



What's in the closet: dress and appearance codes and lessons from sexual orientation

What's in
the closet

Todd Brower

Western State College of Law, Fullerton, California, USA

491

Abstract

Purpose – Dress and appearance codes are often seen as trivial, both because they seem to fit within our notions of how people ought to behave, and because they appear to reflect legitimate employer concerns in running a business. But they are not constructed in a vacuum. They reflect and enshrine societal stereotypes and expectations of women and men and how they look – including assumptions about gender and sexuality and majoritarian norms. As such, they punish anyone who is an outlier by reason of gender, sexuality, race, religion, or culture. This paper seeks to identify the assumptions and effects on gender, sexuality, professionalism and class in appearance and behavior codes.

Design/methodology/approach – This is a conceptual paper exploring US case law on dress codes and employee appearance standards to examine issues of gender and sexual orientation identity on the job. By combining insights from sexual orientation identity theories and visibility, the paper seeks to uncover some of the interactions and effects of these appearance policies on women and LGBT persons in the workplace.

Findings – This paper shows that identity strategies and performances used by LGBT individuals and women in the workplace implicate sexuality and gender, but also professionalism and class. These dress and appearance codes carry with them consequences for both employers and employees.

Practical implications – The paper highlights the gender, sexuality and identity performance burdens on women and sexual minorities workplace controls over dress and appearance.

Originality/value – The paper discusses topics that are of interest to persons studying sexuality and gender identity issues in employment. It is based on an unpublished talk at the EDI conference in Vienna 2010.

Keywords Gender, Sexual orientation, Sex and gender issues, Women workers, Work identity, Discrimination, Dress codes

Paper type Conceptual paper

1. Introduction: *Jespersen v. Harrah's Operating Company*, a paradigmatic US case

Dress and appearance cases raise interesting questions of gender and workplace identity. These issues have also played out in American courts. Probably the most often discussed case in US case law on this topic is *Jespersen v. Harrah's Operating Co.* (2006). The fact pattern is familiar, but contains some interesting twists. Darlene Jespersen performed successfully as a bartender at Harrah's Casino in Reno, Nevada, for almost 21 years. In February 2000, the defendant-employer instituted the "Personal Best" program whose purpose was to create a "brand standard of excellence." The Personal Best program included general appearance standards applicable to all employees and particular, sex-specific appearance standards. The latter standards required that women's hair be styled, teased, or curled, and that they wear makeup, including lipstick, blush, foundation, and mascara; men's hair must be short and they were forbidden to wear makeup or colored nail polish. Each female employee also received a professional makeover from professional image consultants. Then Harrah's photographed each female employee and placed the photos into the employees' files.



Supervisory employees used these photographs to judge whether female employees complied with the standards everyday (*Jespersen v. Harrah's Operating Co.*, 2006).

Jespersen testified that wearing makeup made her feel “sick, degraded, exposed and violated;” she felt “dolled up,” like a sex object, stripped of her dignity, and less effective at work (*Jespersen v. Harrah's Operating Co.*, 2004, p. 1077). Jespersen refused to conform to the Personal Best standards and Harrah's fired her. She sued, alleging sex discrimination in violation of US federal statutes.

The final appellate court majority held that the proper test in dress and appearance cases is whether the policy imposes unequal burdens on men and women. According to the majority, Jespersen’s testimony that she found the makeup requirement burdensome was merely her subjective response to the policy and did not establish that the policy’s burdens were unequal. The majority looked at the entire appearance standard and concluded that there was insufficient evidence in the record to prove a greater burden on women (*Jespersen v. Harrah's Operating Co.*, 2006).

Significantly, the court held that future plaintiffs might potentially employ the sex stereotyping theory articulated by the US Supreme Court in *Price Waterhouse v. Hopkins* (1989) to attack a dress code that intentionally stereotyped a person because of sex and thus created unequal burdens on different sexes. This inequality could be shown in several ways. The majority concluded, however, that Harrah’s dress code did not treat men and women unequally. First, the dress code was not designed to treat women as sex objects. The court noted that the dress code required of male and female bartenders was predominantly unisex and fully covered the bodies of both men and women. The women’s uniform was not sexually provocative. Second, the majority also noted that the makeup requirement did not objectively interfere with a woman’s ability to perform the job as bartender. Third, this was not a case of sexual harassment because of the plaintiff’s failure to conform to feminine norms of dress or behavior. According to the court, Jespersen’s evidence only showed her subjective revulsion to the makeup requirement, and did not establish that Harrah’s intended to sex stereotype women in general (*Jespersen v. Harrah's Operating Co.*, 2006). Both the facts and the court’s opinion in Jesperson raise interesting points which will be explored through the lens of sexual orientation identity as a way of seeing dress and appearance codes more clearly.

