Why Personal Presentation in the Workplace Is Not Trivial: Performativity Theory Applied to Title VII Sex-Dependent Appearance Standard Cases

Gretchen Adel Myers†

I. INTRODUCTION

Under Title VII of the Civil Rights Act of 1964, it is unlawful for an employer to discriminate against its employees "because of . . . sex."[1] "Sex" in this context means not only biological sex, but also the cultural assumptions or sex stereotypes that are associated with biological sex.[2] Generally, then, the most important question in a Title VII sex discrimination case is whether the employer took sex, either biological sex or sex stereotypes, into account when making an employment decision adverse to the employee.[3] If so, the employee has a prima facie case of sex discrimination under Title

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[1] 42 U.S.C. § 2000(e)(2) (2000).

[2] Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (plurality opinion). The distinction between "sex" as biological and "gender" as cultural is useful but also problematic. *See infra* Part III(A) (arguing that sex itself is a cultural construct). For example, in *Price Waterhouse v. Hopkins*, the plurality distinguishes between the biological and cultural aspects of sex by clarifying that sex stereotypes (cultural assumptions associated with sex) are included in the definition of "sex" under Title VII. 490 U.S. at 250. At times, however, the Court uses the two terms interchangeably to mean biological sex. *See id.* at 250 (stating that "[i]n saying that *gender* played a motivating part in an employment decision, we mean that . . . one of [the] reasons [was] . . . that the . . . employee was a *woman*") (emphasis added).

[3] Patrick S. Shin, *Vive La Difference? A Critical Analysis of the Justification of Sex-Dependent Workplace Restrictions on Dress and Grooming*, 14 DUKE J. GENDER L. & POL'Y 491, 506–07 (2007).

VII.[4] Moreover, if the employer's adverse decision is the consequence of an explicit policy that differentiates between employees because of their sex, the affected employee has a prima facie case of sex discrimination under Title VII.[5] However, if that explicit sex-dependent policy is an appearance standard policy,[6] the employee does not have a prima facie case of sex discrimination under the current application of the law.[7] Courts have not explicitly articulated a valid legal justification for approaching sex-dependent appearance standard cases differently from other sex discrimination cases.[8] Instead, they have rationalized their decisions by referencing cultural norms, either directly or indirectly.[9]

Relying on these cultural norms, courts often validate sex-dependent appearance standards that they see as "trivial in their impact on employees, . . . neutral in affecting men and women alike, or essential to the employer's lawful business objectives."[10] These "common-sense" judgments of triviality, neutrality, and business importance reveal the strength of the sex stereotypes that Title VII is meant abrogate.[11] The perception that these sex-dependent appearance standards are trivial is particularly telling because it suggests not only that individual employees are not burdened by the standards, but also that the standards are not culturally significant in terms of sex stereotyping.[12]

However, sex-specific personal presentation is significant for both individual identity and cultural norms: "the social norms of society drive identity performances, which in turn instantiate the social norms."[13] People perform

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[4] *Id.*

[5] *Id.*

[6] The term "appearance standard" includes dress codes, grooming standards, and any other policies that an employer might use to restrict or control employees' self-presentation on the job:

> Employers have traditionally assumed substantial prerogatives with respect to the dress and appearance of their employees, imposing burdens on women that are different from those imposed on men. For example, women may be required to wear skirts of a certain length or high-heeled shoes, to conform to different weight criteria than men, or to wear makeup. They may be fired if they have unladylike facial hair or if they wear their hair in a style that may offend customers. They may be required to have sexually alluring figures or to wear sexually provocative clothing, or they may be made to downplay their sexuality. Men, in turn, may be required to wear ties or to keep their hair cut short, or may be prohibited from wearing "women's" jewelry.

Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2544 (1994).

[7] Shin, *supra* note 3, at 506–07.

[8] Bartlett, *supra* note 6, at 2544.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Devon Carbado et al., *Foreward: Making Makeup Matter*, 14 DUKE J. GENDER L. & POL'Y 1, 1 (2007).

[13] *Id.* at 4.

their own gendered identities on a daily basis by choosing how to present themselves to the world through clothing, makeup, hairstyle, and other sex-specific markers.[14] With these repeated performances, individuals not only solidify their own gender identities by presenting them to others, but also solidify the binary sex/gender system—the cultural norms that categorize people according to sex and gender—by making themselves clearly identifiable as either male or female, masculine or feminine.[15]

This Note argues that it is incorrect as a matter of law and policy to differentiate sex-dependent appearance standard cases from other Title VII sex discrimination cases; this approach assumes that sex-based appearance standards are trivial when they actually highlight the personal and cultural impact of sex stereotypes on gender identity performance. Part II of this Note outlines current sex discrimination law under Title VII and the different approaches that courts have taken in distinguishing sex-dependent appearance standard cases from other sex discrimination cases. Part III uses Judith Butler's theory of gender performativity to suggest that gender performance through personal appearance, instead of being trivial, is in fact integral to the binary sex/gender system that supports inequality between the sexes. Part IV argues that because gender performance is integral to the binary sex/gender system, sex-dependent appearance standards that force employees to perform gender in a particular way should be treated like any other sex discrimination case under Title VII. Accordingly, sex-dependent appearance standards in the workplace should be considered impermissible sex discrimination.

II. Title VII and Sex-Dependent Appearance Standard Law

A. *Title VII*

Cases involving sex and gender discrimination by employers fall within Title VII of the Civil Rights Act of 1964.[16] Under Title VII, it is unlawful for "an employer . . . to discriminate against any individual with respect to . . . terms, conditions or privileges of employment . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."[17] Courts have recognized two grounds on which plaintiffs may proceed on a Title VII sex discrimination claim: disparate treat-

[14] Judith Butler, *Imitation and Gender Insubordination*, *reprinted in* The Lesbian and Gay Studies Reader 307, 314–18 (Henry Abelove et al. eds., 1993) [hereinafter Butler, *Imitation*].

[15] *Id.* For a discussion of the binary sex/gender system, see *infra* Part III(B).

[16] 42 U.S.C. § 2000(e)(2).

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

ment and disparate impact.[18] Because sex-based appearance standards explicitly treat people differently based on their sex, cases involving these standards may be analyzed within a disparate treatment framework.[19] Accordingly, this Part will focus on the development of disparate treatment claims under Title VII.

Disparate treatment claims under Title VII hinge on whether the employer intentionally treated the individual plaintiff differently from similarly situated people of a different class.[20] To prove discriminatory intent, the plaintiff must show either that an "impermissible motive played a motivating part in an adverse employment decision"[21] or that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects on an identifiable group."[22] Notably, the impermissible motive does not have to be the sole factor taken into account when the employer made the adverse employment decision for it to be considered a decision made "because of . . . sex."[23] Indeed, the employee plaintiff only has to prove that the employer relied on sex as a factor—not necessarily the only or even main factor—in the decision.[24]

A plaintiff can prove discriminatory intent with either direct or circumstantial evidence.[25] Direct evidence consists of "conduct or statements by persons involved in the decision-making process, which indicate a discriminatory attitude was more likely than not a motivating factor in the employer's decision."[26] When there is direct evidence of sex discrimination, the defendant has the burden of proving that it would have made the same employment decision had it not considered the illegitimate criteria.[27] If, however, there is a lack of direct evidence, as is often the case, then the plaintiff must rely on circumstantial evidence.[28] This, in turn, requires the

[18] *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[19] Allegra C. Wiles, *More Than Just a Pretty Face: Preventing the Perpetuation of Sexual Stereotypes in the Workplace*, 57 SYRACUSE L. REV. 657, 667 (2007).

