LEAVING EMPLOYERS IN THE DARK: WHAT CONSTITUTES A LAWFUL APPEARANCE STANDARD AFTER *JESPERSEN V. HARRAH'S OPERATING CO.*?

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INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] prohibits discrimination on the basis of race, color, sex, religion, or national origin.[2] Although Title VII clearly forbids employers from discriminating on the basis of sex, courts allow employers to impose "sex-differentiated grooming policies."[3] Under current case law, employers may impose one appearance standard or dress requirement for women and a completely different standard or requirement for men.[4] Courts determine the validity of a sex-differentiated grooming policy by examining whether the policy significantly deprives either sex of employment opportunities, and whether the employer even-handedly applies the

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1 42 U.S.C. § 2000e-2(a)(1)-(2) (2000).

2 *Id.*

> (a) Employer practices
> It shall be an unlawful employment practice for an employer—
> (1) 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; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

3 *See infra* note 4.

4 *See, e.g.*, Barker v. Taft Broad. Co., 549 F.2d 400 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091–92 (5th Cir. 1975) (en banc); Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973).

policy to employees of both sexes.[5] The question for the courts is not whether the policy is *different* for men and women, but rather, whether the sex-differentiated grooming policy imposed on the employees creates an "unequal burden" on the employees based on their sex.[6]

The dominant position advocated by scholars is that sex-differentiated grooming policies are one of the most blatant remaining forms of gender discrimination.[7] Critics question how these requirements can survive Title VII's prohibition on gender discrimination.[8] Following the dominate view regarding sex-differentiate grooming policies, a recent decision by the United States Court of Appeals for the Ninth Circuit questions an employer's right to impose a sex-differentiated grooming requirement.[9] In the case of *Jespersen v. Harrah's Operating Co.*,[10] the defendant, Harrah's, fired the plaintiff, a female bartender, after she failed to comply with Harrah's sex-differentiated grooming policy, which mandated that female employees wear makeup.[11] In an en banc decision, the Ninth Circuit held that an employer's sex-differentiated grooming policy, which may include makeup requirements for women, may be the subject of a Title VII claim for sexual stereotyping.[12] The court then held that the plaintiff failed to provide sufficient evidence of sex-based discrimination to survive Harrah's motion for summary judgment.[13] The court's analysis of Harrah's sex-differentiated grooming policy revealed that the policy did not disproportionately burden women, and, therefore, Harrah's sex-differentiated grooming policy did not violate the unequal burden test.[14]

Since the *Jespersen* court based its holding on the specific facts of the case before it, the court's decision does not preclude *future* claims

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[5] *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006); Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 605–06 (9th Cir. 1982) (citing *Barker*, 549 F.2d at 401); *Earwood*, 539 F.2d at 1350; *Knott*, 527 F.2d at 1252; Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 457 (D.C. Cir. 1976); *Dodge*, 488 F.2d at 1337.

[6] *Jespersen*, 444 F.3d at 1110.

[7] *See infra* Part IV.

[8] *See infra* Part IV.A.

[9] *Jespersen*, 444 F.3d 1104.

[10] 444 F.3d 1104 (9th Cir. 2006).

[11] *Id.* at 1108.

[12] *Id.* at 1106.

[13] *Id.*

[14] *Id.* at 1109.

of sex stereotyping on the basis of sex-differentiated grooming policies.[15] The decision in *Jespersen* leaves employers in the Ninth Circuit uncertain about the lawfulness of their sex-differentiated grooming policies.[16] The only guidance provided to employers is that the law of sex-based stereotyping continues to "evolve."[17]

The court's and scholars' disapproval of sex-differentiated grooming policies ignores the fact that men and women are not exactly the same. Title VII does not command androgynous appearance standards for the sexes. Rigid sex neutrality is neither required by Title VII, nor socially desirable.[18] This Note argues that courts should not require employers to impose a sex-neutral grooming requirement on their employees. Sex-differentiated grooming policies allow employers to project their business's image to the public in a controlled and regulated manner.[19] Employers who use sex-differentiated grooming standards for men and women are not necessarily equating "different" with "demeaning."

This Note analyzes sex-differentiated grooming policies in the aftermath of *Jespersen* and criticizes the Ninth Circuit Court of Appeals' decision to modify previously accepted standards for evaluating sex-differentiated grooming policies. Part I of this Note provides a background discussion of both Title VII and sex-based stereotyping. Part II examines sex-differentiated grooming policy cases prior to *Jespersen*, analyzing both an employer's right to regulate an employee's appearance and limitations on that right. Part III discusses the Ninth Circuit's decision in *Jespersen*, examining the majority opinion and the two dissenting opinions. Next, Part IV analyzes the controversy regarding extending Title VII's prohibition of sex stereotyping and Title VII to sex-differentiated grooming policies. This Part also examines the unequal burdens test stated by the *Jespersen* court and concludes that sex-neutrality is neither mandated, nor encouraged by existing law. Finally, in Part V, this Note criticizes the uncertain position in which the Ninth Circuit's recent decision places employers with respect to sex-differentiated grooming policies and

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15 *Id.* at 1113.

16 Judith A. Moldover, *Maddened by Makeup*, N.Y.L.J., Aug. 25, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1156425446367.

17 *Jespersen*, 444 F.3d at 1113.

18 Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 198 (2004).

19 *See infra* Part II.A.

outlines possible solutions for employers to avoid Title VII sex stereotyping claims.

I. BACKGROUND OF TITLE VII

A. Prohibiting Sex Discrimination

Congress passed Title VII to ensure employees equal access to employment by prohibiting discrimination based on "race, color, sex, religion or national origin."[20] Plaintiffs may file Title VII lawsuits on two bases: disparate treatment and disparate impact.[21] In a "disparate treatment" case, the employer treats a group of individuals less favorably than another group because of their race, color, religion, sex, or national origin.[22] Proof of discriminatory motive is critical, although sometimes the court can infer discriminatory motive "from the mere fact of differences in treatment."[23] A "disparate impact" case involves employment policies that are facially neutral in their treatment of a protected group, but unjustifiably affect one group more harshly than another when they are put into practice.[24] These cases do not require proof of discriminatory motive.[25]

While Title VII provides broad protection to employees, it does contain one exception.[26] An employer may institute divergent policies based on sex, religion, or national origin if the employer establishes a "bona fide occupational qualification" (BFOQ) defense.[27] The BFOQ exception allows disparate employment practices if the practice is "reasonably necessary to the normal operation of the particular business or enterprise . . . ."[28] Although the BFOQ defense is a seemingly narrow exception to the general prohibition on sex discrimination, courts have interpreted this exception quite broadly. For example, the United States Supreme Court used the BFOQ exception to uphold a rule requiring prison guards in contact positions to be the same gender as the inmates.[29]

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20 *See supra* note 2.

