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Sex-Based Discrimination in the American Workforce: Title VII and the Prohibition Against Gender Stereotyping

Serafina Raskin*

I. INTRODUCTION

While it is no longer a contentious fact that discrimination on the basis of sex is an all too frequent occurrence in the American workplace, the question that has become more pressing is what exactly constitutes sex discrimination?¹ Grooming and other appearance based standards have long been tolerated under the auspices of “managerial discretion” or a business’ attempt to establish a corporate image, attract customers, or ensure health and safety standards are met. Yet, today’s employees are taking a stance against those employers who fail to address equality concerns with regard to appearance and/or dress codes. This Note focuses on the way that existing conceptions of American sex discrimination law fail to meet the changing forms of sexual discrimination in the workplace. By focusing on a feminist critique of the developing case law surrounding workplace appearance rules, this note attempts to develop a more complete understanding of the damage that “sex appropriate” or “sex specific” dress codes do to both the female and male workforce. The final part of this Note addresses the way in which localities have attempted to legislate in the area of appearance and dress, and asks whether such legislation will be able to force employers to change basic cultural expectations about gender.

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1. See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1269 (E.D.Wash., 2001) (“the goal of Title VII was to end years of discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce.”).

II. TITLE VII AND DRESS, GROOMING, AND APPEARANCE-BASED RULES

The vast majority of the American workforce must adhere to employer-created policies that establish minimum standards of personal appearance for employees while at work. While most employees unquestioningly accept the legitimacy of the employer rules regarding appearance, other employees have mounted sex discrimination challenges in violation of Title VII of the Civil Rights Act of 1964 (or a state's equivalent).² Unfortunately, American courts have consistently rejected challenges to employer rules and informal practices regarding employee workplace attire, grooming standards, and personal appearance. Instead, courts have been deferential to employer business judgment, stressing the importance of allowing companies to regulate their employees in order to project a professional image when representing the company and its interests.³ This view is expressed by the Court of Appeals for the District of Columbia Circuit:

Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance.⁴

Although courts give employers wide latitude in formulating dress codes, employees are challenging these codes with increasing vigor and frequency.⁵ A basic review of Title VII challenges to appearance based rules demonstrates that employee challenges tend to fall into two types of fact patterns: "(1) challenges to employer dress or grooming codes that are based on gender-linked assumptions and community norms regarding appropriate appearance or attire for men and women and (2) challenges to employer decisions to employ or retain only employees who have an 'attractive' appearance."⁶

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in pertinent part: "(a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or 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 . . . sex . . ." Furthermore, Title VII itself allows an exception to the rule against discrimination on the basis of sex, if the employer can prove that sex is a bona fide occupational qualification ("BFOQ").

3. See, e.g., *Wislocki-Goin v. Mears*, 831 F.2d 1374 (7th Cir. 1987); *Woods v. Safeway Stores, Inc.*, 420 F. Supp. 35 (E.D. Cal. 1976).

4. *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1124-25 (D.C. Cir. 1973).

5. See, e.g., *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977); *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d 190 (D. Mass. 2004).

6. DIANNE AVERY & ROBERT BELTON, *EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE*, 331 (West Group Publishing 1999) (1971),

A. CHALLENGES BASED ON COMMUNITY NORMS AND GENDER-BASED ASSUMPTIONS

In the first category of cases, courts have upheld employers' use of personal appearance policies as a legitimate tool to promote a company's image. In *Tavora v. New York Mercantile Exchange*,⁷ an employee was terminated for failing to comply with the company hair length policy. He challenged his termination, claiming that the policy restricting hair length for male employees but imposing no similar restriction on female employees discriminates in violation of Title VII.⁸ The court observed that of the six federal courts of appeal that have considered the issue, all have agreed that a policy requiring men and not women to wear their hair short does not violate Title VII.⁹

The court concluded that a policy that requires one sex to wear its hair shorter than the other sex is not unlawful merely because it treats men and women differently.¹⁰ The court relied on a series of cases upholding grooming and dress codes based on gender.¹¹ Specifically, in finding a *de minimus* impact on employees' working conditions, the court relied on the reasoning in *Dodge v. Giant Food, Inc.*, where the D.C. Circuit Court found that "Title VII was never intended to encompass sexual classifications having only an insignificant effect on employment opportunities."¹² Furthermore, other courts had reasoned that hair length policies do not fall within the statutory goal of equal employment sought to be remedied by Title VII.¹³ For example, the court in *Willingham v. Macon Telegraph Publishing Co.*, found that an employee's length of hair "is related more closely to an employer's choice of how to run his business than to ensuring equality of employment opportunity."¹⁴ Other courts have accepted the argument that the only way to be "gender neutral" is to adopt disparate rules that reflect "the standard of what the community expects of each sex, respectively."¹⁵ Under such reasoning, employers typically may impose ap-

discussing Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1414-25 (1992).

7. *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996).

8. *Id.* at 908.

9. *Id.* at 908 (citing *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976)); see *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Earwood v. Cont'l South-eastern Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Knott v. Missouri Pac. Ry. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975); *Baker v. California Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973).

10. *Tavora*, 101 F. 3d at 908.

11. See, e.g., *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975).

12. *Dodge*, 488 F.2d at 1337.

13. *Id.*

14. *Willingham*, 507 F.2d at 1191.

