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# What Not to Wear

Samuel R. Bloom

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## **Introduction**

*“Natural beauty takes at least two hours in front of a mirror.”<sup>1</sup>*

It is almost unanimously<sup>2</sup> agreed that women have made considerable advances in society over the last few decades, especially as a result of Title VII of the Civil Rights Act of 1964.<sup>3</sup> A primary purpose of the Act was to prohibit employers from fashioning their “personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.”<sup>4</sup> Or, to put it differently, Congress’s intent was “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”<sup>5</sup>

In some instances, the law has been interpreted to clearly prohibit certain behavior by employers. For example, they may not terminate a female employee for refusing to engage in sexual relations with them<sup>6</sup> nor may they make severe, pervasive and unwelcome sexual advances.<sup>7</sup> However, the law is less clear in regards to several other aspects of gender-based employment discrimination.

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<sup>1</sup> Mike Sager, *What I’ve Learned: Pamela Anderson*, ESQUIRE MAGAZINE (2004).

<sup>2</sup> For a counterargument, see generally CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 16 (1987) (arguing that current sex equality laws are ineffective because they do not go far enough to provide “a chance at productive lives of reasonable physical security, self-expression, individuation, and minimal respect and dignity”).

<sup>3</sup> 42 U.S.C.A. § 2000e-2 (1964).

Title VII states, in relevant part, that it is illegal “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”

<sup>4</sup>City of L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).

<sup>5</sup>Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

<sup>6</sup>See Barnes v. Costle, 561 F.2d 983, 988 (D.C. Cir. 1977).

<sup>7</sup>See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

Courts have wrestled with the issue of what appearance regulations are appropriate under Title VII. Women and men dress differently, including at work. As a result, employers implement appearance requirements which purport to recognize these differences.<sup>8</sup> This is not limited to the private sector; the New Jersey Attorney General's Office, the very agency that prosecutes employers for violations of the state antidiscrimination laws, imposes a gender specific dress code.<sup>9</sup>

This paper will begin by discussing the line of cases involving appearance regulation in the workplace to demonstrate how courts have moved from complete deference to employers in imposing dress codes to recognizing that some situations should not be tolerated, culminating in the "unequal burden" test. Next, the shortcomings of this test will be analyzed to show that it reinforces social norms which inherently "unequally burden" women. I will also discuss some of the solutions that have been offered, namely the argument to change the test to the same used for immutable traits, the *McDonnell* test. Part V demonstrates how appearance regulation uniquely affects African American women and why any test must take that into consideration. Finally I posit a test which allows for dress code policies when they don't overly burden men or women and which recognizes "manifestations" of their immutable traits. Put another way, the unequal

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<sup>8</sup> See *infra*, Part I.

<sup>9</sup> E-mail from Human Resources, New Jersey Attorney General's Office, Division of Law, to All Employees (July 13, 2012) (on file with author).

"Business Attire – Monday through Thursday

Men: Suits or sport coats with dress slacks, dress shirts, ties, dress shoes or boots.

Women: Suits with pants or skirts, dresses, dress slacks, skirts, shirts, blouses, sweaters, knit tops or vests, jackets, heels, flats or boots.

Business Casual Attire:

Men: Casual slacks or pants including khakis, shirts with or without collars, sweaters, loafers, or deck shoes.

Women: Slacks, khakis, capris, skirts, casual dresses, blouses, sweaters, knit tops, shirts, boots, heels, flats, loafers or deck shoes."...

"Any employee who does not comply with the requirements of the work attire guidelines may be considered unfit for duty."

burden test can still exist, but the analysis must recognize the inherent burden that women face in regards to appearance. Furthermore, the test must keep in mind the historical prejudice against African Americans and should allow for, specifically, afros and braided hair (“corn rows”).

### **Part I: The “Unequal Burden” Test in Appearance Regulation**

Title VII states that it shall be an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”<sup>10</sup>

The Supreme Court promulgated a test which laid the groundwork for any litigation brought under Title VII. This framework, articulated in *McDonnell Douglas Corp. v. Green*, ultimately laid the foundation for the “unequal burden test” in appearance regulation (although as you will see, it is much easier to satisfy the unequal burden test). To establish a prima facie case, the plaintiff must be able to demonstrate that (1) they are a member of a protected class, (2) they were qualified for the position in question, (3) the plaintiff was subject to a materially adverse employment action despite being so qualified, and (4) can show the court that the employer acted with a discriminatory motive.<sup>11</sup> The burden then shifts to the employer to demonstrate that their decision-making was based on a legitimate business objective.<sup>12</sup> Then the burden shifts back to the plaintiff to disprove the stated objective by showing that this was merely a pretext for a discriminatory motive.<sup>13</sup>

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<sup>10</sup>42 U.S.C.A. § 2000e-2 (1964).

<sup>11</sup> See *McDonnell Douglas Corp. v. Green* 411 U.S. 792, 802 (1973).

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

<sup>13</sup> See *id.*

Title VII does not prohibit all discrimination on the basis of sex.<sup>14</sup> The statute explicitly allows discrimination when it is “reasonably necessary for the normal operations of that business or enterprise,” otherwise known as the “bona fide occupational qualification (BFOQ) exception.”<sup>15</sup> Basically, this means that in instances where only a certain gender could perform the work at issue, employers may legally discriminate against the other gender. However, this exception is viewed by the Supreme Court as being extremely narrow.<sup>16</sup> Exceptions have been found in relation to positions such as prison guards at maximum security prisons<sup>17</sup> and businesses where “female sexuality [is] reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers.”<sup>18</sup>

The statute also protects against cases in which an employer discriminates intentionally against females or males but does so in addition to having a legitimate business motive.<sup>19</sup> Although this will not absolve an employer of all liability, they are presented a limited defense if they can show that they would have reached the same conclusion in regards to their employment practice even without the impermissible discriminatory purpose.<sup>20</sup>

#### A. Appearance Regulation under Title VII

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<sup>14</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989) (“The existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute.”)

<sup>15</sup> 42 U. S. C. § 2000e-2(e) (1964).

<sup>16</sup> See *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

<sup>17</sup> *Id.* Alabama was allowed to prohibit female prison guards from working in certain areas of their maximum security prison due to fear of the safety of the women and the possibility of violent uproar among prisoners.

