THE BORGATA BABES CASE: THE WEIGHTY MATTER OF APPEARANCE STANDARDS

HOLLY C. FREY*

"She moves toward you like a movie star, her smile melting the ice in your bourbon and water. His ice blue eyes set the olive in your friend's martini spinning. You forget your name. She kindly remembers it for you. You become the most important person in the room. And relax in the knowledge that there are no calories in eye candy."[1]

INTRODUCTION

When your job title is "babe," you can reasonably expect your employer to have some input about your appearance.[2] An Atlantic County Superior Court judge sent that resounding message when he ruled that the Borgata Hotel Casino & Spa was permitted to dictate the weight gain and appearance of its scantily-clad cocktail servers known as "Borgata Babes."[3] On July 18, 2013, in the matter of *Schiavo v. Marina District Development Co.*[4] ("Borgata Babes Case"), Superior Court Judge Nelson Johnson held that a group of twenty-two female cocktail servers at the Borgata "failed to raise inferences of sex discrimination in the casino's personal appearance policy requiring women servers to wear skimpy costumes and prohibiting all servers from gaining more than 7% body weight."[5] The court relied on a rarely interpreted section of the New Jersey Law Against Discrimination ("LAD"), which the court interpreted as permitting employers to establish reasonable workplace appearance, grooming, and dress standards.[6] The court found that the plaintiffs were aware of and voluntarily accepted the Borgata's appearance policy standards at the time of their hiring; the program was reasonable in terms of the industry's mores and

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* J.D. 2015, Widener University School of Law. Holly is the 2014-15 Editor in Chief of the *Widener Law Review*. She dedicates this article to the many Atlantic City cocktail servers who have fought back against manifest discrimination.

[1] Excerpt from a brochure recruiting candidates to work as "Borgata Babes" at the Borgata casino in Atlantic City, New Jersey. William Schreiner, Jr., *The "Borgata Babes" Case: Is an Employer's Weight Requirement for Casino Waitresses Gender Discrimination Or a "Reasonable Appearance Standard?" Part 1,* SUITS BY SUITS BLOG (Aug. 1, 2013), http://www.suitsbysuits.com/Borgata-babes-Weight-Discrimination-Part1.

[2] Jennifer Bogdan, *Borgata can make 'Babes' watch weight,* PRESS OF ATLANTIC CITY, July 25, 2013, at A1.

[3] *Id.*

[4] Schiavo v. Marina Dist. Dev. Co., No. ATL-L-2833-08, 2013 WL 4105183, at *1 (N.J. Super. Ct. Law Div. July 18, 2013).

[5] *No Sex Bias Found Against 'Borgata Babes'; Court Says Weight Policy Lawful Under NJLAD*, 27 LAB. REL. WK. (BNA) No. 32, at 1512 (Aug. 7, 2013) [hereinafter *No Sex Bias*].

[6] Carmen J. DiMaria et al., *New Jersey casino waitress appearance policy not discriminatory*, LEXOLOGY (Sept. 18, 2013), http://www.lexology.com/library/detail.aspx?g=a179a38a-f933-4dea-9e85-786d47a5c8aa.

practices; and there was no evidence that the weight and appearance requirements were disparately enforced based on gender.[7]

In reaching this decision, the court failed to recognize that an employer's discretion—in imposing reasonable appearance standards to protect its business image—cannot be used to craft seemingly benign or neutral appearance policies that conceal discrimination.[8] Title VII protects employees from discriminatory treatment based on "race, color, religion, sex, or national origin."[9] Today, appearance and grooming standards fall under the scope of Title VII regulation and are evaluated primarily under the unequal burdens test, which weighs employee burdens imposed by sex-dependent employment policies.[10]

Part I of this Note discusses the Borgata Hotel Casino & Spa and its Appearance Policy. Part II reviews the opinion in the Borgata Babes Case. Part III reviews Title VII foundational caselaw, including seminal cases regarding sex discrimination and appearance standards with a focus on the Supreme Court case of *Price Waterhouse v. Hopkins*[11] and the Ninth Circuit cases of *Frank v. United Airlines, Inc.*[12] and *Jespersen v. Harrah's Operating Co.*[13] Part IV compares the Title VII foundational caselaw with the Borgata Babes holding and whether the appearance and grooming policy at the Borgata constitutes "reasonable workplace appearance, grooming and dress standards" under Title VII jurisprudence. Finally, Part V will examine what impact the Borgata Babes opinion may have on future appearance standards suits under Title VII and the potential for reform.

I. THE BORGATA HOTEL CASINO AND SPA

Atlantic City's Borgata is a trendy, stylish, and ultra modern casino, catering to a hip crowd as evidenced by its nightclubs, popular and current musical artist events, and advertising. The Borgata clientele consists primarily of young, affluent patrons from New York and Philadelphia.[14]

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[7] DiMaria et al., *supra* note 6.

[8] Megan Kelly, *Making-Up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in* Jespersen v. Harrah's Operating Co., 36 GOLDEN GATE U.L. REV. 45, 66 (2006).

[9] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)-(2) (2012).

[10] Kelly, *supra* note 8, at 46.

[11] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion).

[12] Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000).

[13] Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

[14] Suzette Parmley, *Fit the Mold—or Else Weight-Rule Lawsuit's Effect Could be Widespread*, PHILA. INQUIRER, May 22, 2005, at E1.

A. The Borgata Vibe

"On July 3, 2003, the Borgata Hotel Casino and Spa was the first new hotel casino to open in Atlantic City, New Jersey in thirteen years."[15] In an effort to distinguish itself from the other Atlantic City casinos, the Borgata decided to present itself to prospective patrons as a "Las Vegas style" hotel-casino, "fostering the image of a place to go for a naughty but classy good time in elegant surroundings."[16] From its inception, everything about the Borgata oozed sexiness—the property is littered with nude artwork, and the Borgata has replaced conventional "do not disturb" room signs with "a reversible sign that boasts 'tied up' on one side, and begs 'tidy up' on the other."[17]

To facilitate its sexy image, the Borgata instituted a Costumed Beverage Server ("CBS") program, also known as the "Borgata Babes" program.[18] The program sought servers who were "part fashion model, part beverage server" to function as "entertainers" who serve complimentary drinks to the casino patrons.[19] More than 4000 people applied for the costumed beverage servers, and the Borgata ultimately hired approximately 686 women and 46 men between February 2005 and December 2010 to be part of its "Borgata Babes" program.[20] Female servers were required to wear custom-made tight skirts and bustier tops created by fashion designer Zac Posen and high heels,[21] while male servers were required to wear pants, a club-style t-shirt, and black shoes.[22]

B. Borgata's Weight and Appearance Standards

The original offer letter in 2003 to candidates in the CBS program required that all male and female CBSs appear "physically fit, weight proportional to height, clean healthy smile and attention to personal grooming."[23] The letter also required that both male and female CBSs "maintain approximately the same physical appearance in the assigned costume."[24] The guidelines further required a "well-defined healthy appearance for men, and a clean, hourglass figure for women."[25]

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[15] Jen Purnell, *Weighing In on Title VII: The Impact of the Borgata Casino's Weight Requirement on Female Beverage Servers*, 4 RUTGERS J.L. & PUB. POL'Y 612, 634 (2007).

