Private Employer Dress Codes and Laws Against Sexual Orientation and Gender Expression Discrimination: The Normative Stereotype Exception Should Not Survive

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1 Introduction

Workplace dress codes may affect any aspect of an employee’s appearance, including clothing, jewelry, makeup, and hairstyle. They include detailed written policies that precisely describe permitted and proscribed items as well as informal policies that require “business appropriate” clothing.

Title VII\(^1\) prohibits sexist\(^2\) hiring and employment policies unless the sexism is justified by business necessity. However, not all sexist dress codes violate Federal law. For example, men can be required to wear their hair short, and women can be required to wear makeup.

Courts allow these policies despite their seemingly facial transgression of Title VII. Courts say that the sex-based distinctions these dress codes make do not impose significant obstacles to employment opportunity on one sex relative to the other and do not perpetuate any invidious stereotypes that Title VII was meant to counteract.

These judicial emendations to Title VII allow sexist social norms, the very norms that Title VII may indeed have been meant to subdue, to worm their way back into employment law. They are a judge-made compromise between the spirit and letter of the law and what the court believes are normative, if not objective, distinctions between men and women. The result is that Title VII prevents employers from perpetuating or adhering to norms that would deny women the opportunity to take on stereotypically male roles and from denying men the opportunity to pursue stereotypically female roles but allows employers to comply with and perpetuate norms that say men don’t wear earrings or makeup and do wear ties and that women wear lipstick and have long hair and can wear skirts or dresses.

Some states and cities have moved beyond Title VII and enacted laws prohibiting discrimination on the basis of sexual orientation and gender. Courts generally apply the same set of tests and use the same legal framework when interpreting these laws as they do when interpreting Title VII, but take into account the different classes. This is standard fare: when applying Title VII courts generally use similar tests for discrimination based on sex, race, and any of the other protected classes.

However, to the extent that societal norms for men and women are actually societal norms for heterosexual masculine men and heterosexual feminine women, prohibitions on sexual orientation discrimination compel courts to consider what the norms are for homosexuals and bisexuals.\(^3\) Similarly, prohibitions on gender discrimination compel courts to consider what the

\(^2\) By which I mean “classifying on the basis of sex” and not “illegally discriminating on the basis of sex”. I will use the word “illegal” or otherwise be explicit when I mean to refer to illegal behavior.
\(^3\) I leave as an open question whether the courts must apply a “reasonable heterosexual/homosexual/bisexual” standard or a “reasonable person” standard when deciding whether a dress code represents socially acceptable expectations for a person of that sexual orientation. There would also be questions of intersection: if a dress code represents an undue burden on gay men then does it violate the law if not all homosexual people are so burdened? After all, lesbian women incur no burden from such a policy.
norms are for feminine and masculine individuals. I argue that laws preventing discrimination on the basis of sexual orientation and gender vitiate the interpretations of Title VII, and thus prohibit many dress codes that Title VII allows.

The result is that employers subject to local laws like New York City’s may have to relax or abandon many aspects of their dress codes. Employers will have to identify a business necessity justifying any gender normative dress code and will not be able to rely on societal expectations.

2 Employment & Sex, Sexual Orientation, and Gender Discrimination Law

In this section I briefly review relevant sex and sex related discrimination law. The point is not to be exhaustive about laws that could conceivably be applied to challenge dress codes. Other theories that challenge sexist dress codes are outside the scope of this paper.

2.1 Title VII

Title VII is the flagship federal anti-discrimination statute for the workplace. It applies to nearly any employer with more than 15 employees. It prohibits sex discrimination, but not sexual orientation or gender discrimination. I will specifically analyze how courts have interpreted the law as applied to dress codes in Section 4. With respect to sex discrimination in general, Title VII prohibits two theories of discrimination: disparate treatment, and disparate impact.

2.1.1 Disparate Treatment

If a policy or practice is overtly based on sex then it is prima facie illegal and the employer must show the existence of a Bona Fide Occupational Qualification (BFOQ) that requires the employee to be of a particular sex. Whether or not a BFOQ exists is fact dependent, but courts generally find a BFOQ only if the sex classification is necessary to preserve the essence of the business.

4 The same comment about from what perspective the norm is defined applies in this context as well. So too does the idea of intersection: gender discrimination revolves about not being able to discriminate on the basis of masculinity or femininity, not sex. However, to the extent that, normatively, all men are masculine and all women are feminine, I argue that prohibitions on gender discrimination prevent courts from excusing sex discrimination by saying it is merely legal gender discrimination – these prohibitions make gender discrimination illegal!

