LESSONS FROM EQUAL OPPORTUNITY HARASSER DOCTRINE: CHALLENGING SEX-SPECIFIC APPEARANCE AND DRESS CODES

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I. INTRODUCTION

Employers seeking to enhance their corporate brand or to foster a professional business environment frequently mandate that employees adhere to personal appearance requirements while at work. These requirements often regulate everything from dress and grooming habits to personal hygiene. Though appearance codes are generally based on stereotypical assumptions about how men and women are supposed to look and act, courts tend to acknowledge their validity out of deference to employers' business judgment.[1] Thus, employers are permitted under the law to require male employees to be clean shaven and to have short hair,[2] to ask male employees to wear suits and ties,[3] and to require female employees to wear skirts, dresses, or even high-heeled shoes and makeup.[4] Employers can also lawfully prohibit visible tattoos,[5]

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1. *See infra* notes 23–27 and accompanying text.

2. *See, e.g.*, Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir. 1998) (upholding a policy applying different hair length standards to male and female employees), *cert. denied*, 525 U.S. 1000 (1998); Knott v. Mo. Pacific R.R., 527 F.2d 1249, 1252 (8th Cir. 1975) (upholding a policy requiring male employees to keep sideburns neat and well-trimmed and prohibiting "pork chop" side burns and long hair on men, noting that, although female employees had to conform to other dress standards, the differences in the policy toward male and female employees were "minor" and "reasonable," reflecting "customary modes of grooming"); Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974) (upholding a company policy requiring men—but not women—to wear their hair short because the discrimination was not based on an immutable characteristic).

3. *See, e.g.*, Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 (9th Cir. 1977) (upholding a policy requiring male employees to wear ties, though female employees did not have to comply with a similar requirement, as the requirement was not "overly burdensome" and simply "serve[d] to extend an image to its customers which Safeway believe[d] [was] beneficial to its business").

4. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (finding that a policy requiring female employees to wear makeup, stockings, and colored nail polish was permissible where male employees' appearance was similarly restricted); Craft v. Metromedia, Inc., 766 F.2d 1205, 1215 (8th Cir. 1985) (finding no Title VII violation where employer required plaintiff, a female news anchor, to alter her clothes and makeup based on negative responses from audience focus groups because employer treated male news anchors similarly).

5. *See, e.g.*, Baldetta v. Harborview Med. Ctr., 1997 U.S. App. LEXIS 13939 (9th Cir. June 11, 1997) (upholding employer's ban on tattoos even where the plaintiff's tattoo identifying him as HIV

body piercings, unconventional hairstyles such as dreadlocks, cornrows, and braids,[6] and impose weight requirements.[7]

Although many courts treat employer-mandated appearance codes as "legally insignificant" and have long tolerated them,[8] the weight of literature and theory on the subject, as well as the intensity and frequency with which employees challenge them through litigation,[9] indicate that seemingly trivial dress codes can actually have important implications for autonomy and gender equality in the workplace. Far from trivial to some people, dress codes present the dual problem of preventing some employees from expressing their core sense of gender identity, while simultaneously reinforcing hidden prejudices embedded in social norms.

Under the widely-adopted "unequal burdens" test from *Frank v. United Airlines*, a policy that has different grooming and appearance requirements for men and women is permissible, as long as it imposes equal burdens on males and females and does not limit the employment opportunities of only one sex.[10] Under this test, affirmed by the Ninth Circuit as recently as April 2006,[11] if a dress code is equally offensive to men and women, it will still be permissible since it does not discriminate against only one sex. Sex-specific appearance codes requiring, for example, men to wear ties and women to wear skirts, both

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positive arguably addressed a public health concern); Inturri v. City of Hartford, 365 F. Supp. 2d 240 (D. Conn. 2005) (permitting the city police department to order personnel to cover offensive or unprofessional tattoos); Riggs v. City of Fort Worth, 229 F. Supp. 2d 572, 582–83 (N.D. Tex. 2002) (permitting a requirement that a police officer with tattoos all over his body wear long pants and long sleeves during work, even though he consequently suffered from heat exhaustion and had to be moved to a desk job).

6. *See, e.g.*, Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004) (rejecting a Costco employee's request for exemption from the employer's ban on body piercings because of her involvement in the Church of Body Modification, finding the restriction was justified based on customer preference and where Costco had made reasonable accommodation to allow the employee to cover her piercings), *cert. denied*, 545 U.S. 1131 (2005); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981) (finding policy which prohibited both women and men from wearing hair in cornrows did not violate Title VII on grounds of sex or race); Carswell v. Peachford Hosp., No. C80-222A, 1981 U.S. Dist. LEXIS 14562 (N.D. Ga. May 26, 1981) (upholding employer policy prohibiting female employee from wearing hair in cornrows); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (finding policy prohibiting plaintiff from wearing hair in dreadlocks legally permissible).

7. *See, e.g.*, Horton v. Delta Airlines, Inc., No. C-93-0225-VRW, 1998 U.S. Dist. LEXIS 4265, at *16 (D. Cal. March 27, 1998) (finding employer's use of weight tables not inherently discriminatory).

8. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2580 (1994). Dress and appearance codes have "long been tolerated under the auspices of 'managerial discretion' or a business' attempt to establish corporate image, attract customers, or ensure health and safety standards are met." Serafina Raskin, *Sex-based Discrimination in the American Workforce: Title VII and the Prohibition Against Gender Stereotyping*, 17 HASTINGS WOMEN'S L.J. 247, 247 (2006). Dress codes are especially tolerated when they regulate non-immutable characteristics such as hair length: "From the courts' perspective, it is a minimal intrusion upon the employee's personal autonomy to get a simple haircut." Sandi Farrell, *Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence*, 92 KY. L.J. 483, 493 (2004).

9. Darlene Jespersen, for example, preferred to leave her job rather than wear makeup on a daily basis. *Jespersen*, 444 F.3d at 1108.

10. *See* Frank v. United Airlines, 216 F.3d 845, 853–54 (9th Cir. 2000) (en banc).

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

disadvantage individuals who diverge from prescribed, gender-based stereotypes of appropriate appearance and affirm gendered distinctions that devalue women.[12] Nonetheless, under *Frank's* unequal burden test, if such dress codes are applied evenly to men and women, they are generally upheld.

In recent years, courts have been increasingly willing to recognize that harassment of people who fail to conform to stereotypical gender roles constitutes proscribed discrimination based on sex.[13] Mandating conformity to the gender paradigm through compulsory appearance codes similarly penalizes individuals who fail to conform to stereotypical norms and perpetuates the existence of traditional gender identity and behavioral norms that devalue women, feminized men, and sexual minorities. Using principles from sexual harassment law as a model for the development of dress code law, I argue that in some cases, even dress codes that equally burden men and women may constitute either gender identity or gender expression discrimination—or both—and thereby violate Title VII of the Civil Rights Act.[14]

In sexual harassment law, courts have grappled with the "equal opportunity harasser" problem.[15] Formalistically following the letter of Title VII, which requires that discrimination be "because of sex" for a discrimination claim to be actionable, many courts over the years have held that if an employer harasses both men and women, the conduct does not rise to the level of sexual harassment because both sexes are treated equally.[16] Such holdings are based on the idea that without comparative evidence showing differential treatment of men and women, harassing conduct that targets both sexes cannot be found to violate Title VII. Despite some courts' continuing adherence to this rigid notion of discrimination that requires comparative evidence, many courts have rejected the equal opportunity harasser defense, allowing for the possibility of actionable sexual harassment of some women and some men in the same workplace by the same employer.[17]

Since Title VII does not define "because of sex" and the Supreme Court has left open the possibility of various formulations, courts have been able to find ways around the causation hurdle presented in equal opportunity harasser cases, ranging from bypassing discussion of the "because of sex" requirement altogether to espousing a broader meaning of the term "sex." The best-reasoned cases and commentary, noting the absurdity of a rule that provides an incentive for a defendant to harass members of both sexes in order to create a defense to

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12. *See infra* Parts IV.A & IV.B.

13. *See infra* notes 75 and 78 and accompanying text; *infra* text accompanying notes 82–87.

14. 42 U.S.C. §§ 2000e–2000e-17 (2000).

15. *See infra* notes 57–62 and accompanying text. Related to the equal opportunity harasser is the bisexual harasser. An equal opportunity harasser may or may not be bisexual but sexually harasses members of both sexes, whereas a bisexual harasser is, in fact, bisexual, but may not actually harass members of both sexes. *See* Sandra Levitsky, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013 (1996). Because of parallels with the dress code cases, this Article deals exclusively with the equal opportunity harasser.

16. *See infra* note 59 and accompanying text.

17. *See infra* note 62 and accompanying text.

sexual harassment,[18] generally examine individual plaintiffs' claims separately. This approach considers whether the conduct directed at an individual was based on that individual's sex, gender, or failure to conform to gender stereotypes, without engaging in a direct comparison with the treatment of employees of the opposite sex.

Applying the unequal burdens test to appearance codes presents a challenge similar to the equal opportunity harasser conundrum: even if applied relatively equally to men and women, sex-specific dress codes can be oppressive and discriminatory to members of both sexes. They perpetuate power paradigms harmful to both men and women and penalize individuals who deviate from social norms. Importing interpretations of Title VII developed from the equal opportunity harasser doctrine to dress code cases—which also fall under the purview of Title VII—would allow courts to focus on the sex-based underpinnings of employer dress codes that construct women as generally inferior to men and the harm that dress codes present to individuals who deviate from accepted gender norms, without requiring comparative evidence of unequal burdens to both sexes.

