TRANS EMPLOYEES AND PERSONAL APPEARANCE STANDARDS UNDER TITLE VII

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Transgender and transsexual individuals, collectively known as transpeople, are routinely demoted, terminated, or denied employment simply because of their appearance. For many years, trans employees have been unable to challenge such discriminatory practices under Title VII. This Note explores the status of trans employees in the jurisprudence of contemporary personal standards, with emphasis on two recent cases: Smith v. City of Salem *and* Jespersen v. Harrah's Operating Co. *While* Smith *indicates the opportunities for trans plaintiffs who challenge their employers' personal appearance standards,* Jespersen *shows that obstacles remain. This Note argues that courts should embrace* Smith*'s endorsement of trans rights and reject* Jespersen*'s approval of discriminatory personal appearance standards.*

INTRODUCTION

In her groundbreaking 1990 book *Gender Trouble*, Judith Butler likened gender to a performance.[1] Like actors in a play, people learn their gender roles through repetition and mimicry.[2] They appropriate mannerisms and stylize their bodies in a lifelong effort to perform their roles convincingly.[3] According to Butler, however, the performance of gender is an illusion, a "ritual social drama" that perpetuates the illusion that gender is inherent.[4] Gender is not an expression of one's true self; on the contrary, it is all an act.[5]

The idea that gender is a social construct is nothing new.[6] Indeed, Butler's is but one voice in the crowded gender debate.[7] Nonetheless, Butler's conception

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1. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 175–180 (10th ed. 1999).

2. *Id.* at 178–79.

3. *Id.* at 179.

4. *Id.*

5. *Id.*

6. In many respects, *Gender Trouble* builds on the writings of Sigmund Freud, Simone de Beauvoir, Michel Foucault, Monique Wittig, and Gayle Rubin.

of gender as a performance continues to resonate years after *Gender Trouble* was first published. In many respects, it is hard to argue with Butler. Like it or not, being a man or a woman means acting like a man or a woman. As Butler flatly put it, "we regularly punish those who fail to do their gender right."[8]

Nowhere is this more apparent than at work. With few restrictions, American employers may require male and female employees to follow very different dress and grooming codes.[9] State and federal sex discrimination laws generally do not protect employees from gender-differentiated appearance standards.[10] The most notable example is Title VII of the Civil Rights Act of 1964, the federal statute that prohibits sex discrimination.[11] Courts have interpreted the Bona Fide Occupational Qualification (BFOQ) provision of Title VII to permit employers to set different dress and grooming standards for male and female employees.[12] Accordingly, appearance standards are a fact of life for millions of

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7. The scholarly debate over gender is ongoing. There is considerable disagreement among those who view gender as a social construct ("constructionism") and those who believe that gender is biologically determined ("essentialism"). For a comprehensive discussion of the myriad opinions that inform the gender debate, see CHRIS BEASLEY, GENDER AND SEXUALITY: CRITICAL THEORIES, CRITICAL THINKERS (2005).

8. BUTLER, *supra* note 1, at 178.

9. LEX K. LARSON, LARSON'S EMPLOYMENT DISCRIMINATION § 45.01 (Matthew Bender & Co. 2008) (1975).

10. *See, e.g.*, CAL. GOV'T CODE § 12949 (West 2004) ("Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity.").

11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a)(1)–(2) (2006)):

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

Id.

12. *Id.* § 2000e-2(e)(1):

> (e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin.
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> (1) 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 [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise . . . .

working Americans. Nonetheless, appearance standards often reinforce gender norms in profound ways.

This harsh truth was beautifully illustrated in *Jespersen v. Harrah's Operating Co*., a 2004 case from the Ninth Circuit,[13] upholding a Nevada casino's requirement that female bartenders wear makeup.[14] Darlene Jespersen, a bartender in the casino, claimed that the requirement constituted sex discrimination in violation of Title VII.[15] The court upheld the makeup requirement despite the fact that Jespersen found it degrading and lost her job for refusing to abide by it.[16] Although Jespersen was by all accounts a good employee, she was fired because she chose not to conform to the casino's appearance standards for female employees.[17]

As *Jespersen* indicates, employees usually have little power to successfully challenge their employers' sex-differentiated personal appearance standards.[18] Indeed, plaintiffs like Darlene Jespersen are routinely told to take a hike, first by their employers and later by unsympathetic judges. This is a problem for any employee who finds his employer's appearance standards discriminatory. The problem grows even larger when the employee happens to be transgender or transsexual.

Transgender and transsexual individuals, collectively known as transpeople, do not identify with their assigned gender.[19] On the contrary, they live in defiance of normative gender roles.[20] Because of rampant bigotry, transpeople are routinely demoted or terminated by their employers.[21]

Id.

13. 392 F.3d 1076 (9th Cir. 2004), *aff'd on reh'g*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

14. *Jespersen,* 444 F.3d at 1106.

15. *Id.* at 1108.

16. *Id.* at 1106, 1108.

17. *Id.* at 1106–07.

18. Patrick S. Shin, *Vive la Différence? A Critical Analysis of the Justification of Sex-Dependent Workplace Restrictions on Dress and Grooming*, 14 DUKE J. GENDER L. & POL'Y 491, 492–93 (2007).

19. Although the term "transgender" is often used in reference to both transsexual and transgender people, there is some disagreement in the trans community over this designation. Generally, transgender people do not identify with their assigned sex in some way. Transsexuals, on the contrary, feel completely mismatched with their assigned sex and often pursue gender reassignment surgery. Some transsexuals do not identify with the transgender label. Accordingly, in this Note I use the terms "transperson," and "transpeople" to refer to both transgender and transsexual people. For discussion of the debate over terminology in the transperson community, see JAY PROSSER, SECOND SKINS: THE BODY NARRATIVES OF TRANSSEXUALITY 171–205 (1998).

20. Pat Califia, noted scholar and transgender activist, affectionately refers to herself and her kind as "gender outlaws" who "challenge our ideas of right and wrong, politically correct and politically incorrect, mental health and mental dysfunction." PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM 2 (1997).

21. Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, *in* TRANSGENDER RIGHTS 93, 93 (Paisley Currah et al. eds., 2006).

Recently, a growing number of states have enacted statutes protecting transpeople from discrimination in employment.[22] Additionally, a few enlightened courts have permitted transpeople to challenge discrimination in state and federal courts.[23] Most notably, in 2004 the Sixth Circuit opened the door for trans plaintiffs to challenge discriminatory employment practices under Title VII. In *Smith v. City of Salem*, the court allowed Jimmie Smith, a male-to-female transsexual firefighter, to proceed with her wrongful termination suit against the Salem (Ohio) Fire Department.[24] *Smith* was a radical departure from previous federal appeals court cases that strictly withheld the protections of Title VII from transpeople.[25]

Although *Smith* was a great achievement for trans rights in America, one must keep it in perspective. *Smith*'s holding is confined to the Sixth Circuit; other circuits have yet to extend Title VII protections to transpeople.[26] Additionally, Title VII's protections are limited. Employers may still terminate a trans employee for failing to obey personal appearance standards, even in jurisdictions that recognize the rights of transpeople.[27] Just like other employees, trans employees have scant power to fight appearance standards under the law. This makes objective sense—after all, if it is lawful to fire a non-trans woman for refusing to wear makeup, it should also be lawful to fire a male-to-female trans employee for the same infraction. To suggest otherwise would be to privilege trans employees over non-trans employees.

Still, gender-differentiated personal appearance standards affect transpeople differently.[28] While non-trans employees may find such standards restrictive or even degrading, the stakes are much higher for trans employees. For them, these standards can actually be insurmountable obstacles to living authentic, embodied lives.

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22. Eight states have enacted clear statutory protections for transpeople in employment. *See* The National Center for Transgender Equality, http://nctequality.org/Issues/Discrimination.html#laws (last visited July 19, 2008). Five additional states and the District of Columbia protect transpeople judicially or administratively. *See id.*

23. *See, e.g.*, Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) (deciding in favor of transsexual plaintiff in employment discrimination case brought under New York City law).

24. 378 F.3d 566, 567–68 (6th Cir. 2004).

25. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (9th Cir. 1977).

26. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) (holding that Title VII did not protect transsexual bus driver).