[16] Schiavo v. Marina Dist. Dev. Co., No. ATL-L-2833-08, 2013 WL 4105183, at *1 (N.J. Super. Ct. Law Div. July 18, 2013).

[17] Purnell, *supra* note 15, at 635.

[18] *Schiavo*, 2013 WL 4105183, at *2.

[19] *No Sex Bias*, *supra* note 5, at 1512.

[20] *Id.*

[21] *Id.*; Jason Notte, *Casino Can Fire Waitresses for Gaining Weight*, MSN MONEY (July 29, 2013, 2:18 PM), http://money.msn.com/now/post--casino-can-fire-waitresses-for-gaining-weight.

[22] *See No Sex Bias*, *supra* note 5, at 1513; *Schiavo*, 2013 WL 4105183, at *8.

[23] *Schiavo*, 2013 WL 4105183, at *3 (internal quotations omitted).

[24] *Id.*

[25] Jacqueline L. Urgo, *Grievance filed over forced weigh-ins. Borgata tells its Babes to stay thin or be fired,* PHILA. INQUIRER, Feb. 18, 2005, at A.1.

A year after the Borgata opened, it decided that the "weight proportional to height" standard was difficult to enforce, and it determined that it should issue a clarification to its appearance policy.[26] Subsequently, in February 2005, the Borgata issued a letter establishing a "hire weight" and requiring that, absent a bona fide medical condition, all male and female CBSs and Costumed Bartenders needed to maintain a maximum weight of 7% over their personal hire weight.[27] The Borgata determined that 7% was the weight gain at which a person could normally expect to increase one clothing size.[28] Any server who gained more than the 7% without a medical excuse would be suspended without pay and given ninety days to get back to his or her initial weight.[29] However, if a server was unable to lose his or her weight by the end of the ninety days, he or she would be terminated.[30] Pregnant servers were given between six and nine months to get back in shape,[31] and suspended servers were required to participate in a weight reduction program provided at the Borgata's expense.[32]

C. Immediate Reaction to the Appearance Standards

The pushback to the clarification of the Borgata's appearance policy was swift and contentious. Local 54 of Unite Here, the union that represents Atlantic City cocktail servers, immediately filed a grievance with the National Labor Relations Board, asserting that the policy violated federal and state antidiscrimination laws.[33] Throughout the grievance process, cocktail servers were outspoken about the humiliating effects of the policy, often speaking under the condition of anonymity because the Borgata forbade them from discussing the weight policy.[34] Ultimately, the Borgata rejected the union grievance, standing by its policy and claiming that it was implemented because the cocktail servers and bartenders were "performers" whose personal appearance and grooming were a key part of the casino's image.[35] Subsequently, two former "Babes" filed a $70 million lawsuit in state court against the casino in 2006 over the policy, but their case ended quietly with a

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[26] *Schiavo*, 2013 WL 4105183, at *4.

[27] *Id.*; *see also* Bogdan, *supra* note 2.

[28] *Schiavo*, 2013 WL 4105183, at *5.

[29] Schreiner, *supra* note 1.

[30] Purnell, *supra* note 15, at 639.

[31] *No Sex Bias*, *supra* note 5, at 1513.

[32] *Schiavo*, 2013 WL 4105183, at *6 (noting that "the weight reduction program includes gym membership, personal training sessions, membership to Weight Watchers (or an equivalent program), and nutritional counseling").

[33] Urgo, *supra* note 25.

[34] Judy DeHaven, *Reflecting on Weighty Matters: 'Borgata Babes' Policy Attracts Rights Inquiries*, STAR-LEDGER, Apr. 26, 2005, at 13. The waitresses claimed that since the policy went into effect, a "babe" can't have mayo on her sandwich or fries on the side without unofficial diet police grilling her, and customers and dealers have started the new game of guess the "babe's" weight. *Id.*

[35] John Curran, *Borgata Babes' Grievance Rejected: Casino Sticking to Weight Limits for Servers*, STAR-LEDGER, Mar. 3, 2005, at 43.

confidential settlement two years later.[36] Despite the litigation, the Borgata has continued to implement and stand by its appearance policy, which led to the 2008 suit that is the subject of this Note.

II. SCHIAVO V. MARINA DISTRICT DEVELOPMENT CO. (THE BORGATA BABES CASE)

In August 2008, a group of twenty-two female servers sued the Borgata, alleging, among other things, that the appearance standards required them to look like prostitutes; the casino constantly harassed them through the mandatory weigh-in process; and the casino inconsistently enforced the weight restrictions as to male and female "Babes," which "created a sexually humiliating and objectifying atmosphere based on sex stereotypes."[37] Court papers indicate that during the relevant time period at issue in the suit, February 2005 to December 2012, 686 women and 46 men worked as Borgata Babes, with twenty-five of the women disciplined for weight gain (a few more than once) and none of the men.[38]

A. Plaintiffs' Contentions

While each individual account of the female plaintiffs at the Borgata differs, the overwhelming theme is that each was harassed about her compliance with the appearance policy guidelines. One woman claimed that she was disciplined for eating a cookie, while another was asked if she was publicly faking a pregnancy and "just getting fat."[39] The women further claimed they were advised to take laxatives before mandatory weigh-ins and to stop taking prescription medicines if they were causing weight gain.[40] The plaintiffs also denied that the Borgata's appearance policy was gender neutral in form or application.[41] Female "Babes" were required to wear a "sexually provocative, skimpy costume whereas men were required to wear slacks, a club-style t-shirt, and black shoes," and the weight restrictions were not enforced fairly as male employees were allowed to gain excessive weight, ignore the required costume, and were spared the process of humiliating weigh-ins.[42] This all led to an oppressive, humiliating atmosphere of objectification based on sexual stereotypes.

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[36] Bogdan, *supra* note 2; *see* Notte, *supra* note 21.

[37] *No Sex Bias*, *supra* note 5, at 1513.

[38] Schiavo v. Marina Dist. Dev. Co., No. ATL-L-2833-08, 2013 WL 4105183, at *7 (N.J. Super. Ct. Law Div. July 18, 2013).

[39] Bogdan, *supra* note 2.

[40] Notte, *supra* note 21.

[41] *Schiavo*, 2013 WL 4105183, at *8.

[42] *Id.*

B. Defendant Borgata's Contentions

The Borgata staunchly defended its appearance policy, contending, namely, "that its unique position in the Atlantic City casino-hotel market and the image it has created from its inception necessitates that it must be permitted to require its CBSs to comply with reasonable standards regarding their appearance and weight."[43] The Borgata further claimed that the "type of appearance, grooming, and clothing requirements expected of the Plaintiffs [was] common in the casino-hotel workplace" and was not unreasonable.[44] The Borgata asserted that its appearance policy was neither facially discriminatory nor discriminatory in application—applying to both genders neutrally.[45] Further, the casino argued that the terms and conditions of the policy were made known to the plaintiffs well before their hire dates, and they could therefore not refuse to abide by the policy terms after they were hired.[46] Finally, the Borgata asserted that there was no disparate impact upon female versus male employees with regard to the policy or its enforcement, and the plaintiffs failed to provide specific non-anecdotal hearsay to show otherwise.[47]

C. The Court's Opinion

The court made four key rulings. "First, the court held that the contract fully explained the weight requirement and set out the casino's expectations—the Babes were to be 'ambassadors of hospitality' and 'entertainers [serving] complimentary beverages.'"[48] The court opined that despite the assertions in the plaintiffs' pleadings, the position applied for was "much more than that of cocktail server."[49] Prior to being hired, applicants were made to "audition" by interacting with faux patrons, while attired in revealing clothing.[50] The court recognized that some legal scholars may hold the perspective that women in plaintiffs' status are not granting true consent to serving drinks to casino patrons when done out of pure economic necessity because any consent to be used as a sex object can never be genuinely voluntary.[51] However, the court found that none of the plaintiffs lacked the capacity to understand the policy they had signed.[52] The plaintiffs' allegations of sexual stereotyping by being

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[43] *Schiavo*, 2013 WL 4105183, at *7.

