DECONSTRUCTING SEX AND GENDER ESSENTIALISM: PROTECTING TRANSGENDER, NONBINARY, AND GENDER NON-CONFORMING EMPLOYEES FROM DISCRIMINATION IN THE CONTEXT OF SEXED AND GENDERED DRESS CODES AND GROOMING POLICIES

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ABSTRACT

Transgender, nonbinary, and gender non-conforming individuals face myriad obstacles navigating a society which conflates sex and gender and mandates certain norms of gender presentation. Among these problems include employers' sexed and gendered dress codes and grooming policies. This paper deconstructs sexed and gendered norms of presentation and provides analysis and solutions regarding fair and equitable treatment of both employers and transgender, nonbinary, and gender non-conforming employees.

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INTRODUCTION

Gender identity, gender expression, and gender presentation are frequently considered fundamental aspects of identity and individuals' role in society. In the United States of America, gendered norms of expression can clash with personal identity and are often a basis of discrimination. Many people suffer under the crushing weight of societal expectations of gendered expression and presentation. Transgender, nonbinary,[325] and gender non-conforming individuals face discrimination, disgust, and violence due to their mere existence.[326] In recent years, many federal circuits and districts in the United States have extended the right to due process on the basis of gender identity, expression, and presentation, often through the protected class of "sex."[327] However, in the context of sexed and gendered dress codes and grooming policies,[328] discrimination on the basis of sex and gender is permitted under the

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[325] For the definition of "nonbinary" and its distinction from the term "transgender," see page 4.

[326] *See generally* National Coalition of Anti-Violence Programs, "Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016" (2017), available at avp.org/wp-content/uploads/2017/.../NCAVP_2016HateViolence_REPORT.pdf*; see also* Sandy E. James, et al, *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), available at www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf.

[327] For further discussion, see page 10.

[328] For the purposes of this piece, a sexed or gendered dress code or grooming policy refers to an employer-mandated style of dress or grooming which differentiates between requirements for men and women either on the basis of gender or sex. For explanation and discussion of the differences between sex and gender, see pages 2-3.

guise of "employer choice." Sexed and gendered dress codes and grooming policies allow for employers to stereotype employees based on either sex or gender, ultimately permitting discrimination.

This paper discusses current case law regarding protection (and lack thereof) of transgender individuals in the workplace in U.S. federal courts, and compares this case law with U.S. case law regarding sexed and gendered dress codes and grooming policies. Next, this paper summarizes scholarship concerning sexed and gendered dress codes and grooming policies and explains the perspective that courts' acceptance of sexed and gendered dress codes and grooming policies inherently contradicts the individual protections of Title VII. Finally, this paper proposes recommendations for courts and legal scholars to raise awareness of the issue surrounding employment policies and their effect on transgender, nonbinary, and gender non-conforming individuals. Further, this paper seeks to educate and aid cisgender[329] employers in their understanding of transgender, nonbinary, and gender non-conforming employees to create an atmosphere in which all parties feel respected and valued.

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[329] The term "cisgender" refers to "individuals who have a match between the gender they were assigned at birth, their bodies, and their personal identity." *See infra* note 48 at 198 (*citing* Kristen Schilt & Laurel Westbrook, *Doing Gender, Doing Heteronormativity: "Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality,* 23 Gender & Soc'y 440, 461 (2009)).See pages 2-4 for further discussion.

I. BACKGROUND AND CONTEXT: SEX VS. GENDER AND TRANSGENDER IDENTITY

Gender identity is a complex and nebulous concept to describe. The understandings of gender identity and gender presentation, as codified by law, vastly differ from those defined by non-legal scholars of gender identity. While federal law conflates sex and gender as one concept, the American Psychological Association (APA) defines sex and gender as separate entities.[330] The APA further distinguishes between gender, gender identity, and gender expression.[331] According to the APA, "sex" is defined by biological characteristics (such as sex organs and genitalia); "gender" refers to "attitudes, feelings, and behaviors" culturally associated with a certain biological sex; "gender identity" is "one's sense of oneself as male, female or transgender"; and "gender expression" defines the way an individual presents their personal gender identity.[332] The APA also defines the term "transgender" as "an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex assigned at birth."[333] As a result, the APA recognizes

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[330] American Psychological Association, The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients (2011), www.apa.org/pi/lgbt/resources/guidelines.aspx.
[331] Id.
[332] Id.
[333] American Psychological Association, Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression (2014), available at www.apa.org/topics/lgbt/transgender.pdf.

three defined sexes: "male," "female," and "intersex."[334] However, gender does not necessarily align with the sex a person was assigned at birth, especially in the case of intersex individuals, as there is no gender identity which is societally associated with the intersex condition.[335]

There are many different identities that exist under the umbrella of "transgender."[336] One of the most well-known terms used to describe these identities is "transsexual," or someone who identifies with a different sex than that assigned at birth.[337] Although people who identify as transsexual fit under the transgender umbrella, not all people who identify as transgender are transsexual.[338,339] Some transgender individuals identify under the construct of the gender binary; these individuals identify either as "transgender women," who were assigned male at birth but identify as female, or as "transgender men," who were assigned female at

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[334] The APA defines "intersex" condition as having "abnormalities of the external genitals, internal reproductive organs, sex chromosomes or sex-related hormones." American Psychological Association, Answers to Your Questions About Individuals with Intersex Conditions (2006), available at www.apa.org/topics/lgbt/intersex.pdf.

[335] It is important to note that not all intersex individuals identify as transgender, and it is rare for intersex individuals to be raised in a gender that does not correlate with a binary sex assigned at birth. Many intersex individuals are coercively assigned to one binary sex or the other at birth. Some, but not all, intersex individuals identify as something other than male or female. Julie A. Greenberg, The Roads Less Traveled: The Problem with Binary Sex Characteristics, Transgender Rights, 51, 57 (Paisley Currah, Richard M Juang, Shannon Minter eds., Univ. of Minnesota Press 2006).

[336] *See supra* note 9.

[337] *Id.*

[338] Id.