2. The lessons from sexual orientation identity

The metaphor of the closet is familiar from sexual orientation. To be “in the closet” means to hide one’s true lesbian or gay self; “out of the closet” means to be open about who one is. However, both the metaphor and the dichotomy it invokes are incomplete. One literally moves from a closet into a room by stepping all at once from one place to another. However, coming out of the closet as a gay, lesbian, bisexual or transgender (LGBT) person is a series of individual decisions that one makes anew with each encounter and situation (Badgett, 1996). Thus, the reality of lesbian and gay identity and visibility is more complex and nuanced. Kenji Yoshino (2006) has spoken about “covering;” being open about one’s sexuality, but minimizing that aspect in order to make others more comfortable. For example, an open lesbian may not bring her partner to work events or discuss her when others talk about their spouses. Accordingly, her co-workers do not have to face directly her relationship or her lesbian identity.

One of the lessons of sexual orientation, then, is that identity is performative. It is a series of decisions about how to present oneself to others. It does not exist in a vacuum or in the abstract, but in relationship to time, space, and audience. A person can be open to no one, to other gay people only, to friends, or only outside of work, family, or

church, or at some periods of one's life and not others. Lesbians and gay men consciously and unconsciously modulate their self-presentation in different settings, including their appearance and dress (Clarke and Turner, 2007). Moreover, identity differs with social, community, and workplace cultures (Clarke and Turner, 2007; Blackwood and Weiringa, 1999). Acceptable or expected behaviors vary in different settings (Brower, 2001).

Identity performance is not limited to sexual orientation. One can execute racial identity, such as when a black person dresses or uses speech patterns similar to his white work colleagues to make them feel more comfortable around him (Carbado *et al.*, 2007). Religious identity, too, is subject to calibration; witness the controversies surrounding women wearing Muslim head coverings at school or work (Shadid and van Koningsveld, 2005; Reece, 1996). Gender identity is similarly constructed (Butler, 1990).

As in Jesperson, the dress and appearance codes described in the USA, the UK, and European cases tend to push men and women toward traditional gender presentation: men in ties and short hair, women in dresses and makeup (Cruz, 2004; Skidmore, 1999). Unlike the Jesperson court's conclusion, the burdens on women and men are not necessarily equal in these appearance codes – either when viewed empirically or through a socially constructed lens. Forcing women to wear cosmetics is not equivalent to forcing men to refrain from wearing them, either in cost, time, effort, or burdens (*Jespersen v. Harrah's Operating Co.*, 2006, p. 1117). Moreover, negotiating workplace appearance norms for women is considerably more complex than for heterosexual men (Dellinger and Williams, 1997). Like gay men, women's choices on appropriate work dress often involves considering the impact that sexuality has on competence and professionalism (Rumens and Kerfoot, 2009; Skidmore, 1999; McGinley, 2007).

Additionally, differences in male and female gender roles sometimes result in asymmetrical workplace incentives for identity (*Price Waterhouse v. Hopkins*, 1989). Women's gender-atypical behavior may sometimes be expected or within gender appropriate boundaries where men would not have similar freedom (*Fudge v. Penthouse International*, 1988). The well-known US Supreme Court decision in Price Waterhouse may be one such illustration. Price Waterhouse recognized that an employer who requires traditional gender roles for female employees perpetuates gender stereotypes and violates non-discrimination law. In fact, *Jespersen v. Harrah's Operating Co.* (2006, p. 1111) cited *Price Waterhouse* for this proposition. Price Waterhouse was not a dress or appearance case, although both dress and appearance played a significant role in the matter. Despite her recognized professional and business development abilities, Price Waterhouse denied Ann Hopkins a promotion to an accounting partnership due to her lack of interpersonal office skills, expressed as consequences of Hopkins' gender atypical (masculine) characteristics. She was described as having perhaps "overcompensated for being a woman" and as needing to enroll in a "course at charm school;" she was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry". The court found that Price Waterhouse denied Hopkins a partnership in part because her gendered behavior and characteristics were inappropriate for her sex (*Price Waterhouse v. Hopkins*, 1989, pp. 1112-1113, 1117-1120).

The core of that discrimination was the employer's insistence on traditional gender conformity. It is not coincidental that that workplace gender conformity was partially expressed through comments on Hopkins' dress and appearance. Gender is usually visible and visibly performed, unlike sexual orientation, which can be sometimes hidden or closeted. Accordingly, gender identity displays often arise as a key concern

at work (Levi, 2008; Skidmore, 1999). Because Hopkins was a woman, her employer insisted that she display traditionally constructed feminine behaviors and mannerisms, even as the job required aggressive or “male” behaviors. That created a double bind: the job requirements demanded traditional masculine traits such as assertiveness and forcefulness, yet when Hopkins displayed those qualities, Price Waterhouse viewed them as gender atypical and denied her the promotion (*Price Waterhouse v. Hopkins*, 1989). A man with those aggressive or “masculine” characteristics would have been promoted, while Hopkins, a female, was not; that difference in treatment was sex discrimination.

