LIPSTICK & THE LAW: AN EXPLORATION OF THE AMERICAN AND FRENCH STATUTORY PROTECTIONS AGAINST MAKEUP MANDATES IN THE WORKPLACE

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I. CHAPTER ONE: INTRODUCTION

Employment discrimination issues are ubiquitous. They arise in every industry, at every stage of seniority, and in every country. Employees can face discrimination based on various aspects of their identity – religion, gender, sex, national origin, sexual orientation, and physical appearance, to name a few. This Note explores a particularly niche area of discrimination by conducting a statutory comparison of the French and American legal systems' protection of discrimination on the basis of physical appearance. Specifically, the Note investigates physical appearance-based discrimination by looking at makeup mandates in the workplace wherein female employees are forced to apply

makeup as a term of their employment. Through a comparison of the relevant American and French statutes, legal frameworks and analyses, and case law with a focus on workplace makeup mandates, the ways in which the American legal system fails to protect employees from discriminatory grooming standards are defined, analyzed, and critiqued.

Part II begins with an exploration of the at-will employment doctrine, the reigning employment framework in the United States – and almost nowhere else. Next, Part III delves into the relevant statutory protections against discrimination in the workplace – namely Title VII – and some of the legal factors, such as immutability, that courts typically employ when looking at discrimination cases. Part IV and V introduce *Jespersen v. Harrah's Operating Co., Inc.*, the seminal case on workplace discrimination and makeup mandates in the United States, and offer a critique of both the court's legal reasoning and the problematic message about women and their value-add in the workplace.

Next, chapter two introduces the relevant French laws about discrimination in the workplace as well as the specific framework announced in 2019 by the *Défenseur des Droits* ("DDD"), the French agency dedicated to addressing and combatting discrimination in the workplace.[1] In introducing the French Framework, the Note juxtaposes French law with American law to highlight the varying ways in which French law is more protective of employees experiencing appearance-based discrimination in the workplace. Part VIII applies a hypothetical *Jespersen*-like scenario to the DDD Framework to demonstrate the differences between the French and American systems. Lastly, Part IX contemplates various proposals and resolutions the American legal system should consider in combatting appearance-based discrimination in the workplace.

[1] *Vous pensez que vos droits n'ont pas etè respectès?*, DEFENSEUR DES DROITS, https://www.defenseurdesdroits.fr/ [https://perma.cc/W23U-NU8T] (last visited Nov. 21, 2022).

II. THE HISTORY OF THE AT-WILL EMPLOYMENT DOCTRINE AND THE FRENCH EMPLOYMENT SYSTEM

A. *The American At-Will Employment System*

Central to a discussion of discrimination in the workplace is the doctrine of at-will employment – an employment framework entirely unique to the United States.[2] In the United States, employees are categorized into two buckets – just-cause employees and at-will employees.[3] Just-cause employees can only be fired if there is a legitimate reason for their termination.[4] These employees are typically "entitled to some form of independent review of the employer's decision to terminate them."[5] In contrast, at-will employees are not offered those same protections and can be fired at any time for any reason, unless the termination violates the Constitution or another statute, such as Title VII.[6]

At-will employment was "invented" in the late 1800s and quickly garnered the approval from judges and courts across the country.[7] This type of employment relationship reflected the judicial opinion at the time that employers and employees were on equal playing fields, such that if an employee was able to resign at any time, it was logical for an employer to be able to discharge an employee at any time as well.[8] But, between the 1900s and 1960s, two key occurrences changed the landscape of the at-will employment space.[9] First, union activity and negotiations between unions and employers required employers to show "just cause" when discharging an employee.[10] Second, federal legislation, including the enactment of Title VII via the Civil Rights Act of 1964, protected employees from discriminatory action on the basis of various protected characteristics.[11] These statutory protections reflected the evolving understanding that employer-employee

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[2] George K. Pitchford, *An Examination of the At-Will Employment Doctrine*, ALA-APA (Aug. 2005), https://ala-apa.org/newsletter/2005/08/17/an-examination-of-the-at-will-employment-doctrine/ [https://perma.cc/52CU-7377].

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV. 3, 3 (2001).

[9] *Id.*

[10] *Id.*

[11] *Id.*

relationships are indeed not equal and that employers frequently have "structural and economic advantages" over employees.[12] These enactments, recognizing the uneven balance of power between employers and employees, weakened the at-will employment doctrine by statutorily enshrining protections against discriminatory employment practices.[13]

Yet, despite these developments, there is still a presumption in the United States that employment arrangements are at-will, rationalized by the idea that at-will contracts preserve the freedom to contract and are the preferred method of employment by both employers and employees.[14] Most employer-employee relationships in the United States are at-will, meaning that the working relationship can be terminated at any point by either the employer or employee.[15] An at-will employee can be terminated because the employer "do[es] not like their style of dress, choice of music or maybe even the color of their shirt, and the employee would have no real legal recourse in most instances."[16] Because dress style, shirt color, and music choices are not statutorily protected classes, an at-will employer could terminate an employee on these bases. However, Title VII prohibits workplace discrimination on the basis of race, color, national origin, sex, and religion; an employer would not be able to cite one of the protected characteristics as a reason for an employee's dismissal.[17]

B. *The French Employment System*

Unlike the United States, France does not subscribe to the at-will employment system; instead, in France, there "is a presumption of and desire for indefinite term employment relationships."[18] This presumption creates a more protective and employee-friendly scheme than the

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[12] *Id.*

[13] *Id.* at 3-4.

[14] *At-Will Employment - Overview*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/GDY4-WUPG].

[15] *Id.*

[16] Pitchford, *supra* note 2.

[17] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1964); *see also* 28 C.F.R. § 42.201(a) (1988).

[18] Denise Broussal, Nadege Dallais & Louise Balsan, *4 Major Differences Between US and French Employment Laws*, LAW360 (July 14, 2016, 2:17 PM), https://www.bakermckenzie.com/-/media/files/insight/publications/2016/07/4-major-differences-between-us-and-french/ar_na_usfrenchemployment_jul16.pdf?la=en [https://perma.cc/Q2GP-A8KU].

at-will system in the United States. To terminate an employee in France, the employer must have a valid ground for dismissal.[19] Under the French Labour Code, valid grounds for dismissal include either personal grounds, such as poor performance or misconduct, or economic grounds, including business closures or other economic hardships within the broader industry or sector.[20] If an employer in France wishes to terminate an indefinite-term employment contract, the employer must invite the employee to a meeting with five days' notice and provide an explanation for the employee's termination.[21] Thus, while an employer in the United States can terminate an employee for any legal reason, the reasons for which a French employee can be terminated are far more narrow, creating an inherently more employee-friendly termination scheme in France.

C. *Title VII, the Equal Employment Opportunity Commission, and Employment Discrimination Litigation in the United States*

In America, if an employee alleges to have experienced discrimination on the basis of race, sex, national origin, or religion, at the federal level, an aggrieved employee would likely bring a cause of action under Title VII in addition to any applicable state claims.[22] Of the ninety-seven discrimination enforcement claims brought in federal court by the Equal Employment Opportunity Commission ("EEOC") in 2020, fifty-nine of them included a cause of action under Title VII, highlighting the predominance of Title VII causes of action in employment discrimination cases.[23]

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[19] Joël Grangé & Camille Ventejou, *Employment and Employee Benefits in France: Overview*, WESTLAW (July 1, 2022), https://content.next.westlaw.com/0-503-0054?__lrTS=20220717155354725&transitionType=Default&contextData=%28sc.Default%29 [https://perma.cc/C9L7-75A4].

[20] *Id.*

[21] *Id.*

[22] Before a civil lawsuit can be brought, a plaintiff must often exhaust their administrative remedies through the EEOC, which is beyond the scope of this Note. *Filing a Lawsuit in Federal Court,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/filing-lawsuit-federal-court [https://perma.cc/BC6E-KLLJ] (last visited Nov. 21, 2022).

[23] *EEOC Litigation Statistics, FY 1997 through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2021 [https://perma.cc/5MJT-83EC] (last visited Oct. 19, 2022). These statistics are dramatically lower than those observed in prior years. For example, in 2018, 217 suits were filed, as compared to 97 in 2020. Out of the 217 filed suits, 111 included causes of action under Title VII.