27. *See* Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243, 246 (2007).

28. According to Lambda Legal, an organization devoted to the advancement of civil rights for lesbians, gay men, bisexuals, people with HIV, and transpeople, the decision to violate dress codes presents peculiar problems for trans employees. Lamda Legal advises transpeople to assess a number of factors, including their own personal safety, before making this decision. *See* Transgender People in the Workplace, http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=3198695 0 (last visited July 19, 2008).

While *Smith* was certainly a victory for transpeople, employers can still demote or even terminate a trans employee for dressing like a member of the opposite sex. Accordingly, personal appearance standards pose a peculiar legal problem for transpeople. This Note addresses this problem and advocates a solution that balances the rights of transpeople with the interests of employers.

This Note proceeds in three parts. Part I discusses the evolution of trans rights under Title VII. It progresses chronologically, beginning with early cases that flatly rejected the claims of trans plaintiffs and continuing with *Smith*'s landmark holding. It ends with a look at *Schroer v. Billington*, a recent case that endorses trans rights but takes a critical look at the sex stereotyping claims of trans plaintiffs.[29]

Part II discusses the statutory and regulatory framework that permits employers to base employment decisions on gender. This Part comprises two sections. The first provides an explanation of sex discrimination under Title VII, including the legal basis for a disparate treatment claim and the BFOQ defense. The second assesses the handling of sex-differentiated personal appearance standards in disparate treatment cases, as well as the application of the BFOQ defense to such cases. The section concludes with an assessment of *Jespersen* and its treatment of sex stereotyping.

Part III synthesizes the previous two Parts, discussing the status of trans plaintiffs who challenge their employers' personal appearance standards under Title VII. It focuses on the opportunities created by *Smith* and the challenges conveyed in *Jespersen*, ending with a proposal for future cases in which trans employees challenge personal appearance standards. I argue that the BFOQ provision exception must be interpreted as narrowly as possible to enable transpeople to express themselves freely and openly in the workplace. To this end, courts should apply a heightened standard in order to protect transpeople from outright discrimination. This would effectively balance the legitimate needs of employers with the rights of trans employees.

I. THE EVOLUTION OF TRANS RIGHTS UNDER TITLE VII

A. Early Cases: Holloway, Sommers, *and* Ulane

Congress spent little time debating the meaning of sex in 1964.[30] As the overriding purpose of the Civil Rights Act was to ameliorate the nation's tragic history of racial discrimination, remedying sex discrimination was not a major priority.[31] Indeed, the legislative history of Title VII indicates that "sex" was

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29. 424 F. Supp. 2d 203, 221 (D.D.C. 2006).

30. *See* Barnes v. Costle, 561 F.2d 983, 986–87 (D.C. Cir. 1977) ("[T]he early history of [Title VII] lends no assistance to endeavors to define the scope of [sex discrimination] more precisely, if indeed any elucidation were needed. It was offered as an addition to other proscriptions by opponents in a last-minute attempt to block the bill which became the Act, and the bill, with the amendment barring sex-discrimination, then quickly passed." (footnotes omitted)).

31. RAYMOND F. GREGORY, WOMEN AND WORKPLACE DISCRIMINATION: OVERCOMING BARRIERS TO GENDER EQUALITY 2, 25–26 (2003).

included at the last minute and that it sparked little debate.[32] Accordingly, the meaning of sex discrimination has largely been defined by courts.[33]

During the 1970s and 1980s, courts came to define "sex" narrowly as a way to deny trans plaintiffs Title VII protections.[34] These cases reasoned that Congress barred discrimination based on "sex" (referring solely to one's biological characteristics), but not on "gender" (referring to social norms associated with a person's sex).[35]

The first such case to reject a trans plaintiff's Title VII claim was *Holloway v. Arthur Andersen & Co.*, a Ninth Circuit case from 1977.[36] The plaintiff claimed that she was terminated after telling her boss about her planned sex reassignment surgery.[37] In rejecting the claim, the court looked to the "plain meaning" of "sex" and found that Title VII did not afford trans plaintiffs any protection from sex discrimination.[38] Additionally, the court looked to the legislative history of Title VII and concluded that Congress had not intended to protect transpeople from sex discrimination.[39]

The Eighth Circuit adopted much the same reasoning in *Sommers v. Budget Marketing, Inc.*, a 1982 case involving facts similar to those in *Holloway*.[40] In *Sommers*, the court determined that biological characteristics alone constituted the "plain meaning" of "sex."[41] The court rejected the plaintiff's claim because the alleged discrimination fell outside this narrow definition.[42] The court also

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32. *See* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 177 (1991) (explaining that "sex" was added to the Civil Rights Act by Rep. Howard W. Smith, a Virginia Democrat who staunchly opposed civil rights for African Americans). Some observers believe that Smith's inclusion of sex was an attempt to derail the bill. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283–84 (1991) ("[S]ex discrimination in private employment was forbidden under federal law only in a last minute joking 'us boys' attempt to defeat Title VII's prohibition on racial discrimination. Sex was added as a prohibited ground of discrimination when this attempted *reductio ad absurdum* failed and the law passed anyway.").

33. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–64 (1986) ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives . . . the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'").

34. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).

35. *Ulane*, 742 F.2d at 1087; *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 662-63.

36. *Holloway*, 566 F.2d at 663.

37. *Id.* at 661.

38. *Id.* at 662–63.

39. *Id.* at 662.

40. *Sommers*, 667 F.2d at 750.

41. *Id.* at 749–50.

42. *Id.* at 750.

concluded that "the legislative history does not show any intention to include transsexualism in Title VII."[43]

The third and perhaps most compelling articulation of the "plain meaning" approach to sex discrimination was in *Ulane v. Eastern Airlines, Inc*., a case decided by the Seventh Circuit in 1984.[44] *Ulane* is significant because, unlike *Sommers* and *Holloway*, it actually overturned a trial court's finding in favor of a transsexual plaintiff.[45] According to the trial court, the plaintiff's status as a transsexual was immaterial to her sex discrimination claim.[46] The Seventh Circuit rejected this reasoning, holding that Title VII protects only discrimination against "women because they are women and against men because they are men."[47] The plaintiff was terminated because she was a transsexual, not because she was a woman: "[E]ven if one believes that a woman can be so easily created from what remains of a man, that does not decide this case . . . . If Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual . . . ."[48]

B. Price Waterhouse *and the Advent of "Sex Stereotyping"*

Holloway, *Sommers*, and *Ulane* rejected the Title VII claims of trans plaintiffs by concluding that "sex" was limited to the biological distinctions between men and women.[49] The Supreme Court obliterated this conception of "sex" in the landmark 1989 case *Price Waterhouse v. Hopkins*.[50] There, the Court held that Title VII bars not only discrimination based on sex, but also discrimination based on one's failure to act like one's sex.[51] The Court defined such discrimination as "sex stereotyping."[52]

Price Waterhouse involved a Title VII claim brought by Ann Hopkins, a successful female executive at a major accounting firm.[53] Hopkins claimed that the firm denied her partnership because her assertive bearing and masculine

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43. *Id.*
44. 742 F.2d 1081, 1085 (7th Cir. 1984).
45. *Id.* at 1087.
46. Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 839 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984) ("[W]hether plaintiff be regarded as a transsexual or as a female, she was discharged by Eastern Airlines because of her sex.").
47. *Ulane*, 742 F.2d at 1085.
48. *Id.* at 1087.
49. *See id.* at 1084 (stating that "sex" means biological characteristics rather than gender); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (applying the "plain meaning" of "sex" for purposes of Title VII); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662–63 (N.Y. 1977) (denying Title VII protection to transsexual because discrimination was based on "gender," not "sex").
50. 490 U.S. 228, 250 (1989) (plurality opinion) (recognizing sex stereotyping as form of discrimination subject to Title VII).
51. *Id.* at 250–51; *id.* at 258–61 (White, J., concurring); *id.* at 272–73 (O'Connor, J., concurring) (approving of plurality's characterization of sex stereotyping as discrimination; concurring separately to discuss unrelated evidentiary issue).
52. *Id.* at 250.
53. *Id.* at 233.

appearance flouted traditional notions of femininity.[54] According to Hopkins, one of the senior partners at the firm told her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[55] Another partner characterized her as "macho."[56]

