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## The Many Faces of Darlene Jespersen

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## THE MANY FACES OF DARLENE JESPERSEN

MICHAEL SELMI\*

### I. INTRODUCTION

Darlene Jespersen worked as a bartender at the Harrah's Casino in the hardscrabble town of Reno, Nevada. Unlike its glitzier cousin Las Vegas, Reno is anything but glitzy, with a deteriorating downtown that is thirty years past its prime. Jespersen began her career at Harrah's—now the largest casino chain in the world—as a bar back, fetching ice and cutting lemons, and was quickly promoted to bartender. Twenty years later she remained a bartender in the Sports bar, creating the kind of long-term career that is all too rare these days.

But the career Jespersen formed came to a halt when Harrah's demanded that she wear makeup. Jespersen was required to wear makeup at work, in addition to her uniform, as a part of a company initiative; but she refused to do so. Jespersen never wore makeup in or out of the workplace—she felt extremely uncomfortable doing so and also felt it was unnecessary to her job. In her own words:

I had to become a sex object. And it was only because I am a woman . . . . The men who worked by my side did not have to conceal their faces. Harrah's considers them professional when they look like themselves. Although it had nothing to do with mixing drinks and handling customers, keeping my job became more and more about meeting Harrah's extreme and outdated idea of what a woman should look like.<sup>1</sup>

When Jespersen held her ground, she was fired. So, she sued Harrah's alleging that the company's makeup constituted gender discrimination in violation of Title VII.<sup>2</sup>

These rather straightforward facts demonstrate why this case has garnered so much attention. Here was a dedicated and, by all accounts, outstanding employee standing up for principle against a large corporate employer that imposed what appeared to be an unnecessary and—at least to Jespersen—demeaning policy. Jespersen sued without the help of a union because this particular casino was non-unionized, and she refused to budge. She refused to allow her job to turn her into something she did not want to be.

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1. Darlene Jespersen, Op-Ed., *Case Is About Civil Rights and Sex Bias*, RENO GAZETTE-J., Feb. 5, 2004, at 11A.

2. See *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006). The case is thoroughly discussed in Devon Carbado et al., *The Jespersen Story: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* (Joel W. Friedman ed., 2006).

However, the law was not on her side, a fact she likely realized early on. As discussed in detail shortly, the two legal theories that Jespersen advanced failed to offer any meaningful protection. Courts have long permitted differential grooming codes for men and women so long as the codes do not impose an “undue burden” on one gender, and Harrah’s code arguably treated men and women the same despite having different requirements for each. Had she desired, Jespersen almost certainly could have developed this argument in more detail, but this was the least interesting aspect of her case and one that, if successful, would not have made a major social impact.

The more far-reaching theory involved the developing law of sexual stereotyping, and here is where Jespersen staked her claim. Jespersen argued that the company’s make-up requirement was premised on impermissible sexual stereotypes, effectively requiring her to meet a sexual stereotype of what a woman should look like. This claim, too, failed her, and given the context of the existing legal framework compared to the potential breadth of Jespersen’s claim, I will suggest that it should have failed. Although most slippery slopes are not as slippery as they appear, this one actually was.

That is the legal face of the *Jespersen* case, but there are other, and in some ways, more important aspects of the claim, as well. The Jespersen case raises fundamental and difficult questions about the way in which one’s identity is expressed or created in the workplace, the self we bring to work. At bottom, Jespersen’s claim might be seen as a search for what Kenji Yoshino defines as authenticity, a desire to be true to one’s self in and out of the workplace.<sup>3</sup> But the workplace is not traditionally a place for authenticity: It is a place of uniforms and conformity, a place where we go to be someone else, to perform for someone else, and a legally protectible claim to authenticity threatens to unravel the existing workplace structure.

A related subtext, one that has mostly been skirted in prior discussions of the case, involves the question of sexual orientation, namely whether Darlene Jespersen was a lesbian. One newspaper report of the case included the headline, “Lesbian Loses Dress Code Discrimination Suit,”<sup>4</sup> even though there is nothing in the record to suggest that Jespersen was a lesbian. The Lambda Legal Defense and Education Fund—the premier civil rights litigation group for gay men and lesbians—represented Jespersen throughout most of the litigation, which in and of itself is certainly not evidence that she was gay: Lambda Legal may have taken the case because of the importance of the sexual stereotyping theory to its constituency, given that, to date, the theory has prospered primarily in cases involving gay or transgendered individuals.

Since this symposium and this case are about appearances, it is worth noting that Lambda Legal posted pictures of Darlene Jespersen in her uniform on its website, and those pictures could be seen as presenting a stereotypical

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3. See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006). I discuss Yoshino’s argument in Part III, *infra*.

4. Ann Rostow, *Lesbian Loses Dress Code Discrimination Suit*, DALLAS VOICE, Apr. 20, 2006 (online edition), available at <http://www.dallasvoice.com/artman/exec/view.cgi/18/1892> (last visited Nov. 7, 2006).

image of a middle-aged gay woman.<sup>5</sup> There are obviously many reasons the pictures may have been presented—to humanize her, to show the effect of the makeup policy since the pictures appeared to be taken in the context of the personal best policy—but they also convey an image, and were likely intended to do so. As I will discuss further below, the pictures may provide some insight into the complexities of appearance and identity, and also indicate why we might want to pause before we stake a claim to authenticity within the workplace. When it comes to our identities, there is no escaping social norms, for we can only be authentic within the selves that society provides.<sup>6</sup> That, of course, does not mean that our identities are entirely socially determined, or that we cannot embrace the identities we are provided. Yet, it does mean that the quest for authenticity is always a limited one, and if it is a limited one, why would makeup provide the drawing line? How should we draw the line between who we are and who others want us to be? A better approach to issues of identity in the workplace might be to conceive of our work selves as separate from our authentic selves, acknowledging that at work, we all perform and act out of character. This leaves our identity to be more fully developed outside of work, and raises the more fundamental question: how much of ourselves do we bring to work, or should we expect to bring to work?

In this essay, I will explore the various aspects of the case, the legal, the less legal, and their intersection. I also want to stress that even though I believe the case was correctly decided, I also believe this is precisely the kind of case that needs to be brought even when the prospect of winning is low. Jules Lobel has written eloquently about cases where a losing outcome was all but certain and yet the victory was in the fight.<sup>7</sup> I think that Darlene Jespersen personifies that very phenomenon. She did what she should have done: She stood up for principle and never wavered. This is a law professor's dream case in so many ways, but it is also much more than that, because it forces us to confront fundamental and difficult questions about identity and the workplace, about what the workplace ought to be, and, relatedly, about who we are at work.

## II. THE LEGAL STORY

The facts of the Jespersen case are rather straightforward. Darlene Jespersen had worked as a bartender for Harrah's casino in Reno, Nevada for more than twenty years when the company imposed a new dress code in most of the company's casinos. The company had always maintained dress codes, but the new policy, dubbed "Personal Best," was far more extensive and

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5. Lambda Legal originally posted three pictures of Ms. Jespersen on its website. Two pictures show her in her uniform. (These pictures are no longer available on the Lambda Legal website, but they can be found at [www.nevada.abor.com/barbwire/barboo/barb10-8-00.html](http://www.nevada.abor.com/barbwire/barboo/barb10-8-00.html).)

Another picture, which appears less stereotypical, is of Ms. Jespersen out of her uniform. The pictures are discussed further in Part III, *infra*. Lambda Legal, <http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=191> (last visited Oct. 29, 2006).

6. For a recent excellent overview of meanings of authenticity and identity given the constraints we face, see KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005).

7. See JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003).

confining. Relevant to the case, the policy required women to wear makeup, and it also required the employees to meet with an image consultant to determine the appropriate application of the makeup. Jespersen refused to comply with the requirements because she found the policy revolting and demoralizing.<sup>8</sup> When she refused to abide by the policy, she was offered the opportunity to find another job within the company that would not involve customer contact. When she was unable to find something, she was fired, and there was no question that she was fired for her refusal to wear makeup.

