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Lipstick and Lawsuits: Can Sexual Stereotyping Claims Successfully Combat "Appearance Discrimination?"

By Gregory J. Kamer, Edwin A. Keller, Jr., Josh F. Norris

At a time when many employers in the United States are placing greater emphasis on employees' personal appearance, employee advocates have ratcheted up their efforts to have many types of employment actions based on appearance deemed illegal. What is commonly referred to as "appearance discrimination" has even earned a new catch-phrase: "look-ism." One of the bows in the quiver of employee advocates is the legal theory of sexual/gender-based stereotyping, which originates, in large part, from a plurality opinion in the United States Supreme Court case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). This Article traces the development of the sexual stereotyping cause of action from *Price Waterhouse* to possible applications in current appearance discrimination claims.

The *Price Waterhouse* Decision

The *Price Waterhouse* case is widely known for its holding with respect to the standards applicable to mixed-motive cases, which prompted Congress to later codify what it believed to be the proper standards for such cases in a section of the Civil Rights Act of 1991. However, the decision is also important for another reason, namely, the recognition that sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 includes the use of sex/gender-based stereotyping.

At issue was Price Waterhouse's treatment of Ann Hopkins, a senior manager who had her candidacy for partnership at the national accounting firm put on hold for one year, only to later learn that she

would not be re-nominated for partnership consideration. Hopkins had worked at Price Waterhouse for five years when she was proposed as a candidate for partnership. Her prior accomplishments included playing a key role in securing a $25 million contract with the State Department. Of the eighty-eight candidates submitted for partnership, none of them had a comparable record to Hopkins in regards to securing such a sizeable contract. Some of the partners at Hopkins' office described her as "an outstanding professional" with "strong character, independence and integrity." However, both supporters and opponents of her candidacy also indicated that she was sometimes "'overly aggressive, unduly harsh, difficult to work with and impatient with staff.'" *Price Waterhouse*, 490 U.S. at 232-35.

Once informed that she would not be re-nominated, Hopkins tendered her resignation and pursued a sex discrimination action against Price Waterhouse. At trial, Hopkins introduced evidence that the partners commenting on her candidacy thought she was, among other things, "macho," "masculine," and in need of "a course at charm school." The *coup de grace* was delivered by Thomas Beyer, the partner tasked with explaining to Hopkins why her candidacy was put on hold, when he advised Hopkins that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances of making partner. Despite no majority opinion, six members of the court agreed that such comments displayed gender discrimination as a result of Hopkins not conforming to a gender-based stereotype. *Price Waterhouse*, 490 U.S. at 235.

In addressing the legal relevance of sex stereotyping, Justice Brennan, in his plurality opinion, stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251 (internal citation and quotation omitted). Justice O'Conner, in her concurring opinion accepted this legal conclusion without question, finding that Hopkins had successfully proved that there was "discriminatory input into the decisional process" and that a substantial factor in the decision to put Hopkins candidacy on hold was "her failure to conform to the stereotypes." *Id*. at 272.

The Uncertain Contours of the Sexual Stereotyping Theory

Since *Price Waterhouse,* the courts and legal advocates have struggled to define the crucial questions of what constitutes a "stereotype," and in particular a "gender stereotype," which if used in making employment decisions will render such decisions violative of federal law. As suggested by two legal commentators, the best dictionary definition of the word "stereotype," for the purposes of this issue, is "'a standardized mental picture that is held in common by members of a group and that represents an over-simplified opinion, affective attitude, or uncritical judgment.'" James O. Castagnera and Edward S. Mazurek, Sex Discrimination Based Upon Sexual Stereotyping, 53 Am. Jur. Trials 299 (June 2005). In turn, the most common understanding of a gender stereotype is an image or expectation of how a person of one gender should or should not look like or behave. *See Smith v. City of Salem, Ohio,* 378 F.3d 566, 572 (6th Cir. 2004). Unfortunately, these working concepts do little to define the contours and limits of the sexual stereotyping theory as a form of discrimination based on one's sex.

