

# FROM *JESPERSEN* TO JENNER: EXPLORING GROOMING POLICY STANDARDS IN THE AGE OF GENDER NONCONFORMITY

ASHLEE JOHNSON†

“I wish I were kind of normal. It would be so much more simple.”

- Caitlyn Jenner, 2015<sup>1</sup>

In 1976, Bruce Jenner, “a symbol of masculinity,”<sup>2</sup> was the winner of the gold medal in the decathlon during the Summer Olympics.<sup>3</sup> Afterwards,

[h]e adorned the front of the Wheaties box. He drank orange juice for Tropicana and . . . gave speeches about the 48 hours of his Olympic win. . . . He also secretly wore panty hose and a bra underneath his suit so he could at least feel some sensation of his true gender identity.<sup>4</sup>

In 1991, Bruce Jenner married Kris Kardashian, and on March 15, 2015, at sixty-five years old, Bruce Jenner became Caitlyn Jenner.<sup>5</sup>

Caitlyn Jenner’s story of becoming a transgender woman is not uncommon in the United States.<sup>6</sup> Today, there are approximately 700,000 people who identify as transgender women

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† Ashlee Johnson graduated from Wake Forest University School of Law in 2016 and is currently practicing in the Washington, D.C., metropolitan area. She would like to thank the law professors and students who helped prepare this Comment for publication.

1. Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR, July 2015, at 50, 52.
2. *Id.*
3. *Id.*
4. *Id.* at 53.
5. *Id.* at 52.
6. *See id.*

and men in the United States.<sup>7</sup> The transgender population represents about 0.3% of adults in America.<sup>8</sup> The first gender reassignment surgery in the United States was completed in 1966 at Johns Hopkins University in Baltimore, Maryland,<sup>9</sup> although genital surgery is not required in order to identify as transgender.<sup>10</sup> Since 1936, more than 135,000 Americans have changed genders.<sup>11</sup>

Increasingly, transgender Americans receive economic benefits and legal protections in the United States. For example, a recent study by the Human Rights Campaign found that out of 636 companies analyzed, 207 companies provide healthcare coverage to transgender employees.<sup>12</sup> Furthermore, eighteen states currently have clear laws protecting transgender people.<sup>13</sup> Additionally, there are estimated to be more than 15,000 transgender people on active duty in the military and over 134,000 transgender veterans.<sup>14</sup> Notably, the Equal Employment Opportunity Commission (“EEOC”) filed its first sex discrimination suit on behalf of a transgender employee in 2015, and, since 2012, it has issued a wave of decisions and amicus briefs recognizing rights of transgender individuals based on Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>15</sup>

Though a significant number of Americans have successfully changed genders, an equally significant number have faced discrimination because of their gender identity. According

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7. *Id.*; see also Kenny Thapoung, *The Transgender Community by the Numbers*, MARIE CLAIRE (July 28, 2015), <http://www.marieclaire.com/culture/g3065/transgender-facts-figures>.

8. Thapoung, *supra* note 7.

9. *Id.*

10. Bissinger, *supra* note 1.

11. Francie Diep, *Transgender Americans Have Been Registering Their Transitions with Social Security Since 1936*, PAC. STANDARD (Oct. 5, 2015), <http://www.psmag.com/politics-and-law/data-on-transgender-americans>.

12. Thapoung, *supra* note 7.

13. *Id.*

14. *Id.*

15. *Milestones: 2015*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (2015), <http://www.eeoc.gov/eeoc/history/50th/milestones/2015.cfm>; see also *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (July 8, 2016), [http://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm); *Federal Sector Cases Involving Transgender Individuals*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [http://www1.eeoc.gov/federal/reports/lgbt\\_cases.cfm?renderforprint=1](http://www1.eeoc.gov/federal/reports/lgbt_cases.cfm?renderforprint=1) (last visited Feb. 10, 2017).

to the Report of the National Transgender Discrimination Survey, “[t]ransgender and gender-nonconforming people face injustice at every turn: in childhood homes, in school systems that promise to shelter and educate, in harsh and exclusionary workplaces, [and] at the grocery store.”<sup>16</sup> Nineteen percent of transgender people have suffered abuse or violence from a family member because of their gender nonconformity.<sup>17</sup> Twenty-six percent of transgender people have lost a job due to their gender identity, and another reported fifty percent have suffered workplace harassment because of their identity.<sup>18</sup> One survey found that transgender people were unemployed at twice the rate of the general population.<sup>19</sup> Furthermore, although there are eighteen states in the country that have clear laws protecting transgender individuals,<sup>20</sup> that leaves a majority of states without such protections. In fact, as recently as March 2016, there have been state efforts to further restrict the rights of transgender people.<sup>21</sup>

Without significant state-level protection, transgender individuals must rely on federal discrimination statutes for protection. But are these federal statutes doing any better than the majority of states to protect rights of transgender and gender-nonconforming individuals? One way to answer this question is to focus on a particular area where transgender individuals have faced significant discrimination: the workplace. Accordingly, this Comment evaluates the level of protection for transgender and gender-nonconforming individuals under one federal statute in

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16. JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY EXECUTIVE SUMMARY 1 (2011) [hereinafter INJUSTICE AT EVERY TURN EXECUTIVE SUMMARY], <http://endtransdiscrimination.org/report.html>. See the full report, JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), [http://endtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf), for more statistics and findings on transgender discrimination.