[339] Sex and gender transition are further discussed on pages 4-5.

birth but identify as male.[340] However, not all transgender individuals identify under the gender binary.[341]

The terms "nonbinary" and "genderqueer" are used as umbrella terms to describe those whose gender does not conform to the "binary constructs of 'male' and 'female.'"[342] This nonconformity to the binary genders of "male" and female" can be expressed in a multitude of ways, not limited to dress and grooming.[343] In theory, there are an infinite amount of nonbinary genders.[344] Some individuals also identify as "agender," indicating a lack of gender.[345] Some individuals with a nonbinary gender identify with umbrella terms "genderqueer," "nonbinary," or "trans," exclusive of any specific nonbinary gender terms.[346] Many, but not all, nonbinary people also identify as transgender; thus, it is important to refer to both transgender and nonbinary people

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[340] See supra note 9.
[341] Id.
[342] Evan Urquhart, "What the Heck is *Genderqueer*?" *Slate* (24 March 2015), available at http://www.slate.com/blogs/outward/2015/03/24/genderqueer_what_does_it_mean_and_where_does_it_come_from.html.
[343] Id.
[344] For example, *The Telegraph* lists and defines a number of common nonbinary gender identities, including "genderfluid," "bigender," and "femme." *See* Guy Kelly, "A (nearly) complete glossary of gender identities for your next census," *The Telegraph* (24 May 2016), available at www.telegraph.co.uk/men/the-filter/a-nearly-complete-glossary-of-gender-identities-for-your-next-ce/.
[345] Trans Student Educational Resources, "LGBTQ+ Definitions," (2017), available at http://www.transstudent.org/definitions.
[346] Id.; see also supra notes 9, 18, and 20.

distinctly when referring to those whose gender identity or presentation does not match that assigned at birth.[347]

Most transgender and nonbinary people experience sex and/or gender dysphoria, a term used to describe "intense, persistent [sex and] gender noncongruence."[348] A diagnosis of dysphoria is required to medically transition in the United States.[349] Medical sex and gender transition may include hormone replacement therapy (HRT), and various surgeries to alter one's physical appearance.[350] However, not all transgender and nonbinary people seek hormonal or surgical procedures to transition, and many transgender and nonbinary people choose some transition methods and not others.[351] Because there is no one way in which to transition, factors that may influence an individual's decision to medically transition include time, finances, personal beliefs, overall medical health, and the level of safety the individual feels living as a transgender or nonbinary person. Transgender and nonbinary people also transition socially when they come out as transgender and/or nonbinary and begin presenting as their true gender identity; however, not all transgender and nonbinary people are comfortable openly presenting and identifying as transgender or nonbinary, much like some gay,

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[347] *See supra* note 21.
[348] See supra note 9.
[349] D. Andrew Quigley, Article, Propagating Gender Stasis: Judicial Indifference and the Medical Model of Gender in Requests for State Medical Assistance, 7 Mod. Am. 40 (2011).
[350] See supra note 9.
[351] Id.

lesbian, and bisexual people are not open about their sexual orientation.[352] This is because of the discrimination many transgender and nonbinary people face based on an inability to conform to strict sex and gender norms present in American society, as well as the demonization of non-normative gender identities.[353]

Despite the many ways in which non-normative gender expression may belie a non-normative gender identity, cisgender[354] people may also present their gender in a non-normative fashion, despite identifying as the gender assigned to them at birth.[355] This non-normative presentation can manifest in myriad ways, including "cross-dressing"[356] or participating in drag culture.[357] Cisgender people with non-normative gender presentation are also subject to similar discrimination and maltreatment faced by transgender and nonbinary individuals, although not always to the same extent.[358,359] Regardless of gender identity and whether or not someone is transgender, a person's concept of their own gender identity is immutable.[360] Biological sex is legally viewed as an immutable

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[352] Id.
[353] Id.
[354] *See supra* note 5.
[355] Meredith M. Render, Gender Rules, 22 Yale J.L. and Feminism, 133, 161 (2010).
[356] "Cross-dressing" is a term referring to the act of wearing "clothing that is stereotypically or traditionally worn by another gender in their culture." *See supra* note 9. The author does not condone the use of the term, as the author intends in part to dispel the notion that certain articles of clothing are only acceptable for members of certain genders to wear.
[357] See supra note 9.
[358] Id.
[359] This discrimination is discussed further on pages 6-7.
[360] See supra note 9.

characteristic and a protected class.[361] The Supreme Court has also indicated that "gender" is an immutable characteristic, arguably because of its societal interconnection and conflation with sex.[362]

Discrimination against transgender, nonbinary, and gender non-conforming individuals through sexed and gendered norms of presentation is often legitimized through societal acceptance of sex and gender essentialism.[363] Examples of sex essentialism include the following common and often wide-held beliefs: (1) the belief that only men have beards and women do not; (2) the belief that women's nipples are indecent to show in public, but men's nipples are not; and (3) the belief that women have uteruses, ovaries, and vaginas, while men exclusively have penises and testicles.[364] These examples portray a largely held cultural belief that male and female bodies are inherently different.[365] However, regarding transgender,

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[361] See generally Frontiero v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770 (1973).

[362] *See Lockhart v. McCree*, 476 U.S. 162, 175, 106 S. Ct. 1758, 1766 (1986) (in reference to "immutable characteristics such as race, gender, or ethnic background).

[363] Essentialism is defined as "the belief that things have essential properties that are necessary to those things being what they are." Alison Stone, Article, Essentialism and Anti-Essentialism in Feminist Philosophy, J. of Moral Philosophy, 1(2), 135, 138 (2004). In this context, the author uses "sex essentialism" to denote instances when culture constructs generally-believed norms concerning inherent differences between the sexes "male" and "female." The author uses "gender essentialism" to denote instances when culture constructs generally believed norms concerning inherent differences between the genders "man" and "woman."

[364] See supra note 11 at 56.