21 Frank v. United Airlines, Inc., 216 F.3d 845, 853 (9th Cir. 2000).

22 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

23 *Id.*

24 *Id.*

25 *Id.*

26 42 U.S.C. § 2000e-2(e)(1) (2000).

27 *Id.*

28 *Id.*

29 Dothard v. Rawlinson, 433 U.S. 321, 334-35 (1977).

The existence of the BFOQ defense strongly suggests that Congress's intent in enacting Title VII was not to burden employers by requiring them "to change the very nature of their operations" to comply with the statute.[30] The Supreme Court's emphasis on business necessity in disparate impact cases and on legitimate, nondiscriminatory reasons in disparate treatment cases reflects Title VII's balance between employee rights and employer prerogatives.[31]

B. Sex Stereotyping Under Title VII

The United States Supreme Court addressed the issue of how Title VII affected sex stereotyping in the disparate treatment case of *Price Waterhouse v. Hopkins*.[32] The plaintiff, Ann Hopkins, was a senior manager at Price Waterhouse when her colleagues nominated her for a partnership position.[33] According to Price Waterhouse's partnership policy, a senior manager could become a candidate for partnership if the partners in the local office nominated that person.[34] After nomination, the current partners submitted comments on the candidate.[35] After reviewing the comments and interviewing the partners who submitted comments, the firm's admission committee recommended either acceptance of the candidate for partnership, rejection of the candidate, or placement of the candidate's nomination on hold.[36]

In comments supporting her candidacy for partnership, "the partners in Hopkins's office showcased her successful two year effort to secure a $25 million contract with the Department of State . . . ."[37] However, among the praise of Hopkins's character and accomplishments, some comments also noted Hopkins's overly aggressive personality traits, her difficulties in working with other employees, and her impatience with staff.[38] The firm's admission committee ulti-

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30 Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989).

31 *Id.* at 242-43 ("[T]he existence of the BFOQ exception shows Congress's unwillingness to require employers to change the very nature of their operations in response to the statute.").

32 490 U.S. 228 (1989).

33 *Id.* at 231.

34 *Id.* at 232.

35 *Id.*

36 *Id.* at 232.

37 *Id.* at 233.

38 *Price Waterhouse*, 490 U.S. at 234-35.

mately denied Hopkins's candidacy for partnership, and Hopkins sued, alleging sex discrimination under Title VII.[39]

Although the Court noted Hopkins's problems interacting with staff members, it also found signs that the partners reacted negatively to Hopkins's personality because of her sex.[40] Specifically the Court pointed to examples where partners described Hopkins as "macho," commented that she "overcompensated for being a woman," and advised her to take "a course at charm school."[41] One partner even suggested that Hopkins should walk, talk, and dress more femininely, and wear jewelry and makeup to improve her chances for partnership.[42] Thus, the evidence suggests the partnership committee considered both Hopkins's job performance and her lack of femininity when deciding whether to make her a partner.[43]

The plurality in *Price Waterhouse* noted that Congress intended to forbid employers from taking sex into account in the selection, evaluation, or compensation of employees.[44] The Court formulated a test to examine mixed motive cases, such as *Price Waterhouse*, in which an employer takes into account both legitimate factors, such as job performance, and illegitimate factors prohibited by Title VII, such as gender.[45] In *Price Waterhouse*, the partnership committee looked at both Hopkins's excellent job performance and her lack of femininity when making the decision for partnership.[46] The plurality held that, if a plaintiff in a Title VII case proves that gender played a motivating part in an employment decision, then the defendant may avoid a finding of liability only by proving, by a preponderance of the evidence, that it would have made the same decision even if the employer had not taken the plaintiff's gender into account.[47] The plurality found that the lower court erred in deciding that the defendant must provide clear and convincing evidence that it would have made

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39 *Id.* at 231-32.

40 *Id.* at 235.

41 *Id.*

42 *Id.* at 235.

43 *Id.*

44 *Price Waterhouse*, 490 U.S. at 239 ("Congress's intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.").

45 *Id.* at 241.

46 *Id.* at 251 (the Court found that an employer who requires aggressiveness in the job position, but objects to aggressiveness in women, places women in an intolerable Catch-22: "out of a job if they behave aggressively and out of a job if they do not").

47 *Id.* at 258.

the same decision even if it had not taken the plaintiff's gender into account, and therefore, the Supreme Court reversed and remanded.[48]

After *Price Waterhouse*, several circuits recognized a cause of action under Title VII for an employer's discrimination resulting from an employee's failure to conform to gender stereotypes.[49] However, "[n]either the logic nor the language of *Price Waterhouse* establishes a cause of action for sex discrimination in every case" of an employee's failure to conform with gender stereotypes.[50] Title VII allows an employer to take sex into account when making an employment decision, so long as the employer provides a BFOQ defense that taking sex into account is reasonably necessary for the normal operation of the particular business.

As the *Price Waterhouse* ruling demonstrates, Title VII forbids employers from making gender an indirect stumbling block for employment opportunities.[51] Thus, facially neutral tests or qualifications cannot have a disproportionate, adverse impact on members of a protected group when such tests or qualifications are not required for performance of the job.[52] The plurality in *Price Waterhouse* recognized that an employer's inability to take gender into account is only one aspect of Title VII; another important aspect is the employer's freedom of choice.[53] Employers are not liable if they can show that they would have reached the same employment decision if they did not take gender into account.[54] In *Price Waterhouse*, Justice Brennan, speaking for the plurality, found that Congress did not intend employers to change the essence of their business operation in response to Title VII.[55] Rather, Congress intended to have employers focus on employees' job qualifications, not their race, religion, color, national origin, or sex.[56]

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48 *Id.*

49 Schroer v. Billington, 424 F. Supp. 2d 203, 208 (D.C. Cir. 2006) (citing Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Doe v. City of Belleville, 119 F.3d 563, 580 (7th Cir. 1997); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262-63 (3d Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

50 *Schroer*, 424 F. Supp. 2d at 208. Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989).

51 *Price Waterhouse*, 490 U.S. at 242.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 243.

II. SEX-DIFFERENTIATED GROOMING POLICIES

Although the Supreme Court established in *Price Waterhouse* that gender cannot play a motivational role in employment decisions, this ruling does not preclude sex-differentiated grooming policies.[57] As discussed below, the courts have found that in some instances employers can enforce sex-differentiated grooming policies without violating Title VII. This Section first explores an employer's ability to regulate an employee's appearance through sex-differentiated grooming policies. Then the Section discusses the unequal burdens test and articulates the limitations of sex-differentiated grooming policies.