A parallel double bind also may extend to dress and appearance and to gender identity performance itself. Some high-status workplaces and careers are predominantly and conventionally male, and women may be pressured to utilize more masculine attributes there. Forsythe (1990) found that to be hired or be taken seriously in business, some respondents suggested women not dress or act overtly feminine: not wear too much jewelry, too short skirts, too high heels, etc. At least for certain jobs, therefore, a woman with limited, more masculine-tending personal characteristics may be permitted (McDowell, 1995). Yet, as the employer’s actions in Price Waterhouse caution, however, an employer may still expect women to visibly present in overtly feminine ways.

Indeed, Jesperson also reflects that conflict. As a bartender in a casino, Darlene Jesperson had to deal with drunk or rowdy customers. That part of her job required her customers to respect her authority. Jesperson believed that the feminization and sexualization of her appearance mandated by Harrah’s dress code interfered with her ability to do her job (Pizer, 2007; *Jespersen v. Harrah’s Operating Co.*, 2006). Price Waterhouse required women who were secretaries – customarily female jobs – and accounting partners – predominantly male roles – to present in stereotypically feminine ways. This caused a problem for those women, like Hopkins, who worked in the firm’s male-dominated positions because part of her arsenal of power identity performance was circumscribed and undermined. Similarly, Harrah’s dress code required the women in the traditionally male job of bartending and female-identified position of cocktail waitresses both to appear in a conventionally feminine manner (McGinley, 2007). Jesperson was forced to surmount the barrier imposed on her job performance by her employer’s stereotypical appearance standards which undercut her need to be perceived as an authority figure by bar patrons and not as more decorative objects, like the cocktail waitresses.

Individuals execute identity performances; but corporations, too, may engage in this task. In this context, attention to corporate branding may include employee interaction with the public as well as advertising and logos. The uniforms worn by employees at fast food restaurants or Disney properties are examples of brand identification through employee dress (Avery and Crain, 2007; Leidner, 1993). Indeed, the Disney company calls its theme park employees “cast members” – demonstrating the appearance performance inherent in that label and reinforcing the company’s control over employee identity (Leidner, 1993). One extreme version of branding through employee appearance is the explicit use of sex as an employment criterion (Bona Fide Occupational Qualification (the USA) or Genuine Occupational Requirement (the UK) (*Wilson v. Southwest Airlines*, 1981; McGinley, 2007)). In these situations, sex becomes a specific part of the business model. Yet, one need not go so far as an employer’s attempt to make sex a BFOQ/GOR to see that gender presentation can play a significant role in corporate identity (*HJ Limited Partnership v. Winghouse of Florida*, 2004; Bartlett, 1994).

Indeed, the history of Harrah’s casinos in Jesperson illustrates this point. Bill Harrah, the founder of Harrah’s specifically chose to hire women as casino dealers and

bartenders, jobs traditionally held by men in the gaming industry, to reflect a corporate image of family friendliness in his establishments (Avery and Crain, 2007). Thus as a long-term employee, Jesperson would have been a beneficiary of that change. As a tall, short-haired, non-made-up woman, she may have successfully straddled that double bind described earlier. She had enough masculine characteristics to fulfil the traditionally male job, but still display the family friendly image Harrah's hired women to project.

Notice, too the ways in which “professionalism” and class intersect with appearance. Avery and Crain (2007) argue that the Personal Best requirement for women can be viewed as a sexualization of Harrah's female employees. Harrah's grooming rules explicitly treated female bartenders the same as cocktail waitresses, and erased one significant status distinction between those jobs within the hierarchy of the casino (McGinley, 2007). Jespersen had achieved her authority as a bartender with her customers and co-workers in a traditionally male job through her personality and hard work and not by being made up to encourage others to view her as “pretty” or sexually titillating. A female bartender, like Jespersen, who had never worn makeup, could have reasonably understood the makeup requirement – imposing on her the same grooming requirements as the cocktail waitresses – as lowering her status from bartender to barmaid (Avery and Crain, 2007, p. 83).

Had Jesperson been able to demonstrate to the court that the dress code placed women in a lesser status because it sexualized them, it would have fallen within US precedent holding that treatment to be sex discrimination. In *EEOC v. Sage Realty Corporation* (1981), a court found that forcing female employees to wear revealing uniforms susceptible to encouraging sexual harassment was sex discrimination. Further, cases held that it was sex discrimination to impose sex-differentiated dress requirements because an employer believed that women needed more guidance than men in dressing appropriately. The policies created a status distinction since women had to wear a uniform but men only needed to look “professional” (*Carroll v. Talman Federal Savings and Loan Association*, 1979).