[365] *Se ex.* Christian Jarrett, "Do Men and Women Really Have Different Personalities?", *BBC* (12 Oct 2016), available at www.bbc.com/future/story/20161011-do-men-and-women-really-have-different-personalities (discussing widely-held beliefs regarding the differences between men and women; "While our physical differences in size and anatomy

nonbinary, and intersex individuals, the reality of sex essentialism is not so clear-cut and can cause transgender, nonbinary, and intersex individuals to experience discrimination based on their birth sex or confusion concerning their birth sex. For instance, incorporating a sex-essentialist belief into a grooming policy stating that only men are allowed to wear beards may perpetuate the assumption that men are the only sex that may have beards and women are incapable of growing facial hair.[366]

Similarly, gender essentialism connotes a largely-held belief that men and women are inherently different in terms of gender presentation.[367] An example of gender essentialism is the belief that women may wear dresses, makeup, and long hair in a certain setting, but men may not.[368] This essentialism creates a host of discriminatory conduct based on gender presentation. Examples of currently permitted discrimination based on gender essentialism include prohibiting transgender women and nonbinary people assigned male at birth from wearing feminine attire while being perceived as male because of either past presentation as male or current misconception of male identity, or disallowing feminine

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are obvious…" indicating even the author's belief that men and women inherently have physical differences).

[366] *See ex.* Tamsin Saxton, "The Real Reason Men Grow Beards," *BBC* (19 Apr 2016), available at http://www.bbc.com/future/story/20160418-the-real-reason-men-grow-beards (in which author conflates the male sex with the gender "man," and relies on this assumption to state that only men have beards).

[367] *See supra* note 41.

[368] See supra note 32 at 134, 187.

men to wear feminine attire based on cultural understandings of what men look like.[369] In American society, there is a general lack of cultural understanding or space for nonbinary people because there is no settled essentialist appearance for nonbinary people. Therefore, nonbinary people subject to sexed or gendered dress codes or grooming policies inherently face discrimination for nonconformity to whichever binary gender they are perceived to present.

Due to widespread misunderstanding and stigmatization of transgender and nonbinary identity, transgender and nonbinary people face discrimination in a multitude of fora, including in employment.[370] Transgender and nonbinary people also experience hate crime and violence for their non-conformity.[371] As a result of the pressure and difficulty of living with gender dysphoria and discrimination, many transgender and nonbinary people suffer from depression and/or anxiety, and face high rates of self-destructive behavior and suicide.[372] These health problems are further

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[369] Id.

[370] Matthew Bailey, Transgender Workplace Discrimination in the Age of Gender Dysphoria and ENDA, 38 Law and Psychol. Rev. 193, 194 (2014); *see also supra* note 2.

[371] National Coalition of Anti-Violence Programs, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2013 1, 36 (2013), available at www.avp.org/storage/documents 2013_ncavp_hvreport_final.pdf (indicating that transgender people are more likely than non-transgender people to experience police violence); see also Elliot Jensen, "What Do Nonbinary People Want?" *U. of Iowa Journal of Gender, Race & Justice Vol. 18* (n.d.), available at jgrj.law.uiowa.edu/article/what-do-non-binary-people-want.

[372] Felicity Bell, Note, Children with Gender Dysphoria and the Jurisdiction of the Family Court, 38 U.N.S.W.L.J. 426, 443 (2015).

exacerbated by the discrimination transgender and nonbinary people face, and can result in a cyclical process where dysphoria and societal pressures further oppress transgender and nonbinary employees, creating a system in which transgender and nonbinary employees feel pressured to conform to societal standards of gender presentation. This pressure arguably extends to the transgender and nonbinary individuals' navigation of the employment process as well. The stress caused by conforming to societal standards can further weaken transgender and nonbinary individuals' morale and ability to function in the workplace. In addition, according to the Williams Institute on Sexual Orientation Law and Public Policy, 90% of transgender workers are harassed at work, and between 15% and 43% face adverse employment actions.[373] From an equal rights perspective, transgender and nonbinary employees constitute a class requiring further protection of the law.

II. BACKGROUND AND CONTEXT: SUMMARY OF CURRENT LAW

a. Title VII and *Price Waterhouse*

The Fourteenth Amendment of the United States Constitution requires that all persons be provided "equal protection under the laws."[374] Furthermore, Title VII of the Civil Rights Act of

[373] Crosby Burns and Jeff Krehely, "Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment," *Center for American Progress* (2 June 2011), available at www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/.

[374] U.S. Const. amend. XIV.

1964 expressly prohibits employment "discrimination on the basis of . . . sex.[375] This definition of discrimination includes an employer's failure to hire, refusal to hire, or discharge of an employee "because of . . . sex."[376] Title VII also applies to adverse employment actions.[377] Most plaintiffs in sex-discrimination cases state claims under Title VII.[378] Some plaintiffs also find success in sex discrimination claims under 42 U.S.C. §1983.[379] The Supreme Court has held that, in the context of Title VII, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[380] A plaintiff filing a Title VII claim must show either disparate treatment or disparate impact.[381] This interpretation is one which has given transgender plaintiffs the ability to state claims of sex discrimination on the basis of their transgender identity under Title VII.[382]

While the Supreme Court has yet to hear a case regarding either transgender rights in employment or gendered dress codes and grooming practices in the workplace, the Supreme Court did establish the basis for evaluating claims of sex discrimination under

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[375] 42 U.S.C. 2000e.
[376] Id.
[377] Id.
[378] See infra note 72.
[379] See Smith v. City of Salem, Ohio, 378 F.3d 566, 568 (6th Cir. 2004) (holding that transgender woman showed she was discriminated against on the basis of sex in a hiring decision; showed she had grounds for a claim under §1983).
[380] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).
[381] Young v. United Parcel Serv., Inc., 575 U.S. ___, 135 S.Ct. 1338, 1365 (2015).
[382] See discussion on pages 17-18.

Title VII for both theories. In *Price Waterhouse v. Hopkins*, a woman sued her employer in a Title VII action, claiming that she was denied a partnership in the firm based on "sex stereotyping."[383] Specifically, the employee was described as "macho" and was accused of "overcompensating for being a woman" in her partnership review.[384] The United States Supreme Court held that:

> when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving . . . that it would have made the same decision even if it had not taken the plaintiff's gender into account.[385]

As of November 2017, the Court has not yet discussed the new change in law as it affects gender identity, expression, or presentation in employment. The Court has not since heard a case regarding discrimination against transgender or nonbinary individuals in employment.[386] Despite this, the *Price Waterhouse* analysis is still correctly used as the basis for determining "sex stereotyping" claims.[387]

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[383] 490 U.S. at 235, 109 S.Ct. at 1782.
[384] Id. at 235, 109 S.Ct. at 1782.
[385] Id. at 258, 109 S.Ct. at 1795.
[386] This is to say that as of November 2017, the author is not aware of the Supreme Court hearing a case filed by a transgender or nonbinary plaintiff regarding employment discrimination.
[387] See generally Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S.Ct. 2148 (2003).