The Court found that such statements constituted sufficient evidence of sex discrimination to succeed under Title VII.[57] The Court reasoned that Price Waterhouse did not deny Hopkins a promotion because she was a woman, but rather because she failed to conform to her employer's understanding of how women should behave.[58] According to the Court, "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."[59] Such reliance on gender stereotyping was an impermissible violation of Title VII.[60]

Although *Price Waterhous*e did not directly involve a trans plaintiff, it had far-reaching ramifications for plaintiffs who do not conform with traditional gender roles, including transpeople as well as gay, lesbian, and bisexual people. Several circuit courts have interpreted *Price Waterhouse* to prohibit discrimination based on gender non-conformity.[61] For example, in *Doe v. City of Belleville*, the Seventh Circuit reasoned that a man who is harassed "because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."[62] Likewise, in *Nichols v. Azteca Restaurant Enterprises, Inc.*, a 2001 case from the Ninth Circuit, a male employee succeeded on a sexual harassment claim in which he alleged that his employer had created a hostile working environment in response to the employee's non-conformity to "male stereotype[s]."[63] Upon determining that the "systematic abuse" directed at the plaintiff employee by his supervisors and coworkers "reflected a belief that [he] did not act as a man should act," the court concluded that the plaintiff was a victim of sex discrimination.[64]

In furthering a conception of sex discrimination based on an employee's failure to conform to gender stereotypes, *Price Waterhouse* undercut the reasoning on which *Holloway*, *Sommers*, and *Ulane* were based. Accordingly, in the years since *Price Waterhouse*, courts have embraced *Price Waterhouse*'s sex stereotyping rationale in non-Title VII cases brought by trans plaintiffs. The first

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54. *Id.* at 235–6.
55. *Id.* at 235.
56. *Id.*
57. *Id.* at 251.
58. *Id.* at 258.
59. *Id.* at 251.
60. *Id.*
61. *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (Pregerson, J., concurring); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 262–63 (3d Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999).
62. 119 F.3d 563, 581 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).
63. 256 F.3d 864, 869–70 (9th Cir. 2001).
64. *Id.* at 874–75.

case to recognize the effect of *Price Waterhouse* on trans plaintiffs was *Schwenk v. Hartford*, a Ninth Circuit case decided in 2000.[65] *Schwenk* involved a transsexual prisoner who claimed that she had been assaulted by a prison guard in violation of the Gender Motivated Violence Act (GMVA).[66] The defendant argued that the GMVA did not protect transsexuals.[67] The court rejected this argument by making use of *Price Waterhouse*'s framework of sex stereotyping, concluding in dicta that *Holloway*, *Sommers*, and *Ulane* were inconsistent with *Price Waterhouse*:

> The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse* . . . . Under *Price Waterhouse*, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.[68]

Likewise, in *Rosa v. Park West Bank & Trust Co*., an Equal Credit Opportunity Act case, the First Circuit applied the sex stereotyping rationale and ruled in favor of a transsexual loan applicant who had been denied the opportunity to apply for a loan because bank employees disapproved of her appearance.[69] Together, *Schwenk* and *Rosa* evidence a broad shift in the courts' conception of gender under federal discrimination laws. However, as *Schwenk* and *Rosa* involved claims based on the GMVA and the Equal Credit Opportunity Act respectively, this language had no precedential value in Title VII jurisprudence. It would take another four years for the Sixth Circuit to revisit the status of transpeople under Title VII in *Smith v. City of Salem*.[70]

C. Smith v. City of Salem*: A New Era in Title VII Jurisprudence*

In *Smith v. City of Salem*, the Sixth Circuit became the first federal appeals court since *Ulane* to consider a Title VII case brought by a trans plaintiff.[71] It was also the first post-*Price Waterhouse* court to consider the rights of transpeople under Title VII.

The case was brought by Jimmie Smith, a male-to-female transsexual.[72] Smith was a firefighter for the Salem (Ohio) Fire Department for seven years before being diagnosed with Gender Identity Disorder.[73] Following the diagnosis,

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65. 204 F.3d 1187, 1202 (9th Cir. 2000).
66. *Id.* at 1192.
67. *Id.* at 1199.
68. *Id.* at 1201–02.
69. 214 F.3d 213, 214 (1st Cir. 2000).
70. 378 F.3d 566, 567 (6th Cir. 2004).
71. *See* Ulane v. E. Airlines, Inc.*,* 742 F.2d 1081, 1082 (7th Cir. 1984).
72. *Smith*, 378 F.3d at 567–68.
73. *Id.* at 568. According to the American Psychiatric Association, Gender Identity Disorder is a mental disorder that "is not meant to describe a child's nonconformity to stereotypic sex-role behavior as, for example, in 'tomboyishness' in girls or 'sissyish' behavior in boys. Rather, it represents a profound disturbance of the individual's sense of identity with regard to maleness or femaleness." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 580 (4th ed. 2000).

Smith began to present herself as a woman at work.[74] She also informed her supervisor of her intent to undergo sex-reassignment surgery.[75] Fire department officials quickly held a meeting to discuss Smith's termination from the department that resulted in Smith's suspension from the force.[76] Smith filed a lawsuit against the city claiming sex discrimination under Title VII.[77] Smith based her claim on a *Price Waterhouse* sex stereotyping theory.[78]

The trial court rejected Smith's claim, using the familiar explanation that Title VII did not protect transpeople from sex discrimination.[79] The court determined that Smith was suspended from her position because she was a transsexual, not because she was a woman.[80] In that court's view, Smith misapplied *Price Waterhouse* by invoking sex stereotyping when in reality her claim was about transsexualism.[81]

On appeal, the Sixth Circuit rejected this reasoning and concluded that Smith's claim was about sex, not Smith's status as a transsexual.[82] According to the court, Smith was not barred from bringing a Title VII claim simply because she was a transsexual.[83] On the contrary, the court found that "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."[84]

Moreover, the court embraced Smith's sex stereotyping argument, concluding that her claim fit squarely within *Price Waterhouse*'s expansive conception of sex discrimination.[85] In the court's view, the case was really no different from *Price Waterhouse*: "Discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."[86]

By embracing Smith's *Price Waterhouse* argument, the Sixth Circuit also expressly rejected *Holloway*, *Sommers*, and *Ulane*.[87] In identifying plaintiffs as transsexuals rather than as men and women, those cases artfully denied trans plaintiffs their rights under Title VII. Rejecting the specious reasoning employed in those cases, the court concluded:

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74. *Smith*, 378 F.3d at 568.
75. *Id.*
76. *Id.* at 568–69.
77. *Id.* at 569.
78. *Id.*
79. *Id.* at 571.
80. *Id.* at 574.
81. *Id.* at 575.
82. *Id.* at 574.
83. *Id.* at 574–75.
84. *Id.* at 575.
85. *See id.*
86. *Id.*
87. *Id.* at 573 (stating that *Price Waterhouse* had "eviscerated" *Holloway*, *Sommers*, and *Ulane*).

> Discrimination against the transsexual is . . . found not to be discrimination 'because of . . . sex' but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.[88]

Accordingly, these earlier courts used the "transsexual" label to deny trans plaintiffs the protections of Title VII. By removing this label, the *Smith* court treated trans plaintiffs just like all other plaintiffs: as women and men.

D. Holloway, Sommers, *and* Ulane *Resurrected:* Etsitty v. Utah Transit Authority

While *Smith* was a victory for the rights of transpeople, its scope was nonetheless limited. *Smith*'s holding is confined to the Sixth Circuit; no other federal appeals court has extended Title VII protections to trans plaintiffs in the wake of *Smith*.[89] As such, *Holloway*, *Sommers*, and *Ulane* are still good law outside the Sixth Circuit.

Still, a battle looms. In September 2007, three years after the Sixth Circuit decided *Smith*, the Tenth Circuit expressly rejected *Smith*'s essential holding in *Etsitty v. Utah Transit Authority*.[90] Etsitty, a pre-operative male-to-female transsexual from Salt Lake City, Utah was terminated from her bus driver position after she told her supervisor that she was transsexual.[91] According to Etsitty's supervisor, the primary reason for her termination was Etsitty's intent to use women's restrooms along her bus route.[92]

The Tenth Circuit rejected Etsitty's claim, holding that the Utah Transit Authority's concern over Etsitty's use of women's restrooms was a legitimate, non-discriminatory reason for terminating her.[93] Additionally, the court reiterated the holdings of *Ulane*, *Sommers*, and *Holloway* by pronouncing that transsexuals

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88. *Id.* at 574.

