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EMERGING ISSUES IN TITLE VII AND EMPLOYMENT APPEARANCE CODES

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ABSTRACT

Although employers have considerable rights to regulate employee appearance, their policies must comply with Title VII. Emerging fashion trends in tattoos, hairstyles, and body piercing present potential challenges to such codes. An analysis of Title VII challenges to employer dress codes is presented. Differences between the application of Title VII to appearance codes and other equal employment issues are noted. The effect of current law on emerging issues is discussed and recommendations for legal compliance are made.

NATURE OF THE PROBLEM

Workplace dress and appearance is in a period of extensive change [1]. Fashion trends often make it difficult to distinguish the type of work one performs from one's appearance. A popular fashion trend is to reduce formality through "casual dress days" or relaxed appearance requirements [2]. This trend is not expected to create legal cases in and of itself, but it may affect employers who have casual days, yet seek to enforce more stringent dress codes at other times.

A more extreme trend is that more and more Americans of both sexes are sporting visible tattoos and body piercing. "No longer merely the marks of Hell's Angels or punk rockers, tattoos and, increasingly, body piercing are entering the mainstream with everyone from supermodels to sports stars to college students taking part in the new body art" [3, p. 347]. Tattoos have been seen "in television commercials, on lawyers in courtrooms, or even peeking out of waiters' sleeves

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at renowned New York City restaurants" [3, p. 347]. So popular and widespread are tattoos, that some parlors define their market niche as "business-class people" [3, p. 347]. While body piercing hasn't yet completely gone mainstream, it has begun to attract a diverse clientele, having replaced tattoos and even hairstyles as the latest expression of individuality. The visible results of such widespread body piercing and tattooing have now made their way into every shopping mall and many workplaces in America.

Fashionable hairstyles have also become issues as they have recently come under scrutiny, particularly in educational institutions. At Rickover Junior High School in a Chicago suburb, school dress code policy prohibits "braids, beads, cornrows, dreadlocks, hair coloring, and colored hair extensions" [4]. Under this policy, a student who put her hair in a French roll was disciplined because officials at the school "thought she looked like a gang member" [4]. She and other African-American pupils believe braided hairstyles represent an important cultural heritage and they view these policies as discriminatory. The issues are similar when employers adopt written policies that specifically prohibit braided hairstyles.

As these emerging forms of self-expression reach the workplace they cannot be expected to be greeted with universal enthusiasm by employers. A possible response is the application of employer appearance codes. Employers may have either written dress codes or enforce appearance standards on an ad hoc basis.

Courts have long given protection against Title VII discrimination based on immutable characteristics associated with protected category status. However, personal appearance in dress and grooming is not typically an immutable characteristic of race, sex, national origin, or religion. Some people constantly create and change their "look" in response to (among other influences) personal statements, fashion trends, and workplace requirements. The leisure suits, sideburns, and Afro hairstyles of a former era are replaced in continual transition by tattoos, body piercing, and "casual dress days" in the current era.

For the many employers for whom self-expression in personal appearance is not always welcome, appearance codes limiting the way employees may dress or groom are promulgated. These codes may be motivated by either of two purposes: 1) perceived business advantage, or 2) employer personal preference. In the private sector, in the absence of a union certified as the bargaining representative for employees, these conditions of employment may be imposed unilaterally and are enforceable at the employer's will. They need not be sensible, fair, or even business-related, nor do they require the input or consent of the employees. As a matter of practicality and perceived equity, they would presumably work better if they possessed the aforementioned characteristics, but it is not legally required. An employer is within its legal rights to promulgate an appearance code without benefit of employee input that may not reflect employee preferences and, in fact, be bitterly opposed by them. Interestingly, it matters almost not at all whether an employer's appearance code was promulgated for

business advantage or whether it is merely a reflection of the employer's personal preference in appearance. Either motivation is acceptable unless it violates Title VII. Contrary to widespread employee belief, employer work rules that do not violate Title VII need not be job-related to be enforceable. It is only in situations where Title VII rights have allegedly been violated that employers need defend themselves legally at all. This defense may sometimes incorporate business necessity or advantage.

Therefore, employees are without legal recourse to challenge such a code unless it violates Title VII of the Civil Rights Act of 1964 prohibiting discrimination on the basis of (among other characteristics) race or sex. Because many appearance codes do, however, attempt to regulate aspects of employee appearance that are related to race or sex, a number of significant legal issues have been raised.

This article presents an analysis of case decisions that form the parameters for legal dress codes. We also make recommendations for permissible ways to regulate employee appearance.

METHODOLOGY

To understand the current status and the past history of case law regarding the influence of Title VII on employer appearance requirements, a search of the *Fair Employment Practice Cases* was undertaken. The case indices entries for grooming and appearance under both race and sex discrimination (religion was excluded because of the separate constitutional issues it raises). Entries under both of these categories were examined for all available volumes (1-69). Nearly sixty cases involving questions of Title VII limitations on dress or appearance codes were found dating from 1972 to 1993 (see Table 1). These cases were examined and evaluated for their issues, analysis, conclusions, and outcomes.

EXAMINATION OF LEGAL STATUS OF EMPLOYER APPEARANCE CODES

Appearance codes have traditionally regulated clothing, hair length for males, hair styles for both sexes, maximum weight requirements, and men's facial hair. Sometimes dress codes require wearing specific attire. In other cases they require attire that comports with promulgated guidelines. In some instances, women have complained of having to wear clothing that was too revealing. Employers generally oppose extreme fashion statements or nontraditional attire. It does not appear that cases ever originate in which an employee has been in trouble for being too far behind the times.