5 In this paper I use sex to mean biological sex, sexual orientation to refer to sexuality, and gender to be sexual identity. I assume that each is composed of discrete and mutually exclusive groups: sex – male and female; sexual orientation – heterosexual, homosexual, asexual, and bisexual; gender – masculine and feminine. I don’t define these categories and know that some people fall outside them no matter how they are defined. I accept these limitations because they appear to underlie much of Title VII’s jurisprudence.

7 Id. § 2000e-1(b)
8 See DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979) (refusing to read “sex” as used in Title VII to include sexual orientation or gender. The opinion uses “gender” and “sex” synonymously, and uses “effeminacy” in the way that I use “gender”).
10 For more on BFOQ’s, see generally Melissa K. Stull, Annotation, Permissible sex discrimination in employment based on Bona Fide Occupational Qualifications (BFOQ) under § 703(e)(1) of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(e)(1)), 110 A.L.R. FED. 28.
Both a written policy and an as applied practice can exhibit disparate treatment. The proof patterns vary in different scenarios, but once a plaintiff establishes a prima facie case of disparate treatment, either facial or as applied, the only complete defense is a BFOQ.

2.1.2 Disparate Impact

Employers may apply facially neutral policies or practices evenhandedly and still affect one sex more than the other. Title VII prohibits this type of disparate impact. 11 Outside the realm of sex discrimination, the seminal case is Griggs v. Duke Power Co. 12 which the court has applied to sex. 13 An employer can justify a disparate impact by showing business necessity. A business necessity is “a manifest relationship to the employment in question” and is less stringent than a BFOQ but much more stringent than simple articulation of a rational basis. 14

2.1.3 Title VII Does Not Prohibit Gender or Sexual Orientation Discrimination

Title VII does not prohibit gender 15 or sexual orientation 16 discrimination.

2.2 New York State Human Rights Law

New York State Human Rights Law (NYSHRL) 17 differs from Title VII although courts apply them using the same frameworks and proof patterns. 18 NYSHRL specifically prohibits employment discrimination based on sexual orientation 19 and covers employers with four or more employees. 20

2.3 New York City Human Rights Law

New York City Human Rights Law (NYCHRL) prohibits employment discrimination on the basis of gender. 21 Gender is explicitly defined to be more expansive than sex: “the term "gender" shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned

15 But cf. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). That court did not hold that gender could not be a job qualification. I suggest the court instead found sex-plus discrimination. Men and women were both eligible for the partnership, but only feminine women (gender-neutrally, only women who conformed to the stereotypical gender typical of their sex) were eligible. There is no indication that the court was prepared to consider gender as something disassociated from sex.
19 N.Y. EXEC. Law § 292.27 (McKinney 2005) (defining sexual orientation as heterosexuality, homosexuality, bisexuality, or asexuality).
20 Id. §292(5).
to that person at birth”. Courts apply the same framework to the NYCHRL as they do to Title VII.

3 Dress Codes

3.1 Dress Codes can be Largely Objective or Largely Subjective

Dress codes are policies or practices pertaining to personal appearance and grooming. It is somewhat useful to distinguish between objective and subjective dress codes.

3.1.1 Objective Dress Codes

Objective policies include functionally descriptive statements about permissible and impermissible appearance. Examples include requirements for a specific shade of lipstick, allowing closed toe shoes but not open toe, requiring skirts to be a minimum length below the knee, requiring neckties, and prohibiting earrings.

3.1.2 Subjective Policies

Subjective dress codes are less descriptive of the appearance and more descriptive of the reaction people have to it. Prohibiting sexy or inappropriate clothing and requiring formal, business casual, or fashionable clothing is subjective. Different people with different social backgrounds can look at a shoe and disagree about whether it is formal. They will generally not disagree on whether it open toe.

3.2 Targeted Dress Codes

Dress code can be targeted in ways that roughly align with the Title VII notions of facial disparate treatment, covert disparate treatment, and disparate impact.

3.2.1 Facially Targeted Dress Code (Modeled on Overt Disparate Treatment)

Standards may specifically apply just to men or just to women. Examples include: “men may not have long hair”, “men may not wear earring”, “men must wear ties”, and “women must wear jackets that coordinate with their slacks”.