89. The Tenth Circuit is the only federal appeals court to decide a Title VII case brought by a trans plaintiff since *Smith*. That court declined to extend Title VII protections to a transsexual plaintiff in 2007. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007). For its part, the Supreme Court has declined to consider the rights of trans employees under Title VII in the wake of *Smith*. The City of Salem did not appeal the Sixth Circuit's decision in *Smith*. However, in 2005, the Sixth Circuit reaffirmed *Smith* in *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005). The City appealed, but the Supreme Court denied certiorari. City of Cincinnati v. Barnes, 546 U.S. 1003 (2005).

90. 502 F.3d at 1224 ("[Plaintiff] may not claim protection under Title VII based upon her transsexuality *per se*. Rather, [her] claim must rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes.").

91. *Id.* at 1219.

92. *Id.*

93. *Id.* at 1227.

like Etsitty were not members of a protected class for Title VII purposes.[94] Accordingly, the statute's protections were not available to them.[95]

E. Schroer v. Billington*: Questioning* Smith*'s Reliance on* Price Waterhouse

As the divergence between the *Smith* and *Etsitty* courts shows, the contemporary debate over trans rights under Title VII centers on the meaning of sex stereotyping and the proper interpretation of *Price Waterhouse*. The recent case *Schroer v. Billington* further complicates the debate.[96] In that case, the District Court for the District of Columbia permitted a trans plaintiff to proceed with her Title VII claim, but criticized the applicability of *Price Waterhouse*'s sex stereotyping framework to her case and other cases brought by trans plaintiffs.[97]

The plaintiff in *Schroer* was Diane Schroer, a male-to-female transsexual who applied for, and was offered, a high-ranking position as a terrorism analyst at the Library of Congress.[98] Although the Library of Congress admitted that Schroer was highly qualified for the position, it withdrew the offer the day after Schroer disclosed her transsexual status.[99]

In analyzing Schroer's Title VII claim, the court reasoned that the *Smith* court had misapplied *Price Waterhouse*.[100] The court found that the Library of Congress had not perpetrated harmful sex stereotyping, but rather that it was merely guilty of "intolerance toward a person like [Schroer], whose gender identity does not match her anatomical sex."[101] Absent a finding of sex stereotyping, the court found intolerance towards a transperson would normally be lawful.

In a surprising twist, however, the *Schroer* court denied the Library of Congress's motion for summary judgment.[102] Instead, the court held that discrimination against a transperson based on her status is per se sex discrimination under Title VII.[103] The court cited the district court's decision in *Ulane* to support this proposition, asserting that the court had correctly determined that "discrimination against transsexuals because they are transsexuals is 'literally' discrimination 'because of . . . sex.'"[104] Although the *Ulane* district court's holding was ultimately overturned by the Seventh Circuit, the *Schroer* court indicated that it was worth resurrecting.

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94. *Id.* at 1221–22.
95. *Id.* at 1222.
96. 424 F. Supp. 2d 203, 221 (D.D.C. 2006).
97. *Id.* at 208.
98. *Id.* at 205–06.
99. *Id.* at 206.
100. *Id.* at 211.
101. *Id.*
102. *Id.* at 205.
103. *Id.* at 213.
104. *Id.* at 212 (quoting Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983), *vacated*, 742 F.2d 1081 (7th Cir. 1984)) (alteration in original).

II. PERSONAL APPEARANCE STANDARDS UNDER TITLE VII

A. Sex Discrimination Cases: Disparate Impact and Disparate Treatment

While Title VII broadly prohibits sex discrimination, courts have long held that it does not force employers to hire a man for a position best suited for a woman, or vice versa.[105] Accordingly, employers may justify discriminatory policies and practices, or policies and practices that have discriminatory effects, under certain circumstances.[106]

Courts generally recognize two bases on which plaintiffs may proceed with sex discrimination claims under Title VII: disparate impact and disparate treatment.[107] Disparate impact occurs when an employer's practice is facially neutral but affects members of one sex more harshly than the other.[108] In contrast, disparate treatment occurs when an employer treats members of one sex less favorably than members of the other because of their sex.[109]

To succeed on a disparate impact claim, a plaintiff must prove that an employment practice resulted in an adverse impact on a group of employees based on sex.[110] Proof of disparate impact is usually based on objective criteria such as employment statistics,[111] although subjective criteria may apply as well.[112] If the plaintiff establishes disparate impact, the employer must prove that the challenged practice is job-related for the position in question and consistent with business necessity.[113] If the employer manages to prove that the practice was necessary for business, the plaintiff may still prevail by showing that the employer failed to

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105. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971) ("[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

106. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) ("[Title VII] does not purport to limit the . . . qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of 'for cause' legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice.").

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

108. *Id.*

109. *Id.*

110. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

111. *See* 29 C.F.R. § 1607.4(D) (1978) (explaining EEOC-approved "four-fifths rule," which creates a presumption of adverse impact if members of a protected class are selected at a rates less than four-fifths of that of "the group with the highest rate").

112. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 999 (1988) (plurality opinion) (permitting employer's use of subjective criteria including "personal qualities that have never been considered amenable to standardized testing").

113. *Id.* at 979.

adopt an alternative employment practice that would satisfy the employer's business needs without having a disparate impact on one gender.[114]

Cases involving personal appearance standards are not typically disparate impact cases. This is because personal appearance standards are rarely facially neutral—the very basis of most sex discrimination cases involving personal appearance standards is that such standards are *not* facially neutral. For this reason, the vast majority of cases involving personal appearance standards can be categorized as disparate treatment cases.

In disparate treatment cases, the central issue is whether an employer's actions were motivated by discriminatory intent. To prove a prima facie case for disparate treatment, a plaintiff must show: (1) she was a member of a protected group; (2) she applied and was qualified for a job for which the company was seeking applicants; (3) she was rejected; and (4) after her rejection, the employer continued to seek applicants.[115] By establishing a prima facie case for disparate treatment, the plaintiff creates a presumption that an employer acted with discriminatory intent.[116]

A plaintiff may establish a prima facie case of disparate treatment through either direct or circumstantial evidence.[117] Direct evidence may include employment records and statistics that prove discrimination.[118] Circumstantial evidence may include evidence from which an inference of discrimination may be drawn, such as suspicious timing of employment decisions or ambiguous statements directed at members of a protected group.[119] It may also include evidence that other similarly-situated employees not in the protected class received systematically better treatment.[120] Finally, circumstantial evidence may include evidence that the plaintiff was qualified for the job, that an unqualified person got the job instead, and that the unqualified person was not a member of the protected class.[121]

If a prima facie case is established, the burden shifts to the employer to offer evidence that it refused the applicant for a "legitimate, nondiscriminatory reason."[122] If the employer meets this burden, the plaintiff must then demonstrate that the so-called legitimate, non-discriminatory reason offered by the employer was merely a pretext for an illegitimate, discriminatory reason.[123]

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114. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

115. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

116. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

117. 14A C.J.S. *Civil Rights* § 639 (2008).

118. *See, e.g.*, EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 874–75 (7th Cir. 1994) (holding that plaintiff's reliance on statistical evidence and employment records was sufficient to establish prima facie disparate treatment case).

119. Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994).

120. Marshall v. Am. Hosp. Ass'n, 157 F.3d 520, 525 (7th Cir. 1998).

121. *Id.*

122. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). This burden-shift is one of production, not persuasion; the ultimate burden of persuasion ultimately rests with the plaintiff. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

123. *McDonnell Douglas*, 411 U.S. at 804.

