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Brief for the Plaintiff-Appellant Lucas Rosa in the United States Court of Appeals for the First Circuit Lucas Rosa v. Park West Bank and Trust Company on Appeal from the United States District Court for the District of Massachusetts

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BRIEF FOR THE PLAINTIFF-APPELLANT LUCAS ROSA

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LUCAS ROSA

V.

PARK WEST BANK AND TRUST COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS†

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Massachusetts (the "District Court") had jurisdiction over this action under 15 U.S.C. § 1691e(f) and 29 U.S.C. § 1331 by reason of Plaintiff's claim under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f ("ECOA") and Massachusetts statutes forbidding discrimination in places of public accommodation, Mass. Gen. Laws ch. 272, § 92A and § 98, and credit, Mass. Gen. Laws ch. 151B, § 4. The United States Court of Appeals for the First Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291 and F.R.A.P. §§ 3, 4. This appeal is from a Final Judgment, entered October 18, 1999, that disposed of all claims in the case. Appellant filed a timely Notice of Appeal in the District Court on November 15, 1999.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did the District Court err in dismissing Plaintiff Lucas Rosa's complaint for failure to state any claim for which relief can be granted?

STATEMENT OF THE CASE

A. *Nature of the Case and the Course of Proceedings Below*

This is an action brought pursuant to the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f and Massachusetts statutes forbidding discrimination in places of public accommodation, Mass. Gen. Laws ch. 272, § 92A and § 98, and credit, Mass. Gen. Laws ch. 151B, § 4, against a bank for refusing to issue and accept a loan application from a bank customer because of the customer's sex.

On August 27, 1998, Plaintiff Lucas Rosa filed a charge of discrimination with the Massachusetts Commission Against Discrimination ("MCAD") alleging Defendant Park West Bank engaged in discriminatory conduct in violation of Mass. Gen. Laws ch. 272 §§ 92A, 98. (App. 7,[1] Plaintiff's Complaint.) On December 1, 1998, the MCAD dismissed the charge at Rosa's request in order for

1. Citations are to specific pages and items in the record appendix. [The record appendix is on file with the *Michigan Journal of Gender & Law.*]

Rosa to file a civil action, thereby exhausting available administrative remedies. (App. 7, Plaintiff's Complaint.) Rosa filed his Complaint in the United States District Court for the District of Massachusetts on April 29, 1999, alleging violations of the ECOA as well as state law claims pursued at the MCAD. (App. 2, Docket Entry 1, App. 4–10, Plaintiff's Complaint.) On August 12, 1999, Defendant Park West Bank filed a Motion to Dismiss. (App. 2, Docket Entry 6, App. 11–12, Defendant's Motion to Dismiss.) A hearing was held on the Motion to Dismiss before District Judge Frank H. Freedman on October 18, 1999. (App. 2, Docket Entry 10.) Judge Freedman granted Defendant's motion in a Bench Order entering Final Judgment in the case on October 18, 1999, finding that Plaintiff failed to state an ECOA claim. (App. 2, Docket Entries 12, 13, App. 14–16, Bench Order.) Finding no merit to the only federal claim in the Complaint, he dismissed the pendant state law claims for want of federal jurisdiction. (App. 15, Bench Order.) Plaintiff filed his timely Notice of Appeal on November 16, 1999. (App. 3, Docket Entry 14, App. 17, Notice of Appeal.)

