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Appearance-based Sex Discrimination and Stereotyping in the Workplace: Whose Conduct Should We Regulate?

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Abstract Court treatment of sex discrimination and harassment claims based on appearance and gender stereotyping has been inconsistent, particularly where the facts involve reference to sexual orientation. Ironically, court willingness to allow such claims may turn on the choice of verbal or physical conduct by, or the sex or sexual orientation of, the alleged offenders. Because plaintiffs in such situations may assert retaliation claims to increase their chances of prevailing, employers should focus less on regulating aspects of personal appearance unrelated to job performance and more on problematic reactions by co-workers. Workplace civility policies may hold promise for limiting both legal liability and practical consequences in the absence of a legislative response.

Key words workplace appearance · sex discrimination · gender stereotyping · sexual orientation · retaliation · workplace civility

As the number of employment-related discrimination, harassment, and retaliation claims based on employee appearance has continued to increase, so has the variety of fact patterns that underlie such claims. For example, in Yanowitz v. L'Oreal (2005), the California Supreme Court upheld plaintiff's right to bring a retaliation claim based on her apparent targeting for disciplinary and other adverse action after she refused to follow a superior's order to fire a dark-skinned female salesperson and "get me somebody hot" (referring to a light-skinned blond). The majority of appearance-based discrimination claims, however, still represent two types: those based on the effects of employer dress codes, grooming standards, or other appearance-based requirements, and those based on the effects of co-worker reactions to or stereotypes about gender-related appearance or conduct for men and women on the job.

Both types of claims have proved problematic for plaintiffs, but for different reasons. The former, which may involve personal, financial, or even religious objections to

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compliance with appearance requirements, have fallen victim to judicial deference for employers' rights to maintain reasonably businesslike workplaces. The latter, which may involve reactions to feminine males, masculine females, or epithets reflecting perceived gay or lesbian status, have had difficulty overcoming judicial reluctance to read protection for sexual orientation into Title VII of the Civil Rights Act of 1964. Because attempts to amend Title VII to provide this protection have been unsuccessful (see Berkley and Watt 2006; Kramer 2006), litigants in these areas have had to look to state laws or local regulations that offer such protection where they exist. However, recent changes to the standards for proving retaliation under Title VII suggest that such plaintiffs may increasingly assert retaliation claims to improve their chances in court. Because a retaliation claim does not require success on the underlying discrimination or harassment complaint if it was made in good faith and can be shown to have triggered further mistreatment on the job, it can be pursued independently once a complaint about the offending conduct is filed, and adds an additional source of potential employer liability. To combat such liability proactively, employers should consider adopting and enforcing general civility and non-bullying policies in the workplace rather than trying to regulate aspects of employee appearance that bear little if any relationship to performance on the job.

Appearance-based Cases Generally: The Unequal Burdens Test and *Jespersen v. Harrah's*

Gender-differentiated dress codes, grooming standards, and other appearance-based requirements have typically escaped the general rule that under Title VII, explicit differences in treatment based on sex are discriminatory and impermissible unless justified within the extremely narrow bona fide occupational qualification (BFOQ) exception (Kelley v. Johnson 1976; Philips v. Martin Marietta Corp. 1971; UAW v. Johnson Controls, Inc. 1991; Wilson v. Southwest Airlines Co. 1981). Such regulations, including limitations or prohibitions applicable to hair length, hair style, uniforms, jewelry, and (more recently) body piercings, have drawn minimal judicial concern under Title VII because they do not involve "immutable characteristics" such as race or color, and individuals typically have the ability to comply (see, e.g., Baker v. Cal. Land Title 1974, and Harper v. Blockbuster 1998 [hair length]; Booth *et al*. v. Maryland Dept. of Public Safety 2003 [dreadlocks]; Cloutier v. Costco 2004 [piercing and body modification]).

Although courts generally have been deferential to an employer's desire to regulate employee appearance in order to present to its customers a professional-looking workforce (Cloutier v. Costco 2004; Wisely v. Harrah's 2004), where appearance standards clearly apply differently to men and women, they are typically held to be prima facie discriminatory under Title VII, and thus sustainable only if based on a BFOQ. For example, in Frank v. United Airlines (2000), the Ninth Circuit held that flight attendant weight restrictions limiting women to a stricter standard than men ("medium" vs. "large" build) were impermissible: "[A] sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ." The focus of inquiry in such cases is on burden to a particular plaintiff, not to gender classes as a whole (City of Los Angeles v. Manhart 1978).

It has further been settled for decades that "a BFOQ for gender must be denied where gender is merely useful for attracting customers of the opposite sex," lest Title VII's purpose to prevent denial of employment "based on stereotyped characterizations of the sexes" be undercut (see Wilson, quoting Philips; Price Waterhouse v. Hopkins 1989). The

contextual settings for these cases involved an airline's refusal to hire anyone other than attractive, youthful females (*Wilson*), an employer's refusal to hire women with pre-school age children (*Philips*), and an accounting firm's refusal to promote a woman characterized as "too macho" (*Price Waterhouse*).