<sup>18</sup> *St. Cross v. Playboy Club*, Appeal No. 773, Case No. CFS 22618-70 (New York Human Rights Appeal Board, 1971). *Weber v. Playboy Club*, Appeal No. 774, Case No. CFS 22619-70 (New York Human Rights Appeal Board, 1971).

<sup>19</sup> 42 U.S.C. § 2000e-2(m) (1964).

<sup>20</sup> See generally *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

Since the inception of the Civil Rights Act, courts have not viewed dress codes that treat women and men differently as discrimination based on gender *per se*; the reasoning being that this does not constitute disparate treatment for immutable characteristics.<sup>21</sup> As a result, they originally did not subject these regulations to the test articulated in *McDonnell*. The first federal appellate case discussing appearance regulation, oddly enough, involved a male plaintiff.<sup>22</sup> In *Baker v. California Land Title Co.*, the employee was fired for wearing long hair to work, and claimed discrimination based on gender because women at the site were permitted to have long hair while men were not. The Ninth Circuit stated that the purpose of Title VII of the Civil Rights Act was to prevent employers from discriminating in hiring practices on the basis of gender, not to prevent “regulations by employers of dress or cosmetic or grooming practices which an employer might think his particular business required.”<sup>23</sup> The court made no mention of any concerns about additional burdens that these regulations may have on women, and deferred to the employer as to what was acceptable attire for their business.<sup>24</sup> Other federal courts came to a similar conclusion in related cases,<sup>25</sup> generally reasoning that “Congress sought only to give all persons equal access to the job market, not to limit an employer's right to exercise his informed judgment as to how best to run his shop.”<sup>26</sup>

Over time some courts did recognize that, theoretically, a policy which significantly

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<sup>21</sup> See *infra*, note 41.

<sup>22</sup> See generally *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974).

<sup>23</sup> *Id.* at 896.

<sup>24</sup> *Id.*

<sup>25</sup> See generally *Knott v. Missouri Pac. R.R.*, 527 F.2d 1249 (8th Cir. 1975); *Willingham v. Macon Telegraph Publ. Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc), vacating 482 F.2d 535 (5th Cir. 1973); *Longo v. Carlisle De Coppet & Co.*, 537 F.2d 685 (2d Cir. 1976); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973).

<sup>26</sup> *Willingham*, 507 F.2d at 1092.

burdened one gender over another could be problematic under Title VII.<sup>27</sup> In 1982, the Ninth Circuit implicitly recognized that its own wholesale acceptance of appearance regulation articulated in *Baker* was too broad.<sup>28</sup> In *Gerdom v. Continental Airlines*, the validity of a policy requiring female flight hostesses to comply with strict weight requirements as a condition of their employment was challenged as sex discrimination prohibited by Title VII.<sup>29</sup> Maintaining that differing weight requirements could generally be imposed on men and women, the court recognized that a Title VII violation was evident in this case, as the appearance policy imposed a “significantly greater burden of compliance” on females.<sup>30</sup> Male employees in similar positions had no weight requirement, and as a result “the airline could not successfully maintain that the image of slimness was the critical factor regardless of gender.”<sup>31</sup>

A weight requirement was, however, found valid in *Air Line Pilots Asso., Int’l v. United Air Lines, Inc.* There, United Air Lines imposed a weight requirement on both males and females with the stated goal of to achieving “a tasteful uniformity among the flight attendants as representatives of United, and to project a quality image of the flight attendants as clean, healthy, attractive individuals who take pride in themselves and their job.”<sup>32</sup> The court refused to find disparate treatment even though males were allowed to weigh more than their female counterparts of the exact same height and build,<sup>33</sup> and despite the fact that, in order to “make

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<sup>27</sup> See *Knott*, 527 F.2d at 1252 (Noting that the different requirements on men and women were “slight.”); See also *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 666 (C.D. Cal. 1972) (Stating that although employers could absolutely impose grooming requirements, they nevertheless held that a policy needed to apply equally to each gender. However, this seems limited to men being allowed to wear long hair when females are permitted to do so.).

<sup>28</sup> See generally *Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982).

<sup>29</sup> *Id.* at 603.

<sup>30</sup> *Id.* at 606.

<sup>31</sup> *Id.* at 610.

<sup>32</sup> *Air Line Pilots Asso., Int’l v. United Air Lines, Inc.*, 1979 U.S. Dist. LEXIS 11790, \*15-16 (E.D.N.Y. June 12, 1979)

<sup>33</sup> *Id.* at 17.

weight,” several women “resorted to extreme measures such as crash diets, steam baths, and diuretics in order to meet scheduled weigh-ins.”<sup>34</sup> The struggles of those women who suffered emotional and physical distress were seen as indicative more of the wisdom, or lack thereof, of United’s policy but did not show a violation of Title VII.<sup>35</sup>

The Ninth Circuit tackled the issue of weight requirements in 2000.<sup>36</sup> United Airlines imposed differing weight requirements on males and females, forcing “female flight attendants to weigh between 14 and 25 pounds less than their male colleagues of the same height and age.”<sup>37</sup> The court struck down this policy, noting that the company had used statistical data for “medium sized” females and used that as the requirement but allowed for “large sized” males under the same model.<sup>38</sup> The model was so outrageous that, using contemporary examples, the singer Shakira would likely be unfit to work at United Airlines. Additionally, Alana Beard, a WNBA star and Olympic athlete, would barely make the cut.<sup>39</sup> Consequently, the female plaintiffs had successfully shown a disparate treatment from males that could not be justified. The court pointed out, however, that they “need not decide whether a rule or regulation that compels individuals to change or modify their physical structure or composition, as opposed to simply presenting themselves in a neat or acceptable manner, qualifies as an appearance standard.”<sup>40</sup> Therefore, not only is it plausible that a company could still impose differing weight

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<sup>34</sup> *Id.* at 44.

<sup>35</sup> *Id.* The court did ultimately find that the plaintiffs had stated a viable claim, but only because the court determined that the Airline company had imposed the policy unevenly in granting substantially more exemptions to men than women. Had they not done so, then the policy would have withstood Title VII scrutiny.

<sup>36</sup> *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. Cal. 2000).

<sup>37</sup> *Id.* at 848 (“For example, the maximum weight for a 5’ 7”, 30-year-old woman was 142 pounds, while a man of the same height and age could weigh up to 161 pounds. A 5’ 11”, 50-year-old woman could weigh up to 162 pounds, while the limit for a man of the same height and age was 185 pounds.”).