B. *Statement of Facts*

On July 21, 1998, Plaintiff Lucas Rosa entered Park West Bank to apply for a loan. (App. 4, Plaintiff's Complaint, ¶ 6.) He met with bank employee Norma Brunelle who asked Rosa to present three pieces of identification before she would provide him with the application. (App. 4, Plaintiff's Complaint, ¶ 10.) Rosa produced three pieces of identification, all of which contained his photograph. (App. 4, Plaintiff's Complaint, ¶ 11.) After examining the photo identification, Ms. Brunelle told Plaintiff Rosa that she would not provide him with a loan application until he "went home and changed." (App. 4, Plaintiff's Complaint, ¶ 12.) Lucas was then wearing some clothing that could be considered traditionally female. (App. 4, Plaintiff's Complaint, ¶ 7.) Ms. Brunelle told Rosa that he had to be dressed like one of the identification cards in which his photographic image appeared traditionally male before she would provide Rosa with a loan application. (App. 4, Plaintiff's Complaint, ¶ 13.) The interview ended and the Plaintiff left the Defendant Bank having been refused the service request, i.e. a loan application. (App. 5, Plaintiff's Complaint, ¶¶ 13, 14.) Because Lucas Rosa, a biological male, was dressed in primarily female clothing, Ms. Brunelle refused to provide him a loan application and further process an application for credit.

SUMMARY OF THE ARGUMENT

The District Court erred in granting Defendant's motion to dismiss because Plaintiff states a viable claim of sex discrimination under the ECOA, 15 U.S.C. §§ 1691–1691f. Lucas Rosa proferred two separate theories of sex discrimination supported by the allegations of his complaint. For one, he states a claim of sex discrimination by his allegation that the Defendant Park West Bank discriminated against him for failing to meet a stereotype of masculinity. In addition, his claim that Park West Bank treated him differently than it would treat a similarly situated woman states a separate and distinct, viable claim.

The District Court fundamentally misconceived the law as applicable to the Plaintiff's claim by concluding that there may be no relationship, as a matter of law, between telling a bank customer what to wear and sex discrimination. It also misapplied Rule 12(b)(6) to the extent that it resolved any factual questions beyond the allegations of the Complaint regarding the basis of the Bank's different treatment of the Plaintiff. Finally, because the District Court incorrectly dismissed the single federal claim in Plaintiff's Complaint, it improperly dismissed Plaintiff's pendant state claims for want of federal court jurisdiction.

ARGUMENT

I. APPLICABLE LAW

A. *Equal Credit Opportunity Act*

The Equal Credit Opportunity Act prohibits a lender from discriminating in any aspect of a credit transaction against an applicant because of the applicant's sex.[2] Among other purposes, Congress passed the ECOA to ensure that "firms engaged in the extension of credit make that credit equally available *to all creditworthy customers without regard to sex* . . . ."[3] The Act was originally passed in 1974 to prohibit discrimination on the grounds of sex and marital status.[4] It was amended in 1976 to broaden the scope of its protections to prohibit

2. 15 U.S.C. § 1691(a) (1994).
3. Equal Credit Opportunity Act, Pub. L. No. 93-495 § 502, 88 Stat. 1500, 1521 (1974) (emphasis added).
4. Equal Credit Opportunity Act, Pub. L. No. 93-495 § 502, 88 Stat. 1500, 1521 (1974).

credit discrimination on the basis of race, color, religion, national origin and age as well.[5] Congressman Annunzio, who recommended expanding the coverage of the ECOA in 1975 explained the original purposes of the Act as ensuring that:

> each individual has a right when he applies for credit, to be evaluated as an individual: to be evaluated on his individual creditworthiness, rather than based on some *generalization or stereotype* . . . . Bias is not creditworthiness. Impression is not creditworthiness. An individual's ability and willingness to repay an extension of credit is creditworthiness.[6]

The ECOA parallels the prohibition of Title VII that an employer may not take adverse action against an employee because of the employee's sex.[7] This Court has instructed courts to follow Title VII in their enforcement and interpretation of the ECOA.[8] Title VII prohibits (1) disparate treatment where sex discrimination is a motivating factor in an employer's adverse employment decision, 42 U.S.C. § 2000e–2(m),[9] and (2) disparate treatment where a plaintiff shows by direct or indirect evidence that an employer's action more likely than not was motivated by unlawful discrimination and that an articulated business justification for the action is pretext for discrimination.[10] Plaintiffs may

5. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 1976 U.S.C.C.A.N. (90 Stat. 251) 251.
6. 121 CONG. REC. 16,740 (1975) (emphasis added).
7. 42 U.S.C. § 2000e (1994).
8. Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 893 (1st Cir. 1992).
9. Before the Civil Rights Act of 1991, an employer could disclaim any liability by showing it would have taken the same action absent the impermissible motive. Price-Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989). This standard was modified by the Civil Rights Act of 1991 which now renders a defendant liable for discrimination upon proof that a forbidden criterion "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e–2(m). Where an employer proves that it would have taken the same adverse action against a plaintiff even if it did not consider the forbidden factor, the plaintiff will be precluded from seeking damages or reinstatement, but may still be entitled to declaratory relief, certain injunctive relief, and attorney's fees. 42 U.S.C. § 2000e–5(g)(2)(B)(i); *see also* Woodson v. Scott Paper Co., 109 F.3d 913, 932 (3d Cir. 1997) (under the 1991 Act, employer no longer has complete defense to liability, as it did under Price Waterhouse).
10. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Lipsett v. Univ. of P.R., 864 F. 2d 881, 899 (1st Cir. 1988). *See also* Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 579–80 (1st Cir. 1999) (Title VII plaintiffs may proceed under either mixed motive or pretext approach).

also prove that an employment policy or practice has an adverse impact on a protected class.[11]

Accordingly, applicants for credit may state a claim of sex discrimination under the ECOA according to one or more of these methods of proof developed by courts in employment discrimination cases.

B. *Standard of Review*

Review of the dismissal of Plaintiff's complaint is *de novo*.[12] An appellate court may affirm a lower court's dismissal for failure to state a claim only if the plaintiff clearly cannot recover on any viable theory.[13] An appellate court must accept the Plaintiff's well-pleaded facts as true and "indulge every reasonable inference in his favor."[14]

Because, as a matter of law, Rosa alleges a set of facts that, if proven, would permit a reasonable jury to find in his favor on two separate theories of sex discrimination—(1) impermissible sex stereotyping and (2) disparate treatment—the District Court erred in granting Defendant's 12 (b) (6) motion. Where the District Court improperly dismissed the federal claim, it erred in dismissing the state law claims for want of federal court jurisdiction.

II. Plaintiff Has Stated a Viable Claim of Sex Discrimination Based on Impermissible Sex Stereotyping

Taking the facts in Rosa's Complaint as true, as the Court must, loan officer Norma Brunelle reacted to Rosa's appearance because Rosa is a man, and told Rosa that the reason for her refusal to provide him a loan application was his failure to meet a stereotype of masculinity. In other words, in Norma Brunelle's eyes, Lucas Rosa did not look the way a "real man" should. Because acting on sex stereotypes is impermissible

11. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
12. Cooperman v. Individual Inc., 171 F.3d 43, 46 (1st Cir. 1999).
13. Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (reversing the dismissal of African-American employees' complaints that sufficiently alleged their union's breach of the union's duty to fairly represent them without hostile discrimination); Langadinos v. Am. Airlines Inc., 199 F.3d 68, 69 (1st Cir. 2000) (vacating lower court's dismissal of plaintiff's complaint).
14. *Langadinos*, 199 F.3d at 69.

sex discrimination,[15] and because every applicant for credit has a right to be "evaluated on his individual creditworthiness, rather than based on some generalization or stereotype,"[16] Rosa states a viable claim.

In *Price Waterhouse*, the United States Supreme Court determined as a legal matter that a female associate had been discriminated against as a matter of law "because she was a woman" where members of her accounting firm had acted on sex stereotypes in denying her partnership.[17] The Court affirmed the district court's decision in Ann Hopkins's favor, holding, *inter alia*, that the district court properly determined that sex stereotyping had played a part in Price Waterhouse's partners' evaluations. According to the Supreme Court, one of the critical comments evidencing the role that sex stereotyping had played in the discriminatory process was the comment made by the partner who ultimately explained to Hopkins the reason for the Policy Board's decision. Summarizing the reasons for the refusal to make her a partner, he explained that in order to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[18] Simply put, Ann Hopkins did not exhibit her femininity in a way that met the other partners' perceptions of how a "real woman" should look and act at Price Waterhouse.

