Disparate Dress Codes as Sex Discrimination in Violation of Title VII

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DISPARATE DRESS CODES AS SEX DISCRIMINATION IN VIOLATION OF TITLE VII

Carroll v. Talman Federal Savings & Loan Association
604 F.2d 1028 (7th Cir. 1979), cert. denied, 100 S. Ct. 1316 (1980)

Title VII of the 1964 Civil Rights Act1 prohibits employers from engaging in practices which discriminate upon the basis of race, color, religion, sex, or national origin.2 The purpose of this comprehensive legislation is to create equal opportunities, conditions, privileges, and compensation in employment3 for the traditional victims of job discrimination—blacks, other racial minorities, and women.4 Particularly with respect to sex discrimination, the courts are continually faced with the question of what kinds of employment practices are unlawful under title VII. Not only is title VII silent as to the definition of “discrimination,” but the legislative history also sheds little light on Congress' intention in adding sex as a basis of discrimination under title VII.5 As a result, the courts have been left with the problem of interpreting the statute without the aid of any clear legislative guidelines.6 It is therefore not surprising that judicial interpretations of what constitutes unlawful sex discrimination under title VII often conflict.

Employer-promulgated grooming and dress code policies are one type of employment practice which have been challenged as unlawful sex discrimination under title VII. Generally, the federal courts which

1. Hereinafter referred to in text and footnotes as title VII.
3. Sections 703(a)(1) and 703(a)(2) provide:
   It shall be an unlawful employment practice for any employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
5. For a discussion of the legislative history surrounding the enactment of title VII with respect to sex discrimination, see text accompanying notes 14-20 infra.
6. For a discussion of judicial interpretations of what constitutes unlawful sex discrimination under title VII, see text accompanying notes 21-63 infra.
have decided the validity of grooming regulations involving different requirements based upon sex have upheld them as permissible employment practices.\(^7\) However, in *Carroll v. Talman Federal Savings & Loan Association*,\(^8\) the United States Court of Appeals for the Seventh Circuit reversed the district court\(^9\) and held that an employer's dress code requiring its female employees to wear a uniform as a condition of employment, while only requiring male employees in the same job position to wear "appropriate business attire" constituted sex discrimination under section 703(a)(1) of title VII.\(^10\) In contrast, the dissenting opinion concluded that dress code regulations were not the kind of employment practices which Congress intended to prohibit under title VII.\(^11\)

In light of the differing conclusions among the federal courts upon the question of whether grooming and dress code standards are subject to title VII scrutiny, analysis of the *Carroll* opinion is warranted. This comment will outline briefly the legislative history and judicial interpretations of title VII with respect to sex discrimination, present the responses of other circuits to challenges of grooming and dress codes, and finally analyze the *Carroll* opinion. It will be shown that the Seventh Circuit correctly ruled that a dress code which imposes disparate conditions of employment by sex is a *prima facie* case of sex discrimination under section 703(a)(1) of title VII.\(^12\) The comment concludes that the majority opinion in *Carroll* signifies a wise departure from other circuits’ interpretations of title VII with respect to sex-based regulations.\(^13\)

**Defining Sex Discrimination Under Title VII**

Despite the voluminous legislative history surrounding the enact-
ment of title VII, little of it reflects the intent of Congress in adding the word "sex" to race, color, religion, and national origin. As originally drafted, title VII contained no ban of sex discrimination. However, just one day prior to its passage, a floor amendment effected the inclusion of sex as part of title VII. Even at the time, there was some question as to what the sponsor of the amendment intended by its introduction.

Although the ban of discrimination based upon sex was enacted into law with a minimum of investigation and debate, the legislative history of the 1972 amendments to title VII indicates that discrimination against women is "no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." Nevertheless, the courts have encountered particular problems in the interpretation of gender-based discrimination under title VII. Therefore, a discussion of judicial decisions defining sex discrimination within the meaning of title VII is helpful.

14. The debates that preceded the passage of the 1964 Civil Rights Bill in the Senate alone lasted for eighty-three days. 110 CONG. REC. 2882-14,511 (1964).
15. For a detailed background on title VII prior to the addition of “sex” as a provision, see Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877 (1967).
17. The amendment was introduced by Congressman Smith of Virginia, who voted against title VII, and whose strategy was allegedly to "clutter up" title VII so that it would not be passed at all. See 110 CONG. REC. 2581 (1964) (remarks of Congresswoman Green).
18. Because of the meager legislative history, some courts have held that Congress intended to limit sex discrimination only to those employment practices which prevent equal employment opportunities. See, e.g., Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973). For further analysis of Fagan, see text accompanying notes 67-69 infra.
Establishing Sex Discrimination Under Section 703 of Title VII

Generally, the courts engage in a two-step analysis in determining whether an employment practice is unlawful under Title VII. First, a court must determine that discrimination based upon sex in fact occurred. In Phillips v. Martin Marietta Corp., the Supreme Court gave a very broad definition of sex discrimination under section 703 of Title VII. At issue in Phillips was whether the employer's policy of hiring men with pre-school children, but not women with pre-school children, was a prima facie case of sex discrimination. In reversing the United States Court of Appeals for the Fifth Circuit, the Court held that such an employment practice constituted sex discrimination under Title VII. Recognizing that Title VII requires that persons of like qualifications be given employment opportunities irrespective of their sex, the Court reasoned that, although the company did not discriminate against all women, it singled out women with pre-school children for disfavored treatment which they would not have received but for the fact that they were female. Thus, the Phillips decision held that a prima facie case of sex discrimination exists whenever similarly-situated individuals are treated in a disparate manner solely upon the basis of sex.

22. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971), where the Supreme Court held that "employment practices, procedures, or tests neutral on their face," and in the absence of any discriminatory purpose, "cannot be maintained if they operate to freeze the status quo of prior [discriminatory] practices." Id. at 430. Unlike plaintiffs in constitutional cases who must show proof of a discriminatory purpose or intent on the part of defendant to establish a prima facie case under the equal protection clause of the fourteenth amendment, plaintiffs in Title VII cases need to show only proof of a discriminatory impact to establish a prima facie case. Compare Griggs (Title VII standards) with Washington v. Davis, 426 U.S. 229, 247 (1976) (equal protection standards under the fourteenth amendment).
23. 400 U.S. 542 (1971) (per curiam). Phillips was the first case of Title VII sex discrimination decided by the United States Supreme Court. No subsequent court decisions have deviated from this original holding.
24. Id.
26. 400 U.S. at 544.
27. Id.
28. Id. The Supreme Court thus rejected the narrower "sex-plus" theory espoused by the Fifth Circuit in the case below. The Fifth Circuit had reasoned:

The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. A per se violation of the Act can only be discrimination based solely on one of the categories, i.e., in the case of sex; women vis-a-vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on sex.
The United States Court of Appeals for the Seventh Circuit expanded the definition of sex discrimination in the leading case of *Sprogis v. United Air Lines, Inc.* In *Sprogis*, the plaintiff brought suit alleging that United Air Lines' policy of requiring its stewardesses to be unmarried as a condition of employment, where no such policy existed for its stewards, was in violation of section 703(a)(1) of title VII. In invalidating United Air Lines' "no-marriage" rule, the court not only held that section 703(a)(1) is violated when a portion of a protected class is discriminated against solely upon the basis of sex, but also that disparate treatment of men and women resulting from sex stereotypes was prohibited under title VII. In short, *Phillips* and *Sprogis* at a minimum stand for the general proposition that a *prima facie* case of sex discrimination is established whenever any term or condition of employment treats female and male employees in a disparate manner solely upon the basis of sex, or if the basis for the disparate term or conditions results from sex stereotypes.

Courts which have strictly followed the principles laid down by the *Phillips* and *Sprogis* decisions have found any term or condition of employment which on its face treated men and women in a disparate manner, but which did not necessarily hinder or prevent one sex from obtaining employment, to be unlawful under title VII. For example,

411 F.2d 1, 3-4 (5th Cir. 1969).

29. 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971). Every United States court of appeals as well as the United States Supreme Court has relied upon the *Sprogis* decision. See, e.g., *City of Los Angeles Dept. Water & Power v. Manhart*, 435 U.S. 702, 707 (1978), where the Court stated: "It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."

30. 444 F.2d at 1196-97.

31. Thus, the *Sprogis* court applied the *Phillips* definition to an action brought under section 703(a)(1) of title VII. The *Phillips* case was brought under section 703(a)(2) which prohibits employers from depriving individuals of employment opportunities. See note 3 supra.

32. The Seventh Circuit held:
   The scope of Section 703(a)(1) is not confined to explicit discriminations based "solely" on sex. 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. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.

444 F.2d at 1198.

33. See, e.g., *Pond v. Braniff Airways, Inc.*, 500 F.2d 161 (5th Cir. 1974) (women were subject to more restrictive height and weight restrictions than male employees); *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974) (female employees were not allowed to work overtime); *Hays v. Potlatch Forest*, 465 F.2d 1081 (8th Cir. 1972) (women were restricted to a certain number of regular and overtime hours without similar restrictions on males); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972) (female employees were not allowed to work same number of hours per day as male employees); *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa. 1973) (women were paid lower salaries than men who performed identical work under similar conditions).
in *Laffey v. Northwest Airlines, Inc.*,²⁴ a federal district court held that a rule which forbade all female flight attendants from wearing eye-glasses, but which allowed male employees to wear them, was a violation of title VII.³⁵ Similarly, the United States Court of Appeals for the Sixth Circuit has held that a company policy compelling a married woman to use her husband's name constituted unlawful sex discrimination.³⁶

**Rebutting a Prima Facie Case of Sex Discrimination**

If the court concludes that an employee has established a *prima facie* case of sex discrimination, then the employer has the burden of proof to show that sex is a bona fide occupational qualification³⁷ reasonably necessary to the operation of the employer's business in order to justify the discrimination under title VII.³⁸ In lieu of the statutory BFOQ, employers have also raised the judicially-created "business necessity" defense to rebut a *prima facie* case of sex discrimination under title VII.³⁹

Both the Equal Employment Opportunity Commission⁴⁰ guidelines on sex discrimination⁴¹ and the courts narrowly construe the


³⁵. The decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit even though the specific issue of sex-based eyeglass restrictions was not appealed. *See* 567 F.2d at 439 n.24, 454 n.170. The court also held six other conditions of employment to be a violation of title VII: (1) female flight attendants were required to carry specific luggage while males were only required to have luggage in good condition; (2) male flight attendants were given a $52 clothing allowance per year, while female flight attendants were not given a similar allowance; (3) the maximum height for males was 6', while maximum height for females was 5'9"; (4) females were not allowed to fly after they turned thirty-two years of age, while men were not so restricted; (5) females had to share hotel rooms, while males had private hotel rooms; and (6) females were weighed twice a year and were grounded if overweight, while males were merely subject to weight monitoring. *Id.* at 454-57.


³⁷. Hereinafter referred to in text and footnotes as BFOQ.

³⁸. Section 703(e) of title VII provides in relevant part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for any employer to hire employees ... on the basis of his religion, sex, or national origin or in the instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.


³⁹. For a discussion of the business necessity defense, *see* text accompanying notes 56-63 *infra*.

⁴⁰. Hereinafter referred to in text and footnotes as EEOC.

⁴¹. 29 C.F.R. §§ 1604.1-10 (1979). The United States Supreme Court has stated that the guidelines are to be accorded great deference by the courts. *See* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).
BFOQ defense. For example, the EEOC guidelines do not consider sex a BFOQ when the discrimination is based upon sexual stereotypes. Nor do the guidelines consider sex a BFOQ based upon preferences of co-workers, employers, clients, or customers. However, where it is necessary for the purpose of authenticity, such as requiring an actor to portray a man or an actress to portray a woman, sex will be considered a BFOQ under the guidelines.