Although aggrieved employees sometimes do turn to the judiciary to resolve employment discrimination disputes, American anti-discrimination laws generally do not provide a direct avenue to the courtroom for complaints brought under Title VII. Instead, the law dictates that aggrieved employees must first exhaust their administrative requirements and attempt to settle the complaint through the EEOC's administrative complaint process.[24] Once the complainant has satisfied the administrative exhaustion requirement, they can then proceed to file a lawsuit in the relevant and appropriate court.[25]

Yet, despite the EEOC's mission and dedication to combatting workplace discrimination, the Commission's efficiency and reputation for protecting employees is dubious.[26] Of the 46,158 complaints filed with the EEOC under Title VII, only 2.5% were determined to be "reasonable cause" complaints.[27] Interestingly, in the last decade, the percentage of complaints deemed "reasonable cause" has decreased from 4.9% in 2010 to 2.5% in 2020.[28] Moreover, 67.5% of the 2020 complaints were dismissed as "no reasonable cause," while only 11.8% of charges were settled or successfully conciliated.[29] Based on these statistics, legal scholars and other commentators worry that the EEOC's processes, and exceedingly high rate of "no reasonable cause" findings, deter, rather than encourage, injured employees from seeking judicial remedies in federal courts, thus undermining the founding mission of the EEOC.[30]

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[24] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 22.

[25] *Id.*

[26] *See generally* Patricia Barnes, *Is the EEOC Protecting Workers Or Discriminatory Employers?*, FORBES (Sept. 4, 2019, 4:16 PM), https://www.forbes.com/sites/patriciagbarnes/2019/09/04/is-the-eeoc-protecting-workers-or-discriminatory-employers/?sh=1a08c4155407 [https://perma.cc/AJJ9-5Q3A].

[27] *Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC) (includes concurrent charges with ADEA, ADA, EPA, and GINA) FY 1997 - FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/title-vii-civil-rights-act-1964-charges-charges-filed-eeoc-includes-concurrent-charges [https://perma.cc/CP84-JJUX] (last visited Feb. 18, 2021). A complaint is deemed "reasonable cause" if the EEOC, after conducting an investigation, believes discrimination did occur.

[28] *Id.*

[29] *Id.*

[30] Barnes, *supra* note 26.

D. *Employment Discrimination Litigation in France*

Similar to the EEOC, the DDD is an independent administrative agency charged with addressing complaints about discrimination in the workplace and facilitating settlements between employers and aggrieved individuals.[31] However, unlike the EEOC, the DDD cannot initiate a lawsuit against the employer on the employee's behalf.[32] In the context of litigation, the DDD can only support a complainant's case in a civil, administrative, or criminal proceeding.[33] Thus, when an employee wishes to challenge discriminatory practices in the workplace, they must file a complaint with the Conseil de Prud'hommes (The Industrial Court), which endeavors to first facilitate an agreement between the employer and employee before resorting to a judicial process to reach a resolution.[34]

Not only do the American and French processes of handling discrimination claims vary, but each legal system also offers different remedies to aggrieved employees. While French law provides more upfront protection to employees, the American system offers more remedies to individuals who have experienced discrimination.[35] In America, potential remedies include reinstatement to the employee's prior position, monetary damages for wages, lost benefits, and sometimes emotional or physical distress, attorneys' fees, and punitive damages in extreme scenarios.[36] In contrast, in France, remedies include potential reinstatement or damages to the employee.[37] However, if the employee was employed for less than two years or the employer had less than eleven employees, the judge "will award compensation equal to the damages suffered but without a legally-prescribed minimum amount" the employer must pay.[38] Leaving that decision to the discretion of the employer without ordering a minimum amount of damages exposes the employee to the prospect of being grossly undercompensated for the damages suffered. As will be explored in chapter two, the French legal system provides more upfront and proactive protection against employment discrimination, particularly with the

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[31] JACKSON LEWIS LLP & BENJAMIN KRIEF, A COMPARATIVE GUIDE TO TERMINATING THE EMPLOYMENT RELATIONSHIP IN THE U.S. AND FRANCE 5 (2012).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 5-6.

[37] JACKSON LEWIS LLP & BENJAMIN KRIEF, *supra* note 31, at 6.

[38] *Id.*

dissemination of the DDD's framework decision in 2019.[39] In contrast, the American at-will employment system imposes fewer restrictions on employers but ultimately offers more robust remedies to employees, provided they can successfully navigate the significant administrative obstacles and legal burdens that American employees must satisfy.[40]

III. THE AMERICAN FRAMEWORK: GROOMING STANDARDS, TITLE VII, AND IMMUTABILITY

Because of the broad discretion employers are given to choose how to operate their businesses, in addition to setting workplace policies, employers generally can and do impose grooming standards and dress codes on employees.[41] Thus, if an employer requires that all employees wear uniforms, look polished in the workplace, or cover their tattoos while at work, those policies do not run afoul of Title VII requirements, as long as the policies do not discriminate on the basis of one of the protected classes delineated under Title VII.[42] Moreover, employers can impose grooming standards and dress codes that apply differently to men and women.[43] For example, in *Tavora v. New York Mercantile Exchange*, the Second Circuit held that a grooming standard that imposed a short-hair requirement on men but not women did not violate Title VII.[44] The court, joining other circuits that have decided this issue, articulated that requiring men, but not women, to have short hair does not violate Title VII because decisions about hair length only have a *de minimis* effect and are more a function of how employers wish to operate their business, highlighting the discretion employers are given to run their businesses in the way they choose.[45] In limiting the application of Title VII, the Second Circuit articulated that "Title VII was never intended to encompass sexual classifications having only an insignificant effect on employment opportunities."[46]

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[39] *See* discussion *infra* Chapter Two, Section VII.

[40] JACKSON LEWIS LLP & BENJAMIN KRIEF, *supra* note 31, at 5.

[41] *Dress Codes and Grooming Requirements in the Workplace*, JUSTIA, https://www.justia.com/employment/hiring-employment-contracts/privacy-in-employment/dress-codes-and-grooming-requirements/ [https://perma.cc/8EVX-2BFA] (last visited Oct. 20, 2022).

[42] *Id.*

[43] *Id.*

[44] Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996).

[45] *Id.*

[46] *Id.*

Similarly, in *Baker v. California Land Title Co*., the Ninth Circuit held that a requirement for male employees to maintain short hair did not violate Title VII and "that a private employer may require male employees to adhere to different modes of dress and grooming than those required of female employees" without violating Title VII.[47] Throughout the opinion, the court invoked the concept of immutability – the principle that Title VII is only meant to apply to characteristics about a person that cannot be changed and not how one chooses to wear their hair.[48] Invoking the legislative intent behind Title VII's enactment, the court held that:

> Congress was not prompted to add 'sex' to Title VII on account of regulations by employers of dress or cosmetic or grooming practices which an employer might think his particular business required. The need which prompted this legislation was one to permit each individual to become employed and to continue in employment according to his or her job capabilities.[49]

Thus, the court reasoned that because the employee *could* change his hair length, he did not meet the "immutable" criteria, and, therefore, Title VII's protections were not triggered.[50] Just as *Tavora* limited the reach of Title VII, so too did *Baker.* In relying on the immutability doctrine, the court limited the scope and protection under Title VII to apply to characteristics the employee "had no power to alter."[51]

IV. GROOMING STANDARDS, APPLICABLE CASE LAW, AND UNEQUAL BURDENS

While the grooming standards at issue in *Baker* and *Travora* applied to men, workplace grooming policies directed toward women not only exist but disproportionately affect those who identify as female.[52] Not only can employers dictate that a female employee wear a uniform, but female employees may also be subject to certain gendered

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[47] Baker v. California Land Title Co., 507 F.2d 895, 898 (9th Cir. 1974).

[48] *Id.* at 897.

[49] *Id.* at 896.

[50] *Id*. at 898.

[51] *Id*. at 897.

[52] *See* Mindy Isser, *The Grooming Gap: What "Looking the Part" Costs Women*, IN THESE TIMES (Jan. 2, 2020), https://inthesetimes.com/article/grooming-gap-women-economics-wage-gender-sexism-make-up-styling-dress-code [https://perma.cc/C285-52NJ].

grooming standards, including workplace mandates to wear makeup and specific hairstyles, as was the case in *Jespersen*.[53]

A. *Jespersen v. Harrah's Casino and Harrah's "Personal Best" Program: Pathway to the Federal Courts*

The seminal case upholding workplace policies that require female workers to wear makeup is *Jespersen v. Harrah's Operating Co., Inc.*[54] In *Jespersen,* a female casino bartender was fired for refusing to comply with Harrah's grooming policy.[55] As part of its "Personal Best" program, Harrah's implemented new appearance policies that required both men and women to wear black pants, a white shirt, a black vest, and a bow tie.[56] While this requirement was gender neutral, as part of the "Personal Best" program, women were required to tease their hair, wear a specific nail color, and apply face powder, blush, mascara, and lip colors "applied neatly in complimentary colors . . . at all times."[57] Jespersen, who did not wear makeup in either her personal or professional life, challenged the new policy, arguing that the new policy conflicted with her "self-image" and made her feel so uncomfortable that it impaired her ability to perform her duties.[58] Jespersen was discharged for failing to adhere to the company policy.[59] After her termination, Jespersen filed a complaint with the EEOC, from which she received a right to sue notification.[60] She filed suit in the United States District Court for the District of Nevada, arguing that Harrah's "Personal Best" program discriminated against women by "(1) subjecting them to terms and conditions of employment to which men are not similarly subjected, and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment."[61] The District Court granted summary judgment to Harrah's and Jespersen appealed to the Ninth Circuit.[62]