15. Klare, *supra* note 6, at 1419.

pearance standards that have a foundation in social norms, such as prohibiting tattoos, body piercings, or earrings for men, and requiring the wearing of make-up and high heeled shoes for women.¹⁶

In *Tavora*, the employee-plaintiff claimed that the above mentioned cases were no longer good law by relying on cases where courts found gender-based discrimination unlawful.¹⁷ Specifically, the plaintiff relied on *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, and *City of Los Angeles, Department of Water & Power v. Manhart*.¹⁸ In *Newport News*, the Court found a health benefit policy discriminatory that provided lesser benefits for pregnancy-related services to male employees than it provided to female employees.¹⁹ The Court stated, “[s]uch a practice would not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles Dept. of Water & Power v. Manhart*, for it would treat a male employee with dependents ‘in a manner which but for that person’s sex would be different.’”²⁰

The U.S. Supreme Court in *Manhart* held that an employer may not use the fact that females, as a group, live longer than males to justify a policy of requiring larger contributions by females into a pension plan to receive the same monthly pension benefits when they retire.²¹ In finding that such plans were unlawful, the Court stated, “[i]t is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”²² The Court further explained that “[e]ven a true generalization about the class is an insufficient reason for [discrimination].”²³

In *Tavora*, the plaintiff relied on *Manhart* and *Newport News* to argue that Title VII applies to any employment policy with any difference between men and women, no matter how trivial.²⁴ Specifically, plaintiff argued that the “but for” test enunciated in *Manhart* and *Newport News*, combined with the Supreme Court’s broad prophylactic language intended to eradicate gender-based discrimination, overruled the courts of appeals’ cases cited above.²⁵ The court disagreed with *Tavora*’s reading of *Manhart*

16. See, e.g., Fagan, 481 F.2d at 1117 n.3 (“reasonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought that there is unlawful discrimination ‘because of sex’”).

17. *Tavora*, 101 F.3d at 908.

18. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978).

19. *Newport News*, 462 U.S. at 676.

20. *Tavora*, 101 F.3d at 908 (citing *Newport News*, 462 U.S. at 676).

21. *Manhart*, 462 U.S. 702.

22. *Id.* at 709.

23. *Id.*

24. *Tavora*, 101 F.3d at 908.

25. *Id.*

and *Newport News*.²⁶ The court differentiated the cases cited by the employee, finding that the policies resulting in disparate levels of pension and health benefits for males and females are factually different from the grooming policy at hand.²⁷ The court reasoned that a policy which requires males to wear their hair shorter than females is not unlawful merely because it treats males and females differently, rather the policy is not unlawful because it is trivial in nature.²⁸

Based on the court's reasoning in this case, challenges to employer's appearance and grooming policies must demonstrate more than a *de minimus* impact on employees. *Carroll v. Talman Federal Savings and Loan Association of Chicago*, is a leading case striking down an employer's dress code which required female office and managerial employees to wear employer supplied uniforms.²⁹ The cost of the two-piece, color coordinated uniforms was treated as additional income.³⁰ Male employees at the company were required to wear "customary business attire," consisting of a "suit, a sport jacket and pants, or even a 'leisure suit,' as long as it [was] worn with a shirt and tie."³¹

The company justified its sex-based uniform rules on two bases: first, the bank feared that if it did not impose a uniform on female employees, these women would engage in "dress competition," and second, that if the women were allowed to exercise their own judgment in clothing, the women would "follow the fashion" instead of wearing work appropriate clothing.³² In striking down the company dress code the court found that the company's justifications "reveal that it is based on offensive stereo-

26. *Id.*

27. *Tavora*, 101 F.3d at 908-09 ("We believe that *Tavora's* argument fails to consider the factual context of those decisions, namely employment policies resulting in significantly different levels of pension and health benefits for males and females."). See also *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (distinguishing on similar grounds:

The *Newport News* and *Manhart* plaintiffs could not avoid the effects of the discriminatory policies; they received lesser benefits simply because of their sex. Because the discriminatory policies in those cases were aimed at a single immutable characteristic — the plaintiffs' sex — a simple "but for" test effectively identified forbidden discrimination. In contrast, the alleged discrimination at issue in *Willingham* was between members of the same sex based on the neutral characteristic of hair length. The *Willingham* plaintiff was denied employment because he chose not to cut his hair; however, males in general were not prohibited from working for the defendant. Consequently, applying the "but-for" test from *Newport News* and *Manhart* to a *Willingham*-type situation does not effectively identify forbidden discrimination, i.e., discrimination that deprives members of a given sex of equal employment opportunity. The "but-for" test is appropriate only where alleged discrimination is based on sex alone. Therefore, the Supreme Court's use of that test in *Newport News* and *Manhart* does not affect the analysis or conclusions of the *Willingham* Court).

28. *Tavora*, 101 F.3d at 908.

29. *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028 (7th Cir. 1979).

30. *Id.* at 1030.

31. *Id.* at 1029.

32. *Id.* at 1033.

types prohibited by Title VII.”³³ Furthermore, the court found that:

Two sets of employees performing the same functions are subjected on the basis of sex to two entirely separate dress codes — one including a variety of normal business attire and the other requiring a clearly identifiable uniform. This different treatment in the conditions of employment for female employees cannot be justified by business necessity, since . . . the employer had a variety of nondiscriminatory means of assuring good grooming.³⁴

The court held that the employer's policy violated Title VII because as a result of the policy, female employees were subject to a lower professional status, and therefore were the victims of disparate treatment based upon sex.³⁵ “[W]hile there is nothing offensive about uniforms *per se*, when some employees are uniformed and others are not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues . . .”³⁶ Currently, a number of workplace personal appearance rules are being challenged as violative of Title VII.³⁷ The differing opinions by the circuits make it likely that the Supreme Court will make a definitive ruling on the degree of deference afforded to employers in enforcing workplace grooming standards in the near future.

