the eighty-eight candidates, Hopkins was the only woman. Although she received excellent performance evaluations and won praise for her “strong character, independence, and integrity,” her aggressive behavior was not always welcome. Both supporters and opponents of Hopkins’ partnership bid noted that she was “sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.” As a result, she was passed over in 1982 and was not reconsidered the following year. Hopkins brought a Title VII suit alleging that Price Waterhouse denied her partnership bid because of her sex.

At trial, Hopkins presented significant circumstantial evidence that her gender played a role in Price Waterhouse’s ultimate decision. Hopkins pointed out that the bulk of her negative evaluations had been framed in gendered terms: she was described as “macho”; as “overcompensat[ing] for being a woman”; told to “take ‘a course at charm school’”; and criti-
ized for swearing.\textsuperscript{112} One partner explicitly advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances of making partner.\textsuperscript{113} A social psychologist also testified that sex stereotyping appeared to be a factor in the partnership selection process.\textsuperscript{114} The United States District Court for the District of Columbia concluded that Price Waterhouse, although permitted to consider interpersonal skills in the selection process, had impermissibly relied on sex stereotypes to make its assessment of Hopkins.\textsuperscript{115} The Court of Appeals for the District of Columbia Circuit affirmed.\textsuperscript{116}

The Supreme Court agreed that sex stereotypes played an impermissible role in Hopkins' evaluation.\textsuperscript{117} In his plurality opinion,\textsuperscript{118} Justice Brennan clarified the term "sex stereotyping" in relation to Title VII:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, 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.'" 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. . . . The plaintiff must show that the employer actually relied on her gender in making its decision [and] stereotyped remarks can certainly be evidence that gender played a part.\textsuperscript{119}

\begin{thebibliography}{100}
\bibitem{112} Id.
\bibitem{113} Id.
\bibitem{114} Id.
\bibitem{115} Id. at 236-37.
\bibitem{116} Id. at 237.
\bibitem{117} See id.
\bibitem{118} See id. at 258-61 (White, J., concurring); id. at 261-79 (O'Connor, J., concurring). Justice O'Connor advocated a stricter burden of proof that required mixed motive plaintiffs to prove "by direct evidence that an illegitimate criterion was a substantial factor in the decision." \textit{Id.} at 276 (O'Connor, J., concurring). Applying this standard, Justice O'Connor joined the plurality in concluding that Hopkins proved she was impermissibly terminated based on her failure to conform to sex stereotypes. \textit{Id.} at 272. After Title VII was amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, to reflect the plurality's analysis in \textit{Price Waterhouse}, Justice O'Connor agreed that Title VII does not require mixed motive plaintiffs to present direct evidence of sex discrimination. \textit{See} Desert Palace, Inc. v. Costa, 539 U.S. 90, 102 (2003) (O'Connor, J., concurring).
\bibitem{119} \textit{Price Waterhouse}, 490 U.S. at 251 (second alteration in original) (citations omitted).
\end{thebibliography}
Although the Supreme Court has since addressed sex stereotyping in other contexts,\(^\text{120}\) it has yet to clarify the standard of proof necessary for plaintiffs to establish that sex stereotyping played a "motivating part in an employment decision."\(^\text{121}\) Lower courts must rely on the specific facts of Price Waterhouse and the Court's vague language in determining how far the Price Waterhouse decision extends, and in what contexts it applies.\(^\text{122}\)

II. APPLYING TITLE VII TO APPEARANCE AND GROOMING STANDARDS: THE UNEQUAL BURDENS TEST AND THE LINE BETWEEN IMMUTABLE STATUS AND MUTABLE APPEARANCE

Although Title VII has been successfully applied to employment decisions that tangentially involve appearance and grooming, these cases are the exception rather than the rule.\(^\text{123}\) In pure Title VII challenges to gender-differentiated dress codes, appearance is considered independent of sex unless plaintiffs can otherwise prove McDonnell Douglas disparate treatment.\(^\text{124}\) In other words, members of one sex must establish that they

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121. See Price Waterhouse, 490 U.S. at 254-55. The opinion clarified that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." Id. at 244-45. However, it did not elaborate on how plaintiffs could establish that sex stereotypes were motivating factors in the employment action. See id. at 258. In fact, Justice Brennan expressly declined to establish such standards. Id. at 252; see also Gregory G. Sarno, Article, Employer's Discriminatory Appearance Code, 33 AM. JUR. PROOF OF FACTS 2D 71, 88-90 (1983) (providing case illustrations to demonstrate the differing factors courts use in determining whether an employment action is predicated on an offensive stereotype).

122. See Melissa Hart, Subjective Decisionmaking and Unconscious Discrimination, 56 ALA. L. REV. 741, 759 (2005) (arguing that the Price Waterhouse "mixed motive claim . . . was, at best, a mixed blessing for plaintiffs" because, although it gave them the ability to bring a sex stereotyping claim, it also provided courts and employers with a virtually impenetrable "same decision" defense). Congress attempted to resolve the potential effects of this circular reasoning when it passed the Civil Rights Act of 1991. Id. First, Title VII now confirms that plaintiffs can establish a prima facie case by "demonstrat[ing] that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." See 42 U.S.C. § 2000e-2(m) (2000); Hart, supra, at 759-60. Second, and more importantly, the Act codified the affirmative "same decision" defense in such a way that it limits damages, but not liability. See 42 U.S.C. § 2000e-5(g)(2)(B); Hart, supra, at 760.


124. Sarno, supra note 121, at 88-90.
have been treated differently from comparators of the opposite sex by being saddled with calculable unequal burdens in conforming to an employer's standards.\textsuperscript{125}

The origins of the judicial distinction between appearance discrimination and sex discrimination are rooted in the culture wars of the 1960s and 1970s.\textsuperscript{126} Courts consistently rejected young men's attempts to use the newly established Title VII gender discrimination claim to maintain their longer hairstyles.\textsuperscript{127} The Ninth Circuit, for example, concluded in \textit{Baker v. California Land Title Co.}\textsuperscript{128} that differentiating hair length requirements for men were inconsequential burdens and not based on sex within the meaning of Title VII.\textsuperscript{129} Courts reached the same conclusion in challenges to necktie and no-beard policies for men and no-pants policies for women.\textsuperscript{130}

Initially, some employers argued that \textit{Baker} placed all appearance and grooming standards “outside the purview of Title VII,” regardless of their effects on a particular sex.\textsuperscript{131} Although this broad interpretation was rejected in \textit{Gerdom v. Continental Airlines, Inc.}\textsuperscript{132} and replaced with the unequal burdens test,\textsuperscript{133} courts have differed in how they weigh the burdens imposed by gender-differentiated appearance and grooming requirements.\textsuperscript{134}

\textsuperscript{125} Frank v. United Airlines, Inc., 216 F.3d 845, 854-55 (9th Cir. 2000) (discussing and applying the unequal burdens test to United Airlines' gender-differentiated weight standards for flight attendants).


