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Mark R. Bandsuch

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THE NBA DRESS CODE AND OTHER FASHION FAUX PAS UNDER TITLE VII

MARK R. BANDSUCH, S.J.*

I. INTRODUCTION

Sports have always provided a unique glimpse into the sociological soul of America – reflecting current social dynamics while simultaneously serving as an agent of significant social change. For example, professional sports excluded African-Americans from white teams and leagues for decades before becoming one of the earliest sources of equal rights when it began to integrate athletic competition. Jesse Owens defeated the Nazi nation's claim of racial superiority by winning four gold medals in the 1936 Olympic Games and Jackie Robinson paved the way for integration in athletics, employment, education and public accommodations when he became the first black baseball player in the all-white Major League in 1947. Parallels between sports and society are still prevalent today, with athletes from numerous nations achieving success at all levels in a manner reflecting similar advances of employee diversity in the workplace. The influence of modern athletes on the workplace can even be seen in the assorted attire, trend-setting hairstyles, bountiful body art and extensive "bling-bling"[1] that adorns the fields and factories, as well as the locker rooms and boardrooms.

Unfortunately, not all parallels are positive, as evidenced by the very low number of African-American coaches and executives in professional sports mirroring a similar dearth in upper-level management among corporations. Similarly, the previous freedom sur-

* Assistant Professor of Business Law, College of Business Administration, Loyola Marymount University.

1. Minya Oh, *"Bling Bling" Added to Oxford English Dictionary*, MTV, Apr. 30, 2003, http://www.mtv.com/news/articles/1471629/20030430/bg.jhtml?headlines=true (noting definition of phrase "bling bling").

rounding workplace attire has been replaced by employee dress codes and other appearance rules in both businesses and professional sports. The latest example in sports is the "Business Casual" Dress Code for National Basketball Association ("NBA") players, which among other things, prohibits players from wearing shorts, chains and throwback jerseys.[2] The particular prescriptions and prohibitions of these different dress codes, appearance policies, and grooming rules have raised concerns about a "second generation" of employment discrimination referred to as "trait discrimination."[3]

Parts II and III of this article look at the general authority possessed by employers of business and by commissioners of professional sports organizations to design and implement appearance policies. Parts IV and V turn to Title VII for an analysis of the discriminatory dimensions of dress codes and grooming guidelines, with a focus on the NBA Dress Code. Parts IV and V also investigate the challenges Title VII faces in adequately addressing the adverse impact, cognitive bias and "trait discrimination" inherent in certain appearance policies. This article then offers correctives to Title VII's analytical framework so that it may more effectively address these recent manifestations of appearance discrimination, may more fully promote equal employment opportunities and may more completely cultivate the social goals behind the Civil Rights Act.

II. AUTHORITY OF EMPLOYERS AND COMMISSIONERS

Employers, whether of superstar athletes or minimum wage workers, have traditionally enjoyed vast authority and autonomy over their employees' behaviors and appearance.[4] Dress codes and grooming policies are two of the many forms that workplace rules may take when creating and describing the relative rights and du-

2. NBA Player Dress Code, http://www.nba.com/news/player_dress_code_05 1017.html (last visited Oct. 9, 2008) (stating NBA Dress Code).

3. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468-74 (2001) (claiming trait discrimination may is new form of employment discrimination). "'Second generation' claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups." *Id.* at 460; *see also* Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 366, 369-70. (2006) (noting trait discrimination is akin to race discrimination).

4. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126-27 (1976) (referring to HORACE G. WOOD, MASTER AND SERVANT, § 134 272-73 (1877)) (describing employer's authority over workplace).

ties in the employer-employee relationship. Courts generally have upheld clothing regulations that have required employees to wear suits, dress in accordance with gender, be clean shaven, cut their hair, remove or cover tattoos, avoid certain hair styles, restrict jewelry or associated piercings, and even act and talk in a certain manner (i.e., "conservative").[5]

Owners of professional sports franchises are endowed with the same rights as owners and employers of traditional organizations and businesses. The policy can originate with individual player contracts with the team (like Johnny Damon's requirement to shave in order to wear Yankee pinstripes). Grooming policies and dress codes can also stem from a collective bargaining agreement ("CBA") between all players and the league through the commissioner (like the NBA Dress Code).

A. Commissioners' Authority

Each CBA addresses, to varying degrees of specificity, the commissioner's powers, when those powers are exercisable, and how they are procedurally invoked.[6] The team owners of each league have also granted their respective commissioner the extensive authority to act in the best interests of the game.[7] For example, the NFL commissioner may exercise his disciplinary powers against violent or criminal conduct that "is unacceptable and constitutes conduct detrimental to the integrity and public confidence in the

5. *See, e.g.*, Riggs v. City of Fort Worth, 229 F. Supp. 2d 572 (N.D. Tex. 2002) (upholding employer decision to require employee to wear long pants and shirt to cover tattoos); Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004) (rejecting employees request to be exempt from employer's ban on body piercings); *see also* Michael W. Fox, *Piercings, Makeup, and Appearance: The Changing Face of Discrimination Law*, 69 TEX. B.J. 564, 564 (2006) (describing increased number of Civil Rights cases attempting to expand protected categories).

6. NBA CONSTITUTION (MISCONDUCT), art. 35 (a)-(d) (2005), http://www.nbpa.com/cba_exhibits/exhibitA-excerpt.php (last visited Oct. 15, 2008); *see also* Matthew B. Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1411 (1990) (arguing for balance between respecting league governance and preventing commissioners from unlawfully restricting player rights).

7. *See* Pachman, *supra* note 6, at 1414, 1415, 1417 n.55 (describing origin of league commissioner as response to Black Sox scandal of 1919, in which professional baseball players allegedly took money to fix World Series). Judge Kenesaw Mountain Landis agreed to serve as the first commissioner of Major League Baseball, but only upon receiving immense authority to make and enforce decisions "in the best interests of the game" – which included the power to levy fines and punishments upon players and owners alike (without limitation) and to be the final arbiter of all disputes (with no right of appeal to the courts). *Id.* at 1415. The NBA similarly appointed commissioner endowed with extensive powers in 1949. *See id.* at 1417 n.55.

National Football League."[8] The NBA has also empowered its commissioner with the authority to punish players "guilty of conduct that does not conform to the standards of morality or fair play."[9] The courts and the National Labor Relations Board ("NLRB") have upheld these broad powers and have deferred to the owners' intent "to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial "*pater familias*" – and have even given the CBA precedence over league charters and constitutions.[10]

B. Limitations to Authority

Pursuant to his authority under the six-year NBA CBA, in October 2005, the NBA Commissioner David Stern first implemented the NBA Dress Code. This is significant because it subjected the NBA Dress Code to legal challenges under contract theory (which includes collective bargaining agreements), public policy (rooted primarily in statutory regulations) and implied covenants of good faith and fair dealing.[11] Employment relationships could be terminated in violation of any of these three, leading to a possible claim for wrongful discharge or unjust dismissal.[12]

For example, "the National Labor Relations Board has held that appearance codes are 'terms and conditions of employment' within the meaning of the NLRA and thus 'mandatory subjects of

8. *NFL Personal Conduct Policy* (2007), *available at* http://sports.espn.go.com/nfl/news/story?id=2798214 (listing punishable behavior for NFL and team employees).

9. NBA CONSTITUTION, *supra* note 6, at art. 35 (a)-(d) (making punishable "conduct . . . [that] is prejudicial or detrimental to or against the best interests of the Association or the game of basketball").

10. Milwaukee American Ass'n v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931) (holding commissioner had power to negate contract between two teams); *accord* Charles 0. Finley & Co., Inc. v. Kuhn, 569 F.2d 527 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978) (holding commissioner's authority is not bound by major league rules or moral turpitude); *see also* Pachman, *supra* note 6, at 1418-19 (stating that collective bargaining agreements should and must take precedence in dispute resolution).

11. *See* Michael J. Yelnosky, *What Do Unions Do About Appearance Codes?*, 14 DUKE J. GENDER L. & POL'Y 521, 522 (2007) (showing state action may be brought for breach of implied covenant of good faith); Charles J. Muhl, *The Employment-at-will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3, 3-4 (Jan. 2001) (explaining that implied covenants of good faith and fair dealing as an exception to the employment-at-will). A minority of states (eleven) as of October, 2000, including California, Nevada and Alaska, read a covenant of good faith or fair dealing into all employment relationships. *Id.* at 4.

12. *See* Muhl, *supra* note 11, at 3-4 (explaining terminating employment agreements for these reasons can lead to litigation).

bargaining.'"[13] Therefore, the employer's (and NBA Commissioner's) unilateral implementation of a dress code without explicit good faith bargaining arguably violates fundamental tenets of labor law.[14] The NLRB has held as much in other grooming policy cases.[15] In fact, the NFL recently refrained from requiring players to cut their hair a certain length without negotiations because the NFL's previous CBA "expressly prohibited the imposition of discipline based on facial hair or hair length."[16]

The NBA and other employers often respond that the union either consented to such changes or waived the right to negotiate over it.[17] They support their position with the broad powers granted to the commissioner in the "best interests of the game" provision of the CBA, as well as the stipulation in "every player's contract which states that the player agrees to be "neatly and fully attired in public."[18] Public policy does, however, preclude the employer and union from agreeing to eliminate certain statutorily guaranteed rights or similarly imposed responsibilities, but not all. For example, a CBA can both relinquish the right to strike.[19] As to equal employment opportunity laws and the appearance codes they cover, the Supreme Court has explicitly held that CBA's cannot

13. Yelnosky, *supra* note 11, at 523 n.15 (quoting *Crittenton Hospital*, 342 N.L.R.B. No. 67 (2004)); *see also* 29 U.S.C. § 158(a)(5) (2000) (declaring it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . .").

14. *See Yelnosky*, *supra* note 11, at 523 n.17 (citing *Pub. Serv. Co.*, 337 N.L.R.B. 193, 198 (2001)) (stating it is illegal for employers to unilaterally implement provisions outside of collective bargaining agreement).

15. *See id.* at 524 (holding that it is illegal to unilaterally implement grooming policy decisions outside of the collective bargaining agreement).

16. Lloyd Vance, *Taking it to the House*, http://lloydvance.wordpress.com/ (Mar. 28, 2008, 14:39 EST).

17. *See* Yelnosky, *supra* note 11, at 523 (citing *Pub. Serv. Co.*, 337 N.L.R.B. 193, 198 (2001)) (noting how employers often defend unilaterally implementing provisions outside collective bargaining agreements). Conversely, unions have "successfully challenged employers' appearance codes on the grounds that the employer had given up the right to implement the code under some other provisions of the collective bargaining agreement," including the usual just cause provisions. *Id.* at 525.

18. Larry Coon, NBA Salary Cap FAQ, July 11, 2007, http://members.cox.net/lmcoon/salarycap.htm (explaining NBA CBA requires players uphold certain dress requirements).

19. *See* Boys Mkts. v. Retail Clerks Union, 398 U.S. 235, 254 (1970) (holding injunction is not prohibited when grievance subject to CBA, and employer is both ready for arbitration and would suffer irreparable injury through violation of no-strike obligation); *see also* NLRB v. Magnavox Co., 415 U.S. 322, 325-27 (1974) (holding CBA authorization of employer to issue maintenance rules did not affect union's waiver of right to distribute literature on premises).

eliminate protections guaranteed under the Civil Rights Act.[20] The Court elaborated that:

> It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . . These rights are conferred on employees collectively. . . . Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. . . . In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.[21]

Even the procedural rights to enforce substantive rights granted under Title VII can be relinquished only by the individuals possessing them, and not by any CBA.[22] Furthermore, Title VII rights are substantive rights guaranteed to and possessed by each individual, and thus, cannot be waived by the individuals themselves, let alone by collective bargaining representatives.[23] In short, individual employees, whether NBA superstars or low-wage laborers, can agree to pursue Title VII rights exclusively through alternative dispute resolution ("ADR"), but neither the employee nor a representative can abridge the actual substantive protections afforded under Title VII.[24]

The implicit reference to the NBA Dress Code in players' individual contracts and the CBA's "best interests of the game" provision do not substantively affect any dimensions of discrimination that players face.[25] NBA players did not surrender their right to challenge the NBA Dress Code under Title VII just because it was implemented under the broad "best interests" provision of the CBA.[26] Moreover, they did not surrender those same Title VII sub-

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20. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974) (holding that employee's right to trial de novo under Civil Rights Act is not prevented by earlier submission of claim to final arbitration under CBA).

21. *Id.* at 51-52 (citing Wilko v. Swan, 346 U.S. 427 (1953)) (citations omitted).

22. *See id.* at 48-49 (explaining procedural rights relating to Title VII may not be waived in collective bargaining).

23. *See id.* at 52 (noting "mere resort to the arbitral form to enforce contractual rights" does not waive Title VII rights).

24. *See id.*

25. Coon, *supra* note 18 (referring to clauses in NBA CBA and players contracts that identifies dress code); *accord* NBA Player Dress Code, *supra* note 2 (detailing NBA Player Dress Code).

26. *See* Yelnosky, *supra* note 11, at 528 ("[L]abor law and the enforcement of collective bargaining agreements generally give covered employees [about 13% of

stantive rights by agreeing in their individual contracts to be neatly and fully attired in public.[27] At a minimum, players would be able to initiate a claim of discrimination under the league's arbitration process, or possibly even be required to use ADR by the NBA CBA, in lieu of court.[28] This paper now takes a closer look at the anti-discrimination law that protects the irrevocable rights of individual employees and limits commissioner and employer authority, with or without the existence of a collective bargaining agreement.