Of the *Fair Employment Practices Cases* located, 61 percent dated from the 1970s, 31 percent were from the 1980s, and 9 percent were from the 1990s (see Table 2). The topic of concern changed with the decades. Cases from the

Table 1.

Case	Policy Issue	Conclusion	Outcome
Baker v. California Land Title Co. CA 9 1974 8 FEP Cases 1313	Employer forbids male, but not female employees, to wear long hair results in discharge for failure to comply	Discharge for failure to comply with policy does not constitute discrimination based on sex	Policy does not violate Title VII and discharge is permissible
Fagan v. National Cash Register CA DC 1973 5 FEP Cases 1335	Employer forbids long hair for male employees results in discharge for failure to comply	Male employee's duties included visiting employer's customers; employer's action does not constitute sex discrimination	Policy does not violate Title VII and discharge is permissible
Dodge v. Giant Foods Inc. CA DC 1973 6 FEP Cases 1066	Employer's grooming policies on hair not applicable to female employees results in discharge or unfavorable assignments	Discharge for violation of grooming policies does not constitute sex discrimination	Policy does not violate Title VII and discharge is permissible
Brown v. D.C. Transit Systems, Inc. CA DC 1975 10 FEP Cases 841	Employer regulations forbid long hair and require male employees to be clean shaven results in discharge of black male bus drivers	Discharge for violation of grooming policies does not constitute discrimination	Policy does not violate Title VII and discharge is permissible
Aros v. McDonnell Douglas Corp. DC Calif 1972 5 FEP Cases 397	Employer dress and grooming policies have different allowable hair lengths for male and female employees	Policy must be equally applied unless BFOQ can be shown	Policy is unlawful
Boyce v. Safeway Stores, Inc. DC DC 1972 5 FEP Cases 285	Supermarket policy regarding hair length and facial hair results in discharge of male food clerk	Grooming standards do not constitute stereotyping, but rather the legitimate desire of the company to appeal to customers and is a valid BFOQ; Title VII does not require a "unisex society"	Policy does not violate Title VII and discharge is permissible

Wells v. Aetna Casualty DC DC 1973 6 FEP Cases 826	Employer's unwritten grooming policy regarding hair length results in discharge of two male employees	Standard of "neat and conservative" applied to both men and women; citing *Fagan v. National Cash Register,* policy is not discriminatory	Policy does not violate Title VII and discharge is permissible
Laffey v. Northwest Airlines DC DC 1973 6 FEP Cases 902	Employer's policy forbids female flight attendants from wearing glasses with no similar policy for men	Policy is unequally applied to males and females	Policy violates Title VII
Rafford v. Randle Eastern Ambulance Service, Inc. DC Fla 1972 5 FEP Cases 335	Policy forbidding facial hair results in discharge of male employees	Policy does not discriminate against all men, just men who refuse to shave, as such it is not a Title VII issue	Policy does not violate Title VII and discharge is permissible
Morris v. Texas & Pacific Ry. Co. DC La 1975 9 FEP Cases 81	Employer has policy on hair length for men without similar one for women	Citing case law, policy does not constitute sex discrimination, no need to analyze whether or not a BFOQ exists	Policy does not violate Title VII
Bujel v. Dorman's Inc. DC Mich 1974 8 FEP Cases	Employer has policy on hair length for men that is different than one for women results in discharge of male employee	Discharge for violating grooming code is not sex discrimination	Policy does not violate Title VII and discharge is permissible
Wamsganz v. Missouri Pacific RR Co. DC Mo 1975 10 FEP Cases 337	Employer grooming code for hair and mustache results in discharge of male employee	Discharge for violating grooming code is not sex discrimination	Policy does not violate Title VII and discharge is permissible
Jahns v. Missouri Pacific RR Co. DC Mo 1975 10 FEP Cases 338	Employer grooming code for hair and mustache results in refusal to allow employee to work until he got haircut	Grooming rule for men is not sex discrimination	Policy does not violate Title VII

Table 1. (Cont'd.)

Case	Policy Issue	Conclusion	Outcome
Knott v. Missouri Pacific RR Co. DC MO 1975 10 FEP Cases 339 CA 8 1975 11 FEP Cases 1231	Employer policy limits hair length of men, but not of women	Personal grooming policy applicable to all employees does not constitute sex discrimination	Policy does not violate Title VII
Roberts v. General Mills, Inc. DC Ohio 1971 3 FEP Cases 1080	Employer has rule that men must wear hat and women must wear hairnet results in discharge of male because his hair was too long for hat	Rule classifies employees in ways that deprive them of job opportunities and is a stereotype	Employee maintains right to cause of action
Dripps v. United Parcel Services of Pennsylvania, Inc. DC Pa 1974 8 FEP Cases 1315	Employer rule forbidding beards results in requirement to shave	Even though only men can grow beards and that makes it an issue of sex, there is a BFOQ for the policy	Policy does not violate Title VII
Thomas v. Firestone Tire and Rubber Co. DC Tex 1975 10 FEP Cases 692	Employer grooming policy results in discharge of male employee who refused to shave off mustache and sideburns	Policy is equally applied on basis of race; facial hair is not an immutable characteristic of race or sex	Policy does not violate Title VII and discharge is permissible
Longo v. Carlisle DeCoppet & Co. CA 2 1976 12 FEP Cases 1668 (reversing DC NY 1975; 12 FEP Cases 221)	Employer policy requiring short hair for men, but not women results in discharge of male employee	It is well established that such a policy does not violate Title VII (citing previous cases)	Policy does not violate Title VII and discharge is permissible