If the plaintiff can only present evidence that sex discrimination was one of many reasons for her termination or demotion, the case becomes one of "mixed motives."[124] In such cases, the plaintiff must prove by a preponderance of the evidence that sex discrimination was a motivating factor in the demotion or termination.[125] If the employer proves that it had another reason for its actions and would have made the same decision without the discriminatory factor, it may avoid both liability for monetary damages and an injunction for reinstatement or promotion.[126]

1. The Bona Fide Occupational Qualification (BFOQ) Provision

Although Title VII affords employees considerable protection from employment policies and practices that manifest discriminatory intent, it also affords employers an opportunity to justify discrimination in disparate treatment cases. Under Title VII's BFOQ provision, an employer may base employment decisions on sex if hiring individuals of a specific sex is "reasonably necessary" for the operation of a business or enterprise.[127]

In *International Union v. Johnson Controls, Inc*., the Supreme Court held that disparate treatment is permissible under Title VII only if it is justified under the BFOQ exception.[128] In that case, a battery manufacturer had prohibited fertile women from holding positions that would have exposed them to high levels of lead.[129] Fertile men, however, were not prohibited from such positions.[130] The Court held this was disparate treatment because it failed to treat the reproductive capabilities of male and female employees in a neutral manner.[131] According to the Court, "explicit gender-based policy is sex discrimination under [Title VII] and thus may be defended only as a BFOQ."[132]

Although the Court indicated that the BFOQ exception does not extend to health concerns for the unborn,[133] courts have upheld the BFOQ exception in many

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124. Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003) (describing "mixed-motive" cases as those "where both legitimate and illegitimate reasons motivated the [employment] decision").

125. *Id.* at 101.

126. 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2006).

127. *Id*. § 2000e-2(e).

128. 499 U.S. 187, 200 (1991).

129. *Id.* at 192.

130. *Id.*

131. *Id.* at 199–200.

132. *Id.* at 200; *see also* Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 132 (3d Cir. 1996) ("When open and explicit use of gender is employed . . . the systematic discrimination is in effect 'admitted' by the employer, and the case will turn on whether such overt disparate treatment is for some reason justified under Title VII. A justification for overt discrimination may exist if the disparate treatment is . . . based on a BFOQ." (citation omitted)).

133. *Johnson Controls*, 499 U.S. at 205–06. Lower courts have also declined to recognize the BFOQ defense in cases involving possible harm to the fetus. *See, e.g.*, Burwell v. E. Air Lines, Inc., 633 F.2d 361, 371 (4th Cir. 1980); *In re* Nat'l Airlines, Inc., 434 F. Supp. 249, 259 (S.D. Fla. 1977).

types of disparate treatment cases.[134] For example, the privacy interests of an employer's customers or clients can often justify disparate treatment in hiring and placement decisions.[135] An employer's reliance on statutes or regulations may also justify disparate treatment as a BFOQ.[136]

While courts permit disparate treatment under the BFOQ exception in a variety of cases, they nonetheless interpret the BFOQ provision narrowly and place a considerable burden on employers to justify disparate treatment.[137] This position was first adopted by the Equal Employment Opportunity Commission (EEOC), which published its own explanation of the BFOQ provision in 1965.[138] The

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134. *See* Thomas Fusco, Annotation, *What Constitutes Sex Discrimination in Termination of Employee so as to Violate Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.)*, 115 A.L.R. FED. 1 (1993) (summarizing circumstances where BFOQ defense is often used by employers).

135. *See, e.g.*, Local 567 Am. Fed'n of State, County, and Mun. Employees v. Mich. Council 25, Am. Fed'n of State, County, and Mun. Employees, 635 F. Supp. 1010, 1014 (E.D. Mich. 1986) (holding mental institution's disparate treatment of male and female caregivers was justified by the privacy concerns of mental patients).

136. *See, e.g.*, Hill v. Berkman, 635 F. Supp. 1228, 1243 (E.D.N.Y. 1986) (holding that the U.S. Army's policy of excluding women from combat was justified as a BFOQ on the basis of military policy).

137. *See* Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 925 (5th Cir. 1993); EEOC v. Santa Barbara County, 666 F.2d 373, 376–78 (9th Cir. 1982); Epter v. New York City Transit Auth., 127 F. Supp. 2d 384, 389 (E.D.N.Y. 2001) (stating that proof of a BFOQ requires a showing that all or substantially all members of the excluded group will be unable to safely and efficiently perform the duties of the job, or that it is impossible or impractical to deal with those persons on an individualized basis).

138. 29 C.F.R. § 1604.2 (1972). These guidelines are still included in federal employment regulations:

> (a) The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Label--"Men's jobs" and "Women's jobs"--tend to deny employment opportunities unnecessarily to one sex or the other.
>
> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment: that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
>
> (iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

Supreme Court adopted this position in *Dothard v. Rawlinson*, a 1977 case involving weight requirements for prison employees.[139] There, an Alabama woman was denied a position as a corrections officer because she failed to meet the prison's weight requirement.[140] The Supreme Court held that this requirement treated men and women disparately but that it was nonetheless permissible under the BFOQ provision given the exceedingly dangerous nature of the job.[141] The Court cautioned that the BFOQ exception applied only in rare cases, as it "was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."[142]

In determining whether disparate treatment is justified as a BFOQ, courts often conclude that the BFOQ provision does not apply if reasonable alternatives existed.[143] However, reasonable alternatives are sometimes unavailable depending on the facts of the case, such as where the privacy interests of the employer's clients or customers require employees of one gender to perform a specific function.[144]

In considering whether an employer's disparate policies or practices were unavoidable, courts often rely on the factors articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[145] Relevant factors include the employer's treatment of the employee relative to employees of the opposite sex, the employer's response to the employee's legitimate expression of her civil rights, and the employer's overall hiring and placement practices.[146] Additionally, the plaintiff employee must receive an opportunity to demonstrate that her employer's practices were in fact discriminatory.[147] Cases where a policy or practice fails to meet the BFOQ standard often involve customer preferences. In keeping with *Dothard*'s narrow reading of the BFOQ exception, courts generally do not honor

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> (2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

Id.

139. 433 U.S. 321, 323–24 (1977).

140. *Id.* at 323–24.

141. *Id.* at 336–37.

142. *Id.* at 334.

143. *See, e.g.*, Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d 1052, 1074 (D. Ariz. 1999) (rejecting BFOQ defense to hotel's policy of exclusively hiring female massage therapists on grounds that hotel was unable to prove the absence of reasonable alternatives).

144. *See, e.g.*, Norwood v. Dale Maint. Sys., Inc., 590 F. Supp. 1410, 1419 (N.D. Ill. 1984) (upholding office building's policy of hiring male washroom attendants for men's room on grounds that no reasonable alternative existed); Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1353 (D. Del. 1978) (upholding nursing home's policy of hiring female care providers to tend to elderly female residents out of respect for the residents' privacy concerns).

145. 411 U.S. 792, 802 (1973). Although *McDonnell Douglas* was a race discrimination case, courts apply it to cases involving sex discrimination as well. *See, e.g.*, *In re* Nat'l Airlines, 434 F. Supp. 249, 264 (S.D. Fla. 1977) (applying the *McDonnell Douglas* factors to sex discrimination case against airline).

146. *McDonnell Douglas*, 411 U.S. at 804–05.

147. *Id.* at 805.

the preferences of clients and customers in dealing with members of one sex.[148] The principle behind the rule was illustrated in *Fernandez v. Wynn Oil Co.*,[149] a Ninth Circuit case from 1981 involving client preferences. The case was brought by a woman who had been denied a promotion by her employer, a petrochemical company.[150] The company claimed that sex was a valid BFOQ because its Latin American clients preferred doing business with men.[151] The court held that such practices constituted discrimination, stating that it was contrary to the purpose of Title VII to permit foreign clients to dictate U.S. employment practices.[152]

Similarly, in *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit held that customer preferences generally do not justify disparate treatment under the BFOQ exception.[153] That case involved a man who was rejected for a flight attendant position by a major airline.[154] For its part, the airline asserted that passengers typically prefer female flight attendants.[155] The court stated that passengers' preference for female flight attendants did not justify rejecting men for flight attendant positions.[156] The court said that permitting discrimination because of passenger preferences alone would be "totally anomalous" given the intent of Title VII.[157]

B. Disparate Treatment Cases Involving Personal Appearance Standards

1. The Evolution of Personal Appearance Jurisprudence

Although Title VII makes no mention of personal appearance standards, the EEOC has long recognized that such standards pose considerable harm to employees. Following the passage of the Civil Rights Act, the EEOC interpreted Title VII strictly, if not mechanically, to prohibit sex-differentiated personal appearance standards.[158] In a number of administrative decisions, it concluded that sex-differentiated personal appearance standards were per se violative of Title VII.[159] The EEOC reasoned that personal appearance standards were terms and conditions of employment for purposes of Title VII; as such, standards that created

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148. Melissa K. Stull, Annotation, *Permissible Sex Discrimination in Employment Based on Bona Fide Occupational Qualifications (BFOQ) Under § 703(e)(1) of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(e)(1))*, 110 A.L.R. FED. 28, § 6(a) (1992).