[20] *Id.* at 666.

[21] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (plurality opinion). As the plurality clarifies, "In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or the employee was a woman." *Id.*

[22] EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000) (quoting In re Employment Litig. against Ala., 198 F.3d 1305, 1321 (11th Cir. 1999)).

[23] *Price Waterhouse*, 490 U.S. at 241–42 (plurality opinion).

[24] *Id.*

[25] *Joe's Stone Crab*, 220 F.3d at 1273.

[26] Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1046 (8th Cir. 2005) (citing *Price Waterhouse*, 490 U.S. at 228).

[27] *Kratzer*, 398 F.3d at 1046.

[28] *Id.*

plaintiff to satisfy the McDonnell Douglas test.[29] Under the McDonnell Douglas test, the plaintiff must establish: (1) that she is a member of a protected class; (2) that she was subject to adverse employment action; (3) that her employer treated similarly situated employees more favorably; and (4) that she was qualified to do the job.[30] If the plaintiff establishes these elements, the burden shifts to the defendant, who must then prove that there were "legitimate, non-discriminatory reasons for its employment action."[31] Assuming the defendant carries its burden, the burden then shifts back to the plaintiff, who is given the opportunity to prove that the defendant's given reason is pretextual.[32]

If a plaintiff succeeds in making out a prima facie case of disparate treatment under Title VII, a court will find that the employer's conduct constitutes impermissible sex discrimination unless the employer can justify such conduct as a bona fide occupational qualification ("BFOQ").[33] A BFOQ is a qualification that is "reasonably necessary to the normal operation of that particular business or enterprise."[34] Courts have read this BFOQ exception very narrowly and have found that it applies only in those instances when sex is a qualification relating to the "essence," "core," or "central mission" of the job.[35] In other words, sex must "relate to the ability to perform the job," not just an employer's "idiosyncratic requirements"[36] or customers' preference.[37]

B. *Sex Stereotyping Under Title VII*

In Title VII jurisprudence, the term "sex" includes not only biological sex, but also the cultural assumptions or sex stereotypes that are associated with that sex.[38] As the United States Supreme Court declared in the 1978

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[29] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[30] *Joe's Stone Crab*, 220 F.3d at 1286. The *McDonnell Douglas* case was a racial employment discrimination case, but the same test applies to sex discrimination. *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) (applying the *McDonnell Douglas* test in a sex discrimination disparate treatment case and finding that a policy barring fertile women but not fertile men is impermissible sex discrimination even if the policy is well-intentioned); *Joe's Stone Crab*, 220 F.3d at 1286 (applying the *McDonnell Douglas* test in a sex discrimination case).

[31] *Joe's Stone Crab*, 220 F.3d at 1286 (quoting Holifield v. Reno, 115 F.3d 1555, 1564–65 (11th Cir. 1997)).

[32] *Id.*

[33] *See* 42 U.S.C. § 2000e-2(e) (2000).

[34] *Id.*

[35] *See, e.g.*, *Johnson Controls*, 499 U.S. at 200–04.

[36] *Id.*

[37] Erica Williamson, *Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace*, 56 DUKE L.J. 681, 688 (2006).

[38] Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (plurality opinion).

case Los Angeles Department of Water & Power v. Manhart,[39] "[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."[40] In 1989, the Court reaffirmed this principle in Price Waterhouse v. Hopkins.[41] There, the Court stated, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[42] Applying this principle to the case at hand, the Court found that sex discrimination includes not only refusing to promote someone because she is female, but also refusing to promote someone because she is a female who does not act "appropriately" feminine.[43]

It is important to recognize that disparate treatment and sex stereotyping are not two distinct legal theories, but are one in the same.[44] In fact, most disparate treatment sex discrimination is based on cultural stereotypes about the differences between how men and women actually are, or how they should be.[45] By holding that employers cannot implement policies that treat employees differently based on generalizations about their sex, even if those generalizations are actually true, the Manhart Court recognized that sex stereotyping is a form of disparate treatment.[46] Additionally, in Price Waterhouse, the Court made clear that demanding adherence to stereotypes about gendered personal appearance—such as suggestions that a woman "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances of making partner—could be evidence of disparate treatment, actionable under Title VII.[47] Together, these two cases show that even if sex-dependent appearance codes reflect actual group differences in how men and women dress and groom themselves, these codes should be considered disparate treatment of individual plaintiffs under Title VII.[48] As Joel Friedman states:

> The Supreme Court has articulated a doctrinal framework that, if construed and applied properly, provides the lower federal courts with the

[39] 435 U.S. 702 (1978).
[40] *Id.* at 707–08.
[41] *Price Waterhouse*, 490 U.S. 228.
[42] *Id.* at 251.
[43] *Id.*
[44] Wiles, *supra* note 19, at 673.
[45] *Id.*
[46] L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707–08 (1978). The *Manhart* case dealt with an employer's policy that was based on the generalization that women live longer than men. *Id.* Even though this stereotype is true of women *as a class*, it is still impermissible to treat *individual* women employees differently based on a generalization about their sex. *Id.*
[47] Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989) (plurality opinion).
[48] Wiles, *supra* note 19, at 673–75.

> analytical tools necessary to identify and proscribe workplace rules that compel individuals to adhere to appearance, attire, and behavioral norms that operate to reinforce gendered expectations.[49]

Recently, in the 2004 case Smith v. City of Salem,[50] one court applied the sex-stereotyping doctrine in the manner Friedman proposes. While this case did not involve a sex-based appearance standard policy, it did involve gendered appearance regulation in the workplace.[51]

In City of Salem, the Sixth Circuit applied the Supreme Court's sex-stereotyping doctrine to a case involving a transwoman whose employer began harassing her after her personal appearance and mannerisms at work began to reflect her female identity.[52] The court found that she had an actionable claim of sex discrimination under Title VII because the employer's actions were based on sex stereotyping.[53] Specifically, the court reasoned:

> 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. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[54]

Not all courts have been as accepting of sex stereotyping theories as the Sixth Circuit, however. Courts' abstract acknowledgement that sex stereotyping, including sex stereotyping about personal appearance, constitutes disparate treatment is not usually applied to dress code and appearance standard cases.[55] In fact, most courts have used significantly different approaches in handling this legal issue. The development of these approaches is the subject of the next Subpart.

C. *The Development of Sex-Dependent Appearance Standard Law*

Over the past forty years, courts have applied three different approaches to sex-dependent appearance standard cases: the per se approach, the immutability approach, and the unequal burdens approach.[56] The development of these approaches shows how sex-dependent appearance standard cases have

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[49] Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 205 (2007).

[50] 378 F.3d 566 (6th Cir. 2004).

[51] *Id.* at 569.

[52] *Id.*

[53] *Id.* at 574.

[54] *Id.*

[55] *Id.*

[56] Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535, 539–43 (2007).

come to be treated differently from other sex discrimination cases under Title VII.

