WHAT DO UNIONS DO ABOUT APPEARANCE CODES?

MICHAEL J. YELNOSKY*

I. INTRODUCTION

Most of the legal scholarship analyzing employers' discretion to impose appearance codes focuses on whether antidiscrimination law, particularly Title VII, limits that discretion.[1] Much less attention had been paid to the role that labor law and collective bargaining might play.[2] My intention here is to show how that body of law can offer employees important protection from employer overreaching.[3]

One way to begin is to compare the legal options available to 1) Darlene Jespersen when she objected to her employer's required appearance code, and 2) Renee Gaud and Trisha Hart—cocktail servers at the Borgata Hotel Casino and Spa in Atlantic City—when they objected to their employer's appearance code. Thanks in part to the work of Mitu Gulati, Devon Carbado, and Gowri Ramachandran, many of the elements of the *Jespersen* case are now well-known.[4] Darlene Jespersen, a bartender at Harrah's Casino in Reno, Nevada, challenged her employer's decision to enforce a policy that required female—but not male—employees to wear makeup and style their hair. In a lawsuit filed in federal court, she claimed that her discharge for failing to comply with that

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* Associate Dean for Academic Affairs and Professor of Law, Roger Williams University School of Law. My thanks to Mitu Gulati, whose work on these issues piqued my interest; to his colleague Catherine Fisk; and to their students in a seminar at Duke Law School, all of whom made helpful comments when I presented to them some of the ideas in this paper. Thanks also to my colleagues at Roger Williams—Jared Goldstein, Jonathan Gutoff, Diana Hassel, and Colleen Murphy—who commented on my draft. Finally, many thanks to Kathleen Andresen, a terrific research assistant.

1. *See, e.g.*, Devon Carbado et al., *The Jespersen Story: Makeup and Women at Work*, *in* EMPLOYMENT DISCRIMINATION STORIES (Joel Wm. Friedman ed., 2006); Katherine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004).

2. The only discussion I have found is in an interesting 1992 article by Karl E. Klare, but his treatment of the role of labor law is very short. *See* Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW. ENG. L. REV. 1395, 1425–32 (1992) (suggesting reforms that would establish employee rights to be free from certain employer regulation of appearance and require employers to bargain for more extensive freedom to regulate).

3. One might even think of this paper as a very modest attempt to demonstrate the relevance of labor law in the face of its declining influence. For a recent discussion of the decreasing importance of labor law scholarship, see Cynthia L. Estlund, *The Death of Labor Law?*, 2 ANNU. REV. LAW & SOC. SCI. 6.1 (Dec. 2006).

4. Carbado et al., *supra* note 1.

policy constituted illegal discrimination under Title VII.[5] The Ninth Circuit ultimately determined that Harrah's was entitled to summary judgment.[6] Less well-known is that Jespersen also filed suit against Harrah's in Nevada state court claiming that the discharge constituted a breach of an implied employment contract she had with Harrah's. In rejecting that claim, the Supreme Court of Nevada ruled that her allegations were not enough to overcome her status as an at-will employee whose discharge was not subject to a contract-based challenge.[7]

In contrast, Renee Gaud and Trisha Hart worked as cocktail servers at the Borgata Hotel Casino and Spa in Atlantic City, New Jersey.[8] Unlike Darlene Jespersen, they were union employees represented by the Hotel Employees and Restaurant Employees International Union, Local 54, and thus were not at-will workers.[9] Gaud, Hart, and other employees objected to a new Borgata policy prohibiting cocktail servers and bartenders from gaining more than seven percent of their body weight as determined by a baseline set when the policy was instituted.[10] Gaud and Hart challenged the policy in New Jersey state court on the grounds that it constituted unlawful discrimination against women under New Jersey law.[11] However, because Borgata cocktail servers and bartenders are represented by a union, they had another avenue available to challenge Borgata's policy. Their union filed grievances on their behalf claiming that certain aspects of Borgata's implementation of the policy violated the collective bargaining agreement between the parties. One grievance was settled, and the other was ultimately withdrawn.[12]

In this paper, I will first show why I assert that the statutory and contract protections available to union employees can be quite robust in the area of appearance codes, and sometimes more robust than the protections offered by other bodies of law, particularly antidiscrimination law. Second, I will respond to some critiques I anticipate of the suggestion that labor law has a significant

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5. She also alleged that Harrah's conduct constituted intentional infliction of emotional distress and negligent supervision and training. Jespersen v. Harrah's Operating Co., Inc., 280 F.Supp. 2d 1189, 1194–95 (D. Nev. 2002), *aff'd*, 392 F.3d 1076 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

6. *Jespersen*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

7. *See* Ed Vogel, *Nevada Supreme Court: Court Upholds No-Cosmetics Firing*, LAS VEGAS REV.-J., June 8, 2004, http://www.reviewjournal.com/lvrj_home/2004/Jun-08-Tue-2004/news/24055099.html.