149. 653 F.2d 1273, 1276 (9th Cir. 1981).

150. *Id.* at 1274.

151. *Id.* at 1274–75.

152. *Id.* at 1277.

153. 442 F.2d 385, 389 (5th Cir. 1971).

154. *Id.* at 386.

155. *Id.* at 387.

156. *Id.* at 389.

157. *Id.*

158. The EEOC was criticized for its rigid application of Title VII in these early appearance standards cases. *See, e.g.*, Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1032 (1977).

159. *See, e.g.*, EEOC Dec. No. 72–1931, 1973 EEOC Dec. (CCH) 6373 (1972); EEOC Dec. No. 71-1529, 1973 EEOC Dec. (CCH) 6231 (1971); EEOC Dec. No. 71-2343, 1973 EEOC Dec. (CCH) 6256 (1970).

distinctions between men and women were inherently discriminatory.[160] The few federal courts that faced the issue in these early years adopted the EEOC's rigid stance.[161]

As time progressed, courts generally rejected the EEOC's position.[162] By the early 1970s, many federal courts concluded that sex-differentiated personal appearance standards were not per se violative of Title VII.[163] In rejecting the EEOC's position, they concluded that Congress had not intended to prohibit sex-differentiated personal appearance standards when it passed the Civil Rights Act.[164] As the D.C. Circuit in *Fagan v. National Cash Register Co.* put it, courts were "not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[165]

Over time, courts came to recognize the validity of Title VII claims based on sex-differentiated appearance standards,[166] but soundly rejected the EEOC's position that sex-differentiated appearance standards do not necessarily violate Title VII. Instead, they concluded that employers may actually justify discriminatory appearance standards by satisfying the BFOQ provision of Title VII.[167] An illustrative case is *Frank v. United Airlines, Inc.*, a Ninth Circuit case from 2000.[168] In that case, the court ruled for the plaintiff because the defendant failed to justify a discriminatory policy under the BFOQ provision.[169] The employer, a major airline, set maximum weight standards on the basis of the

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160. EEOC Dec. No. 71-1529.

161. *See, e.g.*, Donohue v. Shoe Corp. of Am., 337 F. Supp. 1357, 1359 (C.D. Cal. 1972); *see also* Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 665 (C.D. Cal. 1972).

162. *See, e.g.*, Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1087 (5th Cir. 1975) (rejecting plaintiff's sex discrimination claim despite EEOC's initial finding of sex discrimination).

163. *See, e.g.*, Baker v. Cal. Land Title Co., 507 F.2d 895, 898 (9th Cir. 1974); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1391 (W.D. Mo. 1979); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141, 145 (E.D. Mich. 1974); Dripps v United Parcel Serv., Inc., 381 F. Supp 421 (W.D. Pa. 1974); Rafford v. Randle E. Ambulance Serv., Inc., 348 F. Supp. 316, 319–20 (S.D. Fla. 1972); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402, 403 (D.D.C. 1972); Roberts v. Gen. Mills, Inc., 337 F. Supp. 1055, 1057 (N.D. Ohio 1971).

164. *See, e.g.*, *Baker*, 507 F.2d at 896 (concluding that "Congress was not prompted to add 'sex' to Title VII on account of regulations by employers of dress or cosmetic or grooming practices which an employer might think his particular business required" and that "[t]he need which prompted this legislation was one to permit each individual to become employed and to continue in employment according to his or her job capabilities").

165. 481 F.2d 1115, 1125 (D.C. Cir. 1973) (quoting NLRB v. Brown, 380 U.S. 278, 291 (1965)).

166. *See, e.g.*, Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 605–06 (9th Cir. 1982) (en banc).

167. *See id.* at 609.

168. 216 F.3d 845 (9th Cir. 2000).

169. *Id.* at 855.

gender, height, and age of its flight attendants.[170] The airlines' weight standard called for female flight attendants to weigh less than the average woman of the same height, while there was no comparable standard for male flight attendants.[171] The court held that the airline could not impose different and more burdensome standards on female employees without justifying those standards under a BFOQ defense.[172] Because the airline failed to do so, its weight standard was unlawful.[173]

As *Frank* indicates, the application of the BFOQ provision to cases involving personal appearance standards is rooted in a desire to balance the needs of both employees and employers. This contrasts starkly with the restrictive approach taken by the EEOC in the years following passage of Title VII in 1964.[174] In applying the BFOQ defense, courts emphasized that employers have legitimate interests that often conflict with the letter, if not the spirit, of Title VII. Such concern for the needs of employers was articulated by the Court of Appeals for the District of Columbia in *Fagan v. National Cash Register Co.*[175] In *Fagan*, the court upheld an employer's sex-differentiated grooming standard, declaring that "employers, like employees, have rights" and that "[t]his court, without a far more certain mandate from Congress than that contained in Title VII, will not be party to what it considers a ridiculous, unwarranted encroachment on a fundamental right of employers, i.e., the right to prescribe reasonable grooming standards which take cognizance of societal mores."[176] The court went on to state that competitive business environments often mandate sex-differentiated grooming standards.[177]

Additionally, courts applying the BFOQ provision have sometimes concluded that plaintiffs' discrimination claims are trivial in comparison to employers' business interests. In these cases, courts conclude that a plaintiff does not merit Title VII protections when his personal preferences are at issue.[178] According to these courts, "mutable" characteristics such as hair length, hair color, makeup, or facial hair do not deserve protection because an employee can change them with little difficulty.[179] These characteristics differ from so-called

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170. *Id.* at 848.
171. *Id.*
172. *Id.* at 855.
173. *Id.*
174. *See, e.g.*, Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973).
175. *Id.* at 1124.
176. *Id.*
177. *Id.* at 1125.
178. *See, e.g.*, Earwood v. Cont'l Se. Lines, 539 F.2d 1349, 1351 (4th Cir. 1976) ("Discrimination based on factors of personal preference does not necessarily restrict employment opportunities and thus is not forbidden.").
179. *See, e.g.*, Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977) ("Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act."); Knott v. Mo. Pac. R.R., 527 F.2d 1249, 1252 (8th Cir. 1975) ("Where [personal appearance] 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.").

"immutable characteristics" such as sex, which is impossible or, in the case of transsexuals, very difficult to change. Under the mutable/immutable paradigm, mutable characteristics merit less protection because as one court put it, Title VII only protected employees from "forces beyond [their] control."[180]

The 1975 case *Wamsganz v. Missouri Pacific Railroad Co.* illustrates the mutability/immutability paradigm.[181] Wamsganz, who was terminated because the length of his hair did not conform to his employer's grooming standard, argued that his employer could not subject male employees to grooming standards that did not also pertain to female employees.[182] The court held that Wamsganz's argument did not reflect Title VII's true purpose of eliminating prejudice based solely on biological characteristics.[183] It was permissible for employers to require employees to conform to reasonable standards of grooming; to conclude otherwise would hinder an employer's capacity to run its business effectively.[184]

2. Undue Burdens and the Limits of the BFOQ Provision

The above cases generally indicate that employers have much authority to set personal appearance standards provided they satisfy two criteria: that they are justifiable under the BFOQ provision and that they regulate only those characteristics that are mutable. Nonetheless, courts have also set two important limits to this authority. First, employers may not set personal appearance standards that impose undue burdens on members of one sex. Second, employers may not set standards that expose employees to humiliation or harassment.

