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SOME MODEST PROPOSALS FOR CHALLENGING ESTABLISHED DRESS CODE JURISPRUDENCE*

JENNIFER L. LEVI**

Historically, most courts have sustained employer-imposed, gender-based dress codes. Two well-established exceptions to the rule exist for dress codes that either (1) objectify or sexualize women¹ or (2) allow for flexibility of standards for male employees' appearance but require stricter rules for women.² A third, still-evolving exception has recently developed regarding challenges to dress codes by transgender litigants.³ Despite this recent progress, however, the classical gender-based dress code—requiring women to conform to feminine stereotypes and men to conform to masculine stereotypes—has, up to the present, been sustained by a majority of the courts time and again.⁴ It is,

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1. See, e.g., *E.E.O.C. v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (ruling that employee could not be required to wear a "sexually revealing . . . uniform"); *Marentette v. Mich. Host Inc.*, 506 F. Supp. 909, 912 (E.D. Mich. 1980) (suggesting that sexually provocative dress code requirement would be impermissible).

2. See, e.g., *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263, 266 (S.D. Ohio 1987) (finding a dress code requiring female sales clerks to wear a "smock" while allowing male sales clerks to wear shirts and ties impermissible, even absent a discriminatory motive, because it perpetuated sexual stereotypes); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1029–30 (7th Cir. 1979) (striking down a dress code that required women to wear a uniform but allowed men to wear business suits).

3. See, e.g., *Miles v. N.Y. Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997) (male-to-female transsexual student, who was in process of becoming female at time of professor's alleged sexual harassment, was subjected to discrimination based on gender, and, thus, was protected by Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, *codified as amended* at 20 U.S.C. §§ 1681–1688 (2000); 29 U.S.C. §§ 203, 213 (West Supp. 2006); 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9, 2000h-2 (2000)); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (evidence that a state prison guard's actions were motivated by a transsexual inmate's gender, i.e., by her assumption of a feminine rather than a typically masculine appearance or demeanor, could support a finding of a gender-motivated attack under the Gender Motivated Violence Act, 42 U.S.C. § 13981 (2000), *invalidated by* *United States v. Morrison*, 529 U.S. 598 (2000)); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (allegations that a transsexual bank loan applicant was discriminated against based upon applicant's gender non-conforming behavior and appearance were actionable pursuant to the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2000)); *Smith v. City of Salem (Ohio)*, 378 F.3d 566, 573 (6th Cir. 2004) (allegations that a transsexual firefighter was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII, 42 U.S.C. §§ 2000e–2000e-4 (2000)).

4. See, e.g., *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (dismissing challenge to policy that prohibited men, but not women, from having long hair); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (upholding employer's policy that required male

therefore, fortuitous that two cases now offer insights as to why dress codes generally survive challenges, while also portending strategies for reversing this longstanding trend.

In *Jespersen v. Harrah's Operating Co.*,⁵ the Ninth Circuit, sitting en banc, sustained against a Title VII⁶ challenge a "grooming and appearance" code adopted by Harrah's Casino that was entitled the "Personal Best" program.⁷ Under the Personal Best program, bartenders (of which Darlene Jespersen was one) had to be "well groomed, appealing to the eye, be firm and body-toned, and be comfortable with maintaining this look while wearing the specified uniform."⁸ Females, but not males, were required to have their hair "teased, curled, or styled," and to wear stockings (of nude or natural color), nail polish, and make-up that included lip color.⁹ Despite the "Personal Best" policy,¹⁰ Darlene Jespersen never wore make-up at work or outside of her job, due to her personal discomfort with it.¹¹ Indeed, she was so uncomfortable wearing make-up that she left her employment with Harrah's—after having been there for over twenty years—because of the new workplace policy.¹² Despite crediting Jespersen's sincere discomfort with the policy, the court sustained the program, finding that, although the program imposed different requirements on men and

employees to have short hair but did not require the same for female employees); *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1392 (D. Mont. 1979) (finding sex discrimination claim insufficient where employer prohibited female, but not male, employees from wearing pantsuits in executive office); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755–56 (9th Cir. 1977) (requiring male, but not female, employees to wear ties was not sex discrimination under Title VII); *Austin v. Wal-Mart Stores, Inc.*, 20 F. Supp. 2d 1254 (N.D. Ind. 1998) (finding grooming policy requiring male employees to maintain hair length above the collar acceptable under Title VII); *Wislocki-Goin v. Mears*, 831 F.2d 1374, 1380 (7th Cir. 1987) (dismissing Title VII claim alleging that grooming policy imposed unduly harsh requirements on women); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding "policy that prohibits to both sexes a style more often adopted by members of one sex" under Title VII challenge); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336 (D.C. Cir. 1973) (upholding policy which only prohibited men from wearing long hair); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (finding grooming policy which "reflect[ed] customary modes of grooming" acceptable even though differences in policy existed for men and women); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (upholding policy which limited manner in which hair of men could be cut and which limited manner in which women's hair could be styled); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976) (finding sex differentiated grooming standards consistent with Title VII); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (upholding policy which required short hair for men, but not women).

5. 444 F.3d 1104 (9th Cir. 2006) (en banc).

6. Civil Rights Act of 1964, § 701, Pub. L. 88-352, 78 Stat. 253, *codified at* 42 U.S.C. §§ 2000e–2000e-4 (2000).

7. *See generally Jespersen*, 444 F.3d at 1104.

8. *Id.* at 1107.

9. *Id.*

10. *Jespersen*, 392 F.3d 1076, 1077 (9th Cir. 2004) (2-1 panel decision) (stating that wearing makeup "made her feel sick, degraded, exposed, and violated"), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006)

11. *Jespersen*, 444 F.3d at 1107–08 (en banc).

12. *Id.*

women, it did not unequally burden them and therefore was permissible.¹³ The court's analysis focused not on whether Jespersen had proved that she suffered discrimination because of her sex, but rather, it considered whether women, as a group, suffered from the policy.¹⁴

The case of *Schroer v. Library of Congress* presented decidedly different facts to the United States District Court of the District of Columbia. Despite the understandably conspicuous absence of a dress-code challenge, that court nevertheless reached the same affirmation of an employer's ability to enforce a gender-based dress code.¹⁵ In that case, a transsexual woman with extraordinary national defense and security qualifications had an offer to work as an analyst at the Library of Congress¹⁶ withdrawn when her new employer learned that she was transsexual.¹⁷ The plaintiff pled both sex stereotyping (i.e., alleging that if the applicant had conformed to a female stereotype, including having been born female, she would not have had the position taken away)¹⁸ and straightforward sex discrimination (i.e., had she been born biologically female, rather than biologically male, she would not have had the position taken away).¹⁹ Interestingly, rather than deciding the case under the familiar rubric of impermissible sex stereotyping that is now common for transgender litigants under Title VII,²⁰ the court instead found a straightforward sex-discrimination

13. *Id.* at 1110 ("Under established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.").

14. *Id.* at 1111 ("Having failed to create a record establishing that the 'Personal Best' policies are more burdensome for women than for men, Jespersen did not present any triable issue of fact." (emphasis added)).

15. 424 F. Supp. 2d 203 (D.D.C. 2006).

16. *See id.* at 205–06.

17. *Id.* at 206–07.

18. Compl. at ¶¶ 52–53, 55, *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006), available at 2005 WL 1924438.

19. Compl. at ¶¶ 52–53, 55; *see also Schroer*, 424 F. Supp. 2d at 205.

20. Most recent courts to address the question have held transsexual people covered under existing laws. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (allegations that a transsexual police officer was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII, 42 U.S.C. §§ 2000e–2000e–4 (2000)); *Smith v. City of Salem (Ohio)*, 378 F.3d 566, 573 (6th Cir. 2004) (allegations that a transsexual firefighter was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act, 42 U.S.C. § 13981 (2000), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000), applies with equal force to both men and women, and its protection extends to transsexuals); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (allegations that a transsexual bank loan applicant was discriminated against based upon applicant's gender non-conforming behavior and appearance were actionable pursuant to the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2000)); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (allegations that a transsexual sales representative was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII, 42 U.S.C. §§ 2000e–2000e–4 (2000)). *But see Etsitty v. Utah Transit Auth.*, 95 Fair Empl. Prac. Cas. (BNA) 1836 (D. Utah 2005) (finding Congress did not intend transsexual persons to be covered under Title VII); *Oiler v. Winn-Dixie La., Inc.*, 89 Fair Empl. Prac. Cas. (BNA) 1832 (E.D. La. 2002) (same).

violation.²¹ The apparent reason for this departure from contemporary jurisprudence was the District Court's stated concern that resolving the claim under a sex-stereotyping theory would undermine the established jurisprudence of dismissing classical dress-code challenges—just as the *Jespersen* Court had done.²²

Thus, while there has been real progress, at least at the margins, in cases involving transgender litigants challenging dress codes based on sex stereotypes, much less progress has been made challenging the central and well-established case law sustaining gender-based dress codes. Moreover, if *Schroer* is any indication, courts seem to be increasingly concerned about how to protect transgender persons in employment—which is good. However, such progress, if it serves to foster or exacerbate bad law for non-transgender men and women who are also hindered in employment opportunities, will have come at a high price indeed.

It is against this judicial landscape that one is compelled to ask, why are the courts so seemingly entrenched in their rejection of dress-code challenges? There exist two potentially contradictory reasons for this established dress-code jurisprudence: Either the courts are over-empathizing with litigants like Darlene Jespersen—who are required by employers to conform to rigid stereotypes—or the courts cannot empathize with them at all. With respect to the over-empathizing side, judges may be saying to themselves, "I have to conform to gender-based stereotypes every day. I don't particularly like to put on make-up, stockings, wear a suit, tie, etc. It's really hard for me to conform to these gender stereotypes daily, and I'm doing what I need to do to fit into the narrow constructions of what makes a man or a woman. Therefore, everybody else should be able to do it, too."

On the other hand, just the opposite could be going on in the minds of some judges deciding dress code cases. Some judges may be saying, "Geez, what's so wrong with Darlene Jespersen? Either I (for female judges) put on make-up every day, or my wife (for male judges) puts on make-up every day. It doesn't seem to be that problematic. Yeah, she says it's so stressful—but alleging that it's devastating to her self-esteem? That's really hard to imagine."

These conjectures regarding the personalization of judges conforming to a dress code are not so far-fetched, as the *Jespersen* dissent demonstrates. In his dissent, Judge Kozinski engaged in a related thought experiment, resulting in his empathizing with Jespersen.²³ As Kozinski explained,

Whether to wear cosmetics—literally, the face one presents to the world—is an intensely personal choice. . . . If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive.

21. See *Schroer*, 424 F. Supp. 2d at 212–13.

22. *Id.* ("Dealing with transsexuality straightforwardly, and applying Title VII to it (if at all) as discrimination 'because of . . . sex,' preserves the outcomes of the post-*Price Waterhouse* [v. *Hopkins*, 490 U.S. 228 (1989) (plurality opinion),] case law without colliding with the sexual orientation and grooming code lines of cases.")

23. See *Jespersen*, 444 F3d. at 1117–18 (Kozinski, J., dissenting).

Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance.²⁴

In his powerful memoir describing his experience as a gender non-conforming youth who was put in a mental hospital for his “transgression,”²⁵ Dylan Scholinski instructed gender-conforming individuals to imagine, for one day, taking on a gender expression that is completely uncomfortable. The object was not to do it as a lark or for drag, but instead in seriousness and earnest. He then instructed readers to imagine doing it for a week, three weeks, and longer, and to feel how having to conform to a different gender expectation tears apart your soul.²⁶

Quite remarkably, Kozinski was able to engage in Scholinski’s experiment and described what that experience might be like for him.²⁷ It is difficult to imagine that something other than this thought experiment persuaded Kozinski (a rather conservative judge²⁸) to support Jespersen’s claim and provide an analysis contrary to the majority view of well-established dress-code jurisprudence.

Individual judges’ experiences of gender seem certainly to guide their thinking (and ultimately judging) in the arena of dress-code challenges. I was first made conscious of that reality when litigating a case on behalf of a transgender loan applicant. In the case of *Rosa v. Park West Bank & Trust Co.*,²⁹ I represented a transgender woman who applied for a loan at a bank and was sent home to dress in a more gender-conforming manner before the loan officer would help her.³⁰ Lucas Rosa, an individual with a female-gender identity who was born biologically male, was told by the bank that she did not look sufficiently masculine to apply for a bank loan.³¹ The case went up to the First Circuit on a sex-discrimination claim, and was argued under both straightforward and sex-stereotyping discrimination umbrellas. At the panel hearing, I was asked the following question: “What evidence will you utilize to demonstrate the sex-stereotyping claim?”³²

The question initially confused me, as I understood sex-stereotyping to be the unwelcome enforcement of gender norms. In other words, sex-stereotyping can be demonstrated by a person evidencing that he or she faced an adverse action for failure to conform to the stereotypical gender norms associated with

24. *Id.*

25. See DAPHNE SCHOLINSKY, *THE LAST TIME I WORE A DRESS* (1997). Since writing this book, Scholinski transitioned from female to male and now goes by the name Dylan.

26. *Id.*

27. *Jespersen*, 444 F.3d at 1117–18 (Kozinski, J., dissenting).

28. Professor Jeffrey Rosen has described Judge Kozinski as “conservative libertarian.” *IDEAS & TRENDS: Perhaps Not All Affirmative Action Is Created Equal*, N.Y. TIMES, June 11, 2006, §4, at 14.

29. 214 F.3d 213 (1st Cir. 2000).

30. *Id.* at 214.

31. *Id.*

32. This articulation of the question is from my recollection of the argument and is not based on the transcript.

their sex. In my view, being sent home for failing to look sufficiently masculine, if proved, would be enough. After all, had the person been of a different sex, the decision-maker would not have found him or her to be gender-nonconforming. Yet, this answer was clearly unsatisfying to the panel. After perhaps too long a time, I realized the court's confusion was that it could not find a group harm associated with forcing an individual to conform to a gender stereotype, since both men and women were expected to so conform. Therefore, the panel questioned whether enforced stereotypes alone could prove the sex discrimination claim asserted. At its essence, the question might have been understood as, "What is the sex-specific harm of sex stereotypes?" More specifically, just because a litigant can demonstrate that he or she was treated differently because of his or her sex does not alone prove sex *discrimination*; discrimination requires something more than different treatment—it requires something amounting to a group harm.³³

In other words, the court was refocusing on *Price Waterhouse v. Hopkins*,³⁴ the foundational case establishing sex stereotyping as problematic under Title VII,³⁵ and narrowing its lens upon what a successful sex-stereotyping claim requires. At least that panel of the First Circuit questioned (without resolving) whether demonstrating the enforcement of male and female stereotypes met the standard for proving a statutory sex-discrimination claim.³⁶ Given the ubiquity of certain stereotypes that lack a communal offense, I think the question is worthy of more focus as litigators continue to develop stereotyping claims. Further delineating appropriate limiting principles and explicating the various harms of sex-stereotyping have become (in light of established law) essential to the development of the doctrine.

It bears mention that part of the problem identified by the *Price Waterhouse* Court was that the plaintiff had been placed in a Catch-22 situation, meaning that women were kept from advancement at the accounting firm irrespective of whether they acted more like a female or adopted more masculine characteristics.³⁷ Indeed, the power of Ann Hopkins' claim was that, despite her having adopted traits that would have solidified a man's advancement at the firm, she was denied partnership when it was also patently obvious that advancement would have been denied if she had rigidly conformed to a female stereotype. As a result, because sex-stereotypes were enforced, women were denied opportunities. Not to under-emphasize the importance of *Price Waterhouse*, the case has been cited for more than the Catch-22 faced by Ann Hopkins described above. To be sure, its dicta has resulted in the recently-reversed trend of excluding transgender people from coverage under sex-

33. As Barbara J. Flagg has explained, "Title VII prohibits 'discrimination,' but the statute leaves obscure the precise meaning of that term." *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2030 (1995).

34. 490 U.S. 228 (1989) (plurality opinion).

35. 42 U.S.C. §§ 2000e–2000e-4 (2000), cited in *Price Waterhouse*, 490 U.S. 228.

36. See *Rosa*, 214 F.3d at 216.

37. 490 U.S. at 251.

discrimination law.³⁸ Yet, taken together, the question posed to me in *Rosa*,³⁹ the *Jespersen* case itself (including its outcome and reflection of the majority position),⁴⁰ and the *Schroer* dicta,⁴¹ suggest serious limits to the logical conclusions drawn from a broad understanding of *Price Waterhouse's* sex-stereotyping language.⁴²

What emerges from this analysis is that contemporary courts have taken a step back from the language of *Price Waterhouse* when applying a sex-stereotyping theory in dress-code challenges. These courts have, seemingly, crafted an additional requirement to Title VII, beyond the demonstration of disparate treatment.⁴³ This new requirement obligates plaintiffs not just to demonstrate sex stereotyping, but also to establish a resultant group-based

38. See Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 55 (2000). See also, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (allegations that a transsexual police officer was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII); *Smith v. City of Salem (Ohio)*, 378 F.3d 566, 573 (6th Cir. 2004) (allegations that a transsexual firefighter was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act, 42 U.S.C. § 13981 (2000), *invalidated by* *United States v. Morrison*, 529 U.S. 598 (2000), applies with equal force to both men and women, and its protection extends to transsexuals); *Rosa*, 214 F.3d 213, 215–16 (1st Cir. 2000) (allegations that a transsexual bank loan applicant was discriminated against based upon applicant's gender non-conforming behavior and appearance were actionable pursuant to the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2000)); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (allegations that a transsexual sales representative was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. 02-1531-PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (allegations of employment termination for failure to conform to gender stereotypes in the use of restrooms was actionable pursuant to Title VII); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (alleged discrimination against a transsexual employee for failing to 'act like a man' is actionable pursuant to Title VII); *Doe v. United Consumer Fin. Servs.*, No. 1:01-CV-1112, 2001 WL 34350174, at *2 (N.D. Ohio Nov. 9, 2001) (allegations that a transsexual employee was discriminated against based upon employee's gender non-conforming behavior and appearance were actionable pursuant to Title VII).

39. 214 F.3d at 213.

40. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir 2006) (en banc).

41. *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

42. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” (quoting *L.A. Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)) (alteration added)).

43. See, e.g., *Jespersen*, 444 F.3d at 1112.

We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.

Id.

harm.⁴⁴ Indeed, the *Schroer* court also embraced a narrower reading of *Price Waterhouse*, suggesting that disparate treatment requires not simply showing the different treatment of two separate classes of people, but also requires that one class be unequally burdened.

[T]he actual holding of *Price Waterhouse* is considerably more narrow than its sweeping language suggests . . . the Court meant no more than that: *disparate treatment* of men and women by sex stereotype violates Title VII. Adverse action taken on the basis of an employer's gender stereotype that does not impose unequal burdens on men and women or disadvantage one or the other does not state a claim under Title VII.⁴⁵

In other words, to show impermissible sex stereotyping, one must prove both (1) disparate treatment according to sex-stereotypes and (2) that women *as a class* have been adversely harmed as a result. Thus, the problem under this arguably distorted interpretation of Title VII in *Price Waterhouse* was not that Ann Hopkins failed to conform to a feminine stereotype, but that requiring her (and other women) to do so limited the advancement of *all* women at the firm. Such an inference is supported by the Court's unexpressed acknowledgement that women demonstrating feminine behavior would undoubtedly have received no better treatment in review for partnership than did Ann Hopkins.⁴⁶

The problem with the additional unequal-burden requirement is, of course, that neither the history⁴⁷ nor the text of Title VII support it.⁴⁸ The whole point of sex-discrimination protection is that it provides for *individuals* to be freed from sex discrimination, regardless of what happens to other applicants or other women. Therefore, the question formulated in the context of dress codes and enforcement of stereotypes, is the following: Why have courts created additional hurdles for litigants? One theory is that the hurdles have been created by the courts' confusion between direct-evidence and indirect-evidence claims. It may be that courts have forgotten the basic structure of discrimination claims because most contemporary actions involve indirect evidence—possibly also suggesting the effectiveness of Title VII. In a direct-evidence claim, of course, there is a smoking gun: an employer essentially states, "We fire you (or do not hire you), because you are a woman." These are usually straightforward cases because direct evidence quickly proves the case in the plaintiff's favor.

However, such cases are fewer and farther between today. Most sex-discrimination claims are litigated under an indirect-evidence process. For

44. *Id.*

45. *Schroer*, 424 F. Supp. 2d at 209.

46. *Price Waterhouse*, 490 U.S. at 251 ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not").

47. The history of the inclusion of the sex discrimination prohibition in Title VII presents little interpretive help here given that most agree that the term was included principally as an effort to defeat the law's adoption. See CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115–17 (1985). Regardless, it offers no support for some group harm requirement.

48. See 42 U.S.C. § 2000e-2 (2000).

indirect-evidence cases, the *McDonnell Douglas*⁴⁹ test controls, which requires a litigant to demonstrate:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.⁵⁰

Upon successful pleading, the burden then shifts to the employer to demonstrate that it had a legitimate and non-discriminatory justification for the different treatment.⁵¹ However, the burden ultimately falls to the employee to show that the proffered justification is pretextual and that the real reason was the prohibited one.⁵²

Before there was *McDonnell Douglas*, though, there was direct evidence. Direct evidence is just that—a claim “of conduct or statements by persons involved in the decision-making process, which indicate a discriminatory attitude was more likely than not a motivating factor in the employer’s decision.”⁵³ Few direct-evidence cases are brought because most cases involving an employer admission of sex discrimination settle before trial. This is due both to the power of the “smoking gun” and to the considerable burden imposed on the employer in such a case. Indeed, an employer needs to both state a legitimate nondiscriminatory reason for its employment decision and evidence a putative reason for its disparate treatment that can explain its facially contradictory actions.

What is key for this discussion, however, is the ease with which a dress code case fits into a straightforward, direct evidence, sex-discrimination claim. Consider, for example, a classic dress code case, such as *Jespersen*. In that case, Darlene Jespersen lost her job for refusing to conform to a dress code that required her to style her hair, paint her nails, and wear particular clothing because she was a woman.⁵⁴ Under the most straightforward analysis of discrimination, Harrah’s terminated her employment “because of sex”—had she been a man, she would not have been fired. Little, if any, logical leaps need be made to understand the claim or how it fits within Title VII. Despite its logic,

49. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

50. *Id.* at 802.

51. *Id.*

52. *Id.* at 804–05 (the plaintiff “must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision”).

53. *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1046 (8th Cir. 2005) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion)). Where there is direct evidence, the burden is on the employer to prove that it would not have made the decision absent the illegitimate motive (in this context, the sex of the employee). *Id.*

54. 444 F.3d 1104, 1107 (9th Cir. 2006) (en banc).

however, the claim failed, as it often has. In *Jespersen*, the claim failed because of the Ninth Circuit's focus on a required demonstration of a group-based harm.⁵⁵

This distinction between direct and indirect evidence explains the court's confusion about when an individual harm, as opposed to a group-based harm, must be demonstrated. In direct-evidence cases, a plaintiff alleges facts which alone support a legal determination that she was treated differently (not hired, fired, etc.) "because of sex." In indirect-evidence cases, the plaintiff has access to no such facts and instead alleges that (1) she is in a protected class (e.g., is a woman); (2) was qualified for the position (promotion, hiring); (3) was nonetheless fired (not promoted, not hired), and (4) that the employer continued to treat other applicants with the plaintiff's qualification favorably (e.g., hired him, didn't fire him, promoted him).⁵⁶ Having established those basic facts, the burden shifts to the employer to prove that there was a permissible justification for the different treatment.⁵⁷

Even if the employer is able to advance a putative, nondiscriminatory reason for the disparate treatment, the case is still not over. At least under Title VII, the employee must then demonstrate that the basis for the different treatment was her sex.⁵⁸ In an indirect-evidence case, how employers treat women as a class becomes very significant to the case because its treatment of women, generally, may strengthen its alternatively proposed justification for the different treatment. This is the classic pretext paradigm: (1) employee is fired for bad reviews; (2) employee alleges that reason is pretextual; and (3) employer supports its justification by showing that many women (just not this one) got good reviews. Thus, in an indirect-evidence case, treatment of other women matters. This is not so for direct-evidence cases, because the central basis for the claim is proving the veracity of the direct evidence, which alone substantiates the disparate-treatment claim.

To state the obvious, the standard dress-code case addressed by this essay is a direct-evidence case. A plaintiff alleges that a policy treats women differently than men. Naturally, the plaintiff must demonstrate the existence of the policy, but requiring her to prove that the different treatment has a subordinating effect on women generally is beyond the requirements of a direct-evidence claim. Indeed, even in the indirect-evidence context, a demonstration of subordination is not required for the claim, even if it might be relevant or provable.

Regardless of the courts' error in dress-code cases, as litigators, we have to recognize what the courts are doing and begin to talk more about the group-based harm that is experienced by the enforcement of discriminatory dress codes. Fortunately, in most contexts that will not be very difficult. Stereotypically feminine dress codes make women's work more difficult. As

55. *Id.* at 1112 ("The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.").

56. *See McDonnell Douglas*, 411 U.S. at 802.

57. *See id.*

58. *See id.* at 804-05.

Judge Kozinski noted in dissent in the *Jespersen* case, having to wear make-up may be “burdensome and demeaning.”⁵⁹ Moreover, the evolution of women’s fashion reflects its discriminatory history.⁶⁰ Once the practical effect and history are exposed, dress code cases like *Jespersen* more comfortably move into the category of impermissible dress codes.⁶¹ This includes, to be sure, cases where dress codes are struck either because the dress code sexually objectifies women or because it limits women as a class in the workplace due to the allowance of discretionary standards for men and rules for women.

The above analysis supports several strategic changes in the way the dress code cases should be litigated. The first of these strategies involves the importance of identifying and responding to what courts have been doing in grafting a group-based harm requirement onto Title VII. Even though the analysis in *Jespersen*⁶² is fundamentally flawed and at odds with established Title VII jurisprudence, litigants should address this new requirement by demonstrating a group-based harm without conceding it as necessary to prove a claim. Second, litigators who are focused on eroding this poorly-developed dress-code jurisprudence should give more thought to which cases would be the most sympathetic to a decisionmaker. In this respect, litigators should be cognizant of judges who find gender stereotypes unobjectionable either because of the ease by which he or she conforms to them or because of his or her assessment of their importance. More sympathetic cases for those persons (reflexively supportive of the imposition of gender norms) might be ones where there is little or no relationship between the enforced stereotype and the perceived job requirements. For example, that relationship may be what made *Jespersen* such a hard case for the Ninth Circuit.

