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## **TRANSGENDERED EMPLOYEES AND THE HETERONORMATIVE “UNIFORM”**

*Uniform: (n) The distinctive clothing worn by members of the same organization or body or by children attending certain schools  
(adj.) not changing in form or character; remaining the same in all cases and at all times*

### **I Introduction**

The employment relationship involves a negotiation of images and perceptions. In the first instance, there is the employer. The employer is sometimes an individual, sometimes a group of individuals, sometimes a concentration of financial interests, but in any case, it projects and promotes a uniform identity. McDonalds. Bank of America. Main Street Dry Cleaning. Each entity makes a series of choices that shape its collective identity. Of course, that identity necessarily includes within it a workforce comprised of the separate and distinct identities of various individuals. The employee must suppress her<sup>1</sup> individual identity at least to the extent that the latter deviates from the will of the employer. For example, although the concessionist at the local corporate movie theater might dislike ruby red vests, she had better wear the vest if she wishes to continue working at the theater. If she refuses, management can justifiably terminate her, assuming her employment is “at-will.”

This essay explores the interplay of the employer’s “uniform” ideal with certain specific categories of employees who either knowingly deviate from that uniform or vainly struggle to find a place within it. In particular, this essay will examine how

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<sup>1</sup> This note will use “she,” “her,” etc. in gender-neutral hypothetical scenarios such as this one. This should not be read to imply anything about the gender or gender identity of the person in the hypothetical unless expressly noted.

employment discrimination law protects certain individuals from suffering adverse employment conditions where the employer's pursuit of uniformity has encroached on individual freedoms. Critical to obtaining a clear picture of transgendered employees in the workplace is an understanding of the history of employment discrimination law, particularly with respect to sex discrimination.

Under "at-will" employment, an employer is free to terminate employees "for a good reason, a bad reason, or no reason at all."<sup>2</sup> The employment-at-will regime protects employers from incurring civil liability upon terminating employees who "don't fit in" in most cases. If, however, the given employee "doesn't fit in because she's black" or a woman or a Mormon, the employer has violated Title VII of the Civil Rights Act of 1964<sup>3</sup> and, in all likelihood, a similar state antidiscrimination law,<sup>4</sup> thereby subjecting the employer to liability. In effect, Title VII made "race, color, religion, sex, and national origin" elements of the uniform workforce identity that the employer is not permitted to shape unless the characteristic is a "bona fide occupational qualification [BFOQ] reasonably necessary to the operation of that particular business or enterprise."<sup>5</sup> Employers are rarely successful when asserting BFOQs as a defense, particularly when asserted with respect to race or sex.<sup>6</sup>

"Sex" has proven itself the knottiest, most heavily disputed Title VII category. In one sense, the problem appears deceptively simple. Discrimination because of sex

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<sup>2</sup> William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 166 (2007).

<sup>3</sup> 42 U.S.C.A. § 2000e-2(a)(1)

<sup>4</sup> As of this year, 20 states and the District of Columbia have laws that protect gay, lesbian and bisexual employees in the workplace and twelve states extend workplace protections to transgendered employees. Vivian Berger, *Half a Loaf is Worse*, Broward Daily Bus. Rev. 5, Vol. 48, Iss. 244 (Nov. 26, 2007).

<sup>5</sup> 42 U.S.C. § 2000e-2(e)

<sup>6</sup> Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 743-44 (2003).

happens when an employer treats men and women differently. Returning to the concessionists, if a movie theater manager terminates female concessionists who fail to wear their mandatory ruby red vest without terminating male concessionists guilty of the same violation, the manager has discriminated because of sex. The shaky assumption implicit in the above example is that “men” and “women” are categories that are always manifestly distinct, a postulate referred to as the “gender binary.”<sup>7</sup> Many legal scholars doubt whether the gender binary is an accurate and useful framework from which a court should evaluate “sex discrimination” claims, although this approach has not gained substantial momentum in the courts.<sup>8</sup> It is beyond dispute, however, that “sex discrimination” under Title VII is broad enough to include claims that arise from “gender atypicality.”<sup>9</sup> For example, where an employee “doesn’t fit in because she’s a lesbian” or “doesn’t fit in because she’s intersex,” the employer can use either of these bases to justify the termination without violating federal law; however, these latter justifications may lose their protected status if the employer has acted on the basis of how she believes a man or woman should behave.<sup>10</sup>

Consistent with the employers’ goals of promoting uniformity, employers are permitted to impose control over how an employee presents herself at work, both by requiring a work uniform and by establishing “grooming standards” for its employees. Courts have generally upheld an employer’s right and ability to impose grooming

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<sup>7</sup> Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 83 (2006).