B. DETERMINING THE “HOTNESS” FACTOR IN A “FACIALLY NEUTRAL” MANNER

The second type of Title VII challenges deals with hiring or employment requirements which may be “facially neutral” but may act as a barrier to hiring or promotion. On their face such requirements may appear to harm men and women equally and thus are not discriminatory. However, much empirical data has come forward showing that appearance standards are not applied equally and that women's appearances are scrutinized much more than men's appearances.³⁸ Furthermore, such “neutral policies” have been accused of perpetuating arcane stereotypes about both men and women.³⁹

The Eighth Circuit confronted these issues in *Craft v. Metromedia, Inc.*⁴⁰ There, the plaintiff, Christine Craft, was demoted from co-anchor to reporter by the Kansas City, Missouri station (KMBC-TV), as a result of

33. *Carroll*, 604 F.2d at 1033.

34. *Id.* at 1032.

35. *Id.* at 1032-33.

36. *Id.* at 1033.

37. *See, e.g., Harper*, 139 F.3d at 1385.

38. *See AVERY & BELTON, supra* note 6, at 333-37.

39. *See, e.g., Manhart*, 435 U.S. 702; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

40. *Craft v. Metromedia, Inc.*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

focus group studies and telephone polls which were “overwhelmingly negative” toward the plaintiff’s appearance and showed that Craft lagged behind her peers in “good looks.”⁴¹ Craft challenged her demotion alleging that different standards of appearance were imposed on her than upon her male coworkers.⁴² The court of appeals acknowledged that:

Evidence showed a particular concern with appearance in television; the district court stated that reasonable appearance requirements were ‘obviously critical’ to KMBC’s economic well-being; and even Craft admitted she recognized that television was a visual medium and that on-air personnel would need to wear appropriate clothes and makeup. . . . While we believe the record shows an overemphasis by KMBC on appearance, we are not the proper forum in which to debate the relationship between newsgathering and dissemination and considerations of appearance and presentation — i.e., questions of substance versus image — in television journalism.⁴³

Although the court recognized that KMBC imposed gender-specific fashion requirements, the court approved such requirements as a business necessity by relying upon focus group and telephone survey results.⁴⁴ The court’s opinion suggests that employers who wish to base hiring decisions on the appearance or attractiveness of applicants would be wise to validate such criteria empirically with consumer and market research.

While the court in *Craft* failed to find a violation of Title VII, other courts have found violations where employer dress codes promote demeaning stereotypes of female characteristics and abilities or stereotypical notions of female attractiveness or use of female sexuality to attract business.⁴⁵ For example, in *EEOC v. Sage Realty Corp.*, plaintiff Margaret

41. *Id.* at 1209.

42. *Id.* at 1207.

43. *Id.* at 1215.

44. *Id.* The Court explained that: While there may have been some emphasis on the feminine stereotype of “softness” and bows and ruffles and on the fashionableness of female anchors, the evidence suggests such concerns were incidental to a true focus on consistency of appearance, proper coordination of colors and textures, the effects of studio lighting on clothing and makeup, and the greater degree of conservatism thought necessary in the Kansas City market. The “dos” and “don’ts” for female anchors addressed the need to avoid, for example, tight sweaters or overly “sexy” clothing and extreme “high fashion” or “sporty” outfits while the male “dos” and “don’ts” similarly cautioned against “frivolous” colors and “extreme” textures and styles as damaging to the “authority” of newscasters. These criteria do not implicate the primary thrust of Title VII, which is to prompt employers to “discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.” See *Knott v. Missouri P. R.R.*, 527 F.2d 1249, 1251 (8th Cir. 1975); see generally Patti Buchman, *Title VII Limits on Discrimination Against Television Anchorwomen on the Basis of Age-Related Appearance*, 85 COLUM. L. REV. 190, 201 (1985).

45. See, e.g., *Gerdom v. Cont’l Airlines*, 692 F.2d 602, 608-09 (9th Cir. 1982) (upholding weight requirements for female flight attendants to ensure slenderness), *cert. dis-*

Hasselmann was hired as an office building lobby attendant.⁴⁶ She was fired for refusing to wear a "Bicentennial uniform" which was an improperly small uniform exposing her thighs, midriff and portion of her buttocks.⁴⁷ Hasselmann was subjected to public comments from guests entering and exiting the building regarding the uniform and she received "a number of sexual propositions and endured lewd comments and gestures."⁴⁸ The court stated that by requiring the plaintiff to wear the uniform, "defendants made her acquiescence in sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant."⁴⁹ The court held that the wearing of this uniform on the job, exposing the plaintiff to sexual harassment, constituted sex discrimination and ruled that on the present facts, "it is beyond dispute that the wearing of sexually revealing garments does not constitute a [bona fide occupational qualification]."⁵⁰

A recent decision by the Ninth Circuit Court of Appeals has limited the scope of Title VII sex discrimination claims.⁵¹ Specifically, the Ninth Circuit Court held that Harrah's workplace appearance rules, although they adopted different appearance standards based on sex, did not constitute disparate treatment sex discrimination under Title VII because the rules did not create unequal burdens for men and women.⁵² This ruling deviates from the somewhat liberal Ninth Circuit trend in expanding causes of action under Title VII and stirs ever-increasing feminist concerns about the level of discretion granted to management to require females to conform to images of "appropriate femininity."

missed, 460 U.S. 1074 (1983); *Laffey v. Northwest Airlines*, 567 F.2d 429, 439 n. 24 (D.C. Cir. 1976) (upholding a policy where female cabin attendants were forbidden to wear eye-glasses), *cert. denied*, 434 U.S. 1086 (1978). *Cf. Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (rejecting flight attendant position limited to females by employer who merely wished to exploit female sexuality as a marketing tool to attract customers and ensure profitability).

46. *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 603 (S.D.N.Y. 1981). The employee's job description consisted of performing "security, safety, maintenance and informational functions."

47. *Id.* at 604.

48. *Id.* at 605.

49. *Id.* at 609-10.

50. *Id.* at 611.

51. *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189 (D. Nev. 2002) (rejecting Jespersen's argument that customer preferences, presumed or actual, could not justify otherwise unlawful sex discrimination).