When asked, many of my colleagues found sympathetic Harrahs’ likely justification for the imposition of a gender-based dress code in light of the goal of increasing bar (and ultimately gambling) tabs. Especially where a plaintiff has direct contact with the consumer public, many reasonable people think that requiring a bartender to “doll it up” is understandable. On the other hand, requiring a switchboard operator (if there remain any these days) with no public contact to do so seems more rooted in objectionable bias. In other words, the easier it is to divorce the employer’s justification from one relating to business necessity or customer preferences, the less likely a court will be to sustain a gender-based dress code. Even though business necessity or customer preference provides no defense to sex-discriminatory decisionmaking, common sense suggests that choosing cases to litigate that do not present potentially sympathetic facts for consumer-conscious decisionmakers would more favorably serve the goal of eroding bad dress code case law.

59. 444 F.3d at 1118 (Kozinski, J., dissenting).

60. See, e.g., Katherine M. Franke, *Amicus Curiae Brief of NOW Legal Defense and Education Fund and Equal Rights Advocates in Support of Plaintiff-Appellant*, 7 MICH. J. GENDER & L. 163, 171–72 (2001) (describing a Massachusetts Bay colony law that considered strict adherence to a dress code essential to the public order and the organization called Dress Reform Club of Boston that held public demonstrations seeking more practical clothing alternatives for women).

61. See *supra* notes 1–2 and accompanying text.

62. *Jespersen*, 444 F.3d at 1104.

Finally, the easier it is to shed distracting justifications allegedly grounded in economic concerns, the easier it is to expose perhaps the truest goal of gender stereotypes—providing society with an uncomplicated method of identifying individuals as either female or male—which is, I argue, more easily demonstrated to be problematic. In the case of *Anderson v. Martin*, the United States considered equal-protection and due-process challenges to Louisiana's practice of identifying the race of candidates on election ballots.⁶³ Louisiana defended its practice as not being race-discriminatory, as it simply, without bias or indication of prejudice, identified each candidate's race.⁶⁴ Despite its equal application to all candidates, and despite no demonstration of a group-based harm, the Court struck down the practice.⁶⁵ As the Court explained, the placement of the race indicator beside a candidate's name

... imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial state in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused.⁶⁶

Moreover, explained the Court, "by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important . . . consideration in the citizen's choice."⁶⁷ Accordingly, "the vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice . . ."⁶⁸ Synthesized, the Court identified two key problems with the race marker: (1) it is a vehicle by which prejudice is aroused and (2) by its presence, it suggests a relevance of the characteristic.⁶⁹

The analogy to be drawn to the dress-code cases is this: To the extent that litigants can reveal that the purpose of the enforcement of gender norms is simply to distinguish between men and women they will have more success in challenging such dress codes. The reason is because exposing the dress codes as being for the purpose only of making sex distinctions between people reveals the harm. As in *Anderson*, the harm is not (just) in the fact that some dress codes harm women (or some women).⁷⁰ Rather, the harm is that all gender-based dress codes suggest that sex is a relevant distinction in a workplace context. If that is the case, then private prejudice against women may be justifiable—a result obviously in tension with the letter and spirit of Title VII. Moreover, because the visual distinctions between male and female are exacerbated by dress codes, the dress codes themselves become the vehicle for the exercise of prejudice.

63. 375 U.S. 399 (1964).

64. *Id.* at 403–04.

65. *Id.* at 404.

66. *Id.* at 402.

67. *Id.*

68. *Id.*

69. *See id.* at 399.

70. *See id.*

The precedent sustaining gender-based dress codes is now longstanding and well-established. Although there are some exceptions, most dress code cases have allowed employers to enforce gender norms despite seemingly clear federal law that by its language should not permit such distinctions. Recent cases have eroded the strength of the dress code jurisprudence at least at the margins in cases affecting gay, lesbian, and transgender litigants. Advocates would do well to pay close attention to judges' views of the distinction between the main and marginal cases. A close analysis of two recent cases, one involving a transgender litigant and one not, reveals some glimpse into a way out of the narrow rulings issued to date.⁷¹ Focusing on the human element of judges' personal experiences of gender norms and the reflexive (but inaccurate) application of employment discrimination doctrine may offer some hope for changing the law.

71. Compare *Schroer v. Library of Cong.*, 424 F. Supp. 2d 203 (D.D.C. 2006), with *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1077 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).