<sup>8</sup> *See eg., Id.*

<sup>9</sup> Deborah Zalesne, *Lessons From Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance And Dress Codes*, 14 DUKE J. GENDER L. & POL’Y 535, 557 (2007).

<sup>10</sup> *See eg., James G. O’Keefe, Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DEPAUL L. REV. 1101, 1113 (2007).

standards. For example, in *Jespersen v. Harrah's Operating Company*<sup>11</sup>, the plaintiff bartender had worked for the defendant employer for nearly twenty years before the employer fired her for failing to conform to the company's new "grooming standards," which required female servers to wear makeup in a distinct way, and required male servers to maintain short haircuts and refrain from wearing makeup.<sup>12</sup> Finding for the employer, the court held that such standards did not constitute sex discrimination under Title VII as long as they imposed an equal burden on men and women, an implicit validation of the gender binary.<sup>13</sup> In *Cloutier v. Costco Wholesale Corp.*,<sup>14</sup> the First Circuit upheld a similar employer grooming code against a challenge that its policy against eyebrow-piercing discriminated against the plaintiff employee's religion, the church of body modification.<sup>15</sup>

Similar to grooming codes is the phenomenon of "appearance discrimination." On its face, Title VII does not protect an employee who "doesn't fit in because she's fat" or "doesn't fit in because she's ugly," however, either of these justifications could conceivably form the basis of a claim when coupled with a protected characteristic. In other words, although firing an employee because she is ugly might be acceptable, firing an employee because she is an ugly *woman* likely violates Title VII, especially if there is evidence that the employment of men within the company is not equally as contingent on attractiveness.<sup>16</sup>

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<sup>11</sup> *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004).

<sup>12</sup> *Id.* at 1079.

<sup>13</sup> *Id.* at 1081, 1083.

<sup>14</sup> *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004).

<sup>15</sup> *Id.* at 134.

<sup>16</sup> *See Corbett, supra* note 2, at 166.

The employer's desire and ability to control how its staff looks while at work derives from its prerogative to maintain a "uniform" identity. In addition to cleanliness, hygiene, and glossy apparel, the employer more often than not has a desire to promote the image that its employees are gender conformists, a wish that is at odds with the experiences and identities of transgendered employees.

## **II BACKGROUND**

### **A. "Sex" Discrimination, Title VII, and ENDA**

Title VII discrimination claims must be evaluated under a framework established in *McDonnell Douglas Corp. v. Green*.<sup>17</sup> A plaintiff must first establish a prima facie case of discrimination by demonstrating that: 1) he or she is a member of a protected class; 2) he or she is competent to perform the job or is performing duties satisfactorily; 3) he or she suffered an adverse employment decision or action; and 4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on the plaintiff's membership in the protected class.<sup>18</sup>

The legislative record does not reveal any floor discussion of the "because . . . of sex" provision, primarily because it was added at the eleventh hour.<sup>19</sup> Title VII had been predominantly a statute about ending racial discrimination; the addition of "sex" as a protected characteristic was a failed effort by Representative Howard Smith of Virginia, who opposed the bill and ultimately voted against it, to derail the legislation.<sup>20</sup> Although there was no substantive discussion of what sorts of things would fall under the umbrella

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<sup>17</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972).

<sup>18</sup> *See eg.*, *Dawson v. Bumble*, 398 F.3d 211, 215 (2nd Cir. 2005) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802).

<sup>19</sup> The Harvard Law Review Association, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1111, 1167 (1971).

<sup>20</sup> *Id.*

of “sex discrimination,” similar language had been used in prior legislation. The year before the Civil Rights Act passed, Congress amended the Fair Labor Standards Act, adding a provision to prevent gender discrimination in the payment of wages with the following statutory language: “No employer . . . shall discriminate . . . *on the basis of sex* by paying wages . . . at a rate less than the rate at which he pays wages to employees *of the opposite sex.*”<sup>21</sup> Accordingly, every circuit court that has addressed the specific issue has stated that transgendered employees are not a “class” under Title VII for purposes of sex discrimination.<sup>22</sup> Traditionally, courts have held that the statute protects discrimination against “women because they are women and against men because they are men.”<sup>23</sup>

Over the past sixteen years, several Congresspersons have proposed legislation that would provide protection against employment discrimination for transgendered employees, lesbian and gay employees, bisexual employees, or all of these.<sup>24</sup> In 1995, the Employment Non-Discrimination Act (ENDA), introduced by the late Senator Edward Kennedy, came within one vote of passing in the United States Senate.<sup>25</sup> The bill would have protected lesbian, gay, bisexual, and transgendered (LGBT) employees from workplace discrimination if it had passed in both chambers of Congress and been signed

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<sup>21</sup> 29 U.S.C. § 206(d)(1) (emphasis added).