Initially, the Equal Employment Opportunity Commission ("EEOC") applied Title VII to sex-dependent appearance standards just like other sex discrimination cases.[57] Since sex-dependent appearance standards, by definition, differentiate on the basis of sex, they were considered per se discriminatory under this approach and, absent a BFOQ, were deemed impermissible sex discrimination.[58] Several district courts applied this standard in striking down sex-specific hair length regulations in the early 1970s.[59]

By the mid-1970s, however, Title VII jurisprudence had shifted—courts began using the immutability approach to treat dress code and grooming standard cases differently from other sex discrimination cases.[60] Under this approach, if a case involved a sex-dependent appearance standard, the court focused on the immutability of the characteristics being regulated by the employer.[61] Courts found that reasonable standards regulating mutable characteristics were lawful under Title VII even if the standards had different requirements for each sex, reasoning that these standards did not significantly burden employees or implicate the inequality between the sexes that causes unequal employment opportunities.[62] Sex-specific standards regulating immutable characteristics and fundamental rights, on the other hand,

[57] Williamson, *supra* note 37, at 686–88.

[58] *Id.*

[59] *See, e.g.*, Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972) (holding that sex-dependent hair length policy was sex discrimination under Title VII but dismissing the claims because the plaintiffs had not been terminated for their hair length); Donahue v. Shoe Corp., 337 F. Supp. 1357 (C.D. Cal. 1972) (finding that an employee who alleged that he was terminated because he had long hair, even though women were allowed to have long hair on the job, had a prima facie case of sex discrimination under Title VII); Robert v. Gen. Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971) (concluding that the plaintiff had a prima facie case of sex discrimination under Title VII, because he was terminated pursuant to a company policy requiring men to wear hats and women to wear hairnets, and his hair was too long to fit under a hat).

[60] Williamson, *supra* note 37, at 689.

[61] *Id.*

[62] Zalesne, *supra* note 56, at 539–40; Williamson, *supra* note 37, at 689 (referring to the immutability approach as the "Employer Friendly Approach"). Interestingly, some sex discrimination cases had struck down regulations based on mutable characteristics outside of the appearance standard context before the immutability approach was applied to appearance standard cases. *Id.* at 692. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971) (finding a genuine issue of material fact as to whether company policy of not hiring women with preschool-age children, when company hired men with preschool-age children, was sex discrimination under Title VII or exempt under BFOQ exemption); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (holding that airline's no-marriage rule for stewardesses discriminated because of sex as prohibited by Title VII and was not justified under BFOQ exemption). Courts reconciled this seeming discrepancy by ruling that Title VII applies to discrimination on the basis of fundamental rights as well as immutable characteristics. Williamson, *supra* note 37, at 692.

were found unlawful.[63] By achieving this result, the immutability test emphasized an employer's right to control employee dress and grooming and deemphasized the seriousness of sex-dependent appearance standards as possible sex discrimination.[64] For example, courts used this test to uphold employers' sex-specific hair length regulations as lawful under Title VII.[65]

In the late 1970s, shortly after the immutability approach had been widely accepted in sex-specific appearance standard cases, federal courts developed another test—the unequal burdens test.[66] This approach allows for sex-dependent appearance standards if the requirements for the sexes are comparable and do not burden one sex more than the other.[67] Like the immutability test before it, the unequal burdens test emphasizes the protection of equal employment opportunity as Title VII's primary purpose and allows dress and grooming standards to stand unless they inhibit that opportunity.[68] However, unlike the immutability test, the unequal burdens test can be used to invalidate dress codes and grooming standards that regulate mutable characteristics.[69]

D. *The Sex Stereotyping Approach and the Jespersen Case*

One approach that has not yet been argued successfully in a sex-dependent appearance standard case is the Price Waterhouse sex stereotyping ap-

[63] Williamson, *supra* note 37, at 691.

[64] *Id.* at 692.

[65] *See, e.g.*, Willingham v. Macon Tel. Publ'g. Co., 507 F.2d 1084 (5th Cir. 1975) (finding that employer's appearance standard that required different hair lengths for male and female employees was not sex discrimination under Title VII because hair length is neither an immutable characteristic nor a fundamental right); Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974) (holding that employer who fired male employee for having long hair, while allowing female employees to have long hair, did not discriminate because of sex under Title VII); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973) (finding that appearance regulation prohibiting male employees from having long hair, but allowing women to have long hair as long as it was secured, did not discriminate because of sex); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973) (holding that company policy of requiring male employees to keep their hair short was not sex discrimination under Title VII).

[66] Zalesne, *supra* note 56, at 541–43; Williamson, *supra* note 37, at 694–96. The first case to delineate the equal burdens test was the 1979 case of *Carroll v. Talman Federal Savings & Loan*, 604 F.2d 1028 (7th Cir. 1979)

[67] Zalesne, *supra* note 56, at 541–43; Williamson, *supra* note 37, at 694–96.

[68] Williamson, *supra* note 37, at 694.

[69] If the characteristics are mutable, but the burdens on men and women are unequal, then the policy will be struck down. *See, e.g.*, Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000) (holding that flight attendant weight restrictions put unequal burdens on men and women and thus constituted sex discrimination under Title VII); *Carroll*, 604 F.2d at 1029 (invalidating dress code that imposed unequal burdens on men and women by requiring men to wear customary business attire while requiring women to wear a uniform).

proach.[70] Under this approach, the validity of sex-dependent appearance standards hinges on whether they reify stereotypes about how each sex should dress or look.[71] In the 2006 sex-dependent appearance standard case of Jespersen v. Harrah's Operating Company,[72] the plaintiff argued the sex stereotyping approach as well as the unequal burdens approach.[73]

For over twenty years, Darlene Jespersen worked as a bartender for Harrah's Casino in Reno, Nevada.[74] She was an exceptional employee who was praised by her supervisors and by her customers for her "excellent service and good attitude."[75] Jespersen never wore makeup.[76] However, in the 1980s, Jespersen's supervisor suggested that she start wearing makeup to work as part of an informal company policy that encouraged female employees to wear makeup.[77] At first, Jespersen attempted to comply with this policy, but later she stopped because being "dolled up" and being "forced . . . to be feminine" made her feel "very degraded and very demeaned."[78]

[70] Williamson, *supra* note 37, at 694 (referring to this approach as the "Price Waterhouse Approach").

[71] *Id.* at 696–98.

[72] 444 F.3d 1104 (9th Cir. 2006) (en banc).

[73] *Id.* at 1108.

[74] *Id.* at 1106–07.

[75] Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077 (9th Cir. 2004).

[76] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1107-08 (9th Cir. 2006) (en banc).

[77] *Id.*; *see* Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 45–47 (2007) (quoting Transcript of Jespersen Deposition at 12, Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (D. Nev. 2002)).

[78] Avery & Crain, *supra* note 77, at 45–47. Jespersen fully described her attempt to wear makeup in her deposition. The following is an excerpt from the deposition of Darlene Jespersen:

> Q: And after he applied makeup on half your face and left the other half normal, did there come a time when you looked in the mirror?
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> A: Yes.
>
> Q: And tell me your reaction.
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> A: I felt very degraded and demean[ed]. I actually felt sick that I had to cover up my face and become pretty or feminine in a sex stereotyping role 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 and comply with your employer's desire that you have a makeup look versus your normal face?
>
> A: Yes.
>
> Q: How long did you try to wear makeup?
>
> A: Just a couple of weeks.
>
> Q: And 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 had nothing to do with the making of a drink. I felt that I had become dolled up and that I was a sexual object.
>
> Q: And how long did you then, even though feeling that way, attempt to comply? How long did you make it?
>
> A: I could only do it for a couple weeks.
>
> Q: And then what happened?