8. Am. Compl., Gaud v. Boyd Gaming Corp., No. ATL-L-544-06 (N.J. Super. Ct. Law Div. Feb 7, 2006).

9. *Id.*

10. *Id. See also* Suzette Parmley, *Suit Over Casino's Weight Rule Could Have Wide-Ranging Repercussions*, PHILA. INQUIRER, May 22, 2005, at 1.

11. Am. Compl., *Gaud* (alleging that the Borgata policy and its implementation constitute intentional infliction of emotional distress as well as discrimination based on handicap, sex, age, and retaliation under the N.J. Law Against Discrimination). A male applicant for a bartender's position has also sued the Borgata, claiming that the policy discouraged him from applying for a job. Parmley, *supra* note 10.

12. Telephone Interview with Jill Owens, Of Counsel, Meiselman, Denlea, Packman, Carton & Eberz, P.C., in White Plains, N.Y. (Aug. 21, 2006).

role to play in protecting the freedom of employees to present the image they choose at work.

II. LABOR LAW, COLLECTIVE BARGAINING AGREEMENTS, AND APPEARANCE CODES

The National Labor Relations Act (NLRA), the primary statute governing union-management relations in the private sector, gives employees the right to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[13] Thus, covered employees may form a union without employer interference, and the employer is obligated to bargain in good faith with that union "with respect to wages, hours, and other terms and conditions of employment."[14] The National Labor Relations Board has held that appearance codes are "terms and conditions of employment" within the meaning of the NLRA and thus "mandatory subjects of bargaining."[15]

This has two important consequences. First, if a union seeks contract language restricting the employer's ability to impose certain appearance requirements, the employer must negotiate with the union to impasse before implementing an appearance code,[16] and the union may insist on its position in bargaining and use economic weapons, such as a strike, in support of its position.

Second, assuming a union and an employer have successfully executed a collective bargaining agreement, the employer may not modify any provision of that agreement involving a mandatory subject for the life of the contract without the union's consent or a waiver of the union's right to bargain over the issue.[17] For example, in *Public Service Co.*,[18] the employer, a utility company, had a collective bargaining relationship for over fifty years with a union representing its electrical and water transmission, distribution, and production employees.[19] The most recent agreement provided specifically that union employees were not required to wear uniforms.[20] However, without bargaining with the union, the

13. 29 U.S.C. § 157 (2000).

14. *Id.* §§ 158(a)(5), 158(d).

15. *E.g.*, *Crittenton Hosp.*, 342 N.L.R.B. No. 67 (2004) (uniform and fingernail policies regulating the appearance of nurses are mandatory subjects of bargaining).

16. Nat'l Labor Relations Bd. v. Katz, 369 U.S. 736 (1962). *See* Transp. Enters., Inc., 240 N.L.R.B. 551 (1979) (finding that the employer violated § 8(a)(5) of the NLRA by publishing a new dress code without giving the union the opportunity to bargain over it, and ordering that employer restore the dress code to its original form). *Cf.* Bd. of Educ., 105 Lab. Arb. Rep. (BNA) 285, 286 (1995) (finding that where during collective bargaining the employer proposed contract language specifically prohibiting teachers from wearing jeans, shorts and mini-skirts and requiring male employees to wear a collared shirt and tie, union disagreed, and the final contract language provided that "[a]ll professional employees shall be dressed in an manner that conforms with their position as leaders and role models of the student population," employer could not enforce a no-jeans rule without proving that the wearing of jeans in a particular case resulted in a particular teacher not being "professionally" dressed).

17. Public Serv. Co., 337 N.L.R.B. 193, 198 (2001).

18. *Id.*

19. *Id.* at 194.

20. *Id.*

employer announced a new uniform policy that stated in part "[w]earing of approved uniform clothing items shall be mandatory as a condition of employment."[21] The Board found that the employer violated § 8(a)(5) of the NLRA (employer's refusal to bargain in good faith with a union) because it unilaterally changed the contract without bargaining, and nowhere in the contract had the union waived its right to bargain over the uniform issue.[22] The employer was ordered to rescind the uniform policy and bargain with the union in good faith before implementing such a requirement.[23]

The Board recently reaffirmed its position that appearance codes are mandatory subjects of bargaining in a case involving a hospital's unilateral decision to require all employees who provide hands-on health care to patients to (1) wear uniforms and (2) refrain from the use of acrylic and artificial nails. Nowhere in the collective bargaining agreement had the union waived the right to bargain over these changes. The Board concluded the employer had breached its duty to bargain when it imposed the uniform requirement.[24]