This Court has recently affirmed the strength and significance of the *Price Waterhouse* analysis. In *Higgins v. New Balance Athletic Shoe, Inc.*,[19] this Court reviewed a district court's grant of summary judgment for an employer in a case in which a former New Balance employee alleged hostile environment sex discrimination. As this Court recognized, the record proffered by Higgins made manifest that Higgins "toiled in a wretchedly hostile environment," but one that Higgins alleged in the trial court was triggered not by Higgins's sex but by his sexual orientation.[20] Despite its scorn for the co-workers' bad behavior, this Court held that, as litigated by Higgins, it could not factually find his action within Title VII because its prohibitions do not stretch that far, proscribing harassment because of sex, not necessarily of sexual orientation.[21]

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15. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
16. 121 CONG. REC. 16,740 (1975).
17. *Price Waterhouse*, 490 U.S. at 258 (1989).
18. *Price Waterhouse*, 490 U.S. at 235.
19. 194 F.3d 252, 259 (1st Cir. 1999).
20. *Higgins*, 194 F.3d at 258, 260.
21. *Higgins*, 194 F.3d at 259–60.

Only on appeal did Higgins argue that "he was harassed because he failed to meet his co-workers' stereotyped standards of masculinity. . . ."[22] Unable to accept Higgins's eleventh hour attempt to present a new theory of sex discrimination, this Court affirmed the summary judgment for the defendant. However, this Court made clear that, just as a woman can ground a claim of sex discrimination on evidence that she was discriminated against for a failure to meet stereotyped expectations of femininity,[23] so too could a man ground a claim on evidence that he was discriminated against "because he did not meet stereotyped expectations of masculinity."[24]

Taking the facts as Rosa has alleged them, the comparison to *Price Waterhouse* and (the sex stereotyping argument this Court endorsed in) *Higgins* is striking. In telling Rosa to "go home and change" in order to look more like a photograph in which he looked stereotypically masculine, it is reasonable to infer based on the allegations of the Complaint that the lender told Rosa he would not be given an application because he failed to meet the bank's "stereotyped standards of masculinity."[25] It is also reasonable to infer based on the allegations that the bank told Rosa that in order to receive a loan application he should, just as Hopkins's evaluators had told her in the employment context, meet the bank's perception of how a "real man" should look and act when applying for a loan.[26] Thus, Plaintiff has alleged that his creditworthiness was determined by Park West Bank according to an "impression" based on some "generalization or stereotype" of masculinity, rather than his "ability and willingness to repay an extension of credit."[27]

Under either reasonable construction of the facts, the lender acted on sex stereotypes in denying Rosa an application. In other words, in

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22. *Higgins*, 194 F.3d at 259.
23. *Price Waterhouse v. Hopkins*, 490 U.S. at 250–51.
24. *Higgins*, 194 F.3d at 261 n.4. *See also* Schmedding v. Tnemec Co., Inc., 187 F.3d 862, 865 (8th Cir. 1999) (allegations that co-workers harassed employee "to debase his masculinity" states a Title VII claim of sex discrimination); EEOC v. Trugreen Ltd. P'ship, 1999 U.S. Dist. LEXIS 9368, at *23 (W.D. Wis. Mar. 23, 1999) (plaintiff could succeed on a theory that employer treated employee adversely because employee "did not exhibit his masculinity in a way that met [employer's] conception of how a man should behave"); Spearman v. Ford Motor Co., 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999) (facts that an employee was targeted for harassment because of how "he projected his gender, or how his gender was perceived by co-workers" supported a claim of sex discrimination).
25. *Higgins*, 194 F.3d. at 259.
26. *Compare Price Waterhouse*, 490 U.S. at 235.
27. *See* 121 CONG. REC. 16,740 (1975).