A recent Ninth Circuit case, however, upheld required adherence to traditional notions of female attractiveness that seem reminiscent of Southwest Airlines' appearance standards that were disallowed in *Wilson*. In Jespersen v. Harrah's (2004), a 2–1 panel majority approved Harrah's firing of a beverage server because she refused to wear makeup. Jespersen presented evidence that she refused because wearing makeup made her feel sick, degraded, "dolled up" like a sexual object, undignified, and in fact interfered with her otherwise excellent job performance. She also objected to the cost of compliance with Harrah's appearance standards, arguing that added time and expense required to maintain styled hair and to purchase and apply makeup in a manner approximating a complete makeover was unduly burdensome, particularly considering that allegedly comparable grooming standards applicable to men in her position involved only hair length limits and a prohibition on ponytails. The majority, however, rejected her contention of unequal burden due to lack of any evidence in the record about the time and expense of compliance, and refused to take judicial notice of these matters as suggested by the dissent.[1]

Gender Stereotype Cases Generally: *Price Waterhouse v. Hopkins* and *Jespersen v. Harrah's*

In addition to unequal burdens, another double standard for workplace appearance involves stereotyping based on attributes or characteristics historically associated with one gender or the other. The Supreme Court explicitly disallowed this sort of stereotyping in *Price Waterhouse*, in which male partners commented that the plaintiff should wear more makeup, act more feminine, and that she "overcompensated for being a woman" by behaving too aggressively. In holding that an employer may not force employees to conform to a gender stereotype as a condition of employment, the Supreme Court made clear that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," and found Price Waterhouse's failure to promote because of nonconformance with a traditional feminine stereotype to be discriminatory under Title VII.

Not surprisingly given the factual similarities, Jespersen also brought a stereotype claim, but was unsuccessful. This result seems anomalous in that it appears to afford to white collar professionals greater protection from sex discrimination than service industry workers, who are both more likely to be subjected to such policies and less likely to be able to stand up to their employers given the power balance typical in most employment

[1] Harrah's policy included the requirement that women's hair "must be teased, curled, or styled every day you work," an explicit makeup requirement for women mandating that "make up (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors," and that "lip color must be worn at all times." To enforce its policy, Harrah's required employees to attend "Personal Best Image Training" at which "Image Facilitators" gave women a makeover to get them "properly" made up. Harrah's then instructed employees on adherence to the standards, took portrait and full body photographs of each employee looking their "Personal Best," placed these photographs in the employee's personnel file, distributed them to the employee's supervisor, and used them as the standard to which the employee would be held accountable on a daily basis.

relationships. Meanwhile, societal standards about gender identity and appropriate business appearance have increasingly begun to clash. These conflicts come to a head when gender stereotype and same-sex cases implicate not only "traditional" gender-based issues such as BFOQ or those in *Price Waterhouse* but also those involving sexual orientation, gender identity, and transgender status.

Gender Stereotypes and "Traditional" BFOQ Issues: Is the Discrimination "Because of Sex"?

Given that Jespersen's performance had been outstanding, and that wearing makeup actually interfered with her job effectiveness, why impose the makeup requirement? The only business purpose that comes to mind is one of generating higher revenues from male customers who would presumably find a gender-stereotypic image of females desirable. If this is the case, then it renews the issue disposed of in cases like *Wilson* of whether stereotyping should be allowed if attractiveness to some segment of the opposite sex is part of an employer's marketing or business strategy. In legal terms, it raises the issues of whether and when gender, "sex appeal," or a particular employer-defined notion of appearance can or should be a BFOQ.

These issues have arisen in previous cases involving airline flight attendants (*Frank*—appearance and weight standards discriminatorily applied to women); broadcast journalists (Craft v. Metromedia Inc. 1985—stricter application to women than to men of appearance standards for on-air personnel, including makeup and hair color requirements for women); athletic club managers (EEOC v. Sedita 1991—refusal to hire men at Women's Workout World, a health club intended for women); and restaurant or cocktail servers in establishments that appear to offer sex-based visual titillation to the opposite gender in addition to food and beverages (e.g., Hooters and Playboy clubs[2]; see generally Adamitis 2000; Bello 2004; Schneyer 1998).

In attempting to harmonize the results of these and related cases, Yuracko (2004) argues that courts have tended to distinguish between privacy-based BFOQ cases (i.e., those involving jobs such as labor-room nurses or restroom attendants that entail physical contact with or observation of naked bodies) and sexual titillation-based BFOQ cases, deferring more to the employer in privacy-based cases. Courts further appear to have distinguished between businesses selling virtually nothing but sex ("sex" businesses) and those offering titillation along with some other type of good or service ("sex-plus" businesses), typically permitting discrimination based on appearance only if it is necessary to preserve the "essence" of the business (*cf. Wilson*). Thus, businesses employing lap dancers in strip clubs ought to fare better with objectifying or stereotypic appearance standards than those employing flight attendants in the commercial airline industry; restaurants probably fall somewhere in between. Nonetheless, at least one case has held under analogous state law that sex could not be a permissible BFOQ for a restaurant that sought to dress female waitresses "in alluring costumes" solely for the purpose of enhancing sales volume

[2] The much-discussed Hooters litigation, in which male applicants challenged Hooters' practice of hiring only attractive, well-endowed women to be food and beverage servers, was settled prior to judicial determination in the midst of an EEOC investigation. Playboy clubs, which won the right to utilize such practices before the now-defunct New York Human Rights Appeal Board, had long since ceased to exist before a recent comeback in Las Vegas.