Finally, one of the least appreciated aspects of labor law is that the protections of the NLRA apply even to employees who are not members of unions. Section 7 gives "employees"—union or otherwise—the right to engage in "concerted activities for . . . mutual aid or protection." The Supreme Court has interpreted the statute, for example, to protect from employer discipline non-union employees who engaged in a walk-out to protest cold temperatures in their workplace.[25] Thus, the NLRA provides protection to even non-union employees who take steps to persuade their employers not to exercise the "right" granted them under the background legal regime of at-will employment to enact appearance codes. For example, in *American Arbitration Association*[26], the employer, a provider of dispute resolution services, announced that clerical employees could no longer wear jeans to the office. A group of non-union secretaries subject to the new rule complained to Billie Holbrook, a non-union tribunal administrator somewhat higher up in the organization, that they could not afford the type of clothing the employer now deemed necessary. On their behalf, Holbrook wrote a letter to the vice-president and to some of the employer's clients attempting to convince the employer to change the no-jeans policy. She challenged her subsequent discharge on the grounds that it constituted interference with her rights under the NLRA to engage in concerted activity—on behalf of the group of complaining employees—for mutual aid or

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21. *Id.* at 196.

22. *Id.* at 198.

23. *Id.* at 194–200.

24. Crittenton Hosp., 342 N.L.R.B. No. 67; *see also* Riverside Office of the Pub. Defender, 92 Lab. Arb. Rep. (BNA) 1241 (1989) (past practice of permitting male investigators to wear open-collared shirts in the office could not be changed by employer to require shirts and ties until the parties agreed to do so through collective bargaining). The Board in Crittenton Hospital concluded the employer did not violate the NLRA when it unilaterally prohibited the use of acrylic or artificial nails because the change was not "material, substantial and significant" given that the prior policy prohibited fingernails longer than one-eighth inch past the tip of the employee's fingers and "strongly discouraged" the use of acrylic and decorated nails. Crittenton Hosp., 342 N.L.R.B. No. 67.

25. Nat'l Labor Relations Bd. v. Washington Aluminum, Co., 370 U.S. 9 (1962).

26. Am. Arbitration Ass'n, 233 N.L.R.B. 71 (1977).

protection.[27] The Board concluded that she had in fact engaged in such concerted activity, although she acted alone, and she likely would have prevailed had she not sent the letter to the employer's clients. In doing so, the Board ruled, she had engaged in acts of disloyalty that took her actions outside the protection of section 7 of the NLRA. [28]

Quite apart from the rights created by the NLRA, union employees have rights created by the collective bargaining agreements to which their unions are signatories. For example, in virtually every collective bargaining agreement, employers agree to limit the discretion they have under the prevailing rule of at-will employment and instead oblige themselves to discipline or discharge covered employees only for "just cause," the presence of which, if challenged, must be established by the employer in arbitration.[29] Some unions have, on behalf of their members, successfully challenged discipline or discharge for failure to adhere to an appearance code under the just cause provision of a collective bargaining agreement. Unions have also successfully challenged employers' appearance codes on the grounds that the employer had given up the right to implement the code under some other provision of the collective bargaining agreement. These two contract-based restrictions on employer discretion can be significant.

The relative traction of employment discrimination and collective bargaining law in an appearance code case is illustrated in *Oxford Nursing Home*,[30] an arbitration award involving a challenge to the employer's dress code, which required female nurses to wear white dresses and male nurses to wear white shirts and pants.[31] The union brought the grievance on behalf of female nurses who claimed that the dress code violated the collective bargaining agreement because (1) it discriminated against female employees and (2) it was "unreasonable and beyond Management's authority under the Collective Bargaining Agreement."[32] The arbitrator found for the employer on the discrimination theory but for the union on the theory that the rule exceeded management's authority under the Collective Bargaining Agreement.[33] As a result, he ordered the hospital to permit female nurses to wear pants.[34] In finding for the employer on the discrimination theory, the arbitrator relied on decisions interpreting Title VII to permit most sex-differentiated appearance codes.[35] He

27. 29 U.S.C. § 158(a)(1) (making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157").

28. Am. Arbitration Ass'n, 233 N.L.R.B. 71. Alan Hyde has discussed in some detail how the Supreme Court's implied limitations on the scope of protected conduct under section 7—conduct that is without question "concerted activity for mutual aid or protection"—chills unorganized employees in the exercise of their section 7 rights. Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993).

29. Richard B. Freeman & James L. Medoff, *The Two Faces of Unionism*, 57 PUB. INTEREST 69, 73 (1979) (explaining that 99% of collective bargaining agreements provide a process for redressing grievances and 95% have arbitration provisions).

30. 75 Lab. Arb. Rep. (BNA) 1300 (1980).

31. *Id.* at 1300.

32. *Id.*

33. *Id.* at 1301.

34. *Id.* at 1302.