<sup>22</sup> See *eg.*, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (“Title VII is not so expansive as to prohibit discrimination against transsexuals.”); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (“Congress intended the term “sex” to mean “biological male or biological female.”); see also *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977); *Ettsity v. Utah*, 502 F.3d 1215 (10th Cir. 2007).

<sup>23</sup> *Ulane*, 742 F.2d at 1085.

<sup>24</sup> Meredith R. Palmer, *Finding Common Ground: How Inclusive Language Can Account For The Diversity Of Sexual Minority Populations In The Employment Non-Discrimination Act*, 37 HOFSTRA L. REV. 873, 888 (2009).

<sup>25</sup> *Id.*

into law.<sup>26</sup> Instead, it has been a constant struggle for LGBT advocates who have been attempting to achieve such protection since that bill failed.<sup>27</sup> To wit, some form of ENDA has been introduced by a Congressperson in every subsequent session of Congress, with the exception of the 109th Congress<sup>28</sup> (a body that was popularly derided as a “do-nothing Congress”<sup>29</sup>). Nevertheless, none of these bills attained sufficient votes in either chamber until September 2007.<sup>30</sup>

ENDA finally received enough votes to pass in the House by a 235-184 vote, but the bill provided no protection for transgendered employees.<sup>31</sup> When Rep. Barney Frank of Massachusetts had introduced an earlier incarnation of the bill, it had included protection for transgendered individuals, but that provision was eliminated before being submitted for a vote.<sup>32</sup> Rep. Frank eliminated the transgendered provision when a Whip count had revealed that ENDA would fail if it included that provision, due to a lack of support among members of Congress.<sup>33</sup>

There was an immense public outcry in the LGBT community when it was revealed that ENDA no longer protected transgendered employees from discrimination.<sup>34</sup> Proponents of the transgendered provision then introduced a second bill that would prohibit employment discrimination based on gender identity.<sup>35</sup> The Education and Labor subcommittee conducted hearings on the subject of transgender discrimination in

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 888-89.

<sup>29</sup> See Norman J. Ornstein & Thomas Mann, *Our Do-Nothing Congress: Little Has Been Accomplished, Too Much Will Be Left Hanging, and What Was Done Was Done Badly*, LOS ANGELES TIMES, Sept. 27, 2006.

<sup>30</sup> Palmer, *supra* note 24, at 889.

<sup>31</sup> H.R. 3685, 110th Cong. (2007).

<sup>32</sup> Sara Lubbes & Libby George, *CQ Bill Analysis*, Congressional Quarterly 2008 WLNR 2798852 (Feb. 9, 2008).

<sup>33</sup> *Id.*

<sup>34</sup> Palmer, *supra* note 24, at 889.

<sup>35</sup> H.R. 3686 110th Cong. (2007).

the workplace in the summer of 2008, during which Diane Schroer testified.<sup>36</sup> Schroer was currently the plaintiff in a high-profile lawsuit against the Library of Congress for discriminating against her on the basis of ‘sex,’ when it rescinded its offer of employment upon learning that she was transgendered and planned on undergoing sex reassignment surgery.<sup>37</sup>

Nevertheless, ENDA died in the Senate; and the House bill that included protection for transgendered employees never came up for a vote in either chamber.<sup>38</sup> Currently, a House version of ENDA, which includes protection for transgendered workers, is once again percolating in the Senate Health, Education, Labor, and Pensions Committee.<sup>39</sup> Its future, once again, is uncertain. While the 2007 version of ENDA that passed the House had the support of 35 House Republicans, the 202 co-sponsors of the 2010 version of ENDA include only one Republican congressman.<sup>40</sup> What has happened -- or, more appropriately, failed to happen -- in Congress is reflective of a reluctance of many Americans to accept transgendered individuals into the mainstream. Transgendered individuals still face widespread discrimination and prejudice in several areas in addition to employment -- from “ credit, public accommodations, and law enforcement to more private areas such as marriage, parenting, healthcare, and inheritance.”<sup>41</sup> As long as transgendered individuals are forced out of other areas of mainstream society, they will not be a part of the employer’s idealized workplace and

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<sup>36</sup> House Education Subcommittee Reviews Workplace Transgender Discrimination, U.S. Fed. News (HT Syndication) 2008 WLNR 12174648 (June 27, 2008).