Part II of this Article sets forth the state of the law dealing with employer-mandated appearance and dress codes by examining both the types of plaintiffs who challenge dress codes and the nature of the typical challenges. It also analyzes the unequal burdens test employed by courts to resolve those cases. Part III examines the development of the law surrounding the equal opportunity harasser. This Part delves into the ambiguities inherent in the "because of sex" language of Title VII and the various ways in which courts have circumvented this hurdle when a supervisor harasses both men and women.

Part IV suggests ways in which the same lines of analysis can be employed in cases involving mandatory appearance codes. Specifically, this Part exposes two flaws in the unequal burdens test and proposes two alternate approaches. Drawing from the equal opportunity harasser doctrine, the proposed approaches are better suited to the arena of dress codes and are more consistent with the substantial body of existing Title VII sex discrimination law. The first approach would use an individualized analysis that considers the harm each individual plaintiff experiences from sex-specific dress codes, without requiring comparative evidence. This approach would emphasize the intangible harm imposed on women by dress codes that have roots in negative stereotypes about a woman's role in the workplace, as well as the harm to men that arises from the same negative stereotypes that construct an image of appropriate "masculine"

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18. *See, e.g.*, Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (noting that even if plaintiff used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby "cure" his conduct toward women); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1338 (D. Wyo. 1993) (finding that the nature of a supervisor's remarks—made towards both men and women—indicated that he harassed the plaintiffs because of their gender and that such conduct constituted exactly the type of harassment contemplated to fall within the purview of Title VII); Levitsky, *supra* note 15, at 1045 (arguing that the increasing use of the "bisexual defense" to escape Title VII liability illustrates one of the fundamental inadequacies of the comparative standard in sexual harassment law); Mark J. McCullough, *One Is a Claim, Two Is a Defense: Bringing an End to the Equal Opportunity Harasser Defense*, 67 U. PITT. L. REV. 469, 484–85 (2005) (arguing for an individual mode of analysis in Title VII discrimination cases).

appearance that not all men meet. The second approach would conceive of "sex" in its broadest, most meaningful sense, encompassing not just biological sex but also gender, gender expression, and gender identity. Drawing from the growing body of law on gender identity and expression discrimination, this approach would extend the inquiry beyond comparing the burden imposed by sex-specific dress codes on men and women as biological classes to comparing the burden imposed on men and women who fail to conform to community-imposed norms related to sex and others. This Article ultimately concludes that if the well-reasoned law rejecting the equal opportunity harasser defense were applied to sex-specific dress codes, such appearance mandates would no longer be permitted.

II. THE LAW SURROUNDING APPEARANCE AND DRESS CODES

Dress and appearance issues usually fall under Title VII of the Civil Rights Act of 1964, which makes it "unlawful for an employer . . . to discriminate against any individual with respect to . . . terms, conditions or privileges of employment . . . because of such individual's race, color, religion, sex, or national origin."[19] Gender-specific dress codes are clearly terms and conditions of employment within the meaning of Title VII.[20] Even though they may amount to sex discrimination in violation of Title VII in some cases, they are more often accepted as a legitimate business decision, even when based on assumptions and expectations about gender differences.[21]

Initially, courts held that reasonable dress and grooming requirements which regulated mutable characteristics of both sexes—such as clothing, hair, cosmetics and jewelry—did not violate Title VII. In contrast, appearance codes seeking to regulate immutable characteristics—such as sex, race or national origin—were generally not permissible.[22] Under this regime, issues arose when appearance standards regulating mutable characteristics were gender-specific. Under the slightly broader unequal burdens test, such standards are generally upheld as long as they are comparable in terms of conventional societal custom and do not impose a greater burden on one sex over the other.[23] For example, women can be sanctioned for wearing too much makeup where male employees are also required to dress conservatively.[24] Additionally, grooming codes for

19. 42 U.S.C. § 2000e-2(a) (2000).

20. Additionally, the National Labor Relations Board has held that appearance codes are "terms and conditions of employment" within the meaning of the National Labor Relations Act. *See, e.g.*, Crittenton Hosp., 342 N.L.R.B. No. 67 (2004) (finding uniform and fingernail policies regulating the appearance of nurses to be mandatory subjects of bargaining). For a discussion of how labor law and collective bargaining can be used to protect employees from sex-specific appearance codes, see Michael J. Yelnosky, *What Do Unions Do About Appearance Codes?*, 14 DUKE J. GENDER L. & POL'Y 521 (2007).

21. *See infra* notes 22–26 and accompanying text.

22. *See generally* William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C. L. REV. 1357, 1359 (2006); Michael W. Fox, *Piercings, Makeup, and Appearance: The Changing Face of Discrimination Law*, 69 TEX. B. J. 564, 564 (2006); Farrell, *supra* note 8.

23. *See* Frank v. United Airlines, 216 F.3d 845, 853–54 (9th Cir. 2000) (en banc).

24. *See, e.g.*, Wislocki-Goin v. Mears, 831 F.2d 1374, 1380 (7th Cir. 1987).

men are more likely to be upheld than similar codes for women, most likely because they tend to be less demeaning than grooming codes for women.[25] Thus, courts have permitted prohibitions of jewelry for men, but not women,[26] and regulations regarding men's hair length and facial hair, as long as these requirements were meant to protect the company's business image.[27]

There are, however, some distinct limitations. When a dress code is applied solely or more stringently to women, it is more likely to be struck down. Thus, employers cannot require only women to wear a uniform[28] or contact lenses,[29] prohibit tattoos on women but not men,[30] or have different weight requirements for men and women, if one is more burdensome to meet than the other.[31] Further, dress codes requiring women to wear "skimpy" or sexy uniforms have been held to constitute gender discrimination if that uniform is likely to invite sexual harassment.[32] In *EEOC v. Sage Realty*, for example, female lobby attendants in an office building were required to wear a poncho with snaps at each wrist but otherwise open on the sides, and were prohibited from wearing a shirt, blouse, or skirt under the outfit.[33] The court struck down the dress code, holding that requiring women to wear the uniform, which was "short and revealing on both sides [such that] her thighs and portions of her buttocks were

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25. *See generally* Farrell, *supra* note 8, at 493 (explaining that "Congress' intent was to afford equal employment opportunities for women relative to those available to men" and courts "cannot seem to conceive of any way in which protecting male employees with long hair could possibly effectuate that goal").

26. *See, e.g.*, Capaldo v. Pan Am. Fed. Credit Union, No. 86 CV 1944, 1987 U.S. Dist. LEXIS 14475, *2 (E.D.N.Y. March 30, 1987) (upholding a rule prohibiting male, but not female, employees from wearing earrings), *aff'd without opinion*, 837 F.2d 1086 (2d Cir. 1987); Lockhart v. La.-Pac. Corp., 795 P.2d 602 (Or. Ct. App. 1990) (upholding "a reasonable grooming policy" forbidding male employees from wearing "facial jewelry," while permitting female employees to wear earrings).

27. *See supra* note 1. *See generally* EEOC Compl. Man. § 619.3 (BNA) (2002).

28. *See, e.g.*, Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032 (7th Cir. 1979) (holding that requiring women to wear uniforms when men could wear "appropriate business attire" violated Title VII); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (holding that a policy requiring women to wear uniform smocks but allowing men to wear normal business dress demeaned women).

29. *See, e.g.*, Laffey v. Nw. Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976) (striking down a rule requiring female flight attendants to wear contact lenses when male flight attendants could wear glasses), *cert. denied*, 434 U.S. 1086 (1978).

30. *See, e.g.*, Hub Folding Box Co. v. Mass. Comm'n Against Discrim., No. 99-P-1848, 2001 WL789248 (Mass. App. Ct. July 12, 2001) (striking down a rule permitting men, but not women, to have conspicuous tattoos).

31. *See, e.g.*, Frank v. United Airlines, 216 F.3d 845, 845 (9th Cir. 2000) (en banc) (striking down a rule requiring female flight attendants to maintain a weight corresponding to women of "medium" build determined by an insurance company table, but permitting men to maintain the weight corresponding to men of "large" build); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (holding that airline's weight requirement on its face constituted discrimination under Title VII because the policy applied only to females and the airline did not assert any non-discriminatory justification for its practice); *Laffey*, 567 F.2d at 454 (striking down a policy imposing weight restrictions on female but not male flight attendants).

32. *See, e.g.*, EEOC v. Newtown Inn Assocs., 647 F. Supp. 957, 958 (E.D. Va. 1986); Priest v. Rotary, 634 F. Supp. 571, 581 (N.D. Cal. 1986); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609–11 (S.D.N.Y. 1981).

33. *Sage Realty Corp.*, 507 F. Supp. at 604.

exposed,"[34] created a hostile working environment under Title VII sexual harassment law.