Some examples of subjective facially targeted dress codes clauses are “women may not wear sexually revealing clothing”, “men must maintain gender appropriate attire”, “men must be well groomed”, and “women must maintain professional levels of makeup and hairstyle”.

3.2.2 Targeting Through Application (Modeled on Covert Disparate Treatment)

Employers might apply facially neutral dress codes on a discriminatory basis. Examples might include a no-shorts policy that is waived for women wearing skorts and a requirement to have “business appropriate hair style” that is applied against men with ponytails but not women.

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22 Id. § 8-102 (23). See also NYC L.L. 3/2002 § 1 (calling for broad interpretation of gender).
24 I do not specifically address height, weight, and fitness requirements but similar results should apply.
3.2.3 Inadvertent Targeting (Modeled on Disparate Impact)

Neutral application of a neutral dress code may require individuals of one sex to spend more money, take more time, or otherwise expend more effort than individuals of the other sex. For example, requiring the removal of all body hair may be more time consuming for men (generally more hirsute) than women.

4 Dress Codes and Sex Discrimination Law

4.1 Generally, Dress Codes are No Different from Any Other Employment Policy or Practice

Dress codes can be illegal under both disparate treatment and disparate impact theories of sexism. For example, employees can’t be required to wear sexually revealing uniforms that may expose them to sexual harassment or that are required only for women and not for men. Standard Title VII pretext analysis for disparate treatment applies to dress codes as does the standard reliance on discriminatory results, not discriminatory intent. However, courts apply a particularized test to dress codes and this test, the unequal burden test, allows employers to impose dress codes that perpetuate stereotypes that the court finds societally normative.

4.2 The Unequal Burden Test: A Judicially Created Escape Valve for Sexist Dress Codes

Courts have generally tolerated dress codes that reify “normative stereotypes.” They do this by declaring that grooming standards that “appropriately differentiate between the [sexes] are not facially discriminatory.” Once deemed to be facially neutral, dress codes are subject to

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26 The Equal Employment Opportunity Commission has adhered to stricter definitions of sex discrimination and has found Title VII violations where Article III courts have not. See generally Annotation, Employer's enforcement of dress or grooming policy as unlawful employment practice under § 703(a) of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(a)), 27 A.L.R. Fed. 274 § 2.
27 See E.E.O.C. v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) (distinguishing between impermissible grooming and clothing requirements such as sexually provocative uniforms or sexually provocative uniforms for women only and permissible requirements such as different maximum hair lengths for men and women).
28 See Tamini v. Howard Johnson Co., 807 F.2d 1550 (11th Cir. 1987) (applying pretext analysis to show makeup requirement imposed at whim of manager (not as part of corporate policy) and after only woman who repeatedly refused to wear makeup became pregnant was illegal sex discrimination).
29 See Carroll v. Talman Federal Sav. and Loan Ass'n of Chicago, 604 F.2d 1028 (7th Cir. 1979) (finding Title VII violated if women required to wear uniforms and men required to wear suits though both had same position: requirements perpetuate a stereotype of female inferiority and non-discriminatory alternatives were available). See also O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987).
31 Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1109-1110 (9th Cir. 2006) (original had “genders” instead of “sexes” but apparently used “gender” the way I use “sex”). Courts also often decline to unpack facially neutral subjective dress codes that require employees to present themselves in a manner that is appropriate for their sex. This is similar to gay marriage cases in which courts have not found language restricting marriage to people of the opposite sex to be facially sexist, even though they effectively say that a man may marry a woman but a woman may not, and a woman may marry a man but a man may not”, which is facially sexist.
the unequal burden test.\textsuperscript{32} Courts make little attempt to define in what way they are appropriate, other than that they comply with normative stereotypes.

For example, a requirement that women, but not men, wear contacts instead of eyeglasses is illegal sex discrimination\textsuperscript{33} but I do not believe most courts would subject it to the undue burden test (which it would probably fail) because it is not an “appropriate differentiation”. Courts are unlikely to believe there is a societal norm that men wear glasses but women do not. Thus, an employer imposing such a policy must justify it as a business necessity.

On the other hand, a plaintiff must challenge facially neutral policies, including facially discriminatory policies that are judicially deemed neutral, using the unequal burden test. Courts generally do not consider makeup, hairstyle, or sex-appropriate attire requirements to represent an undue burden without specific evidence from the plaintiff as to the time, cost, or other unequal burden actually imposed.\textsuperscript{34}

Thus, one question is how “appropriate differentiation” survives state and local expansions of anti-discrimination law. Such laws may eliminate the need for the undue burden test.