Mindful of the EEOC guidelines, the courts also have narrowly interpreted this statutory defense, although no uniform test has been adopted by federal appellate courts in determining whether an employer has established a BFOQ defense. For example, the United States Court of Appeals for the Fifth Circuit, in rejecting an employer's defense that being female was a BFOQ for a job as a flight attendant, held that a BFOQ will be sustained only where being a particular sex goes to the "essence" of performing a particular job. The Fifth Circuit, however, adopted a different standard in Weeks v. Southern Bell Telephone & Telegraph Co. by concluding that an employer must prove that a factual basis existed for having reasonable cause to believe that all or substantially all women would be unable to perform the job safely and effectively. The strictest test was adopted by the United States Court of Appeals for the Ninth Circuit in Rosenfeld v. Southern Pacific Co. where the court held that an evaluation of each individual's ability to perform must be considered in determining whether sexual characteristics are crucial to performing the work. In short, regardless of which test is applied, the courts and the EEOC have suggested that sex may be a valid BFOQ in a few specialized instances such as jobs involving authenticity, privacy, sex appeal, psycho-

42. 29 C.F.R. § 1604.2(a) (1979). See also Dothard v. Rawlinson, 433 U.S. 321, 334 (1977), where the Court noted that the BFOQ was "in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."
43. 29 C.F.R. § 1604.2(a)(1)(ii) (1979). For example, an employer's policy of refusing to hire any women for a job which requires the ability to lift 100 pounds is based upon the stereotyped assumption that all women are physically weaker than men.
44. Id. § 1604.2(a)(1)(iii).
45. Id. § 1604.2(a)(2).
46. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971). It appears that there is very little difference between the test applied in Diaz and the business necessity defense. See text accompanying notes 56-63 infra.
47. 408 F.2d 228 (5th Cir. 1969).
48. Id. at 235. To determine whether a factual basis existed, the court looked at the individual employee's physical and mental capabilities.
49. 444 F.2d 1219 (9th Cir. 1971).
logical needs, and prison security.

In lieu of the statutory BFOQ defense, employers also have attempted to raise the judicially-created business necessity defense to rebut a _prima facie_ case of sex discrimination. This defense evolved from cases involving discrimination based upon race in which the courts recognized that employers may be justified in continuing an employment practice regardless of its differential impact. However, the test adopted by the courts is a strict one: An employer must show that the practice is necessary to the safe and efficient operation of the business and is sufficiently compelling to the business as to override any disparate impact upon a particular sex. In addition, some courts have held that an employer must also show that the employment practice effectively carry out the business purpose it is alleged to serve, but also that there is no other available alternative which would accomplish the same purpose better or equally well with lesser disparate impact. As a result of the heavy burden imposed upon the employer, few courts have found the defense valid to defeat a plaintiff's _prima facie_ case under title VII. With this background in mind, a brief look at how various United States courts of appeals have applied the law to grooming and dress code regulations challenged as unlawful sex discrimination is useful before analyzing the Carroll opinion.

52. The EEOC has informally recognized that an employer could restrict jobs to members of one sex because of community standards such as in the case of a restroom attendant or sales clerk of lingerie. For a thorough discussion of a valid BFOQ, see Sirota, supra note 38, at 1060-65. See also Roberts v. Union Co., 487 F.2d 387, 389 (6th Cir. 1973).

53. A job as a Playboy Bunny or as a topless dancer may justify sex appeal as a BFOQ. See Sirota, supra note 38, at 1066-68.

54. A job as a supervisor at a juvenile home for boys may justify the hiring of men only to satisfy the need for a male image. _Id._ at 1068-69.


56. The doctrine was first expressed in Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), _cert. denied_, 397 U.S. 919 (1970).

57. Unlike discrimination based upon sex, title VII does not set out a statutory defense upon which a defendant-employer could rely to justify discrimination based upon race.


60. _Id._

61. _Id._

62. _Id._

63. _But cf._ de Laurier v. San Diego Unified School Dist., 588 F.2d 674, 678-81 (9th Cir. 1978) (business necessity defense defeated a school teacher's _prima facie_ case of sex discrimination challenging the district's mandatory pregnancy leave policy). The Ninth Circuit did not require a showing of any available alternatives.
Grooming and Dress Code Regulations:  
Permissible Gender-Based Employment Practices

None of the other circuits have had the occasion to review whether a dress code policy like the one challenged in Carroll v. Talman Federal Savings & Loan Association\(^\text{64}\) is a primafacie violation of title VII. However, where federal appellate courts have considered the validity of other types of grooming regulations involving different requirements based upon sex, the courts generally have upheld them as permissible employment practices.\(^\text{65}\) The most common situation has been where a male employee has brought suit charging sex discrimination based upon an employer’s regulation requiring men, but not women, to wear short hair as a condition of employment.

In Fagan v. National Cash Register Co.,\(^\text{66}\) the first of the so-called “hair cases” decided by a court of appeals, employer National Cash Register issued hair grooming regulations in response to customer complaints. These regulations required employees of its technical services department, none of whom were women, to maintain the length of their hair above the collar.\(^\text{67}\) Plaintiff, who wore his hair below collar length, refused to conform to the company’s regulation and consequently was suspended from his job. He then brought suit under title VII alleging that he was the victim of unlawful sex discrimination. In upholding the validity of defendant’s hair regulation, the United States Court of Appeals for the District of Columbia Circuit reasoned that Congress never intended for title VII to interfere in the promulgation and enforcement of general regulations which have only a de minimus economic effect upon the employee.\(^\text{68}\) Moreover, the court maintained that employers should have the right to promulgate grooming standards that merely

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64. 448 F. Supp. 79, 81 (N.D. Ill. 1978).
65. Courts which have held to the contrary have strictly applied the Phillips and Sprogis principles in finding that such disparate treatment was unlawful under title VII. The decisions generally were premised on the theory that requiring men to wear short hair was the result of sex stereotyping. See, e.g., Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972); Donohue v. Shoe Corp. of America, 337 F. Supp. 1357 (C.D. Cal 1972); Roberts v. General Mills, Inc., 337 F. Supp. 1057 (N.D. Ohio 1971). See also Barker v. Taft Broadcasting Co., 549 F.2d 400, 402 (6th Cir. 1977) (McCree, J., dissenting); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (Winter, J., dissenting); Willingham v. Macon Tel. Publishing Co., 482 F.2d 535 (5th Cir. 1973), rev’d en banc, 507 F.2d 1084 (5th Cir. 1975).