Jespersen's supervisor allowed her to continue without the makeup.[79]

Then, in 2000, Harrah's established a formal, more stringent appearance standard policy—the Personal Best Program.[80] This program included regulations of employee uniforms, which were unisex, as well as employee grooming, which was sex-specific.[81] All female bartenders were required to wear powder, blush, mascara, and lipstick on the job.[82] Men, on the other hand, were prohibited from wearing makeup.[83]

Harrah's hired image consultants to help the female bartenders with their new look by instructing them how to be "properly made-up."[84] After this makeover, the bartenders were photographed so that a picture of their "Personal Best" could be kept on file for daily comparison by both the super-

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A: It—it was too harmful. It affected my self-dignity. It portrayed me in a role I wasn't comfortable, that I wasn't taken seriously as myself. I also feel that it took away my credibility as an individual and as a person. I was—it demanded that—that my job performance was based on how I look and not on how I did my work.

Q: So what did you do? How did you stop?

A: I went—I just stopped. And I went home and threw the makeup in the garbage.

Deposition of Darlene Betty Jespersen, at 12, Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (D. Nev. May 22, 2002) (No. CV-N-01-0401-ECR-VPC).

[79] *Id.*

[80] *Jespersen*, 444 F.3d at 1107. The following is an excerpt from Harrah's "Personal Best" policy:

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

- *Overall Guidelines (applied equally to male/female):*
- Appearance: Must maintain Personal Best image portrayed at time 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 exceed below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.
- *Females:*
- Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times. No exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
- Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.
- *Make up (face powder, blush and mascara) must be worn and applied neatly in complementary colors. Lip color must be worn at all times.*

Id. (emphasis added).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1105.

[84] Defendant's Exhibit E, at 79 (Harrah's Operating Co., Brand Standard Grooming and Appearance), Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189 (2002).

visor and the employee herself.[85] Jespersen refused to wear makeup and consequently was fired.[86]

Shortly thereafter, Jespersen filed a complaint against Harrah's, alleging that its "Personal Best" policy "discriminated against women by (1) subjecting them to terms and conditions of employment to which men [were] not similarly subjected, and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment."[87] The district court granted summary judgment for Harrah's, using both the immutability approach and the unequal burdens test, and rejected the application of the sex stereotyping approach to Jespersen's claim.[88] Because Harrah's grooming standards did not regulate immutable characteristics, the court did not consider it discriminatory, finding that Title VII applies to "characteristics which the applicant, otherwise qualified, [has] no power to alter," as opposed to "hair styles or modes of dress over which the job applicant has complete control."[89] Because the grooming standards made requirements and prohibitions for both men and women, the court ruled that the standard burdened both sexes equally.[90] The court summarily rejected Jespersen's sex stereotyping argument by noting that the sex stereotyping approach does not apply to sex-dependent appearance standards.[91] A three-judge panel on the Ninth Circuit affirmed the district court's decision, with one judge dissenting.[92]

On rehearing en banc, the Ninth Circuit affirmed the decision.[93] The court rejected the argument that Harrah's "Personal Best" policy, in and of itself, established discriminatory intent with its sex-specific requirements, instead holding that "[g]rooming standards that appropriately differentiate between genders are not facially discriminatory."[94] Applying the unequal burdens test, the court concluded that Harrah's standards did not unreasona-

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[85] *Id.*

[86] *Jespersen*, 444 F.3d at 1106.

[87] *Id.* at 1108.

[88] Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189, 1192–93 (D. Nev. 2002).

[89] *Id.* (quoting Baker v. Cal. Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974)).

[90] *Jespersen*, 280 F. Supp. 2d at 1192. The appellate court looked at the regulations as a whole, comparing all of the prohibitions and the requirements for both sexes, instead of comparing the female and male policies on makeup. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1081 (9th Cir. 2004). More specifically, the court balanced the female makeup requirement with the male short hair requirement instead of balancing the female makeup requirement with the male makeup prohibition. *Id.*

[91] Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189, 1192 (D. Nev. 2002).

[92] Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1081 (9th Cir. 2004).

[93] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc).

[94] *Id.* at 1109–10. The court found that Jespersen had not presented sufficient evidence to establish that makeup requires more time and money than the corresponding requirement that men keep their hair short. *Id.*

bly burden females over males.[95] Turning to the sex stereotyping claim, the court found that the sex stereotyping approach could apply to sex-dependent appearance standards but distinguished the Jespersen case from Price Waterhouse by looking at the apparent objectivity of the alleged sex stereotyping:

> There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what a woman should wear . . . [or that] the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's subjective reaction to the makeup requirement.[96]

Because the makeup requirement was not objectively discriminatory or unreasonable, the court found that Jespersen had no sex stereotyping claim under a Price Waterhouse theory, noting that if it found for Jespersen, it would be coming dangerously close to creating a claim of sex discrimination for anyone personally offended by a workplace appearance standard.[97] Ultimately, the Jespersen court concluded that when addressing sex-dependent appearance standards, "the touch-stone is reasonableness."[98] Because it found no prima facie case of discrimination, the court declined to address the BFOQ exception to Title VII, but it did justify Harrah's policy as one meant to create a professional look for employees.[99]

Four judges dissented, in two dissenting opinions.[100] The first dissenting opinion argued that Jespersen had been subject to sex discrimination as defined by the Price Waterhouse sex stereotyping theory: "Quite simply, [Jespersen's] termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination 'because of' sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that 'gender must be irrelevant to employment decisions.'"[101] Looking at the makeup requirement separately from the other standards in Harrah's policy, the dissent concluded that the requirement was motivated by stereotypes about how women should present themselves.[102]

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[95] *Id.* at 1110. The court concluded that " '[w]here, as here, such [appearance] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only negligible effect on employment opportunities." *Id.* (quoting Knott v. Mo. Pac. R.R., 527 F.2d 1249, 1252 (8th Cir. 1975)).

[96] *Jespersen*, 444 F.3d at 1112.

[97] *Id.*

[98] *Id.* at 1113.

[99] *Id.* at 1109.

[100] *Id.*

[101] *Id.* at 1113–14 (Pregerson, J., dissenting) (emphasis in original).

[102] *Id.* Judge Pregerson clearly delineated the particular sex stereotype that the "Personal Best" policy perpetuated: "The inescapable message is that women's undoctored faces compare unfavora-

The second dissenting opinion suggested that Harrah's "Personal Best" policy, in addition to being impermissible sex stereotyping, was also substantially more burdensome for females than for males.[103] Highlighting the time, effort, and money that wearing makeup requires, the dissenting judge concluded that Jespersen presented a triable issue of fact on the question of unequal burdens.[104] Alternatively, the opinion argued against the majority's finding that Jespersen's reaction to the makeup requirement was unreasonable, noting that it would not be considered reasonable to require men to wear makeup.[105]

III. PERFORMATIVITY THEORY

Judith Butler's theory of gender performativity challenges the reasoning of those courts that, like the Ninth Circuit in Jespersen, find that sex-based appearance standards do not violate Title VII. These courts differentiate sex-based appearance standard cases from other seemingly more harmful forms of sex discrimination. As will be shown in this Part, this approach seriously misunderstands how the binary sex/gender system perpetuates gender inequality.