the language of *Price Waterhouse*, Park West Bank treated Lucas Rosa adversely because Rosa did not exhibit his masculinity in a way that met Park West Bank's conception of how a man should look. As the United States Supreme Court has now long held, "we are beyond the day" when employers (and banks, by analogy) may insist that employees (which, as the district court judge noted are the equivalent in this case to loan applicants, App. 15) "match[ ] the stereotype associated with their group."[28]

Although seemingly tautological, it bears mention that sex stereotyping includes enforcing gendered norms of appearance, that is, making sure that men look like men and women look like women. As this Court recently explained, the concept of stereotyping includes a host of "subtle cognitive phenomena which can skew perceptions and judgments."[29] Acting on stereotypes based on appearance is squarely within this construct.[30] This point is underscored by considering that Merriam Webster defines stereotype as "a standardized *mental picture* that is held in common by members of a group and that represents an over-simplified opinion, affective attitude, or uncritical judgment."[31] Nearly every case involving stereotypes focuses in some way on perceptions based on appearance.[32] The advice given to Ann Hopkins

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28. *Price Waterhouse*, 490 U.S. at 251 (citing City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
29. Thomas v. Eastman Kodak Co., 183 F.3d 38, 61 (1st Cir. 1999).
30. Social science literature is replete with affirmation that presumptions about appearance form a central component of stereotyping. *See, e.g.*, Kay Deaux & Laurie L. Lewis, *Structure of Gender Stereotypes: Interrelationships Among Components and Gender Label*, 46 J. PERSONALITY & SOC. PSYCHOL. 991, 992 (1984). Consider, too, the conclusions drawn in a study analyzing how people's views of employees were skewed by perceptions of attractiveness. In their study, Heilman and Stopeck found that attractive men were viewed as more capable than unattractive ones, whereas attractive women were viewed as less capable than unattractive ones. Moreover, the study found a relationship between perceptions of masculinity and competence. Madeline F. Heilman & Melanie H. Stopeck, *Attractiveness and Corporate Success: Different Causal Attributions for Males and Females*, 70 J. OF APPLIED PSYCHOL. 379 (1985). It is hard to imagine a more central component of stereotyping than those drawn around appearance.
31. *Webster's Ninth New Collegiate Dictionary* 1156 (9th ed. 1986) (emphasis added).
32. In an Eighth Circuit case in which Judge Aldrich sat by designation, that court held that the Fourteenth Amendment Due Process Clause protects a student's personal freedom to govern one's appearance. Striking a public high school's sex-specific hair length regulation, Judge Aldrich commented on the baselessness of stereotypes about boys with long hair. He commented:

> The area of judicial notice is circumscribed, but I cannot help but observe that the city employee who collects my rubbish has shoulder-length hair. So do a number of our nationally famous Boston Bruins. Barrel tossing and

that she take a course in charm school is an obvious example of this, along with the counsel that she "dress more femininely, wear make-up, have her hair styled, and wear jewelry," comments the Court characterized as the "coup de grace."[33] Indeed, dismissing the need for expert testimony to prove that sex stereotyping had played a role in Hopkins's case, Justice Brennan commented, it requires no expertise in psychology to know that if an employee's abilities can be "corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not" her abilities that has drawn criticism.[34] As one legal commentator has explained, in *Price Waterhouse* the Court did not find as a matter of fact that "Hopkins's appearance was appropriate for her sex; it held as a matter of law that it constituted sex discrimination for her employer to require that it be so."[35]

For the simple and straightforward reasoning that sex stereotyping is sex discrimination, plaintiff has set forth a viable claim which survives a motion to dismiss.