Examining the Harrah's policy more closely shows that it fits within the Carroll precedent. The policy required women to meet with a professional appearance consultant who would create a “look” for each woman (makeup, hair, etc.). That look was memorialized in a photograph. Women were expected to recreate that image each working day and Harrah's would compare a women's job appearance with her photograph for consistency. From this policy one might surmise that the real issue was not imposing makeup on women like Jesperson who did not wear any, but controlling the type and amount of makeup used by other female Harrah's employees to insist that they not look tawdry or lower class (Avery and Crain, 2007; Paules, 1991; *Jespersen v. Harrah's Operating Co.*, 2004). While consistent with corporate branding concerns, the class and gender assumptions beneath this policy risk comparisons to Carroll by implying that women needed monitoring to ensure an appropriate appearance. Although not as obvious as Harrah's policy, other sex-differentiated grooming codes may contain similar assumptions about professionalism.

Sexual orientation identity research can help clarify what is at stake in dress and appearance standards. Because it has not been studied as often as gender construction, sexuality, and professional identity studies may throw these issues into greater relief (Clarke and Turner, 2007). Research shows how gay men sometimes struggle to appear competent or professional. Studies of gay men employed in public service professions such as teaching (Knopp, 1999; Rofes, 2000; Skelton, 2000), policing (Burke, 1993), and local government (Humphrey, 1999) reveal how some gay men hide or cover their

sexual orientation in order to minimize the threat from views of male homosexuality that would denigrate their professionalism. Rumens and Kerfoot (2009) discuss how some gay men are able to appear professional by minimizing sexuality-based identity and conforming to workplace norms in terms of a lifestyle that mimics heterosexual married life, in order to counter the stereotypes of sexual libertinism or hedonism. Thus, conformity to conventional norms serves as a shield for sexual minorities and serves to insulate gay men from charges of unprofessionalism.

Strategies of gay and lesbian passing have often made use of the semiotic quality of clothing (Bell *et al.*, 1994; Bell and Valentine, 1995). As Wilson (1988) showed, dress is a necessary component in the construction of gender for lesbians and gay men. One major characteristic of the popular schema about gay people is that they exhibit cross-gender or gender atypical behavior, behavior traditionally associated with the opposite sex (Halley, 1989; Taylor, 1983). One-way lesbians and gay men pass or cover is to adopt the coloration of binary gender. The complementarity and rigid differentiation of binary gender trigger its conflation with heterosexuality. Accordingly, clothing and appearance are principal signifiers in determining and maintaining the gender complementarity important for passing and serves as an indicator of heterosexuality or homosexuality (Hawkes, 1995). This link is seen in the same-sex harassment cases in which men who wear earrings or have long hair are often assumed to be gay and/or harassed through sexuality-laden terms and actions (*Doe v. Belleville*, 1997).

Although functional, passing or covering one's sexuality by aping conventional appearances is not a solution to anti-gay discrimination; forced invisibility is a form of anti-gay inequality (Schacter, 1997). In addition, silence about one's self-identity reinforces lesbian and gay marginalization because it requires gay people to deny an essential difference between them and others (Brower, 2007; Halley, 1989). They may not share in everyday social interactions at work or in other contexts because they must mask certain aspects of their lives (Brower, 2007; Ho, 2006). Parallels exist with non-conventionally gendered heterosexuals and dress codes. They, too, must deny who they are to conform to employment norms. Thus, their true selves become concealed by their outward appearance.

Sexual minorities are self-conscious in their choice of clothes or appearance and attentive to the gender semiotics of those choices. Heterosexuals and others wishing to remain within heteronormative confines quickly perceive how gender and dress are traditionally mapped. Gendered appearance signs pervade everyday life. Pictograms on toilet doors depict men and women wearing pants and dresses, respectively, and figures of speech such as "knowing who wears the pants/trousers in the family" rely on the cultural knowledge of dress (Skidmore, 1999, p. 512). Thus, women and sexual minorities may signal acceptance and conformity within workplace culture by hewing to conventional gender identity performances. Like lesbians and gay men, hiding their true gender presentation through forced adherence to traditional gender norms is no more comfortable or inconsequential for heterosexual women and men than for their homosexual counterparts.

Consider this thought experiment. In the first situation, a transgender male who has not yet transitioned to being a woman is confronted with a dress and appearance code that assigns men and women to traditional gender roles. It is easy to see that the conventional gender enforcement inherent in that code has significant effects on the transgender worker, particularly as he begins his transition to being a woman via established protocols (WPATH, 2001). He is forced to maintain a gender identity that is at odds with his internal view of himself as female. Not only will he have to keep his hair

and nails short at work, but effectively also outside employment hours. His personal autonomy is subordinated to the employer's goals in a manner that we might see as inappropriate because it goes to the essence of who he is as a transgender person.