Even facially discriminatory policies, however, will be upheld according to the language of Title VII if there is a bona fide occupational qualification (BFOQ).[35] To constitute a BFOQ, the discrimination must relate to the employee's ability to do her job, not just the success of the business based on an actual or perceived customer preference.[36] Accordingly, it is generally permissible for an employer to make an employment decision based on gender, religion, or national origin where "religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[37] The BFOQ defense is also generally available in age discrimination cases,[38] though race can never constitute a BFOQ.[39]

In April 2006, the Ninth Circuit upheld the unequal burdens test, finding that a gender-specific grooming code did not violate Title VII. In *Jespersen v. Harrah's Operating Co.*,[40] a female employee of Harrah's Casino claimed that the employer's "Personal Best" grooming code violated Title VII. Female bartenders at Harrah's were required to wear makeup, stockings, and colored nail polish, and to wear their hair teased, curled, or styled, while male employees were prohibited from wearing makeup or colored nail polish and were required to maintain short haircuts and neatly trimmed fingernails.[41] Jespersen found these requirements so inconsistent with her gender identity that she refused to comply with them. She advanced two arguments to support her refusal to wear the required makeup. First, she argued that the policy failed *Frank*'s unequal burdens test because the financial cost of purchasing makeup, together with the time it takes to apply it, imposed a heavier burden on women than any burden

34. *Id.*

35. Title VII states, "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1).

36. *See, e.g.*, Local 567 Am. Fed'n of State, County, & Mun. Employees v. Mich. Council 25, 635 F. Supp. 1010 (D. Mich. 1986) (holding that privacy rights of mental health patients could justify the requirement for same sex healthcare workers as a BFOQ); EEOC v. Sedita, 816 F. Supp. 1291 (N.D. Ill. 1993) (holding a women's health club's refusal to employ men in managerial positions did not violate Title VII because the positions allegedly involved substantial intimate contact with members); Norwood v. Dale Maint. Sys., 590 F. Supp. 1410 (D. Ill. 1984) (holding employer's requirement that janitors be men was a BFOQ because janitors who cleaned the men's bathrooms could see men using the facilities and workers were prevalent during daylight hours); Torres v. Wisc. Dep't of Health & Soc. Serv., 859 F.2d 1523 (7th Cir. 1988) (holding maximum security women's facility's hiring of only female correctional officers was a BFOQ). *See generally* David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 243–44 (2004) (criticizing courts that rely on BFOQ exception to Title VII to uphold sex-discriminatory dress and appearance requirements); Megan Kelly, *Making-Up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in* Jespersen v. Harrah's Operating Co., 36 GOLDEN GATE U. L. REV. 45 (2006).

37. 42 U.S.C. § 2000e-2.

38. 29 U.S.C. § 623(f)(1) (West Supp. 2006).

39. *See* Morton v. United Parcel Serv., Inc., 272 F.3d 1249, 1260 n.11 (9th Cir. 2001).

40. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109 (9th Cir. 2006).

41. *Id.* at 1107.

imposed on men.[42] She also argued that the policy forced her to conform to sex stereotypes, in violation of Title VII, stating that it "made her feel sick, degraded, exposed, and violated," and "'forced her to be feminine' and to become 'dolled up' like a sexual object."[43] She alleged that it "interfered with her ability to be an effective bartender . . . because it 'took away [her] credibility as an individual and as a person.'"[44]

The court held that Harrah's rules were not more burdensome for women than for men, who had to maintain short haircuts and neatly trimmed nails,[45] and therefore did not violate the "unequal burdens" test articulated in *Frank*.[46] Further, the court held that the employer's rules "d[id] not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender."[47] The en banc majority emphasized that "[t]his is not a case where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype women as sex objects."[48] Rather, Jespersen was simply required to wear a uniform covering her entire body designed for both male and female employees. Accordingly, the court found that the policy showed no "discriminatory or sexually stereotypical intent on the part of Harrah's."[49]

Three dissenting judges argued for the inclusion of less tangible factors such as gender stereotyping in the unequal burdens test. In his dissent to the 2004 appellate opinion, Judge Thomas suggested that Jespersen could prove her case under either an impermissible sex stereotypes theory or imposition of an unequal burden.[50] He noted that being "properly made-up," as required by the policy, was an additional burden to women. He also argued that the makeup requirement is based on a sex stereotype that sends "a message of gender subordination."[51]

In his dissent to the 2006 opinion, Judge Pregerson, joined by Judges Kozinski, Graber, and Fletcher, argued that Harrah's "Personal Best" policy was motivated by sexual stereotyping. He noted that the makeup requirement was, in effect, a "facial uniform" imposed only on females.[52] Judge Kozinski, joined by Judges Graber and Fletcher, agreed that the burden on women was greater than the burden on men.[53] However, he rejected the need for expert or special evidence to show the time and money burden of the makeup policy, as most

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42. *Id*. at 1110.

43. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

44. *Id*.

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

46. *Id.* at 1109–11 (citing Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000) (en banc)).

47. *Id.* at 1113.

48. *Id.* at 1112 (comparing the case to EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981)).

49. *Id.*

50. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1083 (9th Cir. 2004) (Thomas, J., dissenting), *vacated*, 409 F.3d 1061 (9th Cir. 2005).

51. *Id*. at 1086.

52. *Jespersen*, 444 F.3d at 1114 (Pregerson, J., dissenting).

53. *Id.* at 1117 (Kozinski, J., dissenting).

women have applied makeup and most men have waited while women apply it.[54] Further, he pointed out that the choice of wearing makeup or losing one's job was not a choice males in the same position were forced to make.[55]

III. GRAPPLING WITH TITLE VII'S "BECAUSE OF SEX" CAUSATION REQUIREMENT: THE EQUAL OPPORTUNITY HARASSER AS A MODEL FOR DRESS CODE LAW

The unequal burdens test allows employers to institute a dress policy that is burdensome to women, as long as a corresponding policy is equally burdensome to men. As the *Jespersen* dissent pointed out, under this logic, "a sex-differentiated appearance requirement that burdens women . . . could be permissible if the employer unfairly burdened men via another sex-differentiated appearance requirement."[56] Thus, despite the fact that all sex-specific appearance codes are inherently based on harmful sex stereotypes, and unfairly discriminate against both men and women on the basis of gender identity and expression, such codes will be upheld as long as that unfair treatment of men and women is equivalent.

A similar conundrum is seen in sexual harassment cases involving the "equal opportunity" harasser. These cases involve perpetrators who harass both men and women alike. A plaintiff who has been harassed in this way may be unable to prove the harassment was "because of sex," as required for a Title VII cause of action,[57] since both sexes endured equally bad treatment.

The United States Court of Appeals for the District of Columbia Circuit first raised the anomalous issue of an "equal opportunity" or bisexual harasser in the now-famous footnote 55 of *Barnes v. Costle*, which states that "in the case of a bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."[58] Subsequent courts struggled to handle the seemingly illogical consequence of strictly following the Title VII rule that harassment be "because of sex." A string of cases found that harassing people of both sexes was a defense to a Title VII

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54. *Id.*

55. *Id.* at 1118.

56. *Jespersen*, 392 F.3d at 1085.

57. For articles discussing the conundrum of the equal opportunity or bisexual harasser, see generally Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55 (1995); Katherine Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L.J. 101 (2004); Levitsky, *supra* note 15; Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 383 (1996); Dawn Macready, *Statutory Construction as a Means of Judicial Restraint on Government: A Case Study in Bisexual Harassment Under Title VII*, 27 OHIO N.U. L. REV. 659 (2001); McCullough, *supra* note 18; Ronald Turner, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. PA. J. LAB. & EMP. L. 341 (2005).

58. Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). The issue of the bisexual harasser remained hypothetical for nearly twenty years, until it was first taken up in *Ryczek v. Guest Servs., Inc.*, 877 F. Supp. 754 (D.D.C. 1995). In that case, the United States District Court for the District of Columbia declined to rule specifically on whether a person who harasses both sexes is immune from Title VII liability, but noted that the language of footnote fifty-five in *Barnes* presents an interesting Title VII problem in that it requires the court to develop standards for proof of bisexuality. *Id.* at 761 n.6.

sexual harassment claim, as conduct cannot be "because of sex" where men and women are treated equally.[59] In 1998, the Supreme Court gave subtle support for that line of cases in *Oncale v. Sundowner Offshore Services., Inc.*, a case allowing a cause of action for same-sex sexual harassment.[60] In that case, the Court heavily emphasized the importance of comparative evidence showing one sex was treated differently from the other, though it never went as far as saying such evidence was required.[61] Nonetheless, although the circuit courts are still divided on the scope and meaning of the "because of sex" standard, a growing body of authority now rejects the equal opportunity harasser defense and recognizes that harassing conduct directed at both men and women that is sufficiently severe and pervasive does amount to sexual harassment.[62]

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59. *See, e.g.*, Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (finding no actionable harassment claim where a male supervisor was equally abusive to both men and women); Holman v. Indiana, 211 F.3d 399, 404 (7th Cir. 2000) (holding that equal opportunity harassment of employees of both sexes cannot support Title VII sex discrimination claim, as conduct is not "because of sex"); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986) (stating, in dicta, that equal opportunity harassment does not amount to gender discrimination under Title VII); Henson v. City of Dundee, 682 F.2d 897, 904–05 (11th Cir. 1982) (holding that in "cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers . . . the sexual harassment would not be based upon sex because men and women alike are accorded like treatment . . . [and] the plaintiff would have no remedy under Title VII"); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (noting that only in the rare case of a bisexual supervisor who harasses both men and women could sexual harassment not amount to sex discrimination); Venezia v. Gottlieb Mem'l Hosp., Inc., No. 03C7225, 2004 U.S. Dist. LEXIS 4281, at *3 (N.D. Ill. Mar. 18, 2004) (holding that "[a]n 'equal opportunity harasser' is not covered by Title VII"), *rev'd and remanded on other grounds*, 421 F.3d 468 (7th Cir. 2005); Cabaniss v. Coosa Valley Med. Ctr., No. CV 93-PT-2710-E, 1995 WL 241937, at *26 (N.D. Ala. Mar. 20, 1995) (recognizing that when the "'conduct complained of is equally offensive to male and female workers, . . . the sexual harassment would not be based on sex because men and women are accorded like treatment'" (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982))); Raney v. Dist. of Columbia, 892 F. Supp. 283, 288 (D.D.C. 1995) (holding that a bisexual supervisor who sexually harasses only one sex is liable for sex discrimination under Title VII, but that there is no sex discrimination where a supervisor harasses both sexes equally).

60. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

61. *Id.* at 80–81 (stating that a plaintiff can prove that harassment was caused by sex by "offer[ing] direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace").

62. *See, e.g.*, Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) (stating that "[i]t is axiomatic that mistreatment at work, whether through subjection to a hostile environment or through such concrete deprivations as being fired or being denied a promotion, is actionable under Title VII only when it occurs because of an employee's sex, or other protected characteristic"); Smith v. First Union Nat'l Bank, 202 F.3d 234, 238–39, 242 (4th Cir. 2000) (rejecting the argument that a female plaintiff, who was subjected "to a barrage of threats and gender-based insults" by her supervisor, could not have been harassed on account of her sex because both men and women complained about the alleged perpetrator); McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996) (noting "[i]t would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female"); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463–64 (9th Cir. 1994) (finding that a hostile or offensive work environment is based on sex when the supervisor's abuse is directed at both sexes, but the gender-specific abuse is limited to females); Labonia v. Doran Assocs., LLC, No. 3:01CV2399, 2004 U.S. Dist LEXIS 17025, at *9 (D. Conn. Aug. 25, 2004) (maintaining that "'[t]he inquiry into whether ill treatment was actually sex-based discrimination cannot be short-circuited by the mere fact that both men and women are involved'" (quoting *Brown*, 257 F.3d at 254)); Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1336–37 (D. Wyo. 1993) (rejecting a bar

A. The Causation Problem Generally

Of all the elements of a sexual harassment claim, arguably the most conceptually difficult—and the one eliciting the greatest attention from both courts and scholars—is the requirement that the harassment be "because of sex."[63] It is this causation requirement that enables the equal opportunity harasser. The problem is two-fold: (1) Congress inadequately defined "because of" which is susceptible to a variety of meanings, and (2) although "sex" usually means "biological sex," the word is often used interchangeably with "gender," creating an additional ambiguity in the standard.

1. *When is Harassment "Because of" Sex?*

The question of the underlying cause of harassment has led to great confusion and disagreement among both courts and commentators. Title VII does not specify whether harassment must be intentional to be "because of sex," and courts have been left to grapple with "how much" of the employment decision has to be shown to be sex-based to meet the standard.[64] In addition, it is unclear from the statutory language whether males and females must be treated differently, or whether it is sufficient to show that sexualized conduct was invidious.[65] Indeed, Professor Martin Katz observed that "in *Price Waterhouse v. Hopkins*, the Supreme Court used over twenty different formulations to describe Title VII's causation requirement," including "'a discernable factor,'" "'a significant factor,'" "'a motivating part,'" "'a part,'" "a 'substantial' factor," and "a 'but-for' cause," among others.[66] Each of these formulations, in turn, was left undefined, leaving room for wide-ranging interpretations. In 1991, Congress narrowed the test to the "motivating factor" standard and the "same action" standard, but again, failed to adequately define these terms.[67] At the same time, courts interpreting different statutes have deviated from those tests, using other vaguely defined terms,[68] "generating a thicket of vague, undefined, and often-conflicting verbal formulations for causation."[69]

Most relevant to the equal opportunity harasser problem is whether comparative evidence and a showing of differential treatment are essential for a

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against Title VII liability for equal opportunity harassers and finding disparate treatment based on sex when committed by a male supervisor against employees of both sexes).

63. There has been a flurry of recent law review articles dealing with the causation requirement. *See, e.g.*, Camille Hebert, *The Disparate Impact of Sexual Harassment: Does Motive Matter*?, 53 U. KAN. L. REV. 341 (2005); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006); Robert A. Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 HOFSTRA LAB. & EMP. L.J. 185 (2003); Andrea Meryl Kirshenbaum, *"Because of . . . Sex": Rethinking the Protections Afforded Under Title VII in the Post*-Oncale *World*, 69 ALB. L. REV. 139 (2005); David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002); Franke, *supra* note 57.

64. *See generally* Schwartz, *supra* note 63, at 1709–10.

65. *See id.*

66. Katz, *supra* note 63, at 491 n.5.

67. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075, *codified at* 42 U.S.C. § 2000e-2 (1991). *See generally* Katz, *supra* note 63, at 492.

68. *See* Katz, *supra* note 63, at 492–93.

69. *See id.* at 550.

finding of discrimination. In *Oncale*, the Supreme Court proposed two "evidentiary routes" that would support an inference that conduct in a sexual harassment case involving two parties of the same sex occurred because of sex. First, the Court stated that a trier of fact might reasonably infer the requisite sex-based causal nexus "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[70] Second, the Court suggested a same-sex plaintiff could "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[71] The Court thus conceived of conduct based on sex as conduct that affects males in one manner and females in another, giving rise to a direct comparison across the biologically-defined divide.

The Court's dicta offering examples of sex-based conduct do not, however, purport to require the forms of evidence discussed therein, or to preclude plaintiffs from raising an inference of sex-based causation by other means. Indeed, if under *Oncale* it is possible to find sexual harassment against a male in an all-male work environment, then certainly it is possible to find sexual harassment without comparative evidence showing how the opposite sex was treated, since, of course, such evidence would not exist in an all-male workplace. Though in the post-*Oncale* judicial landscape direct comparative evidence of how the harasser treated members of the opposite sex may be more likely to overcome an equal opportunity harasser defense,[72] no court has required such a showing.[73]

2. *The Ambiguity of "Sex"*

The ambiguity inherent in the word "sex" has also been the subject of rich debate.[74] Courts have interpreted the word "sex" as narrowly as just biological sex,[75] and as broadly as gender,[76] gender stereotypes and identity,[77] sexual imagery or epithets,[78] and sexual behavior.[79]

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70. *Oncale*, 523 U.S. at 80.

71. *Id.* at 80–81.

72. *See, e.g.*, Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1124 (D.C. Cir. 2002) (holding that the plaintiff did not satisfy the "direct comparative evidence" evidentiary route articulated in *Oncale* because his evidence proved only that the alleged harasser treated the plaintiff differently from everyone else; he did not show that the harasser treated one gender differently than the other); *Lack*, 240 F.3d at 261 (reversing jury award on the basis of plaintiff's failure to produce "plausible evidence" that harassment was precipitated by defendant's "hostility to Lack as a man").

73. Schwartz, *supra* note 63, at 1713.

74. For a thorough and insightful discussion of the various possible interpretations of "because of sex," see generally Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 495 (2001) (surveying the various scholarly interpretations of "because of sex"); Schwartz, *supra* note 63, at 1709–14.

75. *See, e.g.*, Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 701 (7th Cir. 2000) (holding "Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation").

76. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) (using "because of . . . sex" and "because of . . . gender" interchangeably); *Price Waterhouse*, 490 U.S. at 239 (holding that Congress intended to "forbid employers to take gender into account in making employment decisions"). *See generally* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) (advocating an interpretation of "because of sex" that

The term "sex" embodies many interrelated factors, including chromosomes, genitalia, secondary sex characteristics, gender traits, and sexuality. Traditionally, each of these concepts was thought to embody duality: All people were thought to be either male or female (duality in chromosomes, genitalia, and secondary sex characteristics), masculine or feminine (duality in gender traits), and sexually attracted to only males or only females (duality in sexuality). A person's biological chromosomes and genitalia were used to determine all other factors. That is, a person with male genitalia was expected to act in a masculine fashion and to be sexually attracted to females, and vice versa. When all five factors converge in one person, the courts need not consider all the ideas embodied in the term "sex." But it is now abundantly clear that there is a

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includes gender, explaining, "sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles").