A. Employer's Right to Regulate the Employee's Appearance

Courts have long upheld an employer's right to regulate an employee's appearance and dress.[58] In determining if a grooming policy constitutes sex discrimination, a court will often look to mutable versus immutable or protected characteristics.[59] Mutable characteristics consist of traits based on personal preference, such as hair length.[60] In contrast, immutable characteristics are those based on innate traits, such as national origin, race, or child-rearing, that either cannot or should not be required to change.[61]

Congress intended Title VII to address sexual classifications that have a significant effect on employment opportunities.[62] For example, courts almost uniformly agree that an employer can regulate an employee's hair length in ways that result in differing hair length requirements for men and women.[63] Sex-differentiated hair length requirements do not violate Title VII because hair length is a mutable

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57 *See infra* Part II.A.

58 Barker v. Taft Broad. Co., 549 F.2d 400 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975) (en banc); Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973).

59 *Willingham*, 507 F.2d at 1092; *Earwood*, 539 F.2d at 1351.

60 *Willingham*, 507 F.2d at 1092; *Earwood*, 539 F.2d at 1351.

61 *Willingham*, 507 F.2d at 1091; *Earwood*, 539 F.2d at 1351.

62 *Willingham*, 507 F.2d at 1092 ("Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities." (quoting *Dodge*, 488 F.2d *at* 1337)).

63 *See* Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir. 1998); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907 (2d Cir. 1996); *Earwood*, 539 F.2d at 1351; *Knott*, 527 F.2d at 1252; *Willingham*, 507 F.2d at 1091-92; *Dodge*, 488 F.2d at 1337.

characteristic; if an employee objects to the grooming policy, the employee can look for work elsewhere.[64] Courts have held that, without a far more explicit Congressional mandate than that articulated in Title VII, they will not endorse an unwarranted encroachment on an employer's right to prescribe reasonable sex-differentiated grooming policies that take into account societal standards.[65]

In addition, courts have refused to extend Title VII protection to claims based solely on weight or physical and sexual attractiveness requirements.[66] Thus, an employer may consider weight or other physical characteristics when hiring employees.[67] An employer may additionally impose weight restrictions on its employees.[68] For example, an employer may regulate the weight of flight attendants as part of that employer's personal appearance regulations.[69] The Ninth Circuit Court of Appeals has consistently held that sex-differentiated grooming policies that do not significantly deprive either sex of employment opportunities and are applied even-handedly to employees of both sexes are permissible.[70] The material issue in these types of policies is not whether the requirements are different, but whether the sex-differentiated grooming policy imposed on the employee creates an "unequal burden" based on the employee's gender.[71]

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[64] *Willingham*, 507 F.2d at 1091.

[65] Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1124 (D.C. Cir. 1973); *Willingham*, 507 F.2d at 1091.

[66] Marks v. Nat'l Commc'ns Ass'n, 72 F. Supp. 2d 322, 330 (S.D.N.Y. 1999); Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123, 1131 (Cal. 2005).

[67] *Marks*, 72 F. Supp. 2d at 330 (finding that discrimination based on weight *alone*, or on any other physical characteristic for that matter, does *not* violate Title VII, unless issues of race, religion, sex, or national origin are intertwined).

[68] Jarrell v. E. Air Lines, Inc., 430 F. Supp. 884, 891-93 (E.D. Va. 1977); *In re* Nat'l Airlines, Inc., 434 F. Supp. 269, 275 (S.D. Fla. 1977).

[69] *Jarrell*, 430 F. Supp. at 891-93; *Nat'l Airlines*, 434 F. Supp. at 275.

[70] Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 605-06 (9th Cir. 1982) (citing Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977)); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1350 (4th Cir. 1976); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Laffey v. Nw. Airlines, Inc., 567 F.2d 429, 457 (D.C. Cir. 1976); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973). *See also* Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000); Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006).

[71] *Jespersen*, 444 F.3d at 1110.

B. Limitations on Appearance and Grooming Policies

Even without a written dress code, employers are legally permitted to require their employees to maintain a professional image.[72] However, employers must apply their grooming standards in a way that does not inflict a disproportionately higher burden on one sex as compared to the other sex. For example in *Hollins v. Atlantic Co.*,[73] the Sixth Circuit Court of Appeals found that a Title VII disparate treatment claim was viable because the employer applied an unwritten, race-neutral hairstyle policy differentially to a black female employee.[74] Just as the *Hollins* Court applied Title VII to a facially race-neutral policy, appearance standards and dress policies are also facially discriminatory when they apply to only one sex or when they impose an unequal burden on one of the sexes.[75]

A sex-differentiated grooming policy that imposes an unequal burden on one sex constitutes disparate treatment, which must be justified by a BFOQ defense.[76] In *Frank v. United Airlines, Inc.*,[77] the Ninth Circuit Court of Appeals held that an employer could not mandate stricter weight standards for its female employees without a justified BFOQ defense.[78] The employer, United Airlines, utilized maximum weight regulations that were based on the sex, height, and age of its male and female employees;[79] however, the weight requirement required female flight attendants to weigh in under the standard for a medium sized body frame, while the weight requirement for their male counterparts allowed male flight attendants to weigh in under the standard for large body frames.[80] The court held that United Airlines could not impose different *and more burdensome* weight standards on its female employees without justifying those standards under a BFOQ defense, which United Airlines failed to do.[81]

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72 Wislocki-Goin v. Mears, 831 F.2d 1374, 1376 (7th Cir. 1987) ("Although there is no written dress code, [the employer] describes her dress standards as the 'Brooks Brothers look.'").

73 188 F.3d 652 (6th Cir. 1999).

74 *Id.* at 660-61.

75 Rohaly v. Rainbow Playground Depot, Inc., 2006 Wash. App. LEXIS 1917, at *12 (Wash. Ct. App. Aug. 28, 2006); *see also Carroll*, 604 F.2d at 1033.

76 *Frank*, 216 F.3d at 855.

77 216 F.3d 845 (9th Cir. 2000).

78 *Id.* at 854.

79 *Id.* at 848.

80 *Id.*

81 *Id.* at 855.