17. INJUSTICE AT EVERY TURN EXECUTIVE SUMMARY, *supra* note 16.

18. *Id.*

19. *Id.*

20. Thapoung, *supra* note 7.

21. See H.B. 2, 2016 Leg., 2d Extra Sess. (N.C. 2016); see also Colin Campbell & Craig Jarvis, *LGBT Protections End As NC Governor Signs Bill*, NEWS & OBSERVER (Mar. 23, 2016), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article67731847.html>.

particular: Title VII.<sup>22</sup> Specifically, this Comment revisits the well-established standards for upholding employer grooming policies in light of the rise in known transgender cases in the twenty-first century, referred to in this Comment as “the age of gender nonconformity.”

Part I begins by explaining Title VII and exploring the established standards for upholding grooming policies. Part II analyzes the problems with these standards, asserting that they (1) depart from the scheme of Title VII by ignoring plaintiffs’ individual grievances and requiring “group-based harm,”<sup>23</sup> and (2) encourage gender norms as a justification for discrimination, which is increasingly problematic as gender norms evolve and become less “normal.” Part III explores the impact of the age of gender nonconformity on grooming policy standards by examining courts’ analyses of transgender plaintiffs’ sex stereotyping claims and offering practical applications of the theories used to challenge grooming policies. Part IV concludes by encouraging the quest to make Title VII more inclusive for transgender and gender-nonconforming individuals.

## I. TITLE VII AND GROOMING POLICIES

Title VII prohibits certain employers from discriminating against employees and applicants on the basis of race, color, religion, sex, and national origin.<sup>24</sup> Specifically, a plaintiff alleging discrimination on the basis of sex must prove that the discriminatory actions are not merely tinged with offensive sexual connotations but are “because of” sex.<sup>25</sup> Title VII governs employers’ grooming and appearance policies as a subset of sex discrimination.<sup>26</sup> Challenges to grooming policies are often

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22. 42 U.S.C. § 2000e-2 (2012).

23. Jennifer Levi, *Missapplying Equality Theories*, 19 YALE J.L. & FEMINISM 355, 356 (2008).

24. § 2000e-2(a) (noting Title VII applies to employers with at least fifteen employees).

25. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

26. See *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (analyzing employer’s grooming policy under plaintiff’s claim of sex discrimination); see also JOSEPH G. COOK & JOHN L. SOBIESKI, JR., *CIVIL RIGHTS ACTIONS* 4–21 (1997) (“Similarly, grooming standards that impose greater burdens on female employees have been sustained against claims of [sex] discrimination.”); Marc A. Koonin, *Avoiding Claims of Discrimination Based on Personal Appearance, Grooming, and Hygiene Standards*, 15 LAB. LAW. 19, 19 (1999) (“[P]ersonal appearance, grooming, and hygiene standards can lead

brought as either religious discrimination claims<sup>27</sup> or, more importantly for the purpose of this Comment, as sex discrimination claims.<sup>28</sup>

Grooming and appearance policies are workplace policies that require employees to dress in a certain manner and comply with specific grooming and hygiene standards as a condition of employment.<sup>29</sup> Title VII does not automatically prohibit employer grooming and appearance policies.<sup>30</sup> An employer may require employees to dress uniformly or implement grooming policies for a legitimate business purpose.<sup>31</sup> Yet, when it comes to sex-specific grooming policies—policies that require different appearance standards for male and female employees—courts have made it clear that such grooming policies, even those implemented for a

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to potential liability for discrimination on the basis of a [Title VII] legally protected status.”).

27. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015) (bringing a religious discrimination challenge to employer’s grooming policy); Kiran Preet Dhillon, *Covering Turbans and Beards: Title VII’s Role in Legitimizing Religious Discrimination Against Sikhs*, 21 S. CAL. INTERDISC. L.J. 215, 216 (2011) (“Employees whose religious identities are tied to their appearance are especially harmed by the grooming codes doctrine because grooming and dress policies are often based on mainstream cultural norms, which do not encompass, and often clash with, the grooming and dress requirements of many minority religions.”).

28. See *Jespersen*, 444 F.3d at 1104; *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1084 (5th Cir. 1975) (“Male job applicant brought suit under [Title VII] against prospective employer, asserting that the employer’s hair length standards discriminated against plaintiff on the basis of sex.”); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (bringing a sex discrimination claim under Title VII for employer policy prohibiting employees from wearing braids in their hair).