III. EQUAL RIGHTS IN EMPLOYMENT AND ATHLETICS

Congress has used the public policy exception to empower courts to prohibit workplace rules that discriminate against certain protected classes since the Civil War. Discrimination, unfortunately, has persisted in employment and athletics in the form of "separate but equal" Jim Crow laws even after the Emancipation Proclamation, the Civil War victory,[29] the Fourteenth Amendment,[30] the Fifteenth Amendment[31] and the Civil Rights Acts of 1866 and 1871.[32] Jim Crow laws governed most forms of athletic competition, leading to the same segregation and harsh conditions in sport that existed at work, schools, public facilities and neighborhoods at that time.[33] For instance, black colleges and conferences surfaced in the South, yet were precluded from competing against

labor force] more protection from the imposition of appearance codes than any other statutory or common law regulations.").

27. *See generally id.* (explaining union members cannot waive Title VII rights through collective bargaining).

28. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 658-59 (6th Cir. 2003) (distinguishing between enforceable and unenforceable arbitration agreements).

29. *See* Maris A. Vinovskis, *Have Social Historians Lost the Civil War: Some Preliminary Demographic Speculations, in* TOWARD A SOCIAL HISTORY OF THE CIVIL WAR: EXPLORATORY ESSAYS 1, 34 (Maris Vinovskis ed., Cambridge Univ. Press 2003) (noting more Americans died in Civil War (620,000) than in any other war and almost as many as all other wars combined).

30. U.S. CONST. amend. XIV (securing rights of former slaves). *See generally* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 1866-1876 (1998) (noting that amendment was designed in part as set of guidelines for "reconstruction" of Southern states, which required implementation to be readmitted to the Union).

31. U.S. CONST. amend. XV (prohibiting states from preventing citizens to vote due to race, color or previous condition of servitude).

32. *See* 42 U.S.C. 21 § 1981 (2000) (giving citizens of all races (only men at that time) same contractual rights, which included employment, to buttress Thirteenth Amendment's abolition of slavery); *see also id.* § 1983 (authorizing private actions).

33. *See* Renford Reese, *The Socio-Political Context of the Integration of Sport in America*, 4 JOURNAL OF AFRICAN AMERICAN MEN 5, 7 (Spring 1999) (noting African-Americans could not play organized professional baseball from 1890 to 1946).

white schools. Even Northern teams, which permitted isolated instances of black participation, succumbed to Southern segregation by benching black players when they played segregated schools.[34] Jack Johnson held the heavyweight boxing championship from 1908-1915, after which African-Americans were prohibited from challenging for the title until the 1930s.[35]

Fortunately, Jesse Owens and Joe Louis thwarted the Nazis' claim of racial superiority in 1936 and 1938 respectively. Furthermore, in 1947, after a million blacks participated in and thousands of others died in World War II, Jackie Robinson pioneered integration across the board by becoming the first black baseball player in the all-white Major League.[36] The NFL and NBA followed suit in 1947 and 1951 respectively. The Supreme Court's decision in *Brown v. Topeka Board of Education* ensured that integration would move beyond sports into education and other areas of society.[37]

The violence and delays, however, surrounding integration efforts exemplified the resistance and reticence of many to change their racist ways. Congress was compelled to act, passing the Civil Rights Act of 1964, which outlawed discrimination in public facilities and other areas like employment.[38] Even though sex, color, national origin and religion were all included in its protected classes, it was the prohibition of race discrimination that was the primary purpose behind the Civil Rights Act of 1964. Four years after the Civil Rights Act of 1964, sprinters Tommie Smith and John Carlos made their own political proclamation for equality by raising black-gloved fists high into the air on the Olympic victory stand in Mexico City during the playing of the national anthem.

Unfortunately, prejudicial perspectives still linger as reflected in the numbingly racist remarks about athletes and others made by many media personalities.[39] One radio announcer referred to the

34. *See id.* at 12 ("Many all-white teams, especially in the South, refused to play against integrated teams . . . the integrated teams usually gave in to the demands of the all white-teams and withheld their black athletes from participating.").

35. *See id.* at 8-10 (describing Jack Johnson's controversial career).

36. *See id.* (noting Robinson was chosen in spite of more athletic players because of his character).

37. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (holding that segregation in public schools is unconstitutional).

38. *See* 42 U.S.C. §§ 1981-2000 (2000) (outlawing various discriminatory practices).

39. *See, e.g.*, Lewine Mair, *Annika Sorenstam Battles to Make Cut in the Ricoh Women's British Open at Sunningdale*, THE TELEGRAPH, Aug. 2, 2008, http://www.telegraph.co.uk/sport/golf'/womensgolf/2487137/Annika-Sorenstam-battles-to-make-cut—Golf.html (noting that golf announcer, Kelly Tilghman, was suspended from Golf Channel after "joking" on air that Tiger Woods should be

first African-American presidential candidate of a major political party as a "magic negro," while another referred to the second best women's collegiate basketball team as "nappy-headed hos."[40] The fall of 2004 hosted the infamous Pacers' brawl, while the following months were dotted with player arrests for domestic violence, gun possession, drug use, drunken driving and dog fighting.[41] These regrettable events tainted some of the athletic and economic successes of minorities, but worse yet, renewed the stereotypical attitudes of some towards African-Americans. Commissioners and owners implemented a variety of policies to help repair their damaged reputations – the establishment of grooming guidelines like the NBA Dress Code being one small effort. These dress codes, however, have given rise to a "second generation" of trait discrimi-

"lynched in a back alley"); *Golfweek Fires Editor Responsible for 'Noose' Imagery*, ESPN.COM, Jan. 20, 2008, http://sports.espn.go.com/golf/news/story?id=3202573 (describing *Golfweek* magazine's subsequent story on Tilghman that featured hangman's noose on magazine cover, leading it to fire its editor). *See generally* Richard L. Harris, *For Campanis, a Night that Lived in Infamy*, LA TIMES, Aug. 5, 2008 at D2 (describing baseball's Al Campanis on Nightline in 1987 defending one racial remark about African-Americans lacking "some of the necessities to be . . . a field manager, or perhaps a general manager" with an even more egregious analogy that "black men are not good swimmers . . . because they don't have the buoyancy."); Jonathan Rowe, *The Greek Chorus*, WASHINGTON MONTHLY, Apr. 1988 (quoting Jimmy "The Greek" Snyder shaming football by stating that black athletes are bred to be better because, "[t]his goes all the way to the Civil War when . . . the slave owner would breed his big black to his big woman so that he would have a big black kid.").

40. *See Latching onto L.A. Times Op-Ed, Limbaugh Sings "Barack, The Magic Negro,"* MEDIAMATTERS.ORG, Mar. 20, 2007, http://mediamatters.org/items/200703200012 (Rush Limbaugh berated Barack Obama as "Barack the Magic Negro" and then received contract renewal worth $35 million per year); *see also CBS Fires Don Imus from Radio Show*, MSNBC.COM, Apr. 13, 2007, http://www.msnbc.msn.com/id/18072804/ (noting that in 2007 radio personality Don Imus was fired for referring to Rutgers University's national championship runner-up women's basketball team as "nappy-headed hos"); Roy Spencer, *20 Years of Rush Limbaugh*, NATIONAL REVIEW ONLINE, Aug. 1, 2008, http://www.cbsnews.com/stories/2008/08/01/opinion/main4313723.shtml (discussing Rush Limbaugh's long-running syndicated radio program); Lynn Elber, *Michael Richards, aka Kramer, Spews Racial Slurs During Standup*, S.F. CHRON., Nov. 20, 2006, (reporting that comedian Michael Richards ranted racist epithets at black heckler); *Students Rally After "Halloween in the Hood" Party*, NBC4.COM, Nov. 3, 2006, http://www.nbc4.com/news/10238567/detail.html (reporting college students having party called "Halloween in the Hood"); *Columbia Professor: Noose Message "Very Personal,"* ABCNEWS.COM, Oct. 11, 2007, http://abcnews.go.com/GMA/story?id=3716757&page=1 (reporting about noose placed on professor's office door). *But see* Marc Santora, *Columbia Professor in Noose Case is Fired on Plagiarism Charges*, N.Y. TIMES, June 24, 2008, http://www.nytimes.com/2008/06/24/nyregion/24columbia.html (reporting on firing of Columbia professor in noose case).

41. *See* Skip Wood, *Titans' Jones Agrees to Plea Deal*, USA TODAY, Nov. 14, 2007, at C1 (noting Adam "Pacman" Jones was suspended for entire 2007 season after being arrested over five times in three years, and that 2007 was same year Michael Vick was convicted of organizing dog fighting ring and sent to federal prison).

nation based on stereotypical notions of appearance, dress, traits and characteristics.[42]

For example, the courts have found that dress codes (uniforms, jewelry, gender appropriate attire) and grooming guidelines (hairstyles, beards, tattoos, piercings) violate Title VII for their unequal treatment of protected classes of race, sex and religion.[43] The NBA Dress Code, which seems wrought with racially discriminatory overtones, serves as an intriguing example of trait discrimination. On the surface, the new "NBA Player Dress Code" arguably appears to be a harmless effort to promote professionalism and decorum. It requires players to "wear Business Casual attire whenever they are engaged in team or league business" and a sports coat, dress shoes (or boots), and socks" when "in attendance at games but not in uniform."[44] The requirement to dress professionally is not the worst thing to happen to an employee's terms or conditions of employment, even considering that the failure to comply may result in significant fines and suspensions. But it is the "excluded items" under the NBA's Dress Code that truly trigger concerns about discrimination. Specifically, players are prohibited from wearing "sneakers, sandals, flip-flops or work boots . . . chains, pendants, or medallions. . . over [their] clothes," "sunglasses while indoors" and "headphones [presumably anywhere] (other than on the team bus or plane, or in the team locker room)."[45] The items mentioned have some stereotypical correlation with minority attire, and therefore, the guidelines raise concerns about the coerced compromise of one's racial identity as an adverse impact of the dress code, and the possibility of a more deliberate discriminatory demeanor on behalf of the league. Many NBA players rendered their own judgment, calling the policy patently racist and hypocritical at best, though hypocrisy does not always equal illegality.[46]

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42. *See* Sturm, *supra* note 3, at 460 (describing "second generation" discrimination claims as social practices and workplace interactions that gradually "exclude nondominant groups"); Yuracko, *supra* note 3, at 366 (noting trait discrimination is a new form of race discrimination).

43. *See* Fox, *supra* note 5, at 564 (discussing Title VII cases dealing with categories not traditionally seen as immutable).

44. NBA Player Dress Code, *supra* note 2 (stating NBA Player Dress Code).

45. *Id.*

46. *See* Associated Press, *Pacers' Jackson: Dress Code is 'Racist'*, NBC Sports, Oct. 20, 2005, *available at* http://nbcsports.msnbc.com/id/9730334/site/21683474/ (describing Jackson's belief that NBA Dress Code is targeted at young, African-American males).

IV. AN INITIAL LOOK AT APPEARANCE RULES AND EMPLOYEES UNDER TITLE VII

The Civil Rights Act of 1964 ("the Act") is the comprehensive congressional legislation that prohibits discrimination in voting, public facilities, public education, housing, credit and employment.[47] Title VII of the Act was amended in 1991 and delineates that it is unlawful for an employer "to discriminate against any individual with respect to their compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin."[48] Over the years, the courts and Congress interpreted Title VII to recognize three theories of employment discrimination: (1) disparate treatment; (2) mixed-motives; and, (3) disparate impact. The courts traditionally analyze each theory under a tripartite framework established in *McDonnell Douglas*, which includes: (1) plaintiff's prima facie case; (2) defendant's affirmative defenses; and, (3) rebuttals by plaintiff to overcome those defenses as nothing but a pretext.[49] The three theories share this framework, as well as their understanding of certain essential elements (e.g., protected classes and adverse employment actions). They differ distinctly, however, in their respective requirements for intent, defenses and remedies.

A. "Materially Adverse Impact" upon a "Protected Class" as to "Terms or Conditions" of Employment

Generally, a violation of Title VII requires: (1) an adverse affect to the terms or conditions of employment; (2) of individuals within any of the statutorily protected classes; (3) done either intentionally, unintentionally, or with mixed-motives; and, (4) with no justifiable reason provided by an affirmative defense.[50]

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47. *See* 42 U.S.C. §§ 1971-2000 (2000) (outlawing racial segregation in schools, public places and employment).

48. *Id.* § 2000e-2(a)(1).

49. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (discussing three step framework under which theories of employment discrimination are analyzed); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94-98 (2003) (holding direct evidence of discrimination is not required in mixed motive case). The proof of a pretext, however, no longer binds the jury or judge to an ultimate finding of discrimination. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (finding plaintiff bears burden of persuasion even if there is presumed discrimination).

50. *See* 42 U.S.C. § 2000e-2(a)(2) (providing unlawful employment practices).

Title VII identifies both specific and general examples of unfavorable treatment, such as "discharge,"[51] "to otherwise discriminate" and to "adversely affect."[52] The courts understand unfavorable treatment to require a "materially adverse employment action" upon an employee's terms or conditions of employment, but they do not necessarily restrict a materially adverse employment action to Title VII's basic prohibitions.[53] Both the courts and the National Labor Relations Board have held that appearance codes are "terms and conditions of employment" within the meaning of Title VII and thus, subject to its prohibitions.[54] To be "materially adverse," however, the impact must be "more disruptive than a mere inconvenience or an alteration of job responsibilities"[55] and does not encompass minor subjective injuries.[56]

Title VII does not require employee appearance rules to be identical, although the courts do expect some degree of equality and consistency in the substance of the rules, their enforcement[57] and their consequences.[58] For instance, grooming guidelines that call for different hairstyles or uniforms for men and women is not an unlawful employment policy just because of the substantive differences.[59] If, however, the expectations or application of the pol-

51. *Id.* § 2000e-2(a)(1) (making it unlawful to discharge employee for race and other factors).