A. *Gender as a Performance*

According to Butler, it is incorrect to claim that the cultural existence of gender arises out of the physical existence of sex:

> [g]ender ought not to be conceived merely as the cultural inscription of meaning on a pregiven sex . . . [:] gender must also designate the very apparatus of production whereby the sexes themselves are established. As a result, gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which "sexed nature" or "a natural sex" is produced and established as "prediscursive," prior to culture, a politically neutral surface on which culture acts.[106]

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bly to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup." *Id.*

[103] *Id.* at 1117 (Kozinski, J., dissenting). Judge Kozinski argued that the "Personal Best" policy burdened women more than men, regardless of whether the policy was looked at as a whole or if the makeup policies were looked at separately:

> Every requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. "teased, curled, or styled" hair; clean trimmed nails v. nail length and color requirements. . . . The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the "overall policy" more burdensome for [women].

Id.

[104] *Id.* at 1117–18.

[105] *Id.*

[106] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 10–11 (10th ed. 1990) (emphasis in original) [hereinafter BUTLER, GENDER TROUBLE].

In other words, because the apparent naturalness of sex is itself a cultural construct, gender cannot be said to arise out of biological sex.[107] Instead, gender is created through identity performance that makes both sex and gender appear natural.[108] To add concrete detail to abstract theory, think about how we perform gender. Every day, each one of us performs gender in many small, often unnoticeable, ways: we choose our gendered presentation by wearing or not wearing makeup; by styling our hair in a particular fashion or choosing not to do so; and by wearing gender-specific clothes, gender-neutral clothes, or perhaps gender-transgressive clothes.[109] Because this performance is repeated, routine, and ongoing, gender appears natural even as it is being created and recreated with each gendered presentation.[110] Further, because gendered performances vary greatly while remaining identifiably "masculine" or "feminine," people have the leeway to perform gender differently while still reinforcing the idea that there are only two sexes or genders.[111]

B. *The Stigma and Subversive Potential of Gender Nonconformity*

Although sex and gender are cultural constructs, they are also the basis for very real differences in how people treat each other. Not only are men treated differently from women, but gender-normative people are also treated differently from gender-transgressive people.[112] The binary sex/gen-

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[107] *Id.*

[108] Butler, *Imitation*, *supra* note 14, at 314–15. Butler's argument does not deny the existence of physical sex, but instead posits that physical sex will always be interpreted through and shaped by culture. As Butler suggests,

> [t]he "being" of the subject is no more self-identical than the "being" of any gender; in fact, coherent gender, achieved through an apparent repetition of the same, produces as its *effect* the illusion of a prior and volitional subject. . . . [G]ender is not a performance that a prior subject elects to do, but gender is *performative* in the sense that it constitutes as an effect the very subject it appears to express.

Id. at 314 (emphasis in original).

[109] *Id.* at 314–15.

[110] *Id.*

[111] JUDITH HALBERSTAM, FEMALE MASCULINITY 27 (1998). As Judith Halberstam argues,

> On the one hand, we do not name and notice new genders because as a society we are committed to maintaining a binary gender system. On the other hand, we could also say that the failure of "male" and "female" to exhaust the field of gender variation actually ensures the continued dominance of these terms. Precisely because virtually nobody fits the definition of male and female, the categories gain power and currency from their impossibility. . . . [T]he very flexibility and elasticity of the terms "man" and "woman" ensures their longevity. To test this proposition, look around any public space and notice how few people present formulaic versions of gender and yet how few are unreadable or totally ambiguous.

Id.

[112] *See* KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 114 (1994). Sexism, misogyny, homophobia, and stigma against bisexuality as well as discrimination against gender nonconformists such as transgendered people, transsexual people, drag kings, butch

der system depends on these differences in treatment because without them it would not exist.[113] In turn, these differences in treatment limit what gender presentations are thinkable as not only "proper," but also "real" or "natural."[114] From this limitation arises both a stigma against gender nonconformists as well as a potential for the subversion of the binary sex/gender system through gender nonconformity.[115]

Many people unconsciously and automatically stigmatize gender nonconformity because it threatens the binary sex/gender system. Since the very existence of gender nonconformists threatens the cultural construction of normative gender as "proper," "real," or "natural," gender nonconformity is correspondingly constructed as "improper, "unreal," or "unnatural."[116] This allows the binary sex/gender system to remain intact.[117] But, since the idea of gender being either "proper" or "improper," "real" or "unreal," "natural" or "unnatural" is itself a cultural construct, this dichotomy is radically unstable.[118] Moreover, this instability is constantly in danger of being exposed because gender requires constant performance and production to exist: if someone does not perform gender "properly" or performs "improper" gender instead, the fact that the binary sex/gender system is culturally constructed might be revealed.[119] It is because of this threat that gender nonconformity is stigmatized and is often met with discomfort.[120] On the other hand, it is precisely this threat that gives gender nonconformity its unique subversive potential to challenge the binary sex/gender system and to reveal that gender is a performance by blurring the line between "proper" and "improper," "real" and "unreal," as well as "natural" and "unnatural."[121]

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lesbians, masculine straight women, drag queens, feminine straight men, and feminine gay men all depend on the assumption that there are only two "real" sexes and two "proper" genders. *Id.* at 115.

[113] *Id.* The binary sex/gender system depends on dynamics that mirror other group dynamics: "compliance within a group is set by the naming of good and bad behavior; the former is laudable, the latter is punishable. *Either/or* is used as a control mechanism, as in, 'Either you live up to our high standards here in the club, or [your] membership will be revoked.'" *Id.* at 102 (emphasis in orginal). If there were no either/or control mechanism to label people according to sex/gender (male or female, masculine or feminine, gender conforming or gender nonconforming), the binary sex/gender system would break down.

[114] BUTLER, GENDER TROUBLE, *supra* note 106, at xxii.

[115] *Id.*

[116] *Id.* at 10–11; Butler, *Imitation*, *supra* note 14, at 314–18.

[117] BUTLER, GENDER TROUBLE, *supra* note 106, at 10–11; Butler, *Imitation*, *supra* note 14, at 314–18.

[118] Butler, *Imitation*, *supra* note 14, at 314–18.

[119] *Id.*

[120] *Id.* at 314–15.

[121] BUTLER, GENDER TROUBLE, *supra* note 106, at xxiii.

C. *Why Appearance Standards Are Not Trivial*

Despite courts' arguments to the contrary, appearance standards are not trivial. Personal appearance is an important communicative tool used to perform identity and to indicate membership in certain cultural groups.[122] Gender performance is an important aspect of personal appearance and vice versa.[123] Gender performance through personal appearance not only expresses gender identity to others, but also may solidify gender identity for the individual.[124] Personal appearance implicates the entire binary sex/gender system by labeling the individual either male or female, masculine or feminine.[125] Thus, sex-dependent workplace appearance standards that force employees to perform identity and gender in a certain way by controlling personal appearance in turn control the expression and implications that arise from that personal appearance.[126]

This controlling of identity and gender expression is meant to enforce professional standards in the workplace, but the very concept of what is "professional," and presumably neutral, reflects, among other things, gender-normative biases.[127] While employees who are comfortable performing gen-

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[122] Alison J. Hartwell, *Makeup for Success: Why* Jespersen v. Harrah's *Stifles Diversity by Promoting Stereotypes in Employment*, 13 CARDOZO J.L. & GENDER 407, 408–09 (2007). As Gowri Ramachandran points out,

> The items with which we cover our bodies and the ways in which we style them are physically located at the border—a manipulable border—between our bodies and the rest of the world. They are how we make the human body culturally visible. . . . Sociologists, psychologists, anthropologists, and cultural theorists have long recognized that fashion and other forms of manipulating appearance play a unique role in the development of the individual as a member of society—the negotiation and formation of the public self.

Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 15 (2006).

[123] Carbado et al., *supra* note 12, at 2.

[124] *Id.*

[125] *Id.*

[126] Lucille M. Ponte & Jennifer L. Gillan, *Gender Performance over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 DUKE J. GENDER L. & POL'Y 319, 356–57 (2007).

[127] *Id.* Concepts of what is "professional" as they are interpreted through workplace appearance standards not only implicate gender performance, but expression of various other identities as well: courts have "implicit[ly] accept[ed] . . . the notion of professional image as comporting with dominant white, masculine, heterosexual, and middle-class views of proper appearance, which has implications not only for gender, but race, ethnic and religious performance cases." *Id.* Much like gender identity, expression of racial or ethnic identity is anything but trivial. Bartlett, *supra* note 6, at 2558–59. As Bartlett explains, "prohibition against all-braided hairstyles may seem trivial from the point of view of individuals in [a] culture who find such hairstyles bizarre or threatening, but it will seem anything but trivial to individuals struggling in a larger social context to define and express themselves in ways that affirm their connection to, and identification with, particular historical roots." *Id.*; *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (discussing how what is considered "professional" reflects racial biases).

der in a way that basically aligns with the employer's appearance standard might not object to the restriction on identity expression, employees who wish to perform gender in a way that does not align with the standard may be significantly burdened by the same restriction on identity expression.[128] Since sex-dependent appearance standards generally reify the binary sex/gender system, the employees that are most likely to object to the standards are, in some way, gender nonconformists.[129] Generally, the stigma of gender nonconformity creates an incentive for any person who might wish to present or perform a nonconforming gender identity through her personal appearance to assimilate by "passing"[130] or "covering"[131] with a normative gender self-presentation.[132] Workplace personal appearance standards, however, force "passing" or "covering" upon those whose gender identities do not align with the standard.

Gender-normative personal appearance is often seen as trivial precisely because it is normative.[133] For example, it does not seem burdensome for a woman to decide to wear lipstick only because it's considered very normal for women to wear lipstick. On the other hand, it might seem odd or disruptive—not trivial—for a man to wear lipstick, but this is only because men do not generally wear lipstick. We are only able to make these sorts of judgments because of the ubiquity of the binary sex/gender system. Since the binary sex/gender system is generally considered "proper," "real," and "natu-

[128] For instance, in *Jespersen* Judge Kozinski observed that the majority's opinion "presupposes that Jespersen is unreasonable or idiosyncratic in her discomfort" with wearing makeup. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1117–18 (9th Cir. 2006) (Kozinski, J., dissenting). "Why so?," Judge Kozinski questioned:

> If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance.

Id.

[129] Avery & Crain, *supra* note 77, at 110.

[130] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 773 (2002). "Passing" involves hiding an underlying identity in order to assimilate and avoid stigma. To explain the concept of "passing," Yoshino uses the example of a lesbian who "presents herself to the world as straight." *Id.* To tailor Yoshino's example to the context of personal appearance and gender performance, imagine a lesbian who personally identifies as "butch" but presents herself to the world as a feminine straight woman.

[131] *Id.* To explain the concept of "covering," Yoshino uses the example of a lesbian who is comfortable with telling others that she is a lesbian but otherwise allows others to ignore the fact that she is a lesbian: "She might . . . (1) not engage in public displays of same-sex affection; (2) not engage in gender-atypical activity that could code her as gay; or (3) not engage in gay activism." *Id.* To again tailor Yoshino's example to the context of personal appearance and gender performance, imagine a lesbian who identifies as butch, tells others that she is butch, but downplays her butch identity by making sure that her personal appearance does not code her as a butch lesbian.

[132] *Id.*

[133] Bartlett, *supra* note 6, at 2544.

ral," people—including judges—often presume that employees will naturally present themselves in the gender normative ways required by sex-dependent appearance standards.[134] From this perspective, sex-dependent appearance standards appear trivial and seemingly do not impact employee identity expression in a significant way.[135]

The "common-sense" judgment that workplace appearance standards are trivial also comes from the assumption that self-presentation of gender nonconformity is not something worth protecting, especially in a legal context.[136] Again, this assumption reflects the stigma against gender nonconformity as "improper," "unreal," or "unnatural."[137] However, the other side of this stigma is the potential for subversion and, correspondingly, the other side of this judgment of triviality is the discomfort with gender nonconformity as a threat to the binary sex/gender system.[138] Thus, the "common-sense" judgment that sex-dependent appearance codes in the workplace are trivial ultimately reveals how deeply these standards are rooted in the binary sex/gender system that supports sex/gender-based inequality. As the next Part suggests, this is the primary reason why these standards should be treated like any other form of sex discrimination in the workplace.

IV. Why Sex-Dependent Personal Appearance Standards Are Not Trivial

As Butler demonstrates, gender normative performance is an integral part of the very binary sex/gender system that gives birth to sex/gender inequalities. And, as the United States Supreme Court has recognized, one of the purposes behind Title VII is to abrogate those inequalities that arise from the binary sex/gender system.[139] If sex-dependent appearance standards in the workplace exemplify forced gender performance and perpetuate the very inequalities that Title VII is meant to abrogate, the question must be asked: why do courts routinely find that sex-dependent appearance standards do not violate Title VII?

Courts generally justify this differentiation with "common-sense" judgments that sex-dependent appearance standards are trivial in that they (1)

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[134] *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1117–18 (9th Cir. 2006) (Kozinski, J., dissenting).

[135] *Id.*; *see also* Carbado et al., *supra* note 12, at 1 (discussing the apparent triviality of makeup).

[136] Kimberly A. Yuracko, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 S.D. L. Rev. 857, 857–61 (2006).

[137] Butler, Gender Trouble, *supra* note 106, at 10–11; Butler, *Imitation*, *supra* note 14, at 314–18.

[138] Butler, Gender Trouble, *supra* note 106, at 10–11; Butler, *Imitation*, *supra* note 14, at 314–18.

[139] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion); L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707–08 (1978).

have a minute effect on employees, (2) impose an equal burden on the sexes, or (3) are necessary for employer's businesses.[140] The remainder of this Part evaluates these reasons. After concluding that these reasons reinforce the binary sex/gender system and should thus be disregarded as counter to, and by extension unlawful in, Title VII jurisprudence, this Part proposes that courts should apply the Price Waterhouse sex stereotyping approach to sex-dependent appearance standards, finding that these standards are prima facie discrimination. The final Subpart addresses some concerns that have been raised by courts in sex-dependent standard cases.

A. *The Common-Sense Judgment of Triviality*

The "common-sense" judgment that sex-dependant appearance standards are trivial is telling because it assumes not only that sex-dependent appearance standards are socially insignificant in terms of sex stereotyping, but also that individual employees are not burdened by adhering to gender-normative appearance standards.[141] These assumptions are incorrect for the following reasons. First, sex-dependent appearance standards are culturally significant because they reinforce normative gender performance that in turn perpetuates the binary sex/gender system.[142] The binary sex/gender system supports inequality between the sexes as well as inequality between gender-normative people and gender-transgressive people.[143] Second, sex-dependent appearance standards are significant for individuals, because they force normative gender performance, whether or not a person is comfortable performing normative gender. For people who would rather perform gender

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[140] Bartlett, *supra* note 6, at 2544.