Two other factors contributed to Jespersen's legal claim. As part of the company policy, men were forbidden to wear makeup and they had to keep their hair trimmed. Less relevant to the legal case (but in some ways more significant), the company also required its employees to wear uniforms, and Jespersen's uniform was—somewhat ironically—very male in appearance. She wore a white shirt with a black vest and pants, a dour outfit that seemed to clash with the makeup requirement. Jespersen, however, never objected to wearing the uniform, and certainly one of the questions lurking in the background of her claim was how the makeup requirement differed from the uniform, a question that I will return to shortly and one that is not so readily answered. Two legal theories, one interesting and one less so, were at the core of Jespersen's legal challenge, and I will take them up in turn.

#### A. The Unequal Burdens Test

Jespersen alleged that the company's policy discriminated against women by imposing an unequal burden on them. Of the two core theories, this one was decidedly less interesting because the law in this area was already well settled and the remedy quite limited.<sup>9</sup> Since the 1970s, courts have permitted employers to require different uniforms for men and women, so long as those uniforms do not impose an unequal burden on one sex or the other.<sup>10</sup> That

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8. As part of the consultation, the company took pictures of the employees, including of Darlene Jespersen, and those pictures were kept so that they would be available for a daily comparison. See Darlene Gavron Stevens, *Casino Gives Workers Look They Can, Must Live With: Harrah's Insists they Maintain Appearance Provided in Makeover*, CHI. TRIBUNE, May 7, 2000, at C1 (describing personal best policy).

9. Although the case law is reasonably settled, a vast and interesting literature has developed to explore the various issues raised by the cases. See, e.g., Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004). Two recent articles focus on the Jespersen case and its implications. See David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240 (2004); Catherine L. Fisk, *Privacy, Power and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006).

10. There were a series of cases in the 1970s, all of which permitted differential dress codes. See, e.g., *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (upholding prohibition on long hair for men); *Fountain v. Safeway Stores*, 555 F.2d 753 (9th Cir. 1977) (permitting requirement that men wear ties); *Bellissimo v. Westinghouse Elec.*, 764 F.2d 175 (3d Cir. 1985) (upholding sex-specific dress codes). Challenges to sex-specific dress codes continue to arise and the results tend to be identical. See *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998) (upholding employer policy requiring men to have short hair); *Austin v. Wal-Mart Stores*, 20 F. Supp. 2d 1254 (N.D. Ind. 1998) (upholding employer policy requiring men to have short hair). Courts have

burden might be in the form of differential costs, or even the time that was required to comply with the policy; it might also arise if women were required to wear an excessively suggestive outfit.<sup>11</sup> The latter issue was not implicated in this case, and there was no claim that the company was sexing up Jespersen in order to increase her business, a claim that would otherwise be consistent with the history of bartending.<sup>12</sup> Once employers opened the bartending doors to women, they realized that women could be used to induce men to enter those doors and drink by having those women bartenders wear sexually suggestive outfits or flirt. It is quite likely that such a motive lay behind Harrah's policy, but it did not seem relevant in Jespersen's case, in part because, by all accounts, she had been an extremely successful bartender during her twenty-year career without the assistance of makeup.

In this instance, Jespersen's undue burden claim turned on whether the policy required more of female than it did of male employees.<sup>13</sup> It probably did, as the dissenting opinion of the en banc court pointed out, but Jespersen failed to develop a record on this point, a fact that doomed her claim in the eyes of the majority.<sup>14</sup> As a litigation strategy, failing to develop the record was quite sensible. By the time the case was in litigation, Jespersen was no longer interested in regaining her job—Harrah's had offered to reinstate her and to exempt her from the makeup requirement—she was determined to invalidate the policy altogether. If she had prevailed on the unequal burdens argument, the policy may very well have stayed in place, with the company perhaps supplying the makeup to reduce the cost burden on women. The company might also have reacted by increasing the burdens on the male employees, perhaps by requiring them to shave daily, put gel in their hair, or something along those lines. Similarly, prevailing on the undue burdens test would not have advanced the law; rather, this would have been an application of a limited but well-established legal principle.<sup>15</sup> Consequently, as the case progressed, the

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invalidated differential policies when women have been required to wear a uniform while men were permitted to wear business attire. See *Carroll v. Talman Fed. Sav. & Loan*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

11. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (finding employer's uniform violated Title VII because it subjected women to sexual harassment).

12. See generally Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 1 (Jan. 2007).

13. Within the Ninth Circuit, the undue burdens test has been developed in the context of several airline cases where women were typically required to meet a different weight standard than men. See *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (invalidating policy that imposed weight restriction on female but not male flight attendants); *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (invalidating policy that required women to meet weight requirements for medium frame while men were permitted to satisfy large body frame standard). Various airline policies designed to regulate the appearance of their flight attendants have generated a substantial amount of litigation, and many of the cases are discussed in *Gerdorn v. Cont'l Airlines, Inc.* See *Gerdorn*, 692 F.2d. at 606-08.

14. In his dissenting opinion, Judge Kozinski conceded that Jespersen had failed to develop the record adequately on the burdens of the makeup requirement, but he urged the court to take judicial notice of the time and cost necessary to comply with the company's policy. See *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1117-18 (9th Cir. 2006) (Kozinski, J., dissenting).

15. Many commentators have advocated changing the existing law so that appearance codes would be significantly more difficult to justify. See, e.g., Fisk, *supra* note 9 (advocating that

unequal burdens argument became primarily a sideshow for the far more important claim based on sex-stereotyping.

As an aside, and relevant to the subsequent stereotyping claim, it is worth noting that when the grooming cases first arose, they were not easy cases. The EEOC and some courts held that differential grooming standards violated Title VII, and the claims from men who wanted to wear their hair long appeared to be straightforward claims of sex discrimination that often included claims of stereotyping. In the leading case, *Willingham v. Macon Telegraph Publishing Company*, the plaintiff argued that requiring men to have short hair played on impermissible stereotypes, "since short hair is stereotypically male."<sup>16</sup> In order to resolve that claim, the Fifth Circuit convened an en banc court, plumbed the depths of legislative history, disregarded the EEOC's interpretation and ultimately decided that Congress was not concerned about mutable conditions when it prohibited discrimination based on sex, drawing a dissent from the court's most esteemed members.<sup>17</sup> Yet, once the decision was in place, there was no looking back: All of the other circuits quickly piled on, and the underlying theory has not been seriously revisited since that time.

#### B. The Sex-Stereotyping Claim

Darlene Jespersen's primary claim relied on an emerging theory of sex-stereotyping, one that has been developed most extensively in the Ninth Circuit where Jespersen's lawsuit arose.<sup>18</sup> Jespersen claimed that, by requiring her to wear makeup, Harrah's was requiring her to fit a stereotype of what a woman should look like, and by firing her, Harrah's was penalizing her for her refusal to comply with the sexual stereotype.

This theory has been one of the most interesting developments in employment discrimination law in the last two decades, and it had a curious start. The sexual stereotyping theory is traced to the well-known case of *Price Waterhouse v. Hopkins*, in which Ann Hopkins challenged her employer's decision not to admit her to the partnership.<sup>19</sup> A central reason she was not admitted to the partnership was that she failed to fit the stereotype of a woman, at least in some respects. Hopkins was brash, opinionated, and in the way the case was presented, she acted more like a man than a woman. Yet, she claimed, had she been a man, her behavior would have not only been acceptable but required. Still, although *Price Waterhouse* is usually cited as the origin of the sexual-stereotyping theory, and it is one of the few cases in which the Supreme

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appearance codes should be analyzed as an invasion of privacy). As framed, however, Jespersen was not seeking to change the law, only to fit her claim within it.

16. 507 F.2d 1084, 1089 (5th Cir. 1975). This claim was premised on the Supreme Court's discussion of the "sex-plus" theory in which an employer discriminated against women with pre-age children, rather than all women, a claim the Court held fell within Title VII's prohibition. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

17. See *Willingham*, 507 F.2d. at 1093 (Wisdom, J., dissenting). Judge Wisdom's dissent was joined by Judges Tuttle, Goldberg, and Godbold.

18. Some relevant cases are *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

19. 490 U.S. 228 (1989).