35. *See id.* at 1301.

distinguished *Carroll v. Talman Federal Savings and Loan Association of Chicago*,[36] which held that an employer's policy requiring female but not male bank employees to wear uniforms violated Title VII, on the grounds that *Carroll*, unlike the case before him, involved offensive and unlawful sexual stereotypes.[37] However, the arbitrator refused to defer to the Hospital's "desire to have the Nursing personnel maintain a standard of attire established in accordance with long obtaining and acceptable standards . . . ."[38] It was unreasonable for the employer, he wrote, to force female employees to conform to an archetype embodied by Florence Nightingale and to ignore that women now (the case was decided in 1980) regularly wear pants.[39]

In *Fairmont-Zarda Dairy*, another arbitrator ruled that a company's no-beard rule violated the collective bargaining agreement with the union representing its 180 maintenance, transportation, warehouse, and production employees.[40] Under that agreement, the employer explicitly reserved the right to "unilaterally determine reasonable work and safety rules including—but not limited to—grooming, wearing apparel, and cleanliness standards."[41] The arbitrator found that the prohibition on beards was unreasonable because it was not enacted to respond to a problem in the plant.[42] To the extent that the employer asserted it was a prophylactic rule to avoid contamination of dairy products, the rule was unreasonable because the employer imposed the policy on drivers not involved in production, and industry standards did not prohibit beards.[43] In conclusion, the arbitrator explained why such a rule was "inherently suspect,"[44] using language that makes clear that a culture of employee autonomy exists in some union workplaces that is virtually unheard of in the non-union workplace.

> Wearing a beard is a matter of personal image, indeed, it may be an expression of personality. . . . [I]t is a matter of self-worth which clearly goes beyond the work place. For the employer to have a right to regulate its employees [sic] appearance outside of their work, the reasons for the regulation must be real, and convincing. . . . In industrial relations, the recognition that employers are limited to a regulation of the workplace has always been the expression of "the American way." . . . An order to an employee who has had a beard for twenty-

36. 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

37. *Oxford Nursing Home*, 75 Lab. Arb. Rep. at 1300–01 (citing *Carroll*, 604 F.2d 1028).

38. *Id.* at 1301.

39. *Id.* (referring to a New York Public Library exhibit showing changes in nursing outfits since the sixteenth century and attaching as an exhibit a photocopy of a page from a uniform sales catalog). In another pant suit case decided a decade earlier, an arbitrator concluded that a school district's rule forbidding female teachers in grades K-12 from wearing pants suits, while not discriminatory, was a violation of a collective bargaining agreement provision permitting the employer "to establish and equitably enforce reasonable rules and personnel policies." School District of Kingsley, 56 Lab. Arb. Rep. (BNA) 1138 (1971) (explaining that pant suits met community standards so a rule prohibiting them was unreasonable).

40. 106 Lab. Arb. Rep. (BNA) 583 (1995).

41. *Id.* at 584.

42. *Id.* at 583.

43. *Id.*

44. *Id.* at 590.

> six years to shave is a draconian measure for anyone who believes in individuals and at least in some modicum of individualism.[45]

Finally, in addition to substantive protection from discharges that are not based on a demonstrable breach of an employee's obligations, the "just cause" provision of a collective bargaining agreement gives covered employees certain procedural protections, ranging from elements of procedural due process to protection from unreasonable employer attempts to enforce even reasonable rules.[46] *Albertson's Inc.*[47] offers a good example of this latter protection in the context of an appearance code case. Albertson's, a supermarket chain, had a "conservative jewelry" policy in one of its grocery stores in Portland, Oregon.[48] Under that policy, body-piercings—including tongue rings—were prohibited on the ground that they were offensive to customers.[49] The union did not argue that

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45. *Id. See also* Mitchell-Bentley Corp., 45 Lab. Arb. Rep. (BNA) 1071 (1965) (finding that discipline of two female employees for wearing "short shorts" was improper, although they refused the foremen's direct order to change, because insubordination was excusable when employees were permitted to wear other shorts, the posted plant rule only prohibited the wearing of "unsuitable clothing or attire," and "considering the nature of the personal right of attire the women grievants were trying to exercise").

The arbitrators in both *Fairmont-Zarda* and *Mitchell-Bentley* recognized that grooming cases can impact important personal rights of employees. However, while the arbitrator in *Mitchell-Bentley* may have come out on the side of employee autonomy and perhaps gender equality, his language suggested he was viewing the case through a lens colored by gender stereotypes: "The Chairman must take what amounts to almost judicial notice that short shorts or just shorts worn by some women can be pleasantly attractive as well as distractive . . . . It appears to all depend on the woman who is wearing the short shorts . . . . It would appear to be the personal right of a female employee to wear short shorts for her better or for her worse since the shop practice [permitting women to wear shorts] already embraces the risk (we assume to men) of attraction as well as distraction." *Id.* at 1073. My reaction to the mixed message of this decision was similar to my reaction to Judge Kozinski's dissent from the en banc Ninth Circuit majority opinion in *Jespersen*. While I agree with his analysis and was impressed by his willingness to take seriously, at the summary judgment stage, Jespersen's claims that wearing makeup had a serious negative impact on her, he relied on a gender stereotype in support of another claim that women at Harrah's were seriously burdened by the makeup requirement. "[A]pplication of makeup is an intricate and painstaking process that requires considerable time and care. Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists." *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting). Both decisions—*Mitchell-Bentley* and the Kosinski dissent in *Jespersen*—reminded me of a cautionary note sounded by Carbado, Ramachandran, and Gulati in their chapter arguing in favor of more scrutiny of appearance codes under Title VII. They warned that "given the extent to which the judiciary is becoming increasingly conservative and given further that even liberal leaning judges are likely to have very traditional views about gender, one can reasonably query whether it makes sense to move Title VII's sex discrimination jurisprudence in a direction that explicitly engages the substantive implications of gender normative screening." Carbado et al., *supra* note 1, at 151.