77. *See, e.g.*, Hellebusch v. City of Wentzville, 1996 U.S. Dist. LEXIS 20828, at *3, *5–*6 (E.D. Mo. Nov. 21, 1996) (recognizing that female employee in police department who was consistently subjected to taunts that she should be "at home baking cookies and taking care of her children" was harassed because of her sex); Zorn v. Helene Curtis, Inc., 903 F. Supp. 1226 (N.D. Ill. 1995) (recognizing that management-level female plaintiff who was consistently asked to perform stereotypically female tasks such as cleaning up after meetings and cleaning supply closets was harassed because of her sex); Morris v. Nat'l Can Corp., 730 F. Supp. 1489, 1491 (E.D. Mo. 1989) (recognizing that a female plaintiff who was told she "might as well sit underneath his desk since that's where everybody says [she does] her best work" was harassed because of her sex); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001) (finding actionable sexual harassment under Title VII where a male waiter was systematically abused for failing to act "as a man should act" and for walking and carrying his tray "like a woman"); *Zorn*, 903 F. Supp. at 1237, 1244 (recognizing that repeated comments urging plaintiff to act more feminine amounted to harassment because of her sex); Danna v. N.Y. Tel. Co., 752 F. Supp. 594, 598, 616 (S.D.N.Y. 1990) (upholding female service technician's sexual harassment claim based on repeated suggestions that she act more feminine and cutesy); Sanchez v. City of Miami Beach, 720 F. Supp. 974, 978, 982 (S.D. Fla. 1989) (upholding a jury verdict in favor of female police officer involved in bodybuilding who was harassed by male co-workers for failing to conform to notions of appropriate femininity); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc) (finding actionable sexual harassment under Title VII where a male hotel butler was the victim of assaults "of a sexual nature" by his male co-workers because they perceived him as effeminate); Doe v. City of Belleville, 119 F.3d 563, 566–67 (7th Cir. 1997) (holding that same-sex sexual harassment was actionable under Title VII, regardless of the sexual orientation of the harasser, where two brothers were verbally and physically harassed by heterosexual male co-workers because they were perceived as effeminate), *vacated and remanded*, 118 S. Ct. 1183 (1998).

78. *See, e.g.*, Hellebusch v. City of Wentzville, 1996 U.S. Dist. LEXIS 20828 (E.D. Mo. Nov. 21, 1996) (recognizing the sex-based nature and gender-specific connotations of epithets such as "fucking bitch," "fucking whore," "slut," and "fucking cunt"); Perry-Baker v. Runyon, 1996 U.S. Dist. LEXIS 15548 (N.D. Ill. Oct. 17, 1996) (finding the same, vis-à-vis epithets such as "walking pussy," "cunt," "bitch," "whore," and "slut"); Needy v. Village of Woodridge, 1997 U.S. Dist. LEXIS 11813 (N.D. Ill. Aug. 7, 1997) (determining the same, vis-à-vis epithets such as "cunt," "broad," and "bitch").

79. *See, e.g.*, Dombeck v. Milwaukee Valve Co., 40 F.3d 230, 233, 237 (7th Cir. 1994) (recognizing that defendant's conduct, which included slapping plaintiff's buttocks, forcefully placing his foot in her crotch and wiggling it, and pulling on the waist of her pants to reveal her undergarments, was "because of sex"); Saum v. Widnall, 912 F. Supp. 1384 (D. Colo. 1996) (recognizing that defendant's conduct, which included casting the plaintiff as the "victim" in a simulated rape and exploitation scenario, was "because of sex"); Pease v. Alford Photo Indus., Inc., 667 F. Supp. 1188, 1201–02 (W.D. Tenn. 1987) (recognizing that defendant's conduct, which included a supervisor regularly touching and fondling his female employees on the shoulders, arms, necks, breasts and thighs, was "because of sex").

spectrum of sexes and gender roles that and a person's sexual identity is not always based on his or her biological organs.[80]

Under the umbrella of Title VII's "because of sex" language, many federal and state courts have recognized the complexity of the term "sex" and found it illegal to discriminate against employees not just based on their biological sex, but also based on their gender identity or gender expression.[81] The phrase "gender identity" refers to one's self-identification as a man or a woman, regardless of one's anatomical sex at birth.[82] Usually, one's gender identity matches one's anatomical sex; that is, people born with the physical characteristics of males usually identify as men and those with the physical characteristics of females usually identify as women. However, for some people, gender identity does not always align with anatomical sex. Thus, for transsexual people, gender identity and anatomical sex are not in agreement. Someone born male may have a strong self-image and self-identification as a woman; someone born female may have a strong internal self-image and self-identification as a man.[83]

The phrase "gender expression" refers to how society views and interprets one's gender identity based on the person's manifestations through clothing, behavior, and grooming. Someone's gender identity may be the same as his or her biological sex, but that person may still be perceived differently by others. For example, someone may be born male and self-identify as a man, but may be nonetheless perceived by others as feminine.[84]

The Supreme Court has recognized that discrimination in the workplace based on gender stereotypes meets the "because of sex" requirement of Title VII. In the landmark case *Price Waterhouse*,[85] the Court recognized a cause of action for sex discrimination where the plaintiff was adversely affected by conduct that penalized her for failing to conform to stereotypically female norms. In that case, the plaintiff was denied partnership because her male partners perceived her as too aggressive and "macho." She was told to "walk more femininely, talk more

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80. It is now commonly accepted that there is no intrinsic or stable sexual or gender identity. *See generally* Katherine M. Franke, *The Central Mistake of Sex Discrimination: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 7 (1995); JUDITH BUTLER, GENDER TROUBLES 25 (1990) ("There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results.").

81. Over twenty states have so ruled. *See* Gender Public Advocacy Coalition, States with Gender Expression, Identity Protections Surpass Those with Sexual Orientation for First Time (July 1, 2004), http://www.gpac.org/archive/news/notitle.html?cmd=view&archive=news&msgnum=0555 (last visited Oct. 25, 2006). With the 2004 ruling by the Sixth Circuit in *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that a transsexual had a Title VII discrimination case when he was criticized for failing to conform to sex stereotypes), twenty-one states now have protections in place that ban workplace discrimination based on an individual's gender expression or identity. *See id.*

82. WorkplaceFairness.org, Gender Identity Discrimination, http://www.workplacefairness.org/index.php?page=genderid&view=print&theme=6 (last visited Oct. 25, 2006).

83. *Id.*

84. *Id.*; *see, e.g.*, Doe v. City of Belleville, 119 F.3d 563, 566–67 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998) (involving heterosexual sixteen-year-old whose sexuality was questioned because he wore an earring); Goluszek v. Smith, 697 F. Supp. 1452 (N.D. Ill. 1988) (involving a male whose sexuality was questioned because he did not have a wife or girlfriend).

85. 490 U.S. 228 (1989).

femininely, dress more femininely, wear make-up [sic], have her hair styled, and wear jewelry."[86] The Court rejected the assertion that these assessments of the plaintiff were not based on her sex and held that she had a cause of action under Title VII.

The *Price Waterhouse* Court recognized that the term "sex," for purposes of Title VII, extends beyond the notion of biological sex to encompass gender roles and stereotypes that are imposed upon individuals as a result of their biological sex. The Court therefore proscribed adverse conduct that is based on a person's failure to conform to stereotypical notions of gender-appropriate appearance and demeanor.[87]

Many lower courts have also found that harassment directed at a person based on his or her failure to conform to gender stereotypes constitutes harassment based on sex. For example, courts have found the "because of sex" requirement to be satisfied where a female police officer who was involved in bodybuilding and used steroids was harassed for failing to adhere to gender-based stereotypes of appropriate female appearance and conduct;[88] and where a female repair service technician was told that she would have gotten more assistance if she were more "feminine and cutesy."[89] These courts recognized, implicitly or explicitly, that the plaintiff's sex consists of a constellation of factors including not only her biological attributes but also her conformity to gender-based stereotypes and her projected or perceived sexuality.

In each of these cases, the harassment was not directed toward all women based on their biological status as women, but rather it was aimed at particular women who diverged from gender-based norms. Nonetheless, the courts readily concluded that this conduct was based on the targets' sex because the traits elicited the harassers' hostilities only when exhibited by women. Accordingly, it is

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86. *Id*. at 235.

87. After the Supreme Court in *Price Waterhouse* expanded the coverage of Title VII to include sex stereotypes, many courts concluded that the expansion should apply to transgendered people. *See, e.g.*, Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (holding that "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (upholding a claim brought by a transgendered man, noting that the Supreme Court in *Price Waterhouse* interpreted "sex" as encompassing both anatomical sex and gender); Sturchio v. Ridge, 2004 U.S. Dist. LEXIS 27345, *4–5 (D. Wash. Dec. 20, 2004) (holding that an employee who was subjected to harassment after her sexual reassignment surgery asserted a cognizable claim under Title VII); Maffei v. Kolaeton Indus., 164 Misc. 2d 547, 556 (N.Y. Misc. 1995) (holding in an action by an employee against his employer for public humiliation after the employee's reassignment surgery that: "[A]n employer who harasses an employee because the person, as a result of surgery and hormone treatments, is now of a different sex has violated our City prohibition against discrimination based on sex."). However, while the law is relatively undecided, many courts continue to adhere to a more rigid notion of "sex" in this context, refusing to support claims by transgendered and transsexual plaintiffs. *See, e.g.*, Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) (citing Ulane v. Eastern Airlines 742 F.2d 1081, 1085 (1984) (holding that "Congress intended the term 'sex' to mean 'biological male or female' and not one's sexuality or sexual orientation")). *See generally* Oiler v. Winn-Dixie La., Inc., 2002 U.S. Dist. LEXIS 17417, *27 n.59 (D. La. Sept. 16, 2002).

88. Sanchez v. City of Miami Beach, 720 F. Supp. 974 (S.D. Fla. 1989).

89. Danna v. N.Y. Tel. Co., 752 F. Supp. 594, 598 (S.D.N.Y. 1990); *see also, e.g.*, *supra* note 77.

apparent that cases analyzing sexual harassment have not adhered to a rigid, simplistic conception of "sex" in assessing whether the conduct could be characterized as conduct that occurred "because of" the plaintiff's "sex" within the meaning of Title VII. The courts have recognized that harassment based on stereotypes of gender plays an integral role in perpetuating patterns of male domination and female subordination that characterize workplace gender hierarchies. Consequently, they have developed an understanding of sex-based discrimination that recognizes the interrelationships between gender stereotypes, sexual interactions, and sex discrimination in the employment market.

