THE COURT'S UNDUE BURDEN: A LOOK AT *JESPERSEN* AND ITS INCONSISTENCIES

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I. INTRODUCTION

All over the country, some employers subject their employees to specific dress and grooming requirements. Some of these requirements may be for safety reasons, while others may be for portraying an image that employers want to convey. Sometimes, employers want to portray a professional image and will require professional attire to do so. Generally, grooming policies are unisex and require employees to wear socially accepted garments that are considered professional. This practice is understandably acceptable for some employers. For instance, a law firm would not want its attorneys to show up to a client meeting wearing gym clothes. Sometimes, however, appearance and grooming codes can be based on harmful stereotypes that have developed over time.

In 2006, the Ninth Circuit Court of Appeals decided *Jespersen v. Harrah*,[1] where Ms. Jespersen, the plaintiff, was fired because she refused to wear makeup, which was required by the employer's grooming policy.[2] The court, relying on an "undue burdens" approach to grooming codes, ruled that the employer could require that its female employees wear makeup because the requirement did not place an unequal burden on women as compared to men.[3] Part of that policy required men to keep their hair a certain length.[4] Therefore, because the policy placed different, but essentially equal burdens on both sexes, the court held that the makeup requirement did not violate Title VII, despite being based on the stereotype that women need to wear makeup to look polished.

Other circuits, however, have declined to follow the logic in *Jespersen*.[5] At least one circuit court has relied on *Price Waterhouse v. Hopkins*,[6] to hold that discrimination based on a sex stereotype is forbidden.[7]

Given this predicament and the ruling in *Jespersen*, the undue burdens test it relies on raises doubts on its consistency with Title VII and on the

1. Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006).
2. *Id.* at 1107-8
3. *Id.* at 1109-10.
4. *Id.* at 1108.
5. *See* Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
6. 490 U.S. 228 (1989).
7. *Id.*

results it can yield. Therefore, this Article argues that the undue burdens approach is flawed and inconsistent with Supreme Court precedent and with the overall purpose of Title VII. This Article also argues that employers already have an avenue towards legal discrimination under the bona fide occupational qualification defense. Further, this Article argues that even under the undue burdens approach used by the Ninth Circuit, the makeup requirement in defendant's policy places an expense on women that is not placed on men and is therefore an unequal burden. Finally, this Article provides some possible solutions to this problem and makes predictions about the future of this particular area of employment law.

II. BACKGROUND

This section discusses Title VII and its intent followed by a brief discussion of disparate treatment claims. Then, it explains the relevant frameworks applied to employment discrimination cases, followed by an overview of *Price Waterhouse v. Hopkins* and the legislation that followed, which slightly altered its holding. Next, this section outlines the Ninth Circuit Court of Appeals' decision in *Jespersen v. Harrah's Operating Co.*, followed by the Sixth Circuit's *Smith v. City of Salem* decision, both of which reached different conclusions. This section then explains the very narrow bona fide occupational qualification defense available to employers who discriminate. Finally, this section looks at some criticisms and proposed solutions to the unequal burdens approach used by the Ninth Circuit in *Jespersen*.

A. Title VII.

Congress passed the Civil Rights Act of 1964 with the intent to confer jurisdiction on federal district courts of the United States to provide injunctive relief against discrimination, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, and to establish a Commission on Equal Employment Opportunity.[8] As a means to effectuate these goals, Title VII makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national

8. 88 P.L. 352, 78 Stat. 241.

> origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[9]

As for the legal relevance of sex stereotyping, the Supreme Court has pointed out that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they match a stereotype associated in their group . . . Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[10]

B. Frameworks Under Title VII: Direct or Circumstantial Evidence and Single or Multiple Motivating Factors.

Employment law can be complex because of the many frameworks that the courts have created over the years to analyze claims of discrimination. Most cases under Title VII are brought under 42 U.S.C. § 2000e-2(a)(1) and not 42 U.S.C. § 2000e-2(a)(2).[11] Two ways employers can argue claims under these statutes are disparate treatment and disparate impact.[12] In a disparate treatment claim, an employee alleges that his or her employer treats some employees less favorably than others because of their race, color, religion or other protected characteristics.[13] Proof of discriminatory motive is critical, although it can be inferred from differences in treatment.[14] On the other hand, disparate impact involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.[15] For disparate impact claims, a plaintiff need not prove intent.[16]

If a plaintiff has direct evidence that an employer discriminated against it, then that plaintiff's case is examined in a straightforward way.[17] Direct evidence is evidence that if believed, proves the existence of a fact in issue without interferences or presumption and is composed of the most blatant

9. 42 USCS § 2000e-2(a).
10. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978).
11. United States EEOC v. AutoZone, Inc., 860 F.3d 564, 565 (7th Cir. 2017).
12. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004).

remarks whose intent could be nothing other than to discriminate.[18]

However, if a plaintiff only has circumstantial evidence, that case could be decided under the *McDonnell Douglass* framework (if it's a single motive case) or under the *Price Waterhouse* framework and the amendments that followed (if employer had multiple motivating factors in its decision to adversely affect an employee). Circumstantial evidence is evidence that allows a jury to infer that a fact is true rather than directly supporting the truth of that fact.[19]