<sup>37</sup> *Id.*

<sup>38</sup> Palmer, *supra* note 24, at 889.

<sup>39</sup> H.R. 3017 111th Cong. (2010).

<sup>40</sup> *GOP Support for Gay Rights Measure Slips*, Roll Call (USA), Apr. 27, 2010 WLNR 8628446.

<sup>41</sup> Demoya R. Gordon, TRANSGENDER LEGAL ADVOCACY: WHAT DO FEMINIST LEGAL THEORIES HAVE TO OFFER?, 97 Cal. L. Rev. 1719 (2009).

will likely suffer the added indignity of having their struggles ignored by the federal government.

### **B. “Sex Discrimination” in the Courts**

With Congress reluctant to expand or define the contours of actionable “sex discrimination,” this has left the judiciary in the position of deciding what constitutes actionable “sex discrimination” under the statute. One of the most radical changes in judicial interpretation of sex discrimination under Title VII occurred in *Price Waterhouse v. Hopkins*.<sup>42</sup> In *Price Waterhouse*, an accounting firm decided not to promote Hopkins, a female candidate for partnership, and the evidence suggested that part of the reason she was passed over was because her personality was adjudged too aggressive and abrasive for a woman, notwithstanding whether these characteristics would be desirable in a male candidate.<sup>43</sup> Thus, Hopkins’ challenge to Price Waterhouse’s employment decision represented a challenge to its uniform ideal, one in which men were powerful dealmakers and women were subservient, attractive, and ultimately powerless pawns in the corporate hierarchy.

The Supreme Court held that Price Waterhouse’s conduct constituted sex discrimination actionable under Title VII.<sup>44</sup> Writing for the plurality opinion, Justice Brennan wrote, “[a]n 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.”<sup>45</sup> Moreover, the Court held that “remarks based on sex stereotypes . . .

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<sup>42</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>43</sup> *Id.* at 231.

<sup>44</sup> *Id.* at 251.

<sup>45</sup> *Id.*

can certainly be evidence that gender played a part” in an employment decision in such a way that violates Title VII.<sup>46</sup>

In the immediate aftermath of *Price Waterhouse*, some courts had held that its loosely defined gender-nonconformity doctrine only applied to opposite-sex Title VII claims, and not claims based on same-sex discrimination.<sup>47</sup> In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court disagreed, holding that same-sex discrimination could form the predicate of a Title VII sex discrimination claim.<sup>48</sup> “The critical issue,” Justice Scalia opined for the majority, “is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>49</sup>

The federal courts soon cited *Price Waterhouse* and *Oncale* in advancing the gender-nonconformity line of cases. In *Nichols v. Azteca*, a plaintiff waiter with effeminate tendencies brought suit against his employer, a restaurant whose employees, including supervisors, constantly derided him by referring to him as “faggot,” “she,” and far more vulgar expressions.<sup>50</sup> The Ninth Circuit agreed with Nichols that “the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.”<sup>51</sup> Likewise, in *Higgins v. New Balance Athletic Shoe, Inc.*, the 1st Circuit held:

Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence

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<sup>46</sup> *Id.*

<sup>47</sup> See e.g., *Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996)

<sup>48</sup> *Oncale v. Sundowner Offshore Services, Inc.*, 523, U.S. 75 (1998).

<sup>49</sup> *Id.* at 80.

<sup>50</sup> *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 866 (9th Cir. 2001).

<sup>51</sup> *Id.* at 874.

that other men discriminated against him because he did not meet stereotypical expectations of masculinity.<sup>52</sup>

As the gender-nonconformity doctrine grew in force, it became simultaneously apparent that gay and lesbian plaintiffs could not use the doctrine to “bootstrap protection for sexual orientation into Title VII.”<sup>53</sup> The reason why *Price Waterhouse* sex stereotyping claims could not be applied to gay and lesbian plaintiffs, as explained by the Second Circuit, was “because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”<sup>54</sup> Thus, while an employer may construct for itself an identity that activity excludes gays and lesbians, the employer is prohibited from doing so in a way that appeals to sex stereotypes.

What society deems culturally “feminine” and culturally “masculine” is necessarily premised on a “stereotype,” a social determination regarding which gender preferences or characteristics are conventionally associated with biological males and females.<sup>55</sup> These culturally assigned characteristics and preferences encompass everything from “physical appearance to clothing and self-presentation, to personality and attitude . . . to patterns of speech and behavior.”<sup>56</sup>

These cultural stereotypes dominate mainstream conceptions of gender, which in turn inform the ideological perspectives of American employers. The importance of the *Price Waterhouse* decision was that it circumscribed the extent to which employers may rely on stereotypes that permeate society in making employment decisions. The importance of *Price Waterhouse* to the federal courts, such as the Sixth Circuit in *Salem*,

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<sup>52</sup> *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999).