67. Id. at 1116-17. The section of the company’s regulations dealing with haircuts provided: “Hair will be neatly trimmed and combed. The length of the hair will taper down the back of the head and terminate above the collar. This eliminates any appearance of long hair.” Id. at 1116.
68. Id. at 1123, citing Baker v. California Land Title Co., 349 F. Supp. 235, 237-38 (C.D. Cal. 1972). But see Aros v. McDonnell Douglas Corp., 348 F. Supp. 661 (C.D. Cal. 1972), where the court found that a dress and grooming code wherein the allowable length of hair was different for male and female employees could significantly affect employment opportunities:
reflect the basic differences in the customary dress of men and women without subjecting them to title VII scrutiny.\textsuperscript{69}

Five months later, the District of Columbia Circuit again faced a similar claim of sex discrimination in \textit{Dodge v. Giant Food, Inc.}\textsuperscript{70} In \textit{Dodge}, the employer maintained separate grooming standards for men and women whereby male employees were prohibited from wearing long hair and beards.\textsuperscript{71} Female employees, on the other hand, were allowed to wear their hair in any style as long as it was not "off-beat," but were required to wear hairnets if their hair was difficult to manage.\textsuperscript{72} The male employees who chose to wear their hair longer than the required length were discharged or assigned to unfavorable positions. Subsequently, they brought suit challenging the regulations as unlawful sex discrimination under title VII.\textsuperscript{73} Although admitting that the regulations treating long-haired males differently from long-haired females were based upon sex, the court held that the regulation was not unlawful.\textsuperscript{74} Following its prior decision in \textit{Fagan}, the court reiterated its position that grooming regulations fall outside the scope of title VII because they do not afford significant employment opportunities to one sex in favor of the other.\textsuperscript{75} In addition, the court interpreted the scope

\noindent \textit{Title VII} \ldots is designed to insure equal employment opportunity for all. Specifically, it prohibits discrimination in employment based upon irrational stereotypes of \ldots sex \ldots.

Males with long hair conjure up exactly the sort of stereotyped responses Congress intended to be discarded \ldots \{\ldots \} Long hair may be associated with youth, campus riots, unemployed hippies and "troublemakers" \ldots \ldots Any stereotyped image of males with longer hair as "troublemakers" unjustifiably punishes a large class of prospective, otherwise qualified and competent employees, where an individualized response could adequately dispose of any real employment conflicts. \textit{Id.} at 666 (emphasis added).

\textsuperscript{69} 481 F.2d at 1124-26. The court in \textit{Fagan} could have held that there was no sex discrimination simply on the ground that there were no similarly-situated women in plaintiff's position. However, the court took the opportunity to further justify its decision by weaving together dicta from prior district and appeals court decisions which would place grooming regulations outside the scope of title VII. In so doing, it appears that the District of Columbia Circuit was unwilling to hold otherwise even if there had been similarly-situated women.

\textsuperscript{70} 488 F.2d 1333 (D.C. Cir. 1973).

\textsuperscript{71} The grooming regulations for male employees provided: "[N]o hair may exist below the earlobe except for a neatly trimmed mustache which does not droop or hang over the upper lip. No beards allowed. Haircuts must not be long or ragged. If it is neat, groomed and reasonably trimmed on the back of the neck, it meets Giant's standards . . . ." \textit{Id.} at 1334.

\textsuperscript{72} The grooming regulations for female employees provides in relevant part: "Whatever the style, hair should be kept neat . . . . In compliance with hair regulations, meat wrappers, self-service deli clerks and bakery clerks must wear a hair net if hair is difficult to manage." \textit{Id.} at 1334.

\textsuperscript{73} \textit{Id.} at 1333. The suit was a class action brought on behalf of all males who had been denied employment, discharged or forced to cut their hair, trim their mustaches, or shave their beards as a result of defendant's grooming regulations.

\textsuperscript{74} \textit{Id.} at 1335.

\textsuperscript{75} \textit{Id.} at 1336-37.
of sex discrimination as being limited to terms and conditions of employment which discriminate upon the basis of an immutable characteristic\textsuperscript{76} or involve a fundamental right even though the characteristic may be readily changeable.\textsuperscript{77} Five other federal circuits,\textsuperscript{78} not including the Seventh Circuit, have addressed this issue and have followed the \textit{Fagan} and \textit{Dodge} definitions of sex discrimination under title VII.\textsuperscript{79}

Similarly, in \textit{Fountain v. Safeway Stores, Inc.},\textsuperscript{80} the United States Court of Appeals for the Ninth Circuit held that an employer's regulation requiring its male employees who deal with the public to wear ties does not constitute sex discrimination within the meaning of title VII.\textsuperscript{81} In \textit{Fountain}, the plaintiff, a male, was hired at a time when the female employees were violating the company's dress code by wearing pants instead of skirts to work.\textsuperscript{82} In response to this action, Safeway

\textsuperscript{76} Id. Hair length is not an immutable characteristic, but one which can easily be altered. Accordingly, the court concluded that the sexual distinction embodied in the hair length regulations does not necessarily have to significantly alter employment opportunities and thus is not protected under title VII. See Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (en banc), where the court distinguished the readily mutable characteristic of having long hair from the not so easily mutable condition of having pre-school children in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam). See note 28 supra.

\textsuperscript{77} 488 F.2d at 1337. The court attempted to reconcile hair length regulations with the no marriage rule in Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir.), \textit{cert. denied}, 404 U.S. 991 (1971). The court agreed that both hair length and marriage were mutable characteristics, but that marriage had a much more fundamental importance and effect upon an individual's life. \textit{Id}. Therefore, in the case of marriage, infringement upon the businessman's right to run his business was warranted.

\textsuperscript{78} See Barker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976) (per curiam); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (en banc); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), \textit{cert. denied}, 422 U.S. 1046 (1975).