29. See, e.g., *SAFeway COS., GROOMING GUIDELINES/DRESS CODE GUIDELINES & STANDARDS* (2008), <http://www.careersatsafeway.com/wp-content/uploads/2012/11/Store-Dress-Code-All-Divisions.pdf>.

30. See *Jespersen*, 444 F.3d at 1112 (“We cannot agree, however, that [plaintiff’s] objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.”); see also *Koonin*, *supra* note 26, at 20 (“Employers may generally enforce personal appearance, grooming, and hygiene standards.”).

31. See *Willingham*, 507 F.2d at 1092 (“[D]istinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment *opportunity* . . . [nor] access to the job market, [and do not limit] an employer’s right to exercise his informed judgment as to how best to run his shop.”); *Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115, 1125 (D.C. Cir. 1973) (failing to find sex discrimination “when employees’ hair length fails to conform to an employer’s reasonable requirements, designed to further the company’s legitimate interests”).

legitimate business purpose, may violate Title VII if they create unequal burdens for one sex.<sup>32</sup>

The landmark case regarding sex-based grooming policies is *Jespersen v. Harrah's Operating Co.*<sup>33</sup> In *Jespersen*, the employer implemented a "Personal Best" policy with gender neutral requirements consisting of a standard uniform of black pants, white shirt, black vest, and a bow tie.<sup>34</sup> The policy also included sex-specific requirements, requiring male and female employees to comply as follows:

Males:

- Hair must not extend below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.

Females:

- Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
- Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.
- *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.*<sup>35</sup>

The plaintiff, Darlene Jespersen, objected to the makeup requirement, arguing that the policy discriminated against women by: "(1) subjecting them to terms and conditions of employment

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32. See *Jespersen*, 444 F.3d at 1112.

33. *Id.* at 1104.

34. *Id.* at 1105.

35. *Id.* at 1107 (emphasis added).

to which men are not similarly subjected, and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment.”<sup>36</sup> The court stated that sex-based differences in appearance standards alone, without showing disparate effects, does not create a *prima facie* case of sex discrimination.<sup>37</sup> Essentially, the court reasoned that although the policy differentiated on the basis of sex, it did not create greater burdens on one gender than on the other, and the policy was applied equally to all employees.<sup>38</sup>

Jespersen also argued that the makeup requirement was based on illegal sex stereotyping.<sup>39</sup> The court rejected this argument stating, “[T]he only evidence in the record to support the stereotyping claim is Jespersen’s own subjective reaction to the makeup requirement.”<sup>40</sup> The court noted that grooming policies may give rise to a Title VII claim of sex stereotyping, but Jespersen failed to show how the Personal Best policy was motivated by sex stereotyping.<sup>41</sup> Overall, the Ninth Circuit held that the record was “devoid of any basis for permitting [Jespersen’s] claim to go forward, as it is limited to the subjective reaction of a single employee.”<sup>42</sup> Importantly, the court found that there was no evidence of a stereotypical motivation on the part of the employer to support a claim of sex stereotyping.<sup>43</sup>

This Ninth Circuit opinion establishes two important rules for grooming policies. The first is succinctly stated as, “Grooming standards that appropriately differentiate between the genders are not facially discriminatory.”<sup>44</sup> The second is, “If a grooming standard imposed on either sex amounts to impermissible stereotyping, . . . a plaintiff of either sex may challenge that requirement under *Price Waterhouse*.”<sup>45</sup> In other words, the Ninth Circuit held that grooming policies will be upheld if they (1)

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36. *Id.* at 1108.

37. *Id.* at 1109.

38. *Id.* at 1109–10.

39. *Id.* at 1106.

40. *Id.* at 1112.

41. *Id.* at 1106.

42. *Id.* at 1113.

43. *Id.*

44. *Id.* at 1109–10; *see also* Levi, *supra* note 23, at 355 (“[T]he typical dress code that simply distinguishes the appearance of men and women in the workplace has been found to be unobjectionable by courts.”).

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

appropriately differentiate between the genders without evidence of unequal burdens on either sex, and (2) are not based on impermissible sex stereotyping as defined by *Price Waterhouse v. Hopkins*.<sup>46</sup> Other jurisdictions have affirmed this standard of analyzing grooming policies.<sup>47</sup>

## II. PROBLEMS WITH THE STANDARDS FOR UPHOLDING GROOMING POLICIES

### A. *The Unequal Burdens Standard for Upholding Grooming Policies Contradicts the Scheme of Title VII*

Typically, courts analyze Title VII claims with the understanding that every employee or prospective employee must be treated without regard to protected traits, such as race, sex, religion, or disability.<sup>48</sup> Ironically, courts analyze grooming policies with the understanding that employers may implement separate rules for men and women based on a protected trait: sex.<sup>49</sup> Not only may employers design grooming policies based on a protected trait, but they may do so as long as the policy does not create unequal burdens on the sexes, a high bar for plaintiffs.<sup>50</sup>

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46. *Id.* at 1110 (“[T]he material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an ‘unequal burden’ for the plaintiff’s gender.”). See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (specifically discussing sex stereotyping in Part II-C).