Indeed, if, as suggested by one court, the question of what is a gender stereotype must be answered in the particular context in which it arises, and without undue formalization, then the legal debate and uncertainty surrounding this

theory is certain to continue. *See Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 120 (2d Cir. 2004). Recognizing that stereotypical notions about how men and women should behave often blur ideas about heterosexuality and homosexuality, which are types of sexual orientation not yet protected by federal law, debate over the limits of the sexual stereotyping theory when issues of sexual orientation are intermingled will continue as will its applicability to transsexuals and other individuals with Gender Identity Disorders (GIDs). *See Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264-65 (3d Cir. 2001); *Etsitty v. Utah Transit Authority*, No. 2:04CV616 DS, ---- Slip Op. ---, 2005 WL 1505610, at *3-7 (D. Utah Jun. 24, 2005).

Applications of *Price Waterhouse*

In *Bellaver v. Quanex Corp.*, 200 F.3d 485 (7th Cir. 2000), the Seventh Circuit Court reversed the entry of summary judgment in favor of an employer in a case pertaining to a one-person reduction in force of a female business development manager. Elizabeth Bellaver was a twenty-year employee at Quanex. She consistently scored in the high to highest ranges on her annual evaluations and was praised for her intelligence, ability, and attitude. *Id.* at 489-90. However, she was also criticized for her interpersonal skills, given her aggressive and somewhat abrasive style. While very few concrete examples were provided, one male supervisor observed that she was a poor listener and was not tolerant of the less than very bright. On the other hand, some of Bellaver's male co-workers had similar or worse interpersonal skills, including one employee who lost his temper at a meeting of several managers. However, these male co-workers were not criticized for such behavior. *Id.*

While the company steadfastly contended that Bellaver was let go due to an economic reorganization, the Seventh Circuit Court applied the holding in *Price Waterhouse* and concluded that there was sufficient evidence to suggest that the company relied on impermissible stereotypes of how women should behave. The court found that a jury could reasonably conclude that the decision to let Bellaver go was motivated, at least in part, by the double standard it applied to female and male employees with respect to the ability to get along with others. Thus, the case was remanded back for trial. *Id.* at 492-93.

Likewise, in *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004), the Second Circuit Court had the opportunity to apply *Price Waterhouse* in a § 1983 case brought by a school psychologist who was denied tenure and terminated. During her three years in the position, Back was given "outstanding" and "superior" evaluations. However, as her tenure review approached and she returned from maternity leave, Back faced questions from her superintendent as to how she would be spacing her offspring and suggestions that she wait until her son was in kindergarten before having another child. Additionally, the superintendent and her principal allegedly told Back that maybe the school psychologist job and the school district were not for her if she had little ones and that is was not possible to be a good mother and have the job. Subsequently, Back started to receive negative evaluations from the superintendent and principal for being inconsistent, defensive, difficult to supervise, the source of parental complaints and inaccurate in her reports. *Id.* at 115-16.

Applying *Price Waterhouse*, the court concluded that it took no special training to discern evidence of the stereotyping of women as being unable to be good mothers and have a job that requires long hours. As the stereotype goes, women are primary family caregivers and thus are insufficiently committed to their work. *Id.* at 119-22. Indeed, it found support in the Supreme Court's recent recognition of the notion that caring for family members is women's work is a pervasive sex-role stereotype. *Id.* at 121 (discussing holding in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003)). The parallel stereotype presumes a lack of such

responsibilities for male employees. *Id.* In finding that Back had adduced sufficient evidence to defeat summary judgment, the court remanded the case back to the district court for a trial. *Id.* at 124. In doing so, the court made clear that in applying the principle of *Price Waterhouse* it was confirming that employment actions based on a supposition that individuals *will* conform to a gender stereotype, and thus be deemed unsuited for a particular position, are just as violative of federal law as employment actions premised upon the supposition that an individual is unqualified for a position because he or she does *not* conform to a gender stereotype. *Id.* at 119.

In *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the Sixth Circuit Court applied *Price Waterhouse* in another § 1983 case and concluded that a male fireman could maintain an action for discrimination based on his non-conforming behavior and appearance. Smith was a city fire department employee who was born male and subsequently was diagnosed with Gender Identity Disorder (GID), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. Prior to his diagnosis, Smith had been an employee of the Salem Fire Department for seven years without any negative incidents. After he was diagnosed, Smith began "expressing a more feminine appearance on a full-time basis," at which time his co-workers began questioning him about his appearance and commenting that his appearance was not "masculine enough." *Id.* at 568-69.