52. *Id.* (finding that the female plaintiff failed to demonstrate that Harrah's make-up requirement for women imposed a burden in excess of that associated with normal good-grooming standards).

III. FEMINIST PERSPECTIVE: DEFINING THE DISCRIMINATORY ACT

In deciding sex discrimination cases under Title VII the courts have consistently asked whether differential rules are imposed on men and women.⁵³ The “difference” factor that the courts have adopted must meet a heavy burden.⁵⁴ Whereas in *Price Waterhouse*, the United States Supreme Court has clearly held that employers may not lawfully base employment decisions on stereotyped characterizations of the sexes,⁵⁵ federal and state courts are hesitant to extend the logic to grooming and appearance based rules.⁵⁶

The courts have consistently failed to find discrimination where the difference is merely “*de minimus*” (where the rules imposed are not significantly more restrictive on one sex over another), where the grooming or appearance based discrimination is a business necessity or BFOQ, or where the employer’s policies are based on pervasive “community expectations” or stereotypes. The first part of this analysis addressed the shortcomings of the courts in relying on the aforementioned reasoning in failing to find discrimination. I argue that the failure of the legislators, courts and employers is in the acceptance of gender based stereotypes as legitimate in the context of appearance and grooming based standards. Furthermore, by treating such stereotypes as legitimate and worthy of deference, courts relieve employers of the burden of defying social norms.

A. *DE MINIMUS* IMPACT: THE BURDEN OF LIPSTICK

When Darlene Jespersen was fired from the Reno Harrah’s casino after refusing to wear make-up as required by a new grooming code, called the “Personal Best”⁵⁷ program, she filed a Title VII sex discrimination claim against Harrah’s.⁵⁸ The lawsuit claimed that Harrah’s had violated Title VII’s prohibition on sex discrimination in employment⁵⁹ by firing her for defying a requirement that it imposed only on women.⁶⁰ Harrah’s defended its “Personal Best” program⁶¹ arguing that the program imposed similar

53. *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907.

54. *Id.* (finding that *de minimus* impact on employment was not unlawful).

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

56. *See Tavora*, 101 F.3d 907.

57. *Jespersen v. Harrah’s Operating Co., Inc.*, 392 F.3d 1076, 1077 (9th Cir. 2004). In addition to make-up Harrah’s “Personal Best” program required all women in the beverage department to style their hair, to wear nude or natural stockings, and to limit nail polish to clear, white, pink or red color only. Under the policy male workers were forbidden to wear make-up, ponytails or hair below the top of their shirt collar.

58. *Jespersen*, 280 F. Supp. 2d at 1190.

59. Amici briefs in support of *Jespersen* were filed by the American Civil Liberties Union of Nevada, Northwest Women’s Law Center and California Women’s Law Center.

60. *Id.* at 1193.

61. On Harrah’s side were amici briefs from American Hotel & Lodging Association and the California Hotel & Lodging Association.

burdens on both men and women and was not overly burdensome.⁶² After all, a Harrah's representative postured: "[Jespersen is] only one person among 4200 employees that ha[s] complained about our policy."⁶³

The federal district court, surprisingly, agreed with the lower court and granted summary judgment to the casino.⁶⁴ Title VII was not meant to apply to appearance codes, the court reasoned, and even if it did, this was not unlawful discrimination because the burdens imposed on men and women were equal.⁶⁵ Women were required to wear make-up, he said, but men were forbidden to, and that could be as much of a burden on a man who wanted to wear cosmetics as it was for a woman like Jespersen who did not want to wear make-up but was forced to do so.⁶⁶

I argue that the equal or *de minimus* burdens arguments are illegitimate. First, courts are not in a position to decide what impact is in fact *de minimus*. In sexual harassment case law, the courts apply a "reasonable woman" standard from the perspective of the plaintiff.⁶⁷ Such a perspective is preferable because it recognizes that men and women would have "different perspectives," that is, where a man may not be affected by certain behavior, a woman may find the behavior offensive.⁶⁸ However, in appearance based discrimination claims, the courts have engaged in little or no comparative analysis of the burdens males and females, respectively, face. Furthermore, in practice, some courts will dismiss challenges when employers show that requirements were imposed on both sexes, regardless of how burdensome or demeaning either set of requirements might be.⁶⁹ Such a focus on the comparative burden seems illogical because an employer's policy will be found to be non discriminatory even though the policy is based on stereotypical notions of femininity or masculinity. Carried to its extreme employers may be able to force women to wear only feminine colors to work, as long as the company forced men to conform to an equally ridiculous stereotype of having to wear only masculine colors.

Other courts have seemed to engage in a more qualitative review, implying that the burdens on men and women must be at least roughly comparable by some criterion or another. However, are courts in the position to make such findings? How does a court decide whether a requirement that a

62. *Jespersen*, 280 F. Supp. 2d at 1195.

63. Peter Schelden, *Appeals Court to Hear Harrah's Gender Discrimination Case*, Daily Sparks Tribune, Dec. 2, 2003, available at <http://www.nevadalabor.com/barbwire/barb03/tribjespg616.html> (last visited Mar. 30, 2006).

64. *Jespersen*, 280 F. Supp. 2d at 1202.

65. *Id.* at 1193.

66. *Id.*

67. See *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (evaluating objective hostility from the perspective of the victim).

68. *Id.* at 878.