[44] *Id.*

[45] *Id.* at *8.

[46] *Id.*

[47] *Id.*

[48] William Schreiner, Jr., *The "Borgata Babes" Case: Is An Employer's Weight Requirement For Casino Waitresses Gender Discrimination Or An Agreed-To "Reasonable Appearance Standards?" Part 2*, SUITS BY SUITS BLOG (Aug. 1, 2013), http://www.suitsbysuits.com/Borgata-Babes-Weight-Discrimination-Part2.

[49] *Schiavo*, 2013 WL 4105183, at *12.

[50] *Id.*

[51] *Id.* at *12-13.

[52] *Id.; see also No Sex Bias*, *supra* note 5, at 1514 (reporting the *Schiavo* court rejected the argument that female servers could not have truly consented to serving drinks to casino patrons in often demeaning and sexually exploitive circumstances out of sheer economic necessity).

called "Babes" and being forced to meet weight requirements rang hollow, the court found, stating "for the individual labeled a *babe* to become a sex object requires that person's participation, and nothing before the Court supports a finding of fraud, duress or coercion in connection with the plaintiffs' hiring."[53]

The court's remaining three rulings focused on the plaintiffs' arguments that the weight requirement and its enforcement on female Babes but not male Babes violated New Jersey law.[54] First, the court held that the casino's weight standards did not constitute a gender stereotype under the law because the Borgata established its policy in an attempt to "objectively regulate appearance and applied it evenly to both sexes."[55] The court cited the Ninth Circuit case of *Jespersen v. Harrah's Operating Co.* in finding that employers are permitted to require employees to remain attractive, particularly when the employees are hired in large part because of their attractive appearance.[56] The court further opined that other courts have explicitly found that employers can rely on "*stereotypical* notions of how men and women should appear when expressing appearance preferences."[57] However, the court was clear in pointing out that employers cannot use sexual stereotypes to impose a professional advantage on one sex over the other, nor can they penalize one sex for having a physical trait that is praised in the other.[58] For example, the court cited the seminal case of *Price Waterhouse v. Hopkins* in which the company was held liable for sex discrimination "because it denied partnership to a female accountant because she was too aggressive—the very same stereotypically male trait that was necessary for her job" and also praised in her male colleagues.[59] Conversely, in the instant case, the court found that the plaintiffs had not alleged that any male Babes were praised for being overweight or unattractive, nor had the plaintiffs suggested that they were professionally disadvantaged because of the policy as compared to the men.[60] The court found instead that the plaintiffs had based their entire claim on the fact that they did not like how the weight policy, costume, and hair/makeup

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[53] *Schiavo*, 2013 WL 4105183, at *13.

[54] Schreiner, *supra* note 48.

[55] *Schiavo*, 2013 WL 4105183, at *15; Schreiner, *supra* note 48.

[56] *Schiavo*, 2013 WL 4105183, at *14 (upholding requirement that female employees wear makeup (citing Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1081-82 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006))).

[57] *Id.* (upholding appearance standard even though based on "the feminine stereotype of 'softness'" "bows and ruffles," and "fashionableness" (citing Craft v. Metromedia, Inc., 766 F.2d 1205, 1214–15 (8th Cir. 1985))); Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc) (rejecting gender challenge to requirement that women wear makeup).

[58] *Schiavo*, 2013 WL 4105183, at *14 (citing Carter v. Town of Benton, 827 F. Supp. 2d 700, 709 (W.D. La. 2010); Zalewski v. Overlook Hosp., 692 A.2d 131, 131 n.l (N.J. Super. Ct. Law Div. 1996) (sexual stereotyping is "the assigning of certain behavior characteristics as appropriate for women and for men but not for the other sex").

[59] *Schiavo*, 2013 WL 4105183, at *14 (citing Price Waterhouse vs. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion)).

[60] *Id.*

requirements made them "feel," which was not an appropriate legal argument.[61]

Next, the court ruled that the weight requirement met the dictionary's definition of "reasonable" and therefore was a "reasonable appearance, grooming, and dress" standard.[62] In determining whether the appearance standard was reasonable, the court first examined the context of the standard with regard to the casino industry, placing significant emphasis on: "(1) the industry's mores and practices, (2) the marketplace in which the employer is competing, (3) the duties to be performed by staff, and (4) the expectations of the employer's patrons."[63] This part of the opinion includes a three-page discussion of casino gaming and history of Atlantic City throughout which Judge Nelson Johnson waxes rapturously on the casino "environment of high energy, show-biz and licentiousness" and Atlantic City's unique position in our nation's history.[64] The court further opined that patrons happily participate in this atmosphere and as the casino industry thrives on repeat customers, it is the customer who ultimately determines what types of entertainment the casino offers.[65] The court's nostalgic homage to the birth of Atlantic City and the casino industry is not entirely surprising when one notes that Judge Johnson wrote the book on which the television show *Boardwalk Empire* is based.[66] In fact, the court seemed content to defer to the casinos in determining their employment practices in opining, "Borgata has crafted its own formula to make its business flourish, and absent conduct which clearly violates the public policy of New Jersey, i.e., unreasonable workplace standards for appearance, grooming and dress, this Court is hesitant to meddle in its affairs by rebuking their business model."[67]

The court next addressed the plaintiffs' complaints of sexual objectification in being forced to be mere sex objects in marketing the Borgata.[68] The court was not moved by the plaintiffs' reliance on the dicta in *Jespersen*, but instead found the *Jespersen* holding to be instructive in defeating plaintiffs' claim.[69] The court followed the Ninth Circuit's ruling in holding that personal objections weren't sufficient to challenge an appearance standard because, if they were, "'we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, [could] create a triable issue of sex discrimination.'"[70] The court found no evidence beyond the plaintiffs'

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[61] *Schiavo*, 2013 WL 4105183, at *14.

[62] Schreiner, *supra* note 48.

[63] *Schiavo*, 2013 WL 4105183, at *15.

[64] *Id.* (claiming that Atlantic City is "the first city in America founded for the singular purpose of being a leisure-time destination").

[65] *Id.*

[66] Schreiner, *supra* note 48.

[67] *Schiavo*, 2013 WL 4105183, at *16.

[68] *Id.*

[69] *Id.* at *17.