B. Judicial Reinvention of "Because of Sex" for the Equal Opportunity Harasser

As a result of Congress' failure to clearly define "because of sex" in Title VII and the wide array of judicial formulations of the causation standard, courts resistant to the equal opportunity harasser defense have been able to find ways around the "because of sex" hurdle. Meanwhile, scholars have proposed additional approaches to this problem.

Some commentators have advocated abandoning the causation requirement entirely,[90] and some courts have gotten around the problem by simply directing attention away from the "because of sex" language**.** In *McDonnell v. Cisneros*, for example, the Seventh Circuit emphasized the "perverse" result that would ensue "if a male worker could buy his supervisor and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female."[91] Rather than dissect the meaning of "because of sex" with a detailed critique of previous cases subscribing to the equal opportunity harasser defense, the *McDonnell* court simply relied on logic and reason, proclaiming that courts that subscribe to the equal opportunity harasser defense "interpret sex discrimination in too literal a fashion."[92] Similarly, the court in *Doe v. Belleville*, commenting on a hypothetical bisexual harasser in dictum, suggested that courts espousing the equal opportunity harasser defense have wrongly taken the emphasis off the "factors we have regularly relied on [including] the content (physical and verbal) of the harassment, its gravity, its effect on the plaintiff, and its effect on the reasonable person."[93] In doing so, the court deflected attention away from the causation requirement altogether and onto considerations it found to be more critical to the outcome. These courts presumably took their

90. *See, e.g.*, Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 65–67 (1991) (noting that Justice O'Connor's concurrence suggested that the *Price Waterhouse* majority dispensed entirely with any causation requirement); Kearney, *supra* note 63, at 216.

91. McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996); *see also* Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1338 (D. Wyo. 1993) (noting that "[a]n odd and inefficient result would obtain" if the husband and wife's lawsuit involving a dual complaint of harassment, were dismissed, since each could then pursue individual actions).

92. *McDonnell*, 84 F.3d at 260.

93. Doe v. City of Belleville, 119 F.3d 563, 590 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998).

lead from Supreme Court cases that use "because of sex" in the analysis but do not elucidate the causal requirement implicit in Title VII.[94]

Professor Schwartz advances another approach. He advocates a revival of the "sex per se" rule under which sexual conduct in the workplace is always "because of sex," without regard to the discriminatory intent of the harasser. Such a rule, he argues, would "eliminate the 'bisexual harasser' problem for claims involving sexual conduct since all sexual conduct is 'because of sex' regardless of whether it is directed at just women, or equally at women and men."[95]

Others have suggested adopting an individualized analysis. This approach would examine each plaintiff's claim separately without regard to other claims against the same defendant and without requiring comparative evidence showing that the other sex was treated differently. As noted in *Brown v. Henderson*, "[i]n determining whether an employee has been discriminated against 'because of such individual's . . . sex,' the courts have consistently emphasized that the ultimate issue is the reason for the individual plaintiff's treatment, not the relative treatment of different groups within the workplace."[96]

Looking at the claims individually would allow courts to consider whether the harassment of one sex was quantitatively or qualitatively different from the harassment of the other sex.[97] That is, a supervisor may harass both men and women employees, but to different degrees; or, a supervisor may harass both men and women, but in different ways. Where that occurs, the conduct directed at each plaintiff—if sufficiently severe and pervasive—would amount to sexual harassment. But looking at the claims individually would also allow courts to recognize claims by some women and some men in the same workplace, even without such comparative evidence.

This approach was adopted in *Chiapuzio v. BLT Operating Corp.*, which involved male and female plaintiffs each alleging sexual harassment by the same male supervisor. In that case, a male supervisor harassed female employees by subjecting them to sexually abusive remarks and making sexual advances toward them. He also harassed male employees by bragging about his sexual prowess and graphically describing sexual acts he wanted to perform on female employees and on the wives of some male employees.[98] The court "compartmentalized the claims into gender groups,"[99] looking at the plaintiffs' claims separately and focusing on the conduct targeted at each individual without considering conduct directed at other individuals.[100] The court noted, "it is not unthinkable to argue that each individual who is harassed is being treated

94. *See, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 751–52 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

95. Schwartz, *supra* note 63, at 1793.

96. Brown v. Henderson, 257 F.2d 246, 252, 256 (2d Cir. 2001) (noting that "there is no *per se* bar to maintaining a claim of sex discrimination where a person of another sex has been similarly treated").

97. *See* Calleros, *supra* note 57, at 73.

98. Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1335 (D. Wyo. 1993).

99. Macready, *supra* note 57, at 673.

100. *See Chiapuzio*, 826 F. Supp. at 1337. *See generally* McCullough, *supra* note 18, at 482–85.

badly because of gender,"[101] and suggested that the remarks made to both male and female plaintiffs were "gender-driven."[102]

While the treatment may have been relatively equal in severity toward male and female plaintiffs in *Chiapuzio*, the reason each plaintiff was targeted was quite clearly "because of sex." As for the conduct complained of by the female plaintiffs, it could certainly be viewed as sex-based since the supervisor was a heterosexual male who did not make similar remarks and advances to any male employees. Male employees, however, were harassed in another way. Although the defendant's remarks were primarily aimed at the female plaintiffs, the court found they were also intended to demean their husbands, as the remarks were often made in earshot of the husbands and typically involved reference to the fact that he could "do a better job of making love to [the wives] than the [husbands] could."[103]

Finally, many commentators addressing the issue of the equal opportunity harasser have advocated a broad interpretation of "sex," consistent with *Price Waterhouse* and its progeny, to include not just biological sex, but also gender, sexual conduct, core sexual or gender identity, gender role identity, and sexual or gender expression.[104] Construing the notion of "sex" under Title VII in this more complex, multifaceted way would open the door to a finding of actionable sex-based harassment of a female employee based on a failure to conform to stereotypical notions of femininity and of a male employee in the same workplace based on a failure to conform to stereotypical notions of masculinity.

IV. RETHINKING CAUSATION IN DRESS CODE LITIGATION: APPLYING EQUAL OPPORTUNITY HARASSER DOCTRINE TO JESPERSEN AND ITS PROGENY

Each of the approaches to "because of sex" discussed above[105] could be easily imported to the appearance discrimination cases. Courts could simply choose to shift their attention away from comparing the burdens imposed by sex-specific dress codes on each sex and redirect it to more important factors such as the harm imposed on plaintiffs from the dress requirements. Application of the unequal burdens test, which would uphold a sex-specific dress code based on gender-based stereotypes burdensome to both men and women, is no less "perverse" than the application of the equal opportunity harasser defense. But this approach would be subject to the same criticism it receives in the equal opportunity harasser context for ignoring Title VII's clear causation mandate.

Dress code jurisprudence could also adapt the "sex per se" rule, as advocated by Professor Schwartz, under which sexualized conduct directed at both men and women would automatically be considered sexual harassment,

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101. *Chiapuzio*, 826 F. Supp. at 1337 (quoting John J. Donahue, *Review Essay: Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1610–11 (1992)).

102. *Id.*

103. *Id.* at 1335.

104. *See, e.g.*, Calleros, *supra* note 57, at 56; Franke, *supra* note 57, at 772; Kearny, *supra* note 63, at 212; Kirshenbaum, *supra* note 63, at 156; Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, GEO. L. J. 813, 829 (2002); McCullough, *supra* note 18, at 471.

105. *See* discussion *supra* Part III.B.

despite the fact that it is directed evenly at men and women. Under parallel reasoning, sex-specific dress code policies that require employees to wear sexualized or provocative uniforms would be inherently based on sex, and accordingly would be a per se violation of Title VII. But while the sex per se rule would neatly address sexually exploitive dress requirements,[106] where for the most part courts have already recognized the harm, it would fail to address other concrete harms experienced by women and men from dress requirements that are not provocative or sexy, but that force conformity to destructive gender norms.

This Part focuses on two other means by which courts have dealt with the causation problem when men and women are both subjected to harassing conduct. This section advocates an individualized analysis that would look at the effect of dress codes on individual women and individual men who fail to comport with gender-based stereotypes about how men and women should look and act. Sex-specific dress codes perpetuate gendered paradigms that empower some men and subordinate women and feminized men, and are therefore imposed "because of sex" in violation of Title VII. This Part also advocates a broadened definition of "sex" whereby dress codes would give rise to a Title VII claim if they discriminate against men or women based on gender identity or expression.

A. Individualized Analysis: Harm to Both Men and Women from Forced Adherence to a Gender Paradigm that Legitimizes Social Norms that Devalue Women

Sex-specific dress codes may impose relatively equal burdens on men and women but may restrict the autonomy of both men and women based on gender distinctions, giving rise to claims by those females and males who do not conform to the gender-based restriction. Because of the intangible harms to both men and women from forced adherence to destructive gender stereotypes, each claim would be "because of sex."

The unequal burdens test implies that a dress code as a whole can treat men and women equally, while applying "different, but somehow equivalent . . . restrictions to their freedom to choose their clothing, makeup, jewelry and hairstyles."[107] But dress requirements for women under a sex-specific policy cannot be lumped together and then compared in general to the dress requirements for men.[108] "For the man who wants to wear a pony-tail or a skirt, it is no consolation that women are prohibited from wearing short hair or

106. *See* EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608 (S.D.N.Y. 1981). *See generally* Karl E. Klare, *Power Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1417 (1992) (stating "it is now illegal to require a woman to wear a sexually revealing outfit that has or likely will result in unwelcome verbal or physical harassment").

107. Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334, 355 (1997).

108. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1116 (9th Cir. 2006) (Pregerson, J., dissenting) (arguing that the makeup requirement should be viewed in isolation from the hair and hands policies).

trousers."[109] A grooming code requiring men to wear their hair short and women to wear skirts, in effect, discriminates against the female employee who genuinely wishes to wear pants and the male employee who wants to wear long hair. A woman under that policy is denied an opportunity she would have if she were a man, based only upon stereotypes of acceptable male and female behavior, and a man is denied an opportunity he would have if he were a woman, again based only on stereotypical norms, thus amounting to discrimination against some men and some women.[110]

1. *Harm to Women*

Most courts that have had the opportunity to apply the unequal burdens test have been unwilling to consider the harmful effects of sex stereotyping inherent in sex-specific dress codes as one of the burdens faced by plaintiffs. Though for the most part, courts have recognized the harm to women of imposing sexually exploitive dress requirements,[111] where dress requirements are not provocative or sexy, courts have uniformly ignored the concrete harms experienced by women who are forced to conform to externally imposed gender norms that "construct, exploit, and devalue feminine attributes."[112]

In *Jespersen*, for example, the majority considered only the tangible harms of a dress policy that required men to maintain short haircuts and neatly trimmed fingernails and women to wear makeup and nail polish and keep their hair styled. Since the cost of makeup and nail polish were considered nominal, and the time required to comply with each policy was roughly equivalent, the court found the burden on females to be no greater than the burden on males.[113] The court failed, however, to consider the fact that the makeup, hair, and dress requirements are deeply rooted in traditional notions of how men and women should look and are based on stereotypes that deride feminine traits and marginalize individuals who possess such traits.

Courts typically permit gender-specific dress codes that are consistent with community norms.[114] In this way, "courts may excuse dress and appearance requirements they deem trivial in their impact on employees, or neutral in affecting men and women alike, or essential to the employer's lawful business

109. Wintemute, *supra* note 107, at 355.

110. *Id.*; *see also* Klare, *supra* note 106, at 1420 (noting "the law empowers employers to insist that employees conform to socially constructed norms and expectations about how the sexes should act and look. Employers may punish people who challenge or deviate from prevailing norms").

111. *See Sage Realty Corp.*, 507 F. Supp. 599 (S.D. N.Y. 1981). *See generally* Klare, *supra* note 106, at 1417 (stating "it is now illegal to require a woman to wear a sexually revealing outfit that has or likely will result in unwelcome verbal or physical harassment").

112. Thomas Ling, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277, 282 (2005). Several commentators have emphasized the fact that the *Jespersen* court failed to acknowledge the intangible effects of the makeup policy, leaving women feeling like "ornamental objects of beauty to be contemplated, [and] not agents with talents to be esteemed." Cruz, *supra* note 36, at 248; *see also* Hillary Bouchard, *Jespersen v. Harrah's Operating Co.: Employer Appearance Standards and the Promotion of Gender Stereotypes*, 58 ME. L. REV. 203, 218 (2006).

113. *Jespersen*, 444 F.3d at 1110.

114. Bartlett, *supra* note 8, at 2557; Bouchard, *supra* note 112, at 220–21.

objectives."[115] Community norms, however, are often based on harmful stereotypes that privilege existing power structures favoring men.

Sex-specific dress and appearance codes generally perpetuate gendered paradigms that subordinate women. The demands on women from sex-specific dress requirements are notoriously "much more complex than men's, involving more frequent changes in fashion, more time and effort to assemble, and a greater premium placed on having different clothes for different occasions and on not being seen in the same outfits too frequently."[116] Substantively, women's standards tend to "objectify women and construct them as inferior, submissive, and less competent than men."[117] Furthermore, the clothing women are expected to wear has, throughout European history, "conveyed the message that its wearers are fragile, helpless, debilitated, armored, hobbled, decorative, non-threatening, useless, and immobile."[118]

The classic example of a seemingly innocuous but actually harmful dress code is one that requires men to wear suits and ties and women to wear skirts. Though the tangible burdens of such a policy—including the costs and time required to purchase and wear such clothing—may be roughly equivalent for both sexes, the intangible burdens on women far outweigh those on men. While a requirement that male employees wear a business suit generally has the legitimate purpose to "convey confidence and command respect," the underlying basis for the concomitant requirement that female employees wear a skirt are stereotypes that imply "women should be relegated to a more passive role in business or, worse, that women should have a certain sexual appeal."[119] The requirement of a skirt, which makes women seem "less professional and more ornamental or vulnerable than those who wear pants,"[120] emerged from women's "historically inferior status,"[121] while pants, which generally symbolize

115. Bartlett, *supra* note 8, at 2544.

116. *Id.* at 2547.

117. *Id.*; *see also* Klare, *supra* note 106, at 1419. Klare observes, "employer bans on women wearing pants to work are based almost entirely on sex stereotypes: that women are less capable than men, that they are better suited for less active or assertive roles, that women must do more than men to appear serious and business-like, that a woman in pants at work is sexually provocative and therefore disruptive, that women's clothing (skirts) should enhance their allure as sex objects, and so on." *Id.*

118. Bartlett, *supra* note 8, at 2547. Women walk a fine line when it comes to dress in the workplace, and are often "caught in what the Supreme Court has described as the 'catch-22' of sex discrimination based on gender stereotypes: they are harassed both for possessing stereotypically feminine traits that are devalued in the male-dominated workplace and for failing to conform to gender-defined norms dictating that women should not exhibit the qualities of strength and aggressiveness that are rewarded in the employment market." Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay": Same Sex Sexual Harassment, Workplace Gender Hierarchies and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J. L. & FEM. 155, 164 (1999). If a woman dresses too "soft, frilly, and ornamental" she may not appear competent, and if she dresses too formal or business-like, she risks being perceived as inappropriately departing from accepted gender identifications. Bartlett, *supra* note 8, at 2547, 2552.

119. Miller, *supra* note 22, at 1367. Even "the male dress prohibition, trivial as it may seem to most individuals, reflects and perpetuates gender-role expectations that men wear pants and only women, or sissies, wear skirts." Bartlett, *supra* note 8, at 2571.

120. *Id.* at 2569.

121. *Id.* at 2570.

power and competence, "perpetuate man's historically commanding status."[122] Likewise, as noted by the *Jespersen* dissent, a policy that women wear makeup contains an implicit message that "women's undoctored faces compare unfavorably to men's . . . because of a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup."[123] By enforcing such company policies, courts reinforce, rather than challenge, stereotypically gendered assumptions regarding proper dress and appearance and a woman's role in the workplace.[124]

2. *Harm to Men*

A policy requiring men to conform to a certain image of masculinity can be equally restrictive. A dress code requiring men to wear suits and ties and women to wear skirts perpetuates a set of gender norms that feminize women and masculinize men,[125] thereby punishing men for displaying devalued characteristics of femaleness and femininity. This hegemonic view of masculinity derives from standards of male "homosocial" interactions, which refers to the "nonsexual attractions held by men . . . for members of their own sex."[126] These standards include emotional detachment, competition, and the sexual objectification of women.[127] First, emotional detachment serves to "maintain both clear individual identity boundaries and the norms of hegemonic masculinity." This is so because for a man to share his feelings is to reveal weaknesses; withholding such feelings is to maintain control.[128] Second, competition allows a man to support an identity based on separation and distinction and not on likeness and cooperation, facilitating hierarchy in relationships as opposed to symmetry.[129] Finally, a man's engagement in the sexual objectification of women facilitates this separative identity by distancing the self from all that is associated with being female, thereby maintaining male superiority.[130] This objectification enhances the distance between the sexes, enabling men to depersonalize the oppression of women.[131] These standards work together to form the contours of what may be considered the masculine image.[132] In general, discrimination against men based on this hegemonic norm is underpinned by the same stereotypes used in discrimination against women, gays, lesbians, bisexuals, and other groups because they do not look or act like they are supposed to according to their biological indicators. Thus, whether directed at women or at men, gender regulation perpetuates patterns of

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122. *Id.* at 2571.

123. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1116 (9th Cir. 2006) (Pregerson, J., dissenting).

124. Bouchard, *supra* note 112, at 221; Klare, *supra* note 106, at 1419.

125. Franke, *supra* note 57, at 696.

126. Sharon R. Bird, *Welcome to the Men's Club: Homosociality and the Maintenance of Hegemonic Masculinity*, 10 GENDER & SOC'Y 120, 121 (1996).

127. *Id.* at 122.

128. *Id.*

129. *Id*

130. *Id.* at 123.

131. *Id.*

132. While individual conceptions of masculinity may depart from this hegemonic norm, nonhegemonic meanings are "oppressed due to perceptions of 'appropriate' masculinity." *Id.* at 127.

male domination and gender-based exclusion in the workplace. It ensures that women conform to stereotypical images of "who and what type[s] of workers 'women' are supposed to be,"[133] and that men "project the desired manliness" necessary to preserve the "masculinized image" of certain types of work.[134] Accordingly, both men and women can be harmed from such mandates, but for different historical reasons and with different social impact.