46. *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 611–12 (describing how "just cause" protection 1) imposes a substantial burden on an employer to establish the employee failed to meet fundamental job requirements and that the discipline furthers a legitimate employer interest, and 2) entitles the employee to "industrial due process"—notice, a decision based on facts, the opportunity to be heard, progressive discipline, equal protection, and individualized treatment).

47. Albertson's Inc., 115 Lab. Arb. Rep. (BNA) 886 (2000).

48. *Id.* at 888.

49. *Id.*

the rule was unreasonable.[50] Instead, it filed a grievance on behalf of a lobby clerk who was asked by her supervisor if she was wearing her tongue ring, answered no, and was then fired for insubordination when she refused to stick out her tongue so her supervisor could test the truthfulness of her response.[51]

The arbitrator ruled that Albertson's violated the provision of the collective bargaining agreement giving it the right to discharge covered employees only "for good cause" even though in cases involving insubordination "employees are generally required to follow the basic labor relations rule of "Obey now, grieve later."[52] An exception was warranted here, according to the arbitrator, because the supervisor had no "reasonable suspicion" that the employee was lying when she said that she was not wearing the tongue ring; thus, it was unreasonably intrusive to require her to open her mouth and extend her tongue so the supervisor could check her "private, personal space."[53]

Of course, not all arbitrators view these issues in the same way, and there are plenty of examples of unsuccessful challenges to employer appearance codes brought under collective bargaining agreements. [54] Nevertheless, I think it fair to say, as I stated at the outset, that labor law and the enforcement of collective bargaining agreements generally give covered employees more protection from the imposition of appearance codes than any other statutory or common law regulations.

Other attractive features of arbitration under collective bargaining agreements bear mentioning here. Unlike employees seeking to challenge employer conduct under Title VII, union employees seeking to enforce their rights under a collective bargaining agreement need not incur the time and expense of finding a lawyer, nor need they worry that if their claim has insufficient monetary value, they might not be able to find representation: Union representatives are freely available to help employees assert their rights under a collective bargaining agreement. Moreover, resolutions in litigation often take years, even in discrimination cases brought to the EEOC, and the litigation

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50. *See generally id.*

51. *Id.* at 886.

52. *Id.* at 892.

53. *Id.* at 887. *See also* Lawrence Bros., Inc., 28 Lab. Arb. Rep. (BNA) 83 (1957) (employer's rule requiring "girls operating machines" to wear jeans is reasonable, but discipline of female employee who wore a dress to work after being told not to was not proper because the employer did not consistently require female machine operators to wear jeans).

54. *See, e.g.*, Heiner's Bakery, 112 Lab. Arb. Rep. (BNA) 1014 (1999) (employer had just cause to discharge employee who delivered baked goods to retailers for failing to obey instruction that he cut his ponytail, regardless of the reasonableness of the rule, because the employee's conduct constituted insubordination); Motion Picture and Television Fund, 103 Lab. Arb. Rep. (BNA) 988 (1994) (convalescent hospital and retirement home could prohibit employee with visitor, patient, staff, and resident contact from having a nose ring because collective bargaining agreement gave the employer the right to adopt reasonable rules of conduct); Town of Vernon, 96 Lab. Arb. Rep. (BNA) 736 (1991) (town can prohibit police officer from wearing earring while on duty because the earring is not part of the prescribed uniform); Mister A's Restaurant, 80 Lab. Arb. Rep. (BNA) 1104 (1983) (employer operating a restaurant trying to create a "classical Mediterranean milieu" could require cocktail waitresses to have blonde hair or to wear blonde wigs); County of Cattaraugus, 77 Lab. Arb. Rep. (BNA) 1027 (1981) (employer can require nurses aides to wear pink uniforms because that has been the longstanding past practice).

process is extremely stressful and divisive. As a result, and because of fear of retaliation, incumbent employees are reluctant to bring Title VII claims.[55] Union employees, on the other hand, have a contract and representatives to protect them from retaliation for asserting their rights under a collective bargaining agreement.[56]

III. LOOKING MORE CLOSELY AT THE PROTECTIONS AVAILABLE UNDER LABOR LAW AND COLLECTIVE BARGAINING AGREEMENTS

Having shown that labor law and the enforcement of collective bargaining agreements can serve as vehicles for employees to obtain some freedom from the imposition of what they perceive to be inappropriate appearance codes, it is left to look more closely at the availability and nature of the protection they offer employees.