III. Plaintiff Has Stated a Viable Claim of Sex Discrimination Based on Disparate Treatment of Men and Women

Plaintiff's Complaint also states a claim of sex discrimination because the Defendant bank denied Rosa a loan application when it would have provided one to a similarly situated woman. Taking the facts alleged in Rosa's complaint to be true, the loan officer refused to give Rosa, a biological male, a loan application because he did not appear stereotypically masculine. It is reasonable to assume that the Bank would not have refused to provide a loan application to a female

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> puck chasing are honorable pursuits, not to be associated with effeteness on the one hand, or aimlessness or indolence on the other. If these activities be thought not of high intellectual calibre, I turn to the recent successful candidates for Rhodes Scholarships .... A number of these, according to their photographs, wear hair that outdoes even the hockey players. It is proverbial that these young men are chosen not only for their scholastic attainments, but for their outstanding character and accomplishments.... It is bromidic to say that times change, but perhaps this is a case where bromide is in order.

Bishop v. Colaw, 450 F.2d 1069, 1077–1078 (8th Cir. 1971) (Aldrich, J., concurring).

33. *Price Waterhouse*, 490 U.S. at 235.

34. *Price Waterhouse*, 490 U.S. at 256.

35. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 49 (1995).

customer dressed in traditionally female clothing. In fact, it is hard to conceive, based on contemporary fashions that Park West Bank would deny any woman a loan application because of the gendered nature (masculine or feminine) of her appearance.[36]

Simply stated, Lucas Rosa was denied the opportunity to apply for a loan when a similarly situated woman would not have been denied. This difference in treatment of men and women, in the most elemental of ways, is what constitutes unlawful sex discrimination.[37]

Plaintiff can certainly seek to show, based on the allegations in his complaint, that Park West Bank never declines to provide loan applications to women regardless of whether their appearance matches stereotypes of femininity. At the same time, a developed record may show that the Defendant Park West Bank only permits men who look stereotypically masculine to apply for credit. At its heart, this states a claim of disparate treatment.

Even if Park West Bank's clothing requirement simply follows conventional norms of "appropriate" gender expression, Rosa may show that it allows a narrower range of permissible gender expression for men than for women. For example, it is hard to conceive, based on contemporary fashions that Park West Bank would deny any woman a loan application because of the gendered appearance of her dress—whether too masculine or too feminine—proving that there is neither facial nor formal equality with regard to permissible gender expression for men and women at Park West Bank. If women customers are not denied loan applications for their failure to meet a gendered stereotype, neither should Plaintiff.

Apart from the obviousness of the argument, significant social science data supports the conclusion that the range of permissible

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36. *See, e.g.*, Case, *supra* note 35, at 22 n.60.

37. *See* City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (pension plan that required women to make larger contributions than men violated Title VII prohibition against sex discrimination); Laffey v. Northwest Airlines, 366 F. Supp. 763 (D.D.C. 1973) (practice of restricting purser jobs at airline to men only was impermissible sex discrimination under Title VII); Burkey v. Marshall Cty. Bd. of Ed., 513 F. Supp. 1084 (N.D.W. Va. 1983) (policy of restricting coaching positions for boys' sports to male teachers constitutes illegal discrimination under Title VII on the basis of sex). *See also* United States v. Virginia, 518 U.S. 515 (1996); Mississippi v. Hogan, 458 U.S. 718 (1982) (stereotypical views of men and women insufficient to justify different treatment in admission to nursing school); Califano v. Goldfarb, 430 U.S. 199 (1977) (insufficient justification for different treatment of sexes); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (same).

gender expression for men is narrower than it is for women.[38] A relaxing of gender norms for women, but not for men, has taken place throughout the workplace, including the legal profession.[39] It would be unsurprising to be able to show that a similar relaxing of gender norms for women has taken place in places of public accommodation and as part of credit transactions. While it might be noted that a different range of acceptable gender expression for men and women is fairly ubiquitous, that does not obviate its impermissibility as a legal matter where a statute squarely forbids sex discrimination.

Because Plaintiff has alleged a difference in treatment of men and women by the Defendant, Plaintiff has set forth a viable claim adequate to withstand a motion to dismiss.

IV. THE DISTRICT COURT FUNDAMENTALLY MISCONCEIVED BOTH THE LAW AS APPLICABLE TO THE PLAINTIFF'S CLAIM AND THE PROPER APPLICATION OF RULE 12(B)(6)

The District Court's Order incorrectly states that a requirement that "Rosa change his clothes [can] not give rise to claims of illegal discrimination." (App. 15, Judge's Order.) This facile distinction between dress, on the one hand, and unlawful sex discrimination, on the other, as if, by definition, the two are necessarily separate and unrelated, is simply wrong both as a matter of law and fact. To the extent the Court is drawing a legal conclusion that claims grounded in dress requirements can never state a claim of sex discrimination, its ruling is simply wrong. Dress requirements have regularly been found to constitute prohibited sex discrimination. Moreover, this is true even in the employment context where it is less difficult to justify a sex-specific dress requirement than it is in the credit context before this Court.[40]

38. *See* ELEANOR EMMONS MACOBY AND CAROL NAGY JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 284, 328 (1974) (parents much more tolerant of girls who exhibit "boy-like" behavior than they are of boys who exhibit "girl-like" behavior); Case, *supra* note 35, at 2–3; Donald R. McCreary, *The Male Role and Avoiding Femininity*, 31 SEX ROLES 517, 518 (1994).

39. *See, e.g.*, Martin Fox, *Bar Panel Tackles Sticky Issue of Appropriate Garb for Women*, N.Y.L.J., Dec. 23, 1991, at 1 (the wearing of "tailored pants suits" by women lawyers determined not to violate the Code of Professional Responsibility).

40. It bears mention that there are no facts in the record to support an inference that Park West Bank's refusal to provide Rosa a loan application was in any way connected to enforcing a dress code or appearance requirement. No suggestion that Park West Bank was acting in conformity with a dress code or appearance requirement, sex-specific or otherwise, was ever made by the Defendant either at argument or in the record below. Rosa addresses it here, nevertheless, as the District

Alternatively, to the extent the Court is drawing a factual inference regarding the Bank's motive in telling Rosa to go home and change, i.e., that the reason was dress and not sex, it may not do so consistent with Rule 12(b)(6).

A. *The District Court Erred in Holding That a Requirement That Rosa Change His Clothes to Conform to Gender Stereotypes Cannot Give Rise to a Claim of Illegal Sex Discrimination*

Dress codes and sex discrimination are not mutually exclusive categories. Courts have long recognized that dress requirements may constitute impermissible sex discrimination in the employment context for a variety of reasons.

Some courts have struck dress codes or appearance requirements because they were applied differently for men and women and were not supported by any permissible justification.[41] Others have said that a discriminatory application of even a sex-neutral dress code evidences bias.[42] Still others have found sex-specific dress code or appearance requirements discriminatory because they created a special disadvantage for an employee based on sex.[43] Finally, some courts have found sex-specific dress codes or appearance requirements impermissible because of the particular hardship that falls on one sex as a result.[44]

Court's Order suggests that it may have been guided by a presumption the bank was acting consistent with some unarticulated dress requirement.

41. *See, e.g.*, Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982) (Continental's desire to compete by featuring attractive female cabin attendants insufficient to support discriminatory weight requirement).

42. *See, e.g.*, Tamimi v. Howard Johnson Co., 807 F.2d 1550, 1554 (11th Cir. 1987) (creation of facially neutral makeup rule evidence of pretext for sex discrimination); Harding v. Goodyear Tire and Rubber Co., 929 F. Supp. 1402, 1406 (D. Kan. 1996) (evidence that a "no tank tops" requirement only applied to female employee could support inference of sex discrimination).

43. *See, e.g.*, Carroll v. Talman Fed. Sav. & Loan, 604 F.2d 1028, 1030 (7th Cir. 1979) (striking dress code that required women to wear a uniform but allowing men to wear business suits); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (dress code requiring female sales clerks to wear "smock" while allowing male sales clerks to wear shirt and tie impermissible, even absent discriminatory motive, because it perpetuated sex stereotypes).