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[53] *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006).
[54] *Id.*
[55] *Id.* at 1105.
[56] *Id.* at 1107.
[57] *Id.*
[58] *Id.* at 1107-08.
[59] *Jespersen*, 444 F.3d at 1107-08.
[60] *Id.*
[61] *Id.* at 1108.
[62] *Id.*

B. *The Ninth Circuit Applies the "Unequal Burdens" Test to Reject Jespersen's Sex Discrimination Claim*

On appeal, the Ninth Circuit applied the "unequal burdens" test, holding that to establish a Title VII violation on the basis of sex, a plaintiff must show that the "challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on the basis of gender."[63] Once the plaintiff has made out the *prima facie* case, the burden then falls on the employer to provide a "legitimate, nondiscriminatory reason" for the policy.[64] In rejecting Jespersen's argument that the makeup policy on its face was *prima facie* sufficient, the court articulated that differences in dress codes and grooming requirements that differentiate on the basis of sex do not, on their own, establish a *prima facie* case for sex discrimination under Title VII.[65]

Although the "Personal Best" policies applied to both men and women, the individual requirements applied differently to men and women.[66] Nevertheless, the court held that the makeup requirements did not place a greater burden on women than men, and therefore, the makeup policies were not discriminatory.[67] In upholding Harrah's "Personal Best" policies, the court both announced that "grooming standards that appropriately differentiate between the genders are not facially discriminatory" and invoked other circuit court decisions that upheld dress codes and appearance requirements that differentiated on the basis of sex.[68] Thus, the test for whether grooming policies are discriminatory rests not on whether the policies differ for male and female employees, but rather on whether the policies impose an "unequal burden" on the plaintiff as a result of the plaintiff's gender.[69] In Jespersen's case, the Ninth Circuit failed to acknowledge that Harrah's grooming policies and makeup requirements placed an unequal burden on female employees.[70]

Moreover, the court distinguished Jespersen's case from the seminal case *Price Waterhouse v. Hopkins*. In *Price Waterhouse,* Hopkins, a female employee, was rejected from a partnership position because

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[63] *Id*. at 1108-09 (quoting McDonnell Douglas Corp v. Green, 411 U.S. 792, 802, 93 S.Ct.1817, 36, L.Ed.2d 668 (1973)).

[64] *Id.* at 1109.

[65] *Jespersen*, 444 F.3d at 1109.

[66] *Id.*

[67] *Id.* at 1111.

[68] *Id.* at 1109-10.

[69] *Id.* at 1110.

[70] *Id.*at 1111.

the other partners found her to be too aggressive, noting her unfeminine-like personality.[71] The court in *Jespersen* notes that in contrast to *Price Waterhouse*, Harrah's grooming policy applies to all female employees.[72] Rather than singling out one woman, as was the case in *Price Waterhouse,* Harrah's makeup requirements applied to all women and did not objectively interfere with the female employees' ability to do their work, despite Jespersen's contention that the makeup requirement did indeed interfere with her personal ability to do her work.[73] In contrast, Hopkins' ability to do her work was directly impacted, as she was told to be less aggressive and to "take a course at charm school."[74] In contrast to Jespersen's case, in which there was no evidence of objective sex stereotyping, the Ninth Circuit held that in *Price Waterhouse*, "impermissible sex stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men."[75] Thus, in affirming the District of Nevada's holding, the Ninth Circuit held that an employer's grooming policy that required female employees to wear makeup failed to establish a *prima facie* case for sex discrimination under Title VII because Jespersen did not establish that the policies placed an "unequal burden" on female employees.[76] Additionally, the grooming policy was not enough to be considered sex stereotyping because Jespersen could not establish that gender was a motivating factor in Harrah's grooming and appearance policies.[77]

Borrowing from another famous Ninth Circuit opinion, *Gerdom v. Continental Airlines*, the court in *Jespersen* invoked the "unequal burdens" standard, refusing to recognize that the casino's gendered grooming policies placed an unequal burden on female employees.[78] The court reasoned that although the scope and requirements of the grooming standard for men and women differed, the policy itself was applicable to all employees, regardless of gender, and did not place "a greater burden on one gender than the other."[79] Further, the court refused to take judicial notice of the disproportionate time and money female employees must spend to comply with an employer's

[71] *Jespersen*, 444 F.3d at 1111.
[72] *Id.* at 1111-12.
[73] *Id.*
[74] *Id*. at 1111.
[75] *Id*.
[76] *Id.*
[77] *Jespersen*, 444 F.3d at 1112.
[78] *Id*. at 1109-10.
[79] *Id*. at 1109.

grooming standards, holding that "[j]udicial notice is reserved for 'matters generally known within the . . . jurisdiction of the trial court.'"[80] Because makeup costs do not fall into that category, the court would need to, and refused to, speculate about the costs to determine that female employees bore an unequal burden in complying with an employer's workplace policies.[81] Thus, without affirmative proof of the unequal burden female employees bore in complying with Harrah's grooming standards, the court held that Harrah's makeup requirement, when looking at the totality of the requirements, did not violate Title VII or pose an unequal burden on female workers.[82]

V. *JESPERSEN* IN CONVERSATION WITH OTHER CASES ABOUT MAKEUP MANDATES

In looking at other cases involving makeup requirements and grooming standards, it may seem that *Jespersen* is perhaps an outlier, and in fact, courts have been sympathetic to the demeaning and burdensome requirements imposed on female employees.[83] But, in exploring the facts and holding of *Tamimi v. Howard Johnson Co.*, it becomes clear that this is not the case. In *Tamimi,* female employee Sondra Tamimi worked for Howard Johnson under the direct supervision of Gallof.[84] A few months into Tamimi's employment, Gallof instituted a new dress code that required all women to wear makeup and lipstick.[85] Tamimi, who refused to comply, was later terminated.[86] Ultimately, the Eleventh Circuit affirmed the lower court's finding that Tamimi had established a *prima facie* case for sex discrimination under Title VII.[87]

Facially, in looking at the *Tamimi* result, it seems that Title VII protections in the context of an employer-imposed makeup requirement truly do have teeth. But when probing into the facts and distinctions between *Tamimi* and *Jespersen*, that conclusion becomes less convincing. First, there was circumstantial evidence that the makeup

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[80] *Id*. at 1110 (citing Fed. R. Evid. 201).

[81] *Id.*

[82] *Id.* at 1110-11.

[83] *See* Tamimi v. Howard Johnson Co., 807 F.2d 1550, 1550 (11th Cir. 1987) (holding that an employer-mandated makeup requirement violated Title VII because plaintiff was pregnant and specifically targeted, rather than because the mandate is disproportionately burdensome on women).

[84] *Id.*

[85] *Id.* at 1551.

[86] *Id.* at 1552.

[87] *Id.* at 1553-54.

requirement was specifically directed at Tamimi, as she was the only female employee in the office that did not already wear makeup and had previously told her boss she would not.[88] Substantiating that speculation, Gallof conceded that he instituted the new grooming requirements because Tamimi had been arriving at work "looking pale, with her face broken out."[89] Second, Gallof only began complaining about Tamimi's appearance once he was notified that she was pregnant, prompting the court to find that Gallof, by discharging Tamimi, had committed a Title VII violation because pregnancy is a "fundamental sexual characteristic" protected under Title VII.[90] This holding makes clear that the factor motivating a finding of sex discrimination was not the makeup requirement itself, but rather, Tamimi's pregnancy.[91] In agreeing with the district court that Tamimi experienced sex discrimination, the court even concedes that this case falls outside the typical case involving grooming requirements, calling it "an unusual case which does not fit into the usual pattern of a sex discrimination case."[92] In attempting to square the varied outcomes of *Jespersen* and *Tamimi,* it becomes increasingly clear that if Tamimi's "skin problem had not been related to her pregnancy, an appearance standard applied by the employer to address the problem would not have been discriminatory," and the result would have mirrored that of *Jespersen*.[93]

VI. PROBLEMATIZING *JESPERSEN*

A. *The Holding in Jespersen Deviates from Precedent and Perpetuates Harmful Gender Stereotypes*

The result in *Jespersen* is not only problematic from a legal perspective but also is an assault on feminist ideals and the effort to achieve gender parity in the workplace. From a legal perspective,

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[88] *Id.* at 1551.

[89] *Tamimi*, 807 F.2d at 1551.

[90] *Id.* at 1554.