\textsuperscript{127} \textit{See}, e.g., Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Knott v. Mo. Pac. R.R., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975); Baker v. Cal. Land Title Co., 507 F.2d 895, 896-97 (9th Cir. 1974); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1117 (D.C. Cir. 1973).

\textsuperscript{128} 507 F.2d 895.

\textsuperscript{129} \textit{Id.} at 896-97 (“It seems clear from a reading of the Act that Congress was not permitted to add ‘sex’ to Title VII on account of regulations by employers of dress or cosmetic or grooming practices which an employer might think his particular business required.”).


\textsuperscript{131} \textit{See} Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 605 (9th Cir. 1982).

\textsuperscript{132} \textit{Id.} at 606.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Compare infra} notes 135-37 and accompanying text (demonstrating how some pre-\textit{Price Waterhouse} courts viewed sex stereotypes as burdens under the equal burdens test), \textit{with infra} notes 138-62 and accompanying text (demonstrating how the Ninth Circuit recently applied a facial “objective impediment” version of the unequal burdens test).
Well before the Supreme Court weighed in on the issue of sex stereotyping, some lower courts incorporated the “demeaning” effects of gender-differentiated uniforms into the unequal burdens analysis. For example, the Seventh Circuit endorsed the notion that gender-differentiated uniforms predicated on the belief that female employees were unable to dress as professionally as men violated Title VII, and were not simply reflections of “accepted social [appearance and grooming] norms.” Also, the United States District Court for the Southern District of Ohio held that uniforms rooted in harmful sex stereotypes were tangible conditions of employment based on sex.

Recent decisions have not been as generous in applying the unequal burdens test, despite the Supreme Court’s formal recognition of sex stereotyping in 1989. In Frank v. United Airlines, Inc., the Ninth Circuit addressed United Airlines’ gender-specific weight standards for flight attendants that translated into medium-build maximums for women.

135. See, e.g., infra notes 136-37 and accompanying text.
136. Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032 (7th Cir. 1979). In Carroll, which was decided a decade before Price Waterhouse, the Seventh Circuit held that the employer could not require female bank tellers to wear uniforms while allowing male tellers to wear ordinary business attire. Id. The court first noted that the dress code was discriminatory in terms of compensation, as women were required to purchase and dry clean their own uniforms. Id. at 1030. Responding to the employer’s stated justification that the policy reduced “dress competition” and variable fashions among women, the court asserted that the belief that women were unable to dress as professionally as men was not only an inadequate reason to preclude liability, but also a “demeaning . . . stereotypical assumption[. . .] anathema to the maturing state of Title VII analysis.” Id. at 1033 (citing In re Consolidated Pretrial Proceedings in the Airlines Cases, 582 F.2d 1142, 1146-47 (7th Cir. 1978)).
137. O’Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987). O’Donnell held that a smock requirement for women with only an equivalent business attire requirement for men constituted a violation of Title VII. Id. Although the smocks were provided to female employees at no cost, the court nevertheless concluded that the unequal burdens test had been satisfied:

We believe the cornerstone of the Talman decision is that it is demeaning for one sex to wear a uniform when members of the other sex holding the same positions are allowed to wear professional business attire. . . . [W]e find that the smock rule creates disadvantages to the conditions of employment of female sales clerks . . .

Id. at 264, 266; see also Tamimi v. Howard Johnson Co., 807 F.2d 1550 (11th Cir. 1987). Sondra Tamimi was a desk clerk who brought suit against the Howard Johnson Company following her termination for failure to comply with a mandatory makeup requirement. Id. at 1550-52. Management implemented the requirement only when Tamimi became pregnant and management began to express concern about her resulting pale complexion and acne. Id. at 1551. Declining to apply an unequal burdens test altogether given the “unusual” nature of the case, the court concluded that Tamimi was impermissibly terminated because of management’s aversion to her pregnancy (a protected sex characteristic under Title VII), not her appearance. Id. at 1554.
138. See infra notes 139-62 and accompanying text.
139. 216 F.3d 845 (9th Cir. 2000).
and large-build maximums for men. In striking down the policy, the court relied solely on the fact that the policy was facially disproportionate, expressly declining to comment on whether the application of a different weight standard for women in itself was discriminatory.

A year later in Nichols v. Azteca Restaurant Enterprises, Inc., the Ninth Circuit was again careful to exclude employer-imposed appearance and grooming standards from its consideration when applying Price Waterhouse to the same-sex sexual harassment claim of an effeminate homosexual employee.

The Ninth Circuit's reluctance to apply Title VII to appearance and grooming standards culminated in Jespersen v. Harrah's Operating Co.