B. Adopting an Expanded Definition of Sex: Discrimination Based on Gender Atypicality

Even an appearance policy that is applied equally to men and women may burden members of both sexes who fail to conform to traditional gender norms. Appearances are deeply connected to identity;[135] mandatory dress codes inhibit individual employees' autonomy, restraining their ability to express their true identities. When employers force outward compliance with gender stereotypes, sexual identity is elided with sexual expression and behavior and any deviance from expected gender roles is punished.

As discussed above, courts have interpreted "because of sex" in its broadest sense to mean not only biological sex, but also anything relating to gender, sexual or gender expression, behavior, anatomy, or identity. It is apparent from the sexual harassment and sex discrimination cases that Title VII encompasses not only conduct directed, for example, at women based on their biological status as women, but also conduct directed at women based on their failure to conform to stereotypical assumptions as to how women should look and act. In *Price Waterhouse* and the other lower court cases discussed above, the hostility experienced by the plaintiffs was not targeted at all males, or all females, as biologically-defined classes. Instead, harassment was directed towards men and women who exhibited certain traits, which were in tension with socially defined norms and expectations for appearance and demeanor based on their biological sex.

Notwithstanding *Price Waterhouse* and its progeny, courts continue to permit dress codes that are based on gender stereotypes. In *Jespersen*, the court explicitly refused to apply *Price Waterhouse*, noting that case applies to "discrimination against an employee on the basis of that employee's failure to dress and behave according to the stereotype corresponding with her gender," but not specifically to "sex-differentiated appearance and grooming standards on its male and female employees."[136] The court emphasized that a sexual harassment claim for gender stereotyping is distinct from a claim of gender

133. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1754 (April 1998).

134. *Id.* at 1775 ("[M]en have a lot at stake in assuring a tight linkage between their work and their masculinity. It is crucial for many men to maintain control over the masculinized image of their work. If a job is to confer masculinity, it must be held by those who project the desired manliness."); *see also id.* at n.472 (discussing ways in which men create and perpetuate idealized masculine images of their work).

135. Some have argued that "our behavior, dress and other 'performances' are at least to some degree constitutive of our identity." *See* Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands are Neither Harmless nor Reasonable*, 69 ALB. L. REV. 299, 300 (2005–2006) (critiquing articles by Kenji Yoshino, Devon Carbado, and Mitu Gulati).

136. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1082 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005).

stereotyping in the context of appearance and grooming cases.[137] In so doing, it failed to consider the fact that the makeup requirement made Jespersen feel "sick, degraded, exposed, and . . . forced her to be feminine," and, in so doing, failed to account for the "harms associated with forced gender conformity for persons whose gender identity and expression are not shared by the judges."[138] The *Jespersen* court, in effect, required a showing that all women were burdened, not just women like Jespersen who found the policy inconsistent with her gender identity.

Scholars have overwhelmingly agreed that the *Jespersen* court's interpretation of *Price Waterhouse* is strained and unjustified and that dress codes derived from socially constructed gender norms should be found to violate Title VII.[139] The differences between the two plaintiffs are minimal: "Both cases involve a female employee, terminated or held back from advancement based on her failure to comply with stereotypes associated with her sex. Plaintiff Hopkins in *Price Waterhouse* failed to dress and act femininely enough, while Plaintiff Jespersen failed to wear makeup as a 'proper woman' should."[140] There seems to be no justification for finding that harassing someone because of her

137. *Id.*; *see also* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874, 875 n.7 (9th Cir. 2001) (applying *Price Waterhouse* where male restaurant host was regularly mocked and tormented for failing to conform to male stereotypes, but refusing to specify whether *Price Waterhouse* applies to gender-based distinctions such as dress and grooming requirements). *But see* Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028, 1032–33 (7th Cir. 1979) (applying the unequal burdens test, but also recognizing that appearance codes justified by "offensive stereotypes [are] prohibited by Title VII").

138. Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 113 (2006).

139. Research revealed no law review article espousing the unequal burdens test as applied. *See, e.g.*, Bartlett, *supra* note 8 (arguing that reliance on community norms in application of the unequal burdens test perpetuates harmful stereotypes); Bouchard, *supra* note 112, at 205 (arguing that the "outdated unequal burdens test" fails to adequately consider the gender stereotypes implicated by employer appearance policies); Cruz, *supra* note 36 (arguing that the unequal burdens test reinforces social division and stereotypical differences between men and women); Kelly, *supra* note 36 (arguing that the unequal burden test fails to account for intangible burdens imposed on women by employer appearance standards); Klare, *supra* note 106 (advocating "appearance autonomy" and arguing that dress codes that distinguish between men and women on the basis of commonly accepted community standards of appearance are sexist and patriarchal and allow employers to impose onerous and discriminatory attractiveness standards upon women so long as there is not a greater burden on them than their male co-workers); Miller, *supra* note 22, at 1358 (arguing that the unequal burdens test, which requires weighing and comparing the burdens imposed on each sex, is ineffective because courts fail to consider sexual stereotyping in grooming standards, the most common form of harmful discrimination); Raskin, *supra* note 8, at 267 (arguing that *Price Waterhouse* should be applied to sex-specific employer dress codes that are otherwise "neutral," as sex-based appearance policies reinforce the oppressive social system); *Recent Case: Title VII—Sex Discrimination—Ninth Circuit Holds that Women Can be Required to Wear Makeup as a Condition of Employment*—Jespersen v. Harrah's Operating Co., *392 F.3d 1076 (9th Cir. 2004)*, 118 HARV. L. REV. 2429, 2435–36 (2005) (taking issue with the reasoning of *Jespersen* and arguing that appearance standards based on conformity to sexual stereotypes should be impermissible based on *Price Waterhouse*).

140. Bouchard, *supra* note 112, at 219.

failure to conform to sex stereotypes is unacceptable while firing her for the same reason is acceptable.[141]

Title VII sexual harassment cases recognize that most important differences between men and women are grounded in gender-normativity and the behavioral aspects of sexual identity, not in biology. It is gender and the hierarchy of gender differences which transform an anatomical difference into a socially relevant distinction. Accordingly, under the broader definition of sex, employer-mandated appearance codes, like the one in *Jespersen* requiring women to dress like women and men to dress like men, strike at the heart of a person's gender identity and, therefore, inherently discriminate on the basis of sex.

V. CONCLUSION

For many, the harm from sex-specific dress codes is *de minimis*: shave your beard, cut your hair, wear the uniform. But for some, forced gender conformity is problematic beyond the tangible, striking at the heart of a person's identity. Though courts have long recognized the harm from gender identity discrimination in other contexts, forced conformity to normative stereotypes about gender expression is considered acceptable in the context of appearance codes. Such codes are typically justified on the basis of pervasive community expectations—expectations that reinforce and freeze gender stereotypes that view males as the dominant and competent sex, while relegating females to their traditional domestic, sexual, and reproductive roles.

The unequal burdens test requires courts to compare the burden imposed by sex-specific grooming and dress regulations on men and women, and strikes down a policy only where the burden on one sex is greater than the burden imposed on the other. But sex-specific appearance codes, by their very nature, invoke and perpetuate gender-based stereotypes that are harmful to women and penalize those who diverge from prescribed gender roles. By mandating adherence to a gender paradigm, dress codes can suppress sexual autonomy which in turn produces oppressive sex and gender identities. When courts sanction gender-mandated attire they take a narrow view of sexual identity; they bifurcate personhood into "male" and "female" components and universally attribute distinct characteristics to men and women without variation. The paradigm of genital identity establishes and maintains the hierarchical differentiation between men and women.[142] Thus, when courts accept the validity of dress policies based on biological sexual differences, they perpetuate stereotyped distinctions between the sexes and ignore normative gender ideology, resulting in devaluation of people who are feminized.[143]

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141. *See Jespersen*, 392 F.3d at 1084 (Thomas, J., dissenting); *see also* Kelly, *supra* note 36, at 61 (noting the irony in having a case's outcome "turn on whether the company actually instituted a grooming policy based on gender stereotypes or used considerations of gender stereotyping in making employment decisions").

142. Allan C. Hutchinson, *Part of an Essay on Power and Interpretation*, 60 N.Y.U. L. REV. 850, 875–76 (1985).

143. Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161, 170 (1996).

The unequal burdens test had an admirable goal of preventing the sexual exploitation of women in the workplace by prohibiting the imposition of rules requiring women to dress in provocative or sexy uniforms to attract customers. Indeed, in many cases, this test has led to fair and logical results. For example, the test made sense in *Frank v. United Airlines*,[144] where United Airlines imposed more stringent weight restrictions on female flight attendants than on male flight attendants, given that the policy directly imposed disparate standards for men and women. However, where standards are not capable of direct comparison—such as where women are required to wear makeup and men are required to keep their hair short—the test breaks down. In such cases, courts permit the regulations, as long as the burden on men and women is equal. This stands in stark contrast with the burgeoning case law prohibiting workplace discrimination on the basis of gender identity and expression.

Sexual harassment law has been through the machinations of the "because of sex" causation requirement in the parallel context of the equal opportunity harasser. After more than a quarter of a century of jurisprudence in that area, courts are headed in the right direction by recognizing the sex-based nature of harassing conduct that affects both men and women but in different ways. Can dress code jurisprudence be far behind?

144. 216 F.3d 845, 853–54 (9th Cir. 2000) (en banc).