(Guardian Capital Corp. v. New York State Div. of Human Rights 1974). In any event, given that Harrah's appearance standards did not even seek to rely on a sex- or titillation-based justification, they would seem particularly difficult to sustain.

Gender Stereotypes and Sexual Orientation Issues: Is the Discrimination "Because of Sex"?

The Ninth Circuit has gone further than most jurisdictions in the gender stereotype area in Nichols v. Azteca (2001) and Rene v. MGM Grand (2002), making its ratification of Harrah's appearance standards in *Jespersen* even more surprising. In *Nichols*, sexual harassment of a male employee for failure to conform to a more masculine gender stereotype (walking and carrying his tray "like a woman") was found to be discriminatory under Title VII; in *Rene*, an "effeminate" male butler on a hotel floor for high-rolling gamblers was allowed to pursue a Title VII harassment claim based on assaults "of a sexual nature" by male coworkers (further analysis of gender stereotype and "effeminacy" issues can be found in Hardage 2002, and Trotier 2002).

In other jurisdictions, courts seem to have had greater difficulty acknowledging claims of discriminatory gender stereotyping when they involve adverse workplace treatment by other employees rather than noncompliance with an employer's appearance or grooming standards. The analysis is far from consistent, however, and courts have found that the question of what constitutes an impermissible gender-based stereotype "must be answered in the particular context in which it arises, and without undue formulation" (Back v. Hastings on Hudson 2004; Wood v. Sempra Energy 2005). Judges will generally require that an alleged stereotype involve some "fundamental aspect" of an individual's gender identity (see, e.g., *Wisely* at 408–409, refusing to recognize limitations on men's hair length as such). Yet, although it is hard to imagine that sexual self-image or gender identity does not satisfy this "fundamental" rubric (Kramer 2004), most courts have taken great care to reaffirm that Title VII affords no protection for discrimination or harassment based on sexual orientation in and of itself. This tension has led to inconsistent interpretations across jurisdictions of the term "because of sex," particularly in same-sex cases or where sexual orientation evidence is involved (see Kirshenbaum 2005).

There have been cases where a biological male is treated abusively because of effeminate behavior, such as in *Nichols* and *Rene*, and the conduct is interpreted by the court as differential treatment "because of sex" which is actionable under Title VII. For example, in Doe v. City of Belleville (1997), the Seventh Circuit considered evidence that a young man was harassed by male co-workers who believed that his wearing an earring meant he was not masculine enough, and found it sufficient to sustain a cognizable claim for discrimination: "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." This decision anticipated the U.S. Supreme Court's conclusion in Oncale v. Sundowner Offshore Services (1998) that harassment between members of the same sex could be actionable under Title VII if based on homosexual desire, general workplace hostility to a particular gender, or direct comparative evidence about treatment of one gender versus the other. The Court cautioned, however, that cognizable discrimination "because of sex" cannot be inferred simply from words or actions with sexual content or connotations. Rather, the issue is whether members of one gender are more exposed to adverse treatment in the workplace than are those of the other.

This distinction has been used in recent years to deny the gender stereotype claims of homosexual litigants who fail to convince the court that their mistreatment was based on anything other than actual or perceived sexual affinity orientation. For example, in Bibby v. Coca Cola (2001), the Court considered comments such as "everybody knows you're as gay as a three dollar bill" and "everybody knows you're a faggot" sufficient to sustain the conclusion that the alleged harassment was based on affinity orientation rather than actionable under Title VII "because of sex." Similarly, in Higgins v. New Balance Athletic (1999) and Spearman v. Ford Motor (2000), gender stereotype claims by admittedly gay plaintiffs based on verbal harassment (e.g., "blow jobs 25 cents" and "gay faggot ass") were denied as involving sexual orientation rather than failure to conform to stereotypic images of gender. And in Dandan v. Radisson (2000), epithets and comments such as "fagboy," "Tinkerbell," "shove [a vacuum cleaner hose] up your ass," and "I hate you because you are a faggot" were found to be indicative of affinity orientation harassment rather than cognizable sex discrimination. More recently, the court in Vickers v. Fairfield Medical Center (2006) reached a similar result based on analogous words and conduct, and the absence of any comments about plaintiff's effeminacy or stereotypic references to his bearing at work such as those present in *Nichols* and *Rene* (see also Hamm V. Weyauwega Milk Products, Inc. 2003).