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140. Id. at 854.
141. See id. at 855. But see Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 439 n.24, 454-57 (D.C. Cir. 1976) (holding that facially neutral weight and height requirements, uniform maintenance allowances, and no-eyeglass rules are violations of Title VII where they "operate to 'freeze' the status quo of prior discriminatory employment practices" (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971))).
142. Frank, 216 F.3d at 855.
143. 256 F.3d 864 (9th Cir. 2001).
144. Id. at 875 n.7 ("[O]ur 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."). Nichols involved a male waiter who alleged sexual harassment after being told he carried his tray "like a woman"; was berated for not having sexual intercourse with a female co-worker; and was referred to in the female person by male co-workers. Id. at 874. The court concluded that the harassment was indeed "because of sex" pursuant to Price Waterhouse's definition of sex stereotyping. Id. at 875. In doing so, it was forced to overrule its previous holding in DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979), that appearance-based sex stereotypes related to sexual orientation were entirely outside the scope of Title VII. Id.
145. 280 F. Supp. 2d 1189 (D. Nev. 2002), aff'd 392 F.3d 1076 (9th Cir. 2004), aff'd on reh'g en banc, 444 F.3d 1104 (9th Cir. 2006); see Cruz, supra note 23, at 242 (deeming Jespersen a "hero" among casino workers); Jon Christensen, Rouge Rogue, MOTHER JONES, Mar./Apr. 2001, available at http://www.motherjones.com/news/hellraiser/2001/03/hellraiser.html (deeming Jespersen a "hellraiser"). Jespersen has become something of a poster child for appearance discrimination, particularly within the gaming industry. See Deidre Pike, Sex or Service: Casino Appearance Policies Are Stricter than Those at the Bunny Ranch, RENO NEWS & REV., Feb. 15, 2001, available at http://www.newsreview.com/issues/reno/ 2001-02-15/news.asp. Her case has received substantial media attention, and her story has been featured in People, Time, and on the BBC. Id. Encouraged by the negative public response to "Personal Best," the Alliance for Workers' Rights, the American Civil Liberties Union, the AFL-CIO, and the Nevada Women's Lobby have upped their fight against casino appearance policies. Id. In 2001, the Alliance for Workers' Rights, with the public support of Jespersen, launched the "Kiss My Foot" campaign, targeting casino policies that require cocktail waitresses to wear high heels for excruciating eight to ten hour shifts. Id. However, Nevadans' attempts at lobbying for legislative protections for casino workers have been largely unsuccessful. For example, a 2001 bill that would have prevented discrimination against employees unable to comply with mandatory dress requirements for medical reasons failed to pass in the Nevada Senate following substantial lobbying efforts by the Nevada Resort Association. See S.B. 23, 71st Leg. (Nev. 2001); Provisions Governing Discrimination Against Employees Who Have Certain Medical
In her suit, Jespersen alleged that Harrah’s unlawfully fired her for refusing to conform to a sex stereotype (namely, wearing makeup) pursuant to *Price Waterhouse*. The United States District Court for the District of Nevada relied on *Baker* and *Frank* in holding that sex-differentiated appearance and grooming standards were “expressly excepted . . . from the confines of the *Price Waterhouse* rule.” The court went on to apply its version of the unequal burdens test: “Women must wear makeup. Men cannot . . . ‘[I]n modern society, both men and women wear makeup . . . .’ Thus, prohibiting men from wearing makeup may be just as objectionable to some men as forcing women to wear makeup . . . .” Rather than looking to the actual burdens imposed by the policy, the court simply equated the policy’s negative prohibitions with its positive requirements, and concluded that Jespersen was in no worse a position than her hypothetical, makeup-wearing male counterparts.

On appeal, the Ninth Circuit upheld the district court’s analysis. Over a strong dissent, the majority affirmed that Jespersen was not entitled to introduce *Price Waterhouse* evidence. The court found *Frank’s* version of the unequal burdens test controlling, noting that *Price Waterhouse* did not address the issue of appearance and grooming standards. In response to Jespersen’s alternative argument that the district court improperly ignored the time and cost burdens that makeup and hair

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147. *Id.*
148. *Id.* (citation omitted).
149. *Id.*
150. See *Jespersen v. Harrah’s Operating Co.* (*Jespersen I*), 392 F.3d 1076, 1077 (9th Cir. 2004), aff’d on reh’g en banc, 444 F.3d 1104 (9th Cir. 2006).
151. *Id.* at 1083-87 (Thomas, J., dissenting). Judge Thomas averred that “Jespersen has articulated a classic case of *Price Waterhouse* discrimination and has tendered sufficient undisputed, material facts to avoid summary judgment.” *Id.* at 1084. Specifically, Judge Thomas observed that Jespersen was required to conform to a clear stereotype that had no relationship to bartending, noting that “Title VII does not make exceptions for particular industries.” *Id.* at 1085-86. Even assuming arguendo that the district court’s unequal burdens test was correct, Judge Thomas argued that the “Personal Best” onus was on its face more stringent for females than for males, and that Jespersen had raised a clear issue of material fact as to whether it imposed unequal burdens, making summary judgment improper. *Id.* at 1086.
152. *Id.* at 1083 (majority opinion) (“[A]lthough we have applied the reasoning of *Price Waterhouse* to sexual harassment cases, we have not done so in the context of appearance and grooming standards cases, and we decline to do so here.”).
153. *Id.*; see also *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (applying a strictly facial version of the unequal burdens test).
154. *Jespersen I*, 392 F.3d at 1082.
requirements have on women, the court countered that she had failed to provide specific evidence sufficient to preclude summary judgment.\textsuperscript{155} Jespersen petitioned for, and was granted, en banc rehearing before the Ninth Circuit.\textsuperscript{156} On rehearing, the Ninth Circuit affirmed summary judgment for Harrah's in a seven-to-four decision.\textsuperscript{157} Although Chief Judge Schroeder's majority opinion rejected the court's previous refusal to apply \textit{Price Waterhouse} to appearance and grooming standards, leaving the door open for future sex stereotyping claims,\textsuperscript{158} it found that Jespersen had not established that the makeup requirement in question was discriminatory.\textsuperscript{159} Specifically, it held that “requirements must be viewed in the context of the overall policy,” and that under this standard, Jespersen failed to establish she was required to “conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender.”\textsuperscript{160} The court also rejected Jespersen's unequal burdens argument, refusing to take judicial notice of the cost and time required to comply with makeup requirements.\textsuperscript{161} Two judges dissented on both sex stereotyping and unequal burdens grounds.\textsuperscript{162}

\textsuperscript{155} \textit{Id.} at 1081. The court also noted the high level of discretion afforded to courts when applying the unequal burdens test: “[The unequal burdens test] is not an exact science yielding results with mathematical certainty. . . . [A]ny ‘burden’ to be measured under the ‘unequal burdens’ test is only that burden which is imposed beyond the requirements of generally accepted good grooming standards.” \textit{Id.} at 1081 n.4.

\textsuperscript{156} Jespersen v. Harrah's Operating Co., 409 F.3d 1061 (9th Cir. 2005).

\textsuperscript{157} Jespersen v. Harrah's Operating Co. (\textit{Jespersen II}), 444 F.3d 1104, 1106, 1113 (9th Cir. 2006) (en banc).

\textsuperscript{158} See \textit{id.} at 1113 (“We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves.”).

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.} at 1112-13.

