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GENDER NONCONFORMITY AND THE UNFULFILLED PROMISE OF *PRICE WATERHOUSE V. HOPKINS*

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I. INTRODUCTION

One of the most vexing problems in the application of Title VII of the 1964 Civil Rights Act concerns the extent to which this omnibus anti-discrimination statute should limit an employer's opportunity to place constraints on the ways in which its employees present themselves to the public. Specifically, does the statutory ban on sex-based discrimination have any application to employment policies or individual employment decisions that penalize individuals for the way they present themselves in terms of attire and behavior or for other aspects of their sexual identity, including their choice of sexual partners?

The Supreme Court has articulated a doctrinal framework that, if construed and applied properly, provides the lower federal courts with the analytical tools necessary to identify and proscribe workplace rules that compel individuals to adhere to appearance, attire, and behavioral norms that operate to reinforce gendered expectations.[1] Since the Supreme Court has ruled that penalizing an individual for failing to conform to gendered norms of behavior constitutes a form of sex-based discrimination,[2] one would expect that employees would have achieved some measure of success in challenging such policies. Yet although the lower federal courts acknowledge, in the abstract, that gender nonconformity is a form of unlawful sex-based discrimination, when it comes to scrutinizing challenges to workplace dress and appearance codes brought by individuals whose presentation of self reflects their nontraditional lifestyle these courts typically choose to classify the motivation behind the subject rules as reflective of prejudice based on sexual orientation or transgendered status, rather than on the enforcement of sex-based stereotypes. Then, because Title VII consistently has been construed not to proscribe discrimination on the grounds of sexual orientation or transgendered identity, the courts have been unwilling to strike down these sorts of employment decisions. A review of the extant lower court jurisprudence reveals that these courts have been disinclined to apply the Supreme Court's gender nonconformity doctrine to cases involving individuals who are subject to workplace discrimination because of the way they look, behave, or identify themselves. By focusing on the fact that most of the plaintiffs who claim that they have been subjected to gendered stereotypes lead, or appear to lead unconventional lifestyles, particularly gays or transsexuals, the courts

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1. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion).
2. *See id.*

typically refuse to rule in their favor or even allow them to present their cases to juries.[3]

II. *PHILLIPS* AND THE "SEX-PLUS" DOCTRINE

This story begins with the Supreme Court's 1971 ruling in *Phillips v. Martin Marietta Corp.*[4] Ida Phillips claimed that her employer's policy of refusing to accept job applications from women—but not men—with pre-school aged children violated Title VII's ban on sex-based discrimination in employment.[5] Martin Marietta made no effort to cloak its motivation for the rule. The corporation's policy was aimed neither at protecting pre-school aged children from the evils associated with working parents nor at protecting itself from the hazards of employing workers with pre-school aged children. It couldn't be. After all, Martin Marietta was perfectly happy to employ the fathers of these offspring. Manifestly, the one and only reason that the corporation initiated and maintained this policy was that it assumed that the mothers—but not the fathers—of such young tykes would not report to work when their charges fell ill.[6]

Both the trial judge and the Fifth Circuit Court of Appeals granted summary judgment to the defendant.[7] Since Martin Marietta indisputably employed an overwhelming number of women in the position sought by Ms. Phillips, the courts concluded that the corporation's policy raised "no question of bias against women as such."[8] In a single paragraph, *per curiam* ruling, the Supreme Court vacated the decision and remanded the case to the lower courts.[9] The Supreme Court's ruling was not based on the lower courts' failure to recognize that Martin Marietta was imposing a job requirement—not having pre-school aged children—on women that it did not apply to men. Rather, the Court reasoned that the lower courts had erred in making a pretrial ruling that the policy was enforceable as a matter of law.[10] The Court left open the possibility that further development of the record could reveal that the mothers of pre-school aged children might indeed have family obligations not faced by men which could render them less capable of performing their jobs.[11] Thus, although the Court rightfully acknowledged that this particular employment practice was, as a *prima facie* matter, facially sex-differentiated, it also declared that the company, on remand, might be able to establish that its policy was justified under Title VII's bona fide occupational qualification (BFOQ) defense.[12]

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3. *See infra* notes 100–02 and accompanying text.

4. 400 U.S. 542 (1971).

5. *Id.* at 543.

6. *Id.* at 544 (Marshall, J., concurring).

7. Phillips v. Martin Marietta Corp., 1968 WL 140 (M.D. Fla. July 9, 1968), *aff'd*, 411 F.2d 1 (5th Cir. 1969).

8. 400 U.S. at 543.

9. *Id.* at 544.

10. *Id.*

11. *See id.*

12. Justice Marshall agreed with the decision to remand, but strenuously objected to the suggestion that sex could operate as a BFOQ in this instance. He insisted that application of the

Although the *Phillips* Court's terse opinion did not offer any detailed explanation for its conclusion that the plaintiff at least had made a *prima facie* showing that she had been subjected to a sex-based employment practice, it did not take the lower courts long to draw an ill-conceived doctrine out of the Court's sparse text. The *Phillips* Court expressly had ruled that it was insufficient, as a matter of law, for the company to defeat the plaintiff's claim of sex discrimination merely by demonstrating that it had hired many other women for the job she had sought.[13] A facially sex-differentiated policy that excluded a sub-group of women could, in the absence of a BFOQ-based justification, violate the statutory ban on sex-based discrimination. The unanswered question was whether the *Phillips* Court meant to strike down any and all job requirements that compelled female employees or job applicants to hurdle obstacles that were not placed in the path of their male counterparts. The answer was quick in coming.

The lower courts promptly fashioned a broad limitation to the Court's ruling in *Phillips*—the doctrinally misleading "sex-plus" theory.[14] Paralleling the Title VII notion that biological sex was an impermissible basis for classification because the individual had no control over his or her membership in that group, the courts determined that any "plus" factor used to separate out "acceptable" from unemployable women similarly had to rely on either an immutable trait or characteristic, or to implicate some "fundamental" right. The ruling in *Phillips* fit into this doctrinal construct, the courts explained, because Martin Marietta's fatal mistake was not simply engaging in intra-sex[15] discrimination, but implementing a requirement that interfered with the fundamental right of child-rearing.

This interpretation of *Phillips*, in turn, left the door open for other policies that excluded different sub-categories of female—or, less frequently, male—workers from employment, under what the courts deemed to be less consequential or otherwise volitional factors. For example, when employers subjected female, but not male (or male but not female) employees or job applicants to requirements relating to height, weight, attire, or appearance, some, but not all members of the targeted group were disadvantaged. The undisputed fact that only one of the two sex groups was subjected to these additional job standards was not deemed sufficient *per se* to constitute a *prima facie* case of sex-based discrimination. Rather, the courts invoked their circumscribed version of the sex-plus doctrine, deciding the case on the basis of

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BFOQ defense to this specific employment policy served only to perpetuate the stereotyped notion that women are assigned the primary role as child care provider. And excluding women from employment opportunities in reliance on such stereotypes, he maintained, was precisely what Title VII was designed to proscribe. *Id.* at 544–45 (Marshall, J., concurring).

13. *Id.* at 543.

14. *See, e.g.*, Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975); Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D.Iowa 1980); Valdes v. Lumbermen's Mut. Cas. Co., 507 F. Supp. 10 (S.D. Fla. 1980); Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025 (5th Cir. 1980); Allen v. Lovejoy, 553 F.2d 522 (6th Cir. 1977).