<sup>53</sup> *Simonton v. Runyon*, 292 F.3d 33, 38 (2nd Cir. 2000).

<sup>54</sup> *Id.*

<sup>55</sup> Monica Diggs Mange, *The Formal Equality Theory in Practice*, 16 COLUM. J. GENDER & L. 1 (2007).

<sup>56</sup> *Id.*

was the radical notion that judges may look beyond the simplest applications of Title VII. Indeed, judges can apply the statute in situations where the employer's desire to shape the workplace in conformity with mainstream stereotypes frustrates the autonomy of the employees who constitute that workplace.

### III RESTRICTIONS ON "APPEARANCE" AT WORK

#### A. Transgendered Discrimination in *Smith v. City of Salem*

With gays and lesbians lacking standing to sue under Title VII and "gender-nonconforming" plaintiffs uniquely situated for bringing employment discrimination lawsuits as long as they were the victims of sex stereotyping, where does that leave transgendered employees?

As alluded to earlier, transgendered individuals, like gay and lesbian individuals, are not a protected "class" under Title VII.<sup>57</sup> Nevertheless, in the wake of *Price Waterhouse*, the gender-nonconformity doctrine provided transgendered plaintiffs with an avenue to pursue Title VII claims. A transgendered plaintiff finally got that opportunity in *Smith v. City of Salem*.<sup>58</sup> In that case, Smith had worked for the fire department for nearly seven years before he was diagnosed with Gender Identity Disorder and hence began "expressing a more feminine appearance" at work.<sup>59</sup> Smith's coworkers told him that he was not acting "masculine enough" and Smith afterwards complained to a supervisor, who shortly thereafter made arrangements with other city officials to have

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<sup>57</sup> See e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) ("Title VII is not so expansive as to prohibit discrimination against transsexuals."); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) ("Congress intended the term "sex" to mean "biological male or biological female."); see also *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977); *Ettcity v. Utah*, 502 F.3d 1215 (10th Cir. 2007).

<sup>58</sup> *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

<sup>59</sup> *Id.* at 567.

Smith terminated.<sup>60</sup> The Sixth Circuit reiterated that transgendered was still not a Title VII class, but nevertheless held that Smith had successfully stated a valid Title VII claim, under *Price Waterhouse*, by alleging that sex stereotyping about how a man should act “was the driving force” behind the Department’s suspension of Smith.<sup>61</sup> Thus, for the Sixth Circuit, the employer lacked the power to shape identity and impose uniformity when it came to dictating how men behave as men or, for that matter, as women.

### **B. Grooming Codes, Stereotypes, and Appearance Discrimination**

Growing out of and, to some extent, away from the gender-nonconformity line of cases are a series of cases related to “grooming standards” and dress codes in the workplace. The most pivotal current “grooming standards” case is *Jespersen v. Harrah’s Operating Co.*<sup>62</sup> In *Jespersen*, the plaintiff bartender had worked for the defendant employer for nearly twenty years before the employer fired her for failing to conform to the company’s new “grooming standards.”<sup>63</sup> Under these grooming guidelines, “All beverage servers were required 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.’”<sup>64</sup> Furthermore, “[f]emale beverage servers were required to wear stockings and colored nail polish, and they were required to wear their hair ‘teased, curled, or styled,’” while “[m]ale beverage servers were prohibited from wearing makeup or colored nail polish, and they were required to maintain short haircuts and neatly trimmed fingernails.”<sup>65</sup>

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<sup>60</sup> *Id.* at 567-68.

<sup>61</sup> *Id.* at 574-75.

<sup>62</sup> *Jespersen*, 444 F.3d at 1104.

<sup>63</sup> *Id.*

<sup>64</sup> *Jespersen*, 392 F.3d at 1077.

<sup>65</sup> *Id.*

A three-judge panel affirmed the district court's granting of summary judgment on behalf of the defendant casino.<sup>66</sup> On rehearing en banc, the Ninth Circuit came up with an intermediate holding, ruling for the employer, but carving out a space for future plaintiffs to bring sex stereotyping claims arising from grooming requirements.<sup>67</sup> Specifically, the court held that "appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping," but that Jespersen had failed to provide sufficient evidence either that the burdens imposed by the policy were unequal or that the policy itself "require[d] Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender."<sup>68</sup>

Thus, the Ninth Circuit elevates the importance of weighing relative burdens experienced by each sex. Recall from the introduction of this essay that Title VII prohibits the movie theater manager from firing the female concessionists who fail to wear the ruby red vest unless she also terminates the male concessionists who do the same. *Jespersen* stands for the proposition that the manager actually *can* do just that, as long as it is consistent with a company grooming code and as long as wearing the vest is not considered a burden as compared to wearing a different uniform and vice versa.