\textsuperscript{79} It appears that the rationale underlying the "hair cases" and their references to dress standards evidences a more narrow reading of sex discrimination under title VII. But see Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam), where the Court did not look to the importance, significance, mutability, or fundamental nature of the characteristic. Rather, the Court limited its inquiry to whether there was different treatment of male and female employees. \textit{See also} Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976), where the dissenting judge seized upon the differences between the constitutional test and title VII test for determining unlawful sex discrimination in attacking the majority's approach:

Grooming standards are clearly "terms, conditions, or privileges of employment." Thus an employer may not vary grooming regulations because of an individual's sex . . . The vice in the majority's approach is that it imports \textit{constitutional} notions of immutability and fundamentality into the process of \textit{statutory} interpretation. I can find no warrant for concluding that in enacting Title VII, Congress intended to proscribe only sex discrimination which burdens persons who desire to exercise "fundamental rights" or possess certain "immutable characteristics" . . .

\textit{Id}. at 1352 (Winter, J., dissenting).

\textsuperscript{80} 555 F.2d 753 (9th Cir. 1977).

\textsuperscript{81} \textit{Id}. at 756.

\textsuperscript{82} \textit{Id}. at 755.
amended its dress code to accommodate the preferences of the women. Three years later, when the plaintiff was transferred to a clerk's position, the company regulations required him to wear his hair above the collar and to wear a tie. Upon plaintiff's protest, the company acquiesced to his request to wear longer hair, but refused to abolish the tie requirement. Refusing to wear a tie, the plaintiff was fired. He then brought suit claiming that Safeway's enforcement of its grooming regulations was discriminatory because the female employees did not have to comply with a similar requirement. In rejecting plaintiff's claim, the Ninth Circuit reasoned that sex-differentiated dress regulations are promulgated by employers in an effort to maintain a favorable business image, and if they are not overly burdensome to employees, they should be upheld as permissible. However, in Carroll v. Talman Federal Savings & Loan Association the United States Court of Appeals for the Seventh Circuit disagreed with the other federal circuit courts of appeals in holding that an employer's gender-based dress code was an impermissible regulation under Title VII.

**Carroll v. Talman Federal Savings & Loan Association**

**Facts of the Case**

In 1973, plaintiff Mary Carroll was hired by Talman Federal Savings and Loan Association as a teller. When Carroll was hired, Talman had a written dress code policy which required its female tellers, officers, and managerial personnel to wear a uniform called a "career ensemble" as a condition of employment. The uniforms were to be worn every business day except for the last Tuesday of every month and two weeks out of the year. However, the dress code policy for male employees in the same job positions required only that they wear "proper business attire."

83. Id.
84. Id.
85. Id.
86. Id. at 756. Plaintiff also alleged that the tie requirement violated the collective bargaining agreement which prohibited termination based upon sex. The court held against plaintiff on this count as well as the title VII count. Id. at 756-757.
87. Id.
88. 604 F.2d 1028 (7th Cir. 1979), cert. denied, 100 S. Ct. 1316 (1980).
89. The "career ensemble" consisted of five basic color-coordinated items—a skirt, slacks, jacket, tunic, or vest. A picture of the clothing is included in Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1029 (7th Cir. 1979), cert. denied, 100 S. Ct. 1316 (1980).
90. 604 F.2d at 1030. These days were called "glamour days." On these days, female employees were required merely to wear proper business attire.
91. See Carroll v. Talman Fed. Sav. & Loan Ass'n, 448 F. Supp. 79, 80 (N.D. Ill. 1978). From approximately 1958 to 1969, male employees were required to wear a suit supplied by de-
From the time she was hired until May 1979, Carroll conformed to the bank's dress code. On May 11, 14, and 18, 1979, however, she appeared at work dressed in "appropriate business attire," not in the uniform. Subsequently, the bank suspended her indefinitely without pay until she resumed wearing the career ensemble.

As a result of her suspension, Carroll filed a class action suit under Title VII seeking declaratory, injunctive, and monetary relief on behalf of all female employees of the bank. Specifically, she claimed that the bank's policy of imposing a dress code upon its female employees without imposing a comparable dress code upon similarly-situated male employees constituted sex discrimination in violation of section 703(a)(1) of Title VII. The United States District Court for the Northern District of Illinois dismissed the case upon defendant's motion for summary judgment on the ground that the dress requirements did not prevent or hinder employment opportunities for women. Carroll then appealed to United States Court of Appeals for the Seventh Circuit.

The Majority Opinion

The Seventh Circuit reversed the district court, holding that Talman's dress code discriminated against its female employees with respect to compensation, terms, conditions, and privileges of employment and therefore violated section 703(a)(1) of Title VII. Although the facts in Carroll presented a case of first impression, the Seventh Circuit easily found it to be a classic case of sex discrimination.

In considering the first step of its analysis—whether sex discrimination in fact occurred—the majority asserted that the district court erred in deciding the case under section 702(a)(2) which focuses only on a deprivation of employment opportunities. Rather, the Seventh

92. In October 1973, Carroll filed a charge of discrimination with the EEOC claiming that the dress code policy constituted unlawful sex discrimination. Brief for Appellant at 8-9, Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979). After finding reasonable cause to believe that the bank's dress code policy violated Title VII and failing to resolve the complaint by conciliation, the EEOC issued a "right to sue" letter in February 1976. Appendix of Brief for Appellant at 18-19.


94. 448 F. Supp. at 83.

95. 604 F.2d at 1033. See note 10 supra.

96. See 448 F. Supp. at 81.

97. See text accompanying notes 21-36 supra.

98. 604 F.2d at 1029. See note 3 supra.
Circuit insisted that the question of whether a *prima facie* case of sex discrimination occurred based upon the facts in *Carroll* should be decided under section 703(a)(1) which prohibits any inequities in compensation, terms, conditions, and privileges of employment arising out of a sex-based classification.  