4.3 Acceptance of Normative Stereotypes Undercuts Disparate Impact Arguments

“[A]n even-handed policy that prohibits to both sexes a style more often adopted by members of one sex does not constitute prohibited sex discrimination.”\textsuperscript{35} The distinction between the disparate impact of a neutral style policy and the disparate impact of other neutral policies is that style policies have “a negligible effect on employment opportunity”.\textsuperscript{36} Style is not immutable and is “a matter of relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII”.\textsuperscript{37}

A dress code that perpetuates a negative sex stereotype (as the women-only uniforms in \textit{Carroll} and \textit{O’Donnell} did)\textsuperscript{38} represents exactly what courts believe Title VII to stand against. On the other hand, policies pertaining to hair, jewelry, makeup, and sex-appropriate clothing (remember that courts consider sex-appropriate clothing requirements to be facially neutral) perpetuate stereotypes that are not negative and are instead socially normative.\textsuperscript{39}

So a second question to ask is how expanding the classes protected by Title VII might affect the interpretation of stereotypes.

5 Dress Codes and Sexual Orientation: A Challenging Start

Attacks on dress codes under color of sexual orientation discrimination provisions often fail because courts do not accept that there is a presumptive nexus between sexual orientation and

\textsuperscript{32} \textit{Frank} put it differently, eliding over the fact that the unequal burden test is not necessary according to a literal interpretation of Title VII once the policy is found to be facially sexist. Instead, it casts the test as a unique for dress codes: “A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ.” \textit{Frank v. United Airlines, Inc.}, 216 F.3d 845, 855 (9th Cir. 20000).


\textsuperscript{34} See, e.g., Jespersen 444 F.3d at 1110-1111.


\textsuperscript{36} Id. See also \textit{Capaldo v. Pan Am. Fed. Credit Union}, 1987 WL 9687.

\textsuperscript{37} Id.

\textsuperscript{38} See supra note 29.

\textsuperscript{39} See, e.g., Jespersen at 1111-1113 (noting repeatedly that there is nothing “objectively” offensive or work-inhibiting about the grooming requirements and that they are only “subjectively” problematic for the plaintiff).
personal appearance: gay men do not present themselves in a feminine (which is equivalent to female in a world that does not account for gender stereotypes) way because they are gay – they do so if they are transgender. Similarly, non-transgender lesbian women do not, as a rule, wear normatively male clothing.

I do not have an intuitive understanding of what it means to dress like a heterosexual, homosexual, bisexual, or asexual but the intersection of sexual orientation and sex may make it easier to identify normative stereotypes. For example, we may believe that a normal gay man would wear brighter colors, bolder patterns, softer fabrics, use minimal amounts of makeup (but more than a heterosexual man) and possible wear an earring (but only one). The point is not for me to accurately portray the stereotype here – the point is that such a stereotype is no more or less objectively true than the stereotypes the court blithely accepts in Jespersen.

In a jurisdiction that affords the same protection to sexual orientation as it does to sex, I believe a reasonable court should find that a dress code must make allowances for stereotypical homosexual, bisexual, and asexual appearances. Equivalently, dress codes that explicitly accommodate or mandate compliance with those stereotypes would be appropriately differentiating and seen as facially neutral. We should also expect such a court to hold that dress codes imposing those stereotypes on people of the appropriate orientation will not be objectively onerous, even if the individuals in question find the requirements subjectively objectionable.

6 Dress Codes and Gender Expression: No More Stereotypes?

The law often uses “gender” in the way that I use “sex” in this paper. But New York City makes clear that the NYCHRL means gender as I use it. It refers to “actual or perceived sex; gender identity; self-image; appearance; and, behavior or expression, whether or not that gender identity, self image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to an individual at birth.”

Narrower language that created gender categories such as masculine and feminine might enable courts to continue applying the unequal burden test and allowing normative stereotypes (assuming they could define them). Construing the NYCHRL in this fashion might effectively undermine the legal acceptance of sexist dress codes in that it would decouple feminine from female and masculine from male. Some stereotypes might survive, but I have a tough time imagining what our society’s objective “asexual feminine male” appearance norm is.

However, the language of the NYCHRL is broad and it appears to facially call for protecting a subjective understanding of gender expression!

This is not to say that all dress codes should be illegal under NYCHRL. Those that meet the standard of business necessity would still be legal. But the NYