Nebraska Law Review

Volume 99 | Issue 3 Article 7

3-2021

Who Wears the Pants? Everyone Who Wants To: Expanding Price Waterhouse Sex Stereotyping to Cover Employer-Mandated Sex-Differentiated Dress and Grooming Codes in the Eighth Circuit

Jessica Robinson
University of Nebraska College of Law

Comment*

Who Wears the Pants? Everyone Who Wants To: Expanding *Price Waterhouse* Sex Stereotyping to Cover Employer-Mandated Sex-Differentiated Dress and Grooming Codes in the Eighth Circuit

TABLE OF CONTENTS

* Jessica Robinson, J.D. candidate, 2021, University of Nebraska College of Law; B.S., 2017, Valley City State University.

I would like to thank my husband, Parker Robinson, my parents, Wayne and Felisa Mastel, and my friends for all of their encouragement and support.

I. INTRODUCTION

In November of 1938, Helen Hulick arrived in a Los Angeles court to testify against two burglary suspects.[1] However, Judge Arthur S. Guerin sent Hulick home, ordering her to return in a dress, rather than the pants she was wearing. He warned that if she "insist[ed] on wearing slacks again [she] w[ould] be prevented from testifying because that would hinder the administration of justice."[2] When Hulick returned the next day, again wearing pants, Judge Guerin held her in contempt of court and sentenced her to five days in jail. Though Hulick's contempt citation was eventually overturned by the appellate division, freeing Hulick to wear pants to court,[3] the episode illustrated commonly held views about women's apparel and place in society.[4]

Up until the 1970s, courts assumed women's proper roles were domestic and maternal, and "regularly uph[eld] sex-based distinctions under the logic of protecting women's domesticity, maternal bodies, and sexual morals."[5] Supreme Court Justice Bradley once expressed that "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[6]

Congress challenged these assumptions when it passed Title VII of the Civil Rights Act of 1964. Though the Act was initially intended to combat discrimination in employment on the basis of race, Congress made the "last-minute addition of 'sex' to the forbidden grounds of race, color, national origin, and religion."[7] The passage of Title VII opened the floodgates to sex discrimination litigation, and whole categories of work that had only been available for one gender now presented opportunities for both men and women.[8] "Extreme acts of employment discrimination have diminished" since the passage of Title VII; however, more subtle forms of prejudice remain, including dif-

1. Scott Harrison, *California Retrospective: In 1938, L.A. Woman Went to Jail for Wearing Slacks in Courtroom*, L.A. TIMES (Oct. 23, 2014, 5:00 AM), https://www.latimes.com/local/california/la-me-california-retrospective-20141023-story.html.

2. *Id.*

3. *Id.*

4. *See* Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1198 (2016).

5. *Id.* (citations omitted).

6. Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

7. Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins*, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1338 (2014).

8. *Id.*

ferent dress and grooming requirements for men and women in the workplace.[9]

This Comment explains how employer-mandated sex-differentiated dress and grooming codes have become the "Title VII blind spot"[10] and argues that this could be remedied in the Eighth Circuit by extending the Supreme Court's sex stereotyping doctrine as applied in *Price Waterhouse v. Hopkins*.[11]

II. THE FEDERAL JUDICIAL SYSTEM AND EMPLOYER-MANDATED SEX-DIFFERENTIATED DRESS AND GROOMING CODES UNDER TITLE VII

Though the Supreme Court has not specifically addressed Title VII's application to employee dress and grooming policies,[12] it has discussed the Congressional intent behind Title VII and analyzed the text of Title VII as a whole. Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individ-

9. Mark R. Bandsuch, *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 287 (2009).

10. Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353, 356 (2008).

11. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Notably, the Civil Rights Act of 1991 overturned *Price Waterhouse*'s treatment of mixed motive claims, specifically related to burdens of persuasion and causation showings. However, it did not overturn the underlying rationale of sex stereotyping that is relevant to this Comment. *See* Burrage v. United States, 571 U.S. 204, 213 n.4 (2014) (noting that the Civil Rights Act of 1991 dispensed with *Price Waterhouse*'s treatment of but-for causation); Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1038 (8th Cir. 2010) ("The *Price Waterhouse* plurality's understanding that an employer might escape liability by showing that it would have made the same decision even without a discriminatory motive is no longer permissible because Congress provided otherwise, . . . but the Court's conclusion that Title VII prohibits sex stereotyping endures.").

12. Elizabeth Malcom, Comment, *"Looking and Feeling Your Best": A Comprehensive Approach to Groom and Dress Policies Under Title VII*, 46 SAN DIEGO L. REV. 505, 514 (2009). Notably, in the Supreme Court's recent decision, *Bostock v. Clayton County*, the Court held that "an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex'" in violation of Title VII. 140 S. Ct. 1731, 1753 (2020). In his majority opinion, Justice Gorsuch specified that the legality of "sex-segregated" dress codes was not before the Court in that case. *Id.* This Comment does not otherwise address the arguments posed by the majority in *Bostock*.

ual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex."[13]

Courts and commentators have frequently contended that "there is no useful legislative history attached to the introduction of sex as a forbidden ground in Title VII"[14] because the amendment was introduced merely "one day before the House of Representatives approved Title VII."[15] Some commentators assert that Representative Howard Smith of Virginia, a noted racist, proposed this amendment both as a joke and as an attempt to defeat the Civil Rights Act.[16] Although "Representative Smith was indeed a racist and would have been happy to see the defeat of the Civil Rights Act, . . . he had also been a sponsor of the Equal Rights Amendment since 1943 and was a supporter of the National Women's Party (NWP)."[17] Categorizing the amendment as a joke also ignores the remarks of numerous representatives who advocated for the amendment on the floor of the House[18] and the fact that both houses of Congress approved the amendment and passed the Civil Rights Act without further changes to the sex discrimination provision.[19]

The Supreme Court affirmed that Congress, through Title VII, made classifications based on sex unlawful.[20] The Court declared: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of dispa-

13. 42 U.S.C. § 2000e-2(a)(1)–(2) (2018). Title VII does permit employers to discriminate on the basis of sex when sex is a bona fide occupational qualification (BFOQ) "reasonably necessary to the normal operation of that particular business or enterprise." § 2000e-2(e)(1). "The BFOQ defense is written narrowly," and the Supreme Court has indicated that it only reaches "special situations." Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991). Besides noting that BFOQ can be a potential affirmative defense for an employer implementing a sex-differentiated dress code, this Comment will not engage in a comprehensive analysis of the BFOQ.

14. Case, *supra* note 7, at 1339.

15. Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1975); *accord.* Malcom, *supra* note 12, at 512.

16. Case, *supra* note 7, at 1339.

17. *Id.*

18. *See, e.g.*, 110 CONG. REC. 2580 (1964) (statement of Rep. Martha Griffiths) ("[A] vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister."); *id.* at 2583 (statement of Rep. Edna Kelly) ("My support and sponsorship of this amendment and of this bill is an endeavor to have all persons, men and women, possess the same rights and same opportunities."); *id.* at 2581 (statement of Rep. Katharine St. George) ("The addition of that little, terrifying word 's-e-x' will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will make it right.").