<sup>38</sup> *Id.* at 854.

<sup>39</sup> Yahoo Sports, <http://sports.yahoo.com> (last visited December 4, 2012).

<sup>40</sup> *Id.*

standards under this holding, but they could potentially ask for changes in the physical structure of employees as long as they were not overly burdensome on one gender.

The seminal case discussing and, perhaps, cementing the “unequal burden” test was decided by the Ninth Circuit in 2006.<sup>41</sup> In *Jespersen v. Harrah’s Operating Co, Inc.*, a sports bar in a casino required females, but not males, to wear makeup as part of their “Personal Best” appearance policy.<sup>42</sup> The business also required all female colleagues “to meet with professional image consultants who in turn created a facial template<sup>43</sup> for each woman.”<sup>44</sup> These consultants, among other things, instructed the employees on how to apply makeup.<sup>45</sup> A female employee who refused to wear makeup was terminated and brought suit against her employer, alleging a Title VII violation.<sup>46</sup>

The majority was unconvinced that the employer had unlawfully discriminated. Recognizing the view that different standards could be imposed on men and women, they found that the company’s “Personal Best” dress policy did not unequally burden female employees.

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<sup>41</sup> *Jespersen v. Harrah’s Operating Co, Inc.* 444 F.3d. 1104, 1111 (9<sup>th</sup> Cir. 2006) (en banc).

<sup>42</sup> *Id.* at 1107 (The specific policy is listed below...)

“Beverage Bartenders and Barbacks will adhere to these additional guidelines...

Males:. Hair must not extend below top of shirt collar. Ponytails are prohibited.. Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.. Eye and facial makeup is not permitted.. Shoes will be solid black leather or leather type with rubber (non skid) soles..

Females:. Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.. Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.. Nail polish can be clear, white, pink or red color only. No exotic nail art or length.. Shoes will be solid black leather or leather type with rubber (non skid) soles.. *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors.* Lip color must be worn at all times. (emphasis added).

<sup>43</sup> This template showed the female employees a recommendation as to what makeup should be used given their facial features.

<sup>44</sup> *Jespersen*, 444 F.3d at 1114 (Pregerson, J., Dissenting).

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

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

The “unequal burden” test asks whether the actual effects of the appearance regulation adversely affect one gender more than the other.<sup>47</sup> The court did not find one in this instance and likened the makeup requirement to a requirement for males, but not females, to wear ties.<sup>48</sup> The court also found unpersuasive the argument that it costs far more money and takes more time for women to dress and groom themselves in a manner acceptable than their male counter parts, asserting that this was not general knowledge deserving of judicial notice.<sup>49</sup> Finally, the court noted that men had to comply with many dress requirements, and that this weighed against the Plaintiff’s argument that women were being unequally targeted.<sup>50</sup> As one scholar put it, the logic of the majority demonstrated that “the unequal burdens test is not only difficult to meet, but also depends largely on the subjective standpoint of the judges who are applying it.”<sup>51</sup>

The dissent strongly criticized the approach taken by the majority. Judge Pregerson asserted that the employer was discriminating against female employees on the basis of sex by forcing them to conform to gender stereotypes, namely by requiring them to wear makeup. As he put it “quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination ‘because of’ sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that gender must be *irrelevant* to employment decisions.”<sup>52</sup> He criticized the majority’s reasoning that the “Personal Best” policy was acceptable because there were some gender neutral requirements in the dress code; for example, the employees had to wear the same color clothes. To him this seemed

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (citing *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir 1977)).

<sup>49</sup> *Jespersen*, 444 F.3d. at 1114

<sup>50</sup> *Id.*

<sup>51</sup> Amy Lifson, *Enforcing Femininity: How Jespersen v. Harrah's Operating Co. Leaves Women in Typically Female Jobs Vulnerable to Workplace Sex Discrimination*, 42 U.S.F. L. REV. 849, 876 (2008).

<sup>52</sup> *Jespersen*, 444 F.3d. at 1114.

inconsistent with the holding in *Frank*. Using the majority's logic, the employer in *Frank* could shield themselves from liability if they were to require women, but not men, to meet a medium body frame standard *if* that requirement were imposed as part of a physical appearance policy that also required men to meet any level of upper-body fitness, no matter how slight.<sup>53</sup>

In summary, the current case law stands for the proposition that an employer may impose an appearance policy which differentiates according to gender as long as it does not impose an "unequal burden" on either males or females. Additionally, the fact that a woman is required to wear makeup, nail polish or hair that requires styling does not, as a threshold matter, satisfy the unequal burden test despite the additional time it may take women to comply. Courts may also be unwilling to recognize the financial burden that these requirements may impose on women. Nor is the employer required to adduce evidence that productivity requires gender-based appearance discrimination."<sup>54</sup> In sum, deference to the employer still persists, as courts will not tell an employer "how to run his shop" unless dress code policies are unconscionably discriminatory.

## **Part II- Sex Stereotyping in *Price Waterhouse* and the Unequal Burden Test**

Before criticizing the current standard, it should be noted that the Ninth Circuit should have based its decision in light of the Supreme Court's holding in a case involving sex stereotyping.<sup>55</sup> Sex stereotyping involves situations where a man or woman is judged based on assumptions of what men and women should or should not do. For example, an employer who fires a woman from a job because they feel she should be at home raising children would

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<sup>53</sup> *Id.* at 1116.

<sup>54</sup> Karl E. Klare, *For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism: Part Two: The Politics of Gender Identity: Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1418 (1992).

<sup>55</sup> See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

reinforce the traditional and outdated stereotype as women as the caregiver and homemaker. Courts have consistently stated that “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” and make them irrelevant in any employment decision.<sup>56</sup>

In *Price Waterhouse*, a woman brought suit under Title VII claiming that she was not promoted in an accounting partnership because she was not “feminine enough.”<sup>57</sup> Although “none of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership,”<sup>58</sup> she was nonetheless denied promotion due to low performance evaluations. In ruling for the plaintiff, the Court noted that the employee “proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board’s decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations.”<sup>59</sup> Like the employee in *Jespersen*, this woman was punished for failing to conform to how her employers felt she should look and act. Specifically, her employers found that she was too aggressive for a woman and could use “a course at charm school” where she could learn to walk and talk more femininely, wear make-up, have her hair styled, and wear jewelry in order to come off as more ladylike.<sup>60</sup> The Court explicitly condoned such behavior, stating that an employer could be found liable if they punished someone for not conforming to traditional and outdated stereotypes,<sup>61</sup> and further adding that “Title VII does not permit an employee to be treated adversely because his or her

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

<sup>57</sup> *Id.* at 235.