52. *Id.* § 2000e-2(a)(2) (declaring it illegal "to limit, segregate or classify . . . employees . . . in any way which would . . . adversely affect his status as an employee . . . .").

53. *See* Herrnreiter v. Chicago Housing Auth., 315 F.3d 742, 746 (7th Cir. 2002) (discussing Title VII's retaliation provision).

54. *See* Yelnosky, *supra* note 11, at 523 n.15 (citing *Crittenton Hospital*, 342 N.L.R.B. No. 67 (2004) (stating uniform and fingernail policies regulating appearance of nurses are mandatory subjects of bargaining)).

55. Galabya v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (citing Crady v. Liberty Nat'l Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)).

56. *See* Forkio v. Powell, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (discussing party's insufficient allegations, though not appearance rules).

57. *See* Hollins v. Atlantic Co., Inc., 188 F.3d 652, 660-61 (6th Cir. 1999) (noting grooming policy prohibiting ponytails was potentially applied in discriminatory manner where only African-American worker was reprimanded and requested to get style pre-approved).

58. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (holding that Congress "directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation.").

59. *See* Willingham v. Macon Tel. Publ. Co., 507 F.2d 1084, 1088 (5th Cir. 1975) (holding grooming standards calling for substantive differences between men and women were outside scope of Civil Rights Act, section 703).

icy clearly result in a disparate impact,[60] unequal burdens[61] or imbalanced disciplinary action[62] upon a protected class, then the guidelines are unlawful.[63]

Disparate impact was the early theory for determining a material adverse impact upon a protected class. The Supreme Court determined that the disproportionate exclusion of a protected group from certain jobs was an adverse effect worthy of Title VII protection, despite a lack of intent.[64] The *Jespersen* court held that a requirement to wear make-up did not discriminate against women, reiterating that a sex-differentiated[65] policy is not proof in itself of discriminatory intent or material adversity without a showing of unequal burdens upon one party.[66] The majority of the court, however, made it clear that that the costs, time and hassles of putting on make-up could be an unequal burden supporting discrimination.[67]

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60. *See Griggs*, 401 U.S. at 432 (discussing that policy is unlawful based on the consequences (i.e., disparate impact, and not motivation behind policy)).

61. *See* Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1110-11, 1113 (9th Cir. 2006) (en banc).

62. *See* Hollins v. Atlantic Co., Inc., 188 F.3d 652, 659-60 (6th Cir. 1999) (noting employer disciplinary action does not require "precise equivalence" but should be similar for conduct of "comparable seriousness.").

63. *See* 20 U.S.C §§ 1681-1688 (2000). Although known more for gender equity in intercollegiate athletics, Title IX of the 1972 Amendments to the Education Act (1965) would also address the inconsistent application of sex-differentiated appearance policies among educational institutions that receive Federal funding. *Id.* Although modeled after the Civil Rights Act, Title IX does not use the *McDonnell Douglas* framework. Title IX developed its own "three-prong test," which measures statutory compliance by one of three tests: proportionality, expansion, or interests. 34 C.F.R. §106.41 (2000); *see also* Policy Interpretation, 44 Fed. Reg. at 71,418 ("Compliance will be assessed in *any one* of the following ways . . ."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (stating that "each part of the three-part test is a safe harbor."); Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1996). Title IX usually approves dress codes for faculty, staff and administrators that are relatively equal (but not identical) in content, application, and burdens for both men and women.

64. *See Griggs*, 401 U.S. at 430-31 (1971) (requiring high school diploma in 1970's South affected African-Americans in greater numbers than whites because educational opportunities had been limited many years).

65. *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004) (noting difference between "sex," which refers to individual's anatomical and biological characteristics and "gender," which refers to socially-constructed norms associated with a person's sex). Gender issues are generally excluded from the Act. *Id.* The court said that "without more," the mere existence of different policies for men and women (sex-differentiated) and for different sub-groups of women (intra-sex distinctions) were not absolutely determinative of a Title VII violation. *Id.*

66. *See Jespersen*, 444 F.3d at 1109 (noting sex-based difference in appearance policy, without disparate effects, does not support discrimination case).

67. *See id.* at 1110 (holding that putting on make up is not unequal burden because plaintiff presented insufficient evidence). *But see* Laffey v. Northwestern Airlines, Inc. 366 F. Supp. 763 (D.D.C. 1973) (holding as discriminatory policy that required women to wear contact lenses, while men could wear glasses).

Presumably, the failure to equally reimburse similarly situated employees for costs related to company uniform purchases, dry-cleaning and the time it takes to dress may raise Title VII issues.

NBA players may utilize the disparate impact or unequal burdens rationale to argue that their Dress Code is more burdensome on black players who must adjust to a stereotypically white dress code. African-American players may have to adjust their attire, spending more time and money than their white colleagues. Although the courts have acknowledged that the burdens or impact of a dress code could become unequal or disparate enough to reach the level of discrimination, the standard for it to be classified as such is high.[68] Therefore, even if the NBA Code imposed different burdens upon blacks and whites, it would still be difficult to prove discrimination. On the other hand, a disparity in the consistency and amount of fines and penalties imposed upon players of different races would qualify as a significant harm under the traditional Title VII framework. Furthermore, the NBA may expose itself to allegations of discrimination for unequal implementation of the Dress Code by failing to enforce it among office personnel, team owners or female employees – although these employees are arguably not "similarly situated" as required under Title VII.[69]

In the past, the NBA customarily limited its regulation of players' attire to games and the sidelines. The Dress Code, however, broadens jurisdiction to times when players are outside the arena, such as when they are approaching or departing a game via team transportation. In fact, it applies whenever the players "are engaged in team or league business."[70]

B. Privacy

Privacy is a fundamental right in the home, but not in the workplace.[71] Nonetheless, courts consider privacy rights when calculating whether an appearance code is too intrusive by considering the expectation of privacy, the offensiveness of the invasion, the

68. *See Jespersen*, 444 F.3d at 1110.

69. *See* Kampmier v. Emeritus Corp., 472 F.3d 930, 938 (7th Cir. 2007) (noting that plaintiff failed to identify similarly situated individual who employer treated differently, and therefore court properly granted summary judgment for employer).

70. NBA Player Dress Code, *supra* note 2.

71. *See* Griswold v. Connecticut, 381 U.S. 479, 491-92 (1965) (holding contraceptive ban unconstitutionally intruded on right to privacy).

reason behind the policy and the existence and rejection of reasonable alternatives.[72]

Professional sports leagues and their franchises, like other private employers, are generally not subject to constitutional restrictions. Furthermore, while the NCAA also continues to avoid constitutional critique for its regulatory rules,[73] most universities and colleges that comprise the organization are subject to the constitutional amendments as a state actor.[74] For example, the Seventh Circuit recognized that a school board rule prohibiting basketball players from having tattoos and colored hair could be challenged under the Constitution.[75] An earlier case found a high school grooming code for athletes that required short hair unconstitutional.[76] The court did not find the promotion of teamwork, uniformity and discipline to be compelling enough reasons to justify the denial of the fundamental rights to expression and liberty embodied in personal appearance – especially hairstyle, which is historically "shadowed with political, philosophical and ideological overtones."[77] Conversely, one court held safety and health reasons to be valid justifications for such dress codes, even prohibiting a player from wearing a yarmulke during a game.[78] Another court ruled that a "school district policy prohibiting students from wearing clothing identifying any professional sports teams . . . violated the First Amendment free speech rights of elementary and middle school students."[79]

Despite working for a private employer, NBA players should receive the same protections given to grade-schoolers. Still, the adverse affect upon the NBA players' privacy is not too severe since

72. *See* Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1127-30 (2006) (listing courts' considerations of privacy rights).

73. *See* NCAA v. Tarkanian, 488 U.S. 179, 194-95 (1988) (deciding that NCAA was not state actor when exercising its regulatory functions).

74. *See id.* at 191 (discussing further entanglements of state institutions).

75. *See* Stotts v. Cmty. Unit Sch. Dist., 230 F.3d 989 (7th Cir. 2000) (holding high school freshman who challenged constitutionality of ban on tattoos would have four years to litigate issue, however issue was moot where plaintiff had already graduated). The case is not an exception to cases "capable of repetition, but evading review." *Id.* at 991.

76. *See* Dunham v. Pulsifer, 312 F. Supp. 411 (D.C. Vt. 1970) (holding grooming code for athletes unconstitutional).

77. *Id.* at 419.

78. *See* Menora v. Illinois High Sch. Ass'n, 683 F.2d 1030 (7th Cir. 1982) (prohibiting wearing yarmulkes fastened with bobby pins during play).

79. Max J. Madrid, *Student Dress Codes: Constitutional Requirements and Policy Suggestions*, May 21, 1999, http://www.modrall.com/0927071190907578.art (citing Jeglin v. San Jacinto Unified Sch. Dist., 827 F.Supp. 1459 (C.D. Cal. 1993)).

their employment requires them to be in the public eye. If, however, the dress code is found to have racial motivations or impact it might violate the proscriptions of Title II of the 1964 Civil Rights Act by denying or conditioning use of public accommodations, like a sports arena, upon a protected classification.[80]

C. Immutability as a Misguided Measure of Material Adversity[81]

The courts, in both Title VII and Equal Protection cases,[82] began using immutability[83] as another measure of the "materially adverse affect" upon a protected class.[84] Therefore, dress codes that proscribe hairstyles and jewelry usually will not violate Title VII because hairstyles are easily changed and jewelry is easily removed.[85] This somewhat narrow and rigid application of the immutability requirement is one of the primary imperfections of Title VII because it fails to address the harms of assimilation and subordination that result from trait discrimination.[86]

Assimilation and subordination are "material adverse" consequences that employees may suffer when the trait in question is mutable and they are forced to change it.[87] The Equal Employment

80. *See* 42 U.S.C. § 2000A(B)(3) (2000) ("Each of the following establishments is a place of public accommodation within this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment . . . .").

81. *See* Mark R. Bandsuch, *Dressing Up Title VII's Analysis of Workplace Apperance Policies*, 40.2 COLUM. HUM. RTS. L. REV. (forthcoming Oct. 2009).

82. *See* Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (holding sex-based classifications based to be inherently suspect and subjected to strict judicial scrutiny).

83. *See* Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980), *cert. denied*, 499 U.S. 1113 (1981) (defining immutability as the ease or difficulty of changing a trait or characteristic).

84. *See* Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2217 (2003) (citing *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993)).

85. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp 229, 232 (S.D.N.Y. 1981) (using mutability of cornrow hairstyle to determine that employee was not "adversely affected.").

86. *See* Gonzalez, *supra* note 85, at 2217-18 (noting that trait discrimination does not cause "cognizable harm" under *Rogers*); *see also* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 11 (2006) (proposing legal right to free dress).

87. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 879-925 (2002) (identifying three methods of assimilating). Covering is downplaying an underlying and known identity; passing is masking an underlying identity; and converting is changing an underlying identity as three methods of assimilating. *Id.*; *see also* Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1898-1908 (2008). In a comparable theory of racial identity performance (called "volunteer

Opportunity Commission ("EEOC") itself has honored this reasoning by holding that a company's no-Afro or bushy hair policy would be a form of racial discrimination because it compromises a "cultural symbol [for African-Americans] as to make its suppression. . . an automatic badge of racial prejudice."[88] The harm caused by assimilation can be emotional, economic, physical, professional, relational – and significant.[89] Furthermore, some of these harms reach beyond the workplace and are contrary to the larger purpose and goals of Title VII.

Instead of an all or nothing perspective of mutability, the courts should consider the nature, degree, type, context, seriousness, pervasiveness and offensiveness of the group identity or perception of the trait,[90] and its compromise and related harms in a manner similar to sexual and other harassment cases.[91] For example, the requirement to be clean-shaven is usually considered a mutable trait excluded from Title VII scrutiny, however, many clean-shaven or no-beard policies raise questions of discrimination against African-American men who suffer in disproportionate numbers from pseudofolliculitis barbae ("PFB"), severe shaving bumps.[92] Fortunately, most courts have ruled these policies to affect a characteristic comparable to an immutable trait,[93] resulting in a disparate impact upon black men, and thus, a violation of Title VII.[94] The same logic should hold for other types of identity harms

discrimination"), Onwuachi-Willig, identifies "accommodating" (adopting dominant cultural norms as a means of advancement), "distancing" (distinguishing oneself as a conforming outsider from nonconformists) and "resigned modeling" (adopting norms in position as role model, even though do not accept them). *Id.* at 1898.

88. E.E.O.C. Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971).

89. *See* Yoshino, *supra* note 88, at 925 (describing different ways people assimilate); *see also* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 370-76 (1991) (discussing importance of hairstyle to identity).

90. *See* Yuracko, *supra* note 3, at 410-13 (offering criteria courts should balance in evaluating immutability).

91. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993) (holding no single factor determinative in perceiving plaintiff's environment as hostile or abusive). The Court held the proper inquiry was to evaluate and weigh all relevant circumstances relating to the plaintiff's work environment. *See id.*

92. *See* Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination*, 75 WASH. L. REV. 195, 203-05 (2000) (commenting on appearance-discrimination claims involving PFB).

93. *See* Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 799 (8th Cir. 1993) (holding individuals afflicted with PFB could not easily shave or comply with strict no-beard policy); *see also* Adamitis, *supra* note 93, at 204-05 (discussing balancing test court's use in appearance-related discrimination suits).