The first response to any argument or proposal that suggests labor law as a solution to a problem is that only a small number of American employees are represented by unions and covered by collective bargaining agreements. This critique is well-founded. The decline of union density in the United States is well documented, and its causes have been much discussed. For our purposes, it is enough to begin by noting that according to recent statistics, only 13.7% of all wage and salary workers in the U.S. are represented by unions.[57]

Looking more closely, however, the picture gets more complex; the 13.7% figure may not tell the whole story. First, union density in the private and public sectors is dramatically different. In 2005, only 8.5% of private sector employees were represented by unions, as compared to 40.5% of public sector employees.[58] And of course, the density figures vary from occupation to occupation and industry to industry. For example, by occupation, 42.9% of those in education, training, and library occupations, 39% of those in protective service occupations, and 20.3% of those in transportation and material moving occupations were represented by unions in 2005.[59] By industry, 25.1% of those employed in transportation and utilities and 22.6% of those employed in telecommunications were represented by unions. One might determine, with further study, that the overall union density figures do not satisfactorily measure the amount of protection currently available to employees concerned about appearance codes because those codes may be more (or less) prevalent in industries or occupations that have higher (or lower) than average union density.

A related point is that the National Labor Relations Act excludes from its coverage approximately 20% of the private sector work force—all managerial

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55. *See* Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 587–88 (1999) ("Prospective Title VII plaintiffs worry about retaliation, particularly if they are still employed by the defendant, and worry about being labeled 'trouble makers.'").

56. *See generally id.*; Clyde Summers, *Effective Remedies for Employment Rights*: Preliminary Guidelines & Proposals, 141 U. PA. L. REV. 457 (1992).

57. United States Department of Labor, Bureau of Labor Statistics, Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (January 20, 2006), http://www.bls.gov/news.release/union2.t03.htm.

58. *Id.*

59. *Id.*

and supervisory employees.[60] Thus, the private sector union density figure is higher than the reported 8.5% if one considers all employees other than managers and supervisors. It is possible that only a small percentage of managerial and supervisory employees are subject to formal appearance codes, and that so-called blue-collar workers are much more likely to be subject to these types of formal restrictions.[61] It may be that union density in the private sector is actually highest among the group of employees most likely to be subject to formal appearance codes.

Suggesting that unionization and collective bargaining will be adequate to give employees the power to resist employers' imposition of appearance codes may also be problematic because unions are majoritarian institutions. They have a duty to consider all workers' preferences in deciding how to allocate bargaining and grievance processing resources. Women and minorities may find that their union representative is not a faithful agent for their interests if a majority of the employees in the bargaining unit prefer to pursue and emphasize different goals.[62] For example, assume counterfactually that Darlene Jespersen and her bartender colleagues were unionized. Under Harrah's plan, female bartenders were subject to far greater controls on their appearance than their male counterparts. If men predominated in the bargaining unit, it would not be surprising if a majority of the unit members decided not to make an issue of the "Personal Best" policy in collective bargaining, electing instead to focus on a bargaining objective on which a majority could agree, such as a wage increase.[63] In fact, in unions where men predominate, female members often find it difficult to get issues like sexual harassment, maternity leave, flexible scheduling, family leave, day care, and pay equity to the top of the union's agenda.[64]

On the other hand, appearance codes exist in some predominantly female bargaining units, and majority-female unions have been able to effectively pursue agendas that are responsive to the special needs and desires of female workers.[65] But there is a further complication. Even if women do predominate in

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60. *See* 29 U.S.C. §§ 152(3), 152(11) (2000) (excluding and defining supervisors); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (interpreting the NLRA's supervisory exclusion to require the exclusion of managerial employees); Yelnosky, *supra* note 55, at 619 n.233.

61. Carbado et al., *supra* note 1, at 24–25 (speculating that the national women's rights groups did not show an interest in the outcome of *Jespersen* because their primary constituents, middle-class white women, do not work in jobs governed by formal rules about appearance). Judge Fletcher made a similar point at the en banc oral argument in *Jespersen*, explaining that he was troubled by a legal regime in which higher-level employees had the protection against stereotyping offered by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and blue-collar women had no comparable protection under Title VII. Oral Argument, *Jespersen*, 444 F.3d 1104 (June, 22, 2005), *available at* http://www.ca9.uscourts.gov/ca9/media.nsf/498220E390B8AFEF88257029006EFB24/$file/03-15045.wma?openelement.