<sup>58</sup> *Id.* at 234.

<sup>59</sup> *Id.* at 251.

<sup>60</sup> *Id.* at 256.

<sup>61</sup> *Id.*

appearance or conduct does not conform to stereotypical gender roles." Justice Brennan found that the statute was explicit on this point, noting that the purpose of Title VII was to forever "forbid employers to take gender into account in making employment decisions."<sup>62</sup> Therefore, a female employee who is treated adversely based on how they dress should have a claim if they can show that these requirements are based on stereotypes of what women should wear.

Other federal courts have used this language to allow for more claims to be brought under Title VII.<sup>63</sup> Even the Ninth Circuit, the court that decided *Jespersen*, has broadened the scope of Title VII litigation in light of the ruling.<sup>64</sup> However, in *Jespersen* the court abruptly narrowed *Price Waterhouse* to only apply to cases involving sexual harassment<sup>65</sup> and maintained that the less stringent "unequal burden" test was necessary when looking at dress codes.<sup>66</sup> As they reasoned...

"There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement."<sup>67</sup>

However, a requirement that a woman wear makeup or her hair in a certain way, etc. are objective stereotypes of how we as a society feel women should dress. It seems

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<sup>62</sup> *Id.* at 239.

<sup>63</sup> *See, e.g.*, *Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997).

<sup>64</sup> *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.").

<sup>65</sup> *Jespersen*, 444 F.3d at 1083. ("[A]lthough we have applied the reasoning of *Price Waterhouse* to sexual harassment cases, we have not done so in the context of appearance and grooming standards cases, and we decline to do so here.").

<sup>66</sup> As the court stated, "We concluded that grooming and dress standards were entirely outside the purview of Title VII because Congress intended that Title VII only prohibit discrimination based on 'immutable characteristics' associated with a worker's sex." *Id.* at 1112.

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

incomprehensible that *Jespersen* can be rationalized when the Supreme Court has stated that “as for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>68</sup> Going against the Court, the employer in *Jespersen* evaluated his employee based on something other than her work performance, something that Title VII was meant to prohibit. Would *Price Waterhouse* have been decided differently if the accounting firm had instead imposed a dress code that required that the female employees wear makeup and go to charm school? Given the holding in *Jespersen*, it seems that the answer would be yes as long as men had to conform to some form of appearance regulation.

### **Part III- Female Expectations of Beauty and the Inherently Unequal Burden**

Attractiveness matters.<sup>69</sup> Allowing employers to impose dress codes permits them to model their employees as they feel proper.<sup>70</sup> In fact, this is precisely what the “Personal Best” program sought to accomplish.<sup>71</sup> The major problem with the current interpretation of the “unequal burden” test is that it fails to recognize that requiring women to wear makeup, meet weight requirements, and do things such as wear heels reinforces traditional stereotypes that impose an inherently undue burden on females. Many feminists argue that appearance and dress code regulations not only restrict women from expressing their true identity, but also subordinate

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<sup>68</sup> *Price Waterhouse*, 490 U.S. at 251.

<sup>69</sup> See Karen Zakrzewski, *The Prevalence of Lookism in Hiring Decisions*, 7 U. PA. EMP. L. 2 (2005) (discussing how employers tend to favor “attractive” people in hiring decisions.).

<sup>70</sup> See *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 (1987).

<sup>71</sup> See *Jespersen*, 444 F.3d at 1077 (“The goal of the program was to create a ‘brand standard of excellence’ throughout Harrah's operations, with an emphasis on guest service positions.”).

women to men.<sup>72</sup> The employer may not act knowingly, but what is considered “appropriate” in the office place tends to reflect white, male and heterosexual ideals about appearance.<sup>73</sup> These regulations maintain the sexual subordination of women as they reflect patriarchal views about what women “should” look like.<sup>74</sup> Unfortunately, this concern is not appreciated by courts, which generally seem to view these Title VII claims as unimportant.<sup>75</sup> Instead they created a watered down Title VII analysis in regards to dress codes, even though Title VII does not make exceptions for particular areas of employment.<sup>76</sup> In doing so, they perpetuate this subordination of women.

The identification of beauty as being attributed primarily to women dates back at least as far as Ancient Greece, where philosophers, in discussing virtue, attributed female beauty to good character.<sup>77</sup> Women have continuously attempted to conform to Western ideas of beauty over time by physically injuring their bodies.<sup>78</sup> For example, in the late 18<sup>th</sup> century, many women used a particular substance to give them a fair complexion even though many died from using it.<sup>79</sup> Additionally, corsets were worn by many women into the 20<sup>th</sup> century made of wood, iron or steel. Intended to make women’s waists appear slimmer, the device caused “organ displacement, headaches, fainting, and breathing problems.”<sup>80</sup> This process of injuring the body to conform to

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<sup>72</sup> See, e.g., Catharine A. Mackinnon, *Difference and Dominance: On Sex Discrimination, in Feminism Unmodified*, 87 MICH. L. REV. 32 (1987).

<sup>73</sup> Karl E. Klare; *For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism: Part Two: The Politics of Gender Identity: Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1431 (1992).

<sup>74</sup> *Id.* at 1421.

<sup>75</sup> See, e.g., *Anheuser-Busch, Inc. v. Teamsters Local No. 633*, 511 F.2d 1097, 1098 (1st Cir. 1975), cert. denied, 423 U.S. 875 (1975) (describing case involving a dress code issue as a “tempest . . . brewed in a very small teapot”)

<sup>76</sup> See *id.* at 1083 (J. Thomas, dissenting).

<sup>77</sup> See generally SUSAN BROWNMILLER, *FEMININITY* 35 (1984).

<sup>78</sup> See Julie M. Spanbauer, *Breast Implants as Beauty Ritual: Woman’s Sceptre and Prison*, 9 YALE J.L. & FEMINISM 157 (1997).

<sup>79</sup> *Id.* at 165.