15. I use "sex" to refer to the biological, physiological, or chromosomal classification of an individual, while "gender" refers to cultural expectations and assumptions associated with an individual's biological, chromosomal, or physiological classification.

whether the instant "plus" factor was sufficiently consequential or non-volitional to warrant statutory condemnation.[16]

The impact of the lower courts' development of this analytically challenged "sex-plus" doctrine was compounded when they extended its application beyond the category of sex-based differentiation to cases involving the statutory ban on national-origin discrimination. Employers who required bilingual employees to speak only English in the workplace were found not to have discriminated on the basis of national origin.[17] Then, only five years after *Phillips*, a private sector employer punished women for procreating by expressly withholding non-occupational disability benefits from female employees who became pregnant.[18] This company's action constituted an obvious example of the very "sex plus" discrimination that *Phillips* proscribed precisely because of its deleterious impact on a fundamental right—the right to procreate. Nevertheless, the Supreme Court concocted a cost-based justification for its ruling that discrimination on the basis of this quintessential reflection of traditional female identity—pregnancy—did not constitute discrimination on the basis of sex.[19]

The predominant rationale underlying the immutability-mutability paradigm is that in enacting Title VII Congress intended to proscribe only discrimination based on the possession of a characteristic over which the individual had no control. And the "fundamental right" element of the "sex-plus" or "national origin-plus" doctrines was designed to avoid extending the application of the statute to cases of perceived *de minimis* harm. Both of these explanations, however, either overlook or ignore this legislation's bedrock commitment to preserving human worth and personal dignity. Just as biological sex, national origin, race, or religion are central components of individual

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16. *See, e.g.*, Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3d Cir. 1985) (sex-differentiated dress code is not unlawful sex-based discrimination), *cert. denied*, 475 U.S. 1035 (1986); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084 (5th Cir. 1984) (en banc) (male-only short hair length requirement neither infringes upon a fundamental right nor differentiates on the basis of an immutable characteristic); Barker v. Taft Broad. Co., 549 F.2d 400 (6th Cir. 1977) (enforcement of male-only hair length requirement does not constitute sex-based discrimination); E.E.O.C. v. Delta Air Lines, Inc., 1980 WL 288 (S.D. Tex. Dec. 5, 1980) (female-only maximum weight policy does not violate Title VII because weight is neither an immutable characteristic nor a constitutionally-protected category); Cox v. Delta Air Lines, 1976 WL 730 (S.D. Fla. Sept. 30, 1976) (female-only height/weight policy does not constitute unlawful sex discrimination because weight is neither an immutable characteristic nor a constitutionally-protected category), *aff'd*, 553 F.2d 99 (5th Cir. 1977). *But see* Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (requirement that only female flight attendants adhere to maximum weight requirement held violative of Title VII even though weight is a mutable characteristic; court makes no reference to mutability or fundamental interest analysis), *cert. denied*, 460 U.S. 1074 (1983).

17. *See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 512 U.S. 128 (1994); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). *But see* Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006).

18. Gen. Elec. v. Gilbert, 429 U.S. 125, 138 (1976) (holding that the policy was non-discriminatory in that there was no risk protecting one gender and not the other and that "simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive").

19. *Id.* at 138–40, n.17, 18. Congress responded to this ruling in 1978 with the Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-k (2000)), expressly amending Title VII's definition of "sex discrimination" to include discrimination on the basis of pregnancy.

identity, other characteristics or traits that involve the presentation of self, such as appearance, language, and lifestyle, regardless of their mutability or immutability, are similarly essential to an individual's sense of self and self-worth.[20] Consequently, these aspects of individuality are no less deserving of statutory protection. Minimizing their importance by characterizing them as "mutable" or "non-fundamental" is, therefore, inconsistent with the overarching objective of anti-discrimination law, i.e., the elimination of arbitrary obstacles to full participation in the employment arena. Although some appearance or dress codes might be justifiable under the limited statutory and judicially-created defenses to Title VII claims, sex-differentiated appearance and grooming codes, at a minimum, should be viewed as constituting a *prima facie* case of sex-based discrimination.

Over the years, however, some courts modified the harshness of the fundamental right/immutability analysis by offering an alternative standard. A plaintiff challenging a sex-differentiated dress or grooming requirement also can state a *prima facie* claim of sex-plus discrimination by establishing that the rule imposes an "undue burden" on members of one sex. But as the Ninth Circuit's recent *en banc* opinion in *Jespersen v. Harrah's Operating Co., Inc.*,[21] forcefully demonstrates, the presence of the "undue burden" operation proves to be of marginal utility to plaintiffs who challenge the enforcement of most dress or grooming codes.[22]

In *Jespersen*, the defendant imposed a unisex uniform requirement, but also enforced a grooming policy that was sex-differentiated.[23] It required female beverage servers and bartenders to wear make-up but prohibited males from doing so. It also insisted that male, but not female, bartenders have short-cropped hair.[24] When Darlene Jespersen refused to comply with Harrah's makeup requirement, she lost her job. She subsequently brought suit under Title VII, alleging that wearing makeup made her feel sick, degraded, exposed, and interfered with her ability to effectively perform her job because it detracted from her credibility and conflicted with her self-image.[25]

The trial court granted summary judgment in favor of Harrah's on the ground that the policy did not amount to sex-plus discrimination because it did not differentiate on the basis of an immutable sex-linked characteristics.[26] Alternatively, it ruled, the policy did not discriminate on the basis of sex because it imposed equal burdens on members of both sexes.[27] Both men and women had

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20. *See generally* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987).

21. 444 F.3d 1104 (9th Cir. 2006) (en banc).

22. *See id.* at 1110.

23. *Id.* at 1105–06.

24. *Id.* at 1106.

25. *Id.* at 1107–08. *See generally* Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work*, EMPLOYMENT DISCRIMINATION STORIES 105–52 (Joel Wm. Friedman ed., Foundation Press 2006) (provides a revealing analysis of how the strategies employed by Ms. Jespersen's attorneys affected the Ninth Circuit's disposition of her appeal).

26. Jespersen v. Harrah's Operating Co., Inc., 280 F. Supp. 2d 1189 (D. Nev. 2002), *aff'd*, 392 F.3d 1076 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

27. 280 F. Supp. 2d at 1193.

to comply with sex-differentiated policies—women were required to wear makeup and men were required to have their hair cut to a length above the collar.[28] On appeal, the Ninth Circuit panel applied the undue burden test and determined that the plaintiff had not established that the employer's policy imposed a greater burden on women than on men.[29] The plaintiff-appellant had argued that the makeup requirement imposed a heavier burden on females because of the cost of purchasing makeup and the expenditure of time required to apply it.[30] But since the plaintiff had offered no evidence to support that claim, the panel concluded that she had failed even to raise a triable issue of fact as to whether the makeup requirement imposed unequal burdens on male and female employees.[31] Accordingly, the Ninth Circuit affirmed the grant of summary judgment in favor of the defendant.[32]

This ruling was upheld by the entire court in its *en banc* opinion.[33] It agreed that the mere presence of sex-differentiated requirements did not establish *per se* a prima facie claim of sex-based discrimination and demanded evidence that the policy imposed an undue burden on members of one sex.[34] It then noted that the only evidence tendered by the plaintiff was (1) her deposition testimony that she found the makeup requirement offensive and that it interfered with her ability to perform her job, and (2) customer feedback and employer evaluation forms that attested to her outstanding performance.[35] That showing, the *en banc* majority ruled, was insufficient to establish a genuine issue of fact on the presence of an unequal burden on women.[36] To demonstrate unequal burden, the court required the presentation of evidence that the policy would impose an undue burden on the class of women as a whole.[37] And as to this, the *en banc* court rejected the plaintiff's request that it take judicial notice of the fact that it cost more money and took more time for a woman to comply with the makeup requirement than it took for a man to comply with the short hair mandate.[38] Thus, since the plaintiff had not produced any discovery documents supporting this claim, the *en banc* court agreed with the panel that she had not offered any evidence to support her claim of undue burden.[39]

Not only did the court refuse to take note of the obvious fiscal and temporal costs associated with the employer's makeup requirement, it did not consider the possibility that by subjecting only women to this socially-derived ritual, the employer was enforcing, and the court was sanctioning, a type of physical branding or differentiation of female employees that serves to reinforce both the male behavioral norm and the traditionally dominant role enjoyed by

28. *Id.* at 1192–93.
29. 392 F.3d at 1082.
30. *Id.* at 1081.
31. *Id.* at 1082.
32. *Id.* at 1083.
33. 444 F.3d at 1113.
34. *Id.* at 1110.
35. *Id.* at 1108.
36. *Id.* at 1111.
37. *Id.* at 1109.
38. *Id.* at 1111.
39. *Id.*

men (and the correspondingly subordinate position ascribed to females) in the market place.[40]

Thus, the rulings in *Jespersen* demonstrate that reliance upon the undue burden formulation of the "sex-plus" doctrine as the analytical basis for judicial determination that appearance codes constitute a form of sex-based discrimination proscribed by Title VII has not been, and shows no promise of being, successful. But, in a 1989 case most popularly known for its ruling on another, though related, issue, the Supreme Court articulated an alternative theory of sex-based discrimination that is directly applicable to these cases and offers plaintiffs a potentially more effective method of successfully attacking such workplace rules.[41]

III. *PRICE WATERHOUSE* AND THE SEX-STEREOTYPING DOCTRINE

In *Price Waterhouse*,[42] the Supreme Court offered another perspective on how the presence of sex-based discrimination could be proven. Under what is now referred to as the sex-stereotyping principle, the Court declared that a plaintiff could demonstrate that she had been the victim of sex-based discrimination by establishing that the employer's challenged action had been triggered by her failure to conform to its sex-stereotyped expectations. Nevertheless, while the lower courts proclaim fealty to this legal rule, they choose to apply it in a manner that vitiates its viability.

At the end of a five-year stint as a senior manager in the Government Services Department of "Big-8" accounting firm, Price Waterhouse, Ann Hopkins, was recommended for partnership.[43] As part of its partnership review process, the firm solicited the written comments of all partners.[44] Although the partners who supervised her work endorsed Hopkins's candidacy, praising her professional accomplishments and character, other partners accompanied their negative votes with critical statements that reflected their disapproval of her personality.[45] The latter group of unfavorable comments included one labeling Hopkins as "macho," another suggesting that she enroll in "a course at charm school," and yet another opining that Hopkins "overcompensated for being a woman."[46] Hopkins' direct supervising partner and mentor informed her that the Price Waterhouse Policy Board had decided not to submit her name for a vote by the entire partnership, but to hold her candidacy for reconsideration the following year, because she had irritated the firm's senior partners.[47] To enhance her likelihood of success in the following year's reconsideration process, he

40. *Id.* at 1110. *See generally* Carbado, *supra* note 25.

41. *Price Waterhouse*, 490 U.S. 228.

42. *Id.*

43. *See* Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins*, EMPLOYMENT DISCRIMINATION STORIES 68 (Joel Wm. Friedman ed., Foundation Press 2006).

44. *Id.*

45. *Id.*

46. *Id.* at 235.

47. *Id.*

counseled that Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[48]

When the partners in the Government Services Department subsequently refused to submit her name for reconsideration, Hopkins filed suit alleging that Price Waterhouse's handling of her partnership candidacy amounted to sex-based discrimination in violation of Title VII. District Judge Gerhard Gesell agreed with the testimony of an expert witness that Price Waterhouse's partnership selection process had been tainted by the firm's reliance on comments which themselves were the product of sex stereotyping.[49] Judge Gesell also found, however, that the firm harbored legitimate reservations about Hopkins's interpersonal skills and that it had not relied upon those concerns simply because Hopkins was a woman.[50] Nevertheless, because Price Waterhouse had relied on some of its partners' sex-stereotyped judgments about the plaintiff, he ruled in her favor on the liability issue.[51] Ann Hopkins had been a victim of sex-based discrimination. Then, with respect to the issue of remedies, Judge Gesell ruled that the defendant could avoid equitable relief by proving, through clear and convincing evidence, that it would have placed Hopkins's candidacy on hold had it not considered the sex-stereotyped comments contained in the partners' evaluations.[52] But, in his view, Price Waterhouse had not made such a showing.[53] Nevertheless, because Hopkins had resigned half a year after the firm's decision on her partnership candidacy and had not convinced Gesell that her resignation amounted to a constructive discharge, i.e., that her employer's conduct made her position so untenable and intolerable that any reasonable person in her situation would have felt compelled to resign, Judge Gesell did not order Price Waterhouse to reinstate Hopkins or to provide her with any backpay.[54] He issued only a declaratory judgment and an award of attorney fees.[55]

A majority of the D.C. Circuit Court of Appeals panel embraced Judge Gesell's rulings that reliance on sex stereotyping could and, in this case, did constitute sex-based discrimination.[56] It disagreed, however, with his assessment of the relevance of a determination that the defendant would have reached the same decision in the absence of any discriminatory considerations. For the appellate panel, the "same decision" defense did not merely limit the remedy that the plaintiff could recover; it operated as an affirmative defense to liability itself. But since the appellate panel agreed with Judge Gesell that Price Waterhouse had not established the same decision defense by clear and convincing evidence, the majority upheld his judgment in favor of the plaintiff. The panel delivered a total victory to Ms. Hopkins when, unlike the trial judge,

48. *Id.*
49. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1121 (D.D.C. 1985).
50. *Id.* at 1115.
51. *Id.* at 1122.
52. *Id.* at 1120.
53. *Id.*
54. *Id.* at 1121.
55. *Id.* at 1122.
56. 825 F.2d 458.

it ruled in favor of her constructive discharge claim and remanded the case for a determination of the appropriate remedy, suggesting that it would be "appropriate for the court to award Hopkins the full relief to which she is entitled."[57]

As the Supreme Court made clear in the introductory paragraph of its opinion, the only issue submitted to it for review was the allocation of the burdens of proof in cases involving an employment decision that was the product of both legitimate and discriminatory motives.[58] Although Justice Brennan's opinion for the Court attracted only three other votes—Justices Marshall, Blackmun and Stevens—Justices White and O'Connor issued concurring opinions in which they agreed with the plurality's statement concerning the treatment of "mixed motive" cases. Thus, the six justices endorsed the evidentiary framework confected by the D.C. Circuit.[59] The same decision defense, if established, meant that the defendant would prevail and escape liability.[60]

The ruling in *Price Waterhouse* spawned a new generation of "mixed motive" cases. For the next couple of years, all eyes focused predominantly on that aspect of the Court's decision. This decision, like several other opinions issued by the Court in 1989 that cut back on the Court's previously broad interpretations of Title VII and other antidiscrimination statutes, generated a significant amount of public controversy and served as the impetus for a direct legislative response. In 1991, Congress passed, and President Bush signed, the 1991 Civil Rights Act[61] designed expressly to reverse the Supreme Court's statutory rulings in several of these cases. With specific reference to *Price Waterhouse*, Congress reversed the portion of the opinion dealing with the impact of the same decision defense.[62] It replaced the Court's broad application of that defense with the formulation initially devised by Judge Gesell. Under this statute, the same decision defense restricted only the remedy available to plaintiff; it did not relieve the defendant of liability. Moreover, since § 107 of the 1991 Civil Rights Act also amended Title VII by codifying the other half of the *Price Waterhouse* Court's formulation of the mixed motive analysis—i.e., that the plaintiff need only establish that sex or some other forbidden factor was a

57. *Id.* at 473.

58. Price Waterhouse v. Hopkins, 490 U.S. 228, 232 (1989) (plurality opinion).

59. *Id.* at 279 (Kennedy, J., dissenting) (maintaining that by departing from the extant evidentiary scheme theretofore routinely applied to all claims of disparate treatment pursuant to the Court's rulings in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), the plurality had created doctrinal confusion and improperly transferred the burden of proving causation from the plaintiff to the defendant).

60. *Id.* at 252–53 (plurality opinion). The plurality, as well as concurring Justices White and O'Connor, agreed that the circuit court had erred in subjecting defendants to a "clear and convincing" standard of proof with respect to the same decision defense. The plurality and two concurring Justices declared that the proper standard was the traditional standard applied in civil cases—preponderance of the evidence. *See Id.* at 252–53; 490 U.S. at 260 (White, J., concurring); 490 U.S. at 261 (O'Connor, J., concurring).

61. Pub. L. No. 102-166 (1991).

62. Pub. L. No. 102-166, § 107(b) (amending Title VII, 42 U.S.C. § 2000e-5(g), by adding § 706(g)(2)(B) in order to provide a limitation on available relief in mixed motive cases).

motivating factor for the employer's challenged action[63]—the statute supplanted the ruling in *Price Waterhouse* and, consequently, the case's precedential value appears to have evaporated.[64]

Such a conclusion is not, however, entirely correct. The Supreme Court plurality opinion did not end with its enunciation of a mixed motive evidentiary scheme. Nevertheless, since most attention had focused on that portion of the opinion, a subsidiary ruling associated with the application of that evidentiary structure to the instant facts went relatively unnoticed. With the legislative trumping of the Court's evidentiary standard, however, this comparatively ignored segment of the decision could turn into the opinion's most enduring legacy.

In order to resolve whether or not Ann Hopkins had established a *prima facie* claim of liability, the Court had to determine whether Price Waterhouse had relied on some consideration of her sex in its treatment of her partnership application. The trial judge had found that Hopkins had been the victim of sex-based discrimination based on the company's reliance on sex-stereotyped comments about her personality, behavior, and appearance. On appeal, the company maintained that evidence of its reliance on sex stereotyping was both nonexistent and legally irrelevant. The Supreme Court plurality emphatically rejected these arguments. Not only did it uphold Judge Gesell's finding that Price Waterhouse had engaged in sex stereotyping,[65] it, more significantly, declared:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their

63. 42 U.S.C. § 2000e-2(m) (2000).

64. Post-*Price Waterhouse*, several circuit courts seized on the language in Justice O'Connor's concurring opinion limiting the mixed motive doctrine to cases involving direct evidence of discrimination since her vote in support of the Court's judgment turned the plurality into a majority of five. However, the notion that this was part of the "holding" in *Price Waterhouse* was debunked by the Supreme Court's subsequent ruling to the contrary in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (holding unanimously that the 1991 Civil Rights Act's codification of the mixed motive doctrine into Title VII did not contain such a heightened evidentiary standard and, therefore, that the mixed motive framework could apply regardless of whether proof of reliance on a forbidden factor came in the form of direct or circumstantial evidence).

65. Justice O'Connor agreed with Judge Gesell's findings that Price Waterhouse relied on statements noting Hopkins' failure to conform to sex stereotypes and that the plaintiff established that presence of "discriminatory input" into the decision making process. *Price Waterhouse*, 490 U.S. 261, 272–73 (O'Connor, J., concurring). She wrote separately primarily to set forth her characterization of the mixed motive doctrine as a limited supplement to the traditional *McDonnell Douglas/Burdine* formulation. In her view, the mixed-motive formula and its consequent shifting of the burden of persuasion on but-for causation to the defendant should be available only in cases where the plaintiff offered "direct" evidence that a forbidden factor had played a "substantial" role in the employment decision. *Id.* at 276 (O'Connor, J., concurring). Justice White's brief concurring opinion, however, does not expressly address the issue of sex stereotyping as a form of sex-based discrimination. Nevertheless, he agreed with the plurality that the record supported Judge Gesell's finding that Hopkins had been subjected to sex stereotyping. He also agreed with the plurality's conclusion that Hopkins established that sex was a motivating factor for the employer's decision. *Id.* at 259 (White, J., concurring). His decision to write a separate opinion stems from his objection to the plurality's suggestion that the defendant could only sustain its burden as to the same decision defense through the presentation of "objective" evidence.

> 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. *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971). An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[66]

As this quotation reveals, the ruling in *Price Waterhouse* was not the first time the Supreme Court had denounced the use of sex stereotypes in a Title VII case alleging sex-based discrimination. Eleven years earlier, the Court had struck down a policy that required female employees to make larger contributions to an employee-funded pension plan than comparable male employees. In *Los Angeles Dep't. of Water & Power v. Manhart*,[67] the defendant maintained that because—according to mortality tables—women on the average outlive men, the average female employee would receive more monthly pension payments than the average man. Accordingly, the defendant reasoned that it was entitled to charge female employees a higher premium in order to offset the average longer (and thereby larger) lifetime pay-out.[68]

The Supreme Court rejected these arguments and emphasized that this case did not involve a decision based on an actual difference between all men and all women.[69] Rather, the actuarial statistics reflected only a generalized statement that was accurate for many but definitely not all women.[70] The Court declared that Title VII's "unambiguous" focus on the individual precluded the application of a generally valid stereotype to an individual as to whom it did not or might not apply.[71] Subjecting all women to the generally, but not universally applicable longevity expectation, the Court ruled, constituted unlawful sex-based discrimination.[72] Expanding beyond these narrow parameters, Justice Stevens also announced that "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less."[73]

After renouncing the use of sex as a proxy for longevity on the contribution side of pension funding, it was inevitable that the Court would weigh in on the similarly justified use of sex as a surrogate measure of longevity on the benefit pay-out side of this equation. Five years after its ruling in *Manhart*, the Court

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66. *Id.* at 251 (plurality opinion).
67. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).
68. *Id.* at 702.
69. *Id.* at 708–09.
70. *Id.*
71. *Id.* at 708.
72. *Id.*
73. *Id.* at 707.

examined an optional, fully employee-funded retirement plan that required participating employees to choose from a short list of participating insurers, all of which relied on sex-based mortality tables to calculate the monthly benefit payments. As in *Manhart*, sex was the only factor used to determine longevity of individuals of the same age. Relying on *Manhart*, the Court, in *Arizona Governing Committee v. Norris*,[74] invalidated the State of Arizona's plan under Title VII. The statutory ban on sex discrimination precluded an employer from relying on gross gender-based stereotypes, even when they were predicated upon generally verifiable assumptions, and even in a plan in which participation was optional. This use of a sex stereotype, the Court ruled, was "no more permissible at the pay-out stage of a retirement plan than at the pay-in stage."[75]

But both *Manhart*[76] and *Norris*[77] dealt with a situation where an employer had relied on a stereotype that was predicated on a generally, although not universally valid premise. This is not the problem confronting employees who are compelled to conform to dress and appearance codes. These behavioral and appearance expectations are predicated on the "myths and purely habitual assumptions" to which Justice Stevens alluded, but were not present, in *Norris*. Consequently, it is the Court's subsequent ruling in *Price Waterhouse* that is its most clearly applicable decision to any stereotype-based claim of sex discrimination under Title VII.

IV. *PRICE WATERHOUSE*'S APPLICATION TO APPEARANCE AND GROOMING CODES

The *Price Waterhouse* Court's recognition that employer decisions affecting the terms and conditions of employment of individuals who refuse or fail to conform to sex stereotyped expectations constitute a form of statutorily proscribed sex-based discrimination had repercussions that potentially reverberated far beyond situations such as the one that confronted Ann Hopkins. Ann Hopkins was, as the *Price Waterhouse* plurality recognized, caught in the classic double-bind that confronts many women in traditionally male-dominated working environments.[78] Rejecting the company's contention that sex-stereotyping did not amount to proscribed sex discrimination, the Court declared that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and

74. 463 U.S. 1073 (1983).