b. Employment Protections for Transgender Individuals[388]

The Equal Employment Opportunity Commission (EEOC) has specifically found that transgender individuals may show that they experienced discrimination on the basis of sex for the purposes of proving a Title VII claim. In *Macy v. Holder*, a transgender woman filed a complaint with the EEOC, claiming employment discrimination under Title VII.[389] The EEOC held that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."[390] In addition, in *Lusardi v. McHugh*, the EEOC held that federal employers may not limit employees' access to bathrooms based solely upon the employee's sex assigned at birth, and could not require an employee's proof of medical transition to prove an employee's gender.[391]

It is important to note here that on October 4, 2017, the United States Department of Justice issued a two-page memorandum indicating that Title VII does not protect transgender individuals from discrimination on the basis of gender identity.[392]

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[388] This section only addresses transgender plaintiffs, and not nonbinary plaintiffs, because the author has yet to find an applicable court case in which the plaintiff expressly identified as nonbinary. In addition, many nonbinary individuals identify as transgender. *See* pages 11, 17.
[389] EEOC Appeal No. 0120120821, 1, 2 (2012).
[390] Id.
[391] EEOC Appeal No. 0120133395 (2015).
[392] Attorney General Jeff Sessions, *Memorandum to United States Attorneys and Heads of Department Components* (4 Oct 2017), available at

The memorandum does indicate, however, that Title VII's prohibition against discrimination on the basis of sex stereotypes as indicated in *Price Waterhouse* is still valid law.[393] This memorandum has not yet been applied to a federal case regarding employment discrimination against a transgender or nonbinary employee, so its weight and effect have not yet been determined. However, it is arguable that any instance of employment discrimination against a transgender, nonbinary, or gender non-conforming employee regarding a sexed or gendered dress code or grooming policy is inherently based in "sex stereotypes" regarding how a person may dress or groom themselves in accordance to their assigned sex. As such, there is an argument to be made that this memorandum will, in effect, have little weight on a transgender, nonbinary, or gender non-conforming employee's ability to file a Title VII claim against an employer regarding a sexed or gendered dress code or grooming policy.

Many federal district courts have also found that transgender individuals are protected from sex discrimination in the workplace.[394] However, none of the cases establishing these

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assets.documentcloud.org/documents/4067437/Sessions-memo-reversing-gender-identity-civil.pdf.

[393] *Id.* (*citing Price Waterhouse*, 490 U.S. at 242, 251).

[394] *See Fowlkes v. Ironworkers Local 40*, 790 F.3d 378 (2nd Cir. 2015) (holding that the EEOC has "taken a firm stand" that transgender people are protected from sex discrimination); *Smith*, 378 F.3d 566 (holding that the transgender plaintiff showed she had been discriminated against on the basis of sex in a hiring decision); *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding that the transgender plaintiff showed "sex was a motivating factor" in her

protections involve someone who claimed sex discrimination based on a nonbinary gender identity; on the contrary, almost all of the plaintiffs in these cases identify as binary transgender women.[395] Additionally, none of the cases involve an intersex plaintiff, which demonstrates that precedent only includes plaintiffs who have binary sex and gender identities.[396] Nevertheless, affirmative protection for binary transgender individuals from discrimination on the basis of sex does not preclude that protection from similarly applying to plaintiffs of non-binary genders, as no case thus far has specifically stated that protection based on sex is solely available to people who identify as men or women.[397]

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demotion); *United States EEOC v. Rent-A-Center East, Inc.*, 2017 U.S. Dist. LEXIS 147695 (7th Cir. 2017) (holding that "discrimination because a person is transgender is encompassed within the definition of sex discrimination set forth in *Price Waterhouse*"); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that "discriminating against someone on the basis of [one's] gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause"); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008) (holding that the transgender plaintiff showed she experienced discrimination "based on sex" as described under Title VII); *Lewis v. High Point Reg'l Sys*., 79 F.Supp.3d 588 (E.D.N.C. 2015) (finding that the transgender plaintiff showed she experienced discrimination on the basis of her sex); *Finkle v. Howard Cnty., Md.,* 12 F.Supp.3d 780 (D. Md. 2014) (finding that the plaintiff's claim that she faced discrimination based on her transgender status "is a cognizable sex discrimination claim under Title VII); *Lopez v River Oaks Imaging and Diagnostic Grp., Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008) (finding that the transgender plaintiff showed that her employer engaged in sex discrimination based on her inability to conform to male gender norms); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 U.S. Dist LEXIS 6521 (W.D. Pa. 2006) (finding that the transgender plaintiff showed that her employer discriminated against her on the basis of her gender).

[395] Of the cases mentioned in note 72, the only case which involves a plaintiff who is not a transgender woman is Fowlkes v. Ironworkers Local 40, in which the plaintiff is a transgender man. 790 F.3d at 381.

[396] This is only to say that, thus far, courts have only accounted for the existence of two sexes in the context of sex discrimination. The author has not found a case in which the court accounts for the existence of intersex individuals or identifies an intersex plaintiff in an employment discrimination case.

[397] This assertion is based on the cases cited in footnotes 57, 67, 69, and 72.

Despite a majority of federal circuit courts finding protection for transgender employees on the basis of sex discrimination under Title VII, some courts have found that transgender status is not a protected identity under Title VII.[398] These courts have either held that transgender individuals may not use their transgender status to sue employers for sex discrimination under Title VII, or have declined to find for transgender plaintiffs on other grounds not related to their gender.[399] However, many of these cases were arguably decided either due to a misunderstanding of the nature of transgender identity, or a failure to analyze whether