Smith reported these co-worker comments to his supervisor who in turn informed the Chief of the Fire Department about Smith's GID diagnosis and treatment. In an effort to terminate Smith's employment, the fire chief and other municipal employees arranged for Smith to undergo three separate psychological evaluations, hoping Smith would either resign or refuse to comply, which would allow them an opportunity to terminate his employment. However, Smith learned of the scheme and involved legal counsel. A few days later, Smith was suspended on an alleged infraction of a fire department policy. After obtaining an EEOC right-to-sue letter, Smith filed suit against the City of Salem asserting, among others, a Title VII claim of sex discrimination and retaliation. *Id.*

In reversing the district court's grant of summary judgment to the City of Salem, the Sixth Circuit Court held that Smith's claims were actionable because, like the employee in *Price Waterhouse*, his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind his employer's actions. The court ruled that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because Congress did not intend that Title VII apply to anything other than the traditional concept of sex. *Id* at 572-73 (citing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir. 1984) and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir. 1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on gender rather than sex)). However, the court concluded that such an approach as suggested in *Ulane* and *Holloway* was eviscerated by *Price Waterhouse*. *Id.* (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (holding that the initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*)). In reaching its ruling, the court went so far as to hold that:

> After *Price Waterhouse*, an employer who discriminates against women because for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows those employers who discriminate

> against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

Id. 571-74.

"Appearance Discrimination" and Sexual Stereotyping

Despite the language of the *Price Waterhouse* plurality opinion and the decade and a half of cases that have attempted to apply its core holding, there has yet to be a published case that squarely pits the gender stereotype theory against employers' polices and practices geared to hire only attractive or "hot" women and men. Thus, the question of whether appearance discrimination is "because of sex" and therefore actionable under Title VII is still a hotly contested issue.

There has been at least one post-*Price Waterhouse* case in which the issue was ripe for resolution, but the gender stereotype argument was never raised. In *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905 (D. Nev. 1993), the court addressed various claims filed by male and female casino employees, including that the employer had a surreptitious policy of only employing young "barbie doll" type women (*i.e.*, sexually attractive) in dealer positions and thus discriminated against men and minorities. The court dispensed with this assertion swiftly stating that the real complaint was not about race or sex discrimination, but the selection of sexually attractive persons and concluded that even if the employer did hire and transfer employees on the basis of their sexual attractiveness, such behavior is not actionable under Title VII. The court went on to hold that staffing decisions based on such subjective qualities demonstrates a rather atavistic approach on the part of the employer; however, when such criteria are applied to different classes of people, the practice is not actionable. It went on to conclude that no court can be expected to create a standard on such vagaries as attractiveness or sexual appeal. In support of its conclusions the court cited the pre-*Price Waterhouse* decision in *Malarkey v. Texaco*, 559 F. Supp. 117, 122 (S.D.N.Y.1982), *aff'd*, 704 F.2d 674, 674-75 (2d Cir. 1983) in which the Second Circuit Court affirmed the district court's holding that allegations regarding Texaco's alleged promotion of women based on arbitrary physical judgments of attractiveness and belief that younger women were more attractive did not implicate Title VII as there was no assertion that men when compared to women were not subject to age or beauty criteria in determining their eligibility for promotions.

This lack of published case law on the issue of whether hiring decisions made on the subjective perceptions of beauty and sex appeal, particularly when they are applied to both sexes, leaves a huge void at a time when the use of such perceptions of beauty and good looks is on the rise. *See e.g.*, Brian Branch-Price, *N.J. Casino to Fire Weightier Waitstaff*, U.S.A. Today, Feb. 17, 2005 (discussing Borgata Hotel Casino & Spa's aggressive appearance policies for male and female beverage servers). Given the prior applications of the *Price Waterhouse* holding with respect to gender stereotypes it would appear unlikely that the majority of appellate courts will condone the use of appearance based employment decisions, even if the same criteria is applied to both males and females. Yet, this is exactly what is suggested by the *Alam* and *Malarkey* courts.