94. *See* Adamitis, *supra* note 93, at 203-05 (analyzing no-beard policies that discriminate against individuals suffering from PFB). As in any disparate impact

caused by assimilation and subordination since "being forced to abandon a trait that is integral to one's sense of self may be personally costly even if physically painless."[95] Thus, Title VII should also protect people from having to alter mutable traits that are just as difficult and painful to change in terms of their racial, religious or gender identity as PFB is to change physically.

D. Covering and Subordination under the NBA Dress Code

The "excluded items" under the NBA Dress Code immediately elicited questions and concerns about racial bias, coerced covering, and subordination. The Dress Code appears to target specific items stereotypically associated with African-American culture, prohibiting in particular throwback jerseys, headgear and an assortment of jewelry. The NBA Dress Code seems to force players to compromise or cover certain signals of their identification as black men. Such a concession is a serious harm and adversely affects one's conditions of employment[96] because attire and appearance are quite significant to cultural, racial and personal identity and are historically "shadowed with political, philosophical and ideological overtones."[97] Unfortunately, Title VII analysis and its over reliance on immutability undervalues this harm, erroneously concluding that it has "at most a negligible effect on employment" because it involves an "easily changed characteristic."[98]

The NBA Dress Code's description of acceptable "business casual" attire exacerbated the problem because it essentially detailed a "white man's uniform" – khaki pants, collared dress shirt, and dress shoes with socks. This prescriptive part of the NBA Dress Code harms the players by forcing them to assimilate.[99] To restrict one's

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cases, employers may still avoid judgments of discrimination if the policy is proven to be job related, consistent with business necessity and no reasonable alternative exists. *See id.* For example, even when impacting black men with PFB, the shaving policy is justified for firemen who need to wear respirators or supermarket employees who handle food. *See* Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1126-27 (11th Cir. 1993) (holding city's no-beard policy for firefighters was necessary for safety); Woods v. Safeway Stores, Inc., 420 F. Supp. 35, 42 (E.D. Va. 1976) (holding no-beard policy for supermarket employees who work with food was necessary to protect consumer's health).

95. Yuracko, *supra* note 3, at 376.

96. *See* Yoshino, *supra* note 88, at 931-32 (commenting on negative effects of assimilation).

97. Dunham v. Pulsifer, 312 F. Supp. 411, 419 (D. Vt. 1970).

98. Rogers v. Am. Airlines, Inc., 527 F. Supp 229, 231-32 (S.D.N.Y. 1981) (quoting Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980)).

99. *See* Yoshino, *supra* note 88, at 931-32 (detailing negative effects of assimilation).

ability to signal his or her association with a protected group identity is harmful, but then to further require employees to assimilate an identity somewhat foreign and possibly hostile to their own is an even more egregious and adverse injury.[100] Thus, the immutability requirement reinforces and sanctions this culture of coerced covering and assimilation[101] because the "courts fail to recognize that 'sometimes assimilation is not an escape from discrimination, but precisely its effect.'"[102]

The compromise of one's identity inherent in assimilation perpetuates two other racial harms: subordination and stigmatization.[103] The NBA Dress Code tries to address negative stereotypes society has associated with certain African-Americans and their attire. Instead, by prohibiting chains, headgear and throwback jerseys, the NBA Dress Code stigmatizes those items and the people that wear them. Furthermore, it reinforces the unfortunate associations with such styles, when it should be working, instead, to broaden society's understanding and tolerance. This unseemly combination of assimilation and stigmatization usually leads to the perpetuation of an even uglier harm, subordination.[104]

A major criticism of the NBA Dress Code is that it is catering to the desires of an elite group of Caucasian owners, merchandisers and fans who disfavor certain aspects of the very NBA players that they employ, promote and idolize.[105] Although owner and cus-

100. *See id.*

101. *See* Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369, 387-89 (2007) (describing how identity performance discrimination is strengthened by disparate-impact case law). Employers encourage assimilation and its harms in a variety of subtle manners, including questions, comments, jokes and looks. *See id.* For example, both formal and informal comments about an employee's wardrobe, hairstyle, choice in music, facial expressions, speaking voice, choice of vocabulary, intonation and accent, and handshake style are just a few of the many ways employers send subtle and sometimes not-so-subtle messages that guide, pressure, and evaluate assimilation. *See id.* Dress codes and appearance rules unfortunately make assimilation harms and their underlying biases an accepted, formalized part of company culture. *See id.*

102. Ritu Mahajan, Comment, *The Naked Truth: Appearance Discrimination, Employment and the Law*, 14 ASIAN AM. L.J. 165, 181 (2007) (quoting Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAGAZINE, Jan. 15, 2006, at 632). *See generally* Yoshino, *supra* note 88 and accompanying text.

103. *See* Onwuachi-Willig, *supra* note 88, at 1913 (discussing stigmatization through distancing, accommodating and resigned modeling).

104. *See* Yuracko, *supra* note 3, at 367 (defining subordination as coerced surrender of identity and autonomy by protected group that is replaced with inferior and dependent position in relation to majority).

105. *See* Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819,

tomer preferences are valid considerations for justifying a business policy, the justification is inadequate when the preferences are rooted in prejudice and bias.[106] Dress codes are usually designed and implemented by a white male workforce, are based on predominantly white male community norms, accommodate white male customer preferences, are enforced by a white male judicial system, and approved by an act, Title VII, passed by a white male legislature. Thus, the entire process perpetuates a cycle of stigmatization, assimilation and subordination.[107] Title VII was enacted to end this discriminatory dynamic, however, the immutability requirement and other restrictions impede Title VII's ability to do so. An even uglier debate rages about whether professional sports, the NBA in particular, are a great opportunity for black men or another form of oppressive indentured servitude.

One redeeming quality of the NBA Dress Code is that players may choose what type of business casual they will wear, thereby maintaining some autonomy. NBA players retain a degree of control over their appearance and how they want to express themselves. The offensiveness of the code is further diminished because it is technically part of the new CBA – implicitly agreed to by the players. The harms of assimilation, stigmatization and subordination, albeit very real, are somewhat less severe than they would be if the employees were subject to a broader ban, or worse, were required to adopt a specific attire or hairstyle that is not natural to their group identity. Although the level of harm under the circumstances is reduced, there is still a significant "material adverse impact" upon the NBA players' employment because of the combined affect of assimilation, stigmatization and subordination.

827-32 (2006) (describing NBA's contradictory attempts to control and promote its players).

106. *See id.* (presenting underlying policy considerations for NBA's dress code).

107. *See* Yuracko, *supra* note 3, at 367 (discussing Richard T. Ford's position that expanding Title VII may define groups and prevent their ability to change). "[L]egally enshrining existing group-identified traits" (i.e., essentialism) may do more harm by deepening the hierarchy, oppression, and social subordination resulting from these traits. *Id.* at 385. These "essential traits" "may themselves be the result of . . . social subordination," creating an ugly cycle of discrimination and subordination. *Id.* In short, drawing attention to the stereotype may in fact reinforce the very biases the law wants to eradicate. *See id.* at 385-86 (commenting on negative impact from defining legal scope of antidiscrimination). Assimilation is often the easier path, but one that leads to the same undesirable destination of social subordination and stigmatization. *See generally* Roberts & Roberts, *supra* note 102, and accompanying text on assimilation.

The NBA's admirable actions are renowned and its shameful behaviors are infamous due to the elevated position professional sports occupy in society. Thus, the effects and adverse impact of the NBA Dress Code increase through media coverage and player pontifications. This is especially true when placed within the NBA's recent history of player problems, referee scandals and other allegations of racism.[108] Lastly, when combined with society's current racial sensitivities surrounding a black presidential candidate and the resurfacing of racist rhetoric, the NBA Dress Code appears quite harmful, impacting larger society and reinforcing negative stereotypes directed against people of color.

E. The Immutability Requirement as Determinative of Protected Class Status[109]

Appearance codes or grooming policies that discriminate "because of" or "on the basis of" the protected categories, "race, color, religion, sex or national origin," violate Title VII.[110] Membership in the protected class is a prerequisite to statutory protection because Title VII was designed purposely to protect those groups historically denied equal employment opportunities because of prejudicial treatment. Unfortunately, the courts have also read an immutability requirement into the determination of protected class status, which has rendered Title VII protection inconsistent.[111]

1. *Trait Discrimination Based on Race, Color or National Origin*

More recent policies like the NBA Dress Code seem to target African-American appearance through prohibitions on dreadlocks,

108. *See NBA Local: August 16 – Donaghy Edition*, ESPN.COM, Aug. 16, 2007, http://sports.espn.go.com/nba/news/story?page=nbalocal/070816/donaghy (reporting on NBA's referee scandal); *Players, NBA Dismiss Racial Bias in Officiating*, ESPN.COM, May 4, 2007, http://sports.espn.go.com/nba/news/story?id=2858453 (describing allegations of racial bias in NBA's officiating); *Pacers Center Thinks NBA Age Limit has Racist Undertones*, ESPN.COM, Apr. 12, 2005, http://sports.espn.go.com/espn/wire?section=nba&id=2035221 (alleging NBA's age limit is driven by racist motives).

109. *See generally* Bandsuch, *supra* note 82 (covering topic of employee discrimination).

110. 42 U.S.C. § 2000e-2(a)(1)-(2) (2000); *see also* William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 164 n.69 (2007) (noting seventeen states and District of Columbia have laws prohibiting discrimination on basis of sexual orientation).

111. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006) (holding retaliation provision contains materiality requirement and objective standard); *see also* Gonzalez, *supra* note 85, at 2217 (advocating for elimination of immutability requirement).

tattoos, braided hair or visible jewelry. Policies involving mutable traits such as these, however, are generally upheld because when a policy is directed toward a mutable trait courts do not consider it to involve a protected class or to cause any substantial harm. The EEOC recognized the flaw in this approach and acknowledged the possibility that a trait could be "so appropriated as a cultural symbol by members of the Negro race" as to satisfy the protected class criteria under Title VII.[112] Another court acknowledged the possible application of this theory to "African styled" clothing, but held the plaintiff-employee failed to provide enough evidence that the fashion or hairstyle at issue was so closely affiliated with race or national origin as to deserve comparable protection.[113] Similar scrutiny was given to policies that targeted cultural traits related to national origin "in favor of [a] Native American who was fired for refusing to cut his long hair"[114] and a "height requirement for sheriffs . . . was racially discriminatory against Mexican-Americans."[115]

2. *Trait Discrimination Based on Sex*

The term "sex" in Title VII was originally understood narrowly to mean the biological dimension of the person, denying protection to gender as a social construct.[116] The *Price Waterhouse* Court changed the restricted view of "sex" as strictly biological, expanding the reading of Title VII to prohibit discrimination rooted in gender

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112. E.E.O.C. Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18, 1 (1971).

113. *See* McManus v. MCI Commc'n Corp., 748 A.2d 949, 952, 954-55 (D.C. Cir. 2000).

> As to her claim of racial discrimination, appellant contends that she belongs to a protected class, that she was qualified for the job she held, that she was fired nonetheless, that her position itself never had been eliminated, and that a person of a different race had filled it. If this were true, all elements of a prima facie case, including the "substantial factor" requirement of the fourth criterion, would have been satisfied.

Id. at 954-55.

114. Dodd v. SEPTA, No. 06-4213, 2007 U.S. Dist. LEXIS 46878, at *16 (E.D. Pa. June 26, 2007) (citing Adakai v. Front Row Seat, No. 96-2249, 1997 U.S. App. LEXIS 27014 (10th Cir. Oct. 1, 1997) (unpublished opinion)); *see generally* EEOC Definition of National Origin Discrimination, 29 C.F.R. § 1606.1 (2000) (requiring national origin discrimination to be examined under principals of disparate treatment and adverse impact).

115. Lynn T. Vo, *A More Attractive Look at Physical-Based Discrimination: Filling the Gap in Appearance-Based Anti Discrimination Law*, 26 S. ILL. U.L.J. 339, 348 (2002) (citing Craig v. County of Los Angeles, 626 F.2d 659, 668 (9th Cir. 1980)).

116. *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004) (applying narrow definition of sex). In a Title VII context, sex "refer[s] to an individual's anatomical and biological characteristics" and gender "refer[s] to socially-constructed norms associated with a person's sex." *Id.*

stereotypes associated with the protected class of sex and used "with equal force to discrimination based on race, religion, or national origin."[117] The Court found that the female plaintiff was wrongly denied partnership in her accounting firm based in part on "stereotypical notions about women's proper deportment."[118] The $300,000 question that remains is what degree of stereotyping equates to protected class status, is harmful to the individual and may even imply intent to discriminate.[119] Even after *Price Waterhouse*, however, the traditional rule that sex-differentiated appearance policies are not inherently discriminatory remains.[120]

3. *Trait Discrimination Based on Religion: Reasonable Accommodations for Hair, Tattoos, Piercings and Body Art*[121]

Religion is also a protected class under Title VII, which precludes employers from discriminating based on any and "all aspects of religious observance and practice, as well as belief."[122] Many religions require observers to maintain a certain appearance. Muslim men must grow facial hair; Jewish men must wear a yarmulke; and some Christian women must wear medals. Appearance codes requiring workers to be clean-shaven and to refrain from wearing headwear and jewelry have religious implications upon the above groups and invoke the scrutiny of Title VII.

Employers must reasonably accommodate employees as to "all aspects of religious observance and practice" unless such accommodation creates an "undue hardship on the conduct of the employer's business."[123] For example, a hospital reasonably accommodated employees' religious beliefs when it allowed "Mus-

117. Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.9 (1989).

118. *Id.* at 256.

119. *See* 42 U.S.C. § 1981a(b)(3)(D) (2000) (stating damages cap under Title VII is $300,000).

120. *See* Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc) (holding sex-based appearance polices are not inherently discriminatory, but not precluding "sex-stereotyping on the basis of dress or appearance codes").