These cases appear to reflect judicial skepticism that gay and lesbian individuals may attempt to "bootstrap protection for sexual orientation into Title VII" where none is felt to exist (see, e.g., Simonton v. Runyon 2000, a case denying relief to an openly gay postal worker where the court found "no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation"). In fact, in Dawson v. Bumble & Bumble (2004), the Second Circuit cited both an employment law hornbook and a law review article entitled "How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation" (Bovalino 2003) in support of its refusal to allow the *Price Waterhouse* gender stereotype claim of Dawson, an acknowledged lesbian, to go forward (the law review article counsels gay litigants to "emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality," while the employment law hornbook affirms that failure to do so usually sees such discrimination claims fail in court).

Of course, evidence in cases like *Dawson* is bound to be commingled or ambiguous in many instances. Dawson had acknowledged in her deposition that she felt she had been discriminated against "because you're a lesbian who looks a certain way [more masculine than a stereotypical woman]." Although this kind of statement can be construed to involve both sexual orientation *and* failure to conform to an appearance standard which might be associated with more traditional notions of femininity, conceptually there is no reason why the courts should be less sympathetic to this sort of claim than the one in *Price Waterhouse*. In fact, to do so would seem to leave the viability of a Title VII gender stereotype claim to the particular choice of words by offending co-workers in the workplace.

The point is aptly illustrated in Schmedding v. Tnemec (1999), an earlier Eighth Circuit case in which the court considered evidence that Schmedding was called names such as "homo" and "jerk off" and subjected to behavior by others including scratching of crotches and buttocks and humping the door frame to Schmedding's office. In reinstating discrimination claims over the lower court's ruling that they dealt only with affinity orientation, the appellate court stated: "We do not think that, simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is thereby transformed from one alleging harassment based

on sex to one alleging harassment based on sexual orientation. We note that in *Oncale* ... which dealt with claims of same-sex harassment by heterosexual males against a heterosexual male plaintiff, the alleged harassment included the fact that plaintiff was taunted as being a homosexual" (other 8th Circuit cases, however, have reached contrary results in similar situations; see Klein v. McGowan 1999; McCown v. St. John's Health System 2003; Pedroza v. Cintas Corp. 2005).

Recognition of the evidentiary ambiguity in cases like *Schmedding* can also be found in Centola v. Potter (2002), another case involving a male postal worker. In that case, the Massachusetts District Court reaffirmed that "[b]y itself, Centola's claim that he was discriminated against on the basis of his sexual orientation cannot provide a cause of action under Title VII." Nonetheless, the Court went on to acknowledge that:

> [T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear. Sex stereotyping is central to all discrimination: Discrimination involves generalizing from the characteristics of a group to those of an individual, making assumptions about an individual because of that person's gender, assumptions that may not be true ... Centola does not need to allege that he suffered discrimination on the basis of his sex alone or that sexual orientation played no part in his treatment ... if Centola can demonstrate that he was discriminated against "because of ... sex" as a result of sex stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under Title VII.

Despite the apparent logic of the foregoing analysis, it remains doubtful whether *Centola* and *Schmedding* represent the possibility of more consistent handling of these cases or merely confirm the confusion that can remain even within the same jurisdiction. For example, on the one hand, in Dick v. Phone Directories Co., Inc. (2005), the Tenth Circuit reinstated plaintiff's same-sex harassment case for a finding as to whether harassing conduct by her supervisors and coworkers, all of whom were female, was motivated by sexual desire, thus satisfying one of three evidentiary methods allowed by the Supreme Court in *Oncale*. On the other hand, in Medina v. State of New Mexico (2005), the same circuit upheld dismissal of stereotype discrimination and harassment claims by a heterosexual woman who worked in a predominantly lesbian department, and whose supervisor was lesbian, as not "because of sex." Citing *Bibby* and *Simonton* among other cases, the court explained: "Ms. Medina apparently argues that she was punished for not acting like a stereotypical woman who worked [in her department]—which, according to her, is lesbian. We construe Ms. Medina's argument as alleging she was discriminated against because she is a heterosexual. Title VII's protections, however, do not extend to harassment due to a person's sexuality." For a summary of recent federal appellate cases, by circuit, allowing or disallowing Title VII same-sex or gender stereotype claims where the evidence includes words or conduct involving actual or perceived sexual orientation, see Table 1.

Gender Stereotypes and Transgender Issues: Is the Discrimination "Because of Sex"?

If gay and lesbian litigants present potentially troubling factual situations for judges, then the evidentiary difficulty can become even greater when transgender or transsexual litigants go to court (see generally Lloyd 2005). First, consider the case of Smith v. City of Salem (2004), which involved a biologically male transsexual firefighter diagnosed with Gender Identity Disorder, or "GID" (defined as a disjunction between an individual's sexual organs

Table 1 Recent federal appellate cases, by circuit, allowing and disallowing Title VII same-sex or gender stereotype claims involving sexual orientation evidence.