75. *Id.* at 1081. Indeed, even prior to the Court's rulings in *Manhart* and *Norris*, two circuit courts had struck down sex-differentiated dress and grooming policies because they embodied and codified sex stereotypes to an extent that was deemed particularly demeaning to women. *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (finding that requiring female flight attendants to be unmarried violates Title VII because "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"); Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028 (7th Cir. 1979) (finding that dress code requiring all female employees to wear uniform while males could wear standard business attire is *prima facie* unlawful sex discrimination under Title VII because it is demeaning to women, and wearing a uniform suggests a lesser professional status than is ascribed to men wearing regular business clothing).

76. 435 U.S. at 702.

77. 463 U.S. at 1073.

78. *See* Estlund, *supra* note 43, at 93–94.

impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[79]"[80]

Nevertheless, there is no express language in any of the *Price Waterhouse* opinions limiting the Court's denunciation of sex-stereotyping to the double-bind scenario. Both Judge Gesell and the Supreme Court plurality relied on those portions of the partners' evaluations that referred critically to Hopkins' failure to dress and behave like a stereotypical woman as justification for their determination that Hopkins had made a *prima facie* showing of sex-based discrimination in the firm's decision not to make her a partner.[81]

The formulation of, and reliance on, sex-stereotyped expectations extends far beyond those personality traits involved in Ann Hopkins' case. Cases like *Jespersen* remind us that employers readily have imposed a wide range of appearance, behavior, and dress standards on their employees, many of which derive directly from traditional conceptions of how men and women should appear, dress, and behave. Moreover, the targets of these policies are not always women. Particularly, though not exclusively, in the context of behavioral expectations, men are frequently subjected to disapproving reactions and adverse employment consequences when and because they are perceived as acting in a manner that does not meet stereotyped conceptions of male behavior.

The potential application of *Price Waterhouse*'s gender stereotype doctrine to cases involving plaintiffs that have been targeted because of their appearance or perceived behavior has presented the federal courts with a unique set of analytical challenges. Part of the explanation for this phenomenon is that gendered expectations often are linked to aspects of both sexual orientation and transgender identity. And anytime a case contains even so much as a hint of a reference to sexual orientation or transgendered identity, the courts run up against the well-established and universally-adopted jurisprudence that Title VII's ban on sex-based discrimination does *not* extend to claims of bias based on sexual orientation[82] and transgendered status.[83] Consequently, the courts struggle with the question of whether the plaintiff has either plead or proved that this alleged discriminatory conduct was motivated by her failure to conform to gender-based stereotypes (a potential winning formula) or because of hostility to his sexual orientation or transgendered status (a sure-fire loser). It

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79. *Manhart*, 435 U.S. at 707.

80. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion).

81. *Id.* at 235. *See also* Estlund, *supra* note 43, at 98–99. *See generally* 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 (1995); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 918–19 (2002) ("What is intolerable in these cases [including *Price Waterhouse*] is not that the demands are contradictory, but rather that *either* demand is made at all.") (alteration added).

82. Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989); DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979).

83. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982); Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977). *See generally* Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321 (1998); Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995).

is, therefore, worth examining the extent, if any, to which the *Price Waterhouse* sex-stereotyping doctrine has been or should be applied in these contexts. Can individuals who are diminished, demeaned, or otherwise disadvantaged in the workplace because they fail or refuse to conform to employment policies predicated upon gendered behavioral or appearance expectations state a claim of sex-based discrimination under Title VII? It is to that question—the issue of the continued vitality and viability of this only portion of *Price Waterhouse* that was not legislatively superseded—that attention now will be focused.

V. *PRICE WATERHOUSE*: THE UNFULFILLED PROMISE

A quick review of post-*Price Waterhouse* opinions reveals that the lower federal courts have overwhelmingly, albeit not unanimously, acknowledged that gender nonconformity-based claims are cognizable under Title VII and that the plaintiff's sexual orientation or transgender status is not *per se* fatal to such a claim.[84] Nevertheless, while talking the talk, they rarely walk the walk. While giving lip service to the notion that any plaintiff can fall within Title VII's protective umbrella when alleging a case of sex-based discrimination, the lower courts typically reject claims by plaintiffs whose unconventional behavior or presentation of self can be seen to implicate their sexual orientation or transgendered identity.[85] Compelled by the dichotomous legal framework to pigeon-hole these cases, nearly all courts continue to insist that hostility towards an individual's sexual orientation or transgendered identity is a self-standing phenomenon, unrelated to and independent of the perpetuation of gendered norms.[86] They decline to recognize that sanctions levied on individuals for behaving or presenting themselves in a fashion commonly associated with homosexual orientation or transgendered status are themselves a function of community disapproval of the plaintiffs' refusal or failure to adhere to gendered notions about appearance, attire, as well as sexual and nonsexual behavior.[87] Moreover, they ignore the fact of the imperfect linkage between sexual orientation or transgendered status and nonconforming behavior. The courts do not acknowledge that there are straight men and women who do not conform to gendered behavior or appearance norms and gay men and women who do. It is well established that in ruling on summary judgment motions "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[88] Nevertheless, the courts seize upon the presumed connection between the plaintiffs' behavior or appearance, and their real or perceived sexual orientation or transgendered status, to conclude that the underlying motivation behind the challenged employment action is homophobia rather than gender stereotyping. This, in turn, leads the courts to conclude that the plaintiffs in these cases are attempting disingenuously to bootstrap a statutorily

84. *See infra* notes 91–95 and accompanying text.

85. *See infra* notes 102–03 and accompanying text.

86. *Id.*

87. *See generally* Case, *supra* note 81; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

88. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

unrecognized sexual orientation claim into a statutorily viable allegation of sex-based discrimination.

All circuit courts that have considered the issue now agree with the principle articulated in *Price Waterhouse* that nonconformity to gendered expectations can constitute a form of statutorily proscribed sex-based discrimination survived the enactment of the 1991 Civil Rights Act. Moreover, all circuits agree that the fact that the plaintiff is gay, perceived to be gay, or transgendered is not fatal to such a claim.[89] Rather, they avow, the relevant issue is whether the plaintiff can allege and, ultimately, prove that the discrimination was motivated by his failure or refusal to conform to sex stereotyped expectations, and not because of her sexual orientation or transgendered identity. Thus, as long as the plaintiff can establish that he was discriminated against because of his failure to conform to sex-stereotyped expectations, his sexual orientation or identity bears no independent legal relevance to his claim.

Consequently, in Title VII cases where a plaintiff alleges discrimination associated with his or her unconventional behavior, attire, or other form of presentation of self, the courts usually, though not always,[90] reject defense motions to dismiss based solely on the pleadings.[91] In response to a defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted or motion for judgment on the pleadings under Rule 12(c), as long as the plaintiff has not couched the complaint solely in terms of sexual orientation or transgender,[92] but has made some explicit reference to failure or refusal to

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89. *But see* Sweet v. Mulberry Lutheran Home, 2003 WL 21525058 (S.D. Ind. 2003) (finding that the *Price Waterhouse* ruling does not reverse extant jurisprudence that Title VII does not apply to claims by transgendered plaintiff as prohibition against sex-based discrimination does not extend to discrimination on the basis of sexual identity).

90. *See* Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006) (holding that transsexual plaintiff who was born male but was declined employment after informing prospective employer that she would present herself as a woman and display photos of herself dressed in traditionally feminine workplace-appropriate attire did *not* state gender stereotype-based claim of sex discrimination because plaintiff was a female who met the defendant's sex-stereotyped expectations of a female employee, and that discrimination on the basis of transsexual identity might itself constitute discrimination on the basis of sex and so decision on motion to dismiss postponed until factual record can be created on this latter issue).