Specifically, the majority first found that Talman's dress regulations amounted to disparate compensation based upon sex. Because the bank treated the uniforms as income and therefore withheld tax, and because the female employees were required to clean and maintain their uniforms, female employees were deprived of income which male employees were not. Second, the court also held that the dress code discriminated against women in terms, conditions, and privileges of employment. Addressing the fact that the women were compelled to wear the uniform as a condition of employment, the court maintained that such disparate treatment was demeaning to women because of "a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes." Accordingly, the majority concluded that the uniform requirement was the result of the exact type of sexual stereotyping the Seventh Circuit had held to be unlawful in *Sprogis v. United Air Lines, Inc.*

After determining that Talman's dress code constituted a *prima facie* case of sex discrimination under section 703(a)(1), the majority shifted its focus to the second step of the two-part analysis—whether Talman satisfied its burden of proving a legal justification via a BFOQ or a business necessity defense. Talman asserted neither a BFOQ nor a business necessity defense. Instead, the bank argued that the dress code, if discriminatory, was job-related or reasonably necessary to the operation of its business. The court discarded Talman's defenses as insufficient to sustain a valid business necessity defense because other acceptable alternatives were available to accomplish the same business purpose. The majority thus concluded that

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99. *Id.*
100. 604 F.2d at 1030.
101. *Id.* at 1033.
102. *See* text accompanying notes 29-32 *supra.*
103. *See* text accompanying notes 40-55 *supra.*
104. *See* text accompanying notes 56-63 *supra.*
105. 604 F.2d at 1031.
106. *Id.*
107. *Id.* The majority suggested three alternatives to the bank's then current dress code. First, the bank could require women to wear "appropriate business attire" as in the case of the male
Talman failed to prove any legal justification for its discriminatory practice.108

Finally, the majority dismissed the so-called "hair cases" and their references to standards of dress as inapposite to the issue presented in Carroll. In the hair cases such as Fagan v. National Cash Register Co.,109 and in the tie case, Fountain v. Safeway Stores, Inc.,110 the Carroll majority viewed the issue as one of whether an employer may promulgate different dress requirements for men and women which conform to the traditional differences in the types of clothing worn by men and women.111 However, the Seventh Circuit viewed the issue in Carroll as not whether an employer can lawfully promulgate grooming standards that merely reflect social norms of proper business attire, but whether an employer can lawfully promulgate regulations requiring all women to wear a uniform but only requiring similarly-situated men to wear "proper business attire."112 Without passing judgment on the validity of prior cases involving grooming standards as sex discrimination, the Seventh Circuit concluded that Talman's dress code was unlawful sex discrimination.

The Dissenting Opinion

In his dissenting opinion, Judge Pell strongly disagreed with the majority's reasoning and maintained that Talman's dress code policy was not unlawful under title VII. To support his conclusion, Judge Pell argued that the uniform requirement for female employees and the "appropriate business attire" regulation for male employees were comparable, not disparate, terms and conditions in employment.113 In a lengthy commentary on men's and women's fashions, Judge Pell insisted that "customary business attire" for men has never really advanced beyond the status of being a uniform due to the lack of diversity in men's clothing styles.114 According to Judge Pell, the two rules were employees; second, Talman could make the uniform optional; and third, the bank could also require male employees to wear a uniform as they did between 1958 and 1969. Id.

108. Id.
110. 555 F.2d 753 (9th Cir. 1977). See text accompanying notes 81-88 supra.
111. 604 F.2d at 1032. It would appear that the majority would find nothing wrong, for example, with a dress code requiring females to wear dresses and males to wear suits.
112. Id.
113. 604 F.2d at 1034 (Pell, J., dissenting).
114. Id. Judge Pell admitted however that variation in men's fashions exist:
There have been wide and narrow lapels, cuffed and cuffless trousers, different colored shirts which are ordinarily substantially covered by jackets, some splashes of color in neckties, a choice of four-in-hands or bowties, non-vested and vested suits, a choice of belted or beltless or suspender-supported trousers, three button or two button jackets and even occasionally in daring moments a pleated-back jacket . . . . Men, of course do
only semantically different because both men and women were in effect required to wear a "uniform," and therefore the rules did not offend title VII. 115

Judge Pell alternatively argued that even if Talman's dress code was viewed as imposing different requirements by sex, it was not the kind of employment practice subject to title VII scrutiny. 116 Expressing his concern over excessive government interference into the domain of private enterprise, especially in matters he described as trivial such as dress codes, Judge Pell relied upon the reasoning of the hair cases 117 to support his position. He would limit the scope of title VII to only those regulations with a significant effect upon employment opportunities where one sex is favored over the other. 118

Judge Pell also discussed three aspects of the Carroll case which he felt should justify Talman's dress policy. Specifically, he argued that the uniform requirement for women was not discriminatory because (1) it did not substantially burden female employees more than male employees; 119 (2) the uniforms were attractive and in no way could cause embarrassment or be demeaning; 120 and (3) most of the female employees favored the policy. 121 Therefore, unlike the majority, Judge Pell have a choice of materials and colors in their suit, or sport jacket and slacks outfits, but I am not aware that lurid colors would qualify as "customary business attire," any more than would one of the bizarre assemblages worn by a modern rock singer. 122

Id. (footnote omitted).

115. Id. at 1034.
116. Id. at 1035-37.
117. See text accompanying notes 65-79 supra.
118. 604 F.2d at 1036 (Pell, J., dissenting). But see In re Consol. Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1146-47 (7th Cir. 1978), where Judge Pell, writing for the court, struck down the validity of TWA's no-motherhood policy requiring female cabin attendants who become mothers to resign or accept ground duty positions while not imposing similar restrictions upon their male counterparts who become fathers. Judge Pell reasoned that "such assumptions steeped in cultural stereotypes were anathema to the maturing state of Title VII analysis." Id. at 1146.

119. 604 F.2d at 1037 (Pell, J., dissenting). Judge Pell reasoned that, as long as the sex-differentiated regulations did not substantially burden female employees' enjoyment of their jobs more than male employees, they were not subject to title VII scrutiny. The majority rebutted this argument on the ground that a "substantial burden" test was not a criterion imposed by title VII. Id. at 1030.

120. Id. at 1037 (Pell, J., dissenting). In refuting this contention, the majority maintained that personal tastes of the courts were irrelevant in determining whether an employment practice constituted unlawful sex discrimination. Id. at 1030.

121. Id. at 1038 (Pell, J., dissenting). To rebut this argument, the majority cited Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 (1978), which concluded: [Title VII's] focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.
concluded that Talman's dress code was an improper subject for consideration under title VII.