Earwood v. Continental Southeastern Airlines CA 4 1976 14 FEP Cases 694	Employer has sex-differentiated hair length regulation	So long as policy is not pretext for discrimination, it does not contravene ban on sex discrimination	Policy does not violate Title VII
Jarrell v. Eastern Air Lines, Inc. CA 4 1978 17 FEP Cases 951 (affirming DC Va 1977; 14 FEP Cases 799)	Employer maintains weight program for flight attendants	Weight policies are equally applied and nothing inherent in womanhood makes the standard more difficult for women to comply	Policy does not violate Title VII
Barker v. Taft Broadcasting Co. CA 6 1977 14 FEP Cases 697 (affirming DC Ohio 1975; 11 FEP Cases 851)	Employer policy prohibiting long hair for men but not for women results in discharge of male employee	Individual hair length of men has a "negligible" relationship to the purposes of Title VII	Policy does not violate Title VII
Jenkins v. Blue Cross Mutual Hospital Insurance Co. Inc. CA 7 1976 13 FEP Cases 52	Denial of promotion due to alleged "Afro hairstyle"	Application of grooming requirements may be scrutinized in light of general allegations of discrimination	Complainant may proceed as class action
Carroll v. Talman Federal Savings & Loan Assn. of Chicago CA 7 1979 20 FEP Cases 764 (reversing DC Ill 1978; 17 FEP Cases 215)	Employer policy requires female tellers to wear "career ensemble" uniforms while permitting male employees in same positions to wear business attire	Policy differentiates on the basis of sex	Policy violates Title VII

Table 1. (Cont'd.)

Case	Policy Issue	Conclusion	Outcome
Fountain v. Safeway Stores, Inc. DC Calif 1975 13 FEP Cases 25 CA 9 1977 15 FEP Cases 1493	Employer discharged male employee for failure to wear a tie	Employer has legitimate interest in appearance of employees and requirement does not place undue burden on employee	Policy does not violate Title VII
DeSantis v. Pacific Telephone & Telegraph CA 9 1979 19 FEP Cases 1493	Employer discharged male employee for wearing earring	Questions of effeminacy are not with the purview of Title VII	Policy does not violate Title VII
Allen v. United Parcel Service, Inc. DC Calif 1977 14 FEP Cases 888	Employer policy requiring employees to have hair above a certain length results in discharge of female employee	Despite claim that policy has disparate impact on females, general rule is that hair policies are not Title VII violations	Policy does not violate Title VII
Bertulli v. First National Stores, Inc. DC Mass 1979 20 FEP Cases 1527	Employer grooming policy concerning beards results in suspension of male employee for refusing to shave	Despite differences between male and female grooming code, such a policy is not barred by Title VII	Policy does not violate Title VII
Druia v. Delta Airlines, Inc. DC Mich 1976 13 FEP Cases 1167	Employer grooming policy results in suspension and eventual discharge of male employee who refused to cut hair	Grooming standards applied to males and females equally stringently	Policy does not violate Title VII
Hearth v. Metropolitan Transit Comm. DC Minn 1977 18 FEP Cases 329	Employer hair grooming policy has different standards for men and women	Employee does not prove cause of action under Title VII by demonstrating different policies	Policy does not violate Title VII

Lanigan v. Bartlett & Co. Grain DC Mo 1979 19 FEP Cases 1039	Employer policy forbidding female employees in executive portion of office from wearing pantsuits results in discharge of female employee	Employer policy relates to legitimate business interests, does not impermissibly restrict job opportunities, and allegations of stereotyping are a matter of opinion	Policy does not violate Title VII
Purvine v. Boyd Coffee Co. DC Ore 1976 13 FEP Cases 1015	Employer dress code presents difficulty in compliance for female employee who is pregnant	Dress code is strictly enforced for men and women, applied uniformly to all employees and is not a violation of Title VII	Policy does not violate Title VII
Kearney v. Safeway Stores, Inc. DC Wash 1975 14 FEP Cases 55	Employer no-beard policy results in discharge of male warehouse employee	No-beard policies do not violate Title VII	Policy does not violate Title VII
Gerdom v. Continental Airlines, Inc. CA 9 1982 30 FEP Cases 235 (rvs, rem 18:1118)	Employer appearance policy regarding weight applies only to an all female job grouping resulting in suspension of female employee	Policy is *prima facie* violation of Title VII; only purpose of policy was to have attractive female flight attendants and this is not a legitimate non-discriminatory reason	Policy violates Title VII; suspension is unlawful
Marentette v. Michigan Host Inc. DC Mich 1980 24 FEP Cases 1665	Employer requires female employees to wear sexually provocative uniforms	Sexually provocative dress code that subjects persons to sexual harassment may violate Title VII	Action is moot because uniforms are no longer required and no other relief was sought
EEOC v. Clayton Federal Savings and Loan DC Mo 1981 25 FEP Cases 841	Employer policy requires female, but not male employees, to contribute to the purchase of uniforms	Policy is *prima facie* violation of Title VII but employer has right to attempt to show BFOQ	Burden shifts to employer to demonstrate BFOQ
Miller v. Missouri Pacific Ry. Co. DC Mo 1976 26 FEP Cases 862	Employer has policy limiting hair length of men, but not women	Although unwritten, policy is not vague or arbitrary	Policy does not violate Title VII

Table 1. (Cont'd.)