\textsuperscript{161} \textit{Id.} at 1110-11 (citing \textit{FED. R. EVID.} 201; \textit{FED. R. CIV. P.} 56(e)). For criticisms of the court's refusal to acknowledge the time and monetary costs of “Personal Best” within a traditional unequal burdens framework, see \textit{id.} at 1117 (Kozinski, J., dissenting) (“You don't need an expert witness to figure out that [makeup doesn't] grow on trees. . . . Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists.”); Posting of Paula Branter to Workplace Fairness Blog: Today's Workplace, http://www.workplacefairness.org/2005_01_01_pblog_archive.php (Jan. 3, 2005) (“Have these judges never lived with or shared a bathroom with a woman? [The absurdity of the equal burdens argument] seems like an issue that even Justice David Souter, the U.S. Supreme Court's perennial bachelor, could understand.”). An informal cost survey of low-end stockings, hair products, and makeup reveals that Harrah's female bartenders were paying hundreds, if not thousands, of dollars more annually than their male peers to look their “Personal Best.” See \textit{id.}

\textsuperscript{162} See \textit{Jespersen II}, 444 F.3d at 1113-17 (Pregerson, J., dissenting); \textit{id.} at 1117-18 (Kozinski, J., dissenting). Judge Pregerson argued that little evidence was needed to conclude that the “Personal Best” program imposed sex stereotypes on female employees given the Supreme Court's decision in \textit{Price Waterhouse}. \textit{Id.} at 1114-15 (Pregerson, J.,
Even while Jespersen I remained under review, courts began to apply its lax version of the unequal burdens test to cases that involved individualized employer preferences rather than company-wide standards.163 Similarly, Jespersen II will likely preclude future plaintiffs from challenging the vast majority of stereotypical appearance and grooming codes, as well as abrogate a much broader line of cases involving divergent appearances and mannerisms.164

III. UNDERSTANDING APPEARANCE AND GROOMING STANDARDS AS SEX DISCRIMINATION: A DEONTOLOGICAL APPROACH

A. Recognizing the Need to Impose Reasonable Standards and Preventing a Slippery Slope Effect

Many academics, practitioners, and civil rights advocacy groups are troubled by a teleological, business-oriented approach to appearance and grooming standards.165 Jennifer Pizer, an attorney with the Lambda Le-

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163. See, e.g., Sturchio v. Ridge, No. CV-03-0025-RHW, 2005 WL 1502899, at *15-16 (E.D. Wash. June 23, 2005) (citing Jespersen I and concluding that the employer could order a male employee who had chosen to function in society as a woman not to wear a dress because the request did not constitute an unequal burden, despite the fact that women in the administrative office were permitted to wear dresses, the office had a long history of harassment against the plaintiff, and co-workers had recently complained to management about the plaintiff’s effeminate behavior).

164. Compare Sturchio, 2005 WL 1502899, at *16 (applying Jespersen I to deny a Title VII claim), with Barnes v. City of Cincinnati, 401 F.3d 729, 734-35, 738 (6th Cir.), cert. denied, 126 S. Ct. 624 (2005) (finding that a male employee with a French manicure, arched eyebrows, and makeup established a Price Waterhouse claim after being demoted for his lack of “command presence” and “grooming deficiencies”), Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004) (finding that a male employee with Gender Identity Disorder established a Price Waterhouse claim based on his employer’s aversion to his effeminate appearance and holding that “employers who discriminate against men because they . . . wear dresses and makeup, or otherwise act femininely, are . . . engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex”), and Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (applying Price Waterhouse and finding that refusing to give a loan application to a transsexual based on his effeminate appearance could be a violation of the Equal Credit Opportunity Act, which makes it unlawful for creditors to discriminate against credit applicants “‘on the basis of . . . sex’”).

165. See Cruz, supra note 23, at 258-59; Recent Case, Ninth Circuit Holds that Women Can Be Required to Wear Makeup as a Condition of Employment, 118 HARV. L. REV. 2429, 2436 (2005) [hereinafter Recent Case]; Sherry F. Colb, Makeup Requirements for
gal Defense and Education Fund and counsel for Jespersen, argued that
the Ninth Circuit panel presumptively assumed that applying *Price
Waterhouse* to appearance-based impositions would destroy employers’
ability to enact employee standards and would mire society in frivolous
lawsuits by “eccentric” employees. Pizer pointed out, however, that
Jespersen was not objecting to “neutral, professional standards” or “uni-
forms identifying an employee with his or her employer,” but rather the
specific application of a “demeaning stereotype.” Commentators note
that a more BFOQ-like inquiry into what constitutes an objectively rea-
sonable dress and grooming standard, in addition to health, safety, and
dress ordinances regulating workplace appearance, would provide ade-
quate protections for employers.

166. *See Reply Brief of Appellant at 8-10, Jespersen II, 444 F.3d 1114 (No. 03-15045). Amici curiae briefs in support of Harrah’s set forth a colorful parade of horribles regarding Title VII’s prospective application to appearance and grooming codes, including claims by “employees who sport jewelry like Mr. T, wear makeup like Gene Simmons of Kiss, dress like Dennis Rodman, have hair like Fabio or beards like a member of ZZ Top.” Brief of Council for Employment Law Equity et al. as Amici Curiae Supporting Defendant-Appellee at 23, Jespersen II, 444 F.3d 1114 (No. 03-15045). 167. *See Recent Case, supra note 165, at 2434-35 (noting that the dicta in Nichols refers to reasonable appearance and grooming standards, and should not apply to clearly unreasonable standards, such as those that interfere with personal job performance). Jespersen I and Jespersen II appeared to narrowly define objectively unreasonable policies as only those that directly cause sexual harassment or interfere with the job performance of an entire class of employees. See Jespersen II, 444 F.3d at 1112-13 (noting that Jespersen found the makeup requirement “personally offensive” and that “[t]his is not a case where the dress or appearance requirement is intended to be sexually provocative . . . [n]or is this a case of sexual harassment”); Jespersen v. Harrah’s Operating Co. (Jespersen I), 392 F.3d 1076, 1082-83 (9th Cir. 2004), aff’d on reh’g en banc, 444 F.3d 1104 (9th Cir. 2006) (limiting the application of *Price Waterhouse* to sexual harassment cases and pointing out that Jespersen was never sexually harassed). In fact, the Jespersen I and Jespersen II definitions of reasonableness appear even broader than the definitions that rationalized the exclusion of appearance and grooming standards in the early hair length cases. See Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (defining reasonable grooming standards as those “in accordance with generally accepted community standards of dress and appearance”); Fagan v. Nat’l Cash Register Co., 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973) (defining reasonable grooming regulations as those that take into account “basic differences in male and female physiques and common differences in customary dress”). 169. *See Jespersen II, 444 F.3d at 1118 (Kozinski, J., dissenting) (distinguishing “Personal Best” from policies that reflect the anatomical differences between the sexes, such as
Jespersen II's objective standard gives employers the ability to impose reasonable gender-specific appearance and grooming standards without fear of Title VII challenges. However, in its fervor to avoid interfering with employers' business judgments, the Ninth Circuit's approach appears to have unnecessarily excluded an entire class of clearly unreasonable standards from Title VII's coverage.