**Analysis**

**The Majority Opinion: A Correct Approach**

In *Carroll v. Talman Federal Savings & Loan Association*, the Seventh Circuit correctly ruled that Talman's disparate dress regulations presented a classic case of sex discrimination with respect to terms and conditions of employment under section 703(a)(1). In so ruling, the Seventh Circuit merely followed its own precedent; yet, at the same time, the court broadened the scope of title VII by holding that a dress code which imposes different requirements by sex is subject to title VII scrutiny. However, because the Seventh Circuit's decision in *Carroll* was expressly limited to its facts and because the majority refused to pass judgment upon the validity of prior decisions upholding sex-differentiated grooming regulations as permissible employment practices, whether the Seventh Circuit is willing to extend its reasoning in *Carroll* to future challenges of gender-based grooming regulations remains an open question.

A clear reading of the *Carroll* opinion shows that the majority opinion strictly adhered to the principles laid down by the Supreme Court in *Phillips v. Martin Marietta Corp.* and by the Seventh Circuit itself in *Sprogis v. United Air Lines, Inc.*—that any disparate treatment in terms and conditions upon the basis of sex or resulting from sex stereotypes constitutes a *prima facie* case of sex discrimination. Moreover, in applying these principles to the situation in *Carroll*, the Seventh Circuit correctly followed the established two-step analysis in deciding claims of sex discrimination under title VII. The court first determined that discrimination based upon sex in fact occurred under section 703(a)(1) of title VII. Then, the court determined that Talman failed to meet its burden of establishing a BFOQ or business necessity defense that would justify the discriminatory uniform requirement. In light of prior cases in other circuits involving gender-based grooming regulations, the Seventh Circuit took a novel, yet

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122. 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1316 (1980).
123. 400 U.S. 542 (1971) (per curiam).
124. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).
125. *See* text accompanying notes 29-32 *supra*.
126. *See* text accompanying notes 23-32 *supra*.
127. *See* text accompanying notes 97-108 *supra*.
128. *See* text accompanying notes 37-63 *supra*.
proper approach in Carroll, unlike the approach advocated by Judge Pell in his dissent.

The Dissenting Opinion: A Result-Oriented Approach

In maintaining that Talman's dress code policy was not unlawful under title VII, Judge Pell tailored his reasoning to fit the result he desired, thus ignoring the proper title VII analysis. For example, Judge Pell argued that Talman's uniform requirement for women and the "appropriate business attire" regulation for men were only semantically different because both men and women were in effect required to wear a "uniform." The flaw in this argument is readily apparent—the difference between the uniform requirement and the "appropriate business standard" is more than just a matter of semantics. Unlike the male employees, who were free to wear a wide variety of clothing, the females were compelled to wear clothing of identical cut, style, and material. In effect, therefore, the disparate terms in the dress code were a striking example of an employment practice resulting from well-established sex stereotypes. It appears that Talman felt that it could trust its male employees to know what constituted "proper business attire," whereas Talman had to assure itself that women would do so by requiring a uniform. The rationale seems to be that, left to their own judgment, women may not have the business sense to dress in appropriate attire.

In addition, the uniform requirement may act as a barrier for a female employee who wishes to rise to higher levels of management because it prevents her from asserting her individuality which would enable her to stand out from any other female employee. Therefore, even under the more limited interpretation of sex discrimination as defined by Judge Pell and the "hair cases," Talman's dress code is unlawful because it has the potential effect of significantly hindering employment opportunities for women in the bank.

Judge Pell also agreed with the reasoning of the "hair cases" that

129. See text accompanying notes 113-114 supra.
130. See Brief for Appellant at 39, Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979).
131. Id.
132. Id.
133. The plaintiff in Carroll did not raise this argument. Cf. La Von Lanigan v. Bartlett & Co. Grain, 466 F.Supp. 1388 (W.D. Mo. 1979), where plaintiff, a female employee, was fired for wearing a pantsuit in the employer's executive offices in violation of the company's dress code. The plaintiff in Lanigan specifically contended that the dress code significantly affected employment opportunities because it perpetuated sexist, chauvinistic attitudes. The court rejected this argument and strictly followed the line of reasoning of the "hair cases." Id. at 1392.
sex discrimination should be limited to employer-promulgated regulations involving employment opportunities, immutable characteristics, or fundamental rights. These factors, however, are relevant only in a constitutional interpretation of sex discrimination and therefore should have no bearing on title VII cases. It appears that these distinctions were carved out to justify the courts’ conclusions that gender-based grooming regulations are of insufficient import to warrant attack under title VII. In so doing, Judge Pell and the earlier grooming cases afforded greater deference to the judgment of private business than to the bare terms of title VII and the principles laid down by the Phillips and Sprogis decisions.

Summary

In contrast to the dissent, it appears that the majority in Carroll is more sensitive to the seemingly more trivial forms of discrimination which are commonplace in the employment arena, but often go unnoticed due to established sexual stereotypes. Accordingly, the Seventh Circuit has refused to allow a threshold of permissible sex discrimination to which title VII would be inapplicable. Instead, the court has indicated that sex discrimination is to be defined and remedied as broadly as any other form of discrimination under title VII.

The discrimination which Talman fostered through its disparate dress code is best illustrated by analogizing to a situation in which blacks are required to wear a “uniform” in order to assure that they dress for work in proper business clothes. No such racially-based regulation could possibly withstand attack under title VII. Although the courts have traditionally given greater protection to victims of race discrimination than sex discrimination, the debates surrounding the 1972 amendments to title VII reveal that Congress was largely concerned with remedying all forms of sex discrimination in employment. In sum, the Seventh Circuit properly reversed the decision of the district court.