The second situation concerns a lesbian who presents a customarily masculine appearance: short hair, no makeup, trousers, heavy shoes, etc. If we perceive that she, too, is affected by an employer appearance code requiring her to conform to conventional feminine dress like in our first example, it is because we believe that she and other gay people contravene gender norms. This belief may stem from a perception that lesbians and gay men engage in cross-gender identity performances. Alternatively, it may come from a theoretical model that gay people are gender transgressors because they violate the rule of heterosexual sexual attraction, the ultimate gender marker (Bem, 1993; Law, 1988; Marcosson, 1992). Both notions are false. All gay people do not engage in gender-atypical behavior any more than all heterosexuals are gender conforming, although the conflation is common (Bosson *et al.*, 2005; Case, 1995; Denizet-Lewis, 2003).

The theoretical model also falls victim to this oversimplification, only in a more sophisticated manner. That theoretical model treats lesbians and gay men as a group and not as individuals; their identity is gender disparate or -subversive because they violate heterosexual norms. Gay people are collectively employed in contradistinction to heterosexuals and serve as a foil to that standard. This non-individualization of sexual minorities robs them of agency and incorporates heteronormative assumptions even as it attempts to debunk them. It privileges heterosexuality and heterosexuals as the only ones with gender autonomy. Heterosexuals are gender transgressive by doing – through their own choices and actions; sexual minorities are gender transgressive by being – through their status, regardless of their individual desires and behaviors (Bem, 1993, p. 4-5). That construct effectively permits society and culture to assign gender identity to lesbians and gay men; they do not act, but are acted upon by others.

Nevertheless, the second example with our gender disparate lesbian is equally indicative of dress codes affecting identity as our transgender example, and for parallel reasons. If personal autonomy in whatever gender presentation is valued here because it affects the core of who that particular lesbian or gay man is (Pizer, 2007), and their decisions about sexual orientation visibility – whether they are open, closeted, covering, or somewhere in between – are entitled to deference, then employer dress and appearance codes in the second example negate those choices just as in the first.

Finally, the third scenario is a heterosexual employee who is faced with the same traditionally gendered appearance code as in the first two illustrations. Logically, if the other scenarios are gender discrimination because the appearance code enforces stereotypical gender assumptions in contravention of the personal autonomy of transgender, lesbian, or gay employees, the heterosexuality of the third employee should be equally irrelevant. The only way in which this conclusion is not true is if gender identity and presentation are not important issues for heterosexuals. Jesperson and other cases belie that conclusion. Alternatively, one may argue that it is acceptable to trade off the gender autonomy rights of heterosexuals against employer appearance mandates in ways that would not be permissible for transgender, lesbian, or gay individuals. However, because sexuality and gender are independent constructs, there is no reason why heterosexuals' gender presentation is determined by their sexuality (Bem, 1993; Butler, 1990) or is less important for them than for sexual minorities. These work rules are no more trivial in one instance than they are in the others.

Several implications flow from the prior discussion. First, definitions of gender and sexuality are not fixed. How we understand those identities shifts as a function of the

daily individual choices people make on such matters as dress and appearance (Badgett, 1996; Brower, 2007). Second, individuals act not in isolation, but in conjunction with societal pressures and constraints. Some identity performances are rewarded and others are punished and people often behave consistently with those incentives (Carbado *et al.*, 2007, p. 4). Third, social understandings of particular identity performances regulate and are regulated by this system of incentives and disincentives. For example, if male facial hair is perceived as a sign of fashionability or hipness, then many men will leave their razors unused, while others will reject that image and go clean-shaven; if the hijab is a sign of female religious devotion, then some women in religious communities will cover their hair, while others will not; different societies may mandate or prohibit that religious appearance performance (Shadid and van Koningsveld, 2005). A self-perpetuating cycle is created: social norms drive identity performances, which in turn concretize the social norms.

The preceding dynamic is crucial to understanding discrimination in the contemporary workplace. Workplaces are structured around norms, including the strong norm of teamwork and collegiality in professional workplaces. Employers ordinarily expect that employees will get along with each other; per Donald Langevoort (2004, p. 1630), employers want workers who produce grease, not grit. Accordingly, identity and appearance performances signal much more than conventional gender or sexual orientation; they serve as proxies for conformity or workplace norm-acceptance messages important to the corporate structure.