44. *See, e.g.*, EEOC v. Sage Realty Corp., 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (sexually provocative uniform requirement impermissible); Marentette v. Michigan Host Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980) (sexually provocative dress code unreasonable).

In short, invocation of a "dress code" defense (should Defendant ever make one) does not immunize Park West Bank's conduct from the structure of Title VII. Moreover, even in those cases where courts have upheld even sex-specific dress codes, they have done so because the dress or appearance requirement, though sex discriminatory, can be justified by business justifications reasonably related to the job.[45] Even assuming, *arguendo*, that an employer might be able to justify a dress code according to business needs in the employment context, there can be no plausible justification for basing creditworthiness determinations upon a person's gendered appearance. Indeed, this is the precise evil that the ECOA was designed to address.

There is no relationship between creditworthiness and appearance. Sex stereotypical appearance bears no relationship to creditworthiness. Therefore, a requirement that Rosa appear in a sex stereotypical fashion before he can receive a loan application fits squarely within discriminatory conduct prohibited by the ECOA.[46]

B. *The District Court Erred to the Extent It Resolved Questions of Fact About the Bank's Reasons for Refusing to Provide Rosa With a Loan Application*

In circumventing Rosa's straightforward sex discrimination claim, the District Court's Order attempts either to dissociate dress from sex (*see* Section IV.A., above) or to remove the Plaintiff's sex from the Defendant's basis for its action. In the words of the District Court, "the issue in this case is not [Plaintiff's] sex, but rather how he chose to dress when applying for a loan." (App. 14, Judge's Order.) In short, the Order makes a factual determination that Lucas Rosa's case merely involved the Bank's telling him what to wear and nothing more. This is only possible by looking past the allegations of the Complaint and improperly resolving the factual question of whether sex was a factor behind the lender's decision not to provide Rosa with a loan application—e.g. whether the appearance requirement was a sex-based one.

Regardless of whether the court ultimately credits the allegation that sex was a motivating factor, (App. 6, Plaintiff's Complaint ¶ 20),

45. *See Carroll*, 604 F.2d at 1033 (some courts have permissibly upheld sex-specific dress codes where reasonably related to "employer's business needs.").

46. Pub. L. No. 93-495 § 502, 88 Stat. 1500, 1521 (1974) (one of the purposes of the ECOA was to ensure that credit would be available to all creditworthy customers without regard to sex).

the appellant's complaint states a claim. The District Court's Order improperly rejected Rosa's characterization of the Bank's reason for denying him a loan application, a logical factual inference to be drawn from the allegation that the loan officer refused to provide him a loan application until he "went home and changed" to appear more traditionally masculine. (App. 5, Plaintiff's Complaint ¶¶ 12, 13.) While it will certainly be the province of the factfinder (later on) to decide if Rosa can sufficiently support his allegations, it would be improper on a motion to dismiss to discredit a properly plead allegation of the reason for the Bank's refusal.[47]

V. The District Court Erred in Dismissing the State Law Claims for Want of Jurisdiction

The only ground for dismissing the state law claims, according to the District Court's Bench Order, (App. 15, Judge's Order), was "for want of jurisdiction" where the court dismissed the only federal question in the case. Once it is clear that the federal claim properly survives a Rule 12(b)(6) motion to dismiss, (*see* Sections II, III, and IV, above) the District Court's justification for dismissing the state law claims dissolves. Accordingly, because the District Court improperly dismissed the ECOA claim, it improperly dismissed the state law claims.

Conclusion

For the foregoing reasons, this Court should determine that Lucas Rosa has stated a valid claim under the ECOA, vacate the District Court order dismissing the claim, reinstate the ECOA and state law claims and remand for further proceedings.

Date: 1/28/00

47. *See* Moore v. U.S. Dep't of Agriculture, 993 F.2d 1222, 1224 (5th Cir. 1993) (plaintiff stated a race discrimination claim where FMHA refused to process requests from white applicants regardless of what facts might be later shown regarding qualifications or effect of discrimination).