69. Christine A. Littleton, *Working Women: Thank You, You're Unwelcome*, 19 BERKELEY WOMEN'S L.J. 299, 304 (2004) (reviewing *DIRECTIONS IN SEXUAL HARASSMENT LAW* (Catherine A. MacKinnon & Reva B. Siegel eds., 2004)).

man wear a tie and collar to work, or that he dress in “appropriate business attire” is comparable to a woman having to wear heels⁷⁰ or make-up to work? Should the court focus on the amount of time it takes for a man to put on a tie versus the amount of time it takes a woman to apply make-up and put on pantyhose? If not, should the courts focus on the cost of purchasing ties compared to the cost of purchasing pantyhose?⁷¹ What about the relative discomfort level of a woman forced to wear high heeled shoes, compared to a man having to wear a collar and tie? Such an analysis seems both absurd and yet relevant. If a court is going to judge that the standards applied to men and women are roughly equal, must it not engage in a “fact finding” investigation? Obviously, such an investigation would lead to unreasonable consequences, such as having to poll men about the discomfort level associated with wearing a tie and compare that discomfort level to that of a poll of women wearing make-up, heels, stockings, etc. No two plaintiffs are alike. As in sexual harassment cases, which are judged from the perspective of the reasonable plaintiff, the courts should focus on the perspective of the plaintiff in judging the relative negative employment consequences of its disparate policies.

For example, Darlene Jespersen was deeply disturbed by Harrah’s policy.⁷² In an interview with the Gender Public Advocacy Coalition Jespersen was asked about how she felt about Harrah’s policy and how the policy impacted her work. Jespersen described her reaction to the company policy:

I felt I had to [wear make-up]. I tried it for a couple of weeks, I went and bought the make-up, and then I just stopped doing it. . . . It was real degrading, degrading to be told you have to go see this guy. I had never worn make-up. I said I would never allow myself to be humiliated like that again. I got really stressed over it . . . it was upsetting. When I went to apply for a job, I did not think about make-up. It should be just the fact that you are a good worker, not that you have to paint your face. But,

70. Jennifer Wilder, *High Heels Take a Toll on Women’s Knees*, DrDonnica.com, May 13, 2004, <http://www.drdonnica.com/news/00008550.htm>. “High-heel shoes seem to be wreaking havoc on the joints of women everywhere . . . [o]steoarthritis [often caused by high-heeled shoes] is the most common type of arthritis and is seen more often in women than in men.”

71. Any woman who has worn pantyhose on a regular basis knows how difficult it is to keep them from ripping or snagging. When I worked as a waitress at Coco’s Restaurant and Bakery all women employees who chose to wear skirts to work were required to wear nude colored stockings. I had a hard time wearing the stockings more than one time without ripping them. It cost me approximately \$3.00 for every new pair of stockings. My wage, however, was \$5.75 an hour plus tips.

72. *GenderPAC Interviews Darlene Jespersen on Gender, Being Fired, and Sex Stereotyping in the Workplace*, Jan. 17, 2001, <http://www.gpac.org/archive/news/notitle.html?cmd=view&msgnum=0273> (last visited Feb. 15, 2006).

I thought the first time I had to do it because I thought I would lose my job. After doing it for a couple of weeks, my feelings became more important than losing my job. My happiness became more important . . . The supervisor said this was a corporate decision. I said this has nothing to do with my job, and I'm not doing it. It's degrading. I said, I'm 44 years old and I'm tired of being told how to look and dress. I'm tired and I'm not doing it, not after you let me do this for 20 years. I could tell the supervisor was concerned about my job.⁷³

Darlene Jespersen preferred to lose her job rather than undergo the humiliation of being forced to wear make-up on a daily basis.⁷⁴ Her experience is not unique. Many women feel dehumanized, awkward and uncomfortable in make-up, high-heeled shoes, or skirts. Studies show that women's experience in relation to their physical appearance and their bodies is different from that of a man.⁷⁵ Women's opinions of their bodies is a complex manifestation of both external and internalized sexism.⁷⁶ As a result of the sexist messages directed at them as well as those absorbed by the culture, women feel devalued and hypersensitive about their self-image.⁷⁷ Women's obsession and distorted attention to their bodies are not unfounded. "Studies show that women are judged more harshly than men when they deviate from dominant social standards of attractiveness."⁷⁸ For many women "[b]y adulthood, the habit of fixating on their perceived imperfections has become a permanent way of life; women check mirrors constantly, they diet,⁷⁹ they compare themselves to other women, they contemplate cosmetic surgery."

Anne Bottomley describes the way many women feel about their bodies in *Many Appearances of the Body in Feminist Scholarship*.⁸⁰ "For many of us, as women, the experience of being objectified led to a sense of

73. *Id.*

74. *Id.*

75. See, e.g., SUSAN BORDO, UNBEARABLE WEIGHT, FEMINISM, WESTERN CULTURE, AND THE BODY 166, 329 (University of California Press, 1993) (citing Daniel Goleman, *Dislike of Own Bodies Found Common Among Women*, N. Y. Times, March 19, 1985, at C1.). The study confirms that there is a large gap between the percentages of women who are preoccupied with their appearance, as compared to men. Research conducted at the University of Pennsylvania in 1985 found men to be generally satisfied with their appearance, often, in fact, "distorting their perceptions in a positive, self-aggrandizing way."

76. HOPE LANDRINE & ELIZABETH A. KLONOFF, DISCRIMINATION AGAINST WOMEN: PREVALENCE, CONSEQUENCES, REMEDIES 138-39 (Sage Publications, 1997).

77. *Id.* at 138.

78. BORDO, *supra* note 75, at 329.

79. *Id.* (citing PAUL GARFINKEL AND DAVID GARNER, ANOREXIA NERVOSA: A MULTIDIMENSIONAL PERSPECTIVE 112-13 (1982)). It is estimated that close to 90 percent of all anorexics are female. *Id.*

80. ANNE BOTTOMLEY, THE MANY APPEARANCES OF THE BODY IN FEMINIST SCHOLARSHIP, IN BODY LORE AND LAWS 127, (Andrew Bainham et al. eds., 2002).

dispossession of our bodies.”⁸¹ As a result of this objectification, “we [as women] experience a sense of intrusion, lack of control and being subjected to the ‘gaze’.”⁸² Women become paralyzed, not knowing whether we should take pleasure in our bodies and their beauty. How do we do this when we are being “required to conform to body images that fractured and violated our sense of what it could/should mean to be a woman”?⁸³

The reality that women live in is very different than that of men. In fact, it is different from woman to woman. Not all women are self-critical about their bodies. But, many women are. How can a court look at Darlene Jespersen and say that having to wear make-up, style her hair, wear stockings, and nail polish only has a *de minimus* impact on her work environment?