White, heterosexual men are generally at the center of the professional workplace. The question of fit turns on one's similarity to and difference from that group. This creates an incentive for institutions to enact policies to encourage people's behavior based on those norms. Non-discrimination constraints and diversity goals mean that the employer cannot simply select white, heterosexual males, and assume that they will be compatible with other workers because of their identical demographic characteristics. But neither must the employer completely subordinate its interest in collegiality and institutional fit to those limitations. Through dress and appearance codes, an employer can employ performative criteria to screen workers for those women, racial, religious, and sexual minorities who can produce grease – i.e. work comfortably with white men. Conversely, women and minorities seeking entrance into those workplaces have an incentive to signal – again via performative criteria – that they have the capacity to fit comfortably within a workplace with few women, religious or ethnic minorities, or lesbian and gay individuals (Rumens and Kerfoot, 2009; Carbado *et al.*, 2007). Accordingly, non-conformity in dress and appearance, particularly with respect to gender or sexuality, conveys messages about an individual's view of corporate culture and how she fits into it. The importance of those messages to employers who have workplace dress codes goes beyond mere appearance and branding. There may not be an "I" in "team," but there is certainly one in "iconoclast." That additional signal helps explain why Harrah's would terminate a 21-year excellent employee over her failure to wear makeup.

3. Conclusion

As lawyers and law professors, we sometimes overestimate the practical impact legal rules have on the workplace; informal social or workplace norms may have a greater effect on workers' lives, particularly in dress and appearance codes. As Dellinger and Williams (1997) discuss, often workplace norms and not employer policies dictate dress

and appearance standards. Nevertheless the extent to which courts and legal texts validate employer appearance rules matter, especially given law's signaling or norm-generating function (Lin, 1999; Thomas, 1993).

In thinking about this issue, I assume courts operate within rights-based systems where both the employer and worker have articulable rights. Discussion of rights in a sexuality or gender context has sometimes been problematic because much of that discussion is about who has the power to define the terms of equality (Herman, 1993). Despite its limitations, rights discourse is the language of law; it underlies current western legal systems and is incorporated in most people's lived experience (Minow, 1990; Hunt, 1990).

Moreover, describing employer and employee rights as competing interests leads to the view that the employer and worker are similarly situated; an increase in worker autonomy represents a corresponding and equal decrease in employer autonomy and vice versa (Epstein, 1995). However, if employer and employee are unequal, one sees the employer's power over the worker. In this model the autonomy of the worker hinges on the employer's discretion, but the employer's autonomy is not equally dependent on the worker's actions (Atelson, 1983). The contingent nature of the worker's autonomy and equal treatment strengthens the case for protecting it against the employer and why they should sometimes be allowed to limited employer management prerogatives (Skidmore, 1999, p. 520).

It is appealing to see dress and appearance codes as trivial, both because they seem to fit within our notions of how people ought to behave, and because they appear to reflect legitimate employer concerns in running a business. But they are not constructed in a vacuum. They reflect and enshrine societal stereotypes and expectations of women and men and how they look – including assumptions about gender and sexuality and majoritarian norms. As such, they punish anyone who is an outlier by reason of gender, sexuality, race, religion, or culture.

More specifically, these cases buttress gender hierarchy in the workplace. Women are judged on job performance and appearance, men on their work. This reinforces the view that women are sexual playthings and not workplace equals (MacKinnon, 1979). As with gay men and lesbians, women's dress and appearance may be used to signal competence, and sometimes class or status. Hiding or closeting sexuality, either homosexuality or female heterosexuality, may sometimes be demanded in workplace settings to project professionalism. Yet sex-differentiated dress codes may push women into being seen as sexualized beings. Moreover, those dress and appearance codes emphasize gender differentiation, rather than highlight similarities in skill, credentials, and effort. As such they perpetuate thinking about workplace difference and take away worker autonomy.

References

- Atelson, J.B. (1983), *Values and Assumptions in American Labor Law*, University of Massachusetts Press, Amherst, MA.
- Avery, D. and Crain, M. (2007), "Branded: corporate image, sexual stereotyping, and the new face of capitalism", *Duke Journal of Gender Law and Policy*, Vol. 14, pp. 13-124.
- Badgett, M.V.L. (1996), "Employment and sexual orientation: disclosure and discrimination in the workplace", in Ellis, A.L. and Riggle, E.D.B. (Eds), *Sexual Identity on the Job: Issues and Services*, Hayworth Press, Binghamton, NY, pp. 22-59.
- Bartlett, K.T. (1994), "Only girls wear barrettes: dress and appearance standards, community norms, and workplace equality", *Michigan Law Review*, Vol. 92 No. 8, pp. 2541-2582.
- Bell, D., Binnie, J., Cream, J. and Valentine, G. (1994), "All hyped up and no place to go", *Gender, Place and Culture*, Vol. 1 No. 1, pp. 31-47.