In addition, while an employer can require that all employees wear sex-differentiated uniforms, an employer cannot mandate that female employees, alone, must wear uniforms.[82] In *Carroll v. Talman Federal Savings & Loans Association of Chicago*,[83] the court found that an appearance policy that required women to wear uniforms and men to wear customary business attire violated Title VII.[84] The court found that the requirement demeaned women because it subjected male and female employees performing the same job function to two different dress standards.[85] The *Carroll* employer based its appearance policy on the offensive stereotype "that women cannot be expected to exercise good judgment in choosing business apparel, whereas men can."[86] The court failed to find any business necessity for the differing standards given that the employer had a variety of alternative nondiscriminatory means of assuring good grooming.[87]

Employers are also forbidden from requiring uniforms that are overtly sexual or exposing.[88] In *EEOC v. Sage Realty Corp.*,[89] the New York District Court held that an employer's uniform requirement constituted sex discrimination because the female employees' uniforms were overly exposing.[90] The plaintiff employee was a lobby attendant, whose employer required her to wear a uniform at all times without exception.[91] A few years after the employee began working, the employer issued new uniforms that exposed the employee's thighs and portions of her buttocks.[92] After unsuccessfully requesting alterations to the uniform, the employee wore the exposing uniform and experienced repeated harassment.[93] Thereafter, she refused to wear the new uniform, and her employer terminated her employment.[94] After reviewing photographs of the uniform, the court found the uniform to be short, revealing, and sexually provocative.[95] The court

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82 *Id.*
83 604 F.2d 1028 (7th Cir. 1979).
84 *Id.*
85 *Id.* at 1032-33.
86 *Id.* at 1033 n.17.
87 *Id.* at 1032.
88 EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609 (S.D.N.Y. 1981).
89 507 F. Supp. 599 (S.D.N.Y. 1981).
90 *Id.*
91 *Id.* at 603-04.
92 *Id.* at 604.
93 *Id.* at 605.
94 *Id.* at 606-07.
95 *Sage Realty*, 507 F. Supp. at 607.

additionally found that the defendant required the employee to wear the uniform because she was a woman and made wearing the uniform a condition of her employment.[96] In its opinion, the court never questioned the employer's prerogative to impose reasonable sex-differentiated grooming policies on employees when those requirements have a negligible effect on employment opportunities and present no distinct employment disadvantages.[97] However, because the employer knew that its female uniform requirement subjected the employee to sexual harassment, the uniform requirement constituted employment discrimination based on sex.[98]

In summary, employers may impose sex-differentiated grooming policies on employees.[99] However, appearance requirements cannot inflict a higher burden on one sex. The central issue is not whether the grooming standards are different, but whether the sex-differentiated grooming policy creates a disproportionately higher burden for one sex compared to the other sex, or imposes employment barriers based on the employee's sex.[100]

III. *JESPERSEN V. HARRAH'S OPERATING CO.*

A. Case Facts and Procedural Posture

In *Jespersen v. Harrah's Operating Co.*, the plaintiff, Darlene Jespersen, worked as a bartender for Harrah's Operating Company for twenty years and had an exemplary performance record.[101] In February 2000, Harrah's implemented a new sex-differentiated grooming policy, called the "Personal Best" program.[102] The program required both men and women to wear standard uniforms and contained sex-specific requirements regarding hair, nails, and makeup.[103] In April

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96 *Id.*

97 *Id.* at 608.

98 *Id.* at 609.

99 Barker v. Taft Broad. Co., 549 F.2d 400 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973).

100 Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1110 (9th Cir. 2006); Frank v. United Airlines, Inc., 216 F.3d 845, 885 (9th Cir. 2000); Carroll v. Talman Fed. Sav. & Loans Ass'n of Chi., 604 F.2d 1028, 1033 (7th Cir. 1979).

101 *Jespersen*, 444 F.3d at 1107-08.

102 *Id.* at 1107.

103 *Id.*

2000, Harrah's amended the "Personal Best" program to require that women wear makeup.[104] However, Darlene Jespersen never wore makeup on or off the job.[105] She found the makeup requirement offensive, and she felt that wearing makeup interfered with her ability to do her job.[106] Jespersen was also unable to find a different open position within Harrah's that paid the same salary, but did not require her to wear makeup.[107] Eventually, Harrah's terminated Darlene Jespersen for her failure to comply with the "Personal Best" policy.[108]

After her termination, Jespersen filed a Title VII sex discrimination suit against Harrah's in July 2001.[109] In her complaint, Jespersen sought damages as well as declaratory and injunctive relief for sex discrimination.[110] Jespersen claimed the "Personal Best" policy subjected women to terms and conditions of employment to which men were not similarly subjected, and required women to conform to sex-based stereotypes as a term and condition of employment.[111]

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[104] *Id.* The amended policy provided in relevant part:

> All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.
>
> Beverage Bartenders and Barbacks will adhere to these additional guidelines:
>
> Overall Guidelines (applied equally to male/ female): (1) Appearance: Must maintain Personal Best image portrayed at time of hire; (2) Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets; (3) No faddish hairstyles or unnatural colors are permitted.
>
> Males: (1) Hair must not extend below top of shirt collar. Ponytails are prohibited; (2) Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted; (3) Eye and facial makeup is not permitted; (4) Shoes will be solid black leather or leather type with rubber (non skid) soles.
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> Females: (1) Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions; (2) Stockings are to be of nude or natural color consistent with employee's skin tone. No runs; (3) Nail polish can be clear, white, pink or red color only. No exotic nail art or length; (4) Shoes will be solid black leather or leather type with rubber (non skid) soles; (5) *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.*

Id. (emphasis in original).

[105] *Id.*

[106] *Id.* at 1107-08.

[107] *Jespersen*, 444 F.3d at 1108.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

Harrah's moved for summary judgment against Jespersen.[112] Harrah's argued that the policy created similar standards for both men and women, and any sex-differentiated grooming requirements imposed equal burdens on both male and female bartenders.[113] Jespersen testified that she felt degraded and demeaned when she wore makeup and wearing makeup prohibited her from performing her job because it affected her self-dignity.[114] She provided no evidence of any negative effects of the makeup requirement other than her deposition testimony.[115] The district court found that the record was void of any evidence to establish that the "Personal Best" program imposed unequal burdens on Harrah's male and female employees.[116] The district court granted Harrah's motion for summary judgment and Jespersen appealed.[117]

B. The Majority Opinion

In *Jespersen*, the three judge panel of the Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment for the defendant.[118] The appellate court then decided to rehear *Jespersen* en banc for two purposes: first, to reaffirm Ninth Circuit law regarding appearance and grooming standards; and second, to clarify the evolving law of sex stereotyping.[119] The Ninth Circuit Court of Appeals upheld the district court's decision by finding that Jespersen failed to provide sufficient evidence to support her allegation that the sex-differentiated grooming policy was motivated by sex stereotyping, or that the requirements imposed unequal burdens on women as compared to their male counterparts.[120]

First, the court employed the unequal burdens test.[121] The Ninth Circuit Court of Appeals declined to take judicial notice of the fact

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112 *Id.*

113 *Jespersen*, 444 F.3d at 1108.

114 *Id.*

115 *Id.*

116 *Id.* ("The district court further observed that the Supreme Court's decision in *Price Waterhouse v. Hopkins*, prohibiting discrimination on the basis of sex stereotyping, did not apply to this case because in the district court's view, the Ninth Circuit had excluded grooming standards from the reach of *Price Waterhouse*.").