47. See, e.g., *Viscecchia v. Alrose Allegria, LLC*, 117 F. Supp. 3d 243, 253 (E.D.N.Y. 2015) (stating, “sex-differentiated grooming requirements must ‘not unreasonably burden one gender more than the other,’” and dismissing a claim against employer’s appearance policy that allowed different hair lengths for male and female employees); *Schroer v. Billington*, 424 F. Supp. 2d 203, 208–09 (D.D.C. 2006) (“[C]ourts before and after *Price Waterhouse* have found no Title VII violation in gender-specific dress and grooming codes, so long as the codes do not disparately impact one sex or impose an unequal burden.”). The court in *Schroer* also noted that “disparate treatment of men and women by sex stereotype violates Title VII. Adverse action taken on the basis of an employer’s gender stereotype that does not impose unequal burdens on men and women . . . does not state a claim under Title VII.” *Id.* at 209; see also *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (“A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment.”); *Dodd v. SEPTA*, No. 06-4213, 2007 WL 1866754, at \*4 (E.D. Pa. June 28, 2007) (“Moreover, even if a grooming policy has different requirements or standards for men and women, there is no cognizable disparate treatment claim where the policy is equally enforced and applied, and where the requirements for one gender are not more burdensome than for the other.”).

48. 42 U.S.C. § 2000e-2 (2012).

49. *Levi*, *supra* note 23, at 355–56.

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

Jennifer Levi refers to this unequal burdens standard as the “Title VII blind spot.”<sup>51</sup> The problem is that female plaintiffs, like Jespersen, who challenge their employer’s grooming policy must argue that the grooming policy creates unequal burdens on the sexes, rather than simply demonstrating her personal burden from complying with the policy.<sup>52</sup> The Title VII blind spot ignores the fact that “different treatment of individuals is itself harmful even in the absence of demonstrable group-based harm.”<sup>53</sup>

For this reason, the unequal burdens standard is antithetical to the traditional Title VII scheme, which typically does not require a group of people to be equally affected or burdened. Title VII merely requires an individual to demonstrate a personal harm caused by prohibited discrimination.<sup>54</sup> The unequal burdens standard for assessing the validity of grooming policies thus contradicts the typical analysis of traditional Title VII claims for two reasons: (1) courts uphold discrimination on the basis of sex for grooming policies but prohibit this same basis for other discrimination claims, and (2) courts require plaintiffs challenging grooming policies to demonstrate “group-based harm,”<sup>55</sup> whereas traditional Title VII analysis offers a possible remedy for plaintiffs who can prove an *individual* injury arising from an employer’s prohibited discrimination.<sup>56</sup> Requiring plaintiffs to demonstrate group harm under this unequal burdens standard has further implications considering the sex stereotyping standard discussed below.<sup>57</sup>

*B. The Sex Stereotyping Standard for Upholding  
Grooming Policies Encourages Discrimination Based  
on Evolving Gender Norms*

An alternative argument plaintiffs may raise to challenge a grooming policy is that the policy is motivated by impermissible

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51. Levi, *supra* note 23.

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

53. Levi, *supra* note 23.

54. *Id.* at 357.

55. *Id.*

56. *Id.*

57. *Id.* at 367, 370 (proposing an analysis of grooming policies that “acknowledges the individual harms associated with stereotypical and different treatment of men and women despite the fact that many . . . women and men are untouched by the imposition of gender-based dress requirements because they are gender conforming”).

sex stereotyping.<sup>58</sup> Sex stereotyping is based on traditional gender norms and arises when employees are expected to act—and are punished for failing to act—in accordance with traditional gender behaviors.<sup>59</sup> Impermissible sex stereotyping is prohibited in grooming policies, as it may demonstrate discriminatory intent.<sup>60</sup> However, the law on what constitutes sex stereotyping is unclear. The Supreme Court addressed sex stereotyping at length in *Price Waterhouse*.<sup>61</sup>

In *Price Waterhouse*, the plaintiff, Ann Hopkins, was a senior manager in an accounting firm who was denied partnership and subsequently brought a sex discrimination claim against the firm, arguing that she was rejected partnership partially because of the employer's sex stereotyping.<sup>62</sup> Hopkins argued that she was subjected to comments about her masculinity and told that "in order to improve her chances for partnership . . . [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"<sup>63</sup> The Supreme Court found that such comments undoubtedly constituted sex stereotyping<sup>64</sup> and that the employer

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58. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111 (9th Cir. 2006); *Schroer v. Billington*, 525 F. Supp. 2d 58, 61 (D.D.C. 2007); see also *Levi*, *supra* note 23, at 372 (noting that litigants have challenged gender-based dress codes under sex discrimination claims as well as sex stereotype claims).