Court has discussed the concept of stereotyping,<sup>20</sup> the central issue was not that she failed to meet a stereotype but that she was being treated differently because she was a woman. In other words, Ann Hopkins was not treated differently because she acted out of stereotype: Had she appeared to the partners to be a stereotypical woman, perhaps by acting more demurely, she almost certainly would still have been denied a partnership. In the words of Justice Brennan, the author of the plurality opinion: "An 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."<sup>21</sup> From this perspective, her claim presented a minor twist on an otherwise ordinary disparate treatment claim: Her behaviors were judged differently because she was a woman.

The sexual stereotyping claim alluded to in *Hopkins* lay dormant for most of the next decade,<sup>22</sup> and came to life in the context of a same-sex harassment claim. In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court unanimously held that claims of same-sex sexual harassment were cognizable under Title VII.<sup>23</sup> The facts in *Oncale* lent themselves to the kind of sexual stereotyping suggested in *Price Waterhouse*. *Oncale* worked as part of an all-male team on an offshore oil rigger. He alleged that he was harassed because he was effeminate and therefore, in the eyes of the other male employees, failed to meet the image of what a man should be like. *Oncale* strenuously denied that he was gay; thus, the harassment did not appear to target his sexual orientation, although it may have occurred due to the perception among his co-workers that he was gay.<sup>24</sup> Nevertheless, he claimed that the other men picked on him because he did not fit their stereotype of a man.

Prior to the Supreme Court's decision in *Oncale*, the lower courts had developed a bizarre array of tests to determine when a claim of same-sex sexual harassment could be pursued under Title VII. In some circuits, it was important that the plaintiff not be gay, in others the alleged harasser had to be gay, and in

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20. See *id.* at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .") (plurality opinion). The lower court also admitted testimony from Dr. Susan Fiske discussing sex stereotyping. *Id.* at 235-36.

21. *Id.* at 251 (plurality opinion).

22. There were a few cases that sought to develop a claim along the lines established in *Hopkins*, but most of those were unsuccessful. See, e.g., *Bruno v. City of Crown Point*, 950 F.2d 355 (7th Cir. 1991) (rejecting a sex-stereotyping claim premised on family-oriented questions asked of female applicant). While the case law was relatively quiet, scholars demonstrated an active interest in the theory. See, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 93-98 (1995) (discussing *Price Waterhouse* and stereotyping theory in context of broader theory of equality); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471 (1990) (discussing *Price Waterhouse* and appearance cases).

23. 523 U.S. 75 (1998).

24. In his Supreme Court brief, *Oncale* wrote:

Can there be any treatment more demeaning and objectively harassing to a married, heterosexual male with two children than to be subjected to sexual taunts, sexual touching and physical, sexual assault by other men with whom he must work in a closely confined work space on the Outer Continental Shelf of the United States?

Brief of Petitioner at 27-28, *Oncale*, 523 U.S. 75 (1998) (No. 96-568).



some jurisdictions, the plaintiff had to be gay.<sup>25</sup> It was this doctrinal mess—which arose because Title VII does not prohibit discrimination based on sexual orientation—that the Supreme Court sought to clarify when it held that same-sex sexual harassment was cognizable under Title VII. While in that respect the decision was both short and straightforward, it sparked a new interest in the sex-stereotyping theory, even though that was not how *Oncale*'s claim was framed. In combination with *Price Waterhouse*, a series of cases have arisen challenging employer decisions to compel workers to fit a certain gender stereotype. The cases are still relatively few in number but the majority of successful cases have involved the harassment of gay or transgendered individuals, claims that were not at issue in either *Price Waterhouse* or *Oncale*.

Perhaps the best example of the gender stereotyping case is found in *Nichols v. Azteca Restaurant Enterprises, Inc.*, where a waiter at the restaurant alleged that the other workers harassed him because he did not fit a male stereotype.<sup>26</sup> As described by the Court of Appeals:

Sanchez was subjected to a relentless campaign of insults, name-calling, and vulgarities. Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as 'she' and 'her.' Male co-workers mocked Sanchez for walking and carrying his serving tray 'like a woman,' and taunted him in Spanish and English as, among other things, a 'faggot' and a 'fucking female whore.'<sup>27</sup>

Borrowing from *Oncale* and *Price Waterhouse*, the court held that Sanchez had stated a claim premised on a theory of sexual stereotyping in that he was being "discriminated against for acting too feminine," noting further that the abuse "reflected a belief that Sanchez did not act as a man should act."<sup>28</sup>

Although *Nichols* involved some homophobic taunts, the opinion does not discuss or disclose Sanchez's sexual orientation, and in this respect, the case might be seen as a simple application of *Oncale* with the important exception that the court emphasized the sexual stereotyping theory which was implicit, rather than explicit, in *Oncale*.<sup>29</sup> A more complicated case recently arose in *Rene*

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25. See, e.g., *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (no claim existed where the harasser and the harassed were heterosexual); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138 (4th Cir. 1996) (sexual harassment claim existed where the harasser was homosexual); *Yeary v. Goodwill Indus.*, 107 F.3d 443 (6th Cir. 1997) (sexual harassment claim existed where the harasser was homosexual); *Miller v. Vista, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996) (no same-sex sexual harassment permitted because plaintiff was heterosexual).

26. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

27. *Id.* at 870. The court also noted that the comments "were not stray or isolated." *Id.*

28. *Id.* at 874. The court added:

Sanchez was attacked for walking and carrying his tray 'like a woman'—i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as 'she' and 'her.' And, the most vulgar name-calling directed at Sanchez was cast in female terms.

*Id.*

29. It is worth noting that the concurring opinion in *Rene v. MGM Grand Hotel, Inc.*, stressing the applicability of *Nichols*' gender stereotyping theory, twice states that Sanchez was gay. See 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (Pregerson, J., concurring).

*v. MGM Grand Hotel, Inc.*, where an openly gay butler for a casino complained of harassment from his co-workers, all of whom were male.<sup>30</sup> The harassment endured in *Rene* was strikingly similar to that involved in *Nichols* and *Oncale*, with more sexual overtones. The case was more complicated, however, because during his deposition Rene repeatedly stated that he was harassed because he was gay rather than because of any particular stereotype.<sup>31</sup>

The case produced five separate opinions, with three substantive ones covering the range of perspectives that have emerged in similar contexts. The majority opinion focused on the language of Title VII requiring that the offensive behavior be "because of sex," and since much of the behavior was sexual in nature, though not obviously motivated by sexual desire, the court treated the case as little more than an adaptation of the same-sex harassment cause of action authorized in *Oncale*. The majority opinion also added that Rene's sexual orientation was irrelevant to the legal inquiry, noting that in the many cases involving women who were harassed in similar fashion courts had not "denied relief because the victim was, or might have been, a lesbian."<sup>32</sup> "The sexual orientation of the victim was," the court continued, "simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim."<sup>33</sup> Hard to argue with that logic, one might be tempted to say, except for the stubborn fact that Title VII does not prohibit discrimination based on sexual orientation. As the dissent stressed, if Rene was being harassed because he was gay, a long-standing view of Title VII would deny him any relief.<sup>34</sup>

That is likely why Judge Pregerson's concurrence relied on a sex-stereotyping analysis that, in some ways, offered a more limiting theory, while in other ways provided a more expansive analysis. The concurring judges turned to *Price Waterhouse* to conclude that Rene was being harassed not just because he was gay but rather because his sexual orientation placed him outside of the norm for male behavior. In a footnote the court explained:

There would be no reason for Rene's co-workers to whistle at Rene 'like a woman,' unless they perceived him to be not enough like a man and too much like a woman. That is gender stereotyping, and that is what Rene meant when he said he was discriminated against because he was *openly* gay.<sup>35</sup>

Because the record was relatively undeveloped, the concurring opinion is short and under-theorized. As the dissent emphasized, the logic of the concurring opinion might enable to fit any claim of harassment of gay men into the stereotyping theory, particularly since Rene emphasized that he was a

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30. *Id.* at 1061 (plurality).