In a single motive *McDonnell Douglass* framework, the plaintiff initially has the burden of production and persuasion on a preponderance of the evidence, and has to make out a prima facie case by showing that: (1) he/she was in a protected class; (2) he/she is qualified for the position at issue;[20] (3) despite his/her qualifications, he/she was fired, and; (4) similarity situated employees outside the protected class receive better treatment that him/her.[21] To be considered similarly situated, employees must be comparable in all material respects, such as having the same supervisor, engaging in similar conduct, and being subjected to the same standards.[22] However, some courts use the "enough common features" analysis.[23] Meeting these elements creates a rebuttable presumption of discrimination.[24]

After the employee makes a prima facie showing, the burden of production shifts to the employer, who must articulate some legitimate, non-discriminatory reason for its adverse employment action.[25] There is no credibility determination here; the bar is low, and the employer has to provide a non-discriminatory reason for the termination.[26]

After an employer provides its evidence, the burden of production reverts back to the plaintiff, who must then show that the employer's reasons for the adverse employment action are pretext for discrimination.[27] An employer would be entitled to judgment as a matter of law if: (1) the record conclusively revealed some other, non-

18. Sperino, Et al.., Employment Discrimination A Context and Practice Casebook at 56 (2nd ed. 2014) (defining direct and circumstantial evidence and noting that direct evidence cases are rare).

19. *Id.*

20. *Id.* The qualifications must be the objective minimal qualifications unless a specific training is required for a position.

21. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (fn. 13 says these elements will differ from case to case depending on the facts and circumstances).

22. Brown v. Illinois Dep't of Natural Resources, 499 F.3d 675, 682 (7th Cir. 2007).

23. Elkhatib v Dunkin Donuts, Inc, 493 F3d 827, 831 (7th Cir 2007).

24. McDonnell Douglas Corp., 411 U.S. at 802-3.

25. *Id*. Adverse employment actions include failure to hire, termination, failure to promote, or demotion. Sperino, Et al., Employment Discrimination A Context and Practice Casebook 74 (2nd ed. 2014).

26. *McDonnell Douglas Corp*., 411 U.S. at 802-3.

27. *Id.* at 804.

discriminatory reason for the employer's decision; or (2) the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was an abundance of evidence showing discrimination did not occur.[28]

When an employer accounts for multiple motivating factors in its decision to fire or demote an employee, the proper framework comes from *Price Waterhouse v. Hopkins* and the 1991 amendments to Title VII.[29] In *Price Waterhouse v. Hopkins*,[30] the plaintiff, Ms. Hopkins, brought suit under Title VII alleging that the firm had discriminated against her by not making her a partner on the basis of her sex.[31] Ms. Hopkins was regarded as an excellent employee and even helped defendant secure a $25 million contract with the Department of Defense.[32] The lower court even pointed out that no other candidate for partnership with the firm had a similar work record.[33] However, Ms. Hopkins was alleged to have bad interpersonal skills and was unduly harsh with her fellow employees and staff.[34] Nonetheless, some of the partners reviewing Ms. Hopkins partnership candidacy reacted negatively towards her because she was a woman.[35] Some of the comments made by these partners referred to her as being "macho," that she "overcompensated for being a woman," and that she needed to take "a course at charm school."[36] Ms. Hopkins was told that if she wanted to improve her partnership chances, she should walk, talk, and dress more femininely, wear more jewelry, and style her hair.[37]

The District Court eventually found that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping.[38] The Court of Appeals affirmed the decision, but departed from the District Court's reasoning, holding that the employer needed to prove their case by clear and convincing evidence.[39]

A Supreme Court plurality disagreed and ruled that once a plaintiff has established that gender played a motivating part in an employment

28. *See Id.* at 792.
29. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); 42 U.S.C. § 2000e-2(m).
30. 490 U.S. 228 (1989).
31. *Id.* at 232.
32. *Id.* at 233.
33. *Id.* at 234.
34. *Id.* at 234-5.
35. *Id.* at 235.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 237.

decision, a defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[40] Further, it pointed out that "in the context of sex stereotyping, an employer who acts of the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[41]

Following the Supreme Court's decision in *Price Waterhouse*, the legislature passed the Civil Rights Act of 1991, which affirmed that the mixed-motives analysis was appropriate under Title VII but made some changes to the remedies available to plaintiffs.[42] The Act now provides limited remedies if the employer proves an affirmative defense.[43] Before the 1991 amendments, under the Supreme Court's ruling in *Price Waterhouse*, a plaintiff would get nothing if the defendant proved an affirmative defense.[44]

C. The Ninth Circuit's Jespersen Decision.

Jespersen v. Harrah's Operating Co.[45] was a case about appearance and grooming standards in the employment context. In this case, Ms. Jespersen worked as a bartender for defendant Harrah, a hotel casino, for over twenty years and had an exemplary record.[46] It was not until the year 2000 that defendant implemented a "personal best" grooming and appearance policy.[47] The policy contained appearance standards that applied equally to both sexes and included a standard black uniform.[48] The policy also contained some sex-differentiated appearance requirements, such as hair, nails, and makeup.[49] Bartenders and bar-backs working at Harrah had to adhere to additional guidelines.[50] The following guidelines applied to both sexes: jewelry, if issued, must be worn, simple jewelry was permitted, no large chokers, chains, or bracelets.[51] The guidelines also called for no faddish hairstyles or unnatural colors.[52] For male employees, their hair must not extend below the top of the shirt

40. *Id.* at 258.
41. *Id.* at 250.
42. PL 102–166, November 21, 1991, 105 Stat 1071; 42 U.S.C. § 2000e-2(m).
43. *Id.*
44. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
45. 444 F.3d 1104 (9th Cir. 2006).
46. *Id.* at 1107.
47. *Id*.
48. *Id.*
49. *Id*.
50. *Id.*
51. *Id*.
52. *Id*.