B. Looking to the Literal and Interpretive Meaning of Title VII

1. Title VII's Prohibition Against Adverse Employment Actions "Because of . . . Sex"

Courts and commentators make the common sense observation that appearance standards such as mandatory makeup for women are per se imposed "because of . . . sex." In Price Waterhouse, the Supreme Court read the words "because of" to mean that gender must be irrelevant to employment decisions, regardless of whether or not there is direct causation. Accordingly, the Sixth Circuit recently applied a "but for" test in concluding that requiring women to wear makeup would constitute a Title VII violation. But for an employee's female status, an employer would not fire her for refusing to wear makeup, making gender a relevant factor in the termination.

Professor David Cruz also applies a "straightforward interpretation" of Title VII to reveal the "baroque and linguistically implausible interpretations of what it is to 'discriminate'" set forth in the unequal burdens test and cases like Jespersen:

indecent exposure laws); Reply Brief of Appellant, supra note 166, at 8-9 (observing that employers may require employees to comply with local ordinances). 170. See Jespersen II, 444 F.3d at 1112; see also Bartlett, supra note 123, at 2553-54 (discussing the value of formal dress and appearance codes to employers). 171. See supra note 168 and accompanying text (comparing an intuitive definition of reasonableness with the Ninth Circuit's determination that appearance and grooming standards are presumed reasonable as long as they do not elicit sexual harassment of employees and do not objectively impede a class of employees' ability to perform their jobs). 172. See Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004); Baron, supra note 15, at 370; Cruz, supra note 23, at 244-45; Recent Case, supra note 165, at 2435. 173. See Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989). In fact, EEOC regulations categorize certain gender-differentiated dress codes as direct evidence of sex discrimination. See U.S. Equal Employment Opportunity Comm'n, EEOC Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992), http://www.eeoc.gov/policy/docs/disparat.html (listing a dress code requiring women to wear miniskirts as an example of direct evidence of sex discrimination). 174. See Smith, 378 F.3d at 574 ("After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex."). 175. See supra notes 173-74 and accompanying text.
Darlene Jespersen was fired for refusing to wear the make-up regimen prescribed for women. . . . Yet male bartenders were not subject to this term or condition. Accordingly, this is discrimination prohibited by Title VII (discrimination on the basis of sex in a term or condition of employment) that is never authorized by the BFOQ provision [pursuant to the plain language of the BFOQ provision, which only addresses decisions to “hire and employ”].

Both the Sixth Circuit and Professor Cruz’s readings of Title VII emphasize that the only conceivable reason an employer imposes makeup on employees is because they are female.

2. The “Plus-Sex” Business Distinction

Frank, Nichols, Jespersen I, and Jespersen II reflect understandable concern about avoiding a slippery slope of Title VII challenges to every uniform in the country. However, there are recognizable differences in what gender-differentiated appearance or grooming standards set out to achieve, depending on whether a business is purely for sexual titillation, “plus-sex,” or strictly goods and services oriented. Pursuant to the primary purpose doctrine, the BFOQ exception permits gender specificity when job tasks are primarily related to sex. This is a nuanced, but navigable, line of precedent developed through forty years of BFOQ analysis.

Jespersen II precluded such a distinction. Jespersen II essentially held that as long as employers impose a facially equal burden on men and ensure the standard would not objectively impede job performance, they are free to impose on women any demeaning appearance stereotype they wish, regardless of its relevance to the job or the actual social, emo-

176. Cruz, supra note 23, at 244-47 (citation omitted).
178. See Jespersen v. Harrah’s Operating Co. (Jespersen II), 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc); Jespersen v. Harrah’s Operating Co. (Jespersen I), 392 F.3d 1076, 1082-83 (9th Cir. 2004), aff’d on reh’g en banc, 444 F.3d 1104 (9th Cir. 2006); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 n.7 (9th Cir. 2001); Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir. 2000); cf. Bartlett, supra note 123, at 2553-55 (discussing the extent to which dress and appearance standards are utilized to achieve business goals).
179. See Yuracko, supra note 45, at 156-59 (tracing the “continuum” of business goals involved in BFOQ defenses).
180. See supra Part I.A.
181. See supra Part I.A.
182. See Cruz, supra note 23, at 244-45.
183. See Jespersen II, 444 F.3d at 1116 (Pregerson, J., dissenting).
tional, or psychological harm it may cause. Harrah's is thus permitted to function as a “plus-sex” business without ever having to raise a BFOQ defense or legitimate, nondiscriminatory reason for its employment practices.

3. Price Waterhouse’s Application to Institutionalized Stereotypes

Most importantly, the evidence presented by Jespersen is precisely the kind the Supreme Court used in its original Price Waterhouse decision: an employee’s failure to act feminine in an environment where femininity is detrimental to job performance. Price Waterhouse confirmed that the imposition of sex stereotypes should be considered as evidence that an adverse employment action is based on sex. The Ninth Circuit distinguished Jespersen from Price Waterhouse because Jespersen involved a “subjective reaction” to an “overall policy” that applied to both men and women. However, this rationale ignores the central holding of Price Waterhouse: gender must be irrelevant to an employment decision unless it falls under the BFOQ exception. The Price Waterhouse Court explicitly noted that “[b]y focusing on Hopkins’ specific proof . . . we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, ‘standing alone,’ would or would not establish a plaintiff’s case.”

The “coup de grace” in Hopkins’ case, proving to the Court that Hopkins’ sex motivated Price Waterhouse rather than her interpersonal skills, was the fact that she was told her partnership chances would increase if she softened her physical appearance. Similarly in Jespersen, Harrah’s

184. See id. at 1117-18 (Kozinski, J., dissenting); Cruz, supra note 23, at 242. But see Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (“[T]he language of Title VII is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”) (citations omitted).

185. See Recent Case, supra note 165, at 2436 (arguing that Jespersen inadvertantly disadvantaged women in “plus-sex” service industries because they predominately experience pressure to look sexually alluring, whereas women in white collar professions predominantly experience pressure to act feminine).

186. See id. at 2435 (comparing the catch-22 imposed by the employer in Price Waterhouse to the one imposed in Jespersen); Gowri Ramachandran, Intersectionality as “Catch 22”: Why Identity Performance Demands Are Neither Harmless nor Reasonable, 69 ALB. L. REV. 299, 314-16 (2005) (noting that “one could easily view Jespersen as the [post-Price Waterhouse] case raising a sex-stereotyping claim most similar to the case Ann Hopkins raised . . . yet, Jespersen lost where Hopkins prevailed”).


188. See Jespersen II, 444 F.3d at 1111-13.

189. See Price Waterhouse, 490 U.S. at 241-42.

190. Id. at 251-52.

191. See id. at 235.
demanded that Jespersen (along with all other female beverage servers) soften her physical appearance as a condition of employment. 192 Yet, the Ninth Circuit found no evidence that Harrah's terminated Jespersen because of her sex. 193 Although the holding in Price Waterhouse is framed in terms of acting feminine rather than looking feminine, 194 nothing in its language suggests that institutionalizing a sex stereotype in an overall policy or failing to label it as "feminine" precludes courts from reading it as evidence of sex discrimination. 195 To the contrary, the Court appeared to group appearance within a broader category of stereotypes related to acting feminine. 196

IV. ESTABLISHING A STANDARD OF PROOF

A. An Additional Consideration: Distinguishing Social and Business Norms from Sex Stereotypes

Jespersen II permits plaintiffs to submit Price Waterhouse evidence in Title VII appearance and grooming cases. 197 However, Jespersen II also brings to light the additional hurdle of proving that the requirement is a sex stereotype. 198 This Comment has thus far operated under the assumption that teased hair, stockings, high heels, and makeup inherently are related to sex-oriented norms, whereas short hair, trimmed nails, and a clean face inherently are related to grooming-oriented norms. However, McDonnell Douglas and Jespersen II require plaintiffs to prove this assumption. 199

192. See Jespersen v. Harrah's Operating Co. (Jespersen I), 392 F.3d 1076, 1077 (9th Cir. 2004), aff'd on reh'g en banc, 444 F.3d 1104 (9th Cir. 2006).
193. See Jespersen II, 444 F.3d at 1112 (concluding that Jespersen failed to present evidence that "Personal Best" sex stereotyped female employees or impeded their job performances); Jespersen I, 392 F.3d at 1083 (declining to apply Price Waterhouse to appearance and grooming standard cases altogether).
195. See Jespersen II, 444 F.3d at 1115 (Pregerson, J., dissenting); Gregory J. Kamer et al., Lipstick and Lawsuits: Can Sexual Stereotyping Claims Successfully Combat "Appearance Discrimination?", EMP. L. NEWSL. (Int'l Ass'n of Def. Counsel, Chi., Ill.), Jul. 2005, at 1, 5. Ironically, the Jespersen I majority itself acknowledged that Price Waterhouse "did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees." Jespersen I, 392 F.3d at 1082 (emphasis added).
196. See Price Waterhouse, 490 U.S. at 251-52; see also Jespersen II, 444 F.3d at 1115 (Pregerson, J., dissenting); Recent Case, supra note 165, at 2435.
197. Jespersen II, 444 F.3d at 1113.
198. See Appellee's Answering Brief at 3, 8, Jespersen II, 444 F.3d 1104 (No. 03-15045) (arguing that the sex-differentiated appearance standards at issue were "sex-neutral" and that the "purported stigma" of wearing makeup is no different from maintaining "short hair and a clean-shaven appearance").
199. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (requiring that plaintiffs provide indicia of discrimination on the basis of a protected class to establish a
In *Price Waterhouse*, a partner *told* Hopkins, in no uncertain terms, to “dress more femininely.”\(^2^0^0\) It was easy for the Court to conclude that sex played a role in her evaluation.\(^2^0^1\) Unfortunately, Harrah’s never asked Jespersen to dress or act more femininely in so many words.\(^2^0^2\) Instead, it imposed a department-wide appearance policy, asserting an interest in creating a “brand standard of excellence.”\(^2^0^3\)

Unlike immutable status, beauty and sexuality are artificial cultural constructs.\(^2^0^4\) Moreover, they are constantly evolving and inherently subjective.\(^2^0^5\) While some find wearing stockings, high heels, and makeup to work every day a simple matter of professionalism,\(^2^0^6\) others find them more appropriate as “pornographic accessories.”\(^2^0^7\) Further complicating matters, the women’s liberation movement and the sexual revolution of the 1970s forged a new brand of feminism—one that flaunts difference and, consequently, embraces many stereotypical notions of femininity.\(^2^0^8\)

Legal scholars have long struggled to distinguish workplace appearance and grooming standards that truly are discriminatory from those that merely reflect longstanding cultural differences between the sexes.\(^2^0^9\)

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\(^2^0^0\) Price Waterhouse, 490 U.S. at 235.

\(^2^0^1\) See *id*.

\(^2^0^2\) See Jespersen v. Harrah’s Operating Co. (*Jespersen I*), 392 F.3d 1076, 1077 (9th Cir. 2004), *aff’d on reh’g en banc*, 444 F.3d 1104 (9th Cir. 2006).

\(^2^0^3\) Id.; Appellee’s Answering Brief, *supra* note 198, at 2 (characterizing “Personal Best” as part of an “initiative to raise the total service performance of the . . . beverage team,” alongside changes to uniforms, performance ratings, and hiring criteria).

\(^2^0^4\) See WOLF, *supra* note 9, at 12-13; Bartlett, *supra* note 123, at 2548.

\(^2^0^5\) See WOLF, *supra* note 9, at 12-13.

\(^2^0^6\) See, e.g., Cruz, *supra* note 23, at 241 (discussing how makeup may actually improve some women’s job performance by making them feel “armored, less vulnerable to the world”) (quotations omitted).

\(^2^0^7\) See, e.g., WOLF, *supra* note 9, at 45 (discussing how pornography utilizes stockings, high heels, makeup, and jewelry).