31. The dissenting opinion counted nine different statements during Rene's deposition that he stated that the harassment was due to his sexual orientation. *See id.* at 1077-78 (Hug, J., dissenting). Neither the majority nor the concurring opinion denied this characterization of the record, and the majority explicitly noted that, "When asked what he believed was the motivation behind this harassing behavior, Rene responded that the behavior occurred because he is gay." *Id.* at 1064.

32. *Id.* at 1066.

33. *Id.*

34. *Id.* at 1074-75 (Hug, J., dissenting).

35. *Id.* at 1069 n.2 (Pregerson, J., concurring) (emphasis in original).

“masculine male,” rather than a more effeminate man like Oncale.<sup>36</sup> If so, the stereotyping theory could lead to offering protection for claims based on sexual orientation, in contravention of the statutory language. That may be what the concurrence intended, but it is clear a slippery slope is ahead, and it is a slope even progressives may not want to go down. One reasonable inference from the concurring opinion is that gay men simply do not fit the norm of what it means to be a man. While such a conclusion may provide legal protection in some circumstances, it also may compound the existing stereotypes of gay men and lesbians as individuals who fall outside the mainstream. Maybe that is a necessary first step toward garnering antidiscrimination protection, and maybe some legal protection is better than none,<sup>37</sup> but that may not be so clear, as will be discussed further below.

A recent trio of cases from the more conservative Sixth Circuit has also explored the boundaries of the sexual stereotyping theory. In *Smith v. City of Salem*, the plaintiff was a transsexual who was undergoing treatment for Gender Identity Disorder and in the process was expressing a more feminine appearance.<sup>38</sup> Smith was a lieutenant in the fire department, and when he disclosed his condition to his superiors, they quickly plotted to drive him out of the department. His case was originally dismissed by the district court under the notion that transsexuals were not protected by Title VII, but the Sixth Circuit reversed that determination. Applying a sexual stereotyping theory, the court found that Smith had stated a claim due to his “failure to conform to sex stereotypes concerning how a man should look and behave.”<sup>39</sup> The court went on to elaborate a broader rationale for its determination explaining that:

After *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. It follows that employers who discriminate against men because they *do* wear dresses or makeup, or otherwise act femininely, are also engaging in sex discrimination.<sup>40</sup>

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36. *Id.* at 1077 (Hug, J., dissenting). The full passage from the dissent is:

Rene made no claim of sexual stereotyping and there was virtually no evidentiary basis upon which Rene could have supported such a claim had it been made. In fact, at one point in his deposition in referring to another worker who had harassed him, he stated, ‘He’s skinny. He is not masculine like I am.’

*Id.* (footnote omitted). Obviously, one could contest the meaning of that sentence, but it also suggests that he was not effeminate in the way emphasized in *Oncale*.

37. At this point in time, it is a misnomer to say there are no protections against employment discrimination for gay men and lesbians. Although Title VII does not protect against discrimination based on sexual orientation, and efforts to extend the law have so far failed, many states and localities do prohibit such discrimination, including states where large numbers of gays and lesbians live. See SEAN CAHILL, NAT’L GAY AND LESBIAN TASK FORCE FOUND., THE GLASS NEARLY HALF FULL: 47% OF POPULATION LIVES IN JURISDICTION WITH SEXUAL ORIENTATION NONDISCRIMINATION LAW 1 (2005), available at <http://www.thetaskforce.org/downloads/glasshalf.pdf>.

38. 378 F.3d 566 (6th Cir. 2004).

39. *Id.* at 572.

40. *Id.* at 574.

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Because almost by definition a transsexual is failing to live up to a gender stereotype, one implication of the court's analysis is that transsexuals would always be protected under Title VII.<sup>41</sup> And the next case suggested as much.

In *Barnes v. City of Cincinnati*, the plaintiff, who was a pre-operative transsexual, worked for the Cincinnati police department for nearly twenty years and was seeking a promotion to sergeant.<sup>42</sup> Having passed the written examination, Barnes was then subject to a probationary period during which he was criticized for not being masculine enough, and members of the police force followed him on to investigate his off-work behavior. The court noted that, "Barnes was living off-duty as a woman, had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions."<sup>43</sup> Barnes was denied his promotion and filed suit under Title VII. In a sign that at least in some respects things have changed, he was awarded more than \$575,000 plus attorney's fees by a Cincinnati jury, the same city that just a decade earlier had hosted the battle over the propriety of Robert Mapplethorpe's art. That decision was upheld on appeal in a matter-of-fact determination that simply applied the court's earlier holding in *Salem* to affirm the verdict based on the sexual stereotyping theory. On this point, there was virtually no discussion or analysis.

The court, however, quickly cut back on this expansive interpretation, and it is now possible that within the Sixth Circuit only transsexuals are protected under the sex stereotyping theory. The court recently explored the implications of its prior cases in *Vickers v. Fairfield Medical Center*, where a security officer alleged that he was being harassed because he was perceived to be gay due to his friendship with a gay doctor.<sup>44</sup> Vickers set forth his allegations in a seventy-one page complaint but the court quickly sought to cabin the stereotyping theory by noting that "recognition of Vickers' claim would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination."<sup>45</sup> Sounding much like the dissent in *Rene*, the court explained that allowing Vickers' claim would effectively mean that "[i]n all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."<sup>46</sup> That would only be true, one might respond, if we define one's identity through sexual practices, yet, that leaves unexplored how such a definition differs from the one at issue in *Rene* where, as noted earlier, the concurring opinion suggested that all gay men fall outside of the reigning social norm, independent of their actual sexual practices but not independent of their

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41. At one point the court states, "[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from discrimination directed at Ann Hopkins." *Id.* at 575. In the course of its decision, the court did distinguish an earlier series of cases that had denied protection to transsexuals because those cases had arisen before *Price Waterhouse*. *See id.* at 573–74.

42. 401 F.3d 729 (6th Cir. 2005).

43. *Id.* at 734.

44. 453 F.3d 757 (6th Cir. 2006).

45. *Id.* at 764.

46. *Id.* at 764.

sexual orientation.<sup>47</sup> This was, in fact, the approach taken by the dissenting judge in *Vickers* who stressed that the evidence indicated that Vickers' was harassed because he was perceived as "not masculine enough" for the other workers.<sup>48</sup>

One final case is worth mentioning, in part because it provides perhaps the closest analogy for Darlene Jespersen and demonstrates some of the problems that might arise as a result of an expansive approach to the sexual stereotyping theory. Dawn Dawson was a lesbian who, after she was fired, sued the hair salon where she had worked.<sup>49</sup> There was a substantial dispute in the case about why Dawson was fired, but she sought to fit her case within a gender stereotyping claim. Her case was complicated by the fact that many of the employees at the salon were gay, and the owner was "a pre-surgery male-to-female transsexual."<sup>50</sup> Yet, Dawson argued that she was harassed because of her butch appearance; while conceding that non-conformity was permitted at the salon, she argued that only a certain kind of non-conformity was tolerated. In other words, though she did not make this claim explicitly, it sounded like she was claiming that she was the wrong kind of lesbian.<sup>51</sup> The court had little trouble finding that Dawson's claim fell outside the boundaries of the sexual stereotyping theory as she was not required to change her behavior, nor had she pinpointed any adverse actions that had been taken because of her appearance. Dawson, the court noted, was allowed to wear her hair in a Mohawk style, and a number of the other female stylists had very short hair.<sup>52</sup>

The above discussion demonstrates the fundamental incoherence of the law—a law that, in its complexity, only law professors could admire. When a case turns on the language one uses to answer a deposition question, or on the specific language that is used as part of the harassing behavior,<sup>53</sup> or when the law relies on stereotypes to establish a violation of a stereotyping theory, it is only a matter of time before the edifice is likely to crumble. If one were looking for a silver lining, it might be that the cases could, in an indirect way, encourage individuals to be open about their sexual orientation. But in the way the cases are developing, there remains a fine line between encouraging someone to be openly gay and requiring them to be stereotypically gay. The cases have also restored the confusion *Oncale* was intended to eliminate, as courts are again evaluating the plaintiff's sexual orientation, as well as the identities of the harassers, to determine whether a claim is cognizable. It would be so much

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47. Applying these distinctions recalls the older cases in which the Ninth Circuit battled over the status versus conduct definition in the well-known case involving Perry Watkins. See *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990).