[141] Carbado et al., *supra* note 12, at 1; Bartlett, *supra* note 6, at 2558–59. As Bartlett articulates:

> The real problem with the assumptions courts make about the trivial impact of dress and appearance requirements on employees and their importance to employers is . . . that they rely on unexamined, culture-bound judgments that will tend to reinforce existing, hidden prejudices and stereotypes. Such judgments reflect . . . the high degree of societal consensus regarding dress and appearance expectations. That a woman should wear knee-length skirts and high heels and a man should not can be understood as trivial . . . only from within a culture in which women commonly wear knee-length skirts and high heels and men do not. In such a culture, a requirement that men wear knee-length skirts and high heels could not be so easily dismissed. . . . In short, whether dress and appearance standards are trivial or significant depends upon the relationship between the standard and the culture in which it is imposed. . . . Prejudgments about what is trivial and what is important without regard to the specific relationship between a rule and its cultural context take for granted the very habits Title VII should be used to scrutinize, and thereby undermine the Act. These habits form the basis for practices that, in their normality, are those that will most easily escape suspicion, without rigorous review.

Id.

[142] Carbado et al., *supra* note 12, at 1.

[143] BORNSTEIN, *supra* note 112, at 114.

transgressively, sex-dependent appearance standards may force them to "pass" or "cover."[144]

The "common-sense" judgment that forcing people to perform gendered personal appearance in a normative way is not burdensome and is thus trivial comes from the assumption that self-presentation of gender nonconformity is not something worth protecting, particularly in a legal context.[145] This assumption is rooted in the stigma that gender nonconformity is "improper" or "unnatural" compared to "proper" and "natural" normative gender, as well as in societal discomfort with gender nonconformity.[146] Precisely when a person's gender performance through personal appearance becomes potentially subversive, it is recast as trivial and not worth legal protection.

These underlying assumptions can be seen in the district court's and Ninth Circuit's reasoning at the various stages of the Jespersen case. The district court granted summary judgment for Harrah's using the immutability approach.[147] The immutability test assumes that employer policies that "reasonably" differentiate between the sexes on the basis of mutable characteristics do not significantly burden employees because employees have control over mutable characteristics.[148] Since employees can control mutable characteristics, the argument goes, appearance standards based on mutable characteristics do not implicate the inequality between the sexes that creates unequal employment opportunities.[149] However, this argument assumes that mutable characteristics are trivial compared to immutable characteristics, and that it is therefore acceptable to encourage or enforce "passing" or "covering" by people who do not perform gender normatively. However, mutable characteristics, such as choice of dress and personal appearance, are not trivial; rather, they are an integral part of gender performance.[150] As such, they solidify the cultural construct that sex is an immutable characteristic that can be separated from its cultural context.[151] Because mutable characteristics are significant for individual gender identity performance as well as the perpetuation of the binary sex/gender system as a whole, forcing people to perform gender in a particular way at work is a significant burden. For example, gender nonconformists, whose cultural visibility may reveal binary sex/gender as culturally constructed, may be forced to "pass" or "cover" their

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[144] Yoshino, *supra* note 130, at 773.

[145] Yuracko, *supra* note 136, at 857–61.

[146] BUTLER, GENDER TROUBLE, *supra* note 106, at 10–11; Butler, *Imitation*, *supra* note 14, at 314–18.

[147] Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189, 1192–93 (D. Nev. 2002).

[148] *Id.*; *see also* Zalesne, *supra* note 56, at 539–40; Williamson, *supra* note 37, at 689.

[149] *Jespersen*, 280 F. Supp. 2d at 1192–93.

[150] Butler, *Imitation*, *supra* note 14, at 314–15.

[151] *Id.*

preferred gender performance at work to either hide or soften their subversive potential.[152]

B. *Neutrality and the Unequal Burdens Test*

In Jespersen, the Ninth Circuit focused its reasoning on the seemingly equal burdens that Harrah's "Personal Best" policy placed on the sexes and held that appearance standards that "appropriately differentiate" between the sexes and do not unreasonably burden one sex over the other "are not facially discriminatory."[153] However, the purpose of Title VII, as the text of the statute states, is to protect individuals from sex discrimination.[154] Thus, if a plaintiff is fired for failing to adhere to a sex-dependent appearance standard, as Jespersen was, she has direct evidence of sex discrimination, whether or not males were also burdened by the appearance standard.[155] By the same token, if a man were fired under Harrah's "Personal Best" policy for wearing makeup or colored nail polish, he should also have a claim of sex discrimination under Title VII. Equally burdening both sexes with a sex-dependent appearance standard based on sex stereotypes should give rise to potential sex discrimination claims by both men and women. It should not, as the Ninth Circuit held, defeat such claims.

Ultimately, it is the apparent triviality of sex-dependent appearance standards that makes the unequal burdens test appealing: the test supports "appropriate" and "reasonable" sex-dependent standards as lawful, but what is considered "appropriate" and "reasonable" sex-differentiation is determined by reliance on the binary sex/gender system.

C. *Business Necessity and the BFOQ Exception*

The Jespersen court declined to address the BFOQ exception to Title VII, which states that an employer can take sex into account in employment decisions when it "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[156] The court did, however, justify Harrah's policy as one meant to create a professional look for employees.[157] As previously noted, the concept of what

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[152] Yoshino, *supra* note 130, at 773.

[153] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109–10 (9th Cir. 2006). One of the dissenting opinions also took a class-based approach to Title VII. *See id.* at 1117 (Kozinski, J., dissenting) (focusing on how Harrah's policy was more burdensome for women than for men, whether it was examined as a whole or divided into parts).

[154] 42 U.S.C. § 2000(e)(2) (2000); *see also* Jennifer Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. POL'Y 243, 250 (2007).

[155] Levi, *supra* note 154, at 250.

[156] *Jespersen*, 444 F.3d at 1109.

[157] *Id.*

is "professional," and presumably neutral, reflects gender-normative biases, so labeling a sex-dependent appearance standard "professional" does not negate the fact that it is sex-dependent.[158] Instead, the apparent triviality of including gender normative performance in a "professional" image reflects the insidiousness of sex stereotyping—precisely because gender normative performance is equated with neutral professional appearance, sex stereotyping is all but invisible. Unless the employer's policy qualifies as a BFOQ, where sex is a qualification relating to the "essence," "core," or "central mission" of the job, an employer's interest in creating a professional standard of appearance should not justify sex-dependent standards.[159] Accordingly, the Jespersen court should have required the professional look for employees to be an essential or core qualification for the job of bartending if the court was going to use the professional look as a factor in justifying Harrah's "Personal Best" policy. In sum, as is the case with arguments regarding the seemingly triviality and neutrality of sex-based appearance standards, the professional image justification for sex-based appearance standards perpetuates sex stereotypes and therefore should not be permitted to justify sex discrimination.