121. *See* 42 U.S.C. § 2000e-2(e)(2) (granting religious organizations limited exemption – especially educational institutions "directed toward the propagation of the faith").

122. *Id.* § 2000e(j). The Court has decided that section 1982 also covers people of the Jewish religion and of Arab origin because they were both classified as distinct races at the time the act was promulgated. *See* Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (holding Jews and Arabs in protect class); *see also* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (holding individuals of Arabian descent protected under section 1982).

123. 42 U.S.C. § 2000e(j).

lim women to wear skirts instead of uniform pants."[124] In sports, the NBA reasonably accommodated Mahmoud Abdul-Rauf's Islamic practices by allowing him to pray to himself while standing for the national anthem – only after suspending him first.[125] On the other hand, accommodations that create an undue hardship for the business are unreasonable and not required under Title VII.[126]

Tattoos, piercings and body art raise religious discrimination issues in the private sector apart from the expression questions they create in the public sector.[127] Although tattoos are an immutable trait in one sense, the general ease in which they may be covered, or even removed, renders them relatively mutable in the eyes of the court, who often afford them less protection under Title VII.[128] In a contrary example, Red Robin Gourmet Burgers recently settled a suit brought by the EEOC on behalf of a worker terminated for refusing to cover up tattoos received as part of a ceremony in his Kemetic religion.[129] Due to the religious significance of the tattoos and that the employee was a cook with very limited customer interaction, covering them up was not considered a reasonable accommodation or business necessity by the EEOC.[130]

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124. Barbara L. Jones, *Keeping Up Appearances: How to Advise Your Employer Clients on Addressing Issues of Dress*, ST. LOUIS DAILY RECORD & ST. LOUIS COUNTIAN, Aug. 20, 2005 (discussing legal developments concerning Dress Codes).

125. *See* Jason Diamos, *Abdul-Rauf is Calm in Face of Controversy*, N.Y. TIMES, Mar. 21, 1996, at C1 (covering Mahmoud Abdul-Rauf's religious practices).

126. *See* 42 U.S.C. § 2000e(j) (presenting limitations of Title VII).

127. *See* Mark McGraw, *Limiting Looks*, HUMAN RESOURCE EXECUTIVE ONLINE, Oct. 2, 2005, http://www.hreonline.com/HRE/story.jsp?storyId=4269043 (discussing legal issues surrounding employees' appearances). Rules against tattoos and piercings are not isolated concerns because approximately half of employees wear them, raising concerns about unintended discrimination and the retention of quality employees. *See id.*

128. *See* Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1308-09 (8th Cir. 1997) (noting school district required her to remove tattoo); *see also* Lucille M. Ponte & Jennifer L. Gillian, *Gender Performance Over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 DUKE J. GENDER L. & POL'Y 319, 333 (2007) (discussing mutability issues).

129. *See* EEOC v. RED ROBIN GOURMET BURGERS, INC., No. C04-1291 JLR, 2005 WL 2090677, at *1 (W.D. Wash. Sept. 7, 2005); *see also* Fox, *supra* note 5, at 565 (discussing Red Robin's case).

130. *See* RED ROBIN, 2005 WL 2090677, at *4-5; *see also* Fox, *supra* note 5, at 565 (discussing Red Robin's case). *But see* Swartzentruber v. Gunite Corp., 99 F. Supp. 2d 976, 980-81 (N.D. Ind. 2000) (allowing KKK tattoos to be covered up to avoid hostile workplace); Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 263-64 (4th Cir. 2003) (upholding company's firing of employee who failed to remove confederate flag stickers from tool box).

4. *Trait Discrimination Based on Disability*

The Americans with Disabilities Act of 1990 ("ADA")[131] adds disability to the protected classes given equal employment opportunity protection.[132] The ADA prohibits employers from discriminating against people based on their physical limitations and medical conditions, which includes allergies and HIV/AIDS among others.[133]

5. *Trait Discrimination Based on Age Before Beauty*

Businesses that pursue youthful looking employees may be violating the prohibitions of the Age Discrimination in Employment Act of 1975 ("ADEA"), which precludes unfair treatment on the basis of age with regard to employment.[134] An employer's characterization of "beauty" may also invoke issues of other forms of discrimination, including race. Clothing retailer Abercrombie & Fitch settled a lawsuit related to its policy of hiring young, white males as "brand representatives," while keeping workers of different races and colors off the sales-floor and in the stockroom.[135]

6. *Trait Discrimination Based on More than One Protected Class*

Multi-group consequences or "intersectionality" are an interesting consideration for the courts when calculating the degree and breadth of the trait's impact on the protected class under both disparate treatment and disparate impact.[136] Certain groups possess combined identities or sub-classifications as well as inter-group or

131. *See* 42 U.S.C. §§ 12101-12213 (2000) (providing national mandate to prevent discrimination against disabled people).

132. *Id.* § 12102(2)(A) (defines disability as "a physical or mental impairment that substantially limits one or more . . . major life activities" like walking, seeing, eating, and hearing).

133. *See* Bragdon v. Abbott, 524 U.S. 624 (1998) (protecting asymptomatic HIV positive patient under ADA); *see also* 29 C.F.R. § 1630.16(e) (2001) (stating employers under the ADA must attempt to accommodate food handling employees, who have infectious or communicable diseases); Fox, *supra* note 5, at 564 (referencing Erin Weber v, Infinity Broad. Corp., No. 02-74602, 2005 WL 3726303 (E.D. Mich. May 23, 2005) (discussing that perfume allergies are protected under ADA)).

134. 29 U.S.C. §§ 621-634 (1967) (promoting employment because of ability, not age).

135. Paula Burke Erickson, *More People Benefiting From Discrimination Laws*, THE DAILY OKLAHOMAN, May 1, 2005, at 1.

136. *See* Roberts & Roberts, *supra* note 102, at 392-93 ("Intersectionality is the notion that particular social groups are constituted by multiple status identities and the different status holders within a group encounter different forms of discrimination.").

intra-group status.[137] When this occurs, a plaintiff may have combined claims, for example, a disability claim with a sex-differentiated dress code discrimination claim.[138] Furthermore, a "no cornrow" policy can impact an employee as both an African-American and a woman. The courts have affirmed this position to some degree by acknowledging "black women" as a distinct protected group under Title VII.[139]

The Equal Protection Clause has an affinity with Title VII because it is based on a similar concept, protecting certain classes of people. For example, race, nationality and citizenship are suspect classes that receive strict scrutiny and are given greater deference than gender and age, which are quasi-suspect classes that receive intermediate scrutiny.[140] All other classes receive very little protection under rational basis review.[141]

7. *Congress and the Courts did not Intend Immutability to be the Primary Measure for Title VII*[142]

Congress and the Supreme Court never intended, nor held, nor actually used immutability as the sole criteria for the determination of suspect class status.[143] The courts first began to use the concept of immutability in Equal Protection cases to help them determine whether a group deserved suspect class status and the corresponding anti-discrimination protection.[144] Instead of relying solely on immutability, the courts and Congress purposefully based suspect class status on the representative group's political powerlessness, history of discrimination, irrelevance of a trait to

137. *See id.* at 393 (noting various identities that comprise individuals).

138. *See* Jennifer L. Levi, *The Interplay Between Disability and Sexuality: Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 92-93 (2006) (discussing Collective Hunch Theory and transgender litigants challenging sex-differentiated dress codes).

139. *See* Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980) (noting employers "may not single out black women for discriminatory treatment").

140. *See* United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938) (comparing levels of scrutiny); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (subjecting racial classifications to strict scrutiny); Craig v. Boren, 429 U.S. 190, 197-98 (1976) (analyzing gender-based classifications).

141. *See Carolene Products*, 304 U.S. at 153 n.4 (comparing levels of scrutiny).

142. *See generally* Bandsuch, *supra* note 82 (covering topic of employee discrimination).

143. *See* Watkins v. U.S. Army, 875 F.2d 699, 725 (9th Cir. 1989) (immutable characteristics are not necessary for Title VII case).

144. *See* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973) (holding school finance system does not discriminate against definable suspect class of poor people).

one's employment and overall sense of injustice – in combination with immutability.[145] Names, accents, age, alien status, language, religion, mannerisms, some disabilities and even sex are all mutable characteristics that have been recognized as possible forms of discrimination.[146]

In *Griggs v. Duke Power*, a high school diploma, a clearly mutable trait, was the source of the disparate impact upon unschooled minority employees.[147] If the current courts applied *Griggs* to dress codes, then a prima facie case of disparate impact would exist because a seemingly neutral grooming policy would clearly have a more detrimental impact upon one protected group over another, regardless of the mutability of the criteria. Unfortunately, the courts seem to circumvent disparate impact analysis by reasoning that the mutability of the trait renders the consequences not material or adverse enough to require legal redress. They further reason that the association of an educational trait to a protected class is too tenuous to necessitate coverage.[148] This judicial reasoning is clearly in error, since mutability does not necessarily render the changing of a trait less adverse, less material or less relevant.

8. *A Suggested Hierarchy of Protected Classes*[149]

The courts, when determining the level of protection to afford a class of people under either Title VII or the Fourteenth Amendment, should give significant weight to the importance of the group's interest, the history of their unequal treatment and their

145. *See* Ken Nakasu Davison, Note and Comment, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161, 167 (2005) ("Congress has adopted an expansive definition of discrimination.").

146. *See generally* Graham v. Richardson, 403 U.S. 365 (1971) (denying welfare benefits based on alien status is unconstitutional); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985) (indicating that immutability appears to be description for characteristics "beyond the individuals' control"). Even if immutability were a prerequisite for finding discrimination, it still seems inaccurate to view immutability in so narrow and rigid a manner (i.e., the absolute inability to change the characteristic in question) or to reduce it to a biological basis. *See id.*

147. *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding testing measures must reasonably measure job performance before being given controlling force).

148. *See* Gonzalez, *supra* note 85, at 2216 (challenging connection requirement); *see also* Ramachandran, *supra* note 87, at 21 (questioning antidiscrimination law's focus on "immutable" traits and its lack of protection for "performative aspects of identity.").

149. *See generally* Bandsuch, *supra* note 82 (covering topic of employee discrimination).

political powerlessness.[150] Accordingly, discrimination based on race is especially abhorred and strictly scrutinized. Rather, the harm to the protected group is given greater weight and consideration than it might be given if suffered by other classes under similar circumstances.[151]

The Supreme Court has read the Equal Protection Clause[152] to afford greater protections to the suspect classes of race, nationality, citizenship and religion[153] than to the quasi suspect classes of sex, age, legitimacy and disability.[154] Although other minority groups and classes were given protection under Title VII, the equal opportunities for people of all races were the driving force behind the Act.[155] Congress essentially codified this point by purposely omitting race, and only race, from the bona fide occupational qualification ("BFOQ") defense and by continuing to permit race, under the 1866 Civil Rights Act, to be the only protected class entitled to compensatory damages in cases without intentional discrimination.[156] The courts have done their best to follow the statute's intent by closely examining any policy with racial implications. The paradigmatic example was *Griggs*, where the Supreme Court created the disparate impact doctrine to protect against race discrimination that lacked the requisite intent.[157] Meanwhile, scholars like Corbett have ranked the strength of federal employment anti-dis-

150. *See Cleburne Living Ctr.*, 473 U.S. at 472 (Marshall, J., concurring in part and dissenting in part) (noting "[n]o single talisman" can define discriminated groups and political powerlessness is relevant but neither necessary nor sufficient to determine appropriate level of protection).

151. *See id.* at 440 (plurality opinion) (stating that statutes classifying people by "race, alienage, or national origin" are subject to strict scrutiny).

152. *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 577 (6th Cir. 2004) ("To prove a violation of the equal protection under § 1983, [a plaintiff] must prove the same elements as are required to establish a disparate treatment claim under Title VII." (quoting Lautermilch v. Findlay City Schs., 314 F.3d 271, 275 (6th Cir. 2003)).

153. *See* Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (holding Jewish congregation can bring claim against Caucasian defendants for violation of federal civil rights statute prohibiting racially discriminatory interference with property rights); *see also* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 (1987) (holding Arabian heritage protected from racial discrimination).

154. *See* Corbett, *supra* note 111, at 168 (ranking disability as less legally protected characteristic than race, sex, age and religion).

155. *See id.* at 165 (noting Congress' "grandest vision" for Title VII was to eradicate race and sex discrimination).

156. *See* 42 U.S.C. § 2000e-2(e)(1) (2000) (prohibiting discriminatory employment practices).

157. *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding policy requiring workers to have high school diploma illegal). While the policy appeared to be neutral, it had the adverse affect of disqualifying more black job applicants than white due to educational inequalities. *See id.*

crimination law by calculating the protections afforded each respectively in descending order to be: (1) race or national origin; (2) sex; (3) age; (4) religion; and, (5) disability.[158]

The courts should also look carefully at the group's history of discrimination in general, of discrimination in the respective industry, the discrimination record with a particular employer and the group's current political powerlessness. Even though there is much to elevate gender to the protected status that race has, Title VII should provide more protection to traits associated with race since the history of discrimination against people of color has been especially abhorrent in this country.[159] Race was given especially privileged and protected status under Title VII[160] and race continues to be a source of great prejudice and impediment in the workplace. The courts should also take into consideration the number of employees impacted within the protected class without applying the four-fifths rule formally.