Appellate circuit	Cases allowing claims involving evidence of sexual orientation	Cases disallowing claims involving evidence of sexual orientation
1st circuit		Higgins v. New Balance (1999)
2nd circuit		Dawson v. Bumble & Bumble (2004) Simonton v. Runyon (2000)
3rd circuit		Bibby v. Phila. Coca Cola (2001)
6th circuit		Vickers v. Fairfield Medical (2006)
7th circuit	Doe v. City of Belleville (1997)	Hamm v. Weyauwega Milk (2003) Spearman v. Ford Motor Co. (2000)
8th circuit	Schmedding v. Tnemec (1999)	Klein v. McGowan (1999) McCown v. St. John's Health (2003) Pedroza v. Cintas Corp. (2005)
9th circuit	Nichols v. Azteca Rest. (2001) Rene v. MGM Grand Hotel, (2002)	
10th circuit	Dick v. Phone Directories Co. (2005)	Medina v. State of New Mexico (2005)

and sexual identity). Smith began "expressing a more feminine appearance" at work, which led co-workers to question him about his appearance and mannerisms not being "masculine enough." In response, Smith told his supervisor in confidence that he planned to undergo a physical transformation from male to female. This led the employer to take action designed to intimidate Smith into resigning from his job. Smith's Title VII gender stereotype lawsuit, which claimed he would not have been treated negatively for acting "femininely" had he been a woman, was dismissed by the District Court on the grounds that transsexuality is not a protected class. However, the Sixth Circuit reinstated the case, relying largely on *Price Waterhouse* to find that Title VII's reference to "sex" includes both biological and stereotypical bases for challenging allegedly discriminatory treatment. Likewise, the court in Barnes v. City of Cincinnati (2005) followed Smith to reach a similar result in upholding judgment for a transsexual police officer who had been demoted based on gender stereotyping, finding that Title VII protection does not disappear just because of a plaintiff's transsexual status.

On the other hand, a Utah District Court recently found this analysis unpersuasive in Etsitty v. Utah Transit Authority (2005). Like Smith, Etsitty (a bus driver for UTA) was a biological male diagnosed with GID, but had started undergoing female hormone treatments in anticipation of sex change surgery. Concern then arose about the possibility of Etsitty (who at this point still retained his male genitalia) using female rest rooms on bus routes or switching back and forth between rest rooms assigned to opposite genders. UTA decided it would be impractical to try to ensure unisex rest room facilities at all times, and feared potential privacy issues with co-workers, customers, or the general public. Eventually Etsitty was terminated, but was made eligible for rehire once the surgical transformation was complete.

The Court considered the Sixth Circuit's application of *Price Waterhouse* in *Smith*, summarized above, and found it unconvincing, noting that "there is a huge difference between a woman who does not behave as femininely as her employer thinks she should and a man who is attempting to change his sex and appearance to be a woman. Such drastic

action cannot be fairly characterized as a mere failure to conform to stereotypes." The Court went on to argue that:

> If something as drastic as a man's attempt to dress and appear as a woman is simply a failure to conform to the male stereotype, and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress as a woman, appear and act as a woman, use the women's restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII. *Price Waterhouse* did not go that far.

As this decision suggests, there may also be a difference in the case law between a "woman who doesn't behave femininely" and a man who does behave effeminately; masculine women appear to have fared better than effeminate men in stereotype cases overall (Greenberg 2003). But, while a number of courts have accepted that discrimination against transgender and homosexual individuals may be unlawful under Title VII when based on failure to conform to a gender stereotype, consistent analytic rigor is lacking. For example, in Schroer v. Billngton (2006), another case involving a male-to-female transsexual, the court cited *Etsitty* in finding application of Title VII's "three simple words 'because of sex'" to be "decidedly complex," utilized *Jespersen* to affirm that stereotypes not posing unequal burdens on men or women are not actionable under Title VII, but held nonetheless that discrimination involving transsexualism might still be protected as "because of sex" if convincing scientific evidence were available to show that the term "sex" has evolved post-*Oncale* to include gender identity.

Interestingly, a growing body of research now recognizes sex, gender, sexual orientation, and gender identity to be four distinct concepts,[3] but the courts have failed to distinguish them (Greenberg 2003; Kramer 2006). These four factors may be largely congruent for most people, but for others, two or more may be in conflict. Ironically, the court in *Schroer* rejected plaintiff's gender stereotype claim because Schroer was seeking acceptance *as a female* rather than as an effeminate male. Distinctions among sex- and gender-related constructs thus remain murky and problematic for courts and litigants alike in these types of cases.

Retaliation Claims in Appearance or Stereotype Cases: The Modern Approach?

Section 704 of Title VII protects current or former employees who suffer "adverse employment action" from retaliation causally connected to "protected activity" (e.g., filing a charge of discrimination or harassment with the EEOC, opposing discrimination in the workplace, or cooperating in the investigation of same; *Yanowitz*, discussed earlier, was an opposition case under analogous provisions of California state law). As the Supreme Court has now held in Burlington Northern v. White (2006), adverse employment action means any injury or harm serious enough that "the challenged action ... might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." This definition

[3] Sex refers to biological sex attributes, such as chromosomes and genitalia. Gender refers to characteristics typically associated with masculinity or femininity, such as dress, tone of voice, hobbies, and personality traits. Sexual orientation is determined by the sex of the desired object of one's affections. Gender identity refers to a person's self identity; i.e., whether the person thinks of himself or herself as a male or a female (Greenberg 2003).

was intended to pose a materiality requirement that would eliminate claims based on trivial matters (e.g., "petty slights" or "minor annoyances that often take place at work" such as snubbing by supervisors or co-workers), and to reiterate the Court's prior admonition that Title VII "does not set forth a general civility code for the American workplace." However, this standard may prove difficult to apply in practice, and an increasing number of retaliation claims could now go to a jury to decide whether the adverse action complained of, even if not actionable under Title VII in its own right, could possibly have dissuaded a "reasonable" person from engaging in protected conduct.