[70] *Id.* (quoting Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (2006) (en banc)).

declarations that the standards of the appearance policy subjected them to an "atmosphere of sexual objectification."[71]

The court also took exception to the plaintiffs' assertion that a reasonable jury could find the appearance policy discriminatory and determined that the Borgata policy fell squarely into a LAD provision that took effect in 2007—a provision that had never been construed by a court, to the judge's knowledge or that of the lawyers in the case.[72]

The provision, N.J.S.A. 10:5-12p, states that the law's prohibition against discrimination does not affect the "ability of an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards," so long as they do not interfere with gender identity or expression or violate other provisions of state or federal law.[73] The court found that a common sense definition of "reasonable" was one that contemplated that which is "sensible, appropriate, to be expected, justifiable, ordinary or usual in a given set of circumstances."[74] The court viewed the discretion granted to employers in N.J.S.A. 10:5-12p to be "sufficiently broad to permit a business the necessary freedom to establish its brand in the marketplace"—allowing New Jersey employers the discretion to set not only dress but also appearance and grooming standards as well.[75] Based on the existing case law and the "context" of the Borgata's business, the court found that the Borgata had exercised its discretion and the provisions of the appearance policy were lawful.[76]

Finally, the court agreed with the Borgata's position that the plaintiffs had not presented any evidence to support a finding that there was disparate treatment in the enforcement of the appearance policy.[77] Plaintiffs, in their deposition testimony and responsive documents, mentioned various male Babes as having: 1) gained more weight than the policy permitted without being disciplined; 2) never been weighed during their employment; or 3) worn clothes at work other than the required uniform.[78] However, the court took notice that the plaintiffs failed to provide corroboration of their allegations, particularly failing to depose any of the identified males during pre-trial discovery despite the court having granted requests for expanding the discovery period to permit additional depositions.[79] The court was also clear in its incredulity that in this digital age, the plaintiffs failed to take one compromising photograph of a male Babe in violation of the policy or video surveillance from the casino that evidenced male Babes coming to work in something other than their required uniform.[80] With no evidence of disparate

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[71] *Schiavo*, 2013 WL 4105183, at *17.
[72] *Id.* at *10.
[73] N.J. STAT. ANN. § 10:5-12(p) (2013).
[74] *Schiavo*, 2013 WL 4105183, at *17.
[75] *Id.* at *10.
[76] *Id.*
[77] Schreiner, *supra* note 48.
[78] *Schiavo*, 2013 WL 4105183, at *17.
[79] *Id.*
[80] *Id.*

treatment in the enforcement of the appearance policy, and based on the foregoing analysis, the court found that summary judgment was appropriate.

III. TITLE VII

A. Background of Title VII

Congress passed the Civil Rights Act of 1964 to prohibit discrimination based on "race, color, religion, sex, or national origin."[81] Title VII of the Act specifically prohibits employers from discriminating against individuals in "compensation, terms, conditions, or privileges of employment" on the basis of "race, color, religion, sex or national origin."[82] Today, many courts, including the Supreme Court, have established that by adding sex as a protected category under Title VII, Congress intended to eliminate the offensive and outdated sex stereotypes that limit employment opportunities for women.[83] There are two grounds on which potential plaintiffs can establish a Title VII sex discrimination claim: disparate impact and disparate treatment.[84] Disparate treatment claims rest on whether the employer intentionally treats some employees less favorably than other employees based on their race, color, religion, sex, or national origin.[85] Disparate impact claims involve employment policies that are facially neutral in their treatment of a protected group but affect one group more harshly than another when put into practice.[86] Because sex-based appearance standards explicitly treat individuals differently based on their sex, cases involving these standards are most often analyzed within a disparate treatment framework.[87]

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[81] Kelly, *supra* note 8, at 47 (quoting 42 U.S.C. § 2000e-2 (2005)).

[82] Elizabeth Malcom, *'Looking and Feeling Your Best': A Comprehensive Approach to Groom and Dress Policies Under Title VII*, 46 SAN DIEGO L. REV. 505, 512 (2009) (quoting 42 U.S.C. § 2000e-2(a)(e)(1) (2000)); *see* Kelly, *supra* note 8 at 47-48; Gretchen Adel Myers, *Why Personal Presentation in the Workplace Is Not Trivial: Performativity Theory Applied to Title VII Sex-Dependent Appearance Standard Cases*, 7 THE DUKEMINIER AWARDS 173, 173 (2008); Alexis Conway, *Leaving Employers in the Dark: What Constitutes A Lawful Appearance Standard After* Jespersen v. Harrah's Operating Co.*?*, 18 GEO. MASON U. C.R. L.J. 107, 110 (2007).

[83] Malcom, *supra* note 82, at 513; *see also* City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))); Rodriguez v. Bd. of Educ., 620 F.2d 362, 366 (2d Cir. 1980) ("[S]ex stereotyping may once have been a virtually unquestioned feature of our national life, [but] it will no longer be tolerated."); Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1256 (N.D. Ind. 1998) ("The legislative history accompanying the passage of the 1972 amendments makes clear that the primary thrust of Title VII was to discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.").

[84] Kelly, *supra* note 8, at 47; Myers, *supra* note 82, at 175-76.

[85] Kelly, *supra* note 8, at 48; Conway, *supra* note 82, at 110.

[86] Kelly, *supra* note 8, at 47-48; Conway, *supra* note 82, at 110.

[87] Myers, *supra* note 82, at 176.

Title VII does provide one exception regarding disparate employment policies.[88] An employer can institute distinct policies to different groups based on sex, religion, or national origin if the employer establishes a "bona fide occupational qualification" (BFOQ) defense.[89] The BFOQ exception, however, is very limited in scope and allows for disparate employment practices only if the practice is "reasonably necessary to the normal operation of the particular business or enterprise . . . ."[90]

B. Sex Stereotyping Under Title VII

In 1989, in the seminal disparate treatment case of *Price Waterhouse v. Hopkins*, the United States Supreme Court determined that the term "sex" included "not only biological sex, but also the cultural assumptions or sex stereotypes that are associated with that sex."[91] In *Price Waterhouse*, the plaintiff claimed sex discrimination against her employer for denying her partnership in the accounting firm.[92] The reasons given by the Price Waterhouse Board for the denial were characteristics including aggressiveness and decisiveness–characteristics favored in male partners.[93] The partner responsible for informing Hopkins of the Board's decision went so far as to counsel Hopkins that her professional problems would be solved if she were to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."[94] The Court ruled in Hopkins' favor, finding that the Board had wrongly considered evaluations "motivated by stereotypical notions about women's proper deportment."[95]

The *Price Waterhouse* holding demonstrates that "Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities" by preventing an employer from conditioning "employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job."[96] While the plurality in *Price Waterhouse* recognized that Congress

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[88] Kelly, *supra* note 8, at 48.

[89] *Id.*; Conway, *supra* note 82, at 110.

[90] Conway, *supra* note 82, at 110 (quoting 42 U.S.C. § 2000e-2(e)(1) (2000)). *See also* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 188, 201 (1991) (holding that an employer will prevail using the BFOQ defense only if the sex dependent job qualification relates to the "normal operation" of the employer's business and is objectively and verifiably necessary to the employee's performance of job tasks and responsibilities); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983) (holding that establishing a BFOQ places a "heavy burden" on the employer); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (holding that the female gender is not a BFOQ for a flight attendant).

[91] Myers, *supra* note 82, at 177 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989) (plurality opinion)).