59. See *Levi*, *supra* note 23, at 367 (noting that grooming policies can have a negative affect on those who do not conform to cultural norms); see also *Schroer*, 525 F. Supp. 2d at 61.

60. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 294 (1989) (Kennedy, J., dissenting) ("Evidence of use by decision-makers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent."); *Jespersen*, 444 F.3d at 1111 ("[A] plaintiff in a Title VII case may introduce evidence that the employment decision was made in part because of a sex stereotype."); *id.* at 1112 ("If a grooming standard imposed on either sex amounts to impermissible stereotyping . . . a plaintiff of either sex may challenge that requirement under *Price Waterhouse*."); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."); *Schroer*, 525 F. Supp. 2d at 62 ("[N]umerous federal courts have held that punishing employees for failure to conform to sex stereotypes, including stereotypes regarding dress and appearance, is a form of sex discrimination actionable under Title VII.").

61. See generally *Price Waterhouse*, 490 U.S. at 228 (plurality opinion).

62. *Id.* at 228.

63. *Id.* at 235.

64. *Id.* at 251 ("As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work.").

took sex stereotyping into account in its decision to reject Hopkins for partnership.<sup>65</sup>

This notion of sex stereotyping as explained in *Price Waterhouse* is complicated by the discussion of sex stereotyping in later cases. For example, in *Vickers v. Fairfield Medical Center*,<sup>66</sup> the plaintiff was a homosexual male who worked as a private police officer for defendant Fairfield Medical Center (“FMC”).<sup>67</sup> Vickers’s coworkers subjected him to sexual slurs and alleged that he was gay or homosexual after he befriended a male homosexual doctor at FMC.<sup>68</sup> Vickers’s supervisor witnessed the harassment, but took no action to stop it, and, in fact, frequently joined in the behavior.<sup>69</sup> Having his claim dismissed in district court, Vickers appealed his action for sex discrimination to the Sixth Circuit on a *Price Waterhouse* sex stereotyping theory, claiming the harassment was motivated by his gender nonconformity since his coworkers perceived his “supposed sexual practices” as behavior of a woman rather than a man.<sup>70</sup>

The Sixth Circuit found “that the theory of sex stereotyping under *Price Waterhouse* [was] not broad enough to encompass” Vickers’s claim.<sup>71</sup> The court noted that courts applying the *Price Waterhouse* standard of sex stereotyping have found discrimination on the basis of sex stereotypes that are demonstrable through the plaintiff’s appearance or behavior.<sup>72</sup> In other words, courts will not invoke the *Price Waterhouse* sex stereotyping standard unless the claimed gender nonconformity is “observed at work or affect[s] [plaintiff’s] job performance.”<sup>73</sup> Under this reasoning, Vickers’s sex stereotyping claim failed

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65. *Id.* at 256 (concluding that “the Policy Board in making its decision did in fact take into account all of the partners’ comments, including the comments that were motivated by stereotypical notions about women’s proper department”).

66. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006).

67. *Id.* at 759.

68. *Id.*

69. *Id.*

70. *Id.* at 761–62.

71. *Id.* at 763.

72. *Id.*

73. *Id.*; see, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218, 221 (2d Cir. 2005) (“[I]ndividual employees who face adverse employment actions as a result of their employer’s animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII.”). This “exhibition of behavior” can also include appearance. *Id.* at 221.

because his gender nonconformity—his homosexuality—was not observable at work and did not affect his job performance.<sup>74</sup> The Sixth Circuit found instead that Vickers's sex stereotyping claim was premised on his homosexuality and was a claim of sexual orientation discrimination, which is not actionable under Title VII.<sup>75</sup>

*Vickers* complicates the *Price Waterhouse* sex stereotyping standard by adding the requirement that the discrimination giving rise to the sex stereotyping claim must not only be based on gender nonconformity but that the gender nonconformity is observable at work or interferes with plaintiff's job performance. *Price Waterhouse* and *Vickers* suggest that there are two types of sex stereotyping: (1) impermissible sex stereotyping based on gender nonconformity with notions of how men and women should behave or appear, and (2) permissible sex stereotyping based on gender nonconformity in terms of sexuality. Both types are premised on gender nonconformity, but only one of these gender-nonconforming plaintiffs has a Title VII claim. That distinction between types of sex stereotyping undermines the idea of equality in the workplace and appears to be unfounded both in policy and in practice.<sup>76</sup>

Title VII should attempt to rid the workplace of *any* kind of stereotyping based on gender norms in its quest to “provide injunctive relief against discrimination in public accommodations.”<sup>77</sup> However, both standards under which plaintiffs may challenge grooming policies present barriers for plaintiffs who either struggle to prove group harm under the unequal burdens standard or struggle to prove the class of sex stereotyping that Title VII prohibits. The next section explores how these problems with the standards for upholding grooming policies are even more troublesome for transgender and gender-nonconforming plaintiffs.