117 *Id.*

118 Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004), *vacated*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

119 *Jespersen*, 444 F.3d at 1105.

120 *Id.* at 1106.

121 *Id.* at 1108.

that it takes more time and costs more money for women to comply with the makeup standard than for men to comply with the hair requirement.[122] Jespersen did not provide any documentation or evidence of the relative cost and time required to comply with the appearance policy for men or women.[123] Given the dearth of evidence, the court found it inappropriate to speculate whether the "Personal Best" program created unequal burdens for men and women.[124] Thus, the Ninth Circuit affirmed the district court's decision to grant Harrah's summary judgment motion on the ground that the sex-differentiated grooming policy imposed equal burdens on both male and female bartenders.[125]

The court then turned to the issue of sex stereotyping.[126] For this part of its analysis, the court utilized the *Price Waterhouse* standard, which allows an employee in a Title VII case to introduce evidence that her employer made an employment decision in part due to sex stereotyping.[127] The court found that Jespersen failed to provide any evidence that Harrah's adopted the "Personal Best" policy to make female bartenders conform to a commonly accepted stereotypical image of what women should wear.[128] Harrah's required all of its employees to wear exactly the same uniforms, which were, for the most part, unisex.[129] Nothing in the record suggested that the grooming policy objectively inhibited a woman's ability to perform the job.[130] The court distinguished Jespersen's claim from *Price Waterhouse* because Harrah's grooming standards did not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job as a bartender.[131]

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122 *Id.* at 1110.

123 *Id.*

124 *Id.*

125 *Jespersen*, 444 F.3d at 1111.

126 *Id.*

127 *Id.*

128 *Id.* at 1112.

129 *Id.*

130 *Id.*

131 *Jespersen*, 444 F.3d at 1113 (The "record . . . is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer. This case is essentially a challenge to one small part of what is an overall apparel, appearance, and grooming policy that applies largely the same requirements to both men and women . . . the touchstone is reasonableness. A makeup requirement must be seen in the context of the overall standards imposed on employees in a given workplace.").

In *Price Waterhouse*, the employer refused to promote the plaintiff because of the plaintiff's lack of femininity.[132] Likewise, the *Jespersen* court held that its decision did "not preclude, as a matter of law, a claim of sex stereotyping on the basis of dress or appearance codes."[133] The final decision hinged on the fact that the record of *Jespersen* was devoid of any basis that permitted Jespersen's claim to succeed.[134] Thus, under *Jespersen*, an employee can now file claims for sex-differentiated grooming policies based on sex stereotypes, refining any basis for such claims as the law in this area evolves.[135]

C. *The Dissent Opinions*

Judges Pregerson and Kozinski wrote spirited dissents in *Jespersen*.[136] Judge Pregerson agreed with the majority that sex-differentiated grooming policies may be subject to a Title VII claim;[137] however, he dissented from the majority because he found that the "Personal Best" program was motivated by sex stereotyping. He also found that Jespersen's termination for failing to comply with the program's requirements was "because of" her sex.[138] According to Judge Pregerson, Harrah's termination of Jespersen constituted sex discrimination because Jespersen was only terminated as a result of her failure to comply with a grooming policy that imposed a "facial uniform" solely on female bartenders.[139] Judge Pregerson argued that this type of action is clearly impermissible under Title VII, which requires gender to be a non-factor in employment actions.[140]

Judge Pregerson also disagreed with the majority's determination that *Price Waterhouse* mandated a certain type or amount of evidence to prove a *prima facie* case of gender discrimination.[141] The judge recognized that gender discrimination is not restricted to mandating how women should behave, but may manifest in policies that dictate appearance standards based on stereotypical notions of how women

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132 Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

133 *Jespersen*, 444 F.3d at 1113.

134 *Id.*

135 *Id.*

136 *Id.* (Pregerson, J., joined by Kozinski, Graber, and Fletcher, JJ., dissenting); *Id.* at 1117 (Kozinski, J., joined by Graber and Fletcher, JJ., dissenting).

137 *Id.* at 1113 (Pregerson, J., joined by Kozinski, Graber, and Fletcher, JJ., dissenting).

138 *Id.* at 1114.

139 *Jespersen*, 444 F.3d at 1114.

140 *Id.*

141 *Id.* at 1115.

should dress and present themselves.[142] "The fact that Harrah's designed and promoted a policy that required women to conform to a sex stereotype by wearing full makeup is sufficient 'direct evidence' of discrimination."[143] Viewing the makeup/facial uniforms requirement in narrow context, rather than the broad category of hair, hands and face (as the majority did), Judge Pregerson concluded that the policy constituted impermissible sex stereotyping.[144] Therefore, the judge argued that the court should have denied the employer's motion for summary judgment and the case should have gone to the jury.[145]

Judge Kozinski also dissented from the majority's opinion and agreed with Judge Pregerson's dissent.[146] However, Judge Kozinski also added the caveat that Jespersen had presented a triable issue of fact on the question of disparate burden.[147] The judge found that Harrah's overall grooming policy was substantially more burdensome for women than men.[148] Judge Kozinski pointed out that women would have had to spend more time and money to comply with the "Personal Best" program than their male counterparts.[149] He argued that the court should have taken judicial notice of the additional costs women incurred to comply with the makeup requirement.[150] Judge Kozinski also argued that the makeup requirement was highly intrusive and he asked his fellow judges to consider how demeaning it would feel if the court required all judges to wear face powder, blush, mascara, and lipstick while on the bench.[151] Thus, Judge Kozinski found no justification for requiring women bartenders to conform to Harrah's quaint notion of what a "real woman" looks like.[152]

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142 *Id.*

143 *Id.*

144 *Id.* at 1116.

145 *Jespersen*, 444 F.3d at 1117.

146 *Id.* (Kozinski, J., joined by Graber and Fletcher, JJ., dissenting).

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Jespersen*, 444 F.3d at 1118.

152 *Id.*

IV. EXTENDING *PRICE WATERHOUSE* ANALYSIS AND TITLE VII TO SEX-DIFFERENTIATED GROOMING POLICIES

A. Critics of Sex-Differentiated Grooming Policies

In the wake of *Jespersen*, critics are claiming that courts ignore the implications of *Price Waterhouse* and the intent of Title VII by allowing sex-differentiated grooming policies.[153] The argument is that an employer's grooming policy cannot impose one set of requirements on one sex and a different set of standards on the other sex without violating Title VII and *Price Waterhouse*.[154] Recent articles have echoed this sentiment by stating that sex-differentiated grooming policies are inherently discriminatory and paternalistic, and that courts should take steps toward dismantling the disparities that sex-differentiated grooming policies impose.[155] Opponents of judicial decisions that allow sex-differentiated grooming policies also advance the argument that the unequal burdens test is an ineffective means for ensuring the realization of Title VII ideals.[156] However, the statute does not mandate, nor do the courts desire, a requirement for rigid sex neutral-

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153 William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C.L. REV. 1357 (2006); *see generally* Megan Kelly, *Making-Up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in* Jespersen v. Harrah's Operating Co., 36 GOLDEN GATE U. L. REV. 45 (2006) (arguing that the unequal burdens test provides employees insufficient protection from discrimination); Hillary Bouchard, Case Note, Jespersen v. Harrah's Operating Co.*: Employer Appearance Standards and the Promotion of Gender Stereotypes*, 58 ME. L. REV. 203 (2006) (advocating for the extension of *Price Waterhouse* and a more powerful Title VII).