\(^2^0^8\) See generally LEVY, *supra* note 10, at 3-4; Dowd, *supra* note 42, at 55. “Transcendental feminism” has firmly established itself in the workplace. For example, Carrie Gerlach, a Sony Pictures executive, wrote in 2001:

My best mentors and teachers have always been men. Why? Because I have great legs, great tits, and a huge smile. . . . Do you think those male mentors wanted me telling them how to better their careers, marketing departments, increase demographics? Hell no. They wanted to play in my secret garden. But I applied the Chanel war paint, pried open the door with Gucci heels, worked, struggled and climbed the ladder. . . . And I did it all in a short Prada suit.

LEVY, *supra* note 10, at 102.

\(^2^0^9\) See, e.g., CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED* 32, 33-34 (1987); Bartlett, *supra* note 123, at 2548. Professor MacKinnon’s long-running criticism of the so-called “difference approach” to sex equality provides a particularly useful foundation. See MACKINNON, *supra*, at 34. Professor MacKinnon defines the philosophy of difference as the belief that “sex is a dif-
Courts have refused to make judgments in this regard.²¹⁰ Virtually all dress conventions are rooted in some form of gender construction,²¹¹ and this presents an evidentiary nightmare to an already overburdened judiciary.²¹² It is beyond the capacity of courts to determine whether an employer’s ultimate goal is a wholesome, polished workforce or turning all its female employees into sex objects.²¹³ Moreover, the widely accepted theory of “unconscious bias” posits that most discrimination is largely cognitive.²¹⁴ Employers may be genuinely unaware that they are reinforcing demeaning stereotypes.²¹⁵ However, many commentators stress that the inundation of sex stereotypes in society is an insufficient justification for their judicial reinforcement.²¹⁶ Specifically, many legal theorists argue that the
underlying implications of policies like "Personal Best" overshadow their aesthetically pleasing, normative nature.  

B. Adding Objectivity to a "Subjective Reaction"

Pursuant to the Supreme Court's holding in *Price Waterhouse*, courts appear to have an obligation under Title VII to look past the facial burdens imposed by appearance and grooming standards and make individualized determinations as to whether they are "because of . . . sex." A sociologically informed, contextual inquiry would prove useful for courts and attorneys in evenhandedly determining whether a particular policy qualifies as *Price Waterhouse* evidence.

First, courts should look to the sociological implications of a particular gender-specific appearance and grooming standard. Second, courts should recognize that although virtually all appearance norms are rooted in cultural constructions of gender, they differ in kind and degree, particularly when viewed in context. Cultural meaning or community norms may not provide accurate bases for defining sex stereotyping. However, Dean Katharine Bartlett's proposal to examine whether a particular standard as applied is "interwoven with [women's] historically

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217. See, e.g., WOLF, supra note 9, at 45-46 ("Emulating the male uniform is tough on women. Their urge to make traditionally masculine space less gray, sexless, and witless is an appealing wish. But their contribution did not relax the rules. Men failed to respond with whimsy, costume, or color of their own. The consequence of men wearing uniforms where women do not has simply meant that women take on the full penalties as well as the pleasures of physical charm in the workplace, and can legally be punished or promoted . . . accordingly.").

218. See supra Part III.B.3.

219. See infra Part IV.B.

220. See Bartlett, supra note 123, at 2569-70.

221. See id. at 2570-72.

222. See Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) (observing that "mutually reinforcing stereotypes create[] a self-fulfilling cycle of discrimination" that fosters employers' ability to impose such stereotypes and that courts often are unable to detect); Bartlett, supra note 123, at 2560 (discussing how the formal tests used in appearance and grooming cases are built upon community norms and therefore prove ineffective for plaintiffs who are challenging such norms); Klare, supra note 126, at 1419-20 (describing the "community norm" standard of discrimination as "laughable," arguing that civil rights legislation that works from established social norms is clearly "hollow["])
inferior status” is a useful inquiry in the spirit of Title VII. In this vein, expert witnesses are playing increasingly vital roles in plaintiffs’ cases.

An evidentiary model that takes into account sociological, fact-specific considerations would prevent sweeping precedent leading to the complete dissolution of all sex-differentiated appearance and grooming standards. A careful analysis of the “Personal Best” program proves instructive.

223. See Bartlett, supra note 123, at 2570 (“Identifying . . . damaging links [between appearance conventions and sex stereotypes] cannot be done with scientific certainty, of course, but nonetheless is legally required. . . . Courts should find all such conventions discriminatory ‘on the basis of sex,’ unless narrowly tailored to sex differences in ways that do not perpetuate [women’s] historically inferior status.”); see also Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975) (reasoning that hair length regulations are not within the scope of Title VII because they do not pose “distinct employment disadvantages” to men and are not used to “elevate” women).

224. See Lee, supra note 41, at 497-503; see, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 235, 255-56 (1989) (giving credence to social psychologist Dr. Susan Fiske’s testimony that sex stereotyping played a role in Price Waterhouse’s decision over Price Waterhouse’s objections regarding the speculative nature of her academic analysis). Gregory Sarno provides a hypothetical example of what such testimony may entail, addressing a gender-differentiated dress and appearance code that reflects those found in Carroll, Guardian Capital, and Jespersen:

Q. How, then, professor, does [the] dehumanizing effect of subliminally seductive advertising tie in with the dress and grooming code adhered to by the defendant in the present case?
A. The appearance code in this case clearly perpetuates a male chauvinistic image of women as dumb sex objects. For one thing, the waitresses are required to wear company-provided uniforms, whereas waiters need only select a choice of attire within a range, however limited, of acceptable alternatives; this differential treatment implies that men, but not women, are capable of choosing appropriate work clothing.

Q. Are there any other reasons for your conclusion, professor?
A. Yes. Additionally, the code’s language in and of itself has the effect of reinforcing this negative stereotype of women. Notice how, in addressing the issue of waiters’ attire, the code is relatively brief. In sharp contrast, the requirements for waitresses are extremely detailed and are patronizingly phrased . . . . Thirdly, and most obviously, the waitress’ uniforms are overtly sexually provocative. The garter is nothing other than a sex symbol . . . . Moreover, the short skirt bares the thighs and, at times, the derriere; and the partially unbuttoned blouse exposes the breasts—body parts which, in America, have virtually achieved the status of a sexual fetish . . . .

Q. Do you have an opinion concerning the likely effects on male-female relationships of the defendant’s waitressing outfit?
A. Most assuredly, I do.