[91] *Id.*

[92] *Id.*

[93] Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2560 n.89 (1994). *See also* Stanley Ziemba, *Worker Rights Debate Is Back*, CHI. TRIB. (Apr. 18, 1993, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1993-04-18-9304180096-story.html [https://perma.cc/XLL8-ZVDL] (highlighting that a Continental employee was terminated for not wearing the required foundation and lipstick. The employee was later reinstated after the media drew attention to the incident).

Jespersen blatantly disregards the standard for Title VII violations delineated in *Price Waterhouse v. Hopkins*.[94] In *Price Waterhouse*, the Court, in rejecting Price Waterhouse's defenses, invoked Congress's intent when enacting Title VII, noting that the intent was "to forbid employers to take gender into account in making employment decisions."[95] In constructing what Congress meant when it said that the goal of the statute was to prevent discrimination "*because of* such individual's sex," the Supreme Court held that "*because of* such individual's sex" means that "gender must be irrelevant to employment decisions."[96] In establishing a workplace policy that only women, and not men, must wear makeup, Harrah's is clearly deviating from the standard delineated in *Price Waterhouse.* Not only were men not required to wear makeup, but they were prohibited from doing so, highlighting that gender was quite relevant to Harrah's employment decision.[97] On its face, this policy blatantly ignores the Supreme Court's directive that "gender must be irrelevant to employment decisions," and it prescribes that female employees, despite their wishes, must wear makeup to remain employed.[98]

Additionally, forcing women to wear foundation, powder, lipstick, and mascara is analogous to requiring that female employees wear uniforms without imposing the same requirement on male employees. Judge Pregerson in dissent astutely dubbed the makeup mandate a "facial uniform" and unequivocally held that imposing a makeup mandate on female employees only was sex discrimination.[99] In many ways, this requirement is similar to the one in *Carroll v. Talman Federal Savings and Loan Association of Chicago*, wherein the Seventh Circuit held that a dress code that required women to wear a specific uniform but men to wear any professional clothing of their choosing was sex discrimination under Title VII.[100] In *Carroll*, the employer withheld the cost of the uniforms from the female employees' wages, which prompted the Seventh Circuit to find that the

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[94] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1114-17 (9th Cir. 2006) (Pregerson J., dissenting).

[95] Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion).

[96] *Id.* at 240 (citing 42 U.S.C. §§ 2000e–2(a)(1), (2) (emphasis added)).

[97] *Jespersen*, 444 F.3d at 1115 (Pregerson, J., dissenting).

[98] *Price Waterhouse*, 490 U.S. at 240.

[99] Sanford Heisler Kimpel LLP, *Gender Discrimination? Because Makeup Doesn't Grow on Trees*, CASETEXT (Apr. 4, 2017), https://casetext.com/analysis/gender-discrimination-because-makeup-doesnt-grow-on-trees [https://perma.cc/2NXQ-NL7J].

[100] Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028, 1029-30 (7th Cir. 1979).

employer had discriminated against women under Title VII's prohibition against discrimination related to terms, conditions, or privileges of employment.[101] While the employer in *Jespersen* did not withhold wages to pay for the employees' makeup, it did require that the female employees wear makeup without paying the costs of cosmetic products.[102] Thus, the same rationale applied in *Carroll* should have been applied here. As stated in *Carroll*, when:

> two sets of employees performing the same functions are subjected on the basis of sex to two entirely separate dress codes . . . [t]his different treatment in the conditions of employment for female employees cannot be justified by business necessity, since . . . the employer had a variety of nondiscriminatory alternative means of assuring good grooming.[103]

The majority in *Carroll* stated that had the employer made the uniform optional, that would have evaded the Title VII issue.[104] Similarly, had Harrah's made the makeup policy optional and Jespersen had the option not to participate, there would be no claim of sex discrimination. By instituting a policy that specifically applied to females, in addition to the already-existing gender-neutral grooming requirements, it is difficult to square the two results of *Jespersen* and *Carroll* and to determine there was no Title VII violation.

In addition to the doctrinal and legal problems with the result in *Jespersen*, the majority's decision sends a bleak message about the realities about female equality and status in the workplace. Harrah's policy dictated that all beverage service employees, regardless of sex, must professionally present themselves, be "well groomed, appealing to the eye, . . . firm and body toned."[105] Thus, the general requirement to appear professional in the workplace already applied to both sexes before the makeup policy was instituted. The implication behind the additional makeup requirement is that "[j]ust as the bank in *Carroll* deemed female employees incapable of achieving a professional appearance without assigned uniforms, Harrah's regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform . . . required by Harrah's."[106] As Judge Pregerson

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[101] *Id.*
[102] *Jespersen*, 444 F.3d at 1110.
[103] *Carroll*, 604 F.2d at 1032.
[104] *Id.* at 1031.
[105] *Jespersen*, 444 F.3d at 1107.
[106] *Id.* at 1116 (Pregerson, J., dissenting).

notes in dissent, the "inescapable message [of this holding] is that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup."[107] By requiring that in addition to being well-groomed, female employees also need to wear makeup, Harrah's policy only furthers the sentiment that for female employees, dressing and appearing professionally is not enough to appear workplace-appropriate. Women also need to make cosmetic changes and enhancements to their faces, even if it feels uncomfortable or interferes with their ability to do their job, as it did for Jespersen.[108] *Jespersen*'s holding perpetuates this dangerous stereotype that women on their own, without cosmetic enhancements, will not be viewed as complete, professional, or workplace ready.[109]

Not only does the court's holding perpetuate harmful workplace attitudes toward women, but it also blatantly ignores Jespersen's testimony about how the policy affected her self-image and job performance.[110] In refusing to comply with Harrah's policy, Jespersen testified that she felt "very degraded and very demeaned" to the point that the policy "'prohibited [her] from doing [her] job' because 'it affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person.'"[111] Jespersen had worked at "Harrah's for twenty years and compiled what by all accounts was an exemplary record."[112] When Harrah's encouraged, but did not require, female employees to wear makeup, she remained at her job. Then, once the policy was fully enforced in 2000, she refused to comply and was ultimately terminated.[113] Jespersen's willingness to lose her longtime job at which she excelled, rather than comply with the policy, is evidence of the significant impact the requirement had on her self-image.[114] Rather than acknowledge and validate this impact, the court performatively "respect[ed] Jespersen's resolve to be true to herself," while

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[107] *Id.*
[108] *See id.* at 1108 (majority opinion).
[109] *See id.* at 1113.
[110] *Id.* at 1117 (Kozinski, J., dissenting).
[111] *Jespersen*, 444 F.3d at 1106-07 (majority opinion).
[112] *Id*. at 1107.
[113] *Id.* at 1105.
[114] *Id.* at 1112, 1118 (Kozinski, J., dissenting).

simultaneously refusing to acknowledge the true impact this policy had on Jespersen and other female employees.[115]

In a similar vein, the court's holding marks an unwillingness to acknowledge that a makeup requirement burdens female employees in a way that it does not burden male employees. As Judge Kozinski remarks in dissent:

> Harrah's overall grooming policy is substantially more burdensome for women than for men. Every requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. 'teased, curled, or styled' hair; clean trimmed nails v. nail length and color requirements; black leather shoes v. black leather shoes. The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the "overall policy" more burdensome for the former than for the latter. The only question is how much.[116]

This unwillingness to acknowledge the disparate burdens is substantiated by the majority's holding that there cannot be a finding of an unequal burden because Jespersen failed to proffer evidence that the makeup policy unequally burdened the female employees.[117] The court refused to recognize the time and money required to comply with Harrah's makeup policy without specific documentation of the requisite cost and time, but "[y]ou don't need an expert witness to figure out that such items don't grow on trees."[118] That makeup costs money and time to apply – a cost that men do not have to bear to comply with Harrah's dress code – does not require proof of receipts to establish.[119] The court did not need to know the exact amount the average woman spends on makeup annually to conclude that women spend time and money purchasing and applying cosmetic products.[120] In refusing to acknowledge the disproportionate cost women bear in complying with Harrah's policy without specific receipts proving the costs, the court is willingly turning a blind eye to the disproportionate burden placed

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[115] *Id.* at 1112 (majority opinion).

[116] *Id.* at 1117 (Kozinski, J., dissenting) (citations omitted).

[117] *Jespersen*, 444 F.3d at 1106.

[118] *Id.* at 1112, 1117 (Kozinski, J., dissenting).

[119] *Id.* at 1118.