154 Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 68 (1995).

155 Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2562 (1994); 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); Mary Wisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 76 (1982); *but see* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11 (2006) (advocating for freedom of dress that the law would treat as a unique right with is own particularities); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006) (arguing for a reexamination of the legality of workplace dress codes in terms of the universal protections for liberty and autonomy that are protected by the right of privacy rather than through group-based equality doctrine).

156 Miller, *supra* note 153, at 1360.

ity.[157] The unequal burdens test is an effective means to ensure the intent of Title VII and *Price Waterhouse*.[158]

Critics of the limited application of Title VII and *Price Waterhouse* argue that courts should permit women to possess any feature or attribute that men are permitted to possess in the workplace, and vice versa.[159] One of those critics, Mary Ann Case, provides a strong defense for this rationale.[160] Case asserts that sex-specific clothing regulations constitute disparate treatment, prohibited by Title VII and *Price Waterhouse*.[161] She claims that employers will have less respect for women in pink frilly dresses than for men or women in business suits.[162] Therefore, "the world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well."[163] Case concludes that employers do not have to allow women to wear such clothing, but if they do, they must allow men to do the same.[164]

While scholars may argue that Title VII and *Price Waterhouse* mandate a rejection of sex-differentiated appearance standards, the courts have disagreed.[165] Thirty years of precedent reveals that it is *not* sex discrimination for employers to require members of each sex to dress as dictated by the socially accepted standards prescribed by our culture.[166] An advocate of this view, Kimberly Yuracko, contends that the U.S. Supreme Court intended in *Price Waterhouse* "to protect individuals from adverse employment actions resulting from their possession of attributes that would be acceptable to the employer if possessed by individuals of the other sex."[167] She points out that the mission of Title VII was not to claim that men and women are the same, but to eradicate the impression that women were incapable of

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157 Yuracko, *supra* note 18, at 172; *see also* discussion *supra* Part II.A; Michael Starr & Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?*, 21 LAB. LAW. 213, 244 (2006).

158 See *infra* Part IV.B.

159 Yuracko, *supra* note 18, at 177; Case, *supra* note 154, at 68.

160 Case, *supra* note 154, at 68.

161 *Id.*

162 *Id.*

163 *Id.*

164 If an employer tolerates feminine behavior or attire in women but not in effeminate men, the employer is subjecting these men to disparate treatment in violation of Title VII. *Id.* at 7.

165 See *supra* Part II.A.

166 Starr & Strauss, *supra* note 157, at 244.

167 Yuracko, *supra* note 18, at 181-82.

filling the same roles as men in the workforce.[168] Encouraging rigid neutrality between the sexes forces androgyny, resulting in what is known as a sub-Pareto optimal outcome.[169] Thus, Yuracko argues that allowing employers to institute some sex-specific rules results in some women and men being made better off without making anyone worse off.[170] The arguments for an extension of *Price Waterhouse* and Title VII ignore the fact that we do not live in a gender-neutral world.[171] As Yuracko correctly points out, Title VII and *Price Waterhouse*, do not authorize the courts to create a blanket rule requiring employers to act in a rigid and formalistically sex-neutral manner towards their employees.[172]

Nevertheless, other scholars argue that the courts' analyses of sex-differentiated grooming standards mask and reinforce the discriminatory nature of such policies.[173] Even in a case where a court found a grooming policy to be in violation of Title VII, that court also noted that if it had found "some justification in commonly accepted social norms . . . [sex-differentiated standards] are not necessarily violations of Title VII."[174] Critics of such decisions insist that the courts must find new ways to sharpen Title VII's standards for identifying discrimination in employment practices that appear harmless and ordinary because of social and community standards.[175] These critics argue that mainstream conventional norms are sexist and patriarchal.[176] They contend that courts blindly ignore prejudices by allowing different appearance standards for men and women so long as the burdens on the sexes are equivalent and merely enforce prevailing community standards.[177] Thus, scholarly critics conclude that "different" means

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168 *Id.* at 198.

169 *Id.* at 203. Pareto optimal outcome means that given a set of alternative allocations and a set of individuals, a movement from one allocation to another that can make at least one individual better off, without making any other individual worse off. Wikipedia, Pareto Efficency, http://en.wikipedia.org/wiki/Pareto_efficiency (last visited Aug. 16, 2007).

170 Yuracko, *supra* note 18, at 203.

171 Starr & Strauss, *supra* note 157, at 245.

172 Yuracko, *supra* note 18, at 198.

173 Bartlett, *supra* note 155, at 2563-64.

174 Carroll v. Talman Fed. Sav. & Loans Ass'n of Chi., 604 F.2d 1028, 1032 (7th Cir. 1979).

175 *See* Bartlett, *supra* note 155, at 2568.

176 Klare, *supra* note 155, at 1417-18.

177 *Id.* at 1418.

"unequal" and the courts should replace any standard, such as the unequal burdens test, that perpetuates these differences.[178]

Scholars have offered various suggestions to modify or replace the unequal burdens test. One suggestion is that, in an attempt to provide a more complete approach to evaluating grooming standards under Title VII, the courts must look at the root or historical basis of the community standard.[179] If the investigation reveals that the standard is demeaning or offensive, the court should invalidate the standard under Title VII.[180] In his dissent in *Jespersen*, Judge Kozinski notes the changes in cultural norms and finds no justification for forcing female bartenders "to conform to Harrah's quaint notions of what a 'real woman' looks like."[181] Building on the logic of Judge Kozinski's dissent, the problem is not that courts fail to transcend community norms–an impossible goal–but that the law fails to analyze critically the extent these norms incorporate the attitudes and stereotypes that Congress intended Title VII to combat.[182]

Critics of the unequal burden test also argue that an employer can balance away harmful discrimination by pointing to a corresponding burden the grooming policy imposes on the opposite gender.[183] These critics contend that, although the court in *Jespersen* correctly stated that a plaintiff may establish a Title VII claim for sex stereotyping in a grooming standard case, the Ninth Circuit Court of Appeals should have done more to clarify the elements of the claim and give it force.[184] A two prong test for evaluating grooming standards under Title VII emerges from the criticism regarding the Ninth Circuit Court of Appeals' limited approach in *Jespersen*.[185] Under the first prong of this test, the court would evaluate a grooming standard to determine whether it perpetuates harmful stereotypes.[186] The second prong would entail the traditional unequal burdens test: weighing the costs

178 *See* Wisner, *supra* note 155, at 85; Miller, *supra* note 153, at 1360; Kelly, *supra* note 153, at 46; *see also* Klare, *supra* note 155, at 1396.