134. See text accompanying notes 73-77 supra.
135. See note 79 supra.
136. See Brief for Appellant at 2, Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979).
137. The United States Supreme Court has held that race, but not sex, is a “suspect classification” and therefore is entitled to greater protection under the fourteenth amendment. Compare Korematsu v. United States, 323 U.S. 214 (1944) (race) with Frontiero v. Richardson, 411 U.S. 677 (1973) (sex).
138. See text accompanying notes 19-20 supra.
Although the Seventh Circuit in *Carroll* appears to have broadened the scope of title VII, it is difficult to glean from the opinion whether the court is willing to extend the *Carroll* rationale to all cases involving challenges to gender-based grooming regulations. Not only did the majority limit its decision to the facts in *Carroll*, but the majority opinion stated that as long as a grooming regulation "finds some justification in commonly accepted social norms and [is] reasonably related to the employer's needs, such regulations are not necessarily violations of title VII even though the standards differ somewhat for men and women." From this statement, it would appear that the Seventh Circuit would uphold the validity of employer-promulgated rules requiring male employees to wear short hair or a tie as a condition of employment since short hair for men is a commonly accepted social norm and relates to the employer's need to project a favorable image with customers and the public in general. However, such a conclusion is difficult to reconcile with the *Carroll* rationale.

For example, suppose that the Seventh Circuit was presented with the factual situation in *Dodge v. Giant Food, Inc.* in which the employer required its male employees to maintain short hair as a condition of employment while it permitted similarly-situated female employees to wear their hair in any reasonable hairstyle, long or short. If the Seventh Circuit were to apply the proper test for sex discrimination as it did in *Carroll*, the sex-differentiated hair regulation would be held unlawful. Under *Phillips v. Martin Marietta Corp.*, the sex-based hair regulation singled out men with long hair for disfavored treatment which they would not have received but for the fact they were male. In addition, the regulation is unlawful under *Sprogis v. United Air Lines, Inc.* because it is the result of stereotyping—short-haired men are the commonly accepted norm; long-haired men conjure up stereotypes of hippies, radical politics, troublemakers, and non-conformity in general. Thus, the Seventh Circuit ought to find a *prima facie* case of sex discrimination.

After finding a *prima facie* case, the Seventh Circuit would then

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139. 604 F.2d at 1031-32.
140. Id. at 1032.
141. 488 F.2d 1333 (D.C. Cir. 1973). See also text accompanying notes 70-77 supra.
142. 400 U.S. 542 (1971) (per curiam).
143. See text and accompanying notes 24-29 supra.
144. 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971).
address the issue of whether the employer satisfied its burden of justifying the disparate regulation as a valid business necessity.\textsuperscript{146} Under the strict standards of the business necessity test,\textsuperscript{147} the sex-based regulations could not stand as a valid business necessity because the hair regulation is not an overriding legitimate business purpose that is necessary to the safe and efficient operation of the business.\textsuperscript{148} Moreover, acceptable alternatives with an equal or less discriminatory impact\textsuperscript{149} are available to the employer such as a regulation requiring all employees with long hair to wear it in a neat, orderly fashion. In conclusion, the Seventh Circuit, in applying the \textit{Carroll} rationale, ought to find a sex-based hair regulation unlawful sex discrimination.

Nevertheless, the majority in \textit{Carroll} clearly expressed its shared reluctance with the other federal circuits to subject a short-hair or tie regulation to the provisions of title VII.\textsuperscript{150} In \textit{Carroll}, the Seventh Circuit seemed to imply that a regulation compelling women to wear a uniform as a condition of employment does not involve commonly accepted social norms as does a regulation requiring men to wear short hair as a condition of employment, and therefore the two situations are readily distinguishable. Although admittedly the gender-based uniform requirement is a more offensive type of sex-based regulation than the short-hair requirement, the hair regulation is no less the result of sex stereotyping. Thus, the question becomes how the Seventh Circuit, if faced with a “hair case,” for example, will attempt to justify upholding it in light of its decision in \textit{Carroll}. On an even broader level, the question is where does a court begin to draw the line between those grooming regulations worthy of title VII protection and those which are not?

These questions could be avoided if the courts simply followed the Seventh Circuit’s approach in \textit{Carroll}. If the challenged regulation cannot withstand the two-part test for determining claims of sex discrimination, whether it be grooming regulations or hiring practices, then it is unlawful. However, such a sweeping approach, to an extent, ignores certain societal expectations. For example, even a grooming regulation prescribing only that “all bank tellers wear proper business attire to work” is ultimately based on sex-differentiated standards. Al-
though the rule on its face does not classify on the basis of sex, enforcement of it does: Males wearing long hair or females wearing slacks will not be considered to be in “proper business attire.” As a result, if the Carroll test were extended to its most extreme, yet logical, conclusion, men should be permitted to wear dresses to work barring any business necessity defense.

In response to such a potential conclusion, the Seventh Circuit in dicta indicated that not all sexual stereotyping should be unlawful under title VII by including a caveat: Grooming regulations which reflect the customary differences between men and women’s dress should not be considered unlawful. In this respect, the Carroll opinion, too, is a result-oriented decision in which the Seventh Circuit drew an arbitrary line separating permissible from impermissible gender-based grooming regulations.

**CONCLUSION**

In Carroll, the Seventh Circuit properly held that Talman’s gender-based dress code requiring female employees to wear “uniforms” while requiring similarly-situated male employees to wear “proper business attire” was unlawful under section 703(a)(1) of title VII. On the most basic level, Carroll can be viewed as a classic case of sex discrimination in which the Seventh Circuit strictly adhered to the principals established by the Supreme Court in Phillips v. Martin Marietta Corp. and by its own decision in Sprogis v. United Air Lines, Inc. In addition, the Seventh Circuit correctly applied the two-part test for determining whether a particular employment regulation constitutes sex discrimination.

Yet, at the same, the Seventh Circuit’s holding appears to have broadened the scope of title VII by departing with the other federal courts of appeals and ruling that a dress code which imposes different requirements by sex is subject to title VII scrutiny. In light of such a firm conclusion, the majority in dicta, however, appears to soften the potential impact of Carroll. Not only did the Seventh Circuit expressly limit its decision to the Carroll facts, but the majority also forewarned that if a sex-based regulation finds some justification in commonly accepted social norms and is reasonably related to the employer’s needs, then it is likely that the Seventh Circuit would uphold such a regulation. In sum, the practical effect of the Seventh Circuit’s opinion in
Carroll suggests that employers may lawfully promulgate comprehensive dress codes as long as the codes on their face do not classify by sex.

Susan Hillary Loeb
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