<sup>80</sup> *Id.* (citing LOIS BANNER, *AMERICAN BEAUTY* 10 (1983)).

cultural visions of beauty continues to this day, particularly in regards to breast augmentation.<sup>81</sup> As one scholar put it, “we accept it as part of our culture because women voluntarily engage in the practice and also because society at large is probably unaware of the level of pain, damage and even deformity that can result from a “successful”... surgery.”<sup>82</sup>

In regards to hair, the modern practice of “Brazilian Keratin treatment,” a method of straightening female hair, has raised concerns about its alarming health risks.<sup>83</sup> This process has spread in popularity throughout the United States even though it contains as much as ten times the safe amount of Formaldehyde, a dangerous carcinogen. In spite of this fear, salons charge as much as \$800 for the procedure and it continues to grow in popularity.<sup>84</sup>

Specifically in regards to weight, women are under considerably more pressure than males in regards to societal expectations.<sup>85</sup> Naomi Wolf, in The Beauty Myth, argues that even as women have advanced in many areas, our society has created a cycle of self-loathing in regards to how they should view their bodies.<sup>86</sup> According to Wolf, advertising has created a theoretical object she dubs the “Iron Maiden,” the contemporary ideal of beauty.<sup>87</sup> This Maiden is unrealistic in her appearance, especially in regards to weight,<sup>88</sup> and women suffer physically and psychological as they try to meet this vision of beauty. For example, 40% of women who smoke

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 167.

<sup>83</sup> *Health Alarm over New Hair Straightener, CBS News Online.* (Feb.10, 2009), [http://www.cbsnews.com/2100-500165\\_162-3414868.html](http://www.cbsnews.com/2100-500165_162-3414868.html)

<sup>84</sup> *Id.*

<sup>85</sup> *See generally* NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (1991)

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

<sup>87</sup> *Id.* at 17 (“The original Iron Maiden was a medieval German instrument of torture, a body-shaped casket painted with the limbs and features of a lovely, smiling young woman. The unlucky victim was slowly enclosed inside her; the lid fell shut to immobilize the victim, who died either of starvation or, less cruelly, of the metal spikes embedded in her interior.”).

<sup>88</sup> Wolf argues that as time has progressed this maiden gets more and more thin. She uses Twiggy and Kate Moss as examples. WOLF, at 184

say they do so to maintain weight.<sup>89</sup> Additionally, recent studies have shown that women use far more diet pills and are exponentially more likely than men to have eating disorders.<sup>90</sup> Women also are considerably more likely to be unhappy about their bodies, even if they are not medically obese.<sup>91</sup> A survey of college females found that, in listing their concerns about their lives, the overriding “problem” in their lives was their weight; “all wanted to lose 5-25 points, even though most were not remotely overweight.”<sup>92</sup> Due to these physical and psychological results, Wolf argues that in many ways, women live a worse life than their ancestors.<sup>93</sup>

The informal nature of the unequal burden test (i.e. its lack of explicit factors to look at in analyzing what constitutes an unequal burden) injures women because the media constantly tells them that they must toe a line between being “businesslike” and “feminine”<sup>94</sup> Additionally, women are under the extra burden of trying to look “sexy.” As one scholar put it, “hotness has become our cultural currency, and a lot of people spend a lot of time and a lot of regular, green currency trying to acquire it.”<sup>95</sup> Although it is technically impossible to conform exactly to the Iron Maiden, women spend considerable time and energy attempting to look like her as a way to be viewed as acceptable.

High heels, although worn by many women, have adverse physical consequences to those who wear them.<sup>96</sup> In a study by the Journal of Applied Physics, it was discovered that women who chronically wear heels have shorter fibers in their calf muscles and have to use more energy

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<sup>89</sup> *Id* at 5

<sup>90</sup> *Id.*

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

<sup>92</sup> WOLF, *supra*, note 85 at 213.

<sup>93</sup> *See generally* note 86.

<sup>94</sup> WOLF, *supra* note 85 at 43.

<sup>95</sup> ARIEL LEVY, *FEMALE CHAUVINIST PIGS* (2005), 31

<sup>96</sup> Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295, 300-03 (1997).

to cover the same distance as non-heel wearers even when they were wearing flat shoes.<sup>97</sup>

Additionally, they experience medical problems when exercising. “In a person who wears heels most of her working week,” the Doctor performing the study said, the foot and leg positioning in heels “becomes the new default position for the joints and the structures within”<sup>98</sup>. Any change to this default setting,” he says, like pulling on Keds or Crocs, constitutes “a novel environment, which could increase injury risk.”<sup>99</sup> These health problems were not found in older women; most of the people in the study were in their twenties.<sup>100</sup> These risks are not prominently discussed in the mainstream, as a cursory look at the internet for articles on high heels usually discusses how important heels are as they allow woman to have raised buttocks, giving the wearer a younger looking physique. Given that these medical risks of wearing high heels seems rather conclusive, it seems to *per se* burden women by requiring that they wear clothing which can negatively affect their health while not requiring the same of males.

It should be noted that African American women may suffer even more than their Caucasian counterparts in sacrificing their physical and mental health to become an “Iron Maiden.” Devon Carbado and Mitu Gilatu have argued that people of color “have a greater incentive to perform comfort strategies” than others in order to “fit in” at work.<sup>101</sup> Therefore, they will likely exert extra energy in order to conform to traditional models of what women “should do” because they are at an extra risk of being ostracized in the office place. This extra work can be exhausting as they must juggle acting in this manner with performing their work.

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<sup>97</sup> Neil Cronin, *Long-term use of High-Heeled Shoes Alters the Neuromechanics of Human Walking*. J APPL PHYSIOL.1104 (2012) (Found online at <http://www.ncbi.nlm.nih.gov/pubmed/22241055>)

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

<sup>99</sup> Gretchen Reynolds, *A Scientific Look at the Dangers of High Heels*, N.Y. TIMES, January 25, 2012, <http://well.blogs.nytimes.com/2012/01/25/scientists-look-at-the-dangers-of-high-heels/>.

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

<sup>101</sup> Devon W. Carbado, *The Fifth Black Woman* 11 J. CONTEMP. LEGAL ISSUES 717-720 (2001).