179 Miller, *supra* note 153, at 1366; *see also* Bartlett, *supra* note 155, at 2545.

180 Miller, *supra* note 153, at 1366.

181 Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1118 (9th Cir. 2006) (Kozinski, J., joined by Graber and Fletcher, JJ., dissenting).

182 Bartlett, *supra* note 155, at 2568.

183 Miller, *supra* note 153, at 1360.

184 *Id.*

185 *Id.* at 1365-66.

186 *Id.* at 1366.

and burdens imposed by the sex-differentiated grooming standards.[187] Failure to satisfy either prong of the test would constitute a violation of Title VII.[188]

B. Misconstruing Sex-Differentiated Grooming Policies

In support of the unequal burdens test, this Note argues that the critics misconstrue the plurality holding in *Price Waterhouse* regarding Title VII's intended purpose.[189] Title VII demands equal access to employment opportunities for men and women.[190] The Court in *Price Waterhouse* intended to allow women to possess traits deemed acceptable for men without suffering adverse employment actions.[191] However, the newly proposed two pronged test requires the court to make a subjective determination regarding what constitutes a harmful sex stereotype.[192] Although courts are often compelled to make subjective determinations, the result of such determinations is often inconsistency.[193] If courts adopt the argument that all differences in grooming standards are patriarchal and sexist,[194] then the courts will have to fill in the blanks. The resulting patchwork of rules for employers will result in confusion and increased litigation. Such a scenario is not consistent with the intent of Title VII.[195]

Critics of the unequal burdens test argue that the tests allows employers to perpetuate harmful sex stereotypes based on archaic or obsolete community standards.[196] However, demanding women to wear skirts and requiring men to have hair no longer than the top of their collars, while at the same time prohibiting men from wearing skirts and imposing no hair length restriction on women, does not reinforce the message of male dominance and female weakness.[197]

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187 *Id.*

188 *Id.*; *see also* Yuracko, *supra* note 18, at 226 (discussing the elimination of particularly harmful or limiting gender roles).

189 Starr & Strauss, *supra* note 157, at 244; *see* Yuracko, *supra* note 18, at 172.

190 *See* Yuracko, *supra* note 18, at 172-73.

191 *Id.* at 181-82.

192 Miller, *supra* note 153, at 1368.

193 *Id.*

194 Klare, *supra* note 155, at 1417-18; Wisner, *supra* note 155, at 76, 86; *see* Case, *supra* note 154, at 68.

195 *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982) ("Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits.") (emphasis in original).

196 Miller, *supra* note 153, at 1370.

197 *See* Yuracko, *supra* note 18, at 201.

Although some employees may feel constrained by sex-specific grooming policies, such practices do not inhibit Title VII's goal of substantive sex equality.[198] Constraining men's hair length or barring men from wearing skirts does not deny members of either gender an employment opportunity because of their sex.[199] It allows employers to apply social norms to project a regulated business image to the public, a goal that is not in violation of Title VII.[200]

An alternative approach for modifying the unequal burdens test is for courts to focus on the relationship that a grooming policy has to an employee's ability to complete a job-related task.[201] Through an evaluation of a grooming policy's relationship to the function of a job, courts are able to identify grooming standards based on harmful sex stereotypes and leave benign sex-differentiated grooming policies untouched.[202]

While the majority in *Jespersen* noted that the sex-differentiated grooming policy did not impede Jespersen's ability to perform her job,[203] critics of the *Jespersen* decision argue that the makeup requirement of the "Personal Best" program had no relationship to either efficiency or productivity.[204] These critics contend that it is not simply enough to say that the makeup requirement did not hinder Jespersen's ability to do her job; there must be a valid rationale for the sex-differentiated grooming policy.[205] This condemnation of the unequal burdens test ignores the fact that such a requirement impairs an employer's ability to run his or her own business and exert control over the business's image.[206] Moreover, this line of reasoning does not take into account the intent behind Title VII.[207] Congress did not

198 *Id.* at 202.

199 Starr & Strauss, *supra* note 157, at 244.

200 *Id.*

201 Miller, *supra* note 153, at 1366-67; Kelly, *supra* note 153, at 68-69; *see* Brief for Hawati Civil Rights Commission as Amicus Curiae Supporting Darlene Jespersen, Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. June 13, 2005) (No. 03-15045), 2005 WL 2390155.

202 Miller, *supra* note 153, at 1366-67.

203 *Jespersen*, 444 F.3d at 1113.

204 Brief for Hawati Civil Rights Commission as Amicus Curiae Supporting Darlene Jespersen, *supra* note 201, at 2.

205 *See* Miller, *supra* note 153, at 1367; Brief for Hawati Civil Rights Commission as Amicus Curiae Supporting Darlene Jespersen, *supra* note 201, at 2.

206 Miller, *supra* note 153, at 1369; *see* Starr & Strauss, *supra* note 157, at 244.

207 *See* Starr & Strauss, *supra* note 157, at 244.

intend employers to change the essence of their business in response to Title VII.[208]

A rule requiring employers to prove a valid relationship between their appearance standard and the business's success will result in an employee's rights far outweighing an employer's prerogatives.[209] For example, under this theory it would be hard for an employer to justify a policy prohibiting painted swastikas on employees' faces if the employee did not interact with any member of the public while working (i.e. the employee was a telemarketer), and the employee was able to perform the essential functions of the job while wearing the symbol.[210] However, the courts should not force an employer to allow the personal preferences of an employee for offensive markings because the employer cannot find a valid relationship between the appearance policy and the job functions. Admittedly, this is an extreme example that does not deal with sex-differentiated grooming standards; however, when considering makeup requirements, wearing makeup does not inhibit an employee's ability to serve drinks.[211]

Employers should not have to ignore customer preference and the fact that attractiveness sells because they cannot find a valid relationship between job duties and appearance guidelines.[212] The court in *Jespersen* correctly found that appearance standards that impose different, but essentially equal, burdens on men and women are not disparate treatment under Title VII.[213] The unequal burdens test is an efficient and effective means for the courts to determine which sex-

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208 Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989).

209 *See id.* at 243.