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74. *Vickers*, 453 F.3d at 764.

75. *Id.* at 765–66.

76. *See id.* at 767 (agreeing that there are distinctions in the type of gender stereotyping claims, but noting that “these distinctions can be complicated, and where, as here, the plaintiff has pleaded facts from which a fact finder could infer that sex (and not simply homosexuality) played a role in the employment decision and contributed to the hostility of the work environment, drawing the line should not occur at the pleading stage of the lawsuit”).

77. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

### III. IMPACT OF THE AGE OF GENDER NONCONFORMITY ON GROOMING POLICY STANDARDS

After the Court affirmed sex stereotyping as a theory of sex discrimination in *Price Waterhouse*, courts began questioning the scope of that theory, namely by examining what constitutes sex stereotyping for transgender and transsexual employees.<sup>78</sup> Notably, a more recent line of cases has extended the *Price Waterhouse* sex stereotyping standard to apply in cases in which a transsexual plaintiff alleges “that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer.”<sup>79</sup> For example, the courts in *Smith v. City of Salem*<sup>80</sup> and *Schroer v. Billington*<sup>81</sup> addressed claims of transsexual plaintiffs alleging discrimination under the sex stereotyping theory, where the courts considered whether—and to what extent—to allow sex stereotyping arguments in support of sex discrimination claims.

#### A. *Smith v. City of Salem*

In *Smith*, the Sixth Circuit considered whether Title VII protection extended to transsexuals.<sup>82</sup> Plaintiff Jimmie Smith, a male-to-female transsexual, was employed by the Salem, Ohio, fire department.<sup>83</sup> In treating his Gender Identity Disorder, Smith began dressing in a feminine manner on a full-time basis.<sup>84</sup> Soon after, Smith’s coworkers began questioning his appearance and commenting that his mannerisms were not “masculine enough.”<sup>85</sup>

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78. See *infra* notes 79–121 and accompanying text.

79. *Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006); see also *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (“[T]he Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (“[Plaintiff] contends that the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding that Title VII’s discrimination of sex includes gender discrimination).

80. *Smith*, 378 F.3d at 566.

81. *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2007).

82. *Smith*, 378 F.3d at 569–70.

83. *Id.* at 568.

84. *Id.*

85. *Id.*

When Smith informed his supervisor, Thomas Eastek, Eastek met with the chief of the fire department “with the intention of using Smith’s transsexualism and its manifestations as a basis for terminating his employment.”<sup>86</sup> When Smith found out about the employer’s plan to terminate him, he sued the City for sex discrimination under the theory of sex stereotyping.<sup>87</sup>

In this case, the district court dismissed Smith’s claim for reasons similar to those offered in *Vickers*: that Smith was using the sex stereotyping claim as a proxy for his “real” claim of discrimination on the basis of transsexualism, which is not protected by Title VII.<sup>88</sup> The Sixth Circuit, however, disagreed, concluding that “[h]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.”<sup>89</sup> The Sixth Circuit’s reasoning in this case challenged “a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection.”<sup>90</sup>

### *B. Schroer v. Billington*

In *Schroer*,<sup>91</sup> Plaintiff Diane Schroer, a male-to-female transsexual, applied and interviewed for a position as a terrorism research analyst with the Congressional Research Service (“CRS”), a division of the Library of Congress.<sup>92</sup> She interviewed under her previous male name and dressed in “traditionally masculine clothing.”<sup>93</sup> Shortly afterward, Schroer was offered the position and attended a meeting with Preece, a representative of CRS, to discuss a start date.<sup>94</sup> At that meeting, Schroer informed Preece that she was under treatment for gender dysphoria and was about to change her name, begin dressing in traditionally feminine

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86. *Id.*

87. *Id.* at 569.

88. *Id.* at 571.

89. *Id.* at 572.

90. *Id.*

91. *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2007).

92. *Id.* at 60.