Case	Policy Issue	Conclusion	Outcome
EEOC v. Sage Realty Corp. DC NY 1980 22 FEP Cases 1660	Employer required female lobby attendant to wear sexually revealing uniform	Employer's prerogative to impose reasonable grooming and dress requirements does not allow it to require sexually revealing attire; no BFOQ	Policy violates Title VII
Blowers v. Lawyers Cooperative Publishing Co. Inc. DC NY 1981 25 FEP Cases 1425	Employer required female employees to wear coordinated tunic top or jacket more detailed than standards for male employees	No proof that adherence to these standards affected job opportunities or ability to perform	Policy does not violate Title VII
McConnell v. Mercantile National Bank of Dallas DC Tex 1975 26 FEP Cases 902	Employer unwritten grooming code results in discharge of male employee for having hair that touches eyes, ears, or collars	Does not affect job opportunities and is not associated with an immutable characteristic	Policy does not violate Title VII and discharge is lawful
EEOC v. Greyhound Line, Inc. CA 3 1980 (rvs, rem, 21:358) 24 FEP Cases 7	Employer has rule prohibiting those with beards to have jobs working with the public resulting in a denial of transfer	Title VII's purpose was to outlaw racial discrimination and wearing beards is not a characteristic associated with race; failure to demonstrate PFB has disproportionate impact	Policy is valid
EEOC v. Trailways, Inc. DC Colo 1981 27 FEP Cases 801	Employer has "no beard" rule that excludes 25% of black male job applicants (because of PFB), but less than 1% of white male applicants	PFB is a physical characteristic associated with race	Policy violates Title VII
Carswell v. Peachford Hospital DC Ga 1981 27 FEP Cases 698	Employer's conservative dress policy results in discharge of employee for refusing to remove beads from her braided hair	Grooming policy is not arbitrary and there is no evidence of adverse impact	Policy does not violate Title VII

Rogers v. American Airlines, Inc. DC NY 1981 27 FEP Cases 694	Company policy prohibits "all braided" hairstyle	Although such a hairstyle is associated with racial identity, it is not an immutable characteristic. Policy is administered equally without regard to race.	Policy does not violate Title VII
Police Officers for Equal Rights v. Columbus DC Ohio 1985 42 FEP Cases 1752	Employer no-beard policy excludes disproportionate number of black males because of PFB	No business necessity to require no-beards for those suffering from PFB	Policy violates Title VII, employer must allow employees suffering from PFB to be exempt from clean shaven requirement
Bellissimo v. Westinghouse Electric Corp. CA 3 1985 37 FEP Cases (reversing 34 FEP Cases 1498)	Employer suggests that female attorney "tone down" her attire	This suggestion does not constitute evidence of discriminatory animus because employer consistently sought to maintain conservative dress style	Employer actions do not violate Title VII
Andre v. Bendix Corp. CA 7 1985 38 FEP Cases 1819 (vac, rem 34:1339)	Employer's policy requiring female supervisor to dress like male supervisors results in discharge of female supervisor	Policy is not discriminatory, even though she was singled out	Policy does not violate Title VII
Craft v. Metromedia CA 8 1985 38 FEP Cases 404 (aff in part, rvs in part 33:153)	Television station reassigned female reporter after unfavorable survey raised issues about her appearance	Employer equally enforced their standards as to on-air appearance on male and female employees	Policy does not violate Title VII
Tamimi v. Howard Johnson Co. CA 11 1987 42 FEP Cases 1289	Newly adopted "wear make-up" rule resulted in discharge of pregnant female employee	Rule was adopted only after employer learned of pregnancy and employer knew that she would not wear make-up	Policy violates Title VII

Table 1. (Cont'd.)

Case	Policy Issue	Conclusion	Outcome
Priest v. Rotary DC Calif 1986 40 FEP Cases 208	Employer policy requiring female employees to wear sexually suggestive attire results in removing a female employee as a cocktail waitress because she refused to comply	Employer's actions subject women to potential sexual harassment	Policy violates Title VII
O'Donnell v. Burlington Coat Factory Warehouse, Inc. DC Ohio 1987 43 FEP Cases 150	Employer policy requiring female employees to wear smocks over street clothes, but permitting males to wear business attire results in discharge of female employees who refused to comply	Smock operates as required uniform for women with no similar requirement for men and, as such, violates Title VII	Policy violates TItle VII and discharge is unalwful
Barker v. Taft Broadcasting Co. CA 6 1977 aff'g 11:851 14 FEP Cases 851	Company policy prohibits long hair for men but not women; discharge for failure to comply	Individual hair length of men has a "negligible relationship" to the purposes of Title VII	Policy does not violate Title VII
Flight Attendants v. Pan Am CA 9 1986 41 FEP Cases 769	Company policy establishes height and weight requirements for men and women using large frame standards for all men and medium frame standards for women	Company policy results in a differential standard based on sex that perpetuates sexual stereotype of slim-bodied women as desirable	Policy violates Title VII
Willingham v. Macon Telegraph Publishing Co. CA 5 1975 rev, rem 5:47 9 FEP Cases 189	Company policy restricting hair length is applied only to men	Hair length is not an immutable characteristic associated with sex nor is it a fundamental right	Policy does not violate Title VII

Price Waterhouse v. Hopkins Sct 1989 rev, rem 49 FEP Cases 975	In context of promotion consideration, female candidate was told to "walk more femininely, wear makeup, have her hair styled and wear jewelry"	Sexual stereotyping constitutes sex discrimination under Title VII	Actions violate Title VII; promotion was granted as part of relief
Bradley v. Pizzaco CA 8 1991 55 FEP Cases 47	Company fired African-American employee suffering from PFB for failure to observe the no-beard policy	Policy does have a disparate impact based on race	Case is remanded to determine if there is sufficient business justification for the rule
Fitzpatrick v. City of Atlanta CA 11 1993 62 FEP Cases 1484	Employer no-beard policy has disparate impact on black firefighters	"Tight seal" safety standards for use of respirators require use of rule, there is no less discriminatory requirement available	Policy does not violate Title VII
Drinkwater v. Union Carbide CA 3 1990 56 FEP Cases 483	In context of a sexual harassment claim, the issue of preoccupation with female appearance is raised	Stereotypes of female appearance are not appropriate for evaluation of women in the work place	Undue preoccupation with what female employees look like is not permissible if same attention is not paid to males
Milligan-Jensen v. Michigan Technical Institute DC W Mich 1991 59 FEP Cases 1014	Discharge of female employee linked to sexual stereotyping	Criticism of employee's appearance and dress was sex-related	Discharge is unlawful

Table 2.[a]

Decade	*N*	Hair Length or Style	Facial Hair	Clothing/ Dress	Weight
'70s	35	31	8	8	1
'80s	18	3	3	10	2
'90s	4	0	2	2	0

[a]Some cases involve more than one issue.