Nothing in the *Price Waterhouse* decision even remotely suggests that sexual stereotypes applied equally to each gender somehow cancels each other out and renders stereotyped appearance standards lawful. To the contrary, if Justice Brennan was correct, Congress intended to strike at the *entire* spectrum of disparate treatment of men and women resulting from sex stereotypes. Thus, if such a broad view of Title VII is taken, sexual attractiveness could only be a legitimate basis for hiring and promotion if it can

be shown to be a bona fide occupational qualification under 42 U.S.C. § 2000e-2(e). This would indeed be a difficult burden for employers. *See, e.g., Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 303 (N.D. Tex. 1981); *see generally* 29 C.F.R. § 1604.1 (EEOC guidelines on sex as bona fide occupational qualification).

Employee Appearance Standards and Sexual Stereotyping

Separate and apart from employment decisions based on sexual attractiveness, employer's use of gender specific dress and grooming standards are also under attack. Traditionally, such standards are upheld by the courts so long as they are based on social norms and community standards, equally enforced as to both sexes and do not create an undue burden being placed upon one sex or the other. *See Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117 n.3 (D.C. Cir. 1973); *see also Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 605-06 (9th Cir. 1982) (en banc); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973). Such standards are also upheld based on the rationale that they regulate mutable characteristics such as hair length, nail polish color, and dress and not the immutable characteristics. *See Baker v. Cal. Land Title Co.*, 507 F.2d 895, 897-98 (9th Cir. 1974) (holding that Title VII was designed to combat discrimination on the basis of immutable characteristics, thus appearance standards that regulate mutable characteristics discriminate on appearance rather than sex).

However, concepts of social norms, community concepts, and mutable versus immutable traits are difficult to reconcile with the current application of the sexual stereotype theory. As one court has observed, taking the *Price Waterhouse* gender-based stereotype theory to the extreme, "if something as drastic as a man's attempt to dress and appear as a women is simply a failure to conform to a male stereotype and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype" and any attempt for an employer to prohibit such behavior would violate Title VII. *Etsitty*, 2005 WL 1505610, at *5-6. The same court reasoned that such a complete rejection of sex-related conventions was never contemplated by the drafters of Title VII and is not required by the language of Title VII. *Id.* at *6.

Indeed, even Judge Richard Posner has entered the fray in concurrence to a decision in a same-sex harassment lawsuit. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1066-67 (7th Cir. 2003) (Posner, J., concurring). In analyzing the decision in *Price Waterhouse*, Judge Posner explained that the evidence in the case suggested that Hopkins had been denied a promotion due to her sex because her male superiors did not like her failure to conform to their expectations regarding feminine dress and deportment. While agreeing that such evidence was a valid reason to suspect that the firm discriminated against women, Judge Posner noted a difference, that subsequent cases have ignored, between using evidence of a plaintiff's failure to wear nail polish to show that her sex played a role in the adverse employment action of which she complains, and, on the other hand, creating a subtype of sexual discrimination called "sex stereotyping," that would federally protect those such as male workers who "wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditch diggers [who] strip to the waist in hot weather." *Id.* at 1067. He notes that an absurd result would occur if the law is read to protect effeminate men from employment discrimination, but only if they are not (or are not believed to be) homosexuals, against whom an employer is free to discriminate under Title VII. To impute such a distinction to the authors of Title VII, contends Judge Posner, is to indulge in a most extravagant legal fiction. He also believes that to suppose the courts capable of disentangling the motives for disliking the non-stereotypical man or woman is a fantasy. *Id.* So then, where should the line be drawn?

Employee advocates hope that the answer to the question of the scope of the sexual stereotype theory will be addressed in a drama that is playing out before the Ninth Circuit Court in *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004), *reh'g granted*, 409 F.3d 1061 (9th Cir. 2005). The case involves a female employee who was terminated as a result of not wearing makeup as required by her employer's appearance standards. The Ninth Circuit Court of Appeals originally found that such a requirement was not a violation of Title VII and refused to apply the *Price Waterhouse* gender-based stereotype analysis absent some evidence of harassment due to the appearance standard. However, the case was reheard on June 22, 2005 by an *en banc* panel and a decision is pending.

The plaintiff, Darlene Jespersen, worked at Harrah's Casino in Reno, Nevada for nearly twenty years. Overall, she was an excellent employee, regularly receiving positive evaluations from her supervisors and praise from her customers. Harrah's encouraged its female beverage servers to wear makeup, although until early 2000 it was not a requirement. While Jespersen always reported for work well groomed, she resisted wearing makeup. Jespersen claimed that she tried using makeup but that it "made her feel sick, degraded, exposed, and violated." She felt that it "forced her to be feminine" and it, at times, interfered with her ability to perform her job because it "took away [her] credibility as an individual and as a person" especially when she had to deal with unruly and intoxicated patrons. Harrah's did not object to Jespersen's choice to refrain from wearing makeup. *Id.* at 1077

In February 2000, Harrah's instituted its "Personal Best" program. The goal was to impose a standard of excellence in all twenty Harrah's locations, including its Reno casino, and imposed specific appearance standards for the male and female beverage service employees. Under the "Personal Best" program, female employees are required at all times to wear makeup including foundation/concealer and/or face powder, blush, mascara and lip color. Female employees are also required to have their hair teased, curled or styled and worn down everyday. On the other hand, male employees are prohibited from wearing any kind of makeup, must keep their fingernails neat and trimmed, and can not have hair longer than collar length. *Id.* at 1077-78.

Jespersen refused to comply with the new policy. Harrah's told her that she had thirty days to either comply with the program or apply for another position that did not require makeup to be worn, or else she would be terminated. At the conclusion of the thirty days, Jespersen still refused to follow the policy and she failed to apply for another position, therefore she was discharged. Jespersen subsequently filed a claim of disparate treatment gender discrimination under Title VII against Harrah's. Jespersen maintained that Harrah's "Personal Best" program is unlawful because it places a higher burden on female employees than it does on male employees. *Id.* at 1078-79.

The Ninth Circuit Court used an undue burdens test, as articulated in *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), to determine whether Harrah's appearance policy was discriminatory. The *Frank* case involved a class of female flight attendants who argued that their employer's weight restrictions were a violation of Title VII. The employer required that all employees maintain weight requirements as determined by an insurance company table; however women were required to maintain the weight of a "medium" build, while men were permitted to maintain the weight of a "large" build. The court, in ruling against the employer, found that no nondiscriminatory reason existed for the employer's differential treatment of its male and female employees. In general, the court held, although employers are free to adopt different appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other. In applying this test to Jespersen's case, the court concluded that

there was no evidence in the record of an undue burden placed on females as compared to males. Therefore, the court held that without more specified information, an undue burden could not be demonstrated and therefore upheld the grant of summary judgment to Harrah's. *Jespersen*, 392 F.3d at 1080-83.

Jespersen also argued that even if Harrah's actions did not meet the undue burdens test, the makeup requirement should still be invalidated under the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Jespersen claimed that Harrah's policy requiring cosmetics to be worn by female employees was unlawful because it was predicated on the stereotype that for women to be at their "personal best" they must conform to the traditional notion of femininity which includes wearing makeup. Jespersen's argument was clearly an attempt to expansively apply *Price Waterhouse* in such a way that all sex-based distinctions in employment would be eradicated. The Ninth Circuit Court panel, assumedly recognizing the possible implications, refused to extend *Price Waterhouse* to grooming and/or dress code standards. The court concluded that *Price Waterhouse* only applies in cases involving sexual harassment and that Jespersen claimed no such harassment. *Jespersen*, 392 F.3d at 1082-83. However, as the dissent in *Jespersen* pointed out, the court's proffered rationale that *Price Waterhouse* only applies to sexual harassment cases appears fatally flawed as the *Price Waterhouse* case did not involve a claim of sexual harassment. *Id.* at 1084-85.

A decision from the *en banc* panel is still pending at the time of this Article, but it is clear that employee advocates have high hopes that the Ninth Circuit Court will revisit the sexual stereotyping issue with greater scrutiny and analysis.

Conclusion

The federal courts are headed down an uncertain road in which they must try to better define the scope of the gender based stereotype theory articulated in *Price Waterhouse* as it applies to such things as employers' attempts to hire beautiful and sexually attractive employees for positions where such attributes have heretofore not been found to be a BFOQ as well as the seemingly innocuous issue of gender-specific appearance and grooming standards. In doing so, the courts will face seemingly inconsistent legal theories premised on social norms and mutable characteristics. Perhaps the Ninth Circuit Court will take a position in *Jespersen* that forces the issue onto the plate of the Supreme Court. Whatever the case, employment defense counsel are certain to encounter these issues with more frequency and they will be challenged to make some sense of sea of varied legal opinion.