Plaintiffs' Perspective: Retaliation Claims to Redress Appearance or Stereotype Discrimination

Retaliation claims are appealing from the plaintiff's perspective because they can be pursued independently and do not turn on the viability of the underlying discrimination or harassment complaint (see, e.g., Wright v. CompUSA 2003, in which the main ADA disability claim was disposed of summarily for lack of substantial limitation to a major life activity, but a derivative retaliation claim went to the jury for resolution as to whether the plaintiff may have been terminated for having requested an accommodation). In addition, such claims afford plaintiffs a cause of action that is difficult to defeat on summary judgment given the witness credibility issues typically involved. For these reasons, litigants who face legal or evidentiary obstacles to establishing discrimination or harassment liability under prevailing case law in their jurisdiction may decide as a matter of course to pursue retaliation claims as a tactical hedge. This includes gay, lesbian, or transgender litigants whose stereotype or same-sex cases are rejected in many circuits as not "because of sex" under Title VII (Table 1). By keeping a diary of any differential treatment (e.g., a harsher performance appraisal, gruff comments from a supervisor or co-worker, a less interesting or dead-end work assignment) after an EEOC or state agency filing, as plaintiffs' attorneys now routinely advise, it may be possible to "stack" the resulting evidence into a showing of arguable retaliation that exceeds emerging post-*White* materiality standards.[4]

Employers' Perspective: Civility Policies to Prevent Appearance or Stereotype Discrimination

Retaliation claims were of growing concern from the employer's perspective even before renewed attention to them generated by *White*; statistics indicate that the EEOC received more than 22,000 retaliation charges in fiscal 2005, a twofold increase since 1992 and almost 30% of all EEOC charges filed. Agency resolution of these charges has recovered more than $90 million annually in recent years, not including the proceeds of litigation. To

[4] Although it has become commonplace for gender stereotype and same-sex cases to include derivative retaliation claims (e.g., Lynch v. Baylor University 2006; Miller v. Kellogg 2006; Slagle v. County of Clarion 2006), their ultimate success rate remains to be determined, and they raise numerous questions that complicate an already confusing area. For example, does ensuing conduct need to differ in kind or intensity to support a retaliation claim? Can prior conduct continue but still be found causally related to protected activity? Will prior cases holding that a lowered performance rating without tangible consequences is not actionable now come into question if the *threat* of such action might "dissuade a reasonable person" from filing a Title VII complaint or opposing illegal conduct? Will sensitive (or clever) employees take to filing "good faith" but minor complaints to gain "protected" status under various anti-retaliation laws? A full treatment of these developing issues is beyond the scope of this article.

deal with this mushrooming additional source of liability, employers should consider focusing less on employee appearance unrelated to performance and more on co-worker conduct that can generate discrimination, harassment, and retaliation claims if left unchecked. In other words, given the Supreme Court's admonition that Title VII is not a "general civility code" for the workplace, it is up to employers to adopt and enforce such a code to deal with increasingly problematic employee conduct that can generate cases such as those described throughout this article.

There is no generally accepted definition of impermissible intimidation or "bullying" aside from proscriptions dealing with harassment, but the incidence of general incivility in the workplace appears to be on the rise, and so is the level of attention being paid to its negative individual and organizational effects. Indeed, a recent edition of the APA's Monitor on Psychology (July/August 2006) devotes a major emphasis to the phenomenon, and empirical research has found evidence linking general incivility, verbal abuse, and physical aggression to sex-based forms of harassment, workplace violence, and reduced performance and profits (see Lim and Cortina 2005; Lucero and Allen 2006; Pearson *et al*. 2000; see also Andersson and Pearson 1999).

The legal bases of employer liability for bullying and related conduct are more developed in the UK, Canada, and parts of Europe (Meyers 2006; Quill 2005), but signs that American courts are now also facing the problem have begun to emerge. For example, in Christopher v. NEA (2005), the Ninth Circuit addressed the issue of whether harassing conduct directed toward female employees can violate Title VII in the absence of direct evidence that such conduct was intended to be "because of sex." Deciding in the affirmative based on a male supervisor's numerous episodes of profane, loud, and hostile shouting and intimidating physical conduct toward female, but not male, employees, the Court noted that "direct comparative evidence about how the alleged harasser treated members of both sexes" was one of three evidentiary routes explicitly allowed by the Supreme Court in *Oncale*:

> ... [A] pattern of abuse in the workplace directed at women, whether or not it is motivated by "lust" or by a desire to drive women out of the organization, can violate Title VII. Indeed, this case illustrates an alternative motivational theory in which an abusive bully takes advantage of a traditionally female workplace [a teacher's union] because he is more comfortable when bullying women than when bullying men. There is no logical reason why such a motive is any less 'because of sex' than a motive involving sexual frustration, desire, or simply a motive to exclude or expel women from the workplace ... Whatever the motive, the ultimate question under *Oncale* is whether [the alleged harasser's] behavior affected women more adversely than it affected men.