'70s were dominated by hair length and facial hair, cases from the '80s were more frequently about clothing or weight, and the few cases from the 1990s continue the legal exploration of stereotypes and dress requirements. A discussion of case law on the basis of these categories is helpful in developing a legal framework for analyzing employer appearance requirements

Hair Styles and Lengths

The first Title VII challenges to employer appearance rules involved restrictions on hair styles. Examples include restrictions on hair length and restrictions on certain hair styles. The most obvious legal standard involves disparate treatment claims. Title VII, in general, prohibits employers from imposing different standards on employees based solely on protected category status. Although initially some courts ruled in accordance with this principle, this reasoning eventually gave way to a different type of legal analysis in most of the circuits. Although it is clear that employers could not legally require different working conditions based on sex, the judiciary began to explore ways in which hair length differed from other organizational rules. One legal theory that gained acceptance was an analysis of whether or not hair rules affected an immutable characteristic associated with sex. According to this reasoning, so long as an employer could demonstrate a legitimate business interest in employee appearance, requiring men to have short hair did not preclude them from employment because hair length was not immutable. Working from the concept of hair as distinguishable from gender, the courts have tended to minimize the effect of such rules on men and have accepted the concept of distinctions in "business appearance" based on sex if the standards are not unduly harsh on one sex.

The courts' attempts to reconcile the employer's right to control employee appearance with the general requirement that distinctions based on sex are not permissible under Title VII led some courts to analyze whether or not the question could be raised under Title VII at all. In this vein, the courts attempt to distinguish between issues that might have been anticipated with the enactment of Title VII and those that were not contemplated by the legislation. In *Barker v.*

Taft, the Sixth Circuit wrote that "employer grooming codes requiring different hair lengths for men and women bear such a negligible relationship to the purposes of Title VII that we cannot conclude they were a target of the Act" [5]. The inability to move beyond the threshold question of Title VII applicability is particularly damaging to the claims of men seeking to invalidate employer restrictions on their hair length.

Issues of race and national origin discrimination have also been raised with regard to hair-style requirements. Hair styles and ethnic identity have often been evaluated from the immutable characteristic perspective. For example, in *Rogers v. American Airlines, Inc.* [6], the district court found the employer's policy that prohibited an "all-braided hairstyle" was not a violation of Title VII. The court reasoned that, although an all-braided hairstyle could be considered as an expression of racial identity, it is not associated with an immutable racial characteristic and that the employer's policy was not unduly harsh nor was it applied unequally.

Facial Hair

Similar reasoning has been used in cases involving facial-hair restrictions resulting in a general standard that requires employees who challenge "no facial hair" policies to demonstrate that the policy has a significant effect on an immutable characteristic. In the majority of cases, the courts view the presence or absence of facial hair as a mutable characteristic. The requirement that men must shave is usually not seen as an undue burden. However, there is one exception: pseudofolliculitis barbae ("PFB"), a skin condition that affects a significant proportion of African-American men is perceived as an immutable characteristic. When workers who suffer from PFB can demonstrate adverse impact, employers can be required to make exceptions to the policy if they cannot demonstrate business necessity or job relatedness. For example, when the clean-shaven requirement relates to the use of safety equipment, no exceptions need be granted [7].

Dress Codes

In general, employers have the right to establish dress codes for workers. Even when these policies make distinctions based on sex, they may be justified by a reasonable business purpose. Policies infringe on Title VII when distinctions are viewed as unduly harsh for one sex. The leading examples of dress codes that did not pass Title VII scrutiny are cases in which women were required to wear uniforms while men were free to wear appropriate business attire [8, 9]. This does not mean that dress requirements must be equal in every respect. In some cases, there must be proof that adherence to different standards affects job opportunities or ability to perform the work [10].

The legal issue of stereotyping is also raised in cases involving dress codes. Gender stereotyping makes an assumption about suitable behaviors and/or looks

based on the sex of the individual. Courts have upheld policies that prohibit women from wearing pantsuits [11], that require men to wear ties [12], and required women to adhere to a more detailed dress policy than men [10]. Although business-norm dress policies typically incorporate sexual stereotypes, there is a limit to the extent to which employers may use such stereotypes. For example, in the landmark case of *Price Waterhouse v. Hopkins,* Ann Hopkins, a candidate who was denied partnership, was advised "to dress more femininely" [13]. Among other findings, it was ruled that this constituted illegal sexual stereotyping. On the other hand, the courts have been reluctant to apply this reasoning to the use of male stereotypes. When issues of males and masculinity are raised, the courts often suggest that this issue is one of sexual orientation, not gender discrimination [14].

Requiring women to wear sexually provocative outfits is also found to be a violation of Title VII [15, 16]. This is often determined to be sexual harassment. Even where no specific policy exists, individual actions that place undue emphasis on female appearance also may be considered to be a violation of Title VII [17].