Unfortunately, in wearing the necessary clothes and makeup to “fit in”, women open themselves up to sexual harassment from employers and fellow employees, who in many instances justify their behavior by saying that the women “asked for it” by dressing in a sexual manner in the office place.<sup>102</sup> It is of no concern that were they to not dress in such a manner, they may be ostracized like the women in *Price Waterhouse* or *Jespersen*. Rather than blame their employees and actively litigate, many women blame themselves for the harassment. “Two-thirds to almost nine tenths of [women] experience harassment that they blame on themselves and their appearance.”<sup>103</sup> Requirements or expectations that women wear makeup and certain dress also injure women financially. Statistics show that they make less than their male counterparts, yet “urban professional women are devoting up to a third of their income on “beauty maintenance... [seen as] a necessary investment.”<sup>104</sup> Requirements on makeup, hair, dress, etc. also hurt women physically. A disproportionate number of professional women say they feel tired most of the time and lack the energy for the “kind of social activism or freewheeling thought that would allow them to question and change [the patriarchal system that perpetuates self-loathing] itself.”<sup>105</sup> In sum, women have to spend more time and money than men in order to be viewed as professional in the workplace, and in doing all of this their actual work product suffers.

Some could argue that women should negotiate with their employers in order to secure a more gender-neutral dress code. However, this fails to appreciate that the employer is at a considerable position of power over their employees when negotiating the terms of employment, specifically their dress code preferences. Female employees are at a disadvantage in regards to

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

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

<sup>105</sup> WOLF, *supra* note 85 at 53.

their employer usually because they tend to need the job more than the employer needs them.<sup>106</sup>

In fact, “the costs of exit from employment are frequently very high particularly for long term employees who have invested human capital in a job.”<sup>107</sup> Therefore, they likely will not be able to negotiate with their employer for a favorable policy, and likely will just endure so as to keep their job. Therefore, many policies that clearly violate Title VII under even the most conservative view of the “unequal burden” test are never litigated. Courts need to be aware of this fact, and should be more vigilant in striking down appearance regulation.

Additionally, given the aforementioned ideals about what women “should” look like, many female employees accept the dress codes as being par for the course in regards to employment. Why challenge an employment policy that simply asks that women comply with visual standards that the media and, more generally, society imposes on them? In fact, even in the absence of a dress policy like the “Personal Best” requirements, many women would still dress in that manner because that’s what they may feel they “should” do.

The unequal burden test, as presently construed, continues to perpetuate this ideal by viewing as acceptable requirements for women to meet with a coach to assist them in applying makeup, have their hair teased, wear heels, etc. It is true that many feminists are reluctant to deny women the right to dress how they see fit as a means of expressing themselves.<sup>108</sup> However, the law should have no place in requiring women to conform to the patriarchal system of beauty. Any decision by women to wear heels, makeup, or curly hair should be their own, and certainly

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<sup>106</sup> Klare, at 1418.

<sup>107</sup> *Id.*

<sup>108</sup> SUSAN BROWNMILLER, FEMININITY 79 (1984).

should not be mandated by employers. Giving women the choice to dress or not dress as society deems appropriate is how they can finally repossess their own bodies.<sup>109</sup>

As a result of these and other concerns, scholars have presented a variety of ideas on how the test should be changed. One idea is to use a reasonable person test with recognition that our society should base work on performance, and not appearance.<sup>110</sup> This test has positives, however it suffers from the same problem as the “unequal burden” test. In implementing an objective test, we still allow for majority androcentric views about how women should dress to thrive.

Another interesting theory is posited by Allison Steinle.<sup>111</sup> She argues that “courts have the capacity to efficiently and equitably put the teeth back in Title VII by applying the same considerations to appearance and grooming standards cases as they do to immutable status Title VII claims.”<sup>112</sup> This would mean using the test articulated by the Supreme Court in *McDonnell* without lowering the standard of review for appearance regulation. This seems to follow the rationale of the dissent in *Jespersen*.<sup>113</sup> Effectively, this would only allow for gender neutral dress codes which required proper grooming and hygiene as they could be applied uniformly.

At first blush, this approach seems to provide the desired result. Women will likely be free of any dress requirements which reinforce notions of what is appropriate for them. However, this test fails to realize the interplay that exists between race and gender. An employer could

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<sup>109</sup> LESLIE KENTON, *THE JOY OF BEAUTY* 4 (1983).

<sup>110</sup> Jennifer Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-fication of Bartenders*, 14 DUKE J. GENDER L. & POL'Y 285 (“It would have been consistent with *Price Waterhouse* had the Jespersen court used a “reasonable person” with a masculine or androgynous gender identity to test the reasonableness of Harrah's rules for male bartenders, and it probably would have vindicated Darlene's discrimination claim.”)

<sup>111</sup> Allison Steinle, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 U. CATH. L. REV 261 (2006).

<sup>112</sup> *Id.* at 291

<sup>113</sup> *See infra*, note 69.

legitimately require that all employees have clean cut hair. This seems acceptable under the *McDonnell* framework. However, this could pose serious problems to African American women.

### Part V- African Americans and the Concept of Hair Independence

*“Hair seems such a little thing. Yet it is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory its grounding, and test its legitimacy.”*<sup>114</sup>

Steinle’s call for treating appearance regulation cases with the same analysis as immutable status Title VII claims fails to recognize the unintended negative consequences that this would have on African American women. Steinle argues that hairstyle grooming requirements are, under her test, acceptable because they can be applied equally to men and women without overly burdening either gender; requiring short, well groomed hair doesn’t involve any physical traits that cannot be changed.<sup>115</sup> However, to many African American women, hair style is intimately related to their immutable characteristic; wearing their hair in an afro or braided is a fundamental way that they identify with their African ancestry. They cannot simply “choose” whether or not to wear their hair in an Afro or braided just as much as they could choose to be African American.

Paulette Caldwell, among others, has commented on the significant importance hair styling is for many African American women:

*“For black women, [hairstyle] choices... reflect the search for a survival mechanism in a culture where social, political and economic choices of racialized individuals and groups are conditioned to the extent to which their physical characteristics, both mutable and immutable approximate those of the dominant racial group.”*<sup>116</sup>

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<sup>114</sup> Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, DUKE L.J. 384 (2000)

<sup>115</sup> Steinle, *infra*, note 95.