[120] Deborah Rhode, *A Choice, Not a Requirement*, N.Y. TIMES (Nov. 3, 2013, 7:32 PM), https://www.nytimes.com/roomfordebate/2013/01/02/does-makeup-hurt-self-esteem/a-choice-not-a-requirement [https://perma.cc/GWS7-24E5] (noting that global investment in makeup products is over eighteen billion dollars).

on women and hiding behind a procedural justification of when judicial notice is appropriate.[121]

B. *The Immutability Framework is Harmful and Leaves People Unprotected Against Discriminatory Behavior*

Lastly, the immutability standard the court reiterated from the district court holding is an arbitrary distinction and incongruous with our modern-day conception of what is considered mutable. At the district court level, the Nevada District Court held that Harrah's makeup requirement could not constitute a Title VII violation because it did not discriminate against Jespersen "on the basis of the 'immutable characteristics' of her sex."[122] Immutability is defined as a part of an individual's identity that either cannot be changed or is so fundamental to an individual's identity that it is "effectively unalterable and 'ought not to be required to be changed.'"[123] Thus, race, color, national origin, sex, genetic makeup, disabilities, and citizenship status are among the many characteristics that are considered immutable and treated as such under the law.[124] Immutability has often been cited as the basis for a heightened level of protection against discrimination on the basis of an immutable characteristic. Therefore, Congress statutorily enshrined protection against race, color, national origin, sex, and disability discrimination through Title VII and other statutes, elevating these characteristics to be protected under employment discrimination laws.[125] The rationale behind the immutability doctrine is one rooted in fairness – it is unfair for people to be discriminated against because of a characteristic that cannot be changed.[126] First, Jespersen could not change that she was a female and therefore subject to the makeup requirement. While she could change whether she wore makeup or not, the underlying reason she was subject to Harrah's grooming policy is because she was a female. Thus, as applied, the immutability doctrine should entitle Jespersen to the elevated protections available under Title VII. Second, the immutability doctrine is underinclusive and fails to capture other types of workplace discrimination. Just because

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[121] *Jespersen*, 444 F.3d at 1110.

[122] *Id.* at 1106 (quoting the district court in its decision that Harrah's makeup policy did not violate Title VII).

[123] Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1517 (2011).

[124] *Id.*

[125] *Id.* at 1519.

[126] *Id.*

someone *can* change a certain characteristic, habit, or predilection, like wearing makeup, does not mean that they should be forced to, especially when not all employees are subject to those same requirements. Third, modern society's conception of gender has evolved significantly, and the immutability doctrine does not reflect today's understanding of identity and how that can implicate or exacerbate discrimination in the workplace. Using the concept of immutability as the litmus test to determine whether a character trait or part of someone's identity should be subject to heightened statutory protection leaves the door open for all types of workplace discrimination to continue without judicial intervention or protection.

VII. CHAPTER TWO: THE INTERNATIONAL FRAMEWORK–

A. *France Statutorily Protects Against Discrimination on the Basis of Physical Appearance*

Contrasting the United States' Title VII protections with France's far more expansive and sweeping protections against workplace discrimination, it is even more clear that the United States' framework is unduly strict and unprotective of employees in the workplace. From a simple statutory perspective, the coverage of France's anti-discrimination in the workplace statute is far more expansive. Under Article L.1132-1 and 1132-2 of the French Labour Code and Articles 225-1 et seq of the French Criminal Code, an employer cannot discriminate on the basis of "origin, gender, morals, sexual orientation, . . . religious beliefs, [and] physical appearance . . . ."[127] Among the many differences between France's protections and the United States' protections under Title VII (and other statutory schemes), the French Labour Code prohibits discrimination on the basis of physical appearance.[128] Under French law, physical appearance includes "all the physical characteristics and visible specific attributes of a person, which relate

[127] *France: Employment & Labour Laws and Regulations 2021*, INT'L COMPAR. LEGAL GUIDES (Mar. 26, 2021), https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/france [https://perma.cc/H3QX-2UPA] (explaining the various characteristics protected under French law) ("French law prohibits any form of direct or indirect discrimination towards a candidate or employee on the basis of his/her: origin; gender; morals; sexual orientation; age; family situation; pregnancy; genetic characteristics; belong or not belong (whether actually or supposedly) to an ethnic group, nation or face; political opinions; union or mutual society activities; normal exercise of a right to strike; religious beliefs; physical appearance; name; state of health; or disability.").

[128] *Id.*

both to its physical and bodily integrity (morphology, height, weight, facial features, phenotype, stigma . . .) and to elements related to the expression of its personality (clothing, accessories, hair, beard, piercings, tattoos, make-up . . .).”[129] Thus, France's protection against discrimination in the workplace is not only on its face more expansive with its inclusion of physical appearance, but also applied broadly to both mutable and immutable physical characteristics.[130] Under the French Labor Code, an employee cannot discriminate:

> punish or dismiss employees, or exclude potential employees from the recruitment process (for a job, a training position or an internship), or cause them to endure direct or indirect discriminatory measures with respect to remuneration, incentive schemes, share distribution, training or redeployment programs, posting, qualification, classification, career development, mobility or contract renewal [on any of the aforementioned enumerated bases in the Code].[131]

Similar to the EEOC in the United States, France has a dedicated agency, the DDD, which, since its inception in 2004, has served as the main governmental agency tackling discrimination in the French workplace.[132] In 2019, the DDD issued its sensational Framework decision on employment discrimination based on physical appearance.[133] In the decision, the DDD addressed the never-ending complaints filed

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[129] *Physical Appearance and Discrimination at Work*, CMS LAW-NOW (Dec. 30, 2019), https://www.cms-lawnow.com/ealerts/2019/12/physical-appearance-and-discrimination-at-work [https://perma.cc/JD2F-NKT9].

[130] *See Décision-cadre du Défenseur des droits n°2019-205* [*Framework decision of the Defender of Rights n°2019-205*], DEFENSEUR DES DROITS (Oct. 2, 2019), https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19239 [https://perma.cc/UZK8-7DY3] [hereinafter *Framework Decision*] (Fr.) (showing that France's protections apply to immutable and mutable characteristics, such as clothing choice). The translations provided throughout this Note are rough translations of the original DDD document that is written in French.

[131] *Employment Law Overview France 2021-2022*, L&E GLOBAL, https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEG_MEMO_France_24.11.20_compressed.pdf [https://perma.cc/U5H5-UV2T] (last visited Jan. 19, 2022).

[132] *Defenseur Des Droits,* EQUINET, https://equineteurope.org/author/france-dr/ [https://perma.cc/A5DV-NF36] (last visited Jan. 19, 2021); *Employment Law Overview France 2021-2022*, *supra* note 131 (explaining the mission of the DDD) (“Since 2004, a special body has been created that has an essential role in the fight against discrimination: the Defender of Rights. Any discrimination case, direct or indirect, prohibited by statute, law, or by an international convention to which France is a party, can be brought before the Defender of Rights. Its main task is to ensure the efficacy of the legal mechanisms prohibiting discrimination.”).

[133] *Framework Decision*, *supra* note 130.

by employees who think they have experienced discrimination in the workplace based on their physical appearance.[134] In introducing the aims and catalyst for this type of framework, the DDD acknowledged that employment discrimination is a live issue, many complainants are hesitant to bring claims, and the issue of discrimination based on physical appearance is rarely litigated.[135] This acknowledgment, at least in part, explains why judicial decisions about workplace discrimination and makeup mandates in France are few and far between. Yet, despite the dearth of litigation and claims brought forward, the DDD highlighted that discrimination on the basis of physical appearance not only exists but also has become one of the most prevalent modes of discrimination in the last twenty years.[136] Specifically, the DDD reported that while discrimination is widespread in the workplace, it intersects with gender in a material way, as females are discriminated against on the basis of physical appearance far more than men.[137]

Recognizing the widespread prevalence of physical appearance-based discrimination in the workplace, the DDD felt compelled to issue this Framework decision to remind employers of the governing law under the French Constitution and Labour Code while providing updated guidance for employer consideration when making hiring and recruitment decisions.[138] French law, and case law under the European Court of Human Rights, protects an individual's right to decide how they want to present themselves in private and public settings.[139] This Framework clarifies that physical appearance discrimination is not only prohibited when it has a logical nexus to another protected characteristic, such as sex, race, or religion but also is prohibited in isolation as it relates to employees' decisions about what to wear and how to present themselves.[140] Interestingly, in announcing the reigning legal framework, the DDD requires employers to consider the "evolution and fashion phenomena," noting that some social trends that used to be considered acceptable can "indeed appear today totally obsolete, sexist, and discriminatory."[141] This caveat builds flexibility into the

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[134] *Id.* at 3.

[135] *Id.*

[136] *Id.* at 4 ("74% of executives believe that they are discriminated against because of their physical appearance while job seekers cite physical appearance as the second criterion on which they discriminate (25%) feel they suffer just after age (35%).").

[137] *Id.* at 4.

[138] *Id.* at 6.

[139] *See Framework Decision*, *supra* note 130, at 6.

[140] *Id.* at 7.