Weight Restrictions

Weight restrictions have been evaluated from a different legal viewpoint than have restrictions concerning hair. Many of the cases involve differential standards based on sex, similar in some ways to the hair-length policies. Unlike the reasoning in those cases, however, the courts are more apt to view these policies as "sex plus" discrimination and/or as expressions of illegal sexual stereotyping. "Sex plus" discrimination has often been found in situations where employers add an additional employment requirement for one sex. The case of *Phillips v. Martin Marietta* in which the employer refused to hire women with preschool-age children, but did hire men with preschool-age children is considered to be exemplary of the "sex plus" case [18]. In weight cases, when the employer is only concerned with the weight of women, the weight policy may constitute "sex plus" discrimination [19]. Weight requirements may also be considered as illegal sexual stereotypes when they are used to perpetuate the concept of slim-bodied women as sexually desirable [20].

ANALYSIS

The legal status of employer appearance codes can be evaluated from both the disparate treatment and disparate impact models. Figures 1 and 2 illustrate the primary legal questions that are raised in each type of case. These legal models are discussed below.

DOES APPEARANCE CODE MAKE DISTINCTIONS BASED ON RACE OR SEX THAT ARE RELATED TO THE PURPOSES OF TITLE VII?	NO. Policy does not violate Title VII.
YES	
DOES THE DISTINCTION RELATE TO IMMUTABLE CHARACTERISTICS ASSOCIATED WITH RACE OR SEX?	YES. Policy violates Title VII unless BFOQ can be shown.
NO	
DOES THE DISTINCTION AFFECT FUNDAMENTAL RIGHTS AND JOB OPPORTUNITIES?	YES. Policy violates Title VII unless BFOQ can be demonstrated.
NO	
DOES THE DISTINCTION INVOKE STEREOTYPES, OTHERWISE CLASSIFY EMPLOYEES IN OPPRESSIVE WAYS, OR UNDULY HARSH?	YES. Policy violates Title VII unless BFOQ can be demonstrated.
NO. If the distinction does not affect fundamental rights or invoke stereotypes or otherwise classify employees in oppressive ways, the policy does not violate Title VII.	

Figure 1.

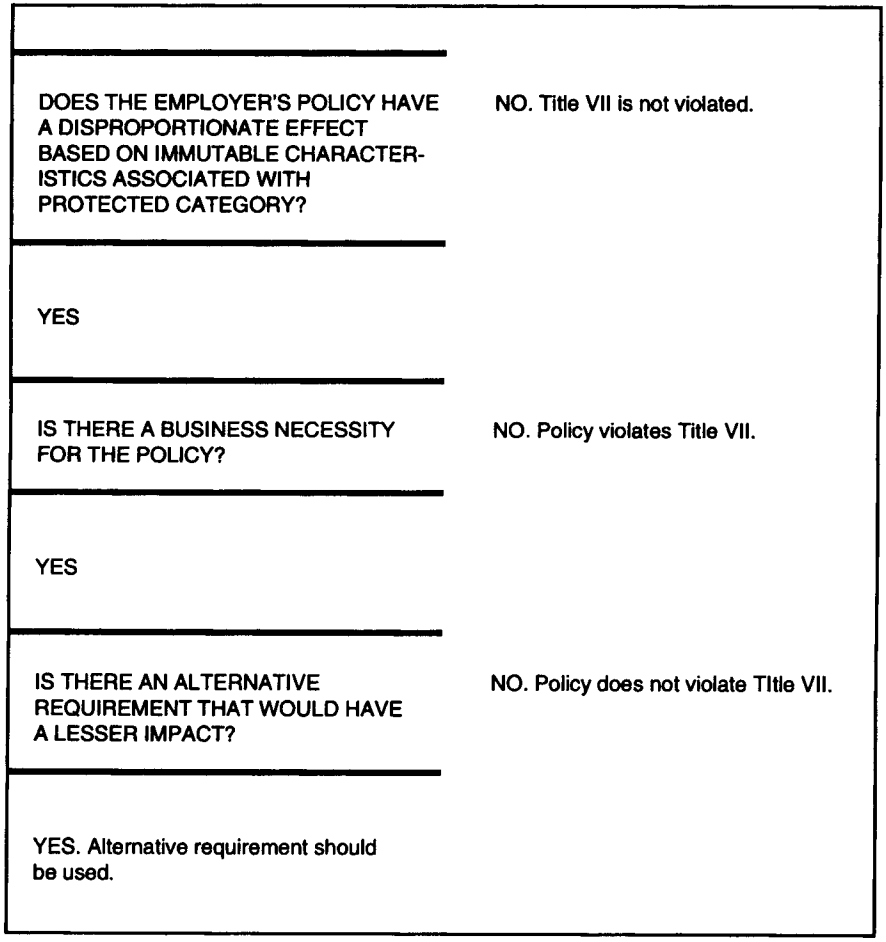

Figure 2.

Disparate Treatment

The courts have used two threshold issues to determine whether the appearance code in question raises any issues that are pertinent to the purposes of Title VII. As is the case with most Title VII claims, the plaintiff must demonstrate that his/her protected category status is implicated. Where appearance codes are involved, there must be a showing that the policy in question uses protected category status to make distinctions or that the policy is applied in some way that utilizes these distinctions. In the absence of such proof, the court has no reason to consider the matter further. For example, if an employer decided to implement an appearance code that required all employees to wear only the color red to work

and the employer applied the policy equally to all employees, no Title VII issue is raised.