62. Yelnosky, *supra* note 55, at 612.

63. Marion Crain, *Women, Labor Unions and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 66 (1995).

64. *Id.* For similar reasons, one might expect it difficult for gay and lesbian employees to get their particular issues to the top of a union's agenda. This critique may be particularly salient in the context of appearance codes because they have such a strong tendency to require gender conformity.

65. Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1871–84 (1991) (describing the tactics of three majority-female unions). For a discussion of the activities of unions representing flight attendants, see *infra* Part IV.

a bargaining unit, some appearance codes may not be equally objectionable, if at all, to a majority of women in that unit. A majority may not find, for example, that a rule requiring female employees to wear makeup is problematic. As many have observed, some grooming standards "simply" require men and women to comply with widely accepted social norms about proper appearance, and in that sense are not only "easy" to comply with, but are acceptable to most men and women.[66] This is simply another version of the same problem: Unions exist to aggregate the preferences of their members, and those in the minority may not find the union is sufficiently protective of their particular concerns.[67]

But this point can be overstated, as even those employees in the minority are not without protection in a unionized workplace. Provisions in a collective bargaining agreement cover all bargaining unit employees, and the union owes each employee (whether or not in the majority) a duty of fair representation in grievance handling.[68] For example, presumably a majority of the employees at the Fairmont-Zarda Dairy did not have beards .[69] Nevertheless, the union at Fairmont-Zarda was willing to bring to arbitration a grievance challenging the employer's no-beard rule, even though success would only benefit bargaining unit employees who wore beards or wanted to wear them in the future.[70] Similarly, it seems fairly safe to assume that a majority of the employees at the Albertson's grocery store in Portland, Oregon did not have body piercings.[71] Nevertheless, the union in *Albertson's* arbitrated the grievant's complaint that she was discharged without just cause when the employer fired her for refusing to stick her tongue out for inspection to determine her compliance with the employer's "no-piercings" rule.[72]

Looking at these cases again, this time through the lens of majoritarian politics, one can perhaps explain the unions' conduct by thinking of the employee grievants as presenting not exceptional complaints but instead complaints that raise issues that are important to a majority of the employees in the affected bargaining units. Recall that the arbitrators in these two cases did not conclude that the appearance codes in question were impermissibly discriminatory; in fact, it appears there was no basis in either case for such a

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66. *E.g.*, Carbado et al., *supra* note 1, at 151–52 (discussing divided opinion among women on the use of makeup).

67. Of course, it may be hard to get an accurate picture of employees' true preferences on issues like appearance codes because they are "public goods," workplace systems or rules the employer must apply to a group rather than to an individual employee. When bargaining for public goods, each individual employee lacks the full incentive to make the investment to secure the desired protection because the costs to the employer exceed the individual benefit to the worker, although the benefits to all similarly situated workers may exceed the costs. Public goods will often be under-produced because if a fellow employee will instead make the investment, the other employees will benefit. Each individual employee has the incentive to be a free rider and wait for a co-employee to negotiate for the good. In that way, individuals who would actually prefer the change may not voice their interest directly to the employer but would be more likely to express support for the change to a collective representative. Yelnosky, *supra* note 55, at 610–11.

68. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

69. *See generally* 106 Lab. Arb. Rep. 583.

70. *Id.*

71. *See generally* 115 Lab. Arb. Rep. 886.

72. *Id.*

claim. Instead, in the *Fairmont-Zarda* case the arbitrator concluded that the employer's no-beard rule violated the collective bargaining agreement because it unreasonably interfered with employees' autonomy.[73] Similarly, in *Albertson's*, the arbitrator concluded that the grievant's unwillingness to comply with the employer's request that she stick out her tongue did not constitute "just cause" for her discharge, because the employer's request was unreasonably intrusive.[74]

In this account, employee autonomy is the principle being vindicated in these cases. And, as several scholars have observed, all appearance code cases present issues of employee autonomy. Only in some cases do they also present issues of discriminatory treatment.[75] The principle of employee autonomy seems much easier for a majoritarian institution to pursue than the principle of antidiscrimination. While most—if not all—employees value freedom from relentless employer oversight and control, concerns about antidiscrimination are more likely to be the priority of a subgroup of employees.

IV. BRINGING LABOR AND EMPLOYMENT LAW TOGETHER: UNIONS OF FLIGHT ATTENDANTS

Despite this dichotomy between issues that are likely to be a high priority of a subset of workers and those likely to be of interest to most if not all employees—scholars have both described and theorized ways in which unions can help workers pursue both types of issues. For example, Robert Rabin has written at length about the capacity for unions to assist organized workers in asserting employment law rights—including those under Title VII.[76] Rabin explained that union assistance could take the form of handling grievances when a collective bargaining agreement incorporates statutory rights by reference, giving employees guidance as to how to proceed to assert rights arising from different sources, representing employees in fora other than arbitrations under collective bargaining agreements, and referring employees to legal counsel.[77]

There is a particularly rich example of unions playing this role in the representation of flight attendants. This example illustrates how a collective representative can use labor law and employment law in concert to give employees more protection from arbitrary employer action than they would have under either regulatory regime alone.