[141] *Id.* at 8.

law to evolve and change as social norms do but also demands that employers constantly reevaluate their dress code and grooming policies to ensure they conform to the ever-changing social and cultural phenomena of the time. This flexibility is embedded into the Framework, which, while discussing prior cases decided by the French courts, noted that "decisions are justified in light of current society and times" and are thus subject to change.[142]

Understanding that despite the Framework, legal disputes about physical appearance discrimination in the workplace are inevitable, the DDD also provided guidance in the event of litigation, including the burden of proof that needs to be satisfied if the dispute is litigated before a civil or administrative court.[143] This burden dictates that if the employee can provide facts that give rise to a presumption of discrimination based on physical appearance, it is then up to the employer to demonstrate that its decision is based on objective, non-discriminatory, and proportionate elements.[144] This burden-shifting framework requires that once the employee establishes the facts that would establish a presumption of discrimination, the burden then shifts to the employer to demonstrate that its actions were non-discriminatory.[145]

B. *Under the DDD Framework, Grooming Standards Need to be Proportional to the Articulated Business Need*

While employers are not allowed to discriminate on the basis of physical appearance, that does not entirely outlaw workplace dress codes and grooming standards. Rather, if an employer restricts what employees can wear, the employer must ensure that the restriction is proportional to the desired objective.[146] Similar to a constitutional strict scrutiny standard of review, the employer must show that the requirements are the least restrictive means through which the employer can achieve its goals.[147] For example, while the DDD recognizes that some physical appearance standards would be appropriate for client-facing or image-centric roles, such as models or hosts, a restriction directed at employees who do not have any contact with customers or clients would "be less, if at all, justified."[148] While

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[142] *Id.* at 28.
[143] *Id.* at 8.
[144] *Id.*
[145] *Framework Decision*, *supra* note 130.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 18.

employers can establish guidelines that employees need to be dressed appropriately, if challenged, the employer would have to demonstrate how an indecently-dressed employee "characterizes an abuse detrimental to the company."[149] In contrast, employers are well within their rights to require clothing or protective gear if the employee's job requires them to work with dangerous tools or products.[150] For example, requiring employees who work in medical settings to have their hair pulled back and wear gloves was considered justified under the DDD Framework, and any employee's failure to comply could result in a justified termination.[151] In these instances, the employer is aiming to not only keep its employees safe but also comply with health and safety guidelines.[152] Thus, because mandating protective gear is necessary to achieve the objective and workplace safety, that workplace policy would be permissible under the DDD's Framework.[153]

C. *Grooming Standards with Discriminatory Undertones Will Not Survive Under the DDD Framework*

In contrast, there are a multitude of workplace grooming policies and dress codes that do not advance the safety of employees and are not necessary to perform a certain job, but rather are rooted in discriminatory and obsolete conceptions of gender and personal expression. Under the DDD Framework, dress codes based on gender stereotypes have repeatedly been struck down as discriminatory.[154] Recognizing the outdated rationale motivating gendered dress codes in the workplace and the disproportionate experiences of discrimination women have historically met in the workplace, the DDD announced that "the specific physical appearance requirements that are linked to membership [of] a given sex should thus be deleted because of their discriminatory purpose or effect but also the sexism they convey."[155] For example, a waiter at a restaurant was terminated for refusing to remove his earrings at work and his letter of termination explicitly stated that because he was in the customer service industry, and because he was

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[149] *Id.* at 20.
[150] *Id.* at 19.
[151] *Framework Decision*, *supra* note 130, at 25.
[152] *Id*. at 25.
[153] *Id.* at 19.
[154] *See generally id.* at 23 (noting that courts have struck down workplace policies that forbade women from wearing trousers and deemed employer action discriminatory when an employer terminated a male employee for refusing to remove his earring).
[155] *Id.* at 24.

a man, he was not allowed to wear earrings, although his female counterpart was permitted to do so.[156] A claim was filed and the social chamber of the Court of Cassation held that this dismissal constituted unlawful sex discrimination.[157] Similarly, when an employee, who was transitioning was dismissed for wearing makeup, a skirt, and high heels and terminated for "undermin[ing] the seriousness, professionalism and credibility of the company vis-à-vis its customers," the Court of Appeals de Grenoble held that the termination was discrimination on the basis of physical appearance and sex.[158] Recognizing the inherent sexism that is embedded in many workplace grooming policies, the Framework explicitly denounces dress codes that require female employees to wear high heels, low necklines, and skirts.[159] Interestingly, when it comes to makeup, the Framework does not explicitly forbid employers from requiring female employees to wear makeup. Rather, the Framework contemplates a limited scenario in which an employee could impose cosmetic requirements on employees who, for example, work in the beauty sector.[160] The Framework hypothesizes that it is not impossible that the makeup industry may require demonstrators to wear makeup or have manicured fingernails, but rules like that "should be assessed according to the position held and within certain limits."[161] In lieu of an explicit makeup requirement, the DDD suggests that employers should impose general, gender-neutral requirements such as "neat presentation," which is devoid of any specific and gendered requirements.[162]

Even if makeup requirements were permissible in the limited circumstance of a female employee working in the cosmetics department, that is vastly different than the grooming policy at issue in *Jespersen*. First, it is reasonable to require a cosmetics employee to wear cosmetics, as patrons would not want to purchase products from people who are unfamiliar with and do not wear those products, just as a patient would not want to see a dentist who lacked basic oral hygiene. Second, the Framework does not give employers carte-blanche to require employees to wear makeup, but rather, mandates that the requirement should be considered in light of the position held and constrained to

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[156] *Id.* at 23.
[157] *Framework Decision*, *supra* note 130, at 23.
[158] *Id.*
[159] *Id.* at 24.
[160] *Id.*
[161] *Id.*
[162] *Framework Decision*, *supra* note 130, at 24.

certain limits.[163] Lastly, the DDD recommends that employers limit themselves to requiring "neat presentation," while the makeup requirement in *Jespersen* only applied to female employees while explicitly forbidding men from donning makeup.[164] Interestingly, the Framework is sensitive to that exact dynamic present in *Jespersen*, noting that requiring women to wear sexualized clothing, including lower necklines, high heels, and shorter skirts, is particularly prevalent in bars and restaurants, as was the case in *Jespersen*.[165] The DDD recognizes that those types of requirements are ways to exploit a woman's "erotic capital," discriminatory, and a direct assault on a person's right to privacy and dignity.[166]

VIII. APPLYING *JESPERSEN* TO THE DDD FRAMEWORK

A. *If Jespersen Had Happened Under the DDD Framework, the Result Would Have Been Different*

Despite the dearth of analogous French case law on the topic of makeup mandates in the workplace, the DDD Framework provides enough guidance to hypothesize how *Jespersen* would be resolved in the French courts after the announcement of the 2019 Framework decision. To reiterate, at issue in *Jespersen* was a revised grooming policy that, among other requirements and restrictions, required female employees to wear makeup while at work.[167] Under the reigning "unequal burden test," the Ninth Circuit found that although the makeup requirement applied to female employees only, it did not constitute an unequal burden and thus did not amount to a Title VII violation.[168]

However, in comparing the French and American legal standards, the significant differences between the countries' statutory protections against workplace discrimination would likely change the outcome of a *Jespersen*-like scenario if it arose in France. First, in contrast to France, the United States does not statutorily protect against discrimination on the basis of physical appearance.[169] Under Title VII, an employer cannot discriminate on the basis of race, color, religion, sex, or

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[163] *See generally id.* at 3.
[164] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006).
[165] *Framework Decision*, *supra* note 130, at 24.
[166] *Id.*
[167] *Jespersen*, 444 F.3d at 1107.
[168] *Id.*
[169] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

national origin.[170] However, under French law, that protection is broadened to protect discrimination on the basis of physical appearance, even when that physical appearance is disassociated from race, religion, or another protected class.[171] Thus, because Title VII's protections do not explicitly protect against physical appearance discrimination, an American employee would need to prove that the grooming policy constituted sex discrimination by establishing that the grooming policy was either intentionally discriminatory or had a discriminatory effect through the unequal burdens test.[172] The absence of protection on the basis of physical appearance automatically makes the burden for a United States employee more difficult than it would be for a French employee because it requires the employee to stretch and shoehorn their complaint to fit within one of the existing protected characteristics of Title VII.