In the face of growing potential liability for bullying, incivility, workplace violence, and related conduct, employers should consider criteria offered by Lucero and Allen (2006) for developing zero tolerance policies that include basic tenets of fairness such as notice of the prohibited conduct, reasonableness of the prohibition, and consistency in handling similar cases. In addition to these general parameters, employers might also consider the following specific recommendations for dealing with such situations *before* they come under scrutiny in court:

(1) Adopt and enforce general non-retaliation, anti-bullying, and civility policies that go beyond EEOC anti-harassment guidance and other standards of compliance based on current, but not emerging, case law;

(2) Provide effective internal grievance procedures with basic due process guarantees so employees don't feel the need to take discrimination issues elsewhere;
(3) Avoid imposing less favorable working conditions or assignments, reducing performance ratings for trivial reasons, denying benefits, or otherwise treating Title VII complainants differently from other employees;
(4) Train supervisors and co-workers to deal more tolerantly with appearance, gender identity expression, mannerisms, or conduct that doesn't comport with their stereotypic or other notion of appropriateness (i.e., "sorry if this bothers you, but it's just not up to you");
(5) Emphasize that, notwithstanding personal sensibilities or subjective preferences about such matters, anything not implicating actual job performance or the effective operation of the business should be of no concern to co-workers or anyone else in the workplace; and
(6) Ensure that documentation of EEOC complaints is handled discretely, and not placed in the charging employee's general personnel file to which a direct supervisor may have access (lack of access to such documentation can help undermine any claimed causal connection between the filing of a complaint and subsequent adverse employment action under *White*).

Appearance Standards Revisited: Implications for Future Litigation

At the heart of all employment discrimination claims is the notion that some factor irrelevant to performance on the job was impermissibly considered in selection, promotion, retention, or other workplace decision processes. Although attractiveness or appearance criteria could arguably result in adverse impact based on race, color, religion, national origin, age, disability, or sex (Adamitis 2000; Bello 2004), thus far, attractiveness or appearance in general have not been widely recognized as explicit bases upon which to redress discrimination in employment. As previously discussed, there may be some types of jobs where conformance to particular expectations regarding gender-stereotypic appearance is arguably job-related (e.g., those in sex or "sex-plus" businesses). However, the circumstances under which courts have upheld employer prerogatives in these areas have thus far been extremely narrow.

Meanwhile, legal standards continue to evolve, and empirical research has found support for the proposition that attractiveness and qualifications may interact to influence selection decisions (Watkins and Johnston 2000). Furthermore, attractiveness may enhance gender characteristics and exaggerate perceptions of gender-related attributes that could lead to stereotypic hiring practices (Drogosz and Levy 1996). For example, attractive women may seem to exhibit greater levels of traditionally "feminine" attributes, which in turn could put them at a disadvantage when applying for or being evaluated in historically "male-typed" jobs and tasks (Drogosz and Levy 1996; Heilman and Saruwatari 1979; Heilman and Stopeck 1985).

More recently, Jawahar and Mattsson (2005) investigated sexism and beautyism effects in employment processes using experimental research. Decision makers were asked to evaluate multiple candidates of both sexes for selection into male-dominated, female-dominated, and gender-neutral jobs. As expected, support was found for the anticipated main effects of both attractiveness and sex on willingness to hire; more attractive candidates fared better than less attractive candidates overall, and candidates matching jobs' historical gender dominance fared better than those who did not. In addition, however, significant

interactions were found among attractiveness, sex, and job type for particular types of decision makers; the advantage for attractive candidates was greater in sex-typed jobs that did *not* match the sex of the candidate among evaluators for whom contextual social cues were more salient (i.e., high "self-monitors"). This suggests that training interventions may be indicated for hiring managers that are prone to accept historical or other contextual cues over more valid individual predictors of performance.

Overall, the results also suggest that the combination of an applicant's sex and attractiveness may well bias hiring decisions most in the context of historically sex-typed jobs. Where attractiveness or analogous appearance standards are thus conflated with protected class status such as gender, the analytic and practical viability of corresponding discrimination claims would seem greater than for those involving attractiveness or appearance alone. Thus far, though, as Jawahar and Mattsson acknowledge, "[r]elative to discrimination based on protected characteristics, discrimination based on the incongruence of applicants' sex with job type and applicants' attractiveness is more subtle, likely to be difficult to eliminate through legal action, and harder to control from an organization's standpoint." Appearance cases may thus continue to revolve around uncertain or practically problematic legal constructs such as unequal burdens, gender stereotypes, or retaliation for the foreseeable future.