In *Cloutier v. Costco Wholesale Corp.*,<sup>69</sup> the First Circuit explored the interplay between grooming standards and religious discrimination. For claims of religious discrimination under Title VII, the plaintiff must first make a prima facie case that a bona fide religious practice conflicts with an employment requirement and was the reason for

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1079.

<sup>68</sup> *Id.*

<sup>69</sup> *Cloutier*, 390 F.3d at 126.

an adverse employment action.<sup>70</sup> The burden then shifts to the employer to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship for the employer.<sup>71</sup> The plaintiff in *Cloutier* was terminated for wearing eyebrow rings in contravention of the company’s “no-facial-jewelry” policy, an action that the plaintiff claimed violated her right to practice her religious beliefs as a member of the Church of Body Modification.<sup>72</sup> The First Circuit did not have to address whether the plaintiff met her burden of making a prima facie claim of religious discrimination, because, the court held, the imposition on the company’s “good grooming regulations” was destructive to defendant Costco’s “public image” and thus constituted an undue hardship.<sup>73</sup>

In *Lewis v. Heartland Inns of Am., L.L.C.*,<sup>74</sup> the Eighth Circuit held that a defendant hotel chain committed actionable sex discrimination under Title VII where the record reflected that the hotel fired the employee because her appearance -- short, “tomboyish” haircut and a lack of makeup -- did not match the stereotypically feminine “midwestern girl” look, which the employer desired in a front desk employee.<sup>75</sup> The court rejected the legal conclusion made by the district court below, which had cited *Jespersen* for the proposition that sex stereotyping claims required “comparative evidence,” i.e. affirmative evidence that one group (women, e.g.) were treated worse than another group (men, e.g.).<sup>76</sup> The court found instead that a plaintiff could support a sex stereotyping claim under Title VII by proffering comparative evidence, evidence of

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 134.

<sup>72</sup> *Id.* at 127.

<sup>73</sup> *Id.* at 136-37

<sup>74</sup> *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033 (8th Cir. 2010).

<sup>75</sup> *Id.* at 1035.

<sup>76</sup> *Id.* at 1037-38.

“remarks that reflect a discriminatory attitude,” or any other evidence that would “permit a reasonable inference of discrimination.”<sup>77</sup>

Related to, but distinct from, grooming code restrictions is the concept of “appearance discrimination.” In *Yanowitz v. L’Oreal USA, Inc.*, a supervisor instructed a female sales manager to terminate a female sales associate and “get somebody hot.”<sup>78</sup> This is an example of sexual attractiveness as an element of the heteronormative work uniform. When the manager refused the supervisor’s request, she herself was terminated. The employee plaintiff had stated a valid retaliation action by alleging that she was terminated for a refusal to comply with an order that she believed to be discriminatory.<sup>79</sup> Standing somewhat in contrast to this case is *Goodman v. L.A. Weight Loss Centers, Inc.*<sup>80</sup> In *Goodman*, the Eastern District of Pennsylvania upheld dismissal of an obese man’s ADA suit against weight loss company who wouldn’t hire him as a sales counselor, adding in dicta:

[I]t is well established that an employer is permitted to make hiring decisions based on certain physical characteristics. The mere fact that Defendant was aware of Plaintiff’s weight and rejected his application for fear that his appearance did not accord with the company image is not improper. To hold otherwise would render an employer’s ability to hire based on certain physical characteristics entirely void.<sup>81</sup>

*Goodman* demonstrates that it the employer may permissibly extend the “work uniform” over which she has control to include the employee’s own physical body.

Commentator Jane M. Siegel addresses the issues of physical body requirements as well as grooming restrictions with respect to women in particular and concluded that

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<sup>77</sup> *Id.* at 1040.

<sup>78</sup> *Id.* at 1030.

<sup>79</sup> *Id.* at 1034.

<sup>80</sup> *Goodman v. L.A. Weight Loss Ctrs., Inc.*, 2005 U.S. Dist. LEXIS 1455.