91. *See* Smith v. City of Salem, Ohio, 378 F.2d 566 (6th Cir. 2004) (affirming trial court's denial of Rule 12(c) motion for judgment on pleadings where born-male plaintiff who was disciplined after appearing at work as a woman alleged that he was discriminated against because his conduct and mannerisms did not conform with the employer's and co-workers' sex stereotypes of how a man should look and behave); Mitchell v. Axcan Scandipharm, Inc., 2006 WL 456173 (W.D. Pa. 2006) (pre-operative transsexual who was terminated after announcing intention to transition from male to female states a claim since complaint alleges that he was discriminated against for failure to conform to gender stereotypes); Tronetti v. TLC Healthnet Lakeshore Hosp., 2003 WL 22757935 (W.D.N.Y. 2003) (plaintiff who was born a man and who informed employer at time of hiring that he was a transsexual in transition and would appear at work wearing overtly feminine attire states a claim under Title VII as he alleged that he was discriminated against for not acting like a man); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) (gay male plaintiff who never disclosed his sexual orientation states a claim of sexual harassment by alleging that the offending comments mocked his masculinity, portrayed him as effeminate, and that the harassment was caused by his failure to meet male gender stereotypes).

92. *See* Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000) (granting Rule 12(b)(6) motion to dismiss complaint brought by male homosexual postal worker subjected to barrage of pejorative comments

conform to gendered expectations, most courts permit the case to go forward. Rather than discard the plaintiff's case at this preliminary stage of the proceedings, federal courts typically provide the parties with an opportunity to engage in discovery in order to generate a factual basis for assessing the motivation behind the challenged action.[93]

Yet not all plaintiffs overcome even this initial hurdle. For example, in *Schroer v. Billington* the trial judge ruled that a plaintiff's allegations of sex stereotyping did not state a claim under Title VII, even though the transsexual plaintiff's complaint alleged discrimination for failure to conform to stereotyped appearance expectations.[94] This transsexual plaintiff who was born male was declined employment after informing the prospective employer that the plaintiff would be presenting herself as a woman on the job and providing photos of herself dressed in traditionally female workplace-appropriate attire.[95] The trial judge ruled that the complaint did not state a claim of gender stereotyping because the plaintiff, who initially presented as a male but who indicated an intention to present as a female, was treated by the court as a female who was conforming to the employer's gendered expectations of a female employee.[96] The court blithely ignored the obvious fact that this employer was motivated by its disapproval of a man choosing to change his sexual identification, and behave and dress like a woman. However, by disingenuously treating the plaintiff as a woman who did conform to the female stereotype, the court was able to conclude that the plaintiff did not even state a claim for gender nonconformity.[97] Interestingly, however, the trial judge did not dismiss the complaint. The court suggested that discrimination on the basis of transsexual identity as such might constitute a form of sex-based discrimination and postponed disposing of the motion to dismiss until the parties had an opportunity to present a factual record on this question.[98]

Nevertheless, a plaintiff who beats back a defense motion to dismiss the complaint for insufficient pleading is generally confronted with another attempt by his or her employer to obtain a pre-trial dismissal of the case, usually via a motion for summary judgment. In this context, the courts look beyond the face of the pleadings to the evidence obtained through various discovery tools to determine whether the plaintiff has unearthed enough facts to warrant a trial on

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from co-workers relating to his homosexuality because the allegations referred only to plaintiff's sexual orientation and did not assert that he had been discriminated against because he did not act like a man).

93. *But see* Vickers v. Fairfield Med. Ctr., 2006 WL 1999132 (6th Cir. 2006) (affirming trial court's grant of Rule 12(c) motion to dismiss complaint brought by private police officer who never discussed his sexuality with any co-workers but who was subjected to onslaught of sexually-based slurs and derogatory remarks on ground that the plaintiff's alleged harassment was based on his sexual orientation and that *Price Waterhouse* stereotyping doctrine does not extend to presumed sexual behavior that is not observable in the workplace).

94. *Schroer*, 424 F. Supp. 2d 203.

95. *Id.* at 205.

96. *Id.*

97. *Id.*

98. *Id.*

the issue of whether the challenged action was motivated by sex-based as opposed to sexual orientation- or transgendered status-based prejudice.

It is one thing to satisfy the federal courts' liberal notice pleading requirements.[99] The body of published case law demonstrates, however, that is quite another to convince the courts that there is sufficient evidence to defeat a defense motion for summary judgment and go to trial. Once the focus of the courts' attention shifts from the sufficiency of the pleadings to the sufficiency of proof, plaintiffs' fortunes dramatically deteriorate. In case after case, with only a few notable exceptions, the courts have rejected the plaintiff's sex-stereotype theory and granted summary judgment in favor of the defendant, concluding that the plaintiff had not offered evidence that would support a finding that the defendant's conduct was based, in whole or in part, on the individual's failure to conform to gendered norms. Rather, they insist, the evidence revealed that the employer's bias was based upon hostility to the plaintiff's real or perceived homosexual or transsexual identity.[100] The courts clearly are suspicious of

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99. *See* Fed. R. Civ. P. 8(a).

100. *See* Myers v. Cuyahoga County, 2006 WL 1479081 (6th Cir. 2006) (unpublished) (affirming summary judgment for defense when there was evidence that supervisor referred to transsexual plaintiff as "he/she" is an isolated remark remote in time from plaintiff's termination that does not rebut substantial defense evidence of legitimate explanation for her discharge and therefore, assuming plaintiff established a prima facie case of gender nonconformity did not create a jury question on pretext); Medina v. Income Support Div., N.M., 413 F.3d 1131 (10th Cir. 2005) (affirming summary judgment for defense when heterosexual plaintiff alleged harassment and retaliation by lesbian supervisor did not offer any evidence that she did not dress or behave like a stereotypical woman, and when her claim is that she was punished for not acting like a stereotypical lesbian and that constitutes discrimination on the basis of sexual orientation); Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) (affirming summary judgment for defense, court states that stereotypical notions about how men and women should behave often necessarily blur into ideas about homosexuality and, therefore, gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058 (7th Cir. 2003) (affirming summary judgment for defense when heterosexual male employee who was called "faggot", "bisexual" and "girl scout" by co-workers established only his co-workers' hostility towards his sexual orientation and not disapproval of his nonconforming conduct); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002) (affirming summary judgment for defense when gay male employee who alleged acts of supervisorial and co-worker harassment did not offer any evidence that he was harassed for failing to conform to societal stereotype of how men should behave or appear); Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001) (affirming summary judgment for defense when evidence that co-worker referred to plaintiff as "faggot" and "gay" and posted homophobic graffiti on bulletin board established that harassment was not motivated by his failure to live up to male image but that it was the result only of hostility to his perceived homosexuality); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999) (affirming summary judgment for defense when plaintiff who alleged on appeal that he was mocked by a barrage of derogatory names and obscene remarks for speaking in a high-pitched voice and mimicking feminine movements and was subjected to offensive comments concerning alleged homosexual activities established only that harassment was based on his sexual orientation, not his sex). *See also* Martin v. N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434, 447 (N.D.N.Y. 2002) (granting defense summary judgment on Title VII harassment claim brought by gay male employee who offered evidence of offensive and degrading sexual comments, physical assaults, and distribution of sexually explicit pictures in his work areas on ground that record was devoid of evidence that he acted in an effeminate manner and so plaintiff had not established discrimination on basis of non-conformity; court wants to avoid bootstrapping sexual orientation claim under Title VII and if "it is difficult to determine where gender ends and sexual orientation begins" court requires evidence that harassment was targeted at plaintiff's non-

gender-stereotyping claims asserted by gay or transgendered plaintiffs. Choosing not to recognize any connection between sexual orientation bias and the perpetuation of gender norms, the courts routinely assert that such claimants are trying merely to bootstrap protection for sexual orientation prejudice into Title VII.[101] Yet in doing so, these courts also ignore the mixed-motive analysis codified at §703(m) of Title VII as amended by the 1991 Civil Rights Act. Even if the evidence does demonstrate that the employer's decision was linked to the plaintiff's sexual orientation or identity, pursuant to the mixed motive doctrine, as long as the plaintiff can establish that her failure to conform to gender norms was also a motivating factor behind the challenged action, she can prevail under Title VII. Nevertheless, with rare exception, the courts have chosen to ignore this statutory provision entirely, concluding instead that the tendered evidence revealed only hostility to the plaintiff's sexual orientation or transgendered identity.

VI. A CAUTIONARY NOTE OF OPTIMISM

There are, however, three notable circuit court opinions and one published trial court judgments that serve as exceptions to the general pattern. The most recognized example is the Sixth Circuit's opinion in *Barnes v. City of Cincinnati*.[102] In that case, Phelicia Barnes, a pre-operative transsexual, was dismissed for failing to pass the training portion of the probationary period that was a prerequisite to becoming a sergeant on the police force.[103] Barnes was the only sergeant trainee to fail probation in a seven-year period.[104] Barnes alleged that he was flunked out of the training program and subjected to greater scrutiny than other probationary officers because he failed to conform to the department's stereotyped view of male behavior.[105] The City insisted that Barnes had been dismissed for poor performance during his probationary period.[106] The trial court denied all of the defense's pretrial motions to dismiss and for summary judgment, and after the jury rendered a verdict in the plaintiff's favor, also denied defense post-verdict motions for judgment as a matter of law.[107] The plaintiff had lived as a male while on duty but was in the process of transitioning to a woman off duty.[108] Members of the vice squad had photographed him at night while he was dressed in traditionally feminine attire and the plaintiff occasionally had reported to work wearing makeup or lipstick.[109] One supervisor had accused Barnes of not appearing sufficiently

masculinity); Ianetta v. Putnam Invs., Inc., 183 F. Supp. 2d 415 (D. Mass. 2002) (granting defense motion for summary judgment when evidence of two instances in which plaintiff was called a "faggot" is not sufficient evidence of sexual stereotyped expectations but reveals only animosity towards the plaintiff's sexual orientation).

101. *See, e.g.*, *Dawson*, 398 F.3d at 218; Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000).

102. 401 F.3d 729 (6th Cir. 2004).

103. *Id.* at 733–34.

104. *Id.* at 735.

105. *Id.*

106. *Id.*

107. *Id.* at 733.

108. *Id.* at 733.

109. *Id.* at 734.

masculine, had warned him to stop wearing makeup, and had urged him to act in a more masculine fashion.[110] The Sixth Circuit panel unanimously upheld the trial judge's denial of the defendant's post-trial motions.[111] It found that there was sufficient evidence to support Barnes' claim that he had been discriminated against for his failure to conform to sex stereotypes.[112] Moreover, it also upheld the trial court's issuance of a mixed motive instruction on the ground that the plaintiff had presented sufficient evidence for a jury to conclude that his failure to conform to gendered norms had, at a minimum, been a motivating factor behind his termination.[113]

In *Nichols v. Azteca Restaurant Enterprises, Inc.*,[114] a male restaurant worker who had been subjected to a relentless barrage of disparaging and vulgar insults, including "faggot," being called "she" and "her," and being mocked for walking and carrying his serving tray "like a woman," lost his case after a bench trial of his Title VII sexual harassment and retaliation claims.[115] The trial judge determined that the harassment was both not hostile and had not occurred because of the plaintiff's sex.[116] But the Ninth Circuit panel reversed those rulings, finding that the harassment was sufficiently severe and pervasive to alter the plaintiff's terms and conditions of employment[117] and that, more significantly, like Ann Hopkins, appellant Antonio Sanchez had established that the abuse directed at him by co-workers and a supervisor reflected their belief that he did not conform to the behavior expected of a person of his sex.[118] In their view, by displaying feminine mannerisms in the way he walked and carried his serving tray, Sanchez did not act as a man should behave.[119] Accordingly, the court ruled that Sanchez was entitled to prevail on his sexual harassment claim.[120]

The final member of the circuit court triad is the Seventh Circuit's decision in *Doe v. City of Belleville, Ill.*[121] The trial court had granted summary judgment to the City as to the plaintiff's Title VII sexual harassment and constructive discharge claims.[122] The plaintiff had offered evidence of being subjected to homophobic epithets, sexually-oriented derogatory remarks, and physical assaults.[123] The appellate court reversed the trial judge's decision to grant summary judgment in favor of the defendant.[124] It ruled that the plaintiff could

110. *Id.* at 735.
111. *Id.* at 737.
112. *Id.*
113. *Id.*
114. 256 F.3d 864 (9th Cir. 2001).
115. *Id.* at 870.
116. *Id.* at 871.
117. *Id.* at 873.
118. *Id.*
119. *Id.* at 870.
120. *Id.* at 878.
121. 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).
122. 119 F.3d at 566.
123. *Id.* at 566–67.
124. *Id.* at 566.

go to trial on his same-sex harassment claim on two alternative grounds.[125] First, the appellate panel reasoned that, since the harassment involved conduct that was explicitly sexual, this was sufficient to state a claim of sexual harassment, regardless of whether or not the conduct was gender-specific.[126] Alternatively, the court declared that even if the sexual character of the same-sex harassment was not sufficient *per se* to violate the statutory ban on sex discrimination, the fact that the plaintiff was subjected to that harassment because the way he presented himself did not conform to his coworkers' view of appropriate male behavior was enough to state a claim of sexual harassment under Title VII.[127] With respect to the second of these rulings, the appellate court also found that the evidence, including the fact that the plaintiff was harassed for wearing an earring, supported a finding that stereotypes had animated the harassing behavior.[128]

Perhaps the most thoughtful analysis of a gender nonconformity claim can be found in *Centola v. Potter*.[129] Stephen Centola had been tormented over his seven year career as a letter carrier with the U.S. Postal Service by comments made by his coworkers who mocked his masculinity and by their distribution of photos that portrayed him as effeminate and implied that he was gay.[130] He was summarily discharged after complaining about this behavior to his supervisors.[131] In response to his Title VII claim alleging sexual harassment and retaliation, the defendant sought summary judgment, asserting that the plaintiff was alleging only sexual orientation-based discrimination which was not cognizable under Title VII.[132] As District Judge Gertner noted, the plaintiff had both alleged that the harassment was motivated, at least in part, by his failure to meet gendered stereotypes of what a man should act or look like and had offered evidence in his summary judgment papers to substantiate that allegation.[133] And though she acknowledged that "the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear,"[134] she also recognized that "[s]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to

125. *Id.* at 568.

126. *Id.* at 574.

127. *Id.* at 575.

128. Although the Supreme Court vacated the Seventh Circuit panel's ruling, the case was remanded for reconsideration in light of the Court's ruling in *Oncale.* The decision in *Oncale* instructed courts to focus on whether or not the plaintiff suffered the harassment because of his or her sex. Consequently, it was the first of the two alternative theories propounded by the Seventh Circuit that resulted in ruling to vacate. There was nothing, however, in *Oncale* to call into question the correctness of the Seventh Circuit's alternative holding that if proof of sex-based motivation was necessary, it was met by proving that the harassment was visited upon the plaintiff for failing to live up to expected gender stereotypes. *See* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263 n.5 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002).

129. 183 F. Supp. 2d 403 (D. Mass. 2002).

130. *Id.* at 407.

131. *Id.* at 406.

132. *Id.*

133. *Id.* at 409 n.6.

134. *Id.* at 408.

our stereotypes about the proper roles of men and women."[135] When co-workers and/or supervisors take adverse action against a gay male employee, she continued, "[t]he gender stereotype at work here is that 'real' men should date women, and not other men."[136] Refusing to fall into the trap of feeling compelled to choose between sexual orientation and sex as the causal factor behind the alleged harassment, Judge Gertner properly invoked mixed motive doctrine, "precisely because of the difficulty in differentiating behavior that is prohibited (discrimination on the basis of sex) from behavior that is not prohibited (discrimination on the basis of sexual orientation)."[137] Stephen Centola had never disclosed his sexual orientation to his co-workers or supervisors.[138] Nevertheless, Judge Gertner determined, Centola's co-employees "leapt to the conclusion that Centola 'must' be gay because they found him to be effeminate."[139] Judge Gertner concluded that their conduct, including the placement of a picture of Richard Simmons in pink hot pants in Centola's work area, was sufficient to support the plaintiff's gender nonconformity claim and, therefore, to defeat the defense request for summary judgment[140] and have the opportunity to convince a jury of the merits of his sexual harassment claim.[141]

VII. A CRITICAL ASSESSMENT

So what is to be made of the predominant judicial attitude towards the enforcement of dress and appearance codes, particularly against individuals whose presentation of self is a direct outgrowth of their nontraditional lifestyle? There is no doubt that the majority of rulings in these cases reflect, in large part, the undeniable fact that Congress has made manifest its disinclination to extend

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135. *Id.* at 410.

136. *Id.*

137. *Id.*

138. *Id.* at 407.

139. *Id.*

140. The trial judge also denied the defense motion for summary judgment on the plaintiff's Title VII retaliation claim. 183 F. Supp. 2d at 413. However, the trial judge did grant the defense motion for summary judgment on the plaintiff's claims that the sexual harassment violated two Executive Orders. *Id.* at 414.

141. *See also* Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Ore. 2002) (denying defense motion for summary judgment on Title VII sex discrimination claim brought by terminated lesbian employee; evidence sufficient to permit reasonable jury to find that plaintiff was repeatedly harassed because of her sex in that she did not conform to manager's stereotype that a woman should be attracted to and date only men). Yet in *Mowery v. Escambia County Utils. Auth.*, 2006 WL 327965 (N.D. Fla. 2006), the trial court granted a defense motion for summary judgment on a Title VII sex discrimination claim where the plaintiff had offered evidence of sexually oriented and homophobic comments. The court denounced the plaintiff's "attempts to place his own interpretive 'spin' on the alleged harassment and classify it as harassment based on sex or gender rather than as harassment based on sexual orientation." *Id.* at *8. The court also repudiated arguments "by some commentators who characterize sex and sexual orientation as 'intricately interrelated,'" *id.*, on the ground that Congress' refusal to amend Title VII to include sexual orientation displayed Congress' determination that there is a meaningful distinction between sex and sexual orientation. Finally, the court reasoned, a co-worker's statement that the plaintiff must be gay because he was forty years old, owned a house, had a truck paid for, did not have a woman, and did not discuss sexual exploits with women was not based on the plaintiff's perceived failure to conform to male gendered stereotype because owning a truck is commonly associated with a masculine gender role.

statutory protection against employment discrimination to gay and transgendered individuals. At the same time, the courts do recognize that gay and transgendered individuals can be the subject of unlawful sex-based discrimination. After all, every court would unqualifiedly recognize that discrimination against any individual, regardless of their sexual identity, is proscribed if it is based on his or her sex. For example, if an employer refused to hire lesbians but employed similarly qualified gay men, one cannot imagine a court failing to strike down such a policy as violative of Title VII. Moreover, the fact is that the courts rarely grant 12(b)(6) motions to dismiss claims brought by gay or transgendered individuals who assert a *Price Waterhouse*-styled claim of gender stereotype-based discrimination. This reflects the prevailing judicial acceptance of the notion that employment policies penalizing individuals for failing to conform to gendered expectations constitutes a form of statutorily proscribed sex-based discrimination. Yet, when it comes to assessing the evidence for the purpose of defining the motivation behind the challenged employment decisions, the courts invariably conclude that the plaintiff was targeted not for failing to conform to gendered standards of acceptable dress, behavior, or presentation of self, but solely and exclusively because of his or her sexual orientation or transgendered status.

The courts' facile and superficial response to these cases cruelly ignores the connection between an individual's sexual identity and various aspects of his or her behavior and presentation of self. Disapprobation of an individual's homosexuality or transgendered identity is nothing more or less than condemnation of that person's failure or refusal to adhere to traditional expectations of how a "real" man or woman should live his or her life and/or present him or herself to the outside world. Whether it is based on how they dress, how they carry themselves, how they groom themselves, or with whom they choose to engage in sexual conduct, these decisions are, at their core, based on a prejudice against individuals' nonconformity to those societally generated norms of behavior imposed on members of each of the two biological sexes. Consequently, firing a man because he chooses to dress in attire or manifest behavior that would be perfectly acceptable for a woman, or terminating a woman because she chooses not to adhere to the company's cosmetic image of femininity, or for that matter, terminating either a man or a woman because he or she chooses to have a sexual relationship with a person of the same biological sex, should be subject to the same legal declaration of unacceptability that would extend to a decision to terminate a woman because she is deemed too aggressive and insufficiently lady-like.

On the other hand, is it reasonable or even appropriate to expect the courts to embrace the linkage between sexual identity and gendered behavioral norms when Congress has consistently and emphatically rejected all direct attempts to provide statutory protection to gays and transgendered persons? Are the courts correct in suggesting that adopting this theory would simply circumvent Congress' clear statement that sexual orientation and transgendered status are matters of personal choice that fall outside the protective ambit of government regulation? I don't think so. There is no reason to suggest that Congress actively has considered the implications of the Court's ruling in *Price Waterhouse* to cases involving the enforcement of workplace rules that enforce sex-stereotypical

norms. Nor is their any evidence of Congressional dissatisfaction with, or repudiation of, the Court's articulation of a sex-stereotype based model of sex-based discrimination. To the contrary, Congress' partial overruling of the mixed motive portion of the Court's ruling in *Price Waterhouse* in the 1991 Civil Rights Act confirms that Congress is fully ready, willing and able to overturn the Court's interpretations of its handiwork. Moreover, in our common law system, it is quite ordinary for Congress to speak in bold strokes and leave the details, and sometimes the juridical dirty work, to the courts. Therefore, if the courts were to conclude that hostility towards a person's sexual identity is a form of gender-stereotyped sex discrimination because it is predicated on a rejection of lifestyle choices that do not adhere to traditional formulations of how a man or a woman should look or behave, including one's choice of a sexual partner, that decision fairly could be justified as a reasonable application of the legislatively untouched portion of the ruling in *Price Waterhouse.*

VIII. CONCLUSION

Despite occasional victories, workers who are subjected to workplace rules governing the way they dress, behave, and present themselves typically are unsuccessful in convincing the federal trial and appellate courts that they are the victims of sex-stereotyped attitudes, particularly when their refusal or failure to abide by these rules is linked to a refusal to conform to societally created sex-specific norms of behavior and appearance. Instead, the courts generally continue to decline to recognize the relationship between sexual identity and gendered norms of behavior. Consequently, the judiciary fails to accept the plaintiffs' claim that they have been victimized by virtue of their failure or refusal to conform to gendered expectations. When individuals perceived to be leading a nontraditional lifestyle or presenting an unconventional sexual identity invoke the Court's seemingly unambiguous declaration that gender nonconformity is a form of proscribed sex-based discrimination, the promise of *Price Waterhouse* goes largely unfulfilled.