It is also apparent that sex discrimination is no longer a predominantly female concern. A policy that requires men to conform to a certain image of masculinity can be said to be equally restrictive. Again, in *Tavora* the court found that the impact of a restrictive hair length requirement on the male plaintiff was minimal, however, such discrimination against a male employee not only affects other male employees who feel they have to conform to a certain image of masculinity, but is also damaging to women in a less obvious way. When employers stigmatize men for displaying female qualities, and/or force men to reject such displays of “femininity” as wearing an earring or having long hair, it can be seen as an indirect assault on female employees. In a sense, what the employer has done is ranked displays of femininity on a lower tier. It follows then that those who display feminine qualities become a part of the lower class employees themselves. When men are precluded from displaying those feminine characteristics it is women who are left to feel the stigma of their traits.

B. MAKE-UP TO TRANSFORM RENO INTO VEGAS

It is well known that competition among gaming establishments is fierce.⁸⁴ In fact, according to several academics within the gaming establishment, “[t]here is constant pressure to find that certain niche, image, or theme that will set a gaming establishment apart from the others.”⁸⁵ One of the ways that establishments attract customers is by appealing to sexuality: “[t]ake a close look around Las Vegas, for example, and count the number of new risqué nightclubs, tantalizing themed bars, and topless showgirl productions, all just a short distance from the casino floor.”⁸⁶ Management

81. *Id.* at 128.

82. *Id.*

83. *Id.*

84. Gregory J. Kamer & Edwin A. Keller Jr., *Give me \$5 Chips, A Jack and Coke — Hold the Cleavage: A Look at Employee Appearance Issues in the Gaming Industry*, 7 GAMING L. REV. 335 (2003).

85. *Id.*

86. Kamer & Keller, *supra* note 84, at 335.

often attempts to enhance the customer base of its casino “with scantily clad ‘Barbie doll’ cocktail servers, beefcake bartenders, and smartly dressed dealers with sex appeal and gregarious personalities.”⁸⁷ Unfortunately, management attempts to draw a bigger customer base by creating a “sexy image” of its operations becomes unlawful when such policies rely on stereotypes about female characteristics and abilities or notions of female attractiveness.

The Supreme Court has repeatedly held that customer preference is not a legitimate nondiscriminatory reason for a policy that has a disparate impact.⁸⁸ A BFOQ must involve a business necessity, not merely a business convenience. The language of Title VII suggests that “permissible distinctions based on sex must relate to ability to perform the duties of the job.”⁸⁹ To establish a legitimate BFOQ defense an employer must prove that: “(1) a direct relationship exists between an employee’s protected class and an employee’s ability to perform the duties of the job, such that members of the excluded class cannot perform the duties of the job; and (2) the required qualification goes to the ‘essence’ of the business operation.”⁹⁰

The first element requires the courts to ask what particular skills are involved in an occupation.⁹¹

In the context of cocktail servers, for example, an employer must demonstrate that a server’s sex and physical appearance are necessary for them to perform their work. Assuming that cocktail servers must be able to serve drinks, carry heavy trays, walk long distances, and be friendly and courteous, their sex or age is not likely to be considered necessary to their ability to acceptably perform their job.⁹²

However, the characterization of the job duties is essential. Depending on how an employer characterizes the essence of the business, a BFOQ based upon appearance and sex may be successful. The second element calls for the court to ask whether the qualification is sufficiently related to the essence of the business.⁹³

For example, in *Playboy Club*, Playboy successfully asserted that vicarious sexual entertainment was its primary service.⁹⁴ The N.Y. Human

87. *Id.*

88. *Auto. Workers v. Johnson Controls*, 499 U.S. 197, 201-06 (1991).

89. *Id.* at 204.

90. *Kamer & Keller*, *supra* note 84, at 340.

91. *Id.*

92. *Id.* at 340-341.

93. *Id.* at 341.

94. *Id.* (citing *St. Cross v. Playboy Club of N.Y.*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights App. Bd. 1971)).

Rights Appeals Board agreed.⁹⁵ The court found that being female is a BFOQ for the position of being a Playboy Bunny because the dominant purpose of the job was characterized as being to “titillate and entice male customers,” thus being female was necessary to the essence of the business.⁹⁶

However, in *Diaz v. Pan American World Airways*, the court rejected the BFOQ defense.⁹⁷ Pan Am had a policy of restricting its hiring for flight attendants to females.⁹⁸ When the company was sued by a male job applicant who had been denied a flight position because of his sex, Pan Am defended its policy by asserting the BFOQ defense.⁹⁹ In denying Pan Am’s defense, the court held that being female was not a BFOQ for the job of flight cabin attendant and appellee’s refusal to hire appellant’s class solely because of their sex constituted a violation of Title VII.¹⁰⁰

The *Playboy* case is a straightforward illustration of when market justifications act as legitimate causes for sex-based discrimination. Similarly, the *Pan Am.* case is a typical example of a company’s reliance on customer preference for sex-based discrimination as violative of Title VII. The above mentioned cases are rather straightforward and do not leave the courts much room to be deferential to employers. However, when discrimination occurs at a deeper level, one that is rooted in a perceived “naturalness of the existing gender order,”¹⁰¹ courts tend to be more deferential to employers by accepting customer preference justifications.