<sup>81</sup> *Id.* at \*7.

such rules and restrictions implicate society's obsession with women's clothing.<sup>82</sup> The fixation on women's clothes itself relates to the recurrent desire in Western civilization to diminish the power of women, Siegel writes, by characterizing them only according to their appearance, because of the outdated, but still pervasive notion that "women are their bodies."<sup>83</sup> Thus, the employer, catering to dominant social norms, grafts an idealized image onto its personnel, and the distinctions between body and dress become fused in a hegemonic work uniform.

### **C. Intersex Employees and "Body" Discrimination**

The most obvious instance where the work uniform interacts with an employee's actual physical body occurs in instances where an individual has suffered workplace discrimination on the basis of being intersexed. "Intersexuals" is a term that refers to a "congenital anomaly of the reproductive and sexual system."<sup>84</sup> There are a wide variety

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<sup>82</sup> Jane M. Siegel, *Thank You, Sarah Palin, for Reminding Us: It's Not About the Clothes*, 17 Va. J. Soc. Pol'y & L. 144, 152 (2009).

<sup>83</sup> *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005).

<sup>84</sup> Emi Koyama, *Who Will Make Room for the Intersexed?*, 30 AM. J. L. AND MED. 41 (2004).

of different physical conditions that result in an individual being classified as “intersex”<sup>85</sup> and it is estimated that there are millions of Americans who are intersex.<sup>86</sup>

Only one reported case, *Wood v. C.G. Studios*, has addressed whether intersexuals are entitled to protection from employment discrimination on the basis of “sex” when they are discriminated against for being intersexuals.<sup>87</sup> Although this Pennsylvania case was based on the commonwealth’s own employment discrimination statute as opposed to Title VII, the court cited the Title VII transsexual cases as support for its holding that intersexuals were not protected by the statute.<sup>88</sup> The plaintiff in *Wood* brought a claim against her former employer, alleging that the reason she was terminated was because her defendant employer found out that she had undergone “gender-corrective surgery” to “correct her hermaphroditic condition” at some point previous to her employment with the defendant. The court held that under the plain meaning of the Pennsylvania statute, the law was intended to bring about “equality between the sexes,” and that terminating an

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<sup>85</sup> For example, with respect to reproductive glands, while at the embryonic stage, most individuals’ gonads develop into either ovaries or testes, some intersexuals have “streak” gonads that do not function as either. Others have ovotestes, a combination of both male and female gonads, and still others have one ovary and one testis. With respect to chromosomes, although typically females have two X chromosomes and males have one X and one Y, these are far from the only possible combinations. Indeed, Greenberg identifies the following alternative combinations: XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO. Even genitalia is not always easy to identify as belonging to one sex or the other. For example, some individuals have clitoral hypertrophy, a large clitoris that can more closely resemble a penis and is sometimes accompanied by an internal vagina. In addition, anomalies with respect to internal sex organs, hormone distribution, phenotypic characteristics (such as breasts or facial hair), and various other anomalies occur with a stunning regularity. Finally, even where all of the above characteristics uniformly point in the direction *male* or the direction *female*, many individuals do not identify themselves with these factors. A recent study suggests that for these individuals, diagnosed with Gender Identity Disorder, “a section of the brain area that is essential for sexual behavior is larger in men than in women and that the brain structure of genetically male transsexuals is more similar to female brains than to male brains.” Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 267-68, 275-89 (2006).

<sup>86</sup> *Id.* at 277.

<sup>87</sup> *Wood v. C.G. Studios*, 660 F. Supp. 176 (1987).

<sup>88</sup> *Id.* at 177-78.

employee who had undergone gender-corrective surgery did not constitute discrimination because of “sex.”<sup>89</sup>

The problem, which the *Wood* case brings to the forefront, is that, as commentator Julie Greenberg’s compendium of the scientific research indicates, “sex,” even in the anatomical sense, is a fluid concept that is sometimes difficult to categorize. Bearing this in mind, how could a court arrive at the result that sex discrimination laws are about achieving “equality between the [two] sexes,” when an honest scientific evaluation of the gender binary renders this approach immensely underinclusive.

**D. *Schroer v. Billington***

In *Schroer v. Billington*, the District Court for the District of Columbia addressed an employment discrimination claim by a male-to-female transsexual plaintiff.<sup>90</sup> The plaintiff, Diane Schroer, born David Schroer, had achieved great success as a highly decorated member of the United States military for 25 years, though during that time she was diagnosed with gender dysphoria.<sup>91</sup> Schroer applied for a position at the Library of Congress, while appearing as a man during the interview.<sup>92</sup> After she was offered the position by a representative of the Library, Schroer revealed her gender dysphoria and her intention to undergo sex reassignment surgery and fulfill the position as a woman.<sup>93</sup> After revealing this information, the offer of employment with the Library was rescinded.<sup>94</sup> Schroer then brought a Title VII action against the Library, claiming discrimination on the basis of sex.<sup>95</sup>

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<sup>89</sup> *Id.* at 176-77.