Thus, the NBA Dress Code in many ways contravenes the goals and objectives of Title VII. The NBA Dress Code adversely impacts African-Americans, which renders it quite harmful considering the history of black oppression inside and outside the workplace and because the concept of racial equality served as the impetus for Title VII. The fact that the NBA policy could possibly impact religion and national origin as well makes it even more serious. Approximately 80% of the 450 signed players are African-American, which means that the approximate number of individuals impacted is 360.[161] This again testifies to the breadth of its potential harms. These injuries are also inflicted on the larger population through the popularity of the NBA and the breadth of its reach through the media. For an example of the NBA's popularity, at least one-hundred million people watched Team USA, which is comprised of NBA players, defeat China in an August 2008 Olympic basketball

158. *See* Corbett, *supra* note 111, at 168 (ranking level of federal protection for covered characteristics).

159. *See, e.g.*, Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1033-34 (5th Cir. 1980) (acknowledging black women as distinct protected group under Title VII).

160. *See* Yuracko, *supra* note 3, at 365-66 (describing Title VII's success at ending blatant race discrimination).

161. *See* 42 U.S.C. § 2000e-2(a) ("[A]n unlawful employment practice . . . to discriminate against any individual . . . because of such individual's race, color . . . ."). More weight is given when so many employees are impacted, but Title VII clearly protects the rights of individuals within the protected class – not just the class itself. *See id.*

game.[162] Thus, the NBA Dress Code and other appearance policies that impact race should be scrutinized more closely and considered to inflict more serious harm upon its protected class than is presently recognized under Title VII.

V. A CLOSER LOOK AT EMPLOYER'S AND THEIR APPEARANCE RULES[163]

Title VII, as first conceived, written and interpreted, focused on the employer's intention to discriminate as an essential element of an unlawful employment action. The concept and requirements of intentionality have evolved so that now the courts consider how much of a factor the protected class status plays in the employer's harmful policy or action.[164] This in turn determines the appropriate theory of discrimination under Title VII and the available defenses and respective remedies.[165] There are different standards for establishing the employer's improper intent in a prima facie case of discrimination under Title VII's various theories.[166]

A. Employer's Intentionality

First, single-intent cases require direct evidence[167] that the protected class status was a substantial (or determinative) factor in the employer's unfavorable employment decisions.[168] The courts have clarified that the ill-will of animus is not necessary for intentional discrimination.[169] For example, the sexist correspondence between

162. *See* Carl Bialik, *About That Basketball Audience of a Billion*, WALL ST. J. ONLINE, Aug. 12, 2008, http://blogs.wsj.com/numbersguy/about-that-basketball-audience-of-a-billion-393/ (describing Olympic basketball game and explaining audience estimates).

163. *See* Bandsuch, *supra* note 90 (forthcoming Oct. 2009).

164. *See id.*

165. *See id.*

166. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 291-92 (1989) (dissenting opinion) (arguing various approaches to discrimination will cause confusion among courts). The dissent argued the lack of uniformity would result in an unclear understanding of what qualifies as direct or circumstantial evidence or the relative meanings of substantial factor, motivating factor and determinative factor. *See id.*; *see also* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 491 (2006) (examining various standards).

167. *See* EEOC v. Liberal R-II Sch. Dist., 314 F.3d 920, 923 (8th Cir. 2002) (explaining direct evidence includes remarks, comments and other communications reflecting discriminatory attitude).

168. *See Price Waterhouse*, 490 U.S. at 276 (O'Connor, J. concurring) (detailing "substantial factor" theory); *see also* Katz, *supra* note 165, at 502 (outlining "determinative factor" theory).

169. *See* 42 U.S.C. § 2000e-2(a)(1) (2000) (prohibiting discriminatory employment practices); *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987

voting partners regarding the plaintiff in *Price Waterhouse* provided enough direct evidence to conclude that her sex was a substantial factor in the rejection of her partnership application and thus was a form of intentional discrimination under Title VII.[170]

Second, mixed-motive cases require sufficient evidence that the protected class status was a motivating factor in the less favorable treatment.[171] The courts have interpreted the 1991 Amendment's qualifying phrase of "even though other factors also motivated the practice" to mean that any consideration at all of protected class status (however slight) by the employer in the unfavorable decision is an improper motivating factor.[172] This satisfies the element of intent necessary for a prima facie case of mixed-motive discrimination under Title VII.[173]

Third, disparate impact cases do not require any proof of intent to discriminate on behalf of the employer. Additionally, they do not require proof that the protected class status was any type of factor in the employer's questionable decision. The plaintiff-employee only needs to demonstrate that the questionable "employment practice . . . causes a disparate impact on the basis of race, [or] color . . . ."[174] Causation in this context does not mean intent or motive, but rather some nexus between the employer's policy, action or decision and the materially adverse impact upon the employees.[175]

Fourth, retaliation cases require sufficient evidence (direct or circumstantial) that retaliation was a determinative factor in the less favorable treatment.[176] Title VII prohibits discrimination against

(1988) ("[S]ome employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.").

170. *Price Waterhouse*, 490 U.S. at 235-36, 258 (majority opinion) (describing sexist criticisms of plaintiff's personality).

171. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (establishing burden of proof); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02 (2003) (providing burden of proof in mix-motive cases).

172. *Desert Palace, Inc.*, 539 U.S. at 101 (holding under Title VII plaintiff does not have to provide direct evidence of discrimination for mixed motive jury instruction).

173. *See* Katz, *supra* note 165, at 491 (discussing mixed-motive cases).

174. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

175. *See* Katz, *supra* note 165, at 504 (arguing Congress probably intended "minimal causation").

176. 42 U.S.C. § 2000e-3(a) (prohibiting discriminatory employment practices). Specifically, the statute provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or

employees because they have "opposed . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" in regards to any practice reasonably believed to be an unlawful employment practice.[177]

1. *Title VII Fails to Adequately Consider Cognitive Bias and Stereotypes*

Title VII's current categories of single-intent (substantial factor) and mixed-motive (motivating factor) do not adequately assess the complexities of cognitive bias. Cognitive bias describes how the employer – knowingly or unknowingly, consciously or unconsciously, rationally or irrationally – connects the visible signals of the person's outward appearance, not with actual work abilities, but rather with stereotypical or prejudicial perspectives about a certain race, religion or gender. For example, employers may relate grooming, hairstyle, jewelry, glasses and attire with characteristics like intelligence, honesty, loyalty and discipline.[178] Facial features, height and weight also carry certain connotations about personality and performance, as do behavioral traits like language, accents and smoking.[179] Employers use these traits as signals to assess the abilities and attitudes of individuals and their compatibility with the organization and its values.[180]

Professional sports leagues are arguably the worst offender of cognitive bias and proxies since physical features like height, weight and muscle tone are primary considerations when making employment decisions. For example, the NFL subjects potential draft choices to rigorous testing and body measurement.[181] Of course, the NFL and other sports leagues escape any potential liability because most of the physical characteristics are arguably a true proxy and a business necessity for meeting the job requirements of a professional athlete. But what about the dearth of minorities in the coaching or management ranks at all levels of competitive sports and the many years it took before African-American men and women joined the ranks of sportscasters? Racist themes still heavily

because he has made a charge, testified, assisted, or participated in any manner . . . under this subchapter.

Id.

177. *Id.*

178. *See* Mahajan, *supra* note 103, at 167-68 (discussing biases in employment based on physical appearance).

179. *See id.* (describing role of physical and behavioral traits in employment).

180. *See* Roberts & Roberts, *supra* note 102, at 369-70. (explaining cultural discrimination in workplace).

181. NFL Scouting Combine, NFL.COM, http://www.nfl.com/combine (last visited Sept. 3, 2008) (discussing potential draft choices in-depth).

influence contemporary American sports, with many prevalent cognitive biases promoting stereotypical portrayals of black and white athletic characteristics and abilities.[182]

The *Price Waterhouse* Court and the 1991 Amendments have already begun incorporating cognitive bias into Title VII analysis by recognizing mixed-motives, motivating factor and stereotyping. A very expansive reading of *Price Waterhouse* would consider any stereotyping whatsoever a violation of Title VII and all appearance codes discriminatory since they are all based at least in part on social constructs of what is acceptable gender appearance. Disciplining men for wearing dresses and make-up to work, for instance, would thus violate Title VII.[183]

Most courts have of course rejected such an expansive reading because it would ignore community norms and disregard the employer's rights over his workplace,[184] while still recognizing that certain socially acceptable standards and community norms in dress codes may in fact include and perpetuate racist and sexist perspectives[185] and their related harms.[186]

2. *A Cognitive Bias Continuum*

The legal understanding of motive and intent should be expanded to include a cognitive bias continuum that begins with relatively neutral proxies and ends with clearly intentional prejudices.[187] In short, the degree of negativity, its association with a protected class and the influence of that association on the employment decision all increase as one progresses on the spectrum from proxy to stereotype to bias to prejudice. Proxies, stereotypes,

182. *See* Jeffrey A. Williams, *Flagrant Foul: Racism in "The Ron Artest Fight,"* 13 UCLA ENT. L. REV. 55, 62 (2005) (describing African-American stars stereotyped as "fast or strong" and white stars as "intelligent" or "good leaders").

183. *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004) (holding that Title VII provides transsexuals with claim for relief).

184. Kleinsorge v. Eyeland Corp., No. 00-1180, 2000 WL 124559, at *3 (E.D. Pa. Jan. 31, 2000) (upholding validity of dress code that prohibited earrings on males, but permitted them for females).

185. *See* Alexis Conway, Comment, *Leaving Employers in the Dark: What Constitutes a Lawful Appearance Standard after Jespersen v. Harrah's Operating Co.?*, 18 GEO. MASON U. CIV. RTS. L.J. 107, 127 (2007) (arguing that courts fail to critically examine social norms built on stereotypes).

186. *See* Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 380 (2008) (describing how assimilation negatively affects social equality).

187. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1185 (1995) ("[C]ognitive forms of intergroup bias affect decisionmaking at all points along a perceptual / inferential / judgmental continuum.").

biases or prejudices may be further delineated as either conscious or unconscious, rational or irrational. These classifications provide for a more accurate assessment of the harms and appropriate remedies.

3. *NBA Dress Code: Proxy, Stereotype, Bias or Prejudice?*

It is illogical to presume that the NBA instituted a Dress Code out of animus for the very players who sustain it. More likely, it arose due to some level of cognitive bias interacting with concerns about the league's deteriorating image and brand – to which the players are directly linked. These less racially volatile motives have much more to do with the desire to protect and cultivate the league's revenue stream, which is based significantly on image and branding, than it has to do with any prejudice or bias against its players. Since the days of Magic Johnson and Larry Bird, the NBA's success seemed especially conditioned on the image of its individual players. This dynamic, of course, was personified to perfection in one of the greatest stars in modern sports history – Michael Jordan. League, team and individual compensation elevated during Jordan's time in the same manner that he elevated during games. This star culture and the high-profile of its African-American population adds to the delicate nature of any discrimination against those members.

The predominantly white management of the NBA interpreted its image problems as caused, at least in part, by the negative biases[188] associated with the urban backgrounds, youthfulness, race, styles and expressions of many NBA players.[189] These racial prejudices, held by fans, media and owners to varying degrees boiled over in Michigan on November 19, 2004 during the game-ending fight between players and fans of the Detroit Pistons and the Indiana Pacers. For certain people with racially blurred vision, the fight that began on the court among the players and ended in the stands among fans was caused by the overpaid, lazy black play-

188. *See* Chris Palmer, *Crisis of Perception*, ESPN.COM, http://sports.espn.go.com/espnmag/story?id=3243624 (last visited Sept. 18, 2008) (noting racial perceptions contribute to NBA image problem); Michael Lee, *NBA Fights to Regain Image*, WASH. POST, Nov. 19, 2005, at E1, *available at* http://www.washingtonpost.com/wpdyn/content/article/2005/11/18/AR2005111802752.html (noting NBA image problem after Pistons-Pacers brawl).

189. *See* NBA Survey Results, http://www.nba.com/news/survey_age_2004.html#bottom (last visited Sept. 18, 2008). The average age of NBA players was twenty-seven years old in 2004-05, with most in their twenties, and three-quarters of them are African-American. *Id.*

ers fighting with the hard-working, paying white fans.[190] Those with a more lucid and unbiased vision realized that a variety of sociological and psychological issues converged to energize that violent eruption.[191]

4. *Rational or Irrational?*

The Piston/Pacer brawl combined with a slew of off-field misconduct in a variety of sports to create major concerns over league and player image, fan interest, television ratings and game attendance.[192] This context served as the backdrop during the collective bargaining talks in 2005, after which the NBA Dress Code was adopted. The commissioner implemented the Dress Code by invoking the CBA's best interests of the game clause in order to promote a more professional image.[193] The NBA Dress Code was influenced to some degree by the image issues, racial and otherwise, that confronted the league and its players at that time. Accordingly, any legal analysis should recognize that the policy contained some degree of cognitive bias towards race – which was at least a motivating factor under the traditional mixed-motive standard of Title VII.[194] In fact, this author classifies it as a relatively rational, yet pejorative prejudice resulting in a detrimental policy to the players.

Appearance issues are not new to the NBA. The 1990's saw shorts, shoes, jerseys, jewelry, haircuts and body art all make visible impressions on the league's image. But it was the league's inconsistent response to these fashions that raised questions about an NBA *faux pas.* As the longer and baggier NBA shorts grew in style and

190. *See* Williams, *supra* note 181, at 76-80 (describing Artest avoiding fight at first and having beer thrown on him by white fan, John Green, whom prosecutors view as responsible for fight in stands); *see also* ClickonDetroit, *Report: Fan in White Hat has Criminal History,* Nov. 22, 2004, http://www.clickondetroit.com/sports/3938054/detail.html (explaining fan who threw cup could face criminal charges).

191. *See* ClickonDetroit, *Report: Fan in White Hat has Criminal History,* Nov. 22, 2004, http://www.clickondetroit.com/sports/3938054/detail.html (describing white fan targeting passive Ron Artest with cup of beer to ignite fighting frenzy).