[92] *Price Waterhouse,* 490 U.S. at 232.

[93] *Id.* at 234.

[94] *Id.* at 272.

[95] *Id.* at 256.

[96] *Id.* at 242.

intended to forbid employers from taking sex into account in the selection, evaluation, or compensation of employees, an employer may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if the employer had not taken the plaintiff's gender into account.[97] However, the Civil Rights Act of 1991[98] overruled that part of *Price Waterhouse* in which the Court held that an employer could avoid liability for intentional discrimination in "mixed motive" cases if it could demonstrate that the same action would have resulted in the absence of the discriminatory motive.[99]

Following *Price Waterhouse*, several circuits acknowledged a cause of action under Title VII for discrimination based on an employee's failure to adhere to gender stereotypes.[100] However, the *Price Waterhouse* holding was not so broadly construed as to allow for a cause of action for every instance that an employee failed to conform with gender stereotypes, as Title VII allows an employer to provide a BFOQ defense when taking sex into account in making an employment decision so long as it is "reasonably necessary for the normal operation of the business."[101]

C. Sex-Dependent Appearance Standards Caselaw

While the holding in *Price Waterhouse* established that gender could not play a motivational part in employment decisions, it does not preclude sex-dependent appearance or grooming standards.[102] Over the last forty years, courts have applied several different approaches to sex-dependent appearance standard cases, with the most current being the unequal burdens approach.[103]

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[97] *Price Waterhouse,* 490 U.S. at 232, 239, 258.

[98] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[99] *See* 42 U.S.C. § 2000e-2(m) (as amended by the Civil Rights Act of 1991 § 107(a)); 42 U.S.C. § 2000e-5(g)(2)(B) (as amended by the Civil Rights Act of 1991 § 107(b)).

[100] Schroer v. Billington, 424 F. Supp. 2d 203, 208 (D.D.C. 2006) (citing Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005)) (allowing a cause of action under Title VII after *Price Waterhouse* for discrimination based on failure to conform to gender stereotypes); Doe v. City of Belleville, 119 F.3d 563, 581 (7th Cir. 1997) (recognizing that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"); Centola v. Potter, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (quoting Oncale v. Sundowner Offshore Serv., Inc.*,* 523 U.S. 75, 79-80 (1998)) (finding harassment of a man by other men is actionable under Title VII so long as there has been "discriminat[ion] . . . because of . . . sex in the terms or conditions of employment") (internal quotation marks omitted).

[101] Conway, *supra* note 82, at 113.

[102] Conway, *supra* note 82, at 114; *see also* Marks v. Nat'l Commc'ns Ass'n, 72 F. Supp. 2d 322, 330 (S.D.N.Y. 1999) (holding that "discrimination based on weight *alone,* or on any other physical characteristic for that matter, does *not* violate Title VII, unless issues of race, religion, sex, or national origin are intertwined").

[103] Myers, *supra* note 82, at 179, 181. The per se approach considered sex-dependent standards to be per se discriminatory as by their very nature they differentiated on the basis of sex, and absent a BFOQ, they were considered impermissible sex discrimination. Myers, *supra* note 82, at 179-80. The immutability approach focused on whether an employer's regulation of

The unequal burdens test focuses on the relative burdens imposed by an appearance policy on employees of both sexes, and if the policy burdens one sex more onerously than the other, the policy violates Title VII.[104] A sex-differentiated appearance policy that imposes an unequal burden on one sex over the other constitutes disparate treatment, defensible only by a BFOQ justification.[105] The Ninth Circuit has been particularly instrumental in deciding that sex-dependent appearance standards that are facially neutral do not deprive either sex of employment opportunities and are applied evenly to both sexes are permissible under Title VII.[106]

In *Frank v. United Airlines, Inc.*, the Ninth Circuit found that United Airlines was permitted to use facially discriminatory weight charts only if it could prove that "the difference in treatment between female and male flight attendants [was] justified as a BFOQ."[107] From 1980 to 1994, United required flight attendants to comply with certain weight requirements based on sex, height, and age.[108] However, the weight requirements required female flight attendants to be weighed under the standard for a medium sized body frame while males were weighed under the standard for a large body frame.[109] Thus, these standards as applied, "required female flight attendants to weigh between 14 and 25 pounds less than their male colleagues of the same height and age."[110]

During the period that the weight restrictions were implemented, the plaintiffs attempted to lose weight by taking various extreme measures, such as severely restricting their caloric intake, using diuretics, and purging, but ultimately each was disciplined and/or terminated for failing to comply with United's maximum weight requirements.[111] The plaintiffs brought suit under the disparate treatment theory under Title VII.[112] However, United claimed that the policy constituted an appearance standard that fell outside the scope

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an employee's appearance or dress focused on immutable characteristics or innate traits such as national origin, race, or child-rearing, that either cannot or should not be required to change. Conway, *supra* note 82, at 114.

[104] Malcom, *supra* note 82, at 528.

[105] Conway, *supra* note 82, at 116.

[106] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1104 (9th Cir. 2006) (en banc); Frank v. United Airlines, Inc., 216 F.3d 845, 845 (9th Cir. 2000); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 605-06 (9th Cir. 1982); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755 (9th Cir. 1977) (holding that employer's distinct requirement that only male employees wear ties fell under employer's discretion to create sex-distinct regulations); Baker v. Cal. Land Title Co., 507 F.2d 895, 897-98 (9th Cir. 1974) (excluding appearance and grooming standards from Title VII discrimination based on appearance (a mutable characteristic) instead of the immutable characteristic of sex).

[107] *Frank*, 216 F.3d at 855.

[108] *Id.* at 847.

[109] *Id.* at 848. The United weight requirements were based on tables of desirable weights and heights published by the Metropolitan Life Insurance Company. *Id.*

[110] *Id.* ("For example, the maximum weight for a 5'7", 30–year–old woman was 142 pounds, while a man of the same height and age could weigh up to 161 pounds.").

[111] *Id.*

[112] *Id.* at 855.

of Title VII.[113] The court held that while United was permitted to use facially discriminatory weight charts that created an unequal burden, it was required to show that the disparate treatment was necessary by a BFOQ.[114] However, United failed to prove that thinner female than male flight attendants had any bearing on a flight attendant's ability to "greet passengers, push carts, move luggage, . . . or provide physical assistance in emergencies."[115] In fact, the court found that the weight requirement might have inhibited the performance of the female flight attendants.[116] Thus, while the court excluded appearance standards from the scope of Title VII, it reevaluated its initial approach by considering the relative burdens placed on employees by sex-dependent appearance standards, and there is every indication that the court took particular notice of the female flight attendants' extreme attempts to maintain the weight requirement and its impact on their job performance when weighing the undue burden.