48. *Id.* at 768 (Lawson, J., dissenting).

49. *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

50. *Id.* at 214.

51. During her deposition she was asked, "Is it fair to state that another thing you're complaining about in this action is that you were discriminated against because you're a lesbian who looks a certain way?" And her answer was, "Yes." *Id.* at 217.

52. *Id.* at 222.

53. For example, a harassment claim based on "you are gay" might not be cognizable, whereas, by adding one word, e.g., "you are so gay," it might be.

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easier if the law was simply extended to provide protection against discrimination based on sexual orientation.

Jespersen's case arose at the fringes of the stereotyping theory. Her sexual orientation was never at issue in the case; rather, she claimed that Harrah's was requiring her to conform to a stereotype about how women ought to appear, an issue that might have satisfied the court in *Smith v. Salem* but that was dismissed in the *Dawson* case. At the same time, because the focus was on her appearance, Jespersen's case more closely resembles the much older case involving newscaster Christine Craft, who was fired for not having the right look.<sup>54</sup> Christine Craft was a newscaster whose employer sought to alter her appearance as a way of boosting her viewer ratings. Despite extensive makeup and wardrobe makeovers, her ratings failed to improve sufficiently. Craft was then reassigned to a reporters' position and later departed for a different station, after which she filed a claim for sex discrimination and fraud against her former employer. Many of the facts implicated in the *Craft* case parallel those in *Jespersen* with two important differences. One difference was that it was not at all clear that Christine Craft could satisfy the station's appearance requirements given that the efforts to dress her up failed to improve her ratings as a television anchor. By contrast, Jespersen could have had the right look by putting on makeup. From a legal perspective, Jespersen's claim then becomes more like one of the many mutable conditions cases, something akin to speaking English or changing her hairstyle, where courts have typically held that so long as the employee could satisfy the requirement there is no statutory violation.<sup>55</sup>

A more important distinction between the cases lies in the fact that Christine Craft was a television anchor, and there is little question that appearance matters for those who appear on television. Indeed, both the district and appellate courts acknowledged that the appearance of the newscasters went to the company's bottom-line, and social norms embraced appearance as relevant for television personalities. No one would suggest that a television anchor, or even a reporter, should be able to wear whatever she wants on the air, and we fully expect that those who appear on television will be made up. From this perspective, one might be tempted to distinguish the *Craft* case by noting that she was a television newscaster while Jespersen was a bartender. Yet, not only is there no newscaster exception in Title VII, even if there were an exception for jobs in which appearance mattered, Jespersen's bartender position might very well fall within that exception. One might then be tempted to conclude that the court was wrong in *Craft*, and as a factual matter, it appeared that Craft's employer was overly obsessed with appearance.<sup>56</sup> Yet, seeking to

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

55. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (upholding policy requiring workers to speak English because they could readily comply). To avoid any misunderstanding, I believe the doctrine that has developed on English-only cases is wrongheaded and that most such policies ought to be invalidated either based on actual animus or at a minimum under a disparate impact approach. Nevertheless, courts have consistently declined to extend protections to mutable conditions.

56. *Craft*, 766 F.2d at 1215 ("While we believe the record shows an overemphasis by [the station] on appearance, we are not the proper forum in which to debate the relationship between newsgathering and dissemination and considerations of appearance and presentation . . .").

establish a line between excessive and appropriate obsession with appearance would draw courts into arbitrating an unwieldy boundary, and it is highly unlikely that a court would voluntarily accept such a role absent a more compelling social norm that appearance should not matter.

This raises an additional question regarding the interrelationship of the workplace and social norms. We often want the workplace to be better than society, and sometimes it is. As Cindy Estlund has noted, workplaces are frequently our most diverse institutions, certainly more diverse than most of our neighborhoods.<sup>57</sup> Nonetheless, whatever diversity or racial harmony one might find in the workplace is principally a reflection of broader social norms of equality: Equality based on race, sex, religion, and national origin is now a well-established national aspiration even though we frequently fail to live up to that aspiration. Discrimination based on appearance is not and never has been.

Perhaps it would be a better world if we did not make judgments based on appearance but, as Robert Post has observed, it is difficult to know what that world would be like.<sup>58</sup> Absent a physical screen to block appearances, it is hard to imagine that we would not make some judgments based on personal appearance, just as it is hard to imagine we would not make aesthetic judgments of art work, buildings, movies, or other things that we observe. The argument might be that not all judgments should be prohibited—appearance might be relevant to the extent that it is important to job performance. But appearance is never intrinsically relevant to performance. The only reason we consider appearance relevant is because we judge people based on their appearance. In other words, it is our obsession with appearance that makes appearance relevant, rather than anything that has to do with job performance. If we sought to limit, or eradicate such judgments, then appearance would never be relevant: We would not have any beauty pageants, and even something like a strip club could presumably no longer choose its employees based on their appearance. We might choose newscasters solely based on their ability to read or possibly on their voice, although it is not clear why judgments based on one's voice would be preferred to those based on appearance. Alternatively, if we are to allow some appearance requirements, then we must decide when appearance is relevant and who should be allowed to make that determination.

This is not to suggest that employers should always be free to make employment decisions based on appearance, but it does suggest that we recognize that these workplace judgments are a reflection of our broader obsession with appearance and attractiveness. Until stronger social norms develop, we should not expect courts to pave the path of resistance. It is also worth noting that judgments based on appearance do not always favor those who fit the classical definitions of beauty—attractive women often have difficulty being taken seriously.<sup>59</sup> Judgments based on appearance run deep and in many directions.

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57. See generally CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003).

58. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1 (2000).

59. Last year, Harvard University was sued by one of its library staff who argued that she had

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To be sure, courts have made some inroads in altering industry norms regarding appearance requirements, particularly in the many cases involving the airlines. At the time Title VII became law most airlines would only hire attractive young women as flight attendants, presumably because their male customers preferred attractive women.<sup>60</sup> Various permutations also prohibited pregnant or married women to work as flight attendants, and when courts struck down those overtly exclusionary policies, the airlines began to impose weight restrictions.<sup>61</sup> Although they proved surprisingly resilient to challenge, the weight limits were ultimately defeated, and today it is not uncommon to find flight attendants of various ages, genders, weight, and appearance. The airline cases, however, have proved of limited precedential value in challenging dress codes. The airline cases were all grounded in overt exclusionary policies and the subsequent practices, such as the weight restrictions, were pretextual in nature, similar to many of the voting rights cases from an earlier era where state officials implemented one scheme after another to evade their constitutional duties.<sup>62</sup> Importantly, none of the airline cases involved challenges to uniform or grooming policies or relied on a sexual stereotyping theory.<sup>63</sup> Instead they sought to alter the sex-stereotyped job classification through traditional claims of disparate treatment, including both whether gender could satisfy the stringent bona fide occupational requirement when men were precluded from serving as flight attendants and why the airlines instituted different weight guidelines for men and women. We might seek to extend these claims to the casino industry—and many claims have been filed challenging various aspects of dress policies for cocktail waitresses<sup>64</sup>—but casinos seem different from airlines, just as television anchors seem different from flight attendants.

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been denied promotions because she was too attractive and did not fit the University's image of a manager. See Shelley Murphy, *Jury Finds No Bias By Harvard: Librarian Loses Race, Gender Case*, BOSTON GLOBE, Apr. 5, 2005, at B2 ("Harvard University did not discriminate against a black assistant librarian who alleged that she was repeatedly bypassed for promotion and was told she was just a 'pretty girl' who dressed too sexy to get ahead . . .").

60. Probably the best known of the airline cases is *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981), a case in which the airlines sought to justify its exclusion of male flight attendants with a study showing that its male passengers preferred female flight attendants. See also *Diaz v. Pan Am. Airlines, Inc.*, 442 F.2d 385 (5th Cir. 1971) (invalidating policy of hiring women only).

61. See, e.g., *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (invalidating weight restrictions on female flight attendants); *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (invalidating weight policy that allowed men a more generous standard than women).