- Bell, D. and Valentine, G. (1995), "The sexed self: strategies of performance, sites of resistance", in Pile, S. and Thrift, N. (Eds), *Mapping the Subject – Geographies of Cultural Transformation*, Routledge, London, pp. 143-157.
- Bem, S.L. (1993), *The Lenses of Gender: Transforming the Debate on Sexual Inequality*, Yale University Press, New Haven, CT.
- Blackwood, E. and Weiringa, S.E. (Eds) (1999), *Female Desires: Same-Sex Relations and Transgender Practices Across Cultures*, Columbia University Press, New York, NY.
- Bosson, J.K., Prewitt-Freilino, J.L. and Taylor, J.N. (2005), "Role rigidity: a problem of identity misclassification?", *Journal of Personality and Social Psychology*, Vol. 89 No. 4, pp. 552-565.
- Brower, T. (2001), "Of courts and closets: a doctrinal and empirical analysis of lesbian and gay identity in the courts", *San Diego Law Review*, Vol. 38, pp. 565-628.
- Brower, T. (2007), "Multistable figures: sexual orientation visibility and its effects on the experiences of sexual minorities in the courts", *Pace Law Review*, Vol. 27, pp. 141-198.
- Burke, M.E. (1993), *Coming Out of the Blue*, Cassell, London.
- Butler, J. (1990), *Gender Trouble: Feminism and the Subversion of Identity*, 2nd ed., Routledge, New York, NY.
- Carbado, D., Fisk, C. and Gulati, M. (2007), "Foreword: making makeup matter", *Duke Journal of Law and Policy*, Vol. 14, pp. 1-12.
- Carroll v. Talman Federal Savings and Loan Association* (1979), 604 F.2d 1028 (7th Cir.).
- Case, M.A. (1995), "Disaggregating gender from sex and sexual orientation: the effeminate man in the law and feminist jurisprudence", *Yale Law Journal*, Vol. 105, pp. 1-105.
- Clarke, V. and Turner, K. (2007), "Clothes maketh the queer? Dress, appearance and the construction of lesbian, gay and bisexual identities", *Feminism and Psychology*, Vol. 17 No. 2, pp. 267-276.
- Cruz, D. (2004), "Making up women: casinos, cosmetics and title VII", *Nevada Law Journal*, Vol. 5, pp. 240-259.
- Dellinger, K. and Williams, C. (1997), "Makeup at work: negotiating appearance rules in the workplace", *Gender and Society*, Vol. 11 No. 2, pp. 151-177.
- Denizet-Lewis, B. (2003), "Putting on a good face: lipstick lesbians may favor makeup and dress-up over political activism, but their very existence rejects the stereotype that femininity is reserved for straight women", *The Boston Globe Magazine*, March 2, p. 11.
- Doe v. Belleville* (1997), 119 F.3d 561 (7th Cir.).
- EEOC v. Sage Realty Corp.* (1981), 507 F. Supp. 599 (S.D.N.Y.).
- Epstein, R.A. (1995), *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Harvard University Press, Cambridge, MA.
- Forsythe, S.M. (1990), "Effect of applicant's clothing on interviewers' decision to hire", *Journal of Applied Social Psychology*, Vol. 20 No. 19, pp. 1579-1595.
- Fudge v. Penthouse International* (1988), 840 F.2d 1012 (1st Cir.).
- Halley, J. (1989), "The politics of the closet: towards equal protection for gay, lesbian and bisexual identity", *UCLA Law Review*, Vol. 36, pp. 915-976.
- Hawkes, G. (1995), "Dressing-up – cross-dressing and sexual dissonance", *Journal of Gender Studies*, Vol. 4 No. 3, pp. 261-270.
- Herman, D. (1993), "Beyond the rights debate", *Social & Legal Studies*, Vol. 2 No. 1, pp. 25-43.
- HI Limited Partnership v. Winghouse of Florida* (2004), 347 F. Supp. 2nd 1256 (M.D. Fla.).
- Ho, J. (2006), "Attracting gay MBAs", *Business Week Online*, August 8, available at: www.businessweek.com/bschools/content/aug2006/bs2006089_3298_bs001.htm (accessed June 4, 2010).