collar, ponytails were prohibited, hands and fingernails must be clean and trimmed, no colored nail polish was permitted, and no eye and facial makeup was permitted, among other things.[53] For female employees, hair had to be teased, curled, or styled everyday they worked, their nails had to be polished, makeup had to be worn and applied neatly in complementary colors, and lipstick had to be worn.[54]

Ms. Jespersen did not wear makeup on or off the job and stated that wearing it conflicted with her self-image and ability to perform her job as a bartender.[55] She even testified that the makeup requirement "affected her dignity and took away her credibility as an individual and as a person."[56] Unwilling to meet the makeup requirement, Ms. Jespersen left her employment with the defendant.[57] She then filed suit alleging that the "personal best" policy discriminated against women by subjecting them to terms and conditions of employment to which men are not, and requiring that women conform to sex-based stereotypes as a term and condition of employment.[58]

In response to the defendant's motion for summary judgement, Ms. Jespersen relied solely on her testimony to establish that the "personal best" policy caused unequal burdens on women compared to men.[59] The District Court granted the defendant's motion for summary judgement and Ms. Jespersen appealed.[60]

The Ninth Circuit affirmed the District Court's judgement.[61] Regarding Jespersen's claim that the makeup policy discriminated against women and not men, the court stated that sex-based differences in appearance standards alone without a showing of disparate effect does not create a prima facie case under *McDonnell Douglas*.[62] The court stated that appearance standards that impose different, but essentially equal, burdens on both sexes is not disparate treatment.[63] However, if a policy applies less favorably to one gender and those burdens are obvious from the policy itself, then disparate treatment is evident.[64] Finally, the court held

53. *Id.*

54. *Id.*

55. *Id.* at 1108.

56. *Id.*

57. *Id.* It is unclear whether she quit or if she was fired, on page 1107 the court says the "left her employment," but on page 1114 the dissenting judge says, "Harrah fired her."

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1109.

63. *Id.* at 1110. "[W]here . . . such [grooming and appearance] policies are reasonable and are imposed in an evenhanded manner om all employees, slight differences in the appearance requirements . . . have only a negligible effect on employment opportunities.

64. *Id.* at 1109.

that the settled law on grooming codes is not whether the policies between both sexes are different, but whether the policy imposed on the plaintiff creates an unequal burden for the plaintiff's gender.[65]

The court refused to take judicial notice of the fact that it takes more time and money for a woman to comply with the makeup requirement than it takes a man to comply with the short hair requirement,[66] which ultimately cost Jespersen her case.[67]

Regarding Jespersen's sex stereotyping claim, the Ninth Circuit differentiated the facts from the case to those from *Price Waterhouse v. Hopkins*.[68] The court noted the facts in *Jespersen* were different in that defendant's "personal best" policy did not single out Jespersen in the same manner that Ms. Hopkins was.[69] In *Jespersen*, the overall policy requires all bartenders to wear the same uniform and it is, for the most part, unisex.[70] Further, there was no evidence that the policy was enacted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.[71] Thus, the court concluded that summary judgment was properly granted.[72] However, the court noted that it did not preclude sex-stereotyping claims on the basis of dress or appearance codes, just that no evidence of stereotypical motivation was found here.[73]

The dissenting judges stated their belief that the policy was motivated by sex stereotyping and that Jespersen's termination was due to her sex.[74] The dissent noted that a policy containing sex-differentiated requirements affecting people of both genders does not excuse a particular requirement from scrutiny.[75] A refusal to consider the makeup requirement separately would allow "otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender."[76] Further, Judge Kozinski, dissenting, pointed out that the makeup policy was substantially more burdensome for women than for men in that purchasing and putting on makeup takes time and money, and that there was no similar male requirement.[77]

65. *Id.*
66. *Id.* at 1110.
67. *Id.* at 1111.
68. *Id.*
69. *Id.*
70. *Id.* at 1112.
71. *Id.*
72. *Id.* at 1113.
73. *Id.* at 1114-8.
74. *Id* at 1114.
75. *Id.* at 1116.
76. *Id.*
77. *Id.* at 1117.

D. The Sixth Circuit's Smith Decision.

In *Smith v. City of Salem*,[78] a transsexual plaintiff sued the City of Salem and various city officials for discrimination on the basis of sex.[79] The plaintiff worked for the City of Salem, Ohio, as a lieutenant in the Fire Department for seven years without any negative incidents.[80] The plaintiff, who is biologically and by birth a male, is a transsexual and has been diagnosed with Gender Identity Disorder ("GID").[81] After the plaintiff was diagnosed with GID, she began to express a more feminine appearance on a regular basis, including at work.[82] The plaintiff's co-workers started to notice the change and began making comments.[83] The plaintiff's supervisors, named defendants in this action, eventually met and discussed options on how to terminate the plaintiff.[84] At the meeting, defendants agreed to arrange for the Salem Civil Service Commission to require the plaintiff to undergo three separate psychological evaluations.[85] Defendants hoped that the plaintiff would either resign or refuse to comply.[86] If she refused to comply, defendants reasoned, it could terminate the plaintiff's employment for insubordination.[87]

One of the plaintiff's supervisors disagreed with the rest and labeled defendants' plan a "witch hunt."[88] This supervisor warned the plaintiff about the meeting's resolution, which prompted the plaintiff to seek counsel.[89] The plaintiff's counsel warned defendants about the legal repercussion of their decision.[90] Defendants suspended the plaintiff for a 24-hour period based on an alleged infraction of the city's policy.[91] At the hearing for the suspension, the commission upheld the suspension, which was eventually appealed.[92] The plaintiff then brought suit asserting sex discrimination under Title VII, among other claims.[93]

78. 378 F.3d 566 (6th Cir. 2004)

79. *Id.* at 567-8.