Conclusion

There is an epilogue to the *Jespersen* case that illustrates all too well the high level of remaining disagreement, even within supposedly liberal jurisdictions like the Ninth Circuit, about the parameters of permissible Title VII gender stereotype and appearance discrimination claims. In April, 2006, Chief Judge Schroeder, a woman, issued the Court's *en banc* decision affirming the 2–1 panel majority because of Jespersen's failure to present a factual record demonstrating the unequal burdens posed for women by Harrah's makeup and hair styling requirements. The opinion, intended to "reaffirm our circuit law concerning appearance and grooming standards, and to clarify our evolving law of sex stereotyping claims," did little to do either. Of the 11 judges participating, only 6 sided with their Chief Judge, while 4 (3 of whom were men) dissented on the grounds that a policy requiring women but not men to wear makeup *must* be motivated by sex stereotyping. In a separate opinion, 3 of the 4 dissenters would also have taken judicial notice of the unequal burdens of compliance with such a policy as "perfectly clear" and beyond dispute.

It is interesting that the Court's rehearing *en banc* left roughly the same proportion of judges in disagreement as did the original panel split, and the language of the two dissenting opinions is telling. First, Judge Pregerson:

> Quite simply, [Jespersen's] termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination "because of" sex.[5]
>
> *Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves ... [noting that the plaintiff in that case was told that her consideration for partnership would be enhanced if she dressed more femininely, wore makeup, and had her hair styled]

[5] Judge Pragerson also notes that the policy, as prima facie discriminatory, could hardly be upheld as a business necessity under the BFOQ doctrine given that Harrah's had "quietly disposed of" its policy after Jespersen sued.

> The fact that a policy contains sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny ... the majority's approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender ... By this logic, it might well have been permissible in *Frank* to require women ... to meet a medium body frame standard if that requirement were part of a policy that also required men ... to achieve a certain degree of upper body muscle definition.

And Judge Kozinski:

> If you are used to wearing makeup—as most American women are—[Harrah's policy] may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine ... a rule that all judges wear face powder, blush, mascara, and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance.

Despite these sorts of concerns, only a few jurisdictions (e.g., the District of Columbia, the State of Michigan, the City of Santa Cruz, California) have expressly prohibited appearance-based discrimination thus far, and the circumstances under which these prohibitions apply are limited (Bello 2004). Meanwhile, issues of appearance in the workplace have now gone far beyond notions of "attractiveness," "sex appeal," or "appropriate" workplace appearance like those involved in *Wilson* and *Jespersen*. Appearance standards that are inherently subjective and unrelated to performance are bound to bring challenges from employees who feel that their personal privacy has been unduly breached as a condition of working for a living. Gender and other social identity constructs further complicate the matter.

For example, it seems anomalous that an effeminate heterosexual plaintiff who is harassed as a perceived homosexual should have more luck asserting a gender stereotype claim than an openly gay individual who suffers identical abusive conduct but whose claims may be barred as based on affinity orientation rather than "because of sex." Ironically, under these circumstances, stereotype discrimination or same-sex harassment can be perpetrated with impunity against gays and lesbians so long as harassers make sure to include homosexual-based epithets or conduct as part of their abuse. These sorts of inconsistencies persist throughout the handling of Title VII claims by "gender-nonconforming" homosexuals (effeminate gay men and masculine lesbians) versus those of "gender-conforming" ones (masculine gay men and feminine lesbians; Kramer 2004), and it has been argued that such inconsistencies could be minimized if courts adopted the Ninth Circuit's approach in *Rene*—where the sexual orientation of the plaintiff, and others' knowledge or perceptions of it, are simply irrelevant (Sachs 2004). Meanwhile, both standards that force one to be unwillingly "dolled up," as in *Jespersen*, or those that prevent one from exhibiting a chosen gender identity, as in *Dawson*, *Etsitty*, or *Smith*, remain troubling from legal, logical, social, and even practical perspectives. Judge Kozinski again:

> I note with dismay the employer's decision to let go a valued, experienced employee who had gained accolades from her customers over what, in the end, is a trivial matter. Quality employees are difficult to find in any industry and I would think an employer would long hesitate before forcing a loyal, long-time employee to quit over an honest and heart-felt difference of opinion about a matter of personal significance to her.

As Greenberg (2003) concludes, "We need to continue to educate courts about how employers mistakenly conflate sex, gender, sexual orientation, gender identity and gender

role performance. This inappropriate conflation can lead to discriminatory employment practices that, regardless of their form, all constitute 'discrimination because of sex' under Title VII." Perhaps training and education about stereotypes and increasing demographic diversity in workforces and applicant bases will chip away over time at extant gender and other role stereotypes. In the near term, however, evolving gender-based parameters of "acceptable" workplace appearance have yet to be dealt with consistently either by the courts or by employers. Until they are, the ideal of a workplace where stereotypes and subjective appearance standards unrelated to job performance are irrelevant to the employment relationship remains an elusive goal.

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