62. In what are collectively known as the white primary cases, the Supreme Court struck down a series of efforts designed to evade constitutional mandates that included transferring power to private parties. While there were some theoretical difficulties involving the state action issue in the cases, the Supreme Court had little difficulty invalidating the various efforts that had the undeniable intent to deny African Americans their constitutional right to vote. The cases are *Nixon v. Herndon*, 273 U.S. 536 (1927); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1955).

63. In 1991, there was, however, an administrative claim filed to challenge Continental Airlines' requirement that its female workers wear makeup. The airline abandoned its policy without litigation. See Elizabeth A. Brown, *Many Women Still Battle Grooming Discrimination*, CHRISTIAN SCI. MONITOR, June 10, 1991, at 1 (discussing case of Teresa Fischette who "refused to wear the makeup required by the new appearance handbook at Continental Airlines.").

64. Workers at the Sands Casino filed suit challenging some of the dress requirements for the cocktail waitresses, including wearing high heels. The case was settled so that the female servers



Even if *Jespersen* were to fit within the emerging stereotyping theory, those cases raise a number of difficult theoretical issues. As noted previously, the stereotyping cases tread a fine line between protecting individuals because of their sexual orientation and because they fail to fit into a certain stereotype of what or who men or women ought to be. But the cases are problematic in a different way, one highlighted by Judge Posner in a recent case. The idea that gay men do not fit the stereotype of a man itself plays on a pervasive stereotype of what a gay man looks and acts like. Stereotypes thus appear necessary to succeed under the stereotyping theory, which might be understandable given the lack of protection federal law offers for gay men and lesbians, but it ought to be deeply problematic as well.<sup>65</sup>

The real problem, however, is not just that Jespersen's case was hard to fit within the stereotyping theory, but rather that her case presented a particularly problematic slippery slope. If employers cannot require makeup, can they require uniforms? Is there any meaningful difference between Jespersen's tuxedo and the makeup requirement as it relates to her authentic identity? Within the context of the casino industry, the next most obvious case would involve the cocktail waitresses who traditionally wear revealing clothes presumably in the hope they might induce men to stay a little longer at the tables and slot machines. And one need not focus on sexy clothes: Is it possible to distinguish any uniform from a makeup requirement? What about sex-specific jewelry requirements, where women may wear earrings but men may not? Surely not all of these issues could lead to federal complaints under Title VII, and many simply rehash old arguments relating to sex-differentiated clothing or hairstyles that, as discussed previously, contemporary courts have had little trouble dismissing.<sup>66</sup>

When I say surely, I do not mean as a normative matter. I can imagine a legal system designed to protect one's identity or one's expressive self in the

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were given the option of wearing lower shoes and pants. See *Stevens*, *supra* note 8 (discussing *Sands* lawsuit).

65. Though Judge Posner, in his inimitable style, overstates and seems unconcerned with the offense that might be taken from his language, his argument seems sound. He begins by noting that "the case law has gone off the tracks in the matter of 'sex stereotyping'" and then proceeds to explain why. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003) (Posner, J., concurring). He writes that, under existing law, or the way in which the law is developing:

[T]he absurd conclusion follows that the law protects effeminate men from employment discrimination . . . but only if they are (or are believed to be) heterosexuals. To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction. It is also to saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process. Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. . . . To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy. . . .

Inevitably a case such as this impels the employer to try to prove that the plaintiff is a homosexual . . . and the plaintiff to prove that he is a heterosexual, thus turning a Title VII case into an inquiry into an individuals' sexual preference . . . . An unattractive byproduct of the inquiry is a gratuitous disparagement of homosexuals, as when Hamm in his brief, remark[s] how "his harassers tormented him with the ultimate attack on his masculinity [by] barraging him with every vulgar, slang phrase for a homosexual . . . .

*Id.* at 1067.

66. See *supra* notes 16-17.

workplace (and I will discuss whether that would be desirable in the next section). What I mean to suggest here is that, absent an explicit directive, it is fanciful to expect that a court would protect those expressive elements because such protections would seriously encroach upon the formidable employment-at-will rule. One of the basic, if implicit, assumptions behind the employment-at-will principle is that employers have a right to have their employees appear as the employer deems appropriate for the workplace, subject to some limitations. It is not possible for employers to always cater to customer desires, for example, as is well established in the context of race discrimination. It is even impermissible for most employers to hire only women or men because the customers might prefer having one gender performing a particular job. This was true in the old airline cases involving stewardesses,<sup>67</sup> and it has been true in the more recent cases involving Home Depot and Wal-Mart, and even within the securities industry.<sup>68</sup> But those cases involved outright exclusions rather than appearance requirements, and courts have been far more hesitant to encroach on that employer prerogative, again so long as the employer stays within established antidiscrimination boundaries.

There is also a theoretical difficulty at the heart of the appearance claims: What if an employer requires its workers to act out of stereotype, perhaps as an act designed to disrupt or destabilize those stereotypes? What if the employer required its male employees to wear dresses while forbidding their female employees from doing so as a way of disturbing the existing stereotypes? Could an employer impose a neutral requirement so that all of its employees dressed alike regardless of gender?<sup>69</sup> This example is not so far-fetched. In the case breaking down the gender exclusion at the Citadel, a central issue was whether Shannon Faulkner could be made to have a buzz haircut just like the male cadets.<sup>70</sup> Faulkner, along with the United States, objected because such a haircut would have the effect of stripping her of her gender with a likely intent, and certainly effect, to demean her presence in the school.<sup>71</sup> Taking these issues one

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67. See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (invalidating policy of hiring women only); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (same).

68. Although none of the class action cases concerning Home Depot, Wal-Mart or the various brokerage firms involve issues of customer preference, those issues were present below the surface, particularly for Home Depot which traditionally had not allowed women to work on the sales floor, in part it appears because of a perception that customers would not want to take advice from women. I have discussed these cases in detail in Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in The Preservation of Male Workplace Norms*, 9 EMPL. RTS. & EMPLOY. POL'Y J. 1 (2005).

69. The Milwaukee Medical Examiner's office required all of its employees to wear ties after men complained that requiring them to wear ties, but not their female counterparts, was discriminatory. The policy was disbanded during arbitration. See Jim Stingl, *Nectkie Policy for Examiners the Focus of Hearing Today*, MILWAUKEE J. SENTINEL, April 5, 2000, at 3B.

70. The issue of Shannon Faulkner and the Citadel's effort to make her have the same buzz haircut as the male cadets is thoroughly discussed in Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 199-201 (2004).

71. *Id.* at 200. In her discussion of the case, Professor Yuracko relies on an article by Faulkner's attorney Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68 (2002), which quotes Faulkner's attorney as arguing that Faulkner would be "a gender outlaw—neither male nor female. Doubtless many male cadets would label her a "dyke," a butch lesbian whose sexual desire for women makes her not a "real woman." *Id.* at 71.

step further, what if an employer required its employees to conform to a stereotype that did not necessarily have negative implications and might, in some respects, be seen as empowering. What if, instead of prohibiting a cornrow hairstyle, American Airlines decided to require all of its African-American female employees to wear their hair in a cornrow style?<sup>72</sup> Would it make a difference if it required all of its female employees to do so? What about the employer that demands authenticity from its employees so that it will only hire those who are true to themselves and therefore bans hair dye, perfume, and plastic surgery? Or consider the employer that prohibits makeup at work?

There are potential answers to these puzzles, and perhaps the most common response would be that no employer would impose most of these requirements so they are not worth discussing. However, that is an answer we would not accept from our students, and it is not one that we should be satisfied with as academics either, in part because these scenarios are ones courts must consider when seeking to rationalize their decisions. The real problem with these appearance issues is determining how to draw the line, by knowing how to conceive of acceptable appearance codes and by identifying those that ought to run afoul of antidiscrimination mandates. For those who find appearance codes problematic in all dimensions, the easiest solution would be to ban all such codes so that employees would be free to dress how they desired, leaving them to express their true selves in the workplace. Yet, even with an explicit ban on all codes, there would have to be some limits: Presumably even the most ardent opponent of appearance codes would accept a requirement that an employee wear clothes of some sort. And from there the slope becomes slippery: Clean clothes? Clothes that are not too revealing? If so, then how would "too revealing" be defined, and more importantly who should get to make that judgment? Once we begin to ask these questions, we are again heading down a road that courts are understandably reluctant to travel.