80. *Id.* at 568.

81. *Id.* The American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders. 576-582 (4th ed. 2000).

82. *Id.*

83. *Id.*

84. *Id.* at 569.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

The Sixth Circuit ruled that the plaintiff had established a Title VII prima facie case of discrimination.[94] Following this determination, the court relied on *Price Waterhouse* to determine whether the plaintiff properly alleged a claim of sex stereotyping.[95] The court noted that, under *Price Waterhouse*, discrimination because of "sex" includes gender discrimination[96] and emphasized 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."[97] With this in mind, the court found that the plaintiff had sufficiently pleaded claims of sex stereotyping and gender discrimination because of the allegations that her failure to conform to sex stereotypes concerning how a man should look and behave were the driving force behind defendants' actions.[98]

The court noted that "[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but-for the victim's sex."[99]

Fourteen years after its *Smith* decision, the Sixth Circuit reaffirmed its views on sex stereotyping in *EEOC v. R.G.*.[100] In that case, the court stated that "even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jespersen* or *Barker* to do so."[101] Further, the court noted that *Smith* and *Jespersen* are irreconcilable with one another because the Sixth Circuit's ruling in *Smith* reaches the opposite conclusion: that requiring women to wear makeup does, in fact, constitute improper sex stereotyping.[102] Finally, the court stated that *Jespersen's* incompatibility with *Smith* may explain why the Sixth Circuit has never endorsed it or cited to it, and why it should not be followed now.[103]

F. Bona Fide Occupational Qualification ("BFOQ").

A bona fide occupational qualification ("BFOQ") is a defense to employment discrimination that is available to employers.[104] This defense is very narrow, and it states that:

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94. *Id.* at 571.
95. *Id.*
96. *Id.*, *Price Waterhouse*, 490 U.S. at 250.
97. *Smith*, 378 F.3d at 572, *Price Waterhouse*, 490 U.S. at 251.
98. *Smith*, 378 F.3d at 572.
99. *Id.* at 575.
100. No. 16-2424, 2018 U.S. App. LEXIS 5720 (6th Cir. Mar. 7, 2018).
101. *Id.* at 21.
102. *Id.* at 22.
103. *Id.* at 23.
104. 42 USC §20002-2(e).

> [i]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupation qualification reasonably necessary to the normal operation of that particular business or enterprise.[105]

Initially, courts constructing a BFOQ standard required that an employer prove that "all or substantially all" protected members would be unable to fulfill the requisite job duties. For example, in *Weeks v. Southern Bell Telephone & Telegraph Co.*, an employer excluded women from positions requiring employees to lift more than thirty pounds.[106] The court rejected this policy because the employer could not show that almost all women were unable to lift thirty pounds.[107] The Fifth Circuit explained that "to rely on the bona fide occupational qualification exception, an employer has the burden of proving that it had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform, safely and efficiently, the duties of the job involved."[108]

Two years after establishing the "all or substantially all" test, the Fifth Circuit, in *Diaz v. Pan American World Airways, Inc.*, created another test, called the "essence of the business" test, to determine whether a BFOQ was properly established.[109] In that case, employer Pan American maintained a policy of exclusively hiring females for its flight attendant positions.[110] The court held that that "[d]iscrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."[111] The court ruled that females may be better suited to fulfill the required duties of the position, but that the essence of the business test was not fulfilled because transporting passengers safely from one place to another, the essence of the airline business, could be accomplished by males without seriously affecting the operation of an airline.[112]

In *Dothard v. Rawlinson*, the Supreme Court gave its express approval to both standards, but employers only need to successfully assert one of

105. *Id.*
106. 408 F.2d 228, 232-4 (5th Cir. 1969).
107. *Id.* at 235–36.
108. *Id.* at 235-6.
109. 442 F.2d 385, 388 (5th Cir. 1971).
110. *Id.* at 385.
111. *Id.* at 388.
112. *Id.*

them.[113] After the Supreme Court authorized the use of both analyses, courts began to employ both tests concurrently as they focus on different considerations. The essence of the business test considers whether the employee's desired trait is essential for the business to run successfully, while the all or substantially all test focuses on whether a class-based ban is the only feasible method of revealing those unable to perform the job.

Often, courts require a third prerequisite, mandating that defendants also show that no reasonable, less discriminatory alternative exists, especially in cases where privacy is at issue.[114] This third prerequisite is beyond the scope of this Article's argument.

The EEOC has also issued regulations pertaining to the use of the BFOQ defense.[115] For instance, employers cannot claim BFOQ when they refuse to hire a woman because of assumptions of the comparative employment characteristics of women,[116] stereotyped characterization of the sexes, or refusal to hire an individual because of the preferences of co-workers, the employer, or its clients.[117]

G. Scholarship Criticisms of Jespersen.

In 2006, an article titled *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards under Title VII*[118] criticized the *Jespersen* decision. Author William Miller had two main arguments. First, he argued that the unequal burdens approach used in *Jespersen* allows harmful discrimination caused by sex-differentiated grooming standards to persist as long as the discriminatory burden is balanced against a corresponding burden on the other gender.[119] Specifically, Miller noted that a strict adherence to the unequal burdens approach allows the most offensive sex discrimination to go unchecked so long as employees of the other gender are subjected to comparable time and cost burdens.[120] For instance, a grooming standard requiring women to wear sexually revealing outfits, while requiring men to wear business casual attire constitutes harmful discrimination, however, under a strict application of the unequal burdens test, the policy would not violate Title VII because it does not impose a

113. 433 U.S. 321, 333 (1977).