<sup>116</sup> *Id.*

The use of hair by African Americans as a cultural expression appears to have gained national prominence during the civil rights movement.<sup>117</sup> Several scholars have stated that American concepts of beauty have long rejected natural African American hair as being unsightly; dating back from antebellum days when hair was the primary indicator of their inferiority.<sup>118</sup> This may be because in many African cultures at the time (and up to the present day) many Africans styled their hair as a way of recognizing their status, identity, and ancestry.<sup>119</sup> Upon arriving to the Americas in bondage, many slaves had their hair shaved for sanitary reasons. However, as far back as the 1850s scientists were arguing that Africans were of a lesser species than Whites in part due to their wooly hair.<sup>120</sup> Additionally, “with pride being a factor as well as needing to not offend White people, house slaves were often given time for grooming and slave women were encouraged to iron their hair straight in the manner of their White counterparts.”<sup>121</sup> Many Blacks living in the antebellum South recognized this stereotype and tried to straighten their hair using axle grease or dirty dishwater with oil.<sup>122</sup> “Slaves knew the ideal of beauty didn’t fit them,” says Neal Lester, chairman of the English Department at Arizona State University.<sup>123</sup> In fact, Madame C.J. Walker, the first African American female to be a millionaire, made her fortune selling hair straightening products.<sup>124</sup>

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<sup>117</sup> See generally AYANNA BYRD, *HAIR STORY, UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA*.(2012)

<sup>118</sup> See, e.g. WILLIE MARROW, *400 YEARS WITHOUT A COMB* (1973). See also ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH; A COMPARATIVE STUDY* (1985).

<sup>119</sup> Whitney Bellinger, *Why African Women Obtain Good Hair*, *SOCIAL VIEWPOINTS* (2007) (<http://www.pasocsociety.org/bellinger.pdf>).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Imus’ Remark has Long, Hurtful History*, MSNBC.COM, Apr. 13 2007 (available at [http://today.msnbc.msn.com/id/18081301/ns/today-entertainment/t/imus-nappy-remark-has-long-hurtful-history/#.UIsX\\_ob4K3c](http://today.msnbc.msn.com/id/18081301/ns/today-entertainment/t/imus-nappy-remark-has-long-hurtful-history/#.UIsX_ob4K3c))

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

Over time, African Americans began to reject the straightening of their own hair to conform to white views of attractiveness. The radical shift became evident in the 1960s as prominent leaders in the African American community, such as Malcolm X, came to reject processes such as “conking,” a practice of chemically straightening one’s hair, as a misguided attempt to “look white.”<sup>125</sup> As he put it:<sup>126</sup>

“This was my first really big step toward self-degradation: when I endured all of that pain, literally burning my flesh to have it look like a white man’s hair. I had joined that multitude of Negro men and women in America who are brainwashed into believing that the black people are “inferior”—and white people “superior”—that they will even violate and mutilate their God-created bodies to try to look “pretty” by white standards.”<sup>127</sup>

Additionally, African American poets like Nikki Giovanni railed against African Americans straightening their hair. In her poem “On Liberation,” she says “Black people these are the facts.. Where’s your power... Honkies tell niggers don’t burn... but they insist on straightened hair, they insist on bleaching creams... it has been pointed out... the last bastion of white supremacy is in the Black man’s mind”<sup>128</sup> Others artists such as Gwendolyn Brooks and Lucille Clifton voiced similar concerns.

In addition to insisting on wearing their hair naturally, many African Americans view the use of braided hair as a similar manifestation of their inherent identity; they are making assertions of the self that stand in stark contrast to “the characteristics and appearance of the hair of whites.”<sup>129</sup> There is evidence that cultures in Africa have braided their hair as early as 500 B.C.E. “Hieroglyphs and sculptures dating back thousands of years illustrate the attention

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<sup>125</sup> MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

<sup>126</sup> This was recounting the first time he underwent the procedure at a barber shop.

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

<sup>128</sup> NIKKI GIOVANNI, *On Liberation*, in *THE COLLECTED POETRY OF NIKKI GIOVANNI 1968-1998* (2007).

<sup>129</sup> Caldwell, *supra* note 114 at 111.

Africans have paid to their hair. Braids were etched into the back of the head of the majestic sphinx."<sup>130</sup>

This trend continued in the United States. "African in origin, the practice of braiding is an American- black American- as sweet potato pie." Some slaves, especially after the abolition of the international slave trade, were able to have slightly more autonomy; some had one day off for church. On Sunday, many "women would gather and braid everyone's hair; on this day everyone 'let their hair out' without wearing scarves. After everyone's hair was done, the women would attend church where everyone could view one another's hair. All the women's hair would be braided in elaborate patterns and designs which would remain in for the rest of the week but once again hidden under a scarf to keep it nice."<sup>131</sup>

Like Afros, braided hairstyle has lived on as a political statement for many African Americans, as evidenced by Cicele Tyson, who wore braided hair to the Academy Awards for that purpose ten years before it was popularized in the main stream by a white actress.<sup>132</sup> To belittle this use of braided hair is to "make invisible all of the black women who for centuries have worn braids in places where they and their hair were not overt threats to the American aesthetic."<sup>133</sup>

As Paulette Caldwell, a prominent scholar on this subject, noted...

"I want to know my hair again, the way I knew it before I knew that my hair is me, before I lost the right to me, before I knew that the burden of beauty – or lack of it – for an entire race of people could be tied up with my air and me."<sup>134</sup>

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<sup>130</sup> *Transformational Geometry and Itineration in Corn Rows*,  
([http://csdt.rpi.edu/african/CORNROW\\_CURVES/cornrow\\_homepage.html](http://csdt.rpi.edu/african/CORNROW_CURVES/cornrow_homepage.html))

<sup>131</sup> *Id.*

<sup>132</sup> Caldwell, *supra*, note 114 at 141.

<sup>133</sup> *Id.*

<sup>134</sup> Caldwell, *supra*, note 114.

Given these feelings, Caldwell has argued that African American hair and the wearing of it naturally or in braids is not as much a choice as it is a manifestation of their immutable characteristic, their racial identity. To enforce appearance regulation which allows for bans on these hair styles, therefore, is unlawful discrimination under Title VII of the Civil Rights Act.