In many situations, any distinctions based on protected category status are considered to be violations of Title VII unless "Bona Fide Occupational Qualification" (BFOQ) can be proved (see *Phillips v. Martin Marietta* (refusal to hire women with preschool-age children without a similar rule for men [18]) and *City of Los Angeles v. Manhart* (an employer's use of sex-based actuarial tables to require women to contribute more to the pension fund than men is a violation of Title VII) [21]). In most employment contexts, societal interests are usually not permitted as justifications for an employer's actions because discrimination often has origins in the attitudes and preferences of the population. On the other hand, the legal analysis of differential dress codes tends to look with approval on appearance policies that relate to customer service, societal norms, or other legitimate interests of employers [22]. Instead of routinely applying the BFOQ standard to situations where distinctions are made on the basis of sex, there are other legal "filters" that are used to determine the validity of the policy in question.

Related to the Purposes of Title VII

Even when distinctions based on protected category status are made, the courts often examine the legislative intent of Title VII and find no reason to make a legal inquiry. For example, in many of the circuits the courts find no legislative mandate to consider men's hair length as a cognizable claim, even though differential treatment on the basis of sex is clearly contemplated in Title VII. As a result, policies that permit women to have long hair but prohibit men from doing so are typically upheld as valid. Often, the court merely refuses to examine the policy on the grounds that there is no cognizable claim. This reasoning is illustrated in *Barker v. Taft,* where the court found that "employer grooming codes requiring different hair lengths for men and women bear such a negligible relationship to the purposes of Title VII that we cannot conclude they were a target of the act" [5]. In contrast, the courts do not permit employers to have differential standards for men and women with respect to weight. One is tempted to view this as a form of stereotyping by the judiciary, yet the cases may be distinguishable. Cases involving weight restrictions tend to characterize the appearance of women as objects of desire, whereas cases involving hair restrictions tend to use general business standards of professional appearance for both sexes. Or perhaps there is a general sentiment that the right for men to have long hair is not as fundamental as the right of women not to be judged more harshly than men in matters of weight.

Immutable Characteristics

Title VII generally prohibits appearance codes that discriminate based on immutable characteristics associated with race or sex. These cases seldom arise,

however, because there are relatively few immutable characteristics that are subject to dress codes. If an employer prohibited "afro" type hairstyles, this would likely be seen as an immutable characteristic [23]. Because hair length is not an immutable characteristic, appearance policies that permit women to have long hair but prohibit men from having long hair do not violate Title VII. The same reasoning is applied to facial hair restrictions and weight restrictions, as long as the employer applies the policy equally [24]. The 4th Circuit Court of Appeals ruled that there is nothing inherent in womenhood that makes it more difficult for women to comply with weight standards than it is for men [25]. As we will discuss later, immutable characteristics can also raise the issue of disparate impact.

Fundamental Rights

Where gender distinctions are made in appearance policies, the courts examine the effect of these distinctions to determine whether they deprive employees of important job opportunities or otherwise affect fundamental rights. Personal choice of hair length or style is not generally regarded as a fundamental right, nor is the right to choose work attire. For example, an employer policy forbidding female employees in the executive portion of an office from wearing pantsuits does not impermissibly restrict job opportunities [26]. Similarly, an employer requirement that had more detailed dress standards for women than for men that did not affect job opportunities nor the ability to perform the job was not found to be a violation [10]. In contrast, where the employer policy that men must wear hats and women must wear hairnets resulted in the discharge of a man because his hair was too long for the hat and he was refused the opportunity to wear a hairnet, the court indicated that the rule classified employees in ways that deprived them of job opportunities [27]. This is similar to the analysis of stereotyping and oppression.

Stereotyping and Oppressive Classification

Appearance rules that classify employees in oppressive ways by race or sex or that use racial or sexual stereotypes may violate Title VII. Although "conservative business attire" may include some stereotypical views of male and female appearance, there are limits to the employer's ability to make such distinctions. Examples include forbidding female flight attendants from wearing glasses when there is no similar policy for men [28], denial of promotion due to an "afro hairstyle" [23], requiring women to wear "career ensembles" while permitting men in same positions to wear business attire [8], weight policies whose purpose is to have "slim attractive female flight attendants" [19, 20], and requiring women to wear smocks over street clothes, but permitting males to wear business attire [9]. On the other hand, having more detailed dress codes for women does not automatically invalidate employer dress codes if there is no effect on job opportunities or the ability to perform the work in question [10]. Similarly, a policy

forbidding the wearing of pantsuits was found to be related to the employer's legitimate interests and that allegations of stereotyping were "a matter of opinion" [11].

Despite showing considerable interest in the effects of stereotyping on women, the courts have generally refused to consider the effects of "masculine" stereotypes on men [14]. In such cases, the collateral issue of sexual orientation discrimination is often raised and the courts continue to distinguish this issue from gender discrimination. The result is that such issues fail to meet the threshold requirement of showing protected category status.

Bona Fide Occupational Qualification

Many of the cases cited in Table 1 never reach the point where the court must consider whether or not there is a valid BFOQ. This is because the court often finds that a threshold issue has not been raised, that immutable characteristics are not involved, that fundamental rights are not affected, and that the policies are not oppressive or illegally stereotypical. Even when the BFOQ defense is raised, it appears to be applied less stringently than is customary in other situations, such as BFOQ for hiring on the basis for sex or national origin. In an early case, the district court of the District of Columbia ruled that the desire of the company to appeal to customers was a valid BFOQ and that Title VII does not require a "unisex society" [29]. On the other hand, the courts have found no BFOQ for requiring sexually revealing attire for a female lobby attendant [15]. These few cases do not provide an adequate basis on which to develop a clear legal model for determining BFOQ status of appearance policies. However, it does seem that customer appeal, conservative business standards, and relationship between the policy and job duties are elements the courts may consider in making a determination.