114. *See* Hardin v. Stynchcomb, 691 F.2d 1364 (11th Cir. 1982).

115. 29 C.F.R. § 1604.2(a).

116. *Id.* For example, the assumption of a higher turnover rate among women.

117. 29 C.F.R. § 1604.2(a).

118. William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C. L. Rev. 1357 (2006).

119. *Id.* at 1360.

120. *Id.* at 1361-2.

greater time or cost burden on one gender relative to the other.[121]

Second, Miller argued that the unequal burdens test is artificial because it fails to address the persistence of sex stereotypes, the real burden created by grooming standards.[122] Miller suggests that by weighing only time and cost burdens, courts ignore the feelings of degradation that accompany grooming standards based on harmful prejudices and stereotypes.[123] Under the unequal burdens test, harmful sex stereotypes go unchecked and continue to adversely impact employees because the test does not consider whether the grooming policy perpetuates harmful stereotypes.[124]

As an alternative to the unequal burdens approach, Miller suggests that courts apply *Price Waterhouse* to grooming standard cases to determine whether those standards perpetuate outmoded, archaic sex stereotypes that serve to disadvantage or stigmatize one gender.[125] After making this determination, he argues that courts should apply the unequal burdens test.[126]

III. ARGUMENT

This section is divided into five sub-sections. The first sub-section argues that the holding and reasoning in *Jespersen* is incompatible with the Supreme Court ruling in *Price Waterhouse*. The second sub-section argues that even if the "undue burdens" approach is compatible with *Price Waterhouse*, the "undue burdens" approach is flawed. The third sub-section argues that the "undue burdens approach" is not needed because an exception to sex discrimination already exists through the BFOQ defense. The fourth subsection argues that even if the "undue burdens" approach is correct, the result in *Jespersen* is not because it costs more money for women than for men to adhere to Harrah's policy. The fifth and final subsection offers some solutions for employers in their use of grooming codes and policies.

A. The "Undue Burdens" Test Used in Jespersen is Incompatible with Supreme Court Precedent.

In *Jespersen*, the Ninth Circuit held that grooming standards that impose different but equal burdens on both sexes does not violate Title

121. *Id.* at 1362.
122. *Id.* at 1360.
123. *Id.* at 1364.
124. *Id.* at 1365.
125. *Id.* at 1365-6.
126. *Id.* at 1366.

VII.[127] Harrah's policy prescribed the manner in which its employees were to carry themselves.[128] Men had to have short, natural hair, and no makeup, among other things.[129] On the other hand, women's hair had to be styled, nail polished was to be worn, and makeup was a requirement.[130] Ms. Jespersen challenged the makeup requirement, stating that she never personally wore it and that she felt demeaned every time she did.[131] Harrah would not excuse plaintiff from the makeup requirement, which led to Ms. Jespersen's termination.[132]

In rejecting Ms. Jespersen's sex discrimination claims, the Ninth Circuit differentiated this case from *Price Waterhouse* by pointing out that Harrah did not single out Ms. Jespersen in the same manner that the defendant in *Price Waterhouse* did with Ms. Hopkins because the policy in *Jespersen* was mostly unisex.[133] Recall that in *Price Waterhouse*, the sex discrimination was not a policy but the comments and promotion criteria the partners took into account when making a decision.[134] The Ninth Circuit also noted that it found no evidence that the policy was adopted to force women to conform to a stereotype.[135]

These findings and conclusions, however, are flawed and incompatible with the Supreme Court's ruling in *Price Waterhouse*. The Supreme Court in *Price Waterhouse* stated that discrimination because of "sex" includes gender discrimination and 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."[136] The defendant in *Jespersen* violated this language directly by requiring women to conform to the stereotype that to look professional, women require makeup. It does not make a difference that the policies at issue in both cases differ, what matters is that they are discriminatory "because of sex." The Ninth Circuit's "undue burdens" test is irrelevant in determining that Harrah discriminated against Ms. Jespersen because of sex. By requiring her to conform to a stereotype, Harrah violated Title VII.

The Sixth Circuit in *Smith* and later in *R.G.* was wise enough to recognize that the "undue burdens" approach is incorrect. In *Smith*, the court explicitly stated that requiring women to wear makeup is sex discrimination because it would not occur but for the employee's sex. In

127. Jespersen v. Harrah's Operating Co., 444 F.3d 1110 (9th Cir. 2006).

128. *Id.* at 1107.

129. *Id.*

130. *Id.*

131. *Id*. at 1108.

132. *Id.*

133. *Id.* at 1111-2.

134. *See* Price Waterhouse v. Hopkins, 490 U.S. 235 (1989).

135. *Jespersen*, 444 F. 3d at 1113.

136. *Price Waterhouse*, 490 U.S. at 251.

R.G., the Sixth Circuit confirmed this holding and stated that it would never cite to *Jespersen* and that other circuits should refrain from doing so.[137]

Thus, the undue burdens test used in *Jespersen* is inconsistent with *Price Waterhouse* because it is based on a harmful sex stereotype, which the Supreme Court explicitly prohibited.