The case of *Jespersen v. Harrah’s* is a good example of a company policy that is so rooted in the notion of the “naturalness of the gendered order” that courts may not recognize the discriminatory nature of the program.

According to the brief filed on Harrah’s behalf, the appearance requirements imposed on employees under Harrah’s neutral “Personal Best” program constituted a legitimate exercise of managerial discretion.¹⁰² Alternatively, the policy was not discriminatory because it qualified as a BFOQ.¹⁰³ Harrah’s “Beverage Department Image Transformation” program was implemented at twenty Harrah’s locations in February 2000 with

95. *Id.*

96. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

97. *Id.* at 388-889.

98. *Id.* at 386.

99. *Id.*

100. *Diaz*, 442 F.2d at 388-89.

101. Deborah L. Brake, *Revisiting Title IX’s Feminist Legacy: Moving Beyond the Three Part-Test*, 12 J. GENDER SOC. POL’Y. & L. 453, 477 (2003).

102. See Appellee’s Answering Brief at 33-34, *Jespersen*, 392 F.3d 1076 (No. 03-15045), available at 2003 WL 22716702; see also, *Brief of the Equal Employment Advisory Council as Amicus Curiae* (2005), available at <http://www.eeac.org/briefs/JespersenvHarrah.s.pdf> (last visited Feb. 15, 2006).

103. *Id.*

the goal of creating a brand standard of excellence.¹⁰⁴

Jespersen, on the other hand, argued that the company policy had nothing to do with the “essence of the [beverage serving] business.”¹⁰⁵ According to Harrah’s own rules the job qualifications included maintaining a courteous, professional relationship with customers and co-workers, as well as making drinks effectively and efficiently.¹⁰⁶ The requirements of wearing make-up cannot be said to be necessary to the job description. In fact, Jespersen detailed how the wearing of make-up negatively affected her ability to perform her job: “[wearing make-up] prohibited me from doing my job. I felt exposed.”¹⁰⁷

While courts justify policies such as Harrah’s as serving legitimate business interests, (including: health and safety reasons,¹⁰⁸ projecting a professional image when representing the company and its interests,¹⁰⁹ and promoting a productive work environment), such discriminatory policies cannot be defensible under the guise of legitimate market justification concerns. By continuing to be deferential to company policies mandating sexual discrimination,¹¹⁰ courts undermine Title VII’s prohibitions on sex based discrimination.

C. BENIGN “COMMUNITY EXPECTATIONS” OR UNLAWFUL “GENDER STEREOTYPING”?

The case of Ann Hopkins in *Hopkins v. Price Waterhouse* is illustrative of unlawful gender stereotyping.¹¹¹ In her fifth year with Price Waterhouse, Hopkins applied for partnership but was told her candidacy would not be considered.¹¹² She resigned and then sued the firm for sex discrimination.¹¹³ Critical to her case were numerous comments by male partners at Price Waterhouse, describing Hopkins as “macho,” remarking she “over-compensated for being a woman,” and suggesting her chances for partnership would improve if she would “walk more femininely, talk more femin-

104. *Jespersen*, 392 F.3d at 1077.

105. See Appellant’s Corrected Opening Brief at 33-34, *Jespersen*, 392 F.3d 1076 (No. 03-15045), available at 2003 WL 22716697.

106. *Jespersen v. Harrah’s Operating Co., Inc.*, 392 F.3d 1076, 1077 (9th Cir. 2004).

107. *GenderPAC Interviews Darlene Jespersen on Gender, Being Fired, and Sex Stereotyping in the Workplace*, *supra* note 72.

108. See *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382 (9th Cir. 1984) (holding that safety concerns justified company policy of requiring all employees to be clean-shaven, where the policy was based on the necessity of being able to wear a respirator with a gas-tight face seal because of potential exposure to toxic gases).

109. See *Wislocki-Goin*, 831 F.2d 1374 (holding that a policy adopted out of legitimate concern for public confidence in professionalism of government employees does not violate Title VII); see also *Lanigan v. Bartlett and Co. Grain*, 466 F. Supp. at 1392 (affirming that the “decision to project a certain image as one aspect of company policy is the employer’s prerogative”).

110. See, e.g., *Tavora*, 101 F.3d at 907.

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

112. *Id.* at 228.

113. *Id.*

inely, wear make-up, have her hair styled and wear jewelry.”¹¹⁴

Furthermore, the American Psychological Association (hereinafter APA) submitted an *amicus* brief in support of Hopkins position.¹¹⁵ The brief argued that:

- (1) empirical research on sex stereotyping has been conducted over many decades and is commonly accepted in the scientific community;
- (2) stereotyping under certain conditions can create discriminatory consequences for stereotyped groups;¹¹⁶
- (3) the conditions that promote stereotyping were present in petitioner’s work environment; and
- (4) although defendant was found to have taken no successful steps to prevent its discriminatory stereotyping of plaintiff, methods are available to monitor and diminish the effects of stereotyping.¹¹⁷

The Court agreed with Hopkins and the APA, finding impermissible gender stereotyping.¹¹⁸ Writing for the Court, Justice Brennan wrote that:

we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women.”¹¹⁹

The Court held that the company impermissibly imposed sex-differentiated appearance standards on male and female employees and awarded Hopkins partnership status with compensation at the level of those partners promoted at the time of her candidacy, back pay with interest, and an injunction against retaliation.¹²⁰

While the *Price Waterhouse* decision seems to bar the use of all sexual stereotypes in employment decisions, in practice the decision has been erratically applied. For example, in *Jespersen* the Ninth Circuit Court refused to apply the *Price Waterhouse* standard, reasoning that gender-

114. *Id.* at 235.

115. *Law and Psychology: Price Waterhouse v. Hopkins*, American Psychological Association, available at <http://www.apa.org/psychlaw/price.html> (last visited Feb. 15, 2006).