In cases involving undue burdens, the plaintiff typically objects to a standard that demeans members of one gender in some fashion. In *Carroll v. Talman Federal Savings & Loan Ass'n of Chicago*, the seminal undue burden case, the Seventh Circuit held that a bank's policy of requiring female bank tellers to wear uniforms was discriminatory because no such standard existed for male bank tellers.[185] The policy was based on the stereotype "that women cannot not be expected to exercise good judgment in choosing business apparel . . . ."[186] According to that court, the policy was based on demeaning "assumptions . . . anathema to the maturing state of Title VII analysis."[187] Likewise, in *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, the court rejected a similar policy on the grounds that "it is demeaning for one sex to wear a uniform when members of the other sex holding the same position are allowed to wear professional business attire . . . . [The policy] creates disadvantages to the conditions of employment of female sales clerks . . . ."[188]

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180. *Fagan*, 481 F.2d at 1125.
181. 391 F. Supp. 306 (E.D. Mo. 1975).
182. *Id.* at 307.
183. *Id.*
184. *Id.*
185. 604 F.2d 1028, 1032 (7th Cir. 1979).
186. *Id.* at 1033 n.17.
187. *Id.* at 1033 (quoting *In re* Consol. Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1146 (7th Cir. 1978)).
188. 656 F. Supp. 263, 266 (S.D. Ohio 1987).

In addition to cases involving undue burdens, the BFOQ defense often arises in cases where employers argue that customer and client preferences justify sex-differentiated personal appearance standards. In keeping with the holdings of *Fernandez* and *Diaz*, some courts have rejected the BFOQ defense where the plaintiff claims that a personal appearance standard invited harassment from customers or from the general public.[189] By subjecting employees of one gender to sexual harassment from customers, employers impose discriminatory standards in violation of Title VII.[190] For example, in *EEOC v. Sage Realty Corp*., the New York District Court held in favor of a female employee who suffered harassing remarks because of her uniform.[191] The woman, a lobby attendant in an apartment building, was terminated for refusing to wear the uniform.[192] The court found that the building manager required the woman to wear the uniform because she was a woman and that a man in the same position would not have been required to wear a sexually provocative uniform.[193] Moreover, the employer knew that the uniform had caused the woman to suffer sexual harassment.[194] Accordingly, the uniform requirement constituted unlawful sex discrimination.[195]

C. Sex-Differentiated Personal Appearance Standards in the Era of Price Waterhouse

As the above cases illustrate, courts have permitted sex-differentiated personal appearance standards by applying a broad reading of the BFOQ provision. That these cases are consistent with Title VII caselaw is not in question. Indeed, the personal appearance standards at issue in each case survived Title VII challenges under *McDonnell Douglas*'s burden-shifting formula. Still, these cases—and the employer-friendly attitude that informed them—is arguably at odds with *Price Waterhouse*'s broad prohibition of sex stereotyping in the workplace.

Perhaps surprisingly, courts in the post-*Price Waterhouse* era have had few opportunities to consider the variance between that case's holding and existing personal appearance standards caselaw. The issue did not attract national attention until 2006, when the Ninth Circuit reached its decision in *Jespersen*.[196] The question raised in that case would ultimately reshape the sex stereotyping debate as

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189. *See, e.g.*, EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609 (S.D.N.Y. 1981).

190. *See, e.g.*, Marentette v. Mich. Host, Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980) ("The Court believes that a sexually provocative dress code imposed as a condition of employment which subjects persons to sexual harassment could well violate the true spirit and the literal language of Title VII.").

191. *Sage Realty Corp*., 507 F. Supp. at 609, 613.

192. *Id.* at 606–07.

193. *Id.* at 607–08, 609 n.15 ("[D]efendants did not employ male lobby attendants. . . . [H]owever, . . . had they employed male attendants . . . defendants surely would not have required these men to wear the [uniform].").

194. *Id.* at 609.

195. *Id.*

196. *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1105 (9th Cir. 2006) (en banc) (stating that a purpose of the en banc decision was to "clarify our evolving law of sex stereotyping claims," presumably in light of appellant Darlene Jespersen's reliance on *Price Waterhouse*).

it relates to personal appearance standards. That question presented as follows: If a personal appearance standard is based on a stereotype of how men or women should appear, a plausible reading of *Price Waterhouse* would suggest that such a standard would be an unlawful form of sex stereotyping—even if it were perfectly justifiable under the BFOQ provision.[197]

Jespersen had been a bartender at Harrah's Casino in Reno, Nevada for twenty years when she was terminated for failing to comply with Harrah's new "Personal Best" grooming policy.[198] The Personal Best policy contained neutral standards applicable to all employees, as well as sex-differentiated standards.[199] For example, the policy prohibited male employees from wearing makeup or having long hair.[200] Female employees were required to wear stockings and nail polish and to wear their hair "teased, curled or styled."[201] The policy also required female employees to wear "face powder, blush and mascara," as well as "[lipstick] . . . at all times."[202] Jespersen was terminated because she refused to comply with the casino's makeup requirement.[203]

Jespersen filed suit against Harrah's, arguing that the Personal Best policy imposed unequal burdens on women and required women to conform to sex stereotypes.[204] The trial court rejected Jespersen's unequal burdens argument, concluding that the appearance requirements for female employees were not unduly burdensome.[205] In 2004, a three-judge panel of the Ninth Circuit affirmed the trial court's decision with regard to Jespersen's unequal burdens claim.[206] Additionally, the panel rejected Jespersen's sex stereotyping argument, holding that *Price Waterhouse* did not apply to personal appearance cases.[207]

Sitting en banc two years later, the Ninth Circuit affirmed the panel's ruling.[208] The case was distinguishable from *Price Waterhouse* because Jespersen was not singled out for her masculine conduct and appearance the way Ann Hopkins was.[209] Hopkins experienced the harm of sex stereotyping because "the very traits that she was asked to hide were the same traits considered praiseworthy

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197. Although a majority of judges rejected such a reading of *Price Waterhouse*, dissenting judges provided a significant counterpoint. In a published dissent, Judge Pregerson stated that "[s]uch discrimination is clearly and unambiguously impermissible under Title VII, which requires that 'gender must be *irrelevant* to employment decisions.'" *Id.* at 1114 (Pregerson, J. dissenting) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989)) (emphasis added by Judge Pregerson).

198. *Id.* at 1106–08.

199. *Id.* at 1107.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1108.

204. *Id.*

205. Jespersen v. Harrah's Operating Co., 280 F. Supp. 2d 1189, 1193 (D. Nev. 2002).

206. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1081–82 (9th Cir. 2004).

207. *Id.* at 1082–83.

208. *Jespersen*, 444 F.3d at 1112.

209. *Id.* at 1113.

in men."[210] Jespersen, on the other hand, merely objected to policies that she found sexist.[211] To allow Jespersen to proceed with such a claim would create a slippery slope:

> We cannot agree . . . that [Jespersen's] objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we 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.[212]

Much of its concern had to do with the slippery-slope effect of allowing Jespersen's case to proceed. The underlying message is simple: if Jespersen is allowed to sue Harrah's, then thousands of other women will jump at the opportunity to sue their employers for forcing them to wear makeup.

Still, the *Jespersen* decision is controversial. Whether or not a victory for Darlene Jespersen would create a tidal wave of litigation and wreak havoc on the court system, the fact remains that Harrah's Personal Best policy looks an awful lot like sex stereotyping to some observers. Indeed, dissenting judges had little difficulty identifying sex stereotyping in Harrah's policy. As Judge Kozinski insinuated in his dissent, the majority's rejection of Jespersen's sex stereotyping argument was not merely rooted in prudence, but also in the sexism and classism of a male-dominated court:

> [T]hose of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that judges wear face powder, blush, mascara, and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning . . . . I suspect that many of my colleagues would feel the same way.[213]

III. TRANSPEOPLE AND EMPLOYEE GROOMING STANDARDS UNDER TITLE VII

A. The Opportunity of Smith*, the Challenges of* Jespersen

In the decades since passage of Title VII, there have been many great victories in the fight against sex discrimination in the workplace. Certainly among the most spectacular is the recent holding in *Smith* that expanded Title VII protections to transpeople. Meanwhile, plaintiffs like Darlene Jespersen have had a difficult time challenging personal appearance standards under *Price Waterhouse*'s sex stereotyping framework. This is indeed troubling for people who care about the demeaning effects of workplace discrimination, but it is certainly maddening for those workers who must endure standards that not only demean them, but objectify and embarrass them. Indeed, the parallels between Jimmie Smith and

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210. *Id.* at 1111.
211. *Id.* at 1112.
212. *Id.*
213. *Id.* at 1118 (Kozinski, J., dissenting).