<sup>90</sup> *Schroer v. Billington*, 424 F.Supp.2d 203, 204-5 (D.D.C. 2006).

<sup>91</sup> *Id.* at 205.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 204.

When it first addressed the *Schroer* claim on a motion to dismiss, the District Court of D.C. rejected Schroer’s contention that his claim was “sex stereotyping” under *Price Waterhouse*.<sup>96</sup> Judge Robertson opined that the *Price Waterhouse* holding was “considerably more narrow than its sweeping language suggests.”<sup>97</sup> The court added that *Price Waterhouse* was limited to the “Catch-22” cases where it could be shown that men or women were suffering adverse consequences regardless of how they chose to represent themselves from a gender standpoint.<sup>98</sup>

When it said, ‘[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,’ *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.<sup>99</sup>

The court nevertheless rejected a motion to dismiss so that a more robust factual record could be developed with regards to another theory, namely that “discrimination against transsexuals because they are transsexuals is ‘literally’ discrimination ‘because of . . . sex.’”<sup>100</sup> Specifically, the court requested scientific testimony as to the “basis for sexual identity in general, and gender dysphoria in particular.”<sup>101</sup>

Curiously, after the factual record was further developed, the court ruled in favor of Schroer, while simultaneously holding that it was not competent to decide the scientific issue the court itself had posed, because the testimony of the experts on both sides was “impressive.”<sup>102</sup> The court arrived at this result, by holding that it did not need

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<sup>96</sup> *Id.* at 209.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (citations omitted) (emphasis added).

<sup>100</sup> *Id.* at 212.

<sup>101</sup> *Id.* at 213.

<sup>102</sup> *Schroer v. Billington*, 577 F.Supp.2d 293, 306 (D.D.C. 2008).

to reach the scientific issue, partially by looking to the plain language of the statute<sup>103</sup> and partially because it held that the Library had engaged in impermissible sex stereotyping under *Price Waterhouse*.<sup>104</sup> With respect to the latter holding, the court distanced itself from the *Jespersen* disparate treatment approach it had employed in *Schroer I*, holding that such a showing was not required where there was direct evidence of stereotyping as in the present case.<sup>105</sup> Judge Robertson wrote, “I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual,” because in any event the factual record supplied evidence of sex stereotyping.<sup>106</sup>

#### **D. What *Schroer* and *Jespersen* Mean to Transgendered Employees**

*Schroer* stands in stark contrast to *Jespersen* and its ilk. Although the latter reaches its very different result through a very different set of legal gymnastics, *Jespersen* seems to supply employers with a foolproof guide to discriminate against transgendered employees and still steer clear of a court that may be taking a *Schroer*-like approach. The expansive language of *Schroer* aside, an employer can easily establish a policy that actively discriminates against transgendered employees by requiring men to wear a certain uniform and women to wear a different uniform. In a sense, then, *Jespersen* represents the stubborn persistence of the gender binary, silently thwarting the efforts of transgendered individuals, intersex individuals, and other advocates who would desire to

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<sup>103</sup> For its plain language argument, the court held essentially that terminating someone’s employment as the result of their intended sex reassignment surgery is “literally” discrimination “because of sex.” *Schroer*, 557 F.Supp.2d at 308.

<sup>104</sup> *Id.* at 307.

<sup>105</sup> *Id.* at 304.

<sup>106</sup> *Id.* at 305.

see gender liberated from the hegemonic uniformity imposed by employers that reflect mainstream prejudices.

#### **IV. CONCLUSION**

The employer owns the image that it projects to society through its employees, but that does not mean that it may control every aspect of that image. It is already forbidden for an employer to actively project an image of all males or all whites in the employees it hires, as it is forbidden for the employer to control its workforce's gender behavior by telling women how to be women or men how to be men. The next logical steps in this scheme are: 1) for courts to follow the examples of *Salem* and *Schroer* in admitting that transgendered individuals also have the right to protection under Title VII; 2) to dismantle the gender binary in recognizing that intersex individuals can state a cause of action for sex discrimination; and 3) to recognize sex-differentiated grooming standards for what they are: the employer's coded tools, used to perpetuate a stereotypical image that obfuscates the truth in the service of a false uniformity.