Courts certainly have not been receptive to any argument that a ban on braided hair or likely, Afros, offends Title VII, rationalizing that these are not an immutable traits.<sup>135</sup> In a prominent case involving hair styles, an African American women claimed discrimination, in relevant part, on Title VII grounds challenging her employer's dress policy prohibiting braided hair.<sup>136</sup> The court ruled for the employer, noting that the policy was addressed to both men and women and because there was no factual evidence that this policy only practically affected women.<sup>137</sup> In response to the idea that an all-braided hair style is "a part of the cultural and historical essence of Black American women", the court first noted that "the defendants have alleged without contravention that plaintiff first appeared at work in the all-braided style after... the style had been popularized by a white actress" in a major motion picture.<sup>138</sup> In this way, the court insinuated that White people wear braided hair, thus belittling their cultural significance to African Americans. They then went on to say that since corn rows are artificially made and easy to remove, they did not count as an immutable trait.<sup>139</sup> Furthermore, the defendant's assertion that the airline had a right to "project a conservative and business-like image" was found reasonable by the court in justifying the prohibition.<sup>140</sup>

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<sup>135</sup> Rogers v. American Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981)

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* The Court stated that men have long hair that, theoretically, could be made into a braids.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

In another case, a black female employee at a detoxification unit was terminated for refusal to remove or cover her “corn rows” and attached beads, which violated the company dress code.<sup>141</sup> In rejecting the plaintiff’s claim that her hair style was an expression of her ethnic culture, the court claimed that it could not accept “that the wearing of beads in one's hair is an immutable characteristic, such as national origin, race, or sex. Further, this court cannot conclude that the prohibition of beads in the hair by an employer is a subterfuge for discrimination.”<sup>142</sup>

These courts seem to adopt an analysis similar to the one called for by Steinle. Put another way, the reasoning of the *Rogers* and *Carswell* courts would still withstand the proposed Title VII scrutiny because, practically speaking, hair styles are not immutable. That logic allows American Airlines to “enforce its view that it might lose sales if some flight attendants or ticket agents wear corn rows, despite the consequences to African-American women in hurt, shame, and impaired employment opportunity.”<sup>143</sup> It should be noted that the *Rogers* court stopped short of saying that a policy that prohibited a natural Afro hairstyle would violate Title VII. Other courts seem to waffle on this issue as well. For example, the Seventh Circuit ruled in favor of a plaintiff who was denied a promotion because her employer stated she “could never represent Blue Cross with [her] Afro.”<sup>144</sup> In the court’s opinion, “a laypersons description of racial discrimination could hardly be more explicit.”<sup>145</sup> However, it should be noted that this case was the result of a derogatory statement by an employer. Were there a neutral policy that happened to be violated by an Afro, the court likely would have reached a different conclusion. In only one

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<sup>141</sup> *Carswell v. Peachford Hospital*, 1981 U.S. Dist. LEXIS 14562 (N.D. Ga. May 26, 1981)

<sup>142</sup> *Id.* at 6.

<sup>143</sup> Klare, *supra*, note 73 at 15. Klare finds this view deplorable in our society given our supposed commitment to equality and multicultural diversity.

<sup>144</sup> *Jenkins v. Blue Cross Mut. Hospital Ins., Inc.*, 538 F.2d 164, 168 (7th Cir. 1976).

<sup>145</sup> *Id.*

instance was such a policy explicitly found to be in violation of Title VII, and that was an administrative court ruling.<sup>146</sup>

### **Part VI- “An Unequal Burden Test with Bite”**

Were courts to read *Price Waterhouse* as prohibiting any type of sex stereotyping, then arguably the concerns about discriminatory treatment against women in general could be alleviated. Any dress code which differentiated between men and women could be invalidated since differentiation “because of” gender would *per se* violate Title VII unless the employer could prove their discriminate treatment meet the “bona fide occupational qualification.” This, as aforementioned, is likely to fail. However, given that the “unequal burden” test has been used consistently since its inception, it appears that courts like the Ninth Circuit are unlikely to change course unless the Supreme Court hears a case explicitly about appearance regulation.

The alternative solution is to maintain an unequal burden test, but to recognize where the starting point is for measuring the “burden.” We should start by honestly analyzing the cost and time necessary for employees of each sex to comply with the policy.<sup>147</sup> Additionally, we must never allow for a policy which reinforces traditional stereotypes of how men and women should dress, especially if they physically harm women. Therefore, requirements about makeup, high heels, and others would immediately be subject to scrutiny under Title VII. Second, given the severe health issues that have followed in regards to body image and females, any weight requirement would be acceptable only if it fell under the BFOQ exception. Finally, courts should take note of the fact that hairstyles often have cultural roots, especially in regards to African

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<sup>146</sup> EEOC Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971 ) (Held that a black employee was unlawfully discharged because his "natural" or "Afro" haircut did not comply with the employer's dress code, which prohibited "bushy" hair or hair "extending in line of sight beyond the ear. “).

<sup>147</sup> *Jespersen*, 392 F.3d at 1081.

Americans. All dress policies should recognize “cultural manifestations” of their immutable trait, their African American identity. This identity has been subordinated throughout American history and Blacks should be allowed to reclaim that identity in the face of Caucasian views of professionalism. This would mean that employers would be unable to ban Afros or “braided hair” when their only justification is to project a “professional and businesslike office place.”

One could argue that this test has an enormous flaw. Where does it end? Couldn't any employee claim that the way they are dressed is a “manifestation” of their immutable trait? Richard Ford argues that, by allowing for discrimination claims to be brought on the basis of discrimination of “some Black women” and not others, we weaken Title VII. He specifically mentions *Rogers* and states that many Black women oppose wearing corn-rows.<sup>148</sup> If that is the case, then how could we prohibit an employer from banning the practice of wearing them when it is unsettled whether or not the practice lies at the “cultural essence” of Black women?

Although this argument has merit, even Ford agrees that some African Americans view braided hair as a necessary manifestation of their immutable trait. Given the fact that African Americans have been so flagrantly discriminated against in our country, it seems that courts should recognize the unique need for African Americans to reclaim an identity that for hundreds of years was denied to them. As aforementioned, African Americans have been pressured to make their hair look more “white” for centuries. Many wear their hair in a natural Afro or in braids as a means to reclaim their identity. Unless an employer can show that short, straight hair is needed for a reason other than to portray a “professional image,” we should not deny them this opportunity.

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<sup>148</sup> RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE 24 (2005).

**Part VII- Conclusion**

Courts, when analyzing a Title VII challenge to an appearance regulation, should impose an “unequal burden” test which recognizes the inherent burdens that historically are imposed on women in regards to makeup, weight, and other dress in the office place. Additionally, courts should recognize that, especially in regards to African American women, wearing hair in an Afro or braided is a “manifestation” of their immutable trait, their African heritage.