[398] See De Tore v. Local No. 245 of Jersey City Pub. Emp. Union, 615 F.2d 980 (3rd Cir. 1980) (holding that the transgender plaintiff failed to state a claim regarding discrimination based on her status as a transgender person); Kirkpatrick v. Seligman & Latz, Inc., 636 F.2d 1047 (5th Cir. 1981) (holding that the transgender plaintiff failed to allege that she would be terminated because of her transgender identity); Hunter v. United Parcel Serv., Inc., 697 F.3d 697 (8th Cir. 2012) (holding that transgender man was not discriminated against in hiring on the basis of his sex because he did not produce evidence that the employer knew that he was a man); Kastl v. Maricopa Cnty. Cmty. Coll., 325 Fed. App'x. 492 (9th Cir. 2009) (holding that employer banning transgender employee from restroom of their gender not considered sex discrimination under Title VII); Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007) (holding that transgender employees are not a protected class; under Title VII, transgender employees must show they experiences discrimination "because they are male or because they are female" to prove sex discrimination); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016) (holding that the Religious Freedom Restoration Act provides employers a defense from Title VII action where conformity with Title VII would violate the employers' "sincerely held religious beliefs," as applied to treatment of transgender employees); Eure v. Sage Corp., 61 F.Supp.3d 651 (W.D. Tex. 2014) (finding that plaintiff failed to present evidence showing their employer engaged in sex discrimination; the plaintiff was treated as if they were transgender but it is unclear whether the plaintiff identified as transgender); Oiler v. Winn-Dixie La., Inc., 2002 WL 31098541 (E.D. La. 2002) (finding that termination for off-duty cross-dressing not actionable as sex discrimination under Title VII); Dobre v. Nat'l R.R. Passenger Corp. ("Amtrak"), 850 F.Supp 284 (E.D. Pa. 1993) (finding that transgender woman failed to state a claim of sex discrimination under Title VII).

[399] See id.

transgender individuals could claim sex discrimination under Title VII and dismissed claims of sex discrimination for unrelated reasons.[400]

An example of a case decided upon a misunderstanding and stereotyping of transgender identity is *Oiler v. Winn-Dixie La., Inc.* In *Oiler,* the plaintiff employee was assigned male at birth, but sometimes dressed femininely, wore makeup, and used a feminine name while off-duty.[401] The plaintiff was fired after their[402] supervisor discovered that the plaintiff dressed femininely in public, despite the plaintiff's masculine presentation at work.[403] The plaintiff identified as transgender, experienced gender dysphoria and testified that they "did not feel fully like a man."[404] The plaintiff is referred to as a "man," a "transvestite," "transgendered," and a "cross-dresser" throughout the span of the opinion.[405] However, despite the court's assertion that the plaintiff was "transgendered," in the written decision the plaintiff is treated as a cisgender man because the plaintiff did not desire to medically transition.[406] The court in *Oiler* found that the plaintiff was terminated not for their

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[400] See further discussion on page 12,
[401] 2002 WL 31098541, 1.
[402] Because it is unclear which pronouns the plaintiff in this case personally used, I use the pronoun "they" to refer to the plaintiff out of respect for the plaintiff's gender. *See infra* note 147 regarding gender-neutral use of the personal pronoun "they."
[403] Id. at 2.
[404] Id. at note 11.
[405] *See ex. id.* at 2.
[406] Id. at note 12.

failure to conform to sex or gender stereotypes, but because the plaintiff "disguised himself [sic] as a person of a different sex and presented himself [sic] as a female for stress relief and to express his [sic] gender identity."[407] The court therefore held that "a person of one sex assuming the role of a person of the opposite sex" was not protected under Title VII.[408]

c. Sexed and Gendered Dress Codes and Grooming Policies

While the Supreme Court has yet to hear a case specifically concerning sexed and gendered dress codes and grooming policies and whether they are indicative of impermissible sex stereotyping under Title VII, almost all federal circuit courts in the United States have found that such dress codes and grooming policies do not constitute sex stereotyping under Title VII, except in certain circumstances.[409] Most circuit courts and some district courts have found that requiring male, but not female, employees to keep short hair does not arise to the level of impermissible sex stereotyping

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[407] *Id.* at 5.
[408] *Id.*
[409] *See ex.* Tavora v. N.Y. Mercantile Exch., 101 F.3d 907 (2nd Cir. 2006); Earwood v. Cont'l S.E. Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084 (5th Cir. 1975); Barker v. Taft Broad. Co., 549 F.2d 400 (6th Cir. 1977); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249 (8th Cir. 1975); Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977); Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir. 1998); Dodge v. Giant Food Inc., 488 F.2d 1333 (D.D.C. 1973); Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254 (N.D. Ind. 1998). See also McNeil v. Greyhound Lines, Inc., 982 F. Supp. 2d 447 (E.D. Pa. 2013) (finding that a male African-American employee fired for having long dreadlocks failed to state a challenge to a "facially gender-neutral employment practice" for the purpose of establishing a gender discrimination claim under Title VII).

under Title VII.[410] Similarly, no-beard policies are commonly considered facially neutral, and thus are not actionable on a theory of sex discrimination under Title VII.[411] Policies requiring female and male employees to dress or groom themselves differently have not automatically been deemed impermissible sex stereotyping under Title VII.[412] However, many federal circuits and districts have found that requiring female employees and male employees to wear different clothing at work amounts to impermissible sex discrimination if one binary gender is more burdened by the sexed or gendered dress code than the other.[413] Only one of these cases, *Schroer v. Billington*, includes a transgender employee plaintiff, specifically a binary transgender woman.[414]

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[410] *Id.*
[411] EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3rd Cir. 1980); Barrett v. Am. Med. Response, N.W., Inc., 230 F. Supp. 2d 1160 (D. Or. 2001).
[412] Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3rd Cir. 1985); Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006); Fountain, 555 F.2d 753; Schroer, 424 F. Supp. 2d 203. See also Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985) (holding that an employer's focus on "consistency of appearance" does not trigger sex stereotyping under Title VII).
[413] Carroll v. Talman Fed. Sav. and Loan Ass'n of Chicago, 604 F.2d 1028 (7th Cir. 1979); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263 (S.D. Ohio 1987). See also Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000) (holding that a gendered weight policy significantly disadvantaged female employees); Tamimi v. Howard Johnson Co., 807 F.2d 1550 (11th Cir. 1987) (holding that plaintiff employee was able to show that she was singled out by the gendered grooming policy implemented by her employer).
[414] 424 F. Supp. 2d at 203.