- Humphrey, J. (1999), "Organizing sexualities, organized inequalities: lesbians and gay men in the public service occupations", *Gender, Work & Organization*, Vol. 6 No. 3, pp. 134-151.
- Hunt, A. (1990), "Rights and social movements: counter-hegemonic strategies", *Journal of Law and Society*, Vol. 17 No. 3, pp. 309-328.
- Jespersen v. Harrah's Operating Co.* (2004), 392 F. 3d 1076 (9th Cir.).
- Jespersen v. Harrah's Operating Co.* (2006), 444 F.3d 1104 (9th Cir.) (en banc).
- Knopp, L. (1999), "Out in academia: the queer politics of one geographer's sexualisation", *Journal of Geography in Higher Education*, Vol. 23 No. 1, pp. 116-123.
- Langevoort, D.C. (2004), "Overcoming resistance to diversity in the executive suite: grease, grit, and the corporate promotion tournament", *Washington & Lee Law Review*, Vol. 61, pp. 1615-1644.
- Law, S.A. (1988), "Homosexuality and the social meaning of gender", *Wisconsin Law Review*, Vol. 1988, pp. 187-236.
- Leidner, R. (1993), *Fast Food, Fast Talk: Service Work and the Routinization of Everyday Life*, University of California Press, Berkeley, CA.
- Levi, J. (2008), "Misapplying equality theories: dress codes at work", *Yale Journal of Law and Feminism*, Vol. 19, pp. 353-390.
- Lin, T.E. (1999), "Note: social norms and judicial decision making: examining the role of narratives in same-sex adoption cases", *Columbia Law Review*, Vol. 99 No. 3, pp. 739-794.
- McDowell, L. (1995), "Body work: heterosexual gender performances in city workplaces", in Bell, D. and Valentine, G. (Eds), *Mapping Desire*, Routledge, London, pp. 75-98.
- McGinley, A.C. (2007), "Babes and beefcake: exclusive hiring arrangements and sexy dress codes", *Duke Journal of Gender Law and Policy*, Vol. 14, pp. 257-283.
- MacKinnon, C. (1979), *Sexual Harassment of Working Women: A Case of Sex Discrimination*, Yale University Press, New Haven, CT.
- Marcosson, S.A. (1992), "Harassment on the basis of sexual orientation: a claim of sex discrimination under Title VII", *Georgetown Law Journal*, Vol. 81, pp. 1-38.
- Minow, M. (1990), *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca, NY.
- Paules, G.F. (1991), *Dishing it Out: Power and Resistance Among Waitresses in a New Jersey Restaurant*, Temple University Press, Philadelphia, PA.
- Pizer, J.C. (2007), "Facial discrimination: Darlene Jesperson's fight against the Barbie-fication of bartenders", *Duke Journal of Gender Law and Policy*, Vol. 14, pp. 285-318.
- Price Waterhouse v. Hopkins* (1989), 618 F. Supp. 1109 (D.D.C.); (1987), 825 F.2d 458 (D.C. Cir.); (1989), 490 U.S. 228.
- Reece, D. (1996), "Covering and communication: the symbolism of dress among Muslim women", *Howard Journal of Communications*, Vol. 77 No. 1, pp. 35-52.
- Rofes, E. (2000), "Bound and gagged: sexual silences, gender conformity and the gay male teacher", *Sexualities*, Vol. 3, pp. 439-462.
- Rumens, N. and Kerfoot, D. (2009), "Gay men at work: (Re)constructing the self as professional", *Human Relations*, Vol. 62, pp. 763-786.
- Schacter, J. (1997), "Romer v. Evans and democracy's domain", *Vanderbilt Law Review*, Vol. 50 No. 2, pp. 361-410.
- Skelton, A. (2000), "Camping it up to make them laugh?: gay men teaching in higher education", *Teaching Higher Education*, Vol. 5 No. 2, pp. 181-193.
- Shadid, W. and van Koningsveld, P.S. (2005), "Muslim dress in Europe: debates on the headscarf", *Journal of Islamic Studies*, Vol. 16 No. 1, pp. 35-61.

- Skidmore, P.L. (1999), "Dress to impress: employer regulation of gay and lesbian appearance", *Social Legal Studies*, Vol. 8 No. 2, pp. 509-529.
- Taylor, A. (1983), "Conceptions of masculinity and femininity as a basis for stereotypes of male and female homosexuals", *Journal of Homosexuality*, Vol. 9, pp. 37-53.
- Thomas, K. (1993), "The eclipse of reason: a rhetorical reading of Bowers v. Hardwick", *Virginia Law Review*, Vol. 79, pp. 1805-1832.
- Wilson, E. (1988), *Hallucinations: Life in the Post-Modern City*, Radius, London.
- Wilson v. Southwest Airlines* (1981), 517 F. Supp. 292 (N.D.Tex.).
- WPATH (2001), "World professional association for transgender health standards of care, 6th edition", *Journal of Psychology and Human Sexuality*, Vol. 13 No. 1, pp. 1-30.
- Yoshino, K. (2006), *Covering: The Hidden Assault on Our Civil Rights*, Random House, New York, NY.

Further reading

- Jesperson v. Harrah's Operating Co.* (2002), 280 F. Supp. 2d 1189 (D. Nev.); (2004), 392 F.3d 1076 (9th Cir.); (2006), 444 F.3d 1104 (9th Cir.).
- Klare, K.E. (1992), "Power/dressing: regulation of employee appearance", *New England Law Review*, Vol. 26, pp. 1395-1451.

Corresponding author

Todd Brower can be contacted at: tbrower@wsulaw.edu