But, under French case law and the DDD Framework, the inquiry is not whether the policy presents an unequal burden, as analyzed in *Jespersen*. Instead, the inquiry begins with a presumption that "only very important considerations can justify differences in treatment on the grounds of sex."[173] Specifically, the Framework notes that "the differences [in] treatment on the basis of belonging to a given sex with regard to the rules of presentation are discriminatory."[174] This starting point stands in stark contrast to the American philosophy that "companies may differentiate between men and women in appearance and grooming policies," highlighting another point of deviation between the French and American positions as it relates to gendered grooming standards in the workplace.[175] The Framework further notes that because gender equality is a fundamental right, workplace policies that differentiate on the basis of sex are only acceptable under exceptional circumstances when the employers can demonstrate that they are not only pursuing a "legitimate objective," but also that the means are necessary, appropriate, and proportionate.[176] It would be difficult for an employer to give proportionate and objective reasons for a makeup mandate without revealing the underlying sexism the policy conveys, especially considering the prevalence of discrimination in restaurants

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[170] *Id.*
[171] *Physical Appearance and Discrimination at Work*, *supra* note 129.
[172] *Jespersen*, 444 F.3d at 1109-10.
[173] *Framework Decision*, *supra* note 130, at 24.
[174] *Id.* at 29.
[175] *Jespersen*, 444 F.3d at 1110.
[176] *Framework Decision*, *supra* note 130, at 29.

and bars that the Framework explicitly acknowledges.[177] The DDD notes that clauses requiring female employees to wear low necklines, high heels, short skirts, makeup, and other requirements stereotypically associated with females are discriminatory and an infringement on a person's right to privacy and to protect their dignity.[178] Interestingly, the very same idea proffered by the DDD – that gendered clauses are discriminatory and an invasion of a person's dignity – was advanced by Jespersen and summarily rejected by the Ninth Circuit, highlighting the significant differences between the positions and attitudes of the two legal systems.[179]

B. *Under the DDD Framework, Plaintiff-Employees Bear a Less Onerous Burden*

These differences, and more specifically, the more pro-employee perspective of the French, are further highlighted when comparing the requisite burdens that need to be satisfied under the French and American systems. Specifically, in France, the burden the employee needs to meet is significantly less weighty than the burden Jespersen needed to satisfy. If the employee can establish the facts that give rise to a presumption of discrimination on the basis of physical appearance, the burden immediately shifts to the employer who must proffer a non-discriminatory, objective, and proportional reason for the grooming policy.[180] In contrast, under the American legal system, a plaintiff needs to make out a *prima facie* case that the "challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on the basis of gender."[181] In the Ninth Circuit, the fact that Harrah's only required women to wear makeup was insufficient to establish a *prima facie* case of discriminatory intent.[182] However, under the DDD Framework, given that the DDD views gendered grooming standards as immediately suspect and only justifiable in limited circumstances, the gendered nature of Harrah's cosmetics policy, without more, would likely be enough to shift the burden to the French employer to articulate a non-discriminatory, objective, and proportional reason for the grooming policy, which would have been difficult. This pro-employee burden, coupled with the other differences

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[177] *Id.*
[178] *Id.*
[179] *Jespersen*, 444 F.3d at 1112.
[180] *Framework Decision*, *supra* note 130, at 8.
[181] *See Jespersen*, 444 F.3d at 1108.
[182] *Id.* at 1109.

between the American and French legal systems, further highlights the ways in which Jespersen's scenario would have been resolved differently if it occurred in France.

Not only are the requisite burdens more employee-friendly in France, but the general employment infrastructure in France is indicative of the country's employee-friendly approach.[183] As discussed, the United States follows an at-will employment system, meaning that the working relationship can be terminated at any point and an employee can be fired for any or no reason at all, as long as the grounds for firing are not illegal.[184] France, in contrast, does not follow an at-will employment system.[185] To fire an employee in France, there must be a legal, genuine substantive ground based on economic reasons or the personal performance of the employee.[186] If a French employer wished to terminate an employee, the employer would need to ground the termination in a genuine, substantive ground while an American employer would not.[187] The American at-will system creates space for employers to terminate employees for any legal reason, allowing them to fire employees without being forced to articulate an economic or performance-related justification.[188] Thus, in addition to the more expansive statutory protections France offers and the less weighty burdens complainants need to meet, the mechanics of the French employment system also are more inherently protective of the employee in a way the at-will American system is not.

IX. PROPOSALS AND POTENTIAL RESOLUTIONS

A. *The Legislature Should Expand Title VII's Coverage to Extend to Physical Appearance*

While eradicating workplace discrimination in its entirety seems like a lofty goal, there are a number of measures the United States can take to equalize workplace experiences and foster a more inclusive workplace devoid of discrimination, sexism, racism, and other forms

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[183] Broussal, Dallais & Balsan, *supra* note 18 (highlighting the different ways in which the French employment scheme is more employee-friendly).

[184] Muhl, *supra* note 8, at 3.

[185] Broussal, Dallais & Balsan, *supra* note 18.

[186] David Anderson, *Dismissing an Employee in France*, DRUCES LLP (Feb. 2018), https://www.saplaw.co.uk/brexit-articles/669-dismissing-an-employee-in-france-2 [https://perma.cc/9K64-6QR4].

[187] *Id;* Broussal, Dallais & Balsan, *supra* note 18.

[188] Broussal, Dallais & Balsan, *supra* note 18.

of discriminatory exclusion. Not only will these proposals yield a safer workplace consistent with the requirements of the law, but they also will reduce the number of EEOC complaints filed and improve the delayed resolution of many cases as a result of the understaffed and underfunded nature of the EEOC.[189]

First, the United States should consider an expansion of Title VII's statutory protections. As it stands, Jespersen was left without a remedy because her claim, with its specific facts, did not fall within any of the protected characteristics under Title VII.[190] For Jespersen to have been entitled to relief, she would have needed to show that the gendered grooming policy created an unequal burden by imposing "a significantly greater burden of compliance," which the court was unwilling to acknowledge.[191] Thus, because Jespersen's complaint did not fit within the narrow confines of a sex discrimination claim, she was ultimately left without relief. However, had the United States statutorily protected against discrimination on the basis of physical appearance, as France does, that likely would have been outcome determinative for Jespersen's case.

While it is important for employers to retain some degree of control over the operation of their workplaces, without more expansive statutory protections, the EEOC's mission statement to "stop and remedy unlawful employment discrimination in the workplace" will never come to fruition, especially with judges who are unwilling to acknowledge the inherently unequal burden Harrah's grooming policy imposed.[192] Thus, the United States should look to France and other countries as a model, assess what types of statutory protections their versions of Title VII include, and consider expanding the Statute's coverage to fulfill the goal and spirit of Title VII.

However, it should be noted that while this expansion will likely yield many positive outcomes, including less administrative congestion at the EEOC, it would be a deviation from the typical classes

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[189] MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 11:1 (2021).

[190] *See* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113 (9th Cir. 2006) (holding that the record did not contain any facts that would allow Jespersen's claim to go forward under the existing Title VII protections).

[191] *Id.* at 1110.

[192] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Open Government Plan* (July 2016), https://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-open-government-plan#:~:text=The%20mission%20of%20the%20U.S.,laws%20that%20prohibit%20employment%20discrimination [https://perma.cc/HNE5-7KBH] (Interestingly, the Judge who wrote the *Jespersen* opinion is a woman.).

protected under Title VII. As Professor Julie Suk notes, "U.S. antidiscrimination law tends to limit the protection from discrimination to traits associated with membership in social groups like races, ethnicities, religions and genders."[193] Physical appearance, unlike race and religion, is an individual experience disconnected from a person's membership in a given social group. However, there are ways to contextualize experiences based on physical appearance as a collective experience that many members of a group face. For example, when looking at makeup mandates specifically applicable to females in the workplace, as in *Jespersen*, the experience evolves from an individual experience to a group one, affecting all females subject to the mandate.[194] In looking at the collective experiences of female employees, discrimination on the basis of physical appearance is no longer an individualized experience and therefore should be subject to statutory protection. Moreover, employees should not be vulnerable to workplace discrimination just because their experience is an individual one that lacks a connection to a social group. Thus, with a statutorily enshrined protection against discrimination on the basis of physical appearance, victims of employment discrimination can seek relief based on their individual experiences without worrying how to properly manipulate their claims to fit into Title VII's existing protections.

B. *The Legislature Should Follow New York to Broadly Read Title VII's Protections and Local Laws Should Continue to Implement Protective Laws to Influence State and Federal Lawmakers to Enact Similar Protections*

While advocating for an amendment to Title VII to include a statutory protection against discrimination on the basis of physical appearance is ambitious, there are also smaller, more gradual measures the legislature can take to address makeup mandates in the workplace. For example, the legislature could construe Title VII's protections more broadly, as New York City has done with its own local statutes beginning in 2019, with the promulgation of Guidance of Discrimination on the Basis of Gender Identity or Expression.[195] These guidelines

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[193] Julie C. Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 340 (2007).

[194] *See Jespersen*, 444 F.3d at 1105-06.