Q. What is your opinion, then, about the uniform’s probable effects on male-female relationships?
A. Under the restaurant’s dress and grooming code, the waitress is dehumanized . . . and, as long as she wishes to retain her employment, she is helpless to prevent [the male observer’s] fantasies.

Sarno, supra note 121, at 161-63.

225. See infra notes 226-36 and accompanying text.
Under the above Price Waterhouse model, a simple hair or stockings mandate in itself is unlikely to be interpreted as a sex stereotype.226 The hair length cases decided over thirty years ago used a similar sociological test in concluding that hair style is unrelated to gender both in terms of power dynamics and employment opportunities.227 Under this reasoning, a standard that requires women to neatly style or comb their hair would not serve as Price Waterhouse evidence.228 However, elaborate requirements such as the one found in “Personal Best” would be more susceptible to the Price Waterhouse rule.229 According to one social historian, “masses of hair arranged in intricate displays” often symbolize women’s sexuality in relation to men.230 As such, hairstyling standards may reinforce women’s inferior status in a limited number of circumstances.231

Both men and women have worn non-sexual variations of hosiery throughout history.232 Stockings serve many functional purposes in the workplace, including keeping legs protected and warm, ensuring sanitation, enhancing blood circulation, and completing a professional look.233 However, a standard requiring female employees to wear overtly sexual hosiery,234 or otherwise applying a stockings requirement in a manner that clearly affects the employment opportunities of women,235 would be plausible evidence of Price Waterhouse sex stereotyping.236

In contrast to hairstyles and stockings, high heel and makeup requirements raise red flags under a sociological, fact-based Price Waterhouse model.237 The “erotic-unpractical” high heel is a remnant of the Industrial Revolution, developed as an “ideal of visible idleness” to contrast
"employed bourgeois men who needed practical clothing." Today, high heel requirements have extremely detrimental effects on female employees' health and their capacity to perform their job tasks. For example, in the casino context, women unable to meet the grueling demands of eight- to ten-hour shifts on their feet have been forced to leave the casinos for lower-paying positions.

As for makeup, the "painted lady" was historically associated with prostitution and immorality, with red lips, dilated eyes, and flushed cheeks intended to replicate signs of sexual arousal. Cosmetics have long been commercialized in a way that reflects the inherent aesthetic and economic differences between men and women. Today, notions of what makes women beautiful and sexually alluring most often involve the application of cosmetics and other artificial practices. According to one commentator, the "legitimation of the use of cosmetics and their powerful hold over American women are a striking example of the dominance of the drive for femininity." Makeup is "deeply offensive and disempowering" to some women. As such, makeup requirements place female employees at a distinct disadvantage in the workplace.

Thus, pursuant to a sociological, fact-based evidentiary model, Jespersen would have successfully presented indicia that her employer's policies

238. Marc Linder, Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees, 22 J. CORP. L. 295, 300-03 (1997). Professor Linder notes how high heels "strikingly" alter women's postures by "forc[ing] the stomach in and the breast out, drawing in the back, making the pelvis more prominent, straightening the knees, and making the thighs firmer." Id. at 300.

239. See id. at 299-300, 312-24 (discussing the pervasiveness of unhealthful high heel requirements in "women-as-servers" occupations).

240. See Kamer & Keller, supra note 9, at 345; Smith, supra note 43.


242. Peiss, supra note 177, at 374-76.

243. See BANNER, supra note 230, at 274.

244. Id. at 275.

245. See Jespersen v. Harrah's Operating Co. (Jespersen II), 444 F.3d 1104, 1117-18 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting); Cruz, supra note 23, at 241-42; Reply Brief of Appellant, supra note 166, at 7-11; Brief of ACLU of Nev. et al. as Amici Curiae Supporting Plaintiff-Appellant at 11, Jespersen II, 444 F.3d 1104 (No. 03-15045).

246. See Cruz, supra note 23, at 241-42. The annual income of a casino beverage worker averages between $75,000 and $90,000, with approximately $50,000 of that coming from tips. Smith, supra note 43. Thus, casino appearance policies often present women unable or unwilling to comply with demeaning sex stereotypes only the options of quitting or taking a significant pay cut. See Kamer & Keller, supra note 9, at 340-42; Smith, supra note 43. In contrast, makeup prohibitions for men simply maintain a neutral status quo, both in terms of sexuality and for purposes of the unequal burdens test. See Recent Case, supra note 165, at 2434 (positing that many standards for men are not sufficiently rooted in harmful sex stereotypes to warrant Price Waterhouse's application).
were motivated by sex.\textsuperscript{247} Harrah's would have countered that Jespersen's termination was based on her failure to comply with a legitimate, nondiscriminatory appearance requirement.\textsuperscript{248} In response, Jespersen would have presented proof of pretext,\textsuperscript{249} including: a review of the burdens placed on male bartenders;\textsuperscript{250} her excellent performance ratings and popularity with customers even when she did not wear makeup;\textsuperscript{251} the fact that the requirement impeded Jespersen's security functions as a bartender;\textsuperscript{252} and evidence of the sociological meaning behind the "Personal Best" makeup requirement.\textsuperscript{253}

In sum, by using a traditional, fact-specific \textit{McDonnell Douglas} interplay, courts would avoid making prodigious declarations regarding the role of gender in society.\textsuperscript{254} In applying a broad objective impediment test, judges underestimate their ability to narrowly interpret standards on a case-by-case basis.\textsuperscript{255} As Justice Stewart once observed: "I shall not . . .
attempt . . . to define the kind of material I understand to be embraced [by a] shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.”

V. CONCLUSION

Although Title VII purportedly “lifts women out of [the] bind” created by sex stereotypes in the workplace, it rarely reaches one of the most common catch-22s they face: their appearance. At a time when “[t]he glossy, overheated thumping of sexuality in our culture is less about connection than consumption,” female employees are being increasingly objectified at work through uniforms and dress codes. However, decisions like Jespersen I and Jespersen II cement the judicial principle that appearance and grooming standards are trivial unless tangibly related to immutable status. This reasoning runs contrary to Title VII jurisprudence. Courts have the capacity to efficiently and equitably put the teeth back in Title VII by applying the same considerations to appearance and grooming standards cases as they do to immutable status Title VII claims.

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256. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (addressing the “indefinable” meaning of obscenity under the First and Fourteenth Amendments).
258. LEVY, supra note 10, at 31.
259. See Bartlett, supra note 123, at 2580.