B. The "Undue Burdens" Approach is Flawed.

The Ninth Circuit in *Jespersen* relied on the "undue burdens" test to hold that Harrah had not discriminated against Ms. Jespersen because of her sex.[138] The undue burdens test states that appearance standards that impose different but essentially equal burdens on both sexes does not violate Title VII.[139] However, this approach is flawed because it allows for sex discrimination to occur as long both sexes are affected evenly. For instance, if an employer required men to be over 200lbs and women to be under 120lbs because men should be bigger than women and women should be smaller than men, under a pure application of the undue burdens test, this would not be discriminatory despite its clear discriminatory nature. Under the undue burdens test, both sexes in this scenario are evenly affected in a negative manner. Thus, even if the policy may seem discriminatory, the undue burdens test would find that this policy would not because both sexes are evenly affected.

The purpose of Title VII is to rid the workplace of all types of discrimination.[140] Under the undue burdens approach, discrimination would be allowed to continue as long as it is equal on both sexes. This result is inconsistent with the purpose of Title VII. However, as noted above, applying the *Price Waterhouse* approach would solve this problem. If an employer maintains the weight requirement policy stated above, neither of the weight restrictions would be allowed because they are based on sex-stereotypes and therefore discriminate against employees "because of sex."

Further, as Miller pointed out in his article, the unequal burdens approach fails to address the persistence of sex stereotypes by only weighting time and costs and ignoring the degrading and discriminatory prejudices that stereotypes have.[141] By only focusing on whether a

137. EEOC v. R.G., No. 16-2424, 23, 2018 U.S. App. LEXIS 5720 (6th Cir. Mar. 7, 2018).

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

139. *Id.*

140. *See* 42 U.S.C. § 2000e-2.

141. William M. Miller, Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII, 84 N.C. L. Rev. 1357, 1367 (2006).

grooming requirement is more expensive or time consuming on one sex against the other, courts that follow the undue burdens approach miss the whole point of Title VII, which is to get rid of workplace discrimination. The undue burden test is flawed because it allows workplace discrimination to occur so long as it is evenly distributed among the sexes.

C. Employers with a "Real" Reason to Discriminate Already Have an Avenue to Do So.

Title VII forbids employers from discriminating on the bases if age, race, sex, or place of origin.[142] An exception to this statute is the bona fide occupational qualification defense ("BFOQ"). Under this narrow defense, an employer is allowed to discriminate against an employee on the basis on his religion, sex, or national origin.[143] For example, the Supreme Court in *Dothard* stated that an employer could successfully plead a BFOQ defense if the essence or central mission of its business would be undermined by hiring members of both sexes and if there is no factual basis for believing that all or substantially all persons of one gender could not perform the job duties safely and efficiently.[144]

Applying both relevant BFOQ tests to the facts in *Jespersen* leads to the conclusion that the BFOQ defense was not available to Harrah. Harrah ran a casino in Nevada and employed Ms. Jespersen as a bartender.[145] For years, Ms. Jespersen was regarded as being excellent at her job.[146] Problems arose, however, when Harrah began to implement a grooming policy which, in part, required women to wear makeup and men to keep their hair short.[147]

Under the "all or substantially all" test, Harrah would need to show that all or substantially all protected members would be unable to fulfill the requisite job duties without wearing the makeup. This variation of the test is appropriate as it attempts to excuse Harrah's discriminating policy. Harrah is not saying that only men or only women can do this job. Harrah, through their overall policy, is saying that, as part of the polished look it wants its employees to display, women need to wear makeup.[148] As noted above, *Price Waterhouse* held that employers cannot discriminate against employees based on a stereotype.[149] The stereotype at issue here is that

142. 42 U.S.C. § 2000e-2(e). Note that race is not included.

143. *Id.*

144. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

145. Jespersen v. Harrah's Operating Co., 444 F.3d 1107 (9th Cir. 2006).

146. *Id.*

147. *Id.*

148. *Id.*

149. Price Waterhouse v. Hopkins, 490 U.S. 251 (1989).

women need to wear makeup to look polished or professional. Given that Ms. Jespersen satisfactorily performed her job as a bartender and that she was well liked by customers,[150] it is impossible for Harrah to successfully assert that Ms. Jespersen, and all other female employees, need to wear makeup to fulfill the requisite job duties. Thus, the BFOQ defense under the all or substantially all test is not available to Harrah.

Applying the "essence of the business" test with a slight variation to make the test fit Harrah's makeup requirement yields the following: discrimination based on sex stereotype is valid only when the essence of the business operation would be undermined by adhering to that stereotype. Harrah would again be unable to make this showing. The essence of Harrah's business is to run a casino.[151] Bartenders are a key component of that business as guests frequently consume alcohol when they gamble. It does not follow, however, that Harrah's makeup requirement is essential to the operation of a casino or bar. The main function of those business components is to serve customers. Ms. Jespersen had been a good bartender for Harrah for twenty years and had been regarded as an exemplary employee.[152] Her employment was not an issue until Harrah implement the makeup requirement.[153] Because Ms. Jespersen was regarded as an exemplary employee prior to the makeup requirement, it would be nearly impossible for Harrah to successfully argue that the makeup requirement is essential to its business. Therefore, the essence of the business defense would not be available to Harrah.

Given the existence of the BFOQ defense to employee discrimination, it is unnecessary, and contrary to legislative intent, to have the court-created undue burdens tests as well. By creating the BFOQ, the legislature gave an employer a route to "legal" discrimination.[154] Had the legislature intended to create another avenue to "legal" discrimination, they would have explicitly done so. However, the legislature did not. The intent of Title VII was to rid discrimination from places of employment.[155] The BFOQ defense was carved out for the businesses that cannot function without some type of necessary discrimination.[156] The BFOQ is a very narrow defense, further highlighting the legislature's concerns with allowing workplace discrimination. Why, then, would it be permissible to discriminate on the basis of sex if the discrimination does not create an undue burden on one sex? It is clear that men and women are anatomically

150. *Jespersen*, 444 F. 3d at 1107.