In *Jespersen v. Harrah's Operating Co.*, the plaintiff argued that a mandatory makeup requirement for female beverage servers constituted a discriminatory appearance standard under Title VII based on sex stereotyping as well as an unequal burden approach.[117] The policy in question, called the "Personal Best" program, outlined sex-specific appearance and grooming standards for male and female Harrah's beverage servers.[118] While the policy contained some sex-neutral provisions (both sexes were required to wear the same style uniform), female employees were also required to wear stockings and colored nail polish with their hair "teased, curled, or styled" every day consistent with a post makeover photograph, while male employees were prohibited from wearing makeup and colored nail polish and were required to maintain short haircuts and neatly trimmed nails.[119] Jespersen had worked as a bartender for Harrah's for almost twenty years prior to implementation of the appearance policy and was considered an outstanding employee, but found that she could not successfully perform her job wearing a full face of makeup.[120] Jespersen was subsequently terminated.[121]

The United States District Court for the District of Nevada granted summary judgment for Harrah's, finding that Harrah's policies did not violate Title VII because there had been no discrimination against Jespersen based on immutable characteristics associated with sex, and the policies imposed equal burdens based on the mutable characteristics of both sexes.[122] Jespersen

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[113] *Frank*, 216 F.3d at 854.

[114] *Id.* at 855.

[115] *Id.*

[116] *Id.*

[117] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1108 (9th Cir. 2006) (en banc).

[118] Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1078 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

[119] *Id.* at 1077.

[120] *Id.*

[121] *Id.* at 1078.

[122] *Id.* at 1078-79.

subsequently appealed to the United States Court of Appeals for the Ninth Circuit.[123]

On appeal, a three-judge panel of the Ninth Circuit Court affirmed the lower court's decision, applying the unequal burdens test to determine Jespersen's claim; however, the court had difficulty determining the exact parameters of the test.[124] The court noted:

> [W]e do not need to define the exact parameters of the "unequal burdens" test, as applied to personal appearance and grooming. We do note, however, that this is not an exact science yielding results with mathematical certainty. We further note that any "burden" to be measured under the "unequal burdens" test is only that burden which is imposed beyond the requirements of generally accepted good grooming standards.[125]

In evaluating the policy under the court's interpretation of the unequal burdens test, the court considered such factors as the "cost and time necessary" for employees of each sex to comply with the policy.[126] However, in its arguably flawed evaluation of the Harrah's policy, the court compared the weight of the singular makeup provision of the female bartenders against the weight of the entire policy for the male bartenders.[127] While the court took judicial notice that "the application of makeup requires *some* expenditure of time and money," it found that Jespersen failed to provide any evidence of the cost and time burdens of the makeup policy on the female bartenders, dooming her undue burden claim.[128] It is clear that the Ninth Circuit missed the irony of applying an undue burden test, which in itself constituted an unequal test. Jespersen's claim of sexual stereotyping also failed because Jespersen neglected to provide any evidence that the policy had been adopted to "make female bartenders conform to a commonly accepted stereotypical image of what women should wear" because all employees were required to wear exactly the same predominantly unisex uniforms.[129]

In a rehearing en banc, the Ninth Circuit once again affirmed, ultimately deciding that when evaluating sex-dependent appearance standards, "the touch-stone is reasonableness."[130] Writing for the majority, Judge Schroeder, in dicta, outlined a stereotyping claim for discrimination cases involving

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[123] *Jespersen*, 392 F.3d at 1079.

[124] *Id.* at 1081, 1083.

[125] Kelly, *supra* note 8, at 57 (quoting *Jespersen*, 392 F.3d at 1081 n.4).

[126] *Jespersen,* 392 F.3d at 1081.

[127] Kelly, *supra* note 8, at 57 (citing *Jespersen*, 392 F.3d at 1081). Jespersen argued that the makeup requirement should only be compared to the makeup prohibition for the men; however, the court agreed with Harrah's that the burden of the makeup requirement should be compared to the burdens of the male appearance policy as a whole. *Id.* at 57 n.105 (citing *Jesperson*, 392 F.3d at 1081).

[128] *Jespersen*, 392 F.3d at 1081.

[129] Conway, *supra* note 82, at 121 (citing Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc)).

[130] Myers, *supra* note 82, at 185 (citing *Jespersen*, 444 F.3d at 1113).

appearance discrimination—plaintiffs could now bring claims challenging appearance policies that stereotype either men or women.[131] The court explained that "[if] a grooming standard imposed on either sex amounts to impermissible stereotyping, something this record does not establish, a plaintiff of either sex may challenge that requirement under *Price Waterhouse*."[132] However, the court emphasized once again that evidence demonstrating that the burdens on one sex were significantly greater than those on the other was necessary—Jespersen had merely asserted the greater burden but had not provided concrete evidence.[133]

Most relevant, however, for this Note are the dissents provided by Judges Pregerson and Kozinski in the en banc opinion. While Judge Pregerson agreed with the majority that sex-differentiated grooming policies may be subject to a Title VII claim, he dissented from the majority because he found the Harrah's policy to be motivated by sex stereotyping, which was therefore a "classic case of *Price Waterhouse* discrimination."[134] Judge Pregerson challenged the logic of the majority's refusal to consider the makeup requirement separately, stating that by:

> [s]tressing that the policy contained *some* gender-neutral requirements, such as color of clothing, as well as a variety of gender-differentiated requirements for "hair, hands, and face," the majority's approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate non-discriminatory requirement that applies to both men and women.[135]

Judge Kozinski joined Judge Pregerson's dissent but also found that Jespersen had presented a triable issue of fact on the issue of disparate burden.[136] Judge Kozinski was incredulous that the majority needed to be provided with concrete proof that putting on makeup requires time and money, arguing that the court should have taken judicial notice of that fact.[137] He further pointed out that the "application of makeup is an intricate and painstaking process that requires considerable time and care," with no logical

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[131] Tracey E. George et al, *The New Old Legal Realism*, 105 NW. U. L. REV. 689, 725 (2011).

[132] *Jespersen*, 444 F.3d at 1112.

[133] *Id.*

[134] *Id.* at 1116-17 (Pregerson, J., dissenting). Judge Pregerson further stated, "[q]uite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination because of sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that gender must be *irrelevant* to employment decisions." *Id.* at 1114 (internal citations omitted).

[135] *Id.* at 1116 (emphasis added) (Pregerson, J., dissenting).

[136] *Id.* at 1117 (Kozinski, J., dissenting).

[137] *Id.* at 1117 (Kozinski, J., dissenting) (stating "[i]s there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees.").

comparison to the shorter time it would take a man to shave.[138] Judge Kozinski also found that Jespersen had introduced evidence that she found the makeup burdensome to her self-image and detrimental to her job performance, and he challenged his fellow judges to consider how demeaning it would be if judges were required to wear face powder, mascara, and lipstick while on the bench.[139] Finally, Judge Kozinski was frank in his dismay that the majority had so easily dismissed Jespersen's personal distaste of makeup, requiring her to leave a job she had performed well for two decades in lieu of applying makeup—a choice that her male colleagues were not forced to make.[140]

IV. APPLYING TITLE VII SEX-STEREOTYPING AND SEX-DEPENDENT APPEARANCE STANDARD CASELAW TO THE BORGATA BABES CASE

After *Jespersen*, appearance policies that impose different requirements on men and women are not deemed legally discriminatory unless the requirements impose a greater burden on one sex over the other.[141] However, as discussed earlier in this Note, the Ninth Circuit's unequal burdens test in *Jespersen* was flawed because it failed to examine the policy's individual requirements, rather than the policy as a whole, leading to an oversimplified analysis that totaled the number of requirements for each sex to ensure that the number was equal.[142] Had the court considered the requirements individually, it would have found that each requirement for men corresponded to a requirement that was generally more onerous for women.[143]

Likewise, while the Borgata may have intended to avoid Title VII challenges by instituting its gender neutral weight provision as part of its appearance policy, the remainder of the Borgata appearance code if taken *as a whole* is not free of sexual stereotyping and exploitation—a fitted bustier and tight skirt as compared to black slacks and a t-shirt do not a unisex, gender neutral uniform make. Policies that generate sex-differentiated and sex-stereotyping "perceptions of employees performing the same jobs are equally as discriminatory as policies that impose different quantitative burdens."[144] The Borgata requires women to wear high heels and sexually provocative, tight fitting uniforms; men, on the other hand, must only wear slacks, t-shirt, and black shoes. This clearly imposes a heavier burden on women, if not because of the humiliating psychological burden of being forced to conform to an oppressive sex stereotype (as the plaintiffs alleged), then at the very

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[138] *Jespersen*, 444 F.3d at 1117.