Darlene Jespersen are notable: both failed to conform to their employers' expectations of how men and women should behave and appear, and both were punished for it. Nonetheless, Smith emerged victorious, whereas Jespersen was essentially told to stop whining and look for a new job.

Why did *Jespersen* turn out so differently from *Smith*? The difference is perplexing but has much to do with the tendency of courts to view personal appearance as a choice. Under the mutable/immutable framework, the characteristics governed by personal appearance standards are decidedly mutable. It is easy to understand, then, why courts would treat those characteristics with less regard than immutable characteristics like height and weight. After all, one can decide whether to apply makeup, but cannot change one's height. Therefore, the harm caused by a makeup requirement is arguably not as severe as a height requirement, or so the courts have reasoned.

Additionally, the Personal Best policy arguably did not impose undue burdens on female employees. In *Carroll*, the plaintiff succeeded because she and other female employees were required to wear uniforms even though there was no such requirement for male employees.[214] The undue burden caused by this requirement was evident to the court.[215] In *Jespersen*, however, both male and female employees were required to meet specific, albeit different, dress and grooming standards.[216] Finding an undue burden was considerably more difficult, despite Jespersen's argument that the cost of makeup and the time spent applying makeup constituted an undue burden on female employees.[217] Additionally, in *Sage Realty*, the sexual harassment suffered by the plaintiff provided clear evidence of an undue burden.[218] In contrast, Jespersen produced no such evidence that the Personal Best policy invited unwelcome sexual advances or comments from the casino's patrons.[219] Accordingly, Jespersen's claim failed.

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214. Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1033 (7th Cir. 1979).

215. *See id.* (stating that "there is a natural tendency to assume that . . . uniformed women have a lesser professional status than their male colleagues attired in normal business clothes").

216. *See Jespersen*, 444 F.3d at 1109–10 ("While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory.").

217. *Id.* at 1110 (rejecting Jespersen's request to take judicial notice of the fact that applying makeup was expensive and time-consuming). In his dissent, Judge Kozinski chided his colleagues for failing to take notice of the costs of the makeup requirement. *See id.* at 1117 (Kozinski, J., dissenting) ("It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees.").

218. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 607–08 (S.D.N.Y. 1981).

219. *See Jespersen*, 444 F.3d at 1112–13 (finding that "Harrah's actions have not condoned or subjected Jespersen to any form of alleged harassment" and that it was "not alleged" that its policy "created a hostile work environment").

Even if this outcome is acceptable under traditional Title VII jurisprudence, *Jespersen* is troubling. The court's analysis of Jespersen's sex stereotyping claim is arguably at odds with *Price Waterhouse*'s broad declaration that "[Title VII] strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[220] If, as Jespersen argued, policies requiring female employees to wear makeup were rooted in stereotypes of femininity, such policies were possibly unlawful. In its adherence to the mutable/immutable paradigm, the *Jespersen* court disregarded the overtly sexist nature of Harrah's policies. Simply because those policies dealt with mutable characteristics like hair length does not make them any less pernicious. It should not matter that makeup can be easily applied and removed, or that hair can be cut or colored with little expense. What matters is that these policies are based on stereotypes of how women should appear.

Additionally, in its adherence to the mutability/immutability paradigm, *Jespersen* disregards two important points: first, that mutable characteristics can be crucial to one's identity; and second, that policies regulating mutable characteristics can damage one's self-esteem in profound ways. For example, a transwoman (born male but self-identifies as female) might argue that her clothing is not a fashion statement, but rather an expression of her true gendered self. It is not a preference, but rather an essential element of her identity.[221] Should the transwoman lose her job because the outward expression of her gender conflicts with her employer's stereotyped notions of how a woman should appear?

B. A Proposal for Litigating a Trans Plaintiff's Personal Appearance Case

The courts have yet to take on a personal appearance case involving a trans plaintiff. At some point, however, a trans employee will challenge her employer's personal appearance standards. When that day comes, the trans plaintiff will most likely argue that those standards violate *Price Waterhouse*'s sex stereotyping prohibition. In turn, her employer will argue that the standards are justifiable under the BFOQ provision. If *Jespersen* is any indication, the trans plaintiff will fail. Avoiding this outcome is a significant challenge. Indeed, the trans plaintiff would have few options for prosecuting her claim under Title VII.

To prevent injustice, courts must rethink their approach to the BFOQ provision. All too often, the BFOQ provision is used by employers to justify policies and practices that are blatantly discriminatory. Accordingly, courts must raise the standard of "reasonably necessary" employment practices or policies under the BFOQ provision.

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220. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (quoting City of L.A., Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 n.13 (1978)).

221. *See* CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 42 (1998). Based on numerous interviews with transpeople about their gender identity, Griggs concluded that most transpeople see gender as "an inherent quality," but that it nonetheless "remains dependent on gender expression." *Id*. For example, one male-to-female transsexual told Griggs that transsexuals express their identity through their bodies because "that is the only avenue we have to display gender. It's in the mind, and only its manifestations, such as clothing, are recognizable to other people. . . . [W]e must give lots of cues. So we tend to fixate on the most obvious marker, clothing." *Id*.

The court in *Wilson v. Southwest Airlines Co.* offered a model approach.[222] That court held that the BFOQ provision calls for a stricter test and a highly critical approach to employers' policies and practices.[223] Like *Diaz*, *Wilson* involved a claim that an airline discriminated against men in hiring flight attendants.[224] According to the *Wilson* court, approval of a BFOQ involved a two-step inquiry: (1) whether the particular job under consideration requires that the worker be of one sex only, and, if so, (2) whether that requirement is reasonably necessary to the "essence" of the employer's business.[225] The first step of the inquiry tests whether sex is so essential to job performance that a member of the opposite sex would be unable to do the job.[226] The second step ensures that the qualification under scrutiny is so important to the business that the business would be undermined if persons of the opposite sex were hired.[227] Under *Wilson*, a BFOQ is justified only if it is inherent in the employer's enterprise.[228]

A court applying *Wilson*'s two-step inquiry would be more likely to find in favor of a trans plaintiff in a case involving sex-differentiated personal appearance standards. Because the inquiry finds discrimination justified only when essential to an employer's business, it provides a greater level of protection from discriminatory practices and policies than do cases like *Jespersen*. Under a heightened standard of review of the BFOQ provision, such as the one articulated in *Wilson*, a trans plaintiff would be more likely to succeed in a challenge to her employer's personal appearance policies.

CONCLUSION

Smith and *Jespersen* are important cases that represent very different strands of Title VII jurisprudence. *Smith* is the latest in a line of cases dealing with the rights of transpeople under federal employment discrimination law; it is significant because it breaks so dramatically from precedent in its treatment of a trans plaintiff. *Jespersen* is the most recent major case to deal with personal appearance standards. It is significant because it upholds an employer's right to restrict an employee's personal appearance. These two cases, and the two strands of Title VII jurisprudence that inform them, are largely distinct. Personal appearance standards were not at issue in *Smith*; trans rights were not at issue in *Jespersen*. Moreover, previous cases involving trans rights did not address personal appearance standards in any meaningful way. Likewise, previous cases involving personal appearance standards did not involve trans plaintiffs or address the broader issue of trans rights.

That *Smith* and *Jespersen* are different types of Title VII cases does much to explain why the two courts ruled as they did. On the one hand, *Smith* stands for

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222. 517 F. Supp. 292, 304 (N.D. Tex. 1981).
223. *Id.* at 304.
224. *Id.* at 293.
225. *Id.* at 299.
226. *Id.*
227. *Id.*
228. *See id.* at 302 (rejecting Southwest Airlines' BFOQ defense on the ground that it failed to prove that it would be unable to perform its "primary business function" unless it discriminated against men).

the proposition that trans employees are entitled to the same basic rights as other employees. On the other hand, *Jespersen* tells us that employers may set strict, gender-based personal appearance guidelines. Side by side, these two cases pose a great opportunity and a great challenge for transpeople and their supporters. While the challenge is great, it is worth the fight.