II. SCHOLARSHIP REGARDING SEXED AND GENDERED DRESS CODES AND GROOMING POLICIES

Scholarship regarding sexed and gendered dress codes and grooming standards is split regarding both the recommended method of evaluating such dress codes and grooming policies and whether or not such sexed and gendered dress codes and grooming policies cause harm.[415] There are four main methods of evaluating sexed and gendered dress codes and grooming policies.[416] The first method is the "*per se* approach," which operates under an assumption that sexed and gendered dress codes and grooming policies are *per se* discriminatory.[417] The second method is the "employer-friendly approach," which assumes that sexed and gendered dress codes and grooming policies do not concern immutable characteristics, and therefore are not discriminatory.[418] The third method is the "equity approach," which requires that sexed and gendered dress codes and grooming policies equally burden men and women in order to be lawful.[419] The fourth and final method is the "*Price Waterhouse* stereotyping approach," which requires that sexed and gendered dress codes and grooming policies

[415] Erica Williamson, Note, Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace, 56 Duke L.J. 681, 684 (2006-2007).
[416] The author of the cited piece is credited for coining and applying the titles of the approaches to standards used by different courts. Id.
[417] Id. at 686.
[418] Id. at 689.
[419] Id. at 694.

not be based upon stereotypes of sexes and genders to be considered valid.[420]

I argue that, of these four methods of analysis, the most successful approach for both employees and employers is a hybrid of the "*per se* approach" and the "equity approach." The method by which courts have historically used the equity approach is fatally flawed, as it ignores transgender, nonbinary, and gender non-conforming identities. Moreover, courts using the equity approach often resort to strawman arguments and logical fallacies in order to twist biased views of sexed and gendered dress codes and grooming policies into their legal framework.[421] By recognizing that sexed and gendered notions of dress and grooming are inherently and *per se* based upon a culturally constructed notions of sex and gender essentialism,[422] courts will be able to radically and justifiably shape the plane of sex and gender in dress codes and grooming policies to allow for transgender, nonbinary, and gender non-conforming individuals to state claims of sex and gender discrimination under Title VII. While this may seem to limit employers' ability to control the presentation of their workers, prohibiting employers from discriminating against employees based on sexed and gendered notions of dress and grooming results in more uniform methods of

[420] Id. at 696.
[421] See ex. discussion on pages 21-22.
[422] See supra note 41 regarding discussion of sex and gender essentialism.

presentation, and additionally fosters healthy workplace morale because employees are able to express their gender identities without fear of repercussion.

a. The *Per Se* Approach

The *per se* approach of evaluating sex- and gender-related dress codes and grooming policies requires employers to "justify [a sex or gender differentiating policy] as a bona fide occupational qualification (BFOQ)" under Title VII.[423] This signifies that, under this approach, to promulgate a dress code or grooming policy which differentiates either on the basis of sex or gender, the employer must give a logical reason for the differentiation.[424] These cases are rare, as courts are unwilling to consider that sexed and gendered dress codes and grooming standards are inherently discriminatory.[425] The *per se* approach analyzes these cases on a theory of "sex-plus" discrimination, adhering to the idea that sexed and gendered dress codes and grooming policies discriminate against individuals based on sex or gender only in addition to another characteristic.[426] For example, under "sex-plus" logic, if a grooming policy requires women to wear nail polish but not men, the policy discriminates against women who don't wear nail polish, but not against women who do wear nail polish.

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[423] See supra note 93 at 686.
[424] Id.
[425] Id.
[426] Id. at 687.

Critics of the *per se* method equate it to a zero-sum game in which employers must either (1) expand dress and grooming options to all genders; or (2) require all employees to dress and groom in a gender-neutral manner.[427] The second scenario is said to "denigrate female identity."[428] A sex- and gender-neutral requirement could also burden those of a male sex more than those of a female sex, as male-sexed individuals may grow beards which those of a female sex generally do not have.[429] Regarding the first scenario, critics contend that preventing employers from instituting reasonable dress codes and grooming policies infringes upon an employer's choice in the professional presentation of employees.[430] Further, this argument seeks to allow employers to prevent employees from gender non-conforming presentation and from non-normative presentation, in the interest of retaining an employee palatable to those who are offended by perceived sex and gender non-conformity.[431] However, this argument fails to consider transgender and nonbinary identities and the employee's interest in personal gender identity and presentation. While employers should have the

[427] Id. at 702.
[428] Id.
[429] See EEOC v. Greyhound, 635 F.2d at 194 (in which the EEOC brought Title VII action against employer for a facially-neutral no-beard policy, which burdened a black male employee with a skin condition that made shaving his face painful; held, the EEOC did not show enough of a disparate impact to consider the grooming policy discriminatory based on the combination of the employee's race, sex, and condition).
[430] See supra note 93 at 701.
[431] Id.

ability to create a cohesive presentation among employees, employers must be precluded from infringing upon the immutable gender identities of employees based on sex or gender stereotypes.[432]

There is some value within the *per se* model to create greater equity within employers' dress codes and grooming standards. Under this model, it is *per se* discriminatory to create distinct look qualifications for a certain gender.[433] There are many options for employers to create dress codes and grooming policies which have nothing to do with either gender or sex while still requiring employees to present themselves in a professional and cohesive manner. Examples of this include prescribing colors for employees to wear at work, requiring workers to wear protective shoes, requiring workers to wear a company badge, T-shirt, or jacket, or requiring a "business casual" or "business formal" presentation. However, as stated above, requiring workers to present a sex- or gender-neutral appearance, which would be permitted under the *per se* approach, may have negative effects.[434] Therefore, further analysis is needed to determine the best approach to take regarding the evaluation of sexed and gendered dress codes and grooming policies.

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[432] See supra note 41.
[433] *See supra* note 93 at 686.
[434] *See* discussion on page 17.

b. The Employer-Friendly Approach

Under the "employer-friendly" approach to analyzing Title VII claims against sexed and gendered dress codes and grooming policies, courts analyze all sex and gender presentation practices as something the individual may change.[435] An example of a court that used the "employer-friendly" approach is *Barker v. Taft Broad. Co.*, in which a male employee with long hair was discharged after his employer determined that he failed to conform to its grooming standards requiring male employees to keep their hair short.[436] The court held that a hair-length policy that differentiates based on gender "bear[s]…a negligible relation" to sex discrimination, and that it was the tradition of course to uphold such policies.[437] However, this standard is based on a fallacious equivalency dictated by antiquated and essentialist norms of sex and gender.[438] In addition, this decision, and others based on the "employer-friendly" approach, is based on the gender binary, which categorically excludes nonbinary employees.