19. Malcom, *supra* note 12, at 512–13.

20. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978).

rate treatment of men and women resulting from sex stereotypes."[21] In an often-cited concurrence, Justice Marshall observed that "characterizations of the proper domestic roles of the sexes [a]re not to serve as predicates for restricting employment opportunity."[22] Accordingly, employers are not only prohibited from restricting employment opportunities on the basis of sex, but also from grounding employment decisions "on mere 'stereotyped' impressions about the characteristics of males or females."[23]

Although society has made progress in workplace gender equality and the Supreme Court has broadly criticized employment classifications based on sex or stereotyped impressions of men and women, lower courts have uniformly ruled that employer-mandated sex-differentiated dress and grooming codes comply with Title VII.[24] This was not always the case. In the period immediately following the passage of Title VII, the Equal Employment Opportunity Commission (EEOC) was prepared to pursue cases where an employer imposed different grooming standards on men and women. In 1972 the EEOC ruled:

> To maintain one employment standard for females and another for males discriminates because of sex . . . and is unlawful unless the employer demonstrates the applicability of the narrow bona fide occupational qualification exception . . . [which w]e hold, that as a matter of law, . . . is not applicable to [the] Employer's long hair policy.[25]

---

21. *Id.* at 707 n.13 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

22. Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

23. *Manhart*, 435 U.S. at 707.

24. *See, e.g.*, Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (upholding employer grooming policy "limiting hair length for male employees but imposing no similar restriction on female employees"); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1350 (4th Cir. 1976) (holding that sex-differentiated grooming standards alone do not constitute discrimination under Title VII); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1088 (5th Cir. 1975) (upholding a grooming policy that prohibited men, but not women, from having long hair); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977) (upholding an employer's grooming code that included hair length restrictions for men but not women); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1249 (8th Cir. 1975) (upholding "private employer's grooming code imposing limits on the hair length of male employees while at the same time not imposing similar limits on the hair length of female employees"); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755 (9th Cir. 1977) (upholding employer's dress code requiring men, but not women, to wear neckties); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (holding that an employer's "differing hair length standards for men and women do not violate Title VII"); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973) (holding Title VII did not invalidate employer's grooming standards requiring men, but not women, to have short hair).

25. EEOC Decision No. 72-1380, 4 Fair Empl. Prac. Cas. (BNA) 846 (1972).

This view was supported and afforded deference by several early district court rulings.[26] In *Donohue v. Shoe Corp. of America*, Judge Pregerson eloquently reasoned:

> In our society we too often form opinions of people on the basis of skin color, religion, national origin, style of dress, hair length, and other superficial features. That tendency to stereotype people is at the root of some of the social ills that afflict the country, and in adopting the Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth.[27]

Similarly, in his opinion for *Aros v. McDonnell Douglas Corp.*, Judge Ferguson maintained that "[a]n employer has every right to adopt dress codes suitable to various job categories. . . . A dress and grooming code, however, must be applied equally to everyone. It may not establish different standards for males and females; it may not discriminate on the basis of sex."[28] Judge Ferguson went on to assert that Title VII does not allow employers to "indulge" in generalizations or stereotyped responses and "requires that every individual be judged according to his own conduct and job performance."[29]

Over time, however, courts moved away from this view and began endorsing employer-mandated sex-differentiated dress and grooming codes.[30] Eventually, "[e]ven the EEOC admitted defeat."[31] It announced that it would continue to hold "to its longstanding view that absent a showing of a business necessity, different grooming standards for men and women constitute sex discrimination under Title VII."[32] However, it would close all sex discrimination charges that dealt with male hair length because "the circuit courts of appeals ha[d] unanimously concluded that different appearance standards for male and female employees, particularly those involving hair length where women are allowed to wear long hair but men are not, do not constitute sex discrimination."[33] By 1981, the EEOC Compliance Manual's examples of Title VII compliant dress codes included an employer "requir[ing] male employees to wear neckties at all times and female employees to wear skirts or dresses at all times" so long as the

26. *E.g.*, Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (C.D. Cal. 1972) (finding a prima facie violation of Title VII where an employer permitted women to wear long hair, but not men); Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 664 (C.D. Cal. 1972) ("The [EEOC] has determined that an individual's hair length and other personal appearance standards are terms and conditions of employment within the meaning of [Title VII]. This court agrees." (citation omitted)).
27. *Donohue*, 337 F. Supp. at 1359.
28. *Aros*, 348 F. Supp. at 666.
29. *Id.* ("Males with long hair conjure up exactly the sort of stereotyped responses Congress intended to be discarded.").
30. *See generally supra* note 24.
31. Case, *supra* note 7, at 1355.
32. *Id.* (quoting 2 EEOC Compl. Man. (CCH) § 619.1 (Oct. 1981)).
33. *Id.*

dress code imposed equivalent standards or burdens on men and women.[34]

Courts have used several rationales to justify upholding sex-differentiated dress and grooming codes. Some found that Title VII did not cover personal appearance codes because the characteristics were neither immutable nor constitutionally protected activities such as marriage or child rearing.[35] Other courts posited that "grooming requirements do not amount to Title VII violations where there is only a negligible effect on employment opportunities."[36] Still other courts reasoned "that policing grooming codes would be an unwarranted judicial intrusion into an employer's business decisions."[37] Whatever rationale a court used, employees bringing Title VII claims regarding a sex-differentiated dress code almost always lost, remaining in a "Title VII blind spot" while facially sex-based practices and policies in other areas were struck down.[38]

III. SEX STEREOTYPING AND *PRICE WATERHOUSE*

A. The Supreme Court's Adoption of Sex Stereotyping Analysis

In 1989 the Supreme Court decided *Price Waterhouse v. Hopkins*,[39] a case which some have called "the most important development in sex discrimination jurisprudence since the passage of Title VII"[40] and which many believed would eliminate the Title VII blind spot.[41]

34. *Id.* (quoting 2 EEOC Compl. Man. (CCH) § 619.4(d) (Oct. 1981)) (alteration in original).
35. *E.g.*, Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (reasoning that employer's hair length policy does not violate Title VII because hair length is not an immutable characteristic and does not affect a fundamental right); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) ("Hair length is not immutable and in the situation of employer vis à vis employee enjoys no constitutional protection."); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336 (D.C. Cir. 1973) ("[H]air length is not an immutable characteristic but one which is easily altered."). *But see* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (holding employer's policy allowing male employees, but not female employees, to have pre-school-age children violated Title VII); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1197 (7th Cir. 1971) (holding employer's policy requiring female employees, but not male employees, to be unmarried violated Title VII).
36. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609 n.15 (S.D.N.Y. 1981) (first citing Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); then citing Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249 (8th Cir. 1975) as examples).
37. Case, *supra* note 7, at 1356.
38. Levi, *supra* note 10, at 355–56.
39. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
40. Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 758 (2013).
41. *See, e.g.*, Levi, *supra* note 10, at 372.

Ann Hopkins had worked at Price Waterhouse, a nationwide professional accounting partnership in Washington D.C., for five years when the partners nominated her as a candidate for partnership.[42] Partners at Hopkins's office praised her as "an outstanding professional" with a "deft touch," and "strong character, independence and integrity."[43] Additionally, Hopkins "played a key role" in securing a multi-million dollar contract between Price Waterhouse and the Department of State.[44] Still, partners opposing her candidacy described Hopkins as "macho," suggested she "overcompensated for being a woman," and "advised her to take 'a course at charm school.'"[45] When Price Waterhouse ultimately informed Hopkins that her candidacy had been placed on hold, the partners explained that she would have a better chance at becoming partner if she "walk[ed] more femininely, talk[ed] more femininely, dress[ed] more femininely, w[ore] make-up, ha[d] her hair styled, and w[ore] jewelry."[46] When the partners in her office refused to re-propose her for partnership, Hopkins sued Price Waterhouse alleging sex discrimination under Title VII.[47]

In a 6–3 decision, the Court held that sex stereotyping had impermissibly played a part in Price Waterhouse's decision to not make Hopkins a partner.[48] The Court laid the foundation for its decision by reiterating that "[i]n passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."[49] The Court declared that "Congress' [sic] intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute"[50] and took those words of Title VII "to mean that gender must be irrelevant to employment decisions."[51] The Court further cited an interpretive memorandum entered into the Congressional Record by the comanagers of the Civil Rights Act of 1964 in the Senate.[52] The memorandum asserted that "[t]o discriminate is to make a distinction, to make a difference in

42. *Price Waterhouse*, 490 U.S. at 233.
43. *Id.* at 234.
44. *Id.*
45. *Id.* at 235.
46. *Id.*
47. *Id.* at 231–32.
48. *Id.* at 257–58. Though the language quoted in this Comment comes from the plurality opinion, the disagreement of the concurring Justices was with the burden of proof, rather than with the sex stereotyping theory of liability or the sufficiency of the evidence. *See id.* at 260–61 (White, J., concurring); *id.* at 261–62 (O'Connor, J., concurring).
49. *Id.* at 239 (plurality opinion).
50. *Id.*
51. *Id.* at 240.
52. *Id.* at 243–44.

treatment or favor,"[53] and that Title VII prohibits distinctions or differences in treatment or favor on the basis of sex.[54]

In applying Title VII to Hopkins's case, the Court confirmed that Price Waterhouse had engaged in sex stereotyping because "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[55] The Court reasoned that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[56] Consequently, the Court effectively stated that "a woman who proffered evidence that she received an adverse employment decision due to a failure to conform to expectations of gendered expression in the workplace had stated a claim of sex discrimination."[57] The Court further declared:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[58]

B. *Price Waterhouse*'s Anticipated Effect on Employer-Mandated Sex-Differentiated Dress and Grooming Codes

The Court's prohibition on sex stereotyping is significant because it actually encompassed two different forms of sex stereotyping: "ascriptive stereotyping and prescriptive stereotyping."[59] Employers engage in ascriptive stereotyping, the more traditional form of sex stereotyping, when they *assume* employees possess particular characteristics because of their sex that make them unqualified for a job.[60] *Price Waterhouse*, on the other hand, involved prescriptive stereotyping,

53. *Id.* at 244 (quoting 110 CONG. REC. 7213 (1964)).
54. *Id.* (citing 110 CONG. REC. 7213 (1964)).
55. *Id.* at 250.
56. *Id.* at 251.
57. Levi, *supra* note 10, at 377 (citing *Price Waterhouse*, 490 U.S. at 250).
58. *Price Waterhouse*, 490 U.S. at 251 (second alteration in original) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
59. Yuracko, *supra* note 40, at 763.
60. *Id.*; *see also, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (holding an employer could not refuse to hire women with young children based on the assumption that women would have heavier childcare responsibilities than men with young children); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198–99 (7th Cir. 1971) (striking down an employer's no-marriage rule that only applied to female flight personnel, reasoning it was based on sex stereotypes about women's domestic role).

which occurs when employers *insist* that employees display certain characteristics because of their sex.[61]

The Court's novel and broad declaration against prescriptive stereotyping excited proponents of eliminating the Title VII blind spot. The Court had previously disparaged classifications based on sex and prohibited employers from grounding employment decisions on "'stereotyped' impressions about the characteristics of males or females."[62] However, those cases dealt with ascriptive stereotyping.[63] In *Price Waterhouse*, the Court condemned Price Waterhouse's prescriptive requirement that Hopkins display feminine characteristics—recognizing gender discrimination in the company's stereotypical notions of the way Hopkins, as a woman, should dress and present herself—and declared that "gender must be irrelevant to employment decisions."[64]

After *Price Waterhouse*, the designation of a plaintiff's sex would, in theory, serve only as the grounding for a claim against an employer.[65] Fundamentally, a plaintiff could now argue: "If my sex were other than the one you have attributed to me, I would not be in the position I'm in. You wouldn't be refusing to hire me or promote me; you wouldn't be harassing me; *you wouldn't be requiring me to dress this way*."[66]

Like Price Waterhouse's stereotypical expectations of Hopkins, sex-differentiated dress and grooming codes "classify employees by sex and treat them differently based solely on that classification."[67] In this way, sex-differentiated dress and grooming codes allow outmoded sex stereotypes to be tolerated and encouraged in the workplace.[68]

One legal commentator provides an analogy to illustrate how such policies allow sex stereotyping in the workplace: Suppose Employer A allows its employees to dress however they want for work so long as they wear a sticker indicating whether they are male or female.[69] Now, suppose Employer B strictly dictates its employees' "clothing and manner of grooming (including hair length and nail style) according to [each] employee's sex." This could include requiring women to wear only skirts and apply makeup, while requiring men to wear dress pants and have short hair.[70]

---

61. Yuracko, *supra* note 40, at 763.
62. *Manhart*, 435 U.S. at 707.
63. *See* Zachary R. Herz, Note, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 404–06 (2014).
64. Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
65. Case, *supra* note 7, at 1344.
66. *Id.* (emphasis added).
67. Levi, *supra* note 10, at 360.
68. *Id.* at 372.
69. *Id.* at 370.
70. *Id.*

The effect of each policy is "conveying to others the sex of the individual employee." Both require "a determination of an employee's sex and some outward expression or statement of it."[71] However, Employer A only requires a public indication of the employee's sex without imposing a "gender norm." If employees do express a gender norm, they do so by choice.[72] Employer B, on the other hand, requires employees to both publicly identify their sex and "incorporate a particular norm of gender expression."[73] If the employers' policies are compared quantitatively, Employer B's dress code requirements could be described as more imposing than Employer A's sticker requirement. Stated as an equation, one could say Employer B's dress code = Employer A's sex sticker + the gendered norm defined by Employer B.[74] Thus, using "basic modern mathematical principles," if Employer A's sex sticker is prohibited,[75] Employer B's dress code should be as well, "unless the addition of a gendered norm is what makes the dress code permissible."[76]

As observed by numerous scholars, employer-mandated sex-differentiated dress and grooming codes "allow employers to make sex a relevant characteristic in the workplace."[77] They allow employers to impose policies that harm people whose gender identity lies outside of cultural norms.[78] They ignore the fact that "[d]ress codes can cause various injuries, including cultural profiling, subordination, assimilation, marginalization, stereotype threat, covering, compromising of group and individual identity, limits to freedom of expression and overall autonomy, loss of personal dignity, prejudice, bias, lower innovation, less authenticity, reduced trust, stress, dissatisfaction, disrespect, inequality, and lost energy."[79]

Most importantly, employer-mandated sex-differentiated dress and grooming codes "undermine Title VII equality commitments by saying that sex is a meaningful, even an important, characteristic in the workplace."[80] This is in direct contradiction to the Supreme Court's declaration that "gender must be irrelevant to employment de-

71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. The sex sticker hypothetical is likely impermissible. *See* Anderson v. Martin, 375 U.S. 399, 403–04 (1964) (striking down a Louisiana statute requiring that ballots have the race of each candidate for elective office in parentheses next to his or her name); *see also* Levi, *supra* note 10, at 371–72 (discussing *Anderson*'s implications for employer-mandated sex-differentiated dress and grooming codes).
76. Levi, *supra* note 10, at 370.
77. *Id.* at 372.
78. *Id.* at 364.
79. Bandsuch, *supra* note 9, at 312.
80. Levi, *supra* note 10, at 372.

cisions."[81] When the *Price* Court affirmed Congress's intent—that treating employees differently based on sex would be considered discrimination[82]—it seemed to embraced a "foundational" principle of discrimination law: "[H]arm is inherent in different treatment."[83] Such harm is created by sex-differentiated dress and grooming codes.

Sex-differentiated dress and grooming codes not only rouse sex-based prejudice in the workplace but tolerate and encourage it.[84] The use of immutable characteristics to categorize people often invigorates private prejudice against groups that lack "majoritarian support in the public square."[85] This is exacerbated by the fact that these codes often "reflect a white male bias in the workplace," which "perpetuate[s] assimilation, subordination, and stigmatization."[86] These detrimental effects contribute to the social and economic inequality that Title VII was crafted to remedy.[87]

If employers can no longer evaluate employees by insisting they match the stereotypes associated with their sex,[88] and "gender must be irrelevant to employment decisions,"[89] then an employer-mandated sex-differentiated dress code would violate Title VII unless it could be justified as a BFOQ.

C. *Price Waterhouse*'s (Lack of) Effect on Employer-Mandated Sex-Differentiated Dress and Grooming Codes

While commentators posited that *Price Waterhouse* would remove the Title VII blind spot and assure legal protection for women who were viewed as more "masculine," this has not been the case.[90] Courts relying on *Price Waterhouse* have become receptive to claims by gay and effeminate men, and *Price Waterhouse* "has been the catalyst for a sea [of] change in courts' treatment of transsexuals."[91] However, courts are still hostile towards plaintiffs like Hopkins—"women who asserted no identity as a sexual minority, but whose gender presenta-

81. Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
82. *Id.* at 243–44 (citing 110 CONG. REC. 7213 (1964)).
83. Levi, *supra* note 10, at 369.
84. *Id.* at 372.
85. *Id.* at 369 n.81.
86. Bandsuch, *supra* note 9, at 296.
87. *Id.*
88. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
89. *Id.* at 240.
90. *See* Case, *supra* note 7, at 1335–36.
91. Yuracko, *supra* note 40, at 758.

tion veered slightly more in a masculine direction than suited their employers."[92]

Furthermore, the few courts that have revisited employer-mandated sex-differentiated dress and grooming codes since *Price Waterhouse* have continued to uphold them. In 1998, the Eleventh Circuit upheld an employer's policy requiring only male employees to have short hair. The court maintained that the plaintiffs did not cite a decision that "supplanted the reasoning or called into question" the long-standing, binding precedent upholding such policies.[93] Bewilderingly, the opinion does not even mention *Price Waterhouse*, leaving one to wonder whether there had been a severe oversight by either the plaintiffs' lawyer or the court.[94] Other courts have similarly upheld sex-differentiated dress and grooming codes.[95]

Even in an opinion declaring that "the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine,"[96] the Ninth Circuit went out of its way to include a footnote specifically upholding employer-mandated sex-differentiated dress and grooming codes. The court stated: "We do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."[97] The assertion in this dicta was further developed in the controversial case *Jespersen v. Harrah's Operating Co.*[98]

---

92. Case, *supra* note 7, at 1352.

93. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1389 (11th Cir. 1998); *see also* Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (per curiam) (holding, without mention of *Price Waterhouse*, that recent Supreme Court cases had not undercut prior lower court precedents upholding differing employer-mandated hair length requirements for men and women).

94. Case, *supra* note 7, at 1356–57 ("Astonishingly, there is no mention whatsoever of [*Price Waterhouse*] in the court's opinion, leaving the reader to wonder whether the plaintiffs' lawyer had committed malpractice or whether the court was being disingenuous in distinguishing only a series of cases much less obviously relevant.").

95. *See, e.g.*, *Tavora*, 101 F.3d at 908 (holding, without mention of *Price Waterhouse*, that recent Supreme Court cases had not undercut previous precedent upholding employers' gender-differentiated hair length requirements); Kleinsorge v. Eyeland Corp., No. CIV. A. 99-5025, 2000 WL 124559, at *2 (E.D. Pa. Jan. 31, 2000) (finding that a grooming code allowing women, but not men, to wear earrings did not violate Title VII); Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800, 804 (Iowa 2003) ("[P]ersonal grooming codes that reflect customary modes of grooming having only an insignificant impact on employment opportunities do not constitute sex discrimination within the meaning of [Title VII].").

96. Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001).

97. *Id.* at 875 n.7.

98. 444 F.3d 1104 (9th Cir. 2006) (en banc).

Darlene Jespersen worked successfully as a bartender at the sports bar in Harrah's Reno casino for twenty years, compiling an exemplary record.[99] After her two decades with the company, Harrah's implemented a "Beverage Department Image Transformation" program at numerous locations, including its Reno casino.[100] The program included a new dress and grooming code which was known as the "Personal Best" program.[101] The program required both male and female beverage servers to wear "a standard uniform of black pants, white shirt, black vest, and black bow tie."[102] However, the program also included the following sex-differentiated requirements for workers' hair, nails, and makeup:

> Males:
>
> Hair must not extend below top of shirt collar. Ponytails are prohibited.
> Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
> Eye and facial makeup is not permitted.
>
> . . . .
>
> Females:
>
> Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
> Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
> Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
>
> . . . .
>
> *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.*[103]

Women in the beverage department, including Jespersen, had compulsory meetings with professional image consultants who created "a facial template for each woman" and determined exactly how she should apply her makeup.[104]

Though the policy differentiated on the basis of sex in several respects, Jespersen specifically objected to the makeup requirement, alleging that she found it offensive and "felt so uncomfortable wearing makeup that she found it interfered with her ability to perform as a bartender."[105] Harrah's fired Jespersen for her refusal to wear makeup.[106]

The Ninth Circuit heard the case en banc "in order to reaffirm [its] circuit law concerning appearance and grooming standards, and to

99. *Id.* at 1105–07.
100. *Id.* at 1107.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 1114 (Pregerson, J., dissenting).
105. *Id.* at 1108 (majority opinion).
106. *Id.* at 1106.

clarify [its] evolving law of sex stereotyping claims."[107] The court analyzed Jespersen's Title VII discrimination claim under both the equal burdens and sex stereotyping theories.

Under an equal burdens analysis, an employer's grooming and appearance policy violates Title VII if it "unreasonably burden[s] one gender more than the other."[108] The court found that Harrah's appearance policy regulated both male and female bartenders, and even though the individual requirements differed according to gender, none were facially "more onerous for one gender than the other."[109] The court also observed that Jespersen did not submit "any evidence of the relative cost and time required to comply with the grooming requirements by men and women."[110] Thus, the court would have had to "speculate" about the required cost and time to then "guess" whether the policy unequally burdened women.[111] Additionally, the court cited to a string of pre-*Price Waterhouse* decisions to reaffirm that courts had "long recognized that companies may differentiate between men and women in appearance and grooming policies."[112]

Moreover, the circuit court held that Jespersen's objection to the makeup requirement, without more, could not "give rise to a claim of sex stereotyping under Title VII."[113] The court asserted that the case essentially challenged "one small part"[114] of an overall appearance and grooming policy that applied to both male and female bartenders and "require[d] all of the bartenders to wear exactly the same uniforms."[115] The court emphasized that the makeup requirement had to "be seen in the context of the overall standards imposed on employees."[116]

Thus, the court maintained that Jespersen's claim "materially differ[ed] from Hopkins' [sic] claim in *Price Waterhouse* because Harrah's grooming standards d[id] not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform

107. *Id.* at 1105.
108. *Id.* at 1110.
109. *Id.* at 1109.
110. *Id.* at 1110.
111. *Id.*
112. *Id.* (citing Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755 (9th Cir. 1977); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1350 (4th Cir. 1976) (per curium); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc); Baker v. Cal. Land Title Co., 507 F.2d 895, 896 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973)).
113. *Id.* at 1112.
114. *Id.* at 1113.
115. *Id.* at 1111–12.
116. *Id.* at 1113.

her job requirements as a bartender."[117] In fact, the court found no evidence at all suggesting that "Harrah's motivation was to stereotype the women bartenders"[118] or "that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear."[119] Finally, the court reasoned that if it held that Jespersen's objections to the makeup requirement alone gave rise to a claim of sex stereotyping, then it "would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination."[120]

On the other hand, the dissent "believe[d] that the 'Personal Best' program was part of a policy motivated by sex stereotyping and that Jespersen's termination for failing to comply with the program's requirements was 'because of' her sex."[121] It emphasized that Title VII required that "gender must be *irrelevant* to employment decisions,"[122] and that "*Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves."[123] It reasoned that Harrah's policy "treated Jespersen differently from male bartenders 'because of' her sex," and "requir[ing] women to conform to a sex stereotype by wearing full makeup is sufficient 'direct evidence' of discrimination."[124]

Additionally, the dissent asserted: "The fact that a policy contains sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny."[125] It criticized the majority's approach, insisting it "would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate non-discriminatory requirement that applies to both men and women."[126] It also pointed to a gap in the majority's reasoning stating, "[T]he fact that employees of both genders are subjected to gender-specific requirements does not necessarily mean that particular requirements are not motivated by gender stereotyping."[127]

---

117. *Id.*
118. *Id.* at 1108.
119. *Id.* at 1112.
120. *Id.*
121. *Id.* at 1114 (Pregerson, J., dissenting).
122. *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071).
123. *Id.* at 1115 (citing *Price Waterhouse*, 490 U.S. at 235).
124. *Id.*
125. *Id.* at 1116.
126. *Id.*
127. *Id.*

Finally, in maintaining that Harrah's "Personal Best" policy "was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear,"[128] the dissent contended that:

> Harrah's regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform designed by a consultant and required by Harrah's. The inescapable message is that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup. We need not denounce all makeup as inherently offensive . . . to conclude that *requiring* female bartenders to wear full makeup is an impermissible sex stereotype and is evidence of discrimination because of sex.[129]

The Ninth Circuit's decision in *Jespersen* sparked sharp criticism from commentators who disagreed with the court's holdings on both the unequal burdens and sex stereotyping grounds.[130] Despite this high-profile decision, many remain optimistic that *Price Waterhouse* could offer a path to eradicate the Title VII blind spot.[131] This may be particularly true in the Eighth Circuit, given that the court of appeals has not considered a case involving an employer-mandated sex-differentiated dress and grooming policy since 1985[132] (prior to *Price*

---

128. *Id.* ("Disagree[ing] with the majority's conclusion that there 'is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.'").

129. *Id.*

130. *See, e.g.*, Case, *supra* note 7, at 1358. Case observed that:

> [I]nstead of "reaffirm[ing] [its] circuit law concerning appearance and grooming standards," the Ninth Circuit should have reevaluated its approach in light of [*Price Waterhouse*] and concluded that its own "evolving law of sex stereotyping claims," previously focused on coworker harassment of effeminate men . . . ,was even more clearly applicable to an employer's direct discriminatory treatment of a woman like Jespersen.

Id. (quoting *Jespersen*, 444 F.3d at 1105) (second and third alterations in original) (footnote omitted). Similarly, Levi pointed out that:

> What is so exceptional about the panel's analysis is the suggestion that the demonstration of different treatment of men and women is not, alone, direct evidence of discrimination. Even though different treatment alone proves sex discrimination in nearly every other situation, the panel decided that, in the context of dress codes, different treatment is not enough to prove a claim.

Levi, *supra* note 10, at 381.

131. *See, e.g.*, Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 924 (2016) (describing "sex discrimination lawsuits relying on the legal theory of stereotyping" as a "bright spot offer[ing] a way forward" for antidiscrimination law); Levi, *supra* note 10, at 372 ("Enthusiasm for the [sex stereotyping] theory rests also on its analytical strength and the possibility it portends for reversing the Title VII blind spot.").

132. Craft v. Metromedia, Inc., 766 F.2d 1205, 1207 (8th Cir. 1985).

Waterhouse) and the court's general acceptance of the sex stereotyping claim.[133]

IV. EIGHTH CIRCUIT PRECEDENT REGARDING EMPLOYER-MANDATED SEX-DIFFERENTIATED DRESS AND GROOMING CODES

The Eighth Circuit's case law concerning employer-mandated sex-differentiated dress and grooming codes is sparse. In the 1975 case *Knott v. Missouri Pacific Railroad Co.*, the Eighth Circuit joined others in holding that a private employer's grooming policy limiting the hair length of male employees, but not female employees, did not violate Title VII.[134] When reviewing Title VII's legislative history, the court recognized that "the primary thrust of the provision was to discard outmoded sex stereotypes posing distinct employment disadvantages for one sex."[135] Nevertheless, the court found that the decisions of other circuits represented the more "realistic and reasonable interpretation" of Title VII and concluded that the Act "was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers."[136] The court determined:

> Without more extensive consideration [of the amendment adding sex to the Act], Congress in all probability did not intend for its proscription of sexual discrimination to have [such] significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.[137]

The court noted the employer's male hair length requirement was "part of a comprehensive personal grooming code applicable to all employees."[138] It reasoned that when "such policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities."[139] Finally, the court held that "minor differences in personal appearance regulations that reflect customary modes of grooming do not constitute sex discrimination within the meaning of [Title VII]."[140]

133. *See, e.g.*, Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1042 (8th Cir. 2010).

134. Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1249 (8th Cir. 1975).

135. *Id.* at 1251.

136. *Id.* at 1251–52 (citing Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973)).

137. *Id.* at 1252 (alterations in original) (quoting *Willingham*, 507 F.2d at 1090).

138. *Id.*

139. *Id.*

140. *Id.*

Following the decision in *Knott*, district courts in the Eighth Circuit upheld similar employer-mandated sex-differentiated dress and grooming codes, including a workplace dress code requiring female office secretaries to wear skirts or dresses rather than pantsuits.[141] The Eighth Circuit Court of Appeals did not revisit employer-mandated sex-differentiated dress and grooming policies until 1985 in *Craft v. Metromedia, Inc.*[142]

In that case, KMBC-TV in Kansas City, Missouri, had slipped in its local news ratings and decided to adopt the co-anchor format used by its competitors. "[B]ecause of the perceived 'coldness'" of its male anchor, KMBC decided to fill the position with a "female to 'soften' its news presentation."[143] KMBC subsequently hired Christine Craft as co-anchor. When Craft made her debut, both KMBC's news director and its vice president/general manager immediately had concerns with her clothing and makeup. KMBC brought in a consultant to help Craft with her wardrobe and other aspects of her "presentation technique."[144]

KMBC's news director "continued to make occasional suggestions or criticisms as to certain articles of Craft's clothing, and Craft was provided with materials, including the book *Women's Dress for Success*, on wardrobe and makeup."[145] KMBC arranged for a consultant from Macy's Department Store to assist Craft in selecting clothing. Afterwards, Craft would return to the studio, try on the clothing for a camera screen test, and send tapes to a consultant for review.[146]

After focus group discussions showed an "overwhelmingly negative" response to Craft's appearance, KMBC increased supervision of Craft's wardrobe and instituted a "clothing calendar."[147] The clothing calendar detailed the blazer, blouse, skirt or slacks, and jewelry that Craft would wear each day.[148] Following another customer survey that again showed poor opinions of Craft's appearance, KMBC "reassigned [Craft] to reporter at no loss of pay or contractual benefits."[149] Craft refused to accept reassignment, left KMBC, and brought a Title VII sex discrimination claim against the company.[150] The district court ruled against Craft, finding that:

> KMBC required both male and female on-air personnel to maintain professional, businesslike appearances "consistent with community standards" and

141. Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1390–91 (W.D. Mo. 1979).
142. 766 F.2d 1205, 1207 (8th Cir. 1985).
143. *Id.* at 1208.
144. *Id.*
145. *Id.*
146. *Id.* at 1208–09.
147. *Id.* at 1209.
148. *Id.* at 1209 n.2.
149. *Id.* at 1209.
150. *Id.*

> that the station enforced that requirement in an evenhanded, nondiscriminatory manner. Any greater attention to Craft's appearance . . . was "tailored to fit her individual needs" and was necessary because of her "below-average aptitude" in matters of clothing and makeup.[151]

Craft sought reevaluation of the evidence and rejection of the district court's factual findings, but the court forewarned it could only set them aside if they were clearly erroneous.[152]

Craft first argued that the district court erred in concluding the facts, in light of all the evidence, "showed only that KMBC was concerned with the appearance of all its on-air personnel and that it took measures appropriate to individual situations, characteristics, and shortcomings."[153] The court found that, like Craft, several males had been given "specific directions as to their individual shortcomings," including directions on weight, fit, and color of clothing, and style of facial hair.[154] The clothing calendar was only necessary for Craft because less intrusive suggestions, like those complied with by other employees, were ineffective.[155]

The court also noted that "[c]redibility . . . was central to the district court's finding[s]."[156] One such finding was whether, as Craft testified, KMBC's news director "told her she was being reassigned because the audience perceived her as too old, too unattractive, and not deferential enough to men."[157] KMBC's news director denied making such a statement and the district court believed him.[158] Similarly, the district court chose not to believe testimony alleging that KMBC's news director said it was more important for female anchors to look good on air than it was for male anchors.[159]

Upon review, the court of appeals found that the district court's interpretation of the record had "support in inferences that may be drawn from the facts."[160] Consequently, it determined the district court's conclusion that "KMBC enforced its appearance standards equally as to males and females in response to individual problems [was] neither 'illogical' nor 'implausible.'"[161] Thus, the court of appeals could not conclude the district court had erred.[162]

Next, Craft argued that "even if KMBC was evenhanded in applying its appearance standards, the district court erred in failing to rec-

151. *Id.* at 1209–10 (citations omitted).
152. *Id.* at 1211.
153. *Id.* at 1213.
154. *Id.*
155. *Id.*
156. *Id.* at 1212.
157. *Id.* at 1209.
158. *Id.*
159. *Id.* at 1213–14.
160. *Id.* at 1213 (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 577 (1985)).
161. *Id.*
162. *Id.*

ognize that the standards themselves were discriminatory" because she was "forced to conform to a stereotypical image of how a woman anchor should appear."[163] Relevant evidence included a communication from a consultant to KMBC's news director criticizing Craft's clothes for being "too masculine" and suggesting Craft purchase more blouses with "feminine touches, such as bows and ruffles."[164] KMBC's consultants' general wardrobe hints for women also "warned that women with 'soft' hairstyles and looks should wear blazers to establish their authority and credibility while women with short 'masculine' hairstyles shouldn't wear 'masculine' clothing in dark colors and with strong lines because they would appear too 'aggressive.'"[165] Furthermore, apparel guidelines for anchors suggested that men should remember "professional *image*" and women should remember "professional *elegance*."[166]

One of KMBC's consultants testified that she had instructed Craft not to wear the same outfit more than once every few weeks because viewers would call KMBC about it; however, men could wear the same suit twice in the same week as long as they wore a different tie.[167] The consultant testified that viewers criticized the appearance of women more severely than men and that "women's dress is more complex and demanding because 'society has made it that way.'"[168] Craft argued these differing standards reflected customer preferences, which some cases held could not justify discriminatory practices.[169]

The district court disagreed and concluded that KMBC's appearance standards were based on permissible factors. Though there was "some emphasis on the feminine stereotype[s] of 'softness' and bows and ruffles," and on female anchors' "fashionableness," it found that "such concerns were incidental to a true focus on consistency of appearance, proper coordination of colors and textures, the effects of studio lighting on clothing and makeup, and the greater degree of conservatism thought necessary in the Kansas City market."[170] Such conservatism included the need for women to avoid "tight sweaters or overly 'sexy' clothing and extreme 'high fashion' or 'sporty' outfits" and

163. *Id.* at 1214. Craft's argument is similar to the one Hopkins would make a few years later in *Price Waterhouse.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1214–15 (citing Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982), *cert. dismissed*, 460 U.S. 1074 (1983); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981)).

170. *Id.* at 1215.

the need for men to avoid "'frivolous' colors and 'extreme' textures and styles as damaging to the 'authority' of newscasters."[171]

The court of appeals cited *Knott* and maintained that the aforementioned criteria did not "implicate the primary thrust of Title VII, which is to prompt employers to 'discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.'"[172] Additionally, the court reasoned that employees' appearance contributed to the company's public image and success; thus, "a reasonable dress or grooming code [was] a proper management prerogative."[173] The court determined that this was particularly true in television, citing the district court's finding that "reasonable appearance requirements were 'obviously critical' to KMBC's economic well-being."[174]

Though the court acknowledged KMBC's overemphasis on appearance, it claimed that it was "not the proper forum in which to debate the relationship between newsgathering and dissemination and considerations of appearance and presentation . . . in television journalism."[175] Thus, the court of appeals found that the record did not leave it with the "definite and firm conviction" that the district court "adopted an impermissible view of the evidence when it concluded that KMBC's appearance standards were shaped only by neutral professional and technical considerations and not by any stereotypical notions of female roles and images."[176]

The Eighth Circuit's holding in *Craft* is markedly different than its later holding in *Lewis v. Heartland Inns of America, L.L.C.*,[177] which was decided after the Supreme Court's ruling in *Price Waterhouse*. There, Brenna Lewis had successfully worked at Heartland Inns, the operator of a group of hotels, for a year and a half.[178] She had started as the night auditor at one of the hotels, working the front desk from 11:00 p.m. to 7:00 a.m.[179] Lewis's supervisors praised her for doing her job well, making a good impression, and being well liked by customers. She received several merit-based pay raises.[180] Lewis's manager received permission over the phone from Heartland's director of operations to offer Lewis a full-time front desk position from 7:00 a.m. to 3:00 p.m., and Lewis accepted the offer.[181]

171. *Id.*
172. *Id.* (quoting Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1251 (8th Cir. 1975)).
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1215–16.
177. 591 F.3d 1033 (8th Cir. 2010).
178. *Id.* at 1035.
179. *Id.*
180. *Id.* at 1035–36.
181. *Id.* at 1036.

However, after seeing Lewis, the director told Lewis's manager that she was unsure if Lewis was a "'good fit' for the front desk."[182] The director called Lewis's manager later and again brought up Lewis's appearance.[183] "Lewis describe[d] her own appearance as 'slightly more masculine,' and [Lewis's manager] ha[d] characterized it as 'an Ellen DeGeneres kind of look.'"[184] Though Lewis was not challenging Heartland's dress code, which required similar standards of professional appearance for male and female employees, she "prefer[red] to wear loose fitting clothing, including men's button down shirts and slacks. She avoid[ed] makeup and wore her hair short at the time."[185]

The director told Lewis's manager that Heartland "took two steps back" when Lewis replaced the previous front desk worker, who dressed "in a more stereotypical feminine manner."[186] The director claimed Lewis lacked the "Midwestern girl look,"[187] which was important because "Heartland staff should be 'pretty,' a quality she considered especially important for women working at the front desk."[188] However, Heartland's personnel manual did not have an appearance requirement.[189]

Shortly thereafter, Heartland instituted a policy requiring a second interview over videoconference for the front desk position.[190] Lewis met with the director for her second interview almost a month after she had started working the new position and was aware of what the director had said about her appearance.[191] Lewis questioned the director's intention behind the interview.[192] Lewis was fired three days later and subsequently brought suit alleging Heartland "found her unsuited for her job not because of her qualifications or her performance on the job, but because her appearance did not comport with its preferred feminine stereotype."[193]

The Eighth Circuit agreed with Lewis and determined she had "offered sufficient evidence from which a reasonable factfinder could find that she was discriminated against because of her sex."[194] The court explained that "[w]ell before *Price Waterhouse* . . . courts had found

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 1036–37.
191. *Id.* at 1037.
192. *Id.*
193. *Id.* at 1038.
194. *Id.* at 1042.

sex specific impositions on women in customer service jobs" (like Lewis's) illegal.[195] Then, in *Price Waterhouse*, "the Supreme Court [explicitly] decided that sex stereotyping can violate Title VII when it influences employment decisions."[196] Thus, "an adverse employment decision based on 'gender nonconforming behavior and appearance' is impermissible."[197] It emphasized that "[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination *because the discrimination would not occur but for the victim's sex*."[198]

Consequently, the court determined that the applicable question was whether the director's "requirements that Lewis be 'pretty' and have the 'Midwestern girl look' were because she [was] a woman."[199] It concluded that a reasonable factfinder could find these requirements to be evidence of wrongful sex stereotyping because "the terms by their nature apply only to women."[200] The court reasoned that "[c]ompanies may not base employment decisions for jobs such as Lewis' [sic] on sex stereotypes, just as Southwest Airlines could not lawfully hire as flight attendants only young, attractive, 'charming' women 'dressed in high boots and hot-pants[.]'"[201] Quoting the Supreme Court's *Price Waterhouse* decision, the Eighth Circuit concluded that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[202]

V. USING *PRICE WATERHOUSE* SEX STEREOTYPING THEORY TO REMEDY THE TITLE VII BLIND SPOT IN THE EIGHTH CIRCUIT

Since *Heartland*, there have been few challenges heard by the Eighth Circuit Court of Appeals alleging the *Price Waterhouse* sex stereotyping theory.[203] However, plaintiffs have been allowed to state

195. *Id.* at 1038.
196. *Id.*
197. *Id.* at 1039 (quoting Smith v. City of Salem, 378 F.3d 566, 571–72 (6th Cir. 2004)).
198. *Id.* at 1040 (alteration in original) (quoting *Smith*, 378 F.3d at 574). The court emphasized this quotation both by italicizing a portion of the text and by stating it twice in the opinion.
199. *Id.* at 1041.
200. *Id.*
201. *Id.* at 1042 (second alteration in original) (quoting Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 294–95 (N.D. Tex. 1981)).
202. *Id.* (alteration in original) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071).
203. As of January 2021, I have only been able to identify a single Eighth Circuit Court of Appeals opinion decided since *Heartland* that cites *Price Waterhouse* and includes derivatives of the word "stereotype." *See* Hunter v. United Parcel Serv.,

a claim under the theory in district court.[204] This successful application of the *Price Waterhouse* sex stereotyping doctrine, together with the fact that the Eighth Circuit Court of Appeals has not considered a case involving an employer-mandated sex-differentiated dress and grooming policy in more than thirty years,[205] makes the Eighth Circuit a promising jurisdiction to apply the reasoning of *Price Waterhouse* to remedy the Title VII blind spot.

The Eighth Circuit's most relevant precedent on employer-mandated sex-differentiated dress and grooming codes includes *Knott*, *Craft*, and *Lewis*. Given the similarities of the claims in these cases, it is perhaps significant that the *Lewis* opinion (the most recent opinion) mentions neither *Knott* nor *Craft*. Potentially even more insightful is the fact that when the district court initially ruled against Lewis (a ruling that was later reversed), it relied on *Craft*.[206] Since the court of appeals did not explicitly mention its reliance on *Craft*, this may suggest that the court no longer perceived *Craft* to be relevant in the post-*Price Waterhouse* jurisprudence of sex stereotyping.

This would not be surprising given the facts in *Craft*. Craft argued that she was "forced to conform to a stereotypical image of how a woman anchor should appear"[207] and presented evidence that supported her contention. KMBC hired Craft to "soften" its news presentation.[208] When her wardrobe did not satisfy KMBC's news director, KMBC provided Craft with materials on apparel and makeup, including the book *Women's Dress for Success*.[209] KMBC told Craft her clothes were too masculine, instructed her to buy blouses with feminine touches like bows and ruffles, and warned her that women with short hairstyles should not wear masculine clothing because they would look too aggressive.[210] Even with these facts, in 1985, the Eighth Circuit held that KMBC's appearance standards were based on permissible, nondiscriminatory factors.[211]

But, twenty-five years later, it is possible that the Eighth Circuit compared these facts with the similar facts presented in *Price Waterhouse* and determined that *Craft* did not apply to *Lewis*. Either

---

Inc., 697 F.3d 697, 704 (8th Cir. 2012) (holding that plaintiff could not prove employer discriminated against him because of a protected status because employer was unaware of plaintiff's protected status as gender-nonconforming).

204. *See, e.g.*, Thompson v. CHI Health Good Samaritan Hosp., No. 8:16CV160, 2016 WL 5394691 (D. Neb. Sept. 27, 2016).

205. *See* Craft v. Metromedia, Inc., 766 F.2d 1205, 1207 (8th Cir. 1985).

206. Lewis v. Heartland Inns of Am., L.L.C., 585 F. Supp. 2d 1046, 1067 (S.D. Iowa 2008), *rev'd*, 591 F.3d 1033 (8th Cir. 2010).

207. *Craft*, 766 F.2d at 1214. Craft made this sex stereotyping argument prior to the Supreme Court's decision in *Price Waterhouse*.

208. *Id.*

209. *Id.* at 1208.

210. *Id.* at 1214.

211. *Id.* at 1215.

way, thirty-five years after the court's decision in *Craft* and forty-five years after its decision in *Knott*, both cases now contain serious precedential flaws.

Prior to *Price Waterhouse*, the Eighth Circuit upheld an employer-mandated sex-differentiated dress and grooming code in *Knott*, reasoning that Congress likely did not intend for Title VII to have such "significant and sweeping implications."[212] Thus, it concluded the more "realistic and reasonable interpretation" of Title VII was that Congress never intended the Act to interfere with the "promulgation and enforcement" of employers' personal appearance regulations.[213]

In a post-*Price Waterhouse* world, this reasoning would ignore both the remarks of numerous representatives who advocated for the addition of "sex" to Title VII and the Supreme Court's interpretation of that intent.[214] In *Price Waterhouse*, the Supreme Court recognized that Congress's enactment of Title VII conveyed to employers that sex was irrelevant to the "selection, evaluation, or compensation of employees."[215] Consequently, if sex was to be irrelevant to employment decisions,[216] employers could no longer insist that their employees matched the stereotype associated with their sex.[217]

The Eighth Circuit adopted this analysis in *Lewis*,[218] emphasizing that discrimination against women for not wearing dresses or makeup was sex discrimination because it "would not occur but for the victim's sex."[219] This observation aligns with the interpretation of district courts that struck down employer-mandated sex-differentiated dress and grooming codes early after Title VII's passage. In striking down such policies, courts had reasoned that Congress adopted Title VII so employees would be "judged by their intrinsic worth" rather than the "stereotyped characterizations" that plagued America.[220]

Furthermore, in *Knott*, the Eighth Circuit reasoned that a dress and grooming code with "minor differences" in requirements for men and women that reflected "customary modes of grooming" was not sex

212. Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975) (quoting Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1975)).

213. *Id.* at 1251–52 (citing *Willingham*, 507 F.2d at 1084; Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973)).

214. *See supra* note 18.

215. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

216. *Id.* at 240.

217. *Id.* at 251.

218. Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1042 (8th Cir. 2010).

219. *Id.* at 1040 (quoting Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004)).

220. Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (C.D. Cal. 1972).

discrimination under Title VII.[221] In *Craft*, the court determined that such "reasonable" codes were a "proper management prerogative."[222]

However, forty-five and thirty-five years later, respectively, cultural norms regarding customary modes of grooming and the reasonableness of dress codes are not what they once were. Though women could previously be jailed for wearing pants and were unofficially banned from wearing them on the floor of the U.S. Senate,[223] today some states even have laws protecting women's right to wear pants at work.[224] Women's and men's faces alike should be considered "perfectly presentable without makeup."[225] The Supreme Court and the Eighth Circuit have recognized these changes by deeming it no longer reasonable for an employer to make "a difference in treatment or favor"[226] of men and women or for an employer to insist employees match the stereotype associated with their sex.[227] However, if courts like the Eighth Circuit agree that sex "must be irrelevant to employment decisions,"[228] then they should hold that employers who impose sex-differentiated dress and grooming codes discriminate on the basis of sex because such codes allow employers to make decisions based on an employee's "gender nonconforming . . . appearance."[229] A declaration by the Eighth Circuit that employer-mandated sex-differentiated dress and grooming codes violate Title VII would be one large step towards eliminating the Title VII blind spot and creating greater equality for all workers, regardless of sex.

VI. CONCLUSION

The United States has come a long way in remedying employment discrimination on the basis of sex. Courts have interpreted Title VII to prohibit employers from enacting "facially sex-based practices and policies."[230] However, courts have continued to uphold employer-mandated dress and grooming codes that require men and women to

221. Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975).
222. Craft v. Metromedia, Inc., 766 F.2d 1205, 1215 (8th Cir. 1985).
223. Marc Bain, *A Brief History of Women's Fight to Wear Pants*, QUARTZ (May 8, 2019), http://qz.com/quartzy/1597688/a-brief-history-of-women-in-pants/ [https://perma.unl.edu/XF6Q-SPCC].
224. *See, e.g.*, CAL. GOV'T CODE § 12947.5 (West 2020).
225. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1118 (9th Cir. 2006) (Kozinski, J., dissenting).
226. Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989) (quoting 110 CONG. REC. 7213 (1964)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.
227. *Id.* at 251; Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1042 (8th Cir. 2010).
228. *Price Waterhouse*, 490 U.S. at 240.
229. *Lewis*, 591 F.3d at 1039 (quoting Smith v. City of Salem, 378 F.3d 566, 571–72 (6th Cir. 2004)).
230. Levi, *supra* note 10, at 355.

comply with different standards.[231] Ironically, it is easy to see that the "Title VII *blind* spot" lives on.[232]

Though the Supreme Court declared in *Price Waterhouse* that "we are beyond the day" when employers could require employees to match the stereotype associated with their sex,[233] in practice it has been proven that we are still not beyond those days. Courts' continued support of employer-mandated sex-differentiated dress and grooming codes forces employees to conform to expectations of gendered expression in the workplace.

Nevertheless, several factors make the Eighth Circuit a promising jurisdiction to eliminate this Title VII blind spot. These include the fact that the Eighth Circuit Court of Appeals has been generally receptive to plaintiffs bringing sex stereotyping claims[234] and that it has not considered a case directly related to employer-mandated sex-differentiated dress and grooming codes since *Price Waterhouse*. Given the changes in both cultural norms and the developing law surrounding sex stereotyping claims, we may soon see the end of the Title VII blind spot.

231. *See generally supra* note 24.
232. Levi, *supra* note 10, at 356.
233. *Price Waterhouse*, 490 U.S. at 251.
234. *See, e.g.*, *Lewis*, 591 F.3d at 1033.