[195] *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression*, NYC COMM'N ON HUM. RTS. https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page#1 [https://perma.cc/6DJW-44DE] (last visited Dec. 26, 2022).

specifically address and reject the unequal burdens framework employed in *Jespersen* and instead require under New York City Human Rights Law ("NYCHRL") that the law must be construed "broadly in favor of discrimination plaintiffs to the extent that such a construction is reasonably possible."[196] The decision to construe New York City's protections more broadly did not involve a sweeping amendment or dramatic legislative changes, but rather, imposed a more liberal standard for those bearing the burden of establishing that discrimination occurred.[197]

New York's promulgation of these guidelines highlights two important points. First, change can occur without sweeping, dramatic changes to the existing law.[198] Second, it highlights that change can be incremental, beginning with local law. Under NYCHRL, gender is read to include gender-related self-image, appearance, and expression, and specifically notes that discriminating against an individual for failure to conform to gender stereotypes is gender discrimination under the law.[199] The law specifically prohibits workplace policies that forbid men from wearing makeup at work, a core feature of *Jespersen*'s grooming policy, highlighting the differences between federal and city laws and the broad construction of gender discrimination under the NYCHRL.[200] If more cities over time develop similar guidelines, perhaps widespread adoption will promote a domino effect that will incentivize state and ultimately federal law to recognize the discriminatory impact of makeup mandates in the workplace.

The CROWN Act is one of the greatest indications of this domino effect and the powerful change it can affect. The CROWN Act, which prohibits race-based hair discrimination in employment and educational contexts, is a product of collaboration between Black women leaders and activists, lawmakers across the nation, and organizations that were committed to addressing and ending race-based hair discrimination.[201] The Act was signed into Law in California in 2019, and since then, fourteen states have concretized this protection through the

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[196] *Id.*

[197] Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013).

[198] *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression*, *supra* note 195, at 3 (reinforcing that the provisions of anti-discrimination guidance should be construed liberally to achieve the intent of the code).

[199] *Id.*

[200] *Id.*

[201] *The CROWN Act*, CROWN COAL., https://www.thecrownact.com/about [https://perma.cc/752P-VCNW] (last visited Feb. 18. 2022).

enactment of the CROWN Act.[202] Additionally, four states have enacted similar legislation inspired by the CROWN Act.[203] Since then, the CROWN Act has "galvanized support from federal and state legislators in the movement to end hair discrimination nationwide."[204] While the focus of the CROWN Act is different and addresses a long-overdue social issue, the takeaway message from the revolution these lawmakers, organizations, and individuals have started is quite powerful and transferable to the makeup mandate context. First, intentional and well-executed collaboration among key stakeholders (politicians, activists, interest groups, and organizations) can produce real, tangible change. Second, if more cities continue to mandate that protected characteristics be construed broadly, in time, these local guidelines will become the norm and hopefully influence the legislature to adopt a similar reading. Thus, in building on broad readings and statutory protections being implemented at the state and local levels, lawmakers will be either pressured or incentivized to enact similar protections at the federal level.

C. *The United States Should Model France's Approach to Employment Guidelines and Dress Codes*

Despite the differences between the employment schemes in France and the United States, there are many lessons that can be gleaned from the French system that would render American workplaces more inclusive and less discriminatory. Some of these lessons include: adopting a similar framework to the one disseminated by the DDD, promulgating guidelines that absent a legitimate business need, dress code policies should employ gender-neutral language, and changing the analysis so that gendered grooming policies are subject to a tailoring analysis, rather than the "unequal burdens" test.

1. *The EEOC Should Adopt and Promulgate a Similar Framework to the DDD and Require Dress Codes to be Gender-Neutral*

Given the prevalence of the at-will employment system in the United States, it is not surprising that the EEOC has not outlined what dress codes and grooming standards are acceptable under the law.

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[202] *Id.*

[203] Emily Tannenbaum, *Here's Every State That Has Passed the Crown Act*, GLAMOUR (July 27, 2022), https://www.glamour.com/story/the-crown-act-banning-hair-discrimination [https://perma.cc/BSM9-NFQ7].

[204] *The CROWN Act*, *supra* note 201.

Rather, in 1989, the EEOC disseminated a compiled list of acceptable grooming standards that highlight all the ways in which an employer can control employee presentation at work.[205] In contrast to the DDD Framework, the EEOC's guidelines gloss over the widespread discrimination employees, especially female employees, face in the workplace.[206] Rectifying discrimination in the workplace begins with an acknowledgment that it exists and a thoughtful remedial action plan to address each type of discrimination. While the EEOC is notoriously underfunded and leanly staffed, updated guidelines on acceptable grooming standards that acknowledge the most frequent discrimination issues would likely serve as a more proactive and efficient approach to workplace discrimination issues.[207]

In addition to updated guidance from the EEOC, workplace grooming policies should be required or at least strongly encouraged to make dress codes gender-neutral as the DDD did. Specifically, the DDD recommended that to mitigate any risk of discrimination or litigation, employers should "limit themselves to set general requirements of 'neat presentation,'" rather than setting "specific physical appearance requirements that are linked to membership [of] a given sex."[208] Rather than specifically requiring females to dress a certain way, the EEOC should encourage employers to implement grooming policies that require professional attire without imposing gendered requirements on employees. In the absence of an articulated business need, employers should endeavor to make gender-neutral grooming policies that do not perpetuate harmful gender stereotypes, sexualize employees, or suppress an individual's gender expression.

2. *If Appearance Standards and Dress Codes in the United States Are Not Gender-Neutral, They Should Be Subject to a Tailoring Analysis*

Alternatively, if employers choose not to employ gender-neutral grooming policies, grooming standards that differentiate on the basis of sex should be required to undergo a tailoring analysis. Currently, as was the case in *Jespersen*, workplace grooming standards that

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[205] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *CM-619 Grooming Standards*, https://www.eeoc.gov/laws/guidance/cm-619-grooming-standards [https://perma.cc/DH8W-8XFZ] (last visited Feb. 22, 2022).

[206] *Compare* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *CM-619 Grooming Standards, supra* note 205, *with Framework Decision*, *supra* note 130, at 3.

[207] Barnes, *supra* note 26.

[208] *Framework Decision*, *supra* note 130, at 24.

differentiate between men and women are subject to the "unequal burdens" test.[209] The "unequal burdens" test gives employers the judicial "green light" to differentiate between men and women when crafting grooming standards as long as the gendered policies do not place an unequal burden on the plaintiff's gender.[210] While this test may seem fair in theory, in looking at the holding in *Jespersen*, the unequal burdens test as interpreted and analyzed by the Ninth Circuit only served to perpetuate gender stereotypes in the workplace and punish female employees who resisted this type of gender stereotyping. The court was unwilling to recognize the unequal financial and personal burdens the makeup mandate imposed on Jespersen and in doing so, implicitly sanctioned employers to do the same.[211]

Given the court's narrow conception of unequal burdens, another test should be employed that would result in a more just outcome for those subject to discriminatory grooming policies. Rather than using the "unequal burdens" test as the legal test in cases where employers differentiate between men and women, courts should subject the gendered requirements to a tailoring analysis similar to the one proposed by the DDD. Under the DDD Framework, when an employer subjects men and women to different grooming standards, the employer needs to show both that he or she is pursuing a "legitimate objective" and that the means are "necessary, appropriate and proportionate."[212] Additionally, any restrictions need to be proportional to the stated objective and need to be substantiated through a showing that the "objective cannot be achieved otherwise [without] the implementation of this restriction."[213] Requiring employers to demonstrate how the gendered policy is both proportional to the stated business objective and impossible to achieve absent the restriction would inevitably expose a lot of the discrimination and sexism that lurks beneath these grooming policies. Ultimately, in replacing the "unequal burdens" test with a proportionality and tailoring requirement, employers will be required to articulate the need behind the policy, which will either disincentivize them from creating gendered policies in the first place or require them to amend their policies to meet the tailoring requirements.

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[209] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006).
[210] *Id.*
[211] *Id.* at 1111.
[212] *Framework Decision*, *supra* note 130, at 29.
[213] *Id.* at 8.

X. CONCLUSION

In conducting a comparative analysis of the French and American employment systems and the different statutory protections offered by each legal regime, , this Note analyzes the ways in which the American system's current legal frameworks fail to provide employees adequate protection against workplace discrimination. Exploring a very specific area within employment discrimination jurisprudence and workplace grooming policies allows for a richer and more tailored reflection on ways in which the system can be improved to protect employees who are forced to wear makeup as a condition of employment. From more extreme measures, like amending Title VII to protect against physical appearance discrimination, to incremental changes, such as enacting laws at the city and state level or requiring that gendered grooming standards undergo a tailoring analysis, there are numerous ways in which this type of discrimination can be addressed. By looking at France and the DDD's Framework as a model, the United States now has a blueprint to follow as it endeavors to create more equitable, inclusive, and discrimination-free workplaces.