93. *Id.*

94. *Id.*

clothing, and start carrying herself as a “full-time woman.”<sup>95</sup> Preece responded by telling Schroer that she had “‘really given [Preece] something to think about,’” and the next day, Preece informed Schroer that she would no longer be offered the job.<sup>96</sup>

Schroer filed a sex discrimination claim, and the Library of Congress moved to dismiss, arguing that Title VII does not prohibit discrimination “on the basis of transsexualism or gender identity.”<sup>97</sup> The district court disagreed, noting that there are two theories under which discrimination against a transsexual may constitute sex discrimination: (1) a sex stereotyping claim, and (2) a general sex discrimination claim.<sup>98</sup> Schroer amended her original complaint to add a sex stereotyping claim based on the following allegations:

Schroer’s non-selection resulted from Preece’s reaction on seeing photographs of Schroer in women’s clothing—specifically, that Preece believed that Schroer looked “like a man in women’s clothing rather than what she believed a woman should look like.” The amended complaint also alleges that Preece’s decision was based on the belief that . . . Schroer’s “appearance when presenting as a female would not conform to [members of Congress’] social stereotypes regarding how women should look” . . . .<sup>99</sup>

The court began its analysis by explaining that punishing employees for failure to conform to sex stereotypes, including stereotypes regarding dress and appearance, is a form of Title VII sex discrimination.<sup>100</sup> The court then noted that transsexuality is not a bar to this rule.<sup>101</sup> Thus, the court denied the defendant’s motion to dismiss and noted that a person’s sex “encompasses

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95. *Id.* at 61.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 62 (citation omitted).

100. *Id.* This rule has been upheld in recent cases. *See* Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (“Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. Indeed, several circuits have so held.”).

101. *Schroer*, 525 F. Supp. 2d at 63.

both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”<sup>102</sup>

Interestingly, the court noted a caveat in the rule that has important implications for transgender plaintiffs: gender nonconformity claims “must actually arise from the employee’s appearance or conduct and the employer’s stereotypical perceptions.”<sup>103</sup> In other words, the court agreed that gender nonconformity may be the basis of a sex discrimination claim but noted that allowing such a claim to proceed under the sex stereotyping theory “may be too expansive.”<sup>104</sup> Instead, the transsexual plaintiff must be careful to allege discrimination based on gender nonconformity rather than transsexual identity.<sup>105</sup> Thus, the court allowed Schroer’s claim to proceed, yet remained reluctant to uphold the claim on the theory of sex stereotyping.<sup>106</sup>

While *Smith* and *Schroer* are not grooming policy cases, they help to explain how courts analyze sex stereotyping claims by transsexual plaintiffs.<sup>107</sup> The next section discusses how this standard applies, in a practical sense, when transgender and gender-nonconforming plaintiffs challenge grooming policies.

### C. Gender-Nonconforming Plaintiffs’ Challenges to Grooming Policies

Grooming policies that require transgender employees to conform to gender norms with which they do not identify is problematic not only for the legal implications but also for psychological and economic reasons.<sup>108</sup> Fortunately, since 1989, the *Price Waterhouse* standard has expanded to include sex

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102. *Id.* (citing *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

103. *Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006).

104. *Schroer*, 525 F. Supp. 2d at 63.

105. *Id.* (“[P]rotection from sex stereotyping is different, not in degree, but in kind, from protecting transsexuals as transsexuals.”).

106. *Id.*

107. *See Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1113 (9th Cir. 2006) (using non-grooming policy cases to “provide the framework for this court’s analysis of when sex stereotyping rises to the level of sex discrimination for Title VII purposes”).

108. *Levi*, *supra* note 23, at 365–67 (exploring the psychological and economic effects of complying with gender-stereotypical grooming policies on transgender employees, including hospitalization due to dysphoria, physical abuse by others, and negative workplace consequences).

discrimination claims previously not supported by Title VII, such as gender nonconformity claims that may provide a remedy for homosexual and transgender employees who were once rejected from Title VII coverage.<sup>109</sup> However, while courts now recognize sex discrimination claims based on gender nonconformity, the standard for upholding these claims is extremely narrow and burdened by technicalities.<sup>110</sup> For example, a transgender plaintiff may argue discrimination based on gender nonconformity, but that plaintiff must be careful to argue that it was his or her behavior and appearance that led to discrimination rather than the mere existence of his or her transsexualism.<sup>111</sup> Further complicating the issue, the sex stereotyping standard that supports gender nonconformity claims has not been officially adopted in all jurisdictions,<sup>112</sup> and where it has been adopted, there are blurred lines as to the type of sex stereotyping claims that are permissible.<sup>113</sup>

So what does that mean for transgender plaintiffs challenging grooming policies? As mentioned, courts will likely uphold sex-specific grooming policies unless the policy is motivated by sex stereotyping.<sup>114</sup> In other words, a transgender plaintiff who has been punished for failing to comply with a grooming policy, and who may not have a claim under the unequal burdens standard, may nevertheless “introduce evidence that the employment decision [punishing the plaintiff] was made in part because of a sex stereotype.”<sup>115</sup> As discussed above, sex

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109. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001); *Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006).

110. *See, e.g.*, *Schroer*, 424 F. Supp. 2d at 211.