Boeing Air Transport added the first stewardesses to passenger flights in 1930. At that time, the job was open only to female nurses, twenty-five years of age or younger, who weighed not more than 115 pounds and stood no taller

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73. *See* discussion *supra* notes 40–45 and accompanying text.

74. *See* discussion *supra* notes 46–53 and accompanying text.

75. *See, e.g.*, Bartlett, *supra* note 1, at 2553; Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006); Klare, *supra* note 2.

76. Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 200–05 (1991).

77. *Id.*

than five feet four inches.[78] Other airlines quickly followed suit. Shortly thereafter, Boeing and the other airlines adopted a no-marriage rule—which was not applied later to the limited number of men whom the airlines began to hire as stewards—and no-pregnancy practices.[79]

In 1945, United Airlines recognized the Air Line Stewardesses Association—a union led by women—as the collective representative of its stewardesses, who at that time were all women.[80] The first contract negotiated by the union raised stewardess pay, provided for a uniform allowance, guaranteed rest periods, and restricted stewardess flying time.[81] In addition to achieving and building on these important successes in distributional bargaining, the unions representing flight attendants recognized the need to confront the discrimination issues that limited the job to a small subset of women and that led inevitably to high turnover in the stewardess ranks and thus less bargaining power for stewardesses.[82]

Attacking these rules through collective bargaining was often complicated and sometimes impossible because, and here are some concrete examples of the majoritarian point discussed above, many stewardesses supported the airlines' no-marriage policy.[83] Nevertheless, flight attendants—in many cases sponsored by their unions—brought actions under Title VII claiming that the no-marriage rules, which were applied to women and not to men, constituted unlawful gender discrimination.[84] Similarly, female flight attendants were often divided over the question of no-pregnancy rules. Even so, the union sponsored successful litigation in state court in New York challenging the collectively bargained compromise of forced layoff with reinstatement rights for pregnant flight attendants. United Airlines was ordered to permit pregnant flight attendants to fly during the first twenty-seven weeks of pregnancy.[85] Finally, the Stewardess and Stewards Division of the Air Line Pilots Association filed EEOC charges challenging the weight restrictions of sixteen different airlines that were more demanding of female than male flight attendants. The division subsequently filed suit against United Airlines in federal court challenging those policies, even though some female flight attendants thought "the company has a

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78. GEORGIA PANTER NIELSEN, FROM SKY GIRL TO FLIGHT ATTENDANT: WOMEN AND THE MAKING OF A UNION 10 (ILR Pr. 1982).

79. *Id.* at 18–22.

80. *Id.* at 33–36. Ultimately, that union later became the Association of Flight Attendants-Communication Workers of America, which today represents approximately 55,000 flight attendants at 20 different airlines. Association of Flight Attendants-CWA, About the Association of Flight Attendants, http://www.afanet.org/default.asp?id=2.

81. NIELSEN, *supra* note 78, at 41.

82. *Id.* at 81–84 (short-term stewardesses did not demand bargaining on issues like retirement and health insurance, and most unmarried women lacked the financial resources a married woman might have had to help sustain her in a strike).

83. *Id.* at 84.

84. *Id.* at 91 (discussing Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971) (finding that United's no-marriage rule for women violated Title VII), *cert. denied*, 404 U.S. 991 (1971).

85. *Id.* at 94–95 (discussing United Air Lines v. State Human Rights Appeal Bd., 61 A.D.2d 1010 (N.Y. App. Div. 1978), *app. denied*, 44 N.Y. 2d 648 (1978), *cert. denied*, 439 U.S. 982 (1978)).

right to have weight check—some of the stewardesses will be too fat to fit into the jumpseats."[86]

V. CONCLUSION

Those of us who have been on passenger flights with U.S. carriers over the last few decades have witnessed a dramatic transformation in the appearance of flight attendants. Not so long ago, all flight attendants were young, ultra-thin, single women dressed to portray a specific image selected by the employer—sometimes a female nurturer and sometimes a sex object. Today, flight attendants are young and old, male and female, and dressed in ways that are much less, if at all, suggestive of a particular gender stereotype. To be sure, this transformation is a combination of many factors—including some that have nothing to do with law—such as customer preference, business judgment, and a focus on flight safety that has made "frills" less important to all concerned. But it is undeniable that union representation had something to do with this change and that litigation under antidiscrimination laws did as well. We can learn from this experience: When considering how to increase employee agency in appearance, we should keep labor law in mind.

86. *Id.* at 99, 102 (discussing Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982), *cert. dismissed*, 460 U.S. 1074 (1983), in which the union was itself a party to a successful Title VII challenge to Continental's weight policies). For another review of the impact of Title VII on the working conditions of flight attendants see Toni Scott Reed, Comment, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems*?, 58 J. AIR L. & COMM. 267 (1992).