116. For example, where stereotypes shape perceptions about women’s typical and acceptable roles in society, and that negative effects on women in work settings have been demonstrated. See, e.g., BORDO, *supra* note 75.

117. *Law and Psychology: Price Waterhouse v. Hopkins*, *supra* note 115.

118. *Price Waterhouse*, 490 U.S. at 250.

119. *Id.* at 251.

120. *Id.* at 252.

stereotyping sexual harassment is distinct from gender-specific appearance standards.¹²¹ Similarly in *Tavora*, the court found that a company policy that required male employees but not female employees to wear short hair does not violate Title VII.¹²² The court reasoned that Title VII does not render illegal all employment policies that treat men and women differently, no matter how trivial.¹²³ Instead, the court stated that the company's neutral policy was not discriminatory simply because it imposed differential standards based on community expectations.¹²⁴

While *Price Waterhouse* has been successfully applied in cases where the stereotypical notions of gender have resulted in harassment from other employees, courts are consistently failing to apply the *Price Waterhouse* standard in "neutral" employer dress codes.¹²⁵

[I]n dress code cases, courts typically refuse to see the "discrimination" at all, as long as both men and women are prohibited from "crossing over" to the gender presentation deemed suitable for the other sex. These cases reflect an implicit judgment that employers should not be forced to bear the costs of challenging certain cultural expectations about gender.¹²⁶

Legal scholars and feminists fault the courts' holdings on an assumption that such dress codes, because they force employees to conform to certain societal notions of masculinity and femininity, are neutral and thus harmless. The courts cannot assume that legal actors come to law as ungendered beings. Such presumptions are "preposterous" because "our society remains gendered in significant ways."¹²⁷

Because gender inequality pervades the way we think, courts must be especially sensitive when defining appearance based policies as "neutral." When courts leave disparate employer practices in place, they are reinforcing the oppressive social systems in place.

To feminists, law both reflects and creates oppressive social systems. Law contributes to our basic understanding of what is real and what is not. Law does this primarily through its 'expressive function': the messages that the law sends about the kind of

121. *Jespersen*, 280 F. Supp. 2d at 1202.

122. *See, e.g., Tavora*, 101 F.3d at 907.

123. *Id.*

124. *Id.* at 908.

125. *Fagan*, 481 F.2d at 1117 (accepting the argument that the only way to be "gender neutral" is to adopt disparate rules that reflect "the standard of what the community expects of each sex, respectively").

126. Brake, *supra* note 101, at 476.

127. BOTTOMLEY, *supra* note 80, at 14.

people we are and the institutions that we value.¹²⁸

Recognizing that the laws were constructed overwhelmingly by Anglomen, who may (and do) have a different understanding of “what is real and what is not” to working women, is essential to transforming the laws surrounding appearance and grooming standards.

University of Michigan Law Professor Catherine A. MacKinnon defines sexual harassment of working women as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.”¹²⁹ While appearance and grooming standards generally do not fall within the purview of sexual harassment analysis, the dynamics MacKinnon describes are valuable for understanding the effect of such “neutral policies” on women. A company policy, written by management, outlining the details of how women must dress, act, and look is a powerful expression of dominance. For women such as Jespersen it is an unwanted imposition of a sexual requirement in the context of a relationship of unequal power. While having to wear make-up and stockings may not appear to a judge to be a sexual requirement, in reality, such “gender neutral” policies have real and long-term implications about how women are perceived in the working world.

IV. CONCLUSION: DISTRICT OF COLUMBIA MODEL

Currently, the District of Columbia is at the forefront of appearance based discrimination legislation. Its statute explicitly includes a prohibition against appearance based discrimination. The District has enacted the following antidiscrimination ordinance:

It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.¹³⁰

The City’s Code defines “personal appearance” as:

128. Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law?*, 28 SW. U. L. REV. 171, 179-80 (1999).

129. RAYMOND F. GREGORY, UNWELCOME AND UNLAWFUL, SEXUAL HARASSMENT IN THE AMERICAN WORKPLACE 1 (Cornell University Press 2004); (quoting CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, (Yale University Press, 1979)).

130. D.C. CODE ANN. § 2-1401.01 (2001).

[T]he outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.¹³¹

The District of Columbia applies its antidiscrimination laws, including the prohibition of “personal appearance” discrimination, via the following, broad statement of law:

Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.¹³²

The benefit of state and local appearance discrimination employment statutes has begun to be recognized by scholars and localities nationwide.¹³³ “Employers would be encouraged to hire applicants based solely on legitimate qualifications and business concerns, instead of on stereotypical and unfounded assumptions.”¹³⁴ Furthermore, these laws would give individuals harmed by unfounded stereotyping a mechanism for change: “an avenue of relief should also exist for individuals who face and endure real and damaging discrimination based on their outward appearance.”¹³⁵

Most applicants and employees receive inadequate protection from appearance discrimination. Although some appearance claims might fall within the scope of Title VII, the ADA, or the ADEA, the vast majority of appearance discrimination claims are not actionable. Furthermore, even where a connection to a protected category can be argued, many claims likely will fail because courts will characterize these claims as discrimination based on appearance, as opposed to a characteristic related to the exist-

131. *Id.* at § 2-1401.02.

132. *Id.* at § 2-1402.01.

133. Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 212 (2000).

134. *Id.*

135. *Id.*

ing category.

Like Adamitis, I argue that appearance discrimination victims should not be limited to existing laws.¹³⁶ Instead, I urge local municipalities and state governments to amend their legislation to include prohibitions against appearance based discrimination. Doing so will ensure that employers will no longer use Title VII's language and the courts' deference to reinforce "harmless" or "neutral" sexual stereotypes. Instead, legislation modeled after the District's ordinance would encourage employers to avoid creating policies and making employment decisions that involve forcing employees to conform to damaging gender stereotypes.

* * *