210 This hypothetical ignores the religious arguments often seen in conjunction with displaying a swastika and hate crime jurisprudence.

211 Darlene Jespersen claimed that the makeup requirement established by the "Personal Best" program inhibited her job performance because the policy affected her self-dignity. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1108 (9th Cir. 2006). However, the Ninth Circuit failed to find any evidence to support Jespersen's claim. *Id.* Evidence to show unequal burdens may include unequal economic burden, unequal physical burden, or unequal psychological burden. Recent Cases, *Title VII–Gender Discrimination–Ninth Circuit Holds that Women Can Be Fired for Refusing to Wear Makeup.*— Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc), 120 HARV. L. REV. 651, 654 (2006).

212 Customer preference does not justify discriminatory practices. Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982) (finding employer whose weight limit for female flight attendants is prohibited sex discrimination may not justify the weight limit by customer preference for slender female flight attendants); Sam's Club, Inc. v. Madison Equal Opportunities Comm'n, 668 N.W.2d 562 (Wis. Ct. App. 2003); Jennifer Fowler-Hermes, *Appearance-Based Discrimination Claims Under EEO Laws*, 75 FLA. B.J. 32 (2001).

213 *Jespersen*, 444 F.3d at 1109.

differentiated grooming policies violate Title VII and which policies do not.

V. UNCERTAINTY FACING EMPLOYERS IN THE WAKE OF *JESPERSEN*

Employers should consider several relevant factors in the wake of *Jespersen*: 1) how to structure sex-differentiated grooming policies to avoid litigation; and 2) what steps they need to take to ensure that they are in line with community standards. The Ninth Circuit Court of Appeals issued the en banc ruling in *Jespersen* for two reasons: first, to reaffirm the Ninth Circuit law regarding sex-differentiated grooming policies; and second, to clarify the evolving law of sex stereotyping.[214] In the opinion, the court emphasized that its decision does not preclude future claims of sex stereotyping on the basis of sex-differentiated grooming policies.[215] Thus, the court opened the door to future litigation without providing any guidance as to how employers should behave to avoid such litigation. Therefore, the Ninth Circuit's decision leaves employers to wonder if their sex-differentiated grooming policies, which were previously presumed valid, now violate Title VII.

Precedent shows that employers have the right to regulate the dress of their employees;[216] however, employers who want to minimize their time inside a courtroom may want to reconsider some of their sex-differentiated grooming policies. The decision in *Jespersen* leaves employers in an area of uncertainty because the Ninth Circuit Court of Appeals failed to signal how far it was willing to push open the door for future sex stereotyping claims based on sex-differentiated grooming policies. Under the previous standard, employers knew that sex-differentiated grooming policies were permissible as long as such requirements did not negatively or disproportionately impact one's sex, or create employment barriers.[217] In the current post-*Jespersen* world, employers in the Ninth Circuit must blindly guess what appearance standards will not result in defending their policy in a courtroom.[218]

The Ninth Circuit Court of Appeals reiterated in *Jespersen* that the "touchstone" for evaluating an employer's appearance policy is

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214 *Id.* at 1105.

215 *Id.* at 1113.

216 *See supra* Part II.A.

217 *See supra* Part II.B.

218 *See Jespersen*, 444 F.3d at 1105.

"reasonableness."[219] Some commentators have interpreted this part of the court's reasoning to suggest that the court should uphold reasonable sex-differentiated grooming policies unless there is objective evidence of discriminatory impact or motive.[220] Others have suggested that employers should adopt dress and grooming policies along the lines of a mandate to "be professional."[221] Yet, employers may have a hard time instituting criteria for professional dress due to the Ninth Circuit Court of Appeals' failure to provide any direction to employers as to where to draw the line.

The Ninth Circuit Court of Appeals should not have opened the door without first laying down the groundwork for what type of claims constitutes a valid challenge to sex-differentiated grooming policies under Title VII. Arguably, the court did not indicate that employers should adopt the standard of gender neutrality in their grooming policies.[222] However, if the court was indeed signaling a change in cultural norms, it failed to indicate how employers should interpret such a change, or where they should look for guidance regarding what constitutes currently acceptable social standards. It is questionable whether other courts will follow in the footsteps of the Ninth Circuit, or alternatively, whether they will be risk-adverse to claims of sex stereotyping on the basis of dress or appearance.

Title VII and *Price Waterhouse* do not mandate gender neutrality. The requirement that men not wear dresses to work and have short hair does not disproportionately burden men in violation of Title VII.[223] The unequal burdens test ensures that employers will not deny employment opportunities to men or women based on their sex, while enabling employers to regulate the image that their employees project to the public.[224] This test incorporates the ideals of Title VII and *Price Waterhouse* by balancing the employee's rights and the employer's prerogatives.[225] The Ninth Circuit Court of Appeals should not have mentioned that it was not precluding future claims of sex stereotyping on the basis of sex-differentiated grooming policies, but rather should

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219 *Id.* at 1113.

220 Patrick H. Hicks, Veronica Arechederra Hall & Deborah L. Westbrook, *Special Feature: Ninth Circuit Upholds Makeup Requirement*, 14 NEV. LAW. 28, 29 (2006).

221 Helen W. Gunnarsson, *Separate But Equal Grooming Standards Okayed*, 94 ILL. B.J. 285, 279 (2006).

222 *See supra* Parts II.A, IV.

223 Yuracko, *supra* note 18, at 201-02.

224 *See supra* Parts II, IV.

225 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 242-43 (1989).

have reinforced the idea that, as community standards change, grooming policies must reflect those changes.[226] Under the unequal burdens test, employers have a duty to make sure that they are in step with prevailing community standards and are not enforcing archaic policies that limit an employee's employment opportunities based on their gender. The unequal burdens test is the correct test to allow employers the ability to regulate their business image and ensure that employers will not deny employees employment opportunities because of the employees' sex.

CONCLUSION

The Ninth Circuit Court of Appeals's decision in *Jespersen* left employers to find the boundaries of appearance and grooming practices without any definitive guidance. The court's previous acceptance of sex-differentiated grooming policies lays the foundation that such standards will not violate Title VII per se. When employers choose to implement different standards for men and women, the general rules for such standards become increasingly unclear, especially for post-*Jespersen* employers residing in the Ninth Circuit.

It remains to be seen whether other courts will follow in the footsteps of the Ninth Circuit and allow sex-differentiated grooming polices to be the subject of a Title VII claim for sex stereotyping. Past decisions allowing employers to regulate their employees' appearance suggest that other circuits will not make the same mistake as the Ninth Circuit. Courts should allow sex-differentiated grooming policies as long as such standards do not inhibit an employee's employment opportunities based on his or her sex and apply equal burdens to both male and female employees.

226 *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113 (9th Cir. 2006).