The "employer friendly" approach operates under the assumption that physical presentation is mutable.[439] However, gender presentation is not as simple as getting a haircut; the Supreme

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[435] See supra note 93 at 689.
[436] 549 F.2d at 401.
[437] Id. at 402.
[438] *See supra* note 41.
[439] See supra note 93 at 689.

Court has held that sex, as conflated with gender, is an immutable characteristic,[440] and for many, gender presentation is not an easily malleable concept.[441] In addition, allowing employers to dictate employees' sexed and gendered methods of dress and grooming is more likely to be enforced through an employer's biased notion of what constitutes appropriate sex and gender presentation, enforcing cultural stereotypes surrounding gender presentation. Allowing an employer to dictate sexed and gendered notions of dress and grooming effectively permits that employer to dictate to employees what their personal gender identity should look like. This is greatly harmful to transgender, nonbinary, and gender non-conforming individuals, especially considering that employers are overall less likely to accommodate for gender non-conforming and nonbinary gender presentation. The employer-friendly approach is too unbalanced to be an effective method of determining whether a sexed or gendered dress code or grooming policy constitutes sex or gender discrimination, as its implementation requires that transgender, nonbinary, and gender non-conforming individuals sacrifice an immutable personal characteristic in deference to antiquated and essentialist norms in exchange to participate in everyday life.

[440] See supra notes 39, 40.
[441] See supra note 9.

c. The Equity Approach

The "equity" approach to analyzing Title VII claims against sexed and gendered dress codes and grooming policies allows employers to promulgate sex- and gender-differentiating dress codes and grooming policies as long as male and female employees are equally burdened.[442] The court provides an example of this analysis in *Craft v. Metromedia, Inc.*, where a female newscaster filed a Title VII claim against her employer for sex discrimination.[443] Specifically, the newscaster accused the news station of enforcing stricter dress and grooming standards for women than for men.[444] The newscaster argued that she was required to wear heavy makeup and had been told to "soften" her delivery of the news, and that none of these things were required of male employees.[445] She argued that other female employees were given advice similar to what she had received.[446] The court held that, although the plaintiff and other female employees experienced pressure from the employer to fit into a "certain look," the male employees received similarly-burdening directions from the employer, including advice to "lose weight," "get better-fitting clothes," and to "get a hair piece."[447] Therefore, the court concluded

[442] See supra note 93 at 694.
[443] 766 F.2d at 1207.
[444] Id.
[445] Id. at 1208.
[446] Id. at 1213.
[447] Id. at 1213.

that the news station's dressing and grooming policy was equitable and did not discriminate more so against female newscasters.[448]

One of the problems with the "equity" approach is that the standard of what is equitable is currently subjective.[449] Many courts utilizing the "equal burdens test" rely on essentialist stereotypes to determine whether one binary gender is more burdened than the other. For instance, in *Jespersen v. Harrah's Operating Co.*, a casino created a new dress code and grooming policy for its bartenders which differentiated drastically between the requirements for male and female employees.[450] Men were required to wear short hair, and were not allowed to wear nail polish or makeup.[451] By contrast, women were required to have styled hair, were allowed to wear nail polish, and were required to meet with a makeup consultant and wear a full face of makeup to work every day.[452] The plaintiff was a female employee who was compelled to leave her employment because she was uncomfortable wearing makeup.[453] The court in *Jespersen* found that the policy placed equal burdens on men and women in that "requirements regarding each employee's hair, hands, and face" applied to both men and women.[454]

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[448] Id. at 1215.
[449] See supra note 93 at 706.
[450] 444 F.3d at 1107.
[451] Id.
[452] Id. at 1114.
[453] Id. at 1107.
[454] Id. at 1109.

One of the dissenting opinions in *Jespersen* also applied the equity approach to the analysis of dress codes and grooming standards.[455] Judge Kozinski, joined by Judges Graber and W. Fletcher, dissented from the majority's opinion regarding whether men and women were equally burdened by the policy, citing very specific differences between the requirements for men and women.[456] Namely, Judge Kozinski pointed out the stark difference between the men's requirements to have "short hair" and "clean trimmed nails," and the women's requirements to have "styled hair," nails of a certain length and color, and "full facial makeup."[457] Judge Kozinski emphasized the extent to which makeup is a burden by pointing to the ease and simplicity of not wearing makeup as well as the potential side-effects of wearing makeup including the possibility of an allergic reaction.[458] Judge Kozinski noted there is an inherent and personal intrusion when one person dictates to another what must be put on their face.[459] Put simply, there is a great difference in the ways in which the majority and dissenting opinions in *Jespersen* defined "equity," elucidating the great difficulty describing and identifying the limits of the term.

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[455] See supra note 129 at 1117.
[456] Id.
[457] Id.
[458] Id.
[459] Id. at 1118.

Another problem with the way the equity approach is used by the courts is that, like in other approaches, courts typically ignore or are silent to the existence of nonbinary genders.[460] If the scope of equity approach analysis were to be broadened to cover equity for all genders, the equity approach potentially would become truly be "equitable."

d. The *Price Waterhouse* Stereotyping Approach

In order for a sexed or gendered dress code or grooming policy to satisfy Title VII under the *Price Waterhouse* stereotyping approach, it must not perpetuate sex stereotypes.[461] The standard for what constitutes a "sex stereotype" is derived clearly from the case *Price Waterhouse*.[462]

The main problem with the stereotyping approach is that, even though *Price Waterhouse* set guidelines for defining a "sex stereotype," it leaves too much room for personal preference and ideology concerning what constitutes a "sex stereotype." As evinced in the majority opinion of *Jespersen*, the court did not feel that the casino's grooming policy "[made] women bartenders conform to a commonly-accepted stereotypical image of what women should wear," despite the fact that the policy required women bartenders to

[460] This is to say the author has not yet discovered a published case regarding employment discrimination in which the court acknowledged the existence of nonbinary genders.
[461] See supra note 93 at 696.
[462] See discussion of Price Waterhouse on page 15-16.