151. *Id.*

152. *Id.*

153. *Id.* 1108.

154. *See* 42 U.S.C. § 2000e-2(e).

155. 42 U.S. Code § 2000e-2.

156. *See* 42 U.S.C. § 2000e-2(e).

different. However, a functioning workplace does not need to adhere to this difference for it to run well. This is evidenced in Harrah's own business, where Ms. Jespersen was an exemplary bartender without any major issues.[157] Her job performance and her relationship with Harrah only deteriorated after the makeup policy was incorporated.[158] If anything, there is a strong argument that Harrah's makeup requirement hurt Harrah's business as it lost a well-qualified and exemplary employee.

In conclusion, the legislature enacted Title VII to remove discrimination from the workplace. In doing so, it realized that some businesses needed to be able to discriminate in order to operate properly and therefore created the BFOQ defense. It does not follow then, that the legislature intended businesses to discriminate against their employees by burdening both sexes. The undue burdens test is a judicially-created test and is widely used by some circuit courts. Its use is perfectly acceptable if the burdens placed on the sexes are not discriminatory nor based on a stereotype. However, when the burdens placed on each sex are based on stereotypes, as is the case in *Jespersen*, the undue burdens test runs afoul of Title VII and the BFOQ defense. Finally, the undue burdens test also creates an avenue towards discrimination not contemplated by the legislature.

D. Jespersen was Incorrectly Decided Under the Undue Burdens Approach.

Even if, in the future, the Supreme Court rules that the undue burdens approach is legal discrimination, the Ninth Circuit still wrongly decided *Jespersen*. In *Jespersen*, Ms. Jespersen decided to not bring forth evidence on how the makeup requirement placed an undue burden upon her.[159] Ms. Jespersen also failed to provide evidence suggesting that Harrah's motivations were to stereotype the women bartenders.[160] In hindsight, this was a fatal mistake. Whether this was due to poor lawyering or Ms. Jespersen's own faulty judgment is unclear. What is clear, however, is that had she provided some evidence on either of these issues, she might have had an easier time convincing the court that Harrah's policy was discriminatory. Instead, Ms. Jespersen opted to rely solely on evidence that she had been a good bartender and that she had personal objections to complying with the policy.[161]

Ms. Jespersen did ask the court to take judicial notice that it takes more

157. *Jespersen*, 444 F. 3d at 1107.
158. *Id.*
159. *Id.* at 1108.
160. *Id.*
161. *Id.*

time and it costs more money for women to comply with the makeup requirement than it does for men to comply with the hair length requirements.[162] Perhaps Ms. Jespersen assumed that the court would grant such request because the difference between the requirements is evident. It does not take an expert to conclude that it costs more time and money for the average female to purchase and put on makeup than it takes for an average male to get a haircut. For instance, fashion magazine *People* reports that the average woman spends about $15,000 on makeup in their lifetime.[163] Though this figure highlights the costs for women who voluntarily wear makeup, it also shows that the "average" user spends a significant amount of money on makeup. Further, data from a mobile payment company called "Square" shows that the average haircut for men costs $28 nationwide, while the average haircut for women costs $44.[164] Even assuming that men cut their hair more often than women do, under Harrah's policy, a woman has to bear the costs of both her more expensive, but less frequent hair-cut and the cost and time associated with purchasing and putting on makeup. Whereas men only need to comply with the less costly, more frequent hair-cut requirement.

Regardless of the statistics or of the self-evident difference in the policy's requirements, the Ninth Circuit noted that making this determination was not appropriate under the judicial notice doctrine.[165] The court stated that judicial notice is reserved for matters "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[166] The court stated that the time and cost of makeup and haircuts did not fit in either category and that judicial notice will not be used to cure Ms. Jespersen's failure to provide the trial court with relevant evidence regarding the time and cost of makeup and haircuts.[167]

The Ninth Circuit relied on its own judicial notice criteria of "matters generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[168] Under either, it is still self-evident that it takes more time and more money for women to comply with Harrah's policy than it does for men.

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162. *Id.* at 1110.

163. Colleen Kratofil, *Can You Guess How Much a Woman Spends on Makeup In Her Lifetime*, (Mar. 30, 2017), People, http://people.com/style/how-much-does-a-woman-spend-on-makeup/.

164. Julie Zeveloff, *This Map Shows What a Haircut Costs Around the US*, (Mar. 3, 2014), Business Insider, http://www.businessinsider.com/haircut-cost-around-us-map-2014-3.

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

166. *Id.*

167. *Id.*

168. *Id.*

Judge Kozinski, dissenting in *Jespersen*, pointed out that the policy is more burdensome for women than it is for men. His main concern was "by how much?"[169] Judge Kozinski acknowledged that Ms. Jespersen failed to provide evidence and that it would have been a tidier case had she done so. He also stated that there is no doubt that putting on makeup requires more time and money.[170] He commented, "[y]ou don't need an expert witness to figure out that [face powder, blush, mascara and lipstick] don't grow on trees,"[171] and concluded that the court could and should have taken judicial notice of these facts.