Another likely response to the idea of something like mandatory cornrows is that employees should be free to choose their own styles, to choose how they want to express their heritage, or whatever else it is they might want to express. I believe that this emphasis on autonomy underlies much of the criticism of appearance codes. Yet, this idea of self-autonomy runs counter to the constraints of the workplace, where most employees enjoy only limited freedom. Employees are typically not free to choose when to arrive or when to leave, or what to do at work and how to do it, which is where the difficulty arises in trying to determine why mandatory cornrows might be impermissible. It would be equally problematic to focus only on negative stereotypes because that would require courts to police stereotyping—such as with makeup—based on broad social norms, and it is certainly not clear why we would expect courts to rise up to challenge those stereotypes when society embraces them. If we were serious about defeating such negative stereotypes, it would seem that we would want to prohibit the use of makeup altogether, otherwise, it is not so much about the negative stereotype but simply about employee autonomy.

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72. See *Rogers v. Am. Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding company's no-braid policy against race discrimination challenge).

Lurking in the background of the entire discussion is the question of uniforms. To many, uniforms are a sign of conformance and employer control, but uniforms also serve important purposes and can be a source of employee pride. One issue that shines through in Katherine Newman's eloquent exploration of low-wage jobs is the pride that many of the workers took in wearing their Burger Barn uniforms.<sup>73</sup> Employers often require uniforms as a manner of branding. One prominent example is United Parcel Service ("UPS"), for which the drab brown uniforms worn by men and women alike are an important part of the company's identity and have created something of a cult following.<sup>74</sup> Perhaps most importantly, from a social perspective, uniforms provide some level of safety, particularly when access to the uniforms is limited and they provide a means of identifying employees. Meter-readers typically wear a uniform for this reason, as do postal workers and others who might have access to one's home; uniforms can also play a role in creating a relationship of trust between the employee and the customer. Surely we would not want to ban all uniforms, and uniforms are most effective when they are, well, uniform.

That is why this particular slippery slope actually feels slippery, and why it is difficult to stretch the stereotyping theory to reach appearance codes. Appearance codes can surely be discriminatory, as was the case with Abercrombie & Fitch and other retailers who sought a particular look among their youthful employees, a look that tended to exclude minority youth.<sup>75</sup> But the stereotyping theory is not needed to strike down those sorts of discriminatory policies, and it is unlikely that the theory can be ably stretched to tinker with the codes and, as discussed in the next section, it may be that we do not want the theory to stretch quite so far.

### III. BEYOND THE LAW

The last section suggested that the law is generally incapable, or unwilling, to make the fine distinctions necessary to determine the propriety of most appearance codes. In this section, I will address a different issue, one that poses the normative question of whether the law should make those distinctions, whether it is desirable, or necessary, that we allow individuals to challenge appearance standards because they threaten one's identity or authenticity. Appearance codes like those instituted by Harrah's might also broadly

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73. See KATHARINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* (1999). Burger Barn was the fictional name Newman gave the fast-food establishment that formed the heart of her book. See also Kathy Nelson & John Bowen, *The Effect of Employer Uniforms on Employee Satisfaction*, 41 *CORNELL HOTEL & RESTAURANT ADMIN. Q.* 86 (2000) (documenting the effects uniforms can have on employee morale and satisfaction).

74. For a discussion of the importance of UPS' uniforms to its brand see Marla Dickerson, *Part of the Package: UPS' Drivers' Image Could Work to Unions Advantage*, *L.A. TIMES*, Aug. 2, 1997, at D1.

75. The clothing company, Abercrombie & Fitch, agreed to pay \$40 million to settle a claim that it discriminated against minority applicants in its hiring practices by consigning minority employees to non-visible positions. See Steven Greenhouse, *Abercrombie & Fitch Bias Case is Settled*, *N.Y. TIMES*, Nov. 17, 2004, at A16. Similar cases have been brought against other retailers. See, e.g., *Cruz v. Coach Stores*, 202 F.3d 560 (2d Cir. 2000) (dismissing Latina plaintiff's claim challenging the "Coach look" — described as "white and blond" — because plaintiff did not show that she would have been promoted but-for not having the "Coach look").

inconsistent with what is often labeled the expressive workplace—a place where individuals are allowed some level of expressive activity, whether in the form of speech or one's identity as expressed through their appearance. These issues touch on the equally fundamental questions of what we expect from the workplace, and relatedly, who we are at work. Indeed, I think the real question underlying Jespersen's claim is who we are, or should be, at work. Should dressing up at work be seen as a threat to one's identity, or might it be better to think of ourselves as someone else when we are at work, or that our work selves are just one part of being? This leads to a question I have been pursuing in other works, namely how much of ourselves should we expect to bring to the workplace, and how much we should expect from work?<sup>76</sup>

In his recent work, Professor Kenji Yoshino sees the workplace as a place where we ought to be able to pursue, or express, our authentic selves.<sup>77</sup> Professor Vicki Schultz and others have argued that the workplace is where we find ourselves, where our selves are created, at least in part, based on our work.<sup>78</sup> In her more recent work, Schultz has also suggested the workplace can be a place of sexual expression and she has cautioned that the evolution of sexual harassment law may be going too far to rid the workplace of its sexuality.<sup>79</sup> Professor Cindy Estlund, in turn, sees the workplace as one where democratic values can flourish. Based on the empirical observation that our workplaces are frequently our most diverse experiences, she wants to create structures to allow space for those democratic values, to allow workers a voice or interactions that they might not find elsewhere.<sup>80</sup> As the suggestive title of a recent book notes, from this perspective, it is not just work.<sup>81</sup>

While disparate in their foci, all of these theories share a common vision of the workplace as serving functions that extend well beyond work. And to a certain extent that is undeniably true, but only to an extent. To be sure, we cannot divide ourselves into work and non-work selves, nor can we divide our lives neatly into work and non-work segments, as there will always be an intersection. But that does not mean the workplace should become a forum for identity, authenticity, democracy, or sex. It might mean that these issues will always be present in the workplace but they need not be dominant, and to the extent we make them dominant, there may be the unintended consequence of enhancing the importance of the workplace in a way that might suppress our demands for justice within. If we expect too much from the workplace, if we expect it to be a place where we find our authentic selves, our friends, or our vocation, we might actually find ourselves asking too little of that workplace for fear that we might lose it. We may, in fact, make more demands the less

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76. See Michael Selmi, *Privacy for the Working Class, Public Work and Private Lives*, 66 LA. L. REV. 1035 (2006); *Workplace Justice: Finding a Balance in a World Without Unions* (working manuscript on file with author).

77. Yoshino, *supra* note 3.

78. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

79. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

80. See Estlund, *supra* note 57.

81. See RUSSELL MUIRHEAD, *JUST WORK* (2004).

important work is to our lives, the less emphasis we place on work, and the more emphasis we place on our lives outside the workplace.

This does not mean that work should just be work, or that employees become the employer's property until the bell or whistle sounds at the end of the day. Many people do find their life's work in the workplace, and when that happens, it is surely to be celebrated rather than condemned. Indeed, I would suggest that, in an ideal world, this consummation of interests should be our aspiration. The problem, of course is that we do not live in that ideal world—well, when I say we, I mean a global “we” because we academics generally do. For academics, work really is more than just work. It is often what we live for, it is where we find our identity, and it is where we find our life's work. As much as any profession, academics understand the joys and fulfillment of meaningful work.

But that is certainly not true for most people and likely never will be. Although this fact may seem too obvious to mention, it is also too easy to forget as we consider what workers expect or deserve from the workplace. For most workers, work is a place to earn a living, to make friends perhaps, but more importantly, to earn money that allows them to enjoy the other parts of their lives. And many people are happy to be someone else while at work. Even our metaphors about work suggest that we are someone different while at work. When one comes home from work, he or she typically “changes,” and although it would be foolish to place much emphasis on this particular phrase, it nevertheless conveys the important idea that there is a separation between our home and work lives. At work, we perform, we act, and we wear uniforms that are not of our choosing.