[139] *Id.* at 1117-18.

[140] *Id.* at 1118.

[141] George et al., *supra* note 131, at 699.

[142] *See supra* Part III.C.

[143] Malcom, *supra* note 82, at 529-30 (citing *Jespersen*, 444 F.3d at 1117 (Kozinski, J., dissenting)).

[144] Kelly, *supra* note 8, at 63.

least because of the discomfort of walking miles in high heels, during long shifts serving cocktails. [145]

Following *Jespersen*, the primary defense to a lawsuit alleging that the dress code sexually stereotypes the women working in the casinos would be for the employer to prove that being a particular woman and wearing the sexy uniform is a BFOQ for the job.[146] The Ninth Circuit in *Jespersen* failed to consider the relationship between the appearance standard and the actual occupational role of the employee because Jespersen could not provide tangible proof of the disparity created by the policy.[147] While the court in *Jespersen* required concrete proof of the cost and time burdens of applying makeup,[148] common sense must dictate that the burden of wearing heels, a fitted bustier, and tight skirt to serve drinks as opposed to flat shoes, slacks, and a t-shirt are worthy of judicial notice. It is hard to imagine that a court would instead require a receipt for first aid cream to treat the blisters incurred by a full shift of running back and forth to customers in high heels. Thus, the Borgata plaintiffs would most likely meet the burden of proving a tangible disparity, triggering the employer's presentation of a narrow BFOQ defense.

In the Borgata Babes opinion, the court relied on the context of the appearance policy, justifying the sexually provocative uniform for female Babes and the weight provision as reasonable, if not expected, in the glittering, licentious casino environment.[149] However, as previously outlined in Part III of this Note, the BFOQ defense has been narrowly interpreted and will apply only if the appearance policy requirements are objectively and verifiably necessary to the employee's performance of job tasks and responsibilities.[150] Thus, sexy dress and appearance codes should be a BFOQ *only* for jobs where "female sexuality [is] reasonably necessary to perform the dominant purpose of the job which is forthrightly to titillate and entice male customers."[151] This has been interpreted to mean those jobs where sex is the primary commodity being sold, such as in a strip club.[152] The Equal Employment Opportunity Commission (EEOC) has also recognized sex as a BFOQ "[w]here it is

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[145] *See supra* Part III.A (discussing plaintiffs' allegations regarding the oppressive, humiliating atmosphere they were subjected to as a result of the appearance policy).

[146] George et al., *supra* note 131, at 703.

[147] Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1081 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

[148] *Id.*

[149] Schiavo v. Marina Dist. Dev. Co., No. ATL-L-2833-08, 2013 WL 4105183 at *15 (N.J. Super. Ct. Law Div. July 18, 2013).

[150] *See supra* Part III.A; Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991); *see also* Anne C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257, 265 (2007) ("[A]n employer must prove that its BFOQ defense is based on objective fact and that the sex or sex-differentiated job qualification relates to the 'essence' or the 'central mission' of the employer's business . . . .").

[151] Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2576-77 (1994).

[152] Ann C. McGinley, *Trouble in Sin City: Protecting Sexy Workers' Civil Rights*, 23 STAN. L. & POL'Y REV. 253, 270 (2012).

necessary for the purpose of authenticity or genuineness" such as in the acting context.[153]

It is hard to believe that the Borgata's appearance policy would fall under one of these viable BFOQ exceptions, as serving drinks rather than appearing sexy seems to be the main purpose of cocktail serving.[154] Despite the Borgata's strategic attempt to label its costumed beverage servers as "part fashion model, part beverage server" and "entertainers," there is no logical relationship between cocktail servers needing to be thin and sexy and the ability, efficiency, or productivity of delivering drinks to customers.[155] Further, there is no suggestion in the court's opinion that the Borgata Babes ever performed, acted, sang, danced, or otherwise entertained casino patrons other than delivering their drinks, nor was there any indication that they were required to as part of their job responsibilities. Thus, it is hard to fathom that the Borgata's policy as applied to its female servers is "reasonably necessary to the normal operation" of the casino. In fact, it could be argued that purging, laxative taking, and the other extreme measures the plaintiffs employed to comply with the policy would naturally provide a detrimental impact on the Babes efficiency and productivity.

The Borgata also claimed that its customers expect and prefer scantily clad waitresses.[156] However, courts and the EEOC have recognized that employers cannot justify discriminatory practices on the basis of customer preferences.[157] Someone who has gained eight percent of their body weight is still just as capable of delivering a drink to a casino patron as someone who has gained six percent of their body weight, and would the average patron truly refuse the proffered drink based on the two percent weight gain difference—would they even be able to gauge the two percent difference? Arguably, regardless of her weight or costume, the point of a cocktail waitress is the cocktail, not the waitress.[158] As one newspaper reporter/casino patron remarked, "[c]learly, as cocktail waitresses, they make great models. But a gambler wants a fresh drink every half-hour. And for that, you need a waitress, not a Babe."[159]

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[153] McGinley, *supra* note 152, at 268 (quoting 29 C.F.R. § 1604.2(a)(2) (2003)).

[154] Gersh Kuntzman, *American Beat: Babes Up in Arms, An Atlantic City Casino Says its Cocktail Waitresses Must be Thin. Could Gamblers—and Drinkers—Possibly Care?,* NEWSWEEK, Feb. 28, 2005, Society Section, *available at* 2005 WLNR 6567258.

[155] Schiavo v. Marina Dist. Dev. Co., No. ATL-L-2833-08, 2013 WL 4105183, at *2 (N.J. Super. Ct. Law Div. July 18, 2013); *see also* George et al., *supra* note 131, at 725. In interviewing attorneys who represented casinos in Las Vegas, the authors were told that one strategy used by a casino to avoid suit over weight restrictions was to re-designate the jobs of its cocktail servers as entertainers ("bevertainers") to be specific. *Id.*

[156] *Schiavo*, 2013 WL 4105183, at *15.

[157] 29 C.F.R. § 1604.2 (a)(1)(iii) (2013); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (holding "a BFOQ ought not be based on the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers") (internal quotations omitted).

[158] Kuntzman, *supra* note 154.