wear a full face of makeup while requiring male bartenders to wear no makeup.[463] In his dissenting opinion, Judge Pregerson, joined by Judges Kozinski, Graber, and W. Fletcher, argued that requiring a "facial uniform" for women and not men was evidence of a "cultural assumption – and gender-based stereotype – that women's faces are incomplete, unattractive, or unprofessional without full makeup."[464] The problem with this side of the sex stereotyping analysis, however, is that it is difficult to cite what is clearly a "culturally-ascribed" sex stereotype and what is not because people have differing opinions as to what ultimately constitutes a "stereotype."[465]

e. The "*Per Se* Equity" Approach

After analyzing the four main methods to solving the dilemma of employer choice versus employee freedom, it is clear that no one approach will produce the best and most equitable results for both the employer and the employee. In the end, courts must create a compromise between employer and employee to ensure that the upholding of certain dress codes and grooming policies does not violate the Constitution, the employer-employee relationship, or the employer's right to dictate certain workplace standards. However, courts must take special care to prohibit sexed and gendered dress

[463] See supra note 129 at 1112, 1114.
[464] Id. at 1116.
[465] Id.

codes and grooming policies from infringing upon the rights and protection of transgender, nonbinary, and gender non-conforming employees from sex- and gender-based discrimination in the workplace.

Adopting a hybrid method of analysis, a "*per se* equity" type of analysis would enable courts to derive a more equitable solution in which they would first consider whether any gender is burdened more so than others, and then encourage employers to use more gender-neutral dress codes and grooming policies. This would ultimately allow employees to express their gender in a professional manner and allow for the presentation of a cohesive unit pleasing to the employer. A further balancing test is required in this method of analysis to determine whether both the needs of the employer and the employee are met within the employer's chosen dress code or grooming policy.

IV. FURTHER RECOMMENDATIONS

In addition to implementing a "*per se* equity" method of analyzing sex and gender discrimination in dress codes and grooming policies, courts and legal scholars must take more steps to increase the protection and enfranchisement of transgender and gender non-conforming employees. First, legal scholarship and courts discussing sexed and gendered dress codes and grooming policies need to solidify whether the code or policy addresses sex,

gender, or both. As courts often conflate the terms "sex" and "gender," so does much of the legal scholarship surrounding the topic. Clarifying the language regarding whether something is discriminatory on the basis of "sex" or "gender" will make it easier for employees experiencing discrimination based on transgender identity, nonbinary identity, and/or gender nonconformity to identify the remedies available and will also allow employers to have clarification on the difference between sex and gender.

Second, because legal scholarship and courts must begin to distinguish between sex and gender, gender and gender identity must become codified as protected classes under Title VII. Without codification as independent protected classes, transgender and nonbinary individuals intending to bring a claim of discrimination on the basis of sex will likely be challenged as that claim does not yet uniformly account for discrimination on the basis of gender, gender identity, gender presentation, or gender expression. As the Supreme Court has indicated that gender is immutable,[466] the law must shift to conform with an interest in protecting individuals from marginalization based on immutable characteristics.

Third, legal scholarship and courts must update the language used regarding transgender identities. Many courts and scholars still use "transsexual" to refer to transgender individuals, when

[466] *See supra* note 40.

"transgender" is the correct and more accurate umbrella term.[467] In addition, many courts and scholars use hurtful, demeaning, and dehumanizing language to refer to transgender people, including the terms "transgendered" and "transgenders," both of which are deemed to be highly offensive by most transgender communities.[468] In addition, many cases and scholars use the wrong pronouns when referring to transgender plaintiffs, which is disrespectful to the plaintiff and implies that the court does not respect the plaintiff's gender identity.[469] Simple changes in language and pronoun usage will greatly help to show respect to transgender plaintiffs. Acceptance of the singular pronoun "they" in addition to "she" and "he," while largely disregarded in legal scholarship, will further show respect to transgender plaintiffs, especially nonbinary plaintiffs.[470]

Fourth, legal scholarship and courts must eschew sexed and gendered essentialisms regarding sex and gender. This requires not only unpacking cultural understandings of what men and women

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[467] *See supra* note 9.
[468] Joanne Herman, "Transgender or Transgendered?" *Huffington Post* (11 May 2010), available at www.huffingtonpost.com/joanne-herman/transgender-or-transgende_b_492922.html.
[469] *See ex.* discussion on pages 13-14._____.
[470] Steven Petrow, Gender-Neutral Pronouns: When "They" Doesn't Identify As Either Male or Female," The Washington Post (27 October 2014), available at www.washingtonpost.com/lifestyle/style/gender-neutral-pronouns-when-they-doesnt-identify-as-either-male-or-female/2014/10/27/41965f5e-5ac0-11e4-b812-38518ae74c67_story.html; *see also Merriam-Webster*, "Singular 'They'" (2017), available at www.merriam-webster.com/words-at-play/singular-nonbinary-they.

look like, but also breaking apart standard norms of what is considered male and female in presentation. Understanding that makeup, long hair, and dresses are not inherently female attire, and that wearing beards, short hair, and ties are not inherent to males, is key for courts to begin to evaluate claims of sex and gender discrimination in dress codes and grooming policies effectively and correctly. Using sexed and gendered essentialisms to decide sex discrimination cases nullifies Title VII's prohibition on sex stereotyping, and removes the very protection Title VII intends to provide to plaintiffs who act and perform outside of narrow culturally-ascribed notions of sex and gender.

Fifth, and finally, legal scholarship and courts must account for the existence of nonbinary individuals. There is very little discussion of nonbinary identity in the legal community, and this blindness to genders other than that of "man" and "woman" renders all gendered dress codes inherently biased against employees whose identities lie outside the gender binary.

CONCLUSION

In conclusion, the law has a long way to go to provide full protections for transgender and gender non-conforming individuals in the workplace. While Title VII provides protection from adverse employment action on the basis of sex, not all federal courts have

found this protection when the employee is transgender, nonbinary, or gender non-conforming. Further, some transgender employees, and all nonbinary employees, are disenfranchised by courts' inability to account for the falsity of a gender binary. Specifically, regarding the legality of sexed and gendered dress codes and grooming standards in most jurisdictions, transgender, nonbinary, and gender non-conforming employees are potentially subject to strict standards which they may be unable to uphold or meet, and as a result will suffer greater marginalization and heightened exposure to adverse employment action. Courts must begin to account for the gap between employers' ability to dictate employee appearance and employees' right to personal gender identity and presentation by paying attention to those who suffer the most under a tyranny of normalized constructions of sex and gender.