111. *Id.*

112. *See, e.g.*, *Oiler v. Winn-Dixie La., Inc.*, No. CIV. A. 00-3114, 2002 WL 31098541, at \*6 (E.D. La. Sept. 16, 2002) (“[M]any courts which have struggled for two decades with the issue of whether Title VII, in prohibiting discrimination on the basis of ‘sex’, also proscribes discrimination on the basis of sexual identity disorders, sexual preference, orientation, or status, Congress has had an open invitation to clarify its intentions. The repeated failure of Congress to amend Title VII supports the argument that Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder.”).

113. *See, e.g.*, *Creed v. Family Exp. Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*6 (N.D. Ind. Jan. 5, 2009) (“Although discrimination because one’s behavior doesn’t conform to stereotypical ideas of one’s gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does not.”).

114. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1112 (9th Cir. 2006).

115. *Id.* at 1111.

stereotyping claims are now made available to transgender and gender-nonconforming plaintiffs, but these plaintiffs must carry the same burden as other plaintiffs bringing sex stereotyping claims; that is, a transgender plaintiff would have to prove (1) “the policy was adopted to make [employees] conform to a commonly-accepted stereotypical image of what [they] should wear;<sup>116</sup> and (2) the grooming standards would objectively inhibit [a specific gender’s] ability to do the job.”<sup>117</sup> For example, if an employer’s grooming policy requires women to wear make-up, wear their hair down at all times, and wear high heels, a male-to-female transgender employee would presumably have a sex discrimination claim if she can show that wearing make-up, her hair down, and high heels are stereotypes of womanhood and that she was punished for failing to comply with the policy. It would not matter if her noncompliance was intentional or due to masculine features preventing her from achieving the complete female image.

Additionally, based on *Jespersen* and the cases discussed herein,<sup>118</sup> transgender plaintiffs may have a sex discrimination challenge to the grooming policy if they demonstrate that the grooming policy was intended to be sexually provocative or led to sexual harassment and a hostile work environment.<sup>119</sup> These claims would be derivative claims resulting from failure to comply with the gender norms that underlie the grooming policy, rather than direct challenges to the grooming policy itself.

Courts appear to be recognizing more claims of sex stereotyping by transgender plaintiffs. Thus, the chances of succeeding on a gender nonconformity claim for transgender plaintiffs is likely greater under the sex stereotyping theory than under the unequal burdens theory. This is because, while courts have expanded the *Price Waterhouse* sex stereotyping standard, the unequal burdens standard has barely evolved, and challenges under that standard are unlikely to succeed where the majority of employees suffer no burden in complying with sex-specific

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116. *Id.* at 1112.

117. *Id.*

118. *See id.*; *see also* Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004).

119. *See Jespersen*, 444 F.3d at 1112.

grooming policies based on gender norms.<sup>120</sup> One possible improvement to the unequal burdens standard is a more narrow objective—or even a subjective—standard for demonstrating an unequal burden, replacing the objective standard currently used.<sup>121</sup> For example, a male-to-female transgender plaintiff should be able to successfully argue that the sex-specific grooming policy creates unequal burdens for all gender-nonconforming employees. A narrow, objective standard for ascertaining unequal burdens may resolve the Title VII blind spot that limits Title VII to only gender-conforming plaintiffs in most cases.

#### IV. CONCLUSION: THE NEW NORMAL

In 2015, Caitlyn Jenner stated, “I wish I were kind of normal. It would be so much more simple.”<sup>122</sup> For purposes of Title VII, Jenner’s statement could not be more true. If all employees were “normal,” Title VII would be much simpler. However, the new normal is that there is no normal. Individuals do not fit perfectly into the gender they were assigned at birth. Society is slowly rejecting gender norms and behaviors that serve as the basis for sex stereotyping claims. Moreover, grooming policies that appropriately differentiate between the sexes may not appropriately differentiate between genders, and vice versa.

For this reason, the laws on grooming policies are not simple, and the standards for upholding them must evolve so as not to preclude valid sex discrimination claims for want of unequal burdens or impermissible sex stereotyping. Fortunately, courts have begun to question whether and how transgender employees may successfully challenge sex-specific grooming policies. Discussions of transgender and gender-nonconforming individuals’ rights are evolving at the state and federal level, suggesting that the standards in *Jespersen* and *Price Waterhouse* must

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120. See Levi, *supra* note 23, at 367 (“[M]any (perhaps even most) women and men are untouched by the imposition of gender-based dress requirement because they are gender conforming.”).

121. In *Jespersen*, the court denied Jespersen’s sex discrimination challenge to the grooming policy because “[t]he record contain[ed] nothing to suggest the grooming standards would objectively inhibit a woman’s ability to do the job” and that “the only evidence in the record to support the stereotyping claim is *Jespersen’s own subjective reaction to the makeup requirement.*” *Jespersen*, 444 F.3d at 1112 (emphasis added).

122. Bissinger, *supra* note 1, at 52.

also evolve to uphold the purpose of Title VII in the age of gender nonconformity.