Even among academics, uniforms are the rule. Among male law professors, there are some who wear suits to convey authority, to look like a lawyer used to look or perhaps simply because others wear suits.<sup>82</sup> There are those who want to look hip and will dress down, or up, depending on what hip means to that person or what meaning of hip one is trying to convey. There will also be those who want to appear like they just put on whatever clothes were close at hand without spending any significant time on the choice, and perhaps they did just that, but chances are they did so to appear like one who does not care about clothes. The restraints on women can be different but they are no more circular, as inevitably we seek to convey an image in how we appear, and it is not a freely chosen image. For example, none of those who wear suits to command respect or convey authority can actually think the suit does anything other than play on the images the students may have. They might just like wearing a suit and the reduced choices that come in matching a coat and pants, yet the reason one likes to wear a suit has to do with a look or appearance, at least for most people. It might just be easier if we all wore robes.

With the possible exception of a robe, academics would surely object if they were required to dress in a particular way. However, it is not because of an

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82. There are also probably some older Professors who wear suits because they have them from their days as a lawyer. I have heard some Professors say that they wear suits to look like a lawyer, which only suggests that they have not been inside a law firm in ten years since suits are no longer the norm in many workplaces.

especially strong desire to exercise our autonomy or express our authenticity, it is because of our status. Other than judges, high-status individuals are not typically required to wear costumes, and I suspect Chief Judge Schroeder, the author of the *Jespersen* en banc opinion, would strenuously object if she were ordered to wear makeup or to appear more (or less) feminine. Even though Justice O'Connor donned ruffles while on the Supreme Court bench, she would presumably have objected if she had been required to wear them, or if she and Justice Ginsburg had been ordered to wear different colored robes.<sup>83</sup> But, as Catherine Fisk has recently explained, that is primarily a matter of status and power rather than about the reach of the law.<sup>84</sup>

And that is ultimately the point at issue in *Jespersen*. The real issue was not that she was being required to be someone she was not, to be dolled up with makeup, to look like a clown as she claimed,<sup>85</sup> but that she did not have the power and the status to fight the employer's dress code. No one would tell a judge to wear makeup or establish a formal dress code for professors because of their status and power. But there is little restraint when it comes to low-level, low-prestige jobs. Changing that dynamic, giving workers more power, would surely be a better solution than turning to antidiscrimination law for help, particularly since, the law is likely to turn its back on such claims. Collective action can help restore some of the imbalance of power workers now experience, and if there had been a union in place at the Harrah's casino in Reno, or if more of the servers had objected to the policy, the litigation may have been unnecessary. Nevertheless, Jespersen's act of resistance proved effective, as Harrah's later abandoned its Personal Best policy.<sup>86</sup> The important point here is to emphasize that ultimately it is not about the makeup, or the desire to be oneself at work—rather, it is about the current imbalance of power that allows employers to impose many oppressive conditions that individual employees are left largely powerless to confront. The law might be able to remedy some of the extreme deficiencies on a limited ad hoc basis but we ought to be careful how we choose to utilize the law, and it may be that we would be better off thinking of the workplace as a place for work, rather than as a place for expressive activities or a place to pursue our authenticity. When we ask too much of law—as the appearance cases generally do—we are almost certain to be disappointed, and Title VII is not likely to be a sharp weapon in the battle to rectify the glaring imbalance of power that currently defines the workplace.

There is another reason why we should pause before we begin to treat the workplace as a forum for authentic identity, and this returns me to the

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83. Requiring judges to wear different robes based on their gender may be designed to undermine the authority of the female judges, particularly if their chosen color was pink, which might be seen as less strong or authoritative. But what if the female judges wore the black robes while men wore blue, or green?

84. Fisk, *supra* note 9.

85. See Rhina Guidos, *Fashion Checklist: No Blush, No Lipstick . . . No Job*, CHRISTIAN SCI. MONITOR, July 18, 2001, at 1 (“I was good enough to do my job for 18 years,” says the bartender [Jespersen]. “Suddenly, I wasn’t good enough to do my job because I refused to look like a clown.”).

86. Bob Egelko, *Court Oks Sex-Based Grooming Standards*, S.F. CHRON., Apr. 15, 2006, at B1 (“Harrah’s says it no longer enforces the makeup requirement and at one point offered to rehire Jespersen without makeup . . .”).

contentious question I raised at the outset regarding Darlene Jespersen's sexual orientation and the lingering question of whether she was a lesbian. The obvious temptation when this issue is raised is to suggest it is either irrelevant or perhaps unduly invasive. But, in the context of the case, that is not at all clear. An important rationale for challenging the makeup requirement is that it was inconsistent with Darlene Jespersen's own self-image, as it interfered with her quest for authenticity. Yet, her sexual orientation could be relevant to that quest, as presumably one's authentic self would not be hidden from public view, so there would be no desire to cover one's sexual orientation, even if there might still be a need. If the workplace becomes a place to express our identity, it may not be long before employers or other employees might demand authenticity or begin to peer into private lives by blurring the distinction between work and home life. Maybe the emphasis is really on her autonomy, the desire to control her public image or how the public perceives her.<sup>87</sup> While such a goal is understandable, we do not typically have the luxury of controlling how the world sees us or how we are judged. Even if we did have that luxury, it would have little to do with one's authentic self, but instead it would involve the self we desire to reveal, a claim that is as noted, fundamentally inconsistent with the idea of a workplace where personal autonomy is restrained. Rather than a focus on authenticity, it might be that what is really at issue is that Darlene Jespersen considers her sexual orientation irrelevant to her work self, that it is neither relevant to her work nor of relevant concern to her customers, coworkers and employees. On this point, I fully agree and do not believe she should feel compelled to discuss or disclose her sexual orientation if she chooses not to, but this conclusion must then concede that we do have, and often want, a separate work self.

An objection to this line of reasoning is likely to emphasize that the only reason many individuals conceal their sexual orientation is because of discriminatory social attitudes towards gay men and lesbians. This is a theme that Kenji Yoshino emphasizes, and the social pressures that result are obviously real and tragic in so many ways. This is not the place to have an extended discussion regarding the various pressures to cover, but it is to say that Title VII is not likely to ease the pressures or burdens of covering. What is needed along these lines is explicit protection against discrimination for gays and lesbians, as well as further erosion of the social barriers to acceptance. The idea that gays and lesbians cannot talk about their partners and lovers and cannot put up pictures of them at work is wrong, but the stereotyping cases may not alleviate that harm. Indeed, they could compound it, particularly if the cases continue to distinguish between discrimination based on sexual orientation and discrimination based on refusing to meet the stereotypical image of a man or a woman. This is an issue for which, as a society, there remains a need for

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87. Autonomy is central to Jeffrey Rosen's concept of privacy, namely an ability to control how the world sees us. See Jeffrey Rosen, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (Knopf Publ'g Group 2001). This is also central to Professor Yoshino's work: "My real commitment is to autonomy—giving individuals the freedom to elaborate their authentic selves—rather than to a rigid notion of what constitutes an authentic gay identity." *Id.* at 93.



substantial change and progress, but we also want to be careful that individuals are not compelled to either reveal or hide their sexual orientation.

#### IV. CONCLUSION

As mentioned at the outset, Lambda Legal posted pictures of Darlene Jespersen on its website, and there were three such pictures. Two were of Jespersen in her uniform and while it is difficult to tell from the pictures whether she is wearing any makeup, in both she looks like a bartender, someone who is at work. The third picture is of Jespersen out of her uniform, out of work, as she sits comfortably on a rock probably in the desert outside of Reno. She could be anyone or anything, and there is little question that the contrast portrayed by this third picture is far stronger than is present in the two uniform pictures. This third picture is a picture of strength and courage, a picture of a woman who stood up for principle, never wavered, and ultimately improved the working conditions of others. And it is ultimately this picture that we should see, the authentic Darlene Jespersen as revealed by her actions, the self that ultimately matters most.