[159] *Id.*

Finally, while employers who use sex appeal to entertain their customers may be permitted to do so in the sexual entertainment and acting industries,[160] and assuming arguendo that the Borgata falls into that category, they should not be permitted to engage in the selling of female sexuality without the selling of its male counterpart. While the Borgata has instituted an appearance policy that includes a provocative, tight uniform, emphasizing the female form for its female Babes, the uniform of slacks, black shoes, and t-shirt for the male Babes does nothing to equally showcase the male physique. If the Borgata is intent on keeping its appearance policy and wishes to avoid sexual stereotyping, at the very least, it should outfit its male Babes in tight fitting hot pants and six-pack baring shirts.

V. THE IMPACT OF THE BORGATA BABES RULING ON FUTURE APPEARANCE STANDARDS SUITS UNDER TITLE VII AND THE POTENTIAL FOR REFORM

"Flesh goes on pleasuring us, and humiliating us, right to the end."[161]

After the Borgata Babes Case ruling, employment attorneys worried that the troubling result could set a precedent for other employers around the country.[162] The courts in New Jersey are well-regarded on employment issues by federal and other states' courts, giving this ruling a potentially greater impact than others in the field of employment law.[163] However, the crux of the Borgata Babes ruling focused on a narrow first impression interpretation of a LAD provision with significant emphasis placed on the context of the Borgata's appearance standard with regard to the casino industry—more specifically the Atlantic City casino industry—potentially limiting its precedential value.[164] With such a pointed emphasis on Atlantic City's "unique position" in the gaming industry, the Borgata Babes ruling may be relegated to merely an Atlantic City, New Jersey casino carveout or at the very most a casino specific carveout, applying to those states with casino laden employment opportunities such as Las Vegas.

While discrimination based on appearance may seem justifiable to some in the casino context because it seems relevant to job performance, the biggest concern is how far employers will be able to push the limits of the ruling. As one Borgata Babe queried after the institution of the weight policy—"What if they decide they only want blondes with blue eyes?"[165] While it is hopeful that

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[160] *See supra* Part IV.

[161] Mignon McLaughlin, *The Second Neurotic's Notebook*, 1966, THE QUOTE GARDEN, http://www.quotegarden.com/body.html (last visited Sept. 9, 2014).

[162] *See* Parmley, *supra* note 14; Josh Sanburn, *Too Big to Cocktail? Judge Upholds Weight Discrimination in the Workplace*, TIME (July 26, 2013), http://nation.time.com/2013/07/26/too-big-to-cocktail-judge-upholds-weight-discrimination-in-the-workplace/.

[163] Parmley, *supra* note 14.

[164] Schiavo v. Marina Dist. Dev. Co., No. ATL-L-2833-08, 2013 WL 4105183, at *17 (N.J. Super. Ct. Law Div. July 18, 2013).

[165] Urgo, *supra* note 25.

the Borgata Babes ruling will at the very least prompt employers to carefully review their dress and appearance policies in an effort to steer clear of Title VII violations based on sexual stereotyping, it is perhaps more realistic to predict that many employers will use the ruling as an excuse to craft policies that further burden one sex over the other as long as the employers can prove that the policy comports with the "industry's mores and practices." The ruling may also have a chilling effect on the number of plaintiffs willing to take on casinos and their appearance policies, as many casinos may be less likely to settle appearance standard cases.

This author is hopeful that with the publicity surrounding the most recent Borgata Babes case and other recent casino appearance standard cases,[166] state and federal courts will be encouraged to implement new and more comprehensive methods for analyzing appearance standards under Title VII that will remain true to Congress' intent to eliminate the offensive and outdated sex stereotyping that limits employment opportunities for employees. Specifically, when assessing sex-specific policies under Title VII and other constitutional provisions, such as LAD, courts should take a realistic view of what constitutes a disproportionate burden on one sex and should prohibit rules that reinforce gender stereotypes.[167]

When considering future appearance standard cases, courts should be mindful that the *Jespersen* majority declined to preclude, as a matter of law, claims of sex-stereotyping on the basis of dress or appearance codes and recognized that the bases for such claims would become more refined as the law evolved.[168] That refinement should include examining the individual restrictions and requirements of the policy as a whole, considering a wide range of factors, including the temporal, financial, physical, and emotional costs of compliance as well as the psychological burden of conforming to a sexual stereotype and the employee's personal objections to compliance, as outlined so eloquently in the *Jespersen* dissenting opinions.[169] Appearance standards with specific provisions regarding makeup, "teased, curled, or styled hair," heels, and sexually skimpy, provocative uniforms for women, and only prohibitions on makeup and jewelry for men, should be challenged on their obvious facial inequality. Should it truly require expert witness testimony for courts to acknowledge that styled hair, makeup, heels, stockings, and provocative tight fitting uniforms for female bartenders or cocktail servers constitutes a greater burden than short hair, clean fingernails, slacks, and a t-shirt for their male colleagues?

Further, it is essential that courts adhere to the limiting language of Title VII's BFOQ exception and the narrow interpretations found in the

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[166] *See* Sam Wood, *Two 'Borgata Babes' Settle Their Discrimination Suit,* PHILA. INQUIRER, Aug. 1, 2008, at B3; Donald Wittowski, *Older servers: Resorts firings 'predetermined*,' PRESS OF ATLANTIC CITY, Apr. 2, 2011, at A1; Donald Wittowski, *Roaring '20s Costume Controversy/Ex-servers sue Resorts/Nine more cocktail workers claim bias*, PRESS OF ATLANTIC CITY, June 1, 2011, at A1.

[167] Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1097 (2009).

[168] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc).

[169] Malcom, *supra* note 82, at 539. *See Jespersen*, 444 F.3d at 1116-17.

foundational caselaw examined in this Note, such as the *Price Waterhouse* and *Frank* opinions.[170] Sex should be a BFOQ only if it relates to the ability to perform the job, not just an employer's idiosyncratic requirements or customer's preference[171]—thus limiting the defense to occupations involving strictly modeling, acting, or sexual entertainment. In enforcing this narrow standard, courts should not be taken by employers' strategies to circumvent Title VII discrimination suits such as re-designating employees' job titles.[172] A casino should not be permitted to define its cocktail server jobs as a combination of model and server with the sole purpose of maintaining a discriminatory appearance policy when that job description has no viable relation to the qualifications required for performance of the job—to serve drinks to customers.

CONCLUSION

Courts cannot continue to fail to question sex stereotypes underlying conventional "community standards" and dubiously "reasonable" business justifications for employers' appearance restrictions. Employment policies such as the Borgata appearance policy promote sex stereotyping, limiting employment opportunities for entire protected classes of individuals in direct violation of the primary non-discriminatory intent of Title VII.[173] The current unequal burdens test as applied in *Jespersen* does not advance the goals of Title VII but instead provides a legal loophole to discriminate. The potential reform outlined in this Note, requiring a more comprehensive, multi-faceted approach to the undue burdens test and stricter limitations on the BFOQ exception, will provide more effective methods of Title VII protection.[174] Had the Ninth Circuit employed these approaches in evaluating Jespersen's undue burden claim, she would likely have prevailed, and by extension, the Borgata Babes may have as well.

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[170] *See supra* Part III.

[171] Erica Williamson, *Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace*, 56 DUKE L.J. 681, 688 (2006).

[172] *See* George et al., *supra* note 131, at 725.

[173] Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989).

[174] *See supra* Part V.