192. *See* Wood, *supra* note 41.

193. *See* NBA Players Association Collective Bargaining Agreement: Article XXXI, § 8, http://www.nbpa.com/cba_articles/article-XXXI.php#section8 (last visited Oct. 16, 2008) (stating player discipline procedures). Section 8 of the CBA covers "action taken by the Commissioner . . . concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball . . . ." *See id.*; *see also* NBA Dress Code, *supra* note 2.

194. Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.9 (1989) (majority opinion) (expanding Title VII to prohibit discrimination rooted in gender stereotypes associated with protected class of sex and "with equal force to discrimination based on race, religion, or national origin [stereotypes]").

acceptance, the league marketed the larger sizes, while simultaneously fining "several players for wearing shorts too far below their knees."[195] The league seemed to afford greater tolerance for throwback jerseys, shoes, jewelry, hair-styles and tattoos. But a line has always been drawn in the sand, as restrictions existed as to the color of shoes (must match the uniform), the type of jewelry (not loose during games) and even tattoos.[196] Even the venerable Mr. Jordan was not exempt from NBA appearance rules. The NBA once "threatened [him with] a $1,000 fine for violating uniform policies requiring shoes show only the major team colors."[197]

As the initial commotion over the 2005 NBA Dress Code seemed to subside, the integrity of sports in general and basketball in particular were hit hard again during the 2007-2008 seasons. In addition to track and baseball's steroid scandals, one basketball referee was accused of betting on games he worked, while other referees were found to call more fouls on players of the opposite race.[198] Thus, white referees whistle more fouls on black players and black referees call more fouls on white players. A related study found Major League Baseball umpires suffer from a similar form of color blindness or bias.[199] These examples of affinity towards players of the same race reinforce the role that cognitive biases, whether rational or irrational, can play in the workplace through things such as grooming policies. They also seem to support a determination that the NBA Dress Code was both rational and conscious in its bias.

5. *Conscious or Unconscious Bias*

The "excluded items" in the NBA Dress Code triggered concerns about a deeper discrimination and the league's inherent bias, while also displaying a slight hypocrisy, because it now restricted the elements of urban, hip-hop culture that it once promoted and em-

195. Williams, *supra* note 181, at 67 (citing Jon Eligon, *In NBA Clothes Dress Up the Image*, N.Y. TIMES, Oct. 19, 2005, at D5) (discussing NBA issued fines for baggy shorts).

196. *See* Williams, *supra* note 181, at 66 (describing uniform restrictions and symbiotic marketing relationship between NBA and Nike that started with Air Jordan shoes).

197. *Id.*

198. *See* Joseph Price & Justin Wolfers, *Racial Discrimination among NBA Referees* (Nat'l Bureau Of Economic Research, Working Paper No. 13206, 2007).

199. *See* Ciara Byrne, *Umpires Show Racial Prejudice, Study Reveals*, CANWEST NEWS SERVICE (Aug. 13, 2007), *available at* http://www.canada.com/topics/sports/story.html?id=58f434c5-ce21-4cd8-9c62-c838ae722856&k=78486 (reporting study that suggests umpires give preference to pitchers of their own race).

braced.[200] In the season prior to the dress code year, the NBA aired promotional commercials featuring comedian Sacha Baron Cohen as his Ali G character "dressed in a tracksuit accessorized by large, bulky chains, while donning a skullcap and wraparound sunglasses."[201] The selection of Ali G is riddled with racial overtones since Cohen's character satirizes white culture's fascination with hip-hop culture, even though he is not black himself. The NBA consciously "affiliated itself with the hip-hop industry, and commercialized a cultural authenticity closely associated with race."[202] The league marketed an image or brand with known racial overtones, which played positively, yet precariously on "the elementary power of stereotyping" and "exploitation of subconscious biases shared by a portion of the respective industry markets" for financial gain.[203] It was with the same awareness of proxies, stereotypes, prejudices and biases that the NBA instituted its dress code.

The context, language and prohibitory elements of the Dress Code rendered its implementation to be a much more harmful conscious prejudice than a less harmful stereotype.

"[T]his form of commercial racism is just as real and, particularly in the case of popular professional sports, just as dangerous."[204] The danger lies in the negative stereotypes and biases (i.e., players are immature and uneducated)[205] associated with the urban backgrounds, youthfulness, race, styles and expressions of NBA players that certain constituents usually (and the NBA sometimes) frown upon.[206] This sort of behavior stigmatizes black players, which reinforces stereotypes and biases that then further assimilation and subordination in the workplace and society.

And just when everyone thought all was well in the NBA with the return of the Lakers and Celtics to the NBA Finals, NBA Commissioner David Stern raised the racist flag again by fining Celtic Paul Pierce for allegedly making a "menacing gesture" of a gang

200. *See* Williams, *supra* note 181, at 75-76 (suggesting that league sanctions perpetuate racist social norms).

201. McCann, *supra* note 106, at 828.

202. *See* Williams, *supra* note 181, at 75.

203. *Id.*

204. *Id.* at 75-76.

205. *See* McCann, *supra* note 106, at 821 ("NBA players tend to be wrongly identified as immature, out-of-control, and hopelessly uneducated.").

206. *See* NBA Survey Results, *supra* note 188. The average age of NBA players was twenty-seven years old in the 2004-2005 season, with most players in their twenties. *See id.*

sign at the opposing team's bench.[207] The finger gesture (in the shape of an OK or B) has multiple interpretations, with Pierce and others adamantly denying the gang implications.[208] Commissioner Stern was the architect behind the NBA Dress Code and the judge behind the Pierce discipline. The NBA's actions further betray a conscious racial bias, exemplifying an ugly form of "trait discrimination" that is harmful to the individuals in the protected class, to sports leagues and to society overall.

B. Affirmative Defenses[209]

If the employer's requisite intent, employee's adverse impact and the relative connection of each to a protected class exists, then a prima facie case of unlawful employment discrimination under Title VII is established. The courts then turn to the affirmative defenses[210] to see if the defendant's intent can be legitimized, or the policy, action or decision can be justified based on the importance of the reason, its degree of necessity and any other mitigating factors.[211]

Title VII articulates an affirmative defense to single-intent disparate treatment, excusing it "in those certain instances where [the class itself of] religion, sex, or national origin is a BFOQ reasonably necessary to the normal operation of that particular business or enterprise."[212] Customer concerns about bodily privacy are often at

207. *See* Kurt Streeter, *Commissioner David Stern Sends Wrong Signal with Punishment of Celtics' Paul Pierce*, L.A. TIMES, May 11, 2008, at D1 (explaining that Paul Pierce has donated money to clean up his former neighborhood, Inglewood, CA, from gang activity).

208. *See id.* (explaining that Pierce's hand gesture could have meant many things).

209. *See* Bandsuch, *supra* note 82 (forthcoming Oct. 2009).

210. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (holding after plaintiff establishes prima facie case, employer has burden of proving "legitimate, nondiscriminatory reason for . . . employee's rejection"); *see also* Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 147 (2000) (noting that under Title VII's three-prong approach, Plaintiff-employee may rebut all defendant's articulated defenses by proving reasons given were really nothing more than pretext used to hide fact of purposeful discrimination). *But see* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515-16 (1993) (holding that proof of pretext does not necessitate that judgment be rendered for plaintiff-employee since all circumstances can be considered).

211. *See* David B. Cruz, *Pursuing Equal Justice in the West: Making up Women: Casinos, Cosmetics and Title VII*, 5 NEV. L.J. 240, 244 (Fall 2004) (arguing that BFOQ should apply only to decision to hire someone, but not to terms or conditions of employment, yet acknowledging this narrow reading is not utilized by courts) (citing Knott v. Mo. Pac. R.R., 527 F.2d 1249 (8th Cir. 1975)); *see also* Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1126 (D.C. Cir. 1973) (validating different hair length requirements as BFOQ).

212. 42 U.S.C. § 2000e-2(e)(1) (2000).

the source of the BFOQ exception for sex,[213] yet even bodily privacy does not guarantee a BFOQ if there exists another way to minimize encroachment upon the customer's privacy.[214] Furthermore, race is never a valid BFOQ[215] and thus is inapplicable to the NBA Dress Code.

Another defense to single-intent (pretext) discrimination recognized by the courts is when the employer's decision was based on a legitimate alternative business reason ("LABR").[216] The alternative business reason does not excuse employers from liability for mixed-motive discrimination unless the LABR was the only reason for the policy.[217] It follows that, as valid as the reasons behind the NBA Dress Code may be, they do not fully excuse the policy's inherent cognitive bias.

Defendant-employers are also afforded limited statutory protections when they "would have taken the same action in the absence of the impermissible motivating factor."[218] The "would have" defense is limited in that the defendant-employer may utilize it only to reduce the employee's available remedies, not to escape overall liability.[219]

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213. *See* Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77, 99 (2003) (noting courts have upheld sex discrimination based partially upon customer preference).

214. *See* Olson v. Marriott Int'l, Inc., 75 F. Supp. 2d 1052, 1060-69 (D. Ariz. 1999) (deciding that being female was not BFOQ of holding massage therapist position).

215. *See* Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (holding that BFOQ defense should be narrowly construed).

216. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (establishing prima facie case shifts burden to defendant to prove legitimate, nondiscriminatory business reason); *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (describing that these legitimate reasons must be set out clearly).

217. *See Burdine*, 450 U.S. at 253 (noting that if plaintiff proves prima facie case, burden shifts to defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection").

218. 42 U.S.C. § 2000e-5(g)(2)(B) (2000) (providing court with discretion regarding awarding damages when defendant would have taken same action even without impermissible motivating factor).

219. *See id.* § 2000e-2, 5(g)(2)(B)(i)-(ii) (allowing defendant to escape rehiring or paying damages to plaintiff when presenting *legitimate other reason*, but allowing court in its discretion to award declaratory relief, limited injunctive relief and attorney's fees and costs). The defendant arguably can still fully overcome the prima facie case, but only by proving that the defendant's decision was based *actually and solely* on a legitimate nondiscriminatory business reason (which would essentially repudiate even the existence of a mixed-motive). *See id.* § 2000e-5(g)(2)(B)(i)-(ii).

Under the Civil Rights Act of 1991, Congress codified the disparate impact theory[220] and its exclusive affirmative defense of business necessity[221] – which requires defendant-employer to demonstrate[222] that the business practice was "job related to the position in question" and "consistent with business necessity."[223] For instance, in its effort to "present a clean, neat environment," Starbucks "requires employees to cover all tattoos and remove certain piercings."[224] Customer and co-worker preferences, however, are not valid reasons when the preferences themselves are prejudicial and not based on safety, privacy or image.[225]

The 1991 Amendments to Title VII also placed some responsibility on the employer to reasonably accommodate the employees since an additional rebuttal is available if the plaintiff shows that a reasonable alternative employment practice with less unfavorable consequences was known and rejected by the employer in favor of the practice in dispute.[226] Similarly, in religious or disability discrimination cases the defendant need not accommodate employees when doing so would be an unreasonable and undue hardship.[227] When an employee wanted to wear an eyebrow ring, which was protected by her membership in the Church of Body Modification, in

220. *See id.* § 2000e-2(k)-(n) (permitting claimants to demonstrate employment practices cause disparate impact). This revived, or codified, the disparate impact theory, which two years earlier was practically eliminated by the same Court which first founded it as a viable theory of discrimination. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653-55 (1989) (holding that racial imbalance, without more, does not establish Title VII prima facie case).

221. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (stating that business necessity defense applies only to disparate impact cases).

222. *See id.* § 2000e(m) ("The term 'demonstrates' means meets the burdens of production and persuasion."). Congress clarified that in disparate impact cases, the burden of proof shifts throughout the three prongs. *See id.* § 2000e-2(k)(1) (establishing requirements of burden of proof for disparate impact).

223. *Id.* § 2000e-2(k)(1)(A)(i).

224. Mary Jo Feldstein, *Piercing, Tattoos Create Workplace Issues*, REUTERS, June 23, 2001, *available at* http://www.rense.com/general11/plac.htm (explaining that piercing and tattoos challenge workplace dress codes).

225. *See id.*

226. *See* 42 U.S.C. § 2000e-2(j)-(k) (2000) (stating that if employer refuses to adopt alternative employment practice, it is disparate treatment). An "undue hardship" is anything more than a minor, or "de minimis," burden on the employer's business. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 67 (1986) (holding courts need not consider prima facie case or accommodations when there is undue hardship). Even in Sabbath cases, an undue burden is created when the scheduling accommodation would disrupt a variety of other employees work schedules, contradict a seniority system or violate a collective bargaining agreement. *See* Trans World Airlines v. Hardison, 432 U.S. 63, 84-85 (1977) (finding that religious accommodations in this case would cause undue hardship).

227. *See Trans World Airlines*, 432 U.S. at 84-85 (accommodating employees in this case would be undue hardship).

contravention of Costco's appearance policy, the First Circuit held that Costco did not have a duty to accommodate such an employee "because it could not do so without undue hardship."[228] The court validated professionalism in appearance as a legitimate business necessity that overcame the religious accommodation by conceding that allowing such jewelry would "influence[ ] Costco's public image and, in Costco's calculation, detract[ ] from its professionalism."[229] This offers help against any future challenges by players to the NBA Dress Code based upon religious grounds while also providing insight into deeper racial issues. In the Costco case, the court emphasized that accommodation went both ways and that "the employee has a duty to cooperate with the employer's good faith efforts to accommodate" an employee's religious beliefs.[230]

The common legal theme that certain harms should be given more weight, or rather, certain rights should be given more protection exists in both the Title VII defenses and in its sister statutes.[231] This is accomplished by looking at the importance of the reason behind the rule or policy and the necessity of the rule in bringing about its stated purpose.