In sum, even under the undue burdens approach, the Ninth Circuit wrongly decided *Jespersen* because Harrah's policy clearly burdens women more than men. Women not only must keep their hair styled but they also have to purchase and wear makeup, while men only have to keep their hair short. Also, there is no equivalent male requirement. As Judge Kozinski noted, the court should have taken judicial notice of these facts. Had it done so, it would have found that Harrah's policy burdened females more than males and therefore violating Title VII, even under the undue burdens approach.

E. Proposed Solutions to Appearance and Grooming Codes.

Given the different approaches the circuit courts apply to dress and grooming codes, employers can easily run afoul of Title VII if they base their dress and grooming policies on sex stereotypes. One common sense solution is to make dress and grooming policies 100% sex neutral. For instance, Harrah could have made a policy in which it describes what a polished employee looks like without referencing sex. Harrah could issue unisex standard uniform and require all employees to be "clean and polished." It could say that hair is supposed to be kept "neat and combed" and that nails should be clean. It does not need to state sex specific requirements as it did in *Jespersen.*

If Harrah really believed that the make-up requirement was essential to its business, then it can make wearing makeup a requirement for all bartender employees, male and female alike. Though it might seem odd to require men to wear makeup, men's use of makeup is not uncommon as male news reporters and other TV personalities use makeup while still maintaining a polished and professional look. Requiring all bartenders to wear makeup does not violate Title VII under the undue burdens approach or the *Price Waterhouse* approach. Because the makeup requirement is a burden placed on both sexes, it would not place an undue burden on one

169. *Id.* at 1116.
170. *Id.* at 1117.
171. *Id.*

sex. Similarly, because the employer is not basing the makeup requirement on the stereotype that women ought to wear makeup, and by requiring every bartender to wear it, the employer would not be acting based on sex or a sex stereotype.

Another solution would be to first apply the reasoning in *Price Waterhouse* and then use the undue burdens test. In his article, William Miller details this approach.[172] He argued that by using the two-prong standard, courts will be able to differentiate grooming standards based on harmful sex stereotypes from benign sex-differentiated grooming standards.[173] He provided the example of men being required to wear suits.[174] It is a stereotype that professional men are to wear suits. Traditionally, this attire is worn by men to convey confidence and command respect. While clearly based on a sex specific stereotype, this requirement does not demean or stigmatize those abiding by it. On the other hand, an appearance standard requiring women to wear skirts may be based on the stereotype that women should have sex appeal.[175] Unlike the suit requirement for men, the skirt requirement is based on a sex stereotype that is harmful and hardy benign.

In the end, whether it's through neutral policy or through a two-prong approach using both the *Price Waterhouse* language forbidding discrimination based on a stereotype and the undue burdens test, solutions do exist. Until either the legislature or the Supreme Court clarifies the appropriateness of the undue burdens, employers should be mindful of the potential legal consequences grooming and appearance policies can yield.

IV. CONCLUSION

The Ninth Circuit's decision in *Jespersen* is flawed in multiple ways. First, it's reliance on the undue burdens test is inconsistent with *Price Waterhouse*, a Supreme Court decision with expressly forbid sex discrimination based on harmful sex stereotypes. In *Jespersen*, defendant Harrah's policy requiring women to wear makeup was based on the harmful stereotype that women need makeup to look polished and professional.

Second, the undue burdens test itself is flawed because it allows for sex discrimination to occur as long both sexes are affected evenly. This result is in direct conflict with Title VII, which sought to eliminate discrimination from the workplace. Title VII created a very narrow exception, allowing employers to discriminate through the bona fide

172. *Id.* at 1366-7.
173. *Id.* at 1366.
174. *Id.* at 1367.
175. *Id.*

occupational qualification defense ("BFOQ"). The defendant in *Jespersen* would not be able to successfully plead any variation of the BFOQ as their makeup requirement is not an essential function of their business. Ms. Jespersen worked for the defendant for over twenty years, prior the makeup requirement, in an exemplary manner and without issues. The makeup requirement did not enhance the business or Ms. Jespersen's performance. In fact, the makeup requirement hurt Harrah's business as it lost a very good employee. In *Jespersen*, the undue burdens test functioned as another avenue to discrimination, something Title VII does not condone given the narrowness of the BFOQ defense.

Further, even assuming that the undue burdens test is consistent with Title VII and with *Price Waterhouse*, the Ninth Circuit's decision in *Jespersen* is still flawed because the makeup requirement does place an undue burden on female employees. The Ninth Circuit ruled that Ms. Jespersen was not entitled to judicial notice on the fact that it costs women more money and more time to comply with the makeup requirement than it does for men to comply with the short hair requirement. However, judicial notice should have been granted given how clear and obvious the discrepancies between the requirements are. A dissenting judge in *Jespersen* agreed with this proposition, stating that while the case would have been tidier with evidence, taking judicial notice on the cost and time discrepancies was well within the court's ability. The makeup requirement clearly placed an undue burden on female employees and the court should have granted judicial notice despite Ms. Jespersen's lack of evidence.

Given the problems that the undue burdens approach can yield, employers would be wise to either enforce neutral grooming and appearance policies or to perform preliminary checks for harmful stereotypes before placing a burden on any sex. However, until the Supreme Court takes a case dealing with undue burdens test and its compatibility with Title VII, or the legislature clarifies its intent, employers in most circuits will be allowed to discriminate based on stereotypes as long the opposite sex has a different, but equal, burden placed on them. As society continues to seek workplace equality, the issues presented in cases like *Jespersen* will continue to gain relevance in the public's eye. Perhaps a clear answer is on the horizon.