Disparate Impact

The disparate impact model can also be applied to dress and appearance codes. In this case, an otherwise neutral rule is evaluated for its effect on a protected class. Such cases primarily involve immutable characteristics. For example, if an employer had a rule that required straight hair styles, this might have a disproportionate effect on employees by race and national origin. If a protected group is adversely affected by the rule, the employer must demonstrate business necessity. The "PFB" cases fall into this category. In *Police Officers for Equal Rights v. Columbus,* the court found no business necessity to justify the no-beard requirement for those suffering from PFB [30]. Business necessity was demonstrated in *Fitzpatrick v. City of Atlanta* where the city successfully argued the need for a "tight seal" on respirators justified the no-beard rule. In addition, the court ruled there was no alternative that met the safety need for a tight seal that would have a lesser impact [31].

Other attempts to demonstrate adverse impact have failed. The courts appear uninterested in the impact of hair-length rules. In *Allen v. United Parcel Service* the employer's uniformly applied hair-length rule resulted in adverse impact on women [32], yet instead of analyzing business necessity, the court cited the general rule that hair policies are not Title VII violations. Sometimes, the issue is whether adverse impact can be adequately demonstrated. In *Jarrell v. Eastern Airlines* the court ruled that weight policies did not have a disproportionate impact on women [25]. Similarly, in *Rogers v. American Airlines,* the court ruled that braided hairstyles may be associated with racial identity, but there was no evidence that an adverse impact resulted from the policy [6]. In general, the courts appear to have the same reluctance to apply the general model of disparate impact to employer appearance codes as they have shown with the application of the general disparate treatment model. Nevertheless, issues relating to both disparate treatment and disparate impact can be expected to be raised in the future as a new generation of workers with unique personal statements enters the workforce.

FUTURE ISSUES

As the preceding examination has demonstrated, employee appearance may be restricted as a matter of employer preference as long as Title VII protections are not abridged. It is certainly reasonable to suppose that some employers will indeed wish to restrict emerging employee displays of tattoos or body piercings. Whether such restrictions will be constrained depends on their protected category status implications.

On the surface (which is, of course, where the problem lays), it appears that employers will have considerable latitude. The very fact that tattoos and body piercings are exhibited by both sexes and people of all colors and national origins cuts against arguments that they are manifestations of a particular race, origin, or gender. This makes claims of disparate impact unlikely to succeed. Claims of disparate treatment would only succeed if the employer had differential rules based on protected category status. This is unlikely in the case of race or national origin. Gender discrimination, on the other hand, does suggest some possibilities.

Already, some employers permit women, but not men, to have pierced ears. Although it is likely that the courts would view this as a reasonable reflection of conservative business attire today, it is questionable whether or not this will continue to be the case as a generation of young men with pierced ears comes of age in business. And with piercing trends migrating to nose, eyebrows, and tongues, it seems unlikely that employers could permit women to have these less typical piercings while prohibiting them in men. Although piercing may not be seen as a "fundamental right," such a distinction would probably be seen as invoking illegal stereotypes or as being unduly harsh on one sex. Similar legal

issues might be raised if employers had policies prohibiting tattoos for women, while permitting them for men.

Other future gender issues might involve hair color and make-up. Hair coloring is quite typical and acceptable, but recent trends that follow the follicle exploits of, say, professional basketball player Dennis Rodman, bring a whole new aspect to personal grooming. Employers who tolerate purple hair from female employees may feel less tolerant of a similar color for male employees. Making gender-based distinctions on issues such as unusual hair coloring does not seem to serve the types of purposes that the courts generally recognize as reasonable (such as conservative business norms). They are more similar to cases involving distinctions that classify employees in oppressive ways (such as prohibiting only one gender from wearing glasses).

Make-up is considered to be typical, even necessary, for many working women, but it is less common for men. Rules prohibiting men from wearing make-up raise some interesting legal points. Are men entitled to improve their appearance through the use of make-up when women are permitted to do so or can the employer impose different rules based on sex? It is possible such a rule would be treated as a negligible issue under Title VII. If the courts follow their logic in cases involving prohibitions on long hair for men, they may find these sex-based distinctions to be a valid expression of the employer's interest in maintaining employee appearance that reflects business norms.

It is interesting to note the startling contrast between the court's view of appearance codes and the general model that prohibits employment distinctions based on protected category status. For example, the courts have made it clear that customer preference and societal norms are not valid reasons for hiring a woman over a man or vice versa. Yet, when it comes to employer dress codes, the courts appear willing to use these same rationales based on the somewhat questionable legal premise that the legislative intent behind Title VII did not contemplate appearance codes.

Although it is clear that the courts do not believe that Title VII requires a "unisex society," distinctions based on gender that go beyond "conservative business attire" can be perceived as inequitable because they promote stereotypes, classify employees in oppressive ways, or are unduly harsh on one sex. Employers who wish to control current fashion trends of body piercing, tattoos, and unusual hair styles or colors need only to have rules that apply equally to all employees. By doing so, no threshold issue for Title VII is raised. Such is the case at the Atticus Bookstore Cafe in New Haven, Connecticut. The bookstore has a dress code that permits one facial piercing in addition to ear piercing. The policy applies equally to both sexes [33].

As the analysis of cases has shown, issues of workplace appearance tend to change over time. As each generation joins the work force, the norms for business attire also change. Although employers enjoy considerable authority to regulate appearance, Title VII does provide limits. It will be interesting to see what new

limits may develop. If current legal trends continue, restrictions on the right of employers to make gender-based appearance distinctions will continue to be less than those typically associated with equal employment opportunity.

* * *

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