Instead of a bright-line, specific-standard, litmus-test approach to justifying the business purpose behind a given appearance policy, the courts should consider the importance of the business reason and its relatedness to the job or objective, as well as the existence and ease of possible alternatives. The courts could derive an overall weighted value for the business reason by looking at the importance of the rule's objective and the rule's ability to achieve

228. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 128 (1st Cir. 2004) (holding no duty to accommodate employee because it would cause undue hardship).

229. *Id.* at 135 (finding as established that employees reflect on their business). *See generally* Alison Stein Wellner, *Costco Piercing Case Puts a New Face on The Issue of Wearing Religious Garb at Work*, 84 WORKFORCE MANAGEMENT 77 (2005), *available at* http://www.allbusiness.com/management/3494872-1.html (analyzing *Cloutier's* effect on employers).

230. *Cloutier*, 390 F.3d at 131.

231. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 189-90 (2005) (explaining that private cause of action under Title IX for intentional sex discrimination is not precluded by Title VII); *see also* Middlesex County Sewage Ass'n v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 11 (1981) (holding Federal Water Pollution Control Act and Marine Protection, Research and Sanctuaries Act of 1972 do not authorize implied right of action). Depending on the protected status of the employee, discrimination claims could be brought under the ADEA, the ADA, the Equal Pay Act, the NLRA, Title IX, Title II, the Religious Freedom Restoration Act, The Federal Tort Claims Act, The Free Exercise, Freedom of Speech, Equal Protection, Due Process Clauses, sections 1981 and 1983, the applicable CBA, or certain state discrimination laws.

it. The court then determines if together the rule justifies the adverse impact it inflicts upon the protected class. Therefore, the less serious the harm, the less related or necessary the rule may need to be. Conversely, the more serious the harm, the more important and related the business reason should be for justification.

C. The NBA's Business Reason

For years, commissioners restricted the exercise of their powers to matters that were related directly to competition or disputes between players and teams. Nevertheless, a slew of off-field misconduct has led commissioners, along with the support of the owners and leagues, to enhance their powers and broaden the circumstances under which they impose penalties.

Unfortunately, the police blotter at times has read like an All-Star team with Ray Lewis charged with murder in 2000, Peter Warrick with grand theft in 2000 and Kobe Bryant with rape in 2003. The Fall of 2004 unleashed the infamous Pacers' Brawl, and the following months were dotted with player arrests for domestic violence, gun possession, drug use and drunken driving. The same year Michael Vick was convicted of organizing a dog fighting ring and sent to federal prison, Adam "Pacman" Jones was suspended for the entire 2007 NFL season after being arrested over five times in three years.[232] The NHL had its own problems with gambling, assaults, and its lost season of 2004-2005. All of these have created major concerns over league and player image, fan interest, television ratings and game attendance, prompting each league to increase commissioner authority in some form. For example, under its new Personal Conduct Policy, the NFL expanded the commissioner's right to discipline players for almost any off-field conduct, significantly expanding his authority beyond the previous violent crime policy, which required a conviction or plea in order to intervene or discipline.[233]

The NBA similarly suffers severe image problems from both on-court and off-court behavior which has unfortunately been linked to stereotypical notions of a certain subset of the African-American community.[234] This has also led to decreased attendance

232. *See* Wood, *supra* note 41 (discussing Jones' legal troubles and plea deal).

233. *See* Michael McCann, *Does the NFL's New Personal Conduct Policy Afford the Commissioner Too Much Discretion?*, SPORTS LAW BLOG, Apr. 18, 2007, http://sportslaw.blogspot.com/2007/04/does-nfls-new-personal-conduct-policy.html (questioning if Commissioner has too much power over personal conduct issues).

234. *See, e.g.*, Stephen A. Smith, *We Know Howard Can play, but There's Little Value in What He Has to Say*, ESPN.COM, Sept. 18, 2008, http://sports.espn.go.com/

at NBA games.[235] The visibility of the league, because of media coverage and its resultant social impact, further increases the importance of the rule. Customer preference and business image are valid, but not absolute defenses under Title VII, albeit quite substantial under the current image concerns confronting the NBA and sports in general.

The NBA Dress Code seems designed to promote professionalism, repair a damaged image and reconstruct a more favorable brand all in the hope of customer satisfaction, television ratings and overall league revenue. It is understandable, albeit not laudable, to many that the NBA owners and executives would implement practices and policies like a dress code to recapture their previous success or even sustain their current reputation.[236]

Requiring players to wear three-piece suits is a form of impression management meant to enhance business and to counteract previous images of Ron Artest running into the stands or of a tattooed Allen Iverson standing on the sidelines adorned with baseball cap, throwback jersey and gold medallions. Studies validate this perspective by finding that dress codes may facilitate professional behavior and promote a more favorable image to customers.[237] Some appearance rules promote homogeneity and conformity in an effort to increase trust, fairness, loyalty and performance.[238] Conventional business wisdom advises that dressing more formally for work may increase productivity, professionalism, reputation, creativity and performance. Under the law, while none of these can justify a discriminatory action by itself, they can be considered as containing probative value depending on the supporting statistical evidence, industry studies and expert testimony.[239]

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nba/columns/story?columnist=smith_stephen&page=jhoward-080918 (discussing Dallas Maverick Josh Howard's scorn for national anthem and lack of comment by NBA, other players and owners). During the national anthem, Howard told a cellphone camera, "I don't celebrate this [expletive]. I'm black . . . ." *Id.*

235. *See* Williams, *supra* note 181, at 85 (noting Pistons – Pacers brawl damaged ticket sales).

236. *See* Gregg Easterbrook, *Why NFL Coaches Should Wear Pajamas, and 96% of the Universe Finally Found!*, NFL.COM, Oct. 25, 2005, http://www.nfl.com/news/story/9002795 (noting NFL's dress code requires players and coaches to wear team and league garb at times, instead of dress attire in order to protect and promote NFL licensing purchases and agreements).

237. *See* Anat Rafaeli et al., *Navigating Attire: The Use of Dress by Female Executive Employees*, 40 ACAD. MGMT. REV. J. 9, 21 (1997) (studying effects of dress on female administrative support staff).

238. *See* Mahajan, *supra* note 103, at 175-76 (explaining that promoting homogeneity through dress is another form of discrimination).

239. *See* Corbett, *supra* note 111, at 163-69 (explaining belief that appearance-discrimination law is unlikely to be passed).

Title VII, like its constitutional counterparts, should also look at the fit between the company rule and the business reason. The courts can and should integrate the EEOC guidelines regarding validation into its analysis about the job-relatedness and business necessity of the employer's policy. Content validity, construct validity and criterion-related validity can all be part of the business reason analysis; and they can be employed to varying degrees depending on the level of infringement upon the protected class.[240] In general, the job-relatedness, fit or necessity of the NBA rule in bringing about the desired goals of image repair, customer satisfaction and sales is on the lower end of the continuum. This is because the behavior during the games is more directly related to image than the outfit a player is wearing. The further removed the rules are from the player's activity and place of actual performance or work, the less important or necessary the business purpose behind the dress code seems.

The cause of the image problems makes the reasons for the rule more tenuous because they were related to off-court antics and more about behaviors than appearance. Because the cause of the image problems are related to off-court antics and concern behaviors more than appearance, it would seem more appropriate for the NBA to institute disciplinary actions for the particular behaviors about which they were concerned. This is precisely what the NBA did. For example, the referees were instructed to no longer tolerate the players' complaints after a whistle – and were authorized to call a technical foul for behavior that reflected poorly on the overall league image. The Commissioner also punished off-court wrongdoings more seriously through fines and suspensions in an effort to further address the image problems of the NBA.

In evaluating the necessity or fitness of the rule, reasonable alternatives are also considered. The reasonableness of any alternative, like with reasonable accommodations, is determined by looking at expense, ease of implementation and impact on operations.[241] Mitigating factors may include the company's history of prior discrimination, employment diversity record, cooperation with the EEOC or the degree of notification to the employees among others. The fact that reasonable alternatives to the NBA

240. *See* 29 C.F.R. § 1607 (2000) (stating uniform guidelines on employment selection procedures).

241. *See id.* § 1630.2(o) (explaining reasonable accommodations for disabilities address the "application process," performance of "essential functions," and "equal benefits and privileges," or "providing accommodations beyond those required by this part.").

Dress Code exist – moderation in jewelry as opposed to its complete prohibition – also lowers the job-relatedness or necessity. Additionally, the NBA has been helpful to the larger African-American community with donations and services, which is a mitigating factor to be considered when determining overall liability and later when assigning a remedy. The cumulative business reasons behind the NBA Dress Code, however, still do not seem to justify the adverse impact it causes. The NBA Dress Code should thus be considered an unlawful employment practice that discriminates in violation of Title VII.[242]

The result of finding the NBA Dress Code discriminatory would most likely conflict with the three-pronged approach of *McDonnell Douglas* and its dress code progeny. Under the traditional approach, the courts would apply the immutability/mutability standard, most likely rendering the rule outside of the protected class status and not having much of an adverse affect.[243] The dress code bias against African-Americans would satisfy a mixed-motive prima facie case, but unlikely single-intent. Although the BFOQ defense is never available for race, the NBA would avail itself of the alternative legitimate nondiscriminatory business reason. In this case, the business reasons are to promote professionalism, preserve decorum and maintain its business image. Courts have upheld business image as a legitimate nondiscriminatory affirmative defense.[244] Though customer and co-worker preference would buttress that position, they are not absolute defenses.[245] Under the ensuing mixed-motive analysis, the players would need some proof of pretext to overcome the NBA's rationale. Unfortunately for the NBA players, it would be difficult considering the league's 80% minority employment rate and its overall support of the African-American community.

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242. *See* Fisk, *supra* note 72, at 1126-27 (analyzing whether dress codes are invasion of privacy). Fisk and others recommend shifting the burden of proof back and forth between employee and employer similar to the current state of Title VII for both disparate impact and mixed-motive cases. *See id.* Although clear and convincing evidence is required for affirmative defenses against claims of retaliation under Sarbanes-Oxley, both the Supreme Court and Congress have clearly rejected the standard for Title VII cases. *See id.*

243. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (holding that hairstyle restrictions were not discriminatory).

244. *See id.* at 233 (describing that policies may be adopted to help project certain business image and this serves as bona fide business purpose).

245. *See* 29 C.F.R. § 1604.2(a)(1)(iii) (1972) (stating that coworker, employer, client and customer preferences do not justify BFOQ); *see also* Rucker v. Higher Educ. Aid Bd., 669 F.2d 1179, 1181-82 (7th Cir. 1982) (concluding it is improper to base employment decisions on customer preference).

D. Remedies

The full gamut of remedies should be made available to the courts in all Title VII cases. In the same way that the Civil Rights Act of 1991 allowed the courts, in their discretion, to award declaratory relief and limited injunctive relief,[246] the determination of the appropriate remedies should also be placed within the discretion of the court.

Critics question the wisdom of giving courts this much discretion since they are equally subject to prejudicial perspectives and cognitive bias. Yet, judges still seem to be in the best position to address these concerns and overcome their biases on a case-by-case basis. As Justice Marshall stated, as "[t]o this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community."[247]

If the NBA Dress Code was officially found to be discriminatory, the courts could easily enjoin parts or all of the dress code, then award costs to the employees. The courts should also consider whether some sort of reasonable accommodation can be reached. This would allow the courts to carve out remedies, exceptions or a reasonable accommodation for the burdened individuals without necessarily nullifying the entire policy. The NBA has already evidenced the ability to do so when they accommodated Mahmoud Abdul-Rauf's Islamic practices by allowing him to pray to himself while standing during the national anthem after first fining and suspending him.[248]

The NBA and other businesses should anticipate this approach by developing dress codes as a collaborative project with their employees and use their perspectives and insights in forming new rules. This collaborative approach seems quite fitting for a unionized workplace like the NBA, which also experiences a wide cultural gap between white management and black players.

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246. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2000) (stating what relief courts may grant when race, color, religion, sex or national origin are motivating factors in employers' actions).

247. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part).

248. *See* Diamos, *surpa* note 126 (reporting on controversy behind Abdul-Rauf's choice not to stand during National Anthem).

VI. CONCLUSION

Professional baseball, football and basketball were all segregated at one time, mirroring society and employment prejudices, yet it was these very sports that broke down many racial barriers and biases by integrating competition and teams. Business and sports continue to reveal society's soul, reflecting the beauty of the human person's skills, intelligence and emotions, while also exposing the ugliness of its violence, corruption, and racism. The integral role of sports and business in society provide them both with a unique opportunity to actually influence and shape society's values, including those towards discrimination. Accordingly, appearance rules and grooming policies, like the NBA Dress Code, provide employers and leagues with a perfect vehicle for integrating and balancing the diverse cultural expressions of their employees with the traditional goals of professional appearance.

Recently, in January 2006, history was made by a simple handshake between two black men. Tony Dungy and Lovie Smith, the head football coaches of the two Super Bowl teams, shook hands after the Colts victory over the Bears in front of 70,000 spectators and millions more television viewers around the globe. The world was witnessing another defining moment for race relations in sport comparable to Jesse Owens' 1936 Olympics and Jackie Robinson's first-at-bat in 1947. These are moments which give hope to the ideals of equal-opportunity and mutual respect for all peoples, upon which this country was founded and the Civil Rights Act endeavors to secure.[249]

249. *See* Robert C. Post, *Prejudicial Appearances: The Logic of American Anti-Discrimination Law*, 88 CAL. L. REV. 1, 9, 16 (2000) (describing Justice William J. Brennan Jr.'s differing approach to antidiscrimination law).