D. *Applying the Price Waterhouse Sex Stereotyping Approach and Responding to Objections*

As previously discussed, apparent triviality, neutrality, and professional necessity do not justify treating sex-based appearance standard cases differently from other sex discrimination cases. For this reason, the Price Waterhouse sex stereotyping approach should apply to sex-dependent appearance standard cases.[160]

Sex-specific appearance standards are workplace policies based on the same criteria found illegitimate by the Supreme Court in Price Waterhouse and by the Sixth Circuit in City of Salem: the employee's gendered appearance.[161] These codes are more blatant and systematic in their discrimination, however, because they are company policies that apply to all of the company's employees, much like the policy struck down in Manhart.[162] Instead of arbitrarily discriminating against one employee on the basis of sex, as the employers did in Price Waterhouse and City of Salem, employers with sex-specific dress codes discriminate against all of their employees who are subject to the dress code. Ultimately, under the sex stereotyping ap-

[158] *See supra* note 127 and accompanying text.

[159] *Cf.* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 200–04 (1991).

[160] Wiles, *supra* note 19, at 666.

[161] Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1998); Smith v. City of Salem, 378 F.3d 566, 569 (6th Cir. 2004).

[162] L.A. Dep't of Water v. Manhart, 435 U.S. 702, 707–08 (1978).

proach,[163] sex-dependent appearance standards should be considered prima facie discrimination because they systematically and forcefully reify stereotypes about how each sex should dress or look.[164] If this approach had been used by the Jespersen majority, Harrah's "Personal Best" policy would have been considered prima facie discrimination as sex stereotyping and would have had to be justified with a BFOQ.[165]

Those courts that have rejected the sex-stereotyping theory in sex-dependent appearance standards cases have raised a number of concerns. Perhaps none is more prevalent than the judiciary's concern over creating 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."[166] However, such concerns can be readily handled under the already-existing Title VII framework.

The BFOQ exception is one reason that applying the sex stereotyping approach to appearance standards would not create an absolute right of free expression in the workplace, as the Jespersen majority seemed to fear.[167] If sex is truly a qualification necessary to the normal operation of the business in question, the employer can lawfully discriminate on the basis of sex under Title VII.[168] Even though this exception is interpreted narrowly and customer preference is not generally considered a legitimate justification for sex discrimination, customer preference may be recognized as a BFOQ in some situations—for example, a sexy feminine image can be a BFOQ for a job that revolves around explicitly sexual entertainment.[169] It would follow, then, that a sex-specific and also sexy dress and appearance code could be a BFOQ for those jobs where "female sexuality [is] reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers."[170] It is unlikely that Harrah's "Personal Best" policy would

[163] This approach was adopted by the first dissenting opinion in *Jespersen*. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113–14 (9th Cir. 2006) (Pregerson, J., dissenting).

[164] Wiles, *supra* note 19, at 696–98.

[165] *Jespersen*, 444 F.3d at 1109.

[166] Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058 (7th Cir. 2003).

[167] Wiles, *supra* note 19, at 666.

[168] Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 200–04 (1991).

[169] *See* Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. POL'Y 257, 266–67 (2007) (noting that courts judge an employer's BFOQ defense more harshly when the employer hires women or men exclusively to use sex appeal to sell unrelated goods and services); Bartlett, *supra* note 6, at 2577–79 (arguing that it is beneficial to allow a BFOQ for sex work, even though it may be seen as an "extreme [form] of sexual subordination," because to qualify for this exception "[a] business must show that its primary purpose is to provide sexual stimulation rather than food, drink, or some other service for which sex is not an essential component. This it has a perfect right to do, although to defend its right to discriminate on the basis of sex, a business will not be able to hide behind the legitimacy of ordinary business purposes the public deems more 'respectable'—flying passengers, serving food, and so on.").

[170] Bartlett, *supra* note 6, at 2577.

fall under this exception: serving drinks—not appearing sexy—is the main purpose of bartending.[171]

Additionally, extralegal measures can quell the judiciary's fears. For instance, even if the "Personal Best" policy was found impermissible under Title VII, Harrah's would still have many other appearance-standard options, because it could institute gender-neutral appearance standards. Employers have the option of creating dress and appearance codes—even sexy ones—that are not sex-specific.[172] As Ann C. McGinley suggests,"[o]ne solution to the problem of subordination [of women in the workplace] is to require businesses wishing to exploit female sexuality also to exploit male sexuality."[173] Such an approach would challenge the notion of women as subordinate sex objects by requiring employers who want to convey a sexy image to present men as sex objects as well.[174] Of course, sex appeal is not necessary for dress codes and appearance standards to be unisex—Harrah's dress code, which required "all bartenders, both men and women, to wear the same uniform of black pants and white shirts, a bow tie, and comfortable black shoes," would continue to be acceptable even if dress and appearance codes were scrutinized under the Price Waterhouse approach.[175]

The Jespersen majority also worried that applying the sex stereotyping approach to sex-dependent appearance standards would create a claim of sex discrimination for anyone personally offended by a workplace appearance standard.[176] This is not the case, however. Since an employee must prove that she was subject to an adverse employment action and suffered an adverse impact on her job performance before she has a prima facie case of sex discrimination, merely being offended by a policy would not be enough to establish a claim.[177] Jespersen, for example, could claim sex discrimination because she had such a strong negative reaction to the makeup policy, was unable to bartend to the best of her ability while wearing makeup, and, ultimately, lost her job due to the policy.[178] Many bartenders subject to the exact same "Personal Best" policy would have trouble proving these necessary elements of a sex discrimination case, even if they were highly offended by the policy.

The worries that applying the Price Waterhouse sex stereotyping approach to appearance standard cases would lead to an absolute right to free

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[171] Wiles, *supra* note 19, at 682.

[172] McGinley, *supra* note 169, at 282–83 (discussing cocktail servers and the BFOQ exception).

[173] *Id.*

[174] *Id.*

[175] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1105–06 (9th Cir. 2006).

[176] *Id.* at 1112.

[177] Wiles, *supra* note 19, at 678–79.

[178] *Id.*

expression in the workplace or would allow anyone simply offended by an appearance standard to sue their employer under Title VII are unfounded. Employers would still be able to require some sex-specific appearance standards under the BFOQ exception and would be free to regulate employee appearance in non-sex-specific ways. Further, employees would still need to show adverse employment impact and job performance before making out a complete case of sex discrimination, even if sex-specific appearance standards were considered prima facie discrimination. For these reasons, the judiciary's worries should not support treating sex-based appearance standard cases differently from other sex discrimination cases.

V. Conclusion

When an employer uses sex stereotypes to justify treating men and women differently, adversely affected employees generally have a prima facie case of disparate treatment sex discrimination under Title VII. It follows, then, that when an employer uses sex stereotypes to justify a dress code or grooming standard that treats men and women differently, adversely affected employees should also have a prima facie case of disparate treatment sex discrimination. This is not always the case, however. Courts often use arguments about triviality, neutrality, and professional image to distinguish sex-dependent appearance standard cases from other sex-based discrimination cases. Ironically, the assumptions underlying these rationales reveal the very biases Title VII is meant to guard against.

The seeming triviality, neutrality, and professional necessity of sex-dependent appearance standards actually highlight the impact of personal appearance as gender identity performance and reveal the ubiquity of the sex stereotypes perpetuated by these standards. Sex-specific dress and grooming codes mandate gender normative performance, which is an integral part of the binary sex/gender system that creates sex/gender-based inequality. Therefore, by forcing normative gender, these standards are anything but trivial or neutral—they reinforce gender inequality. Instead of making an exception in sex discrimination law for sex-dependent appearance standards, courts should apply the Price Waterhouse sex stereotyping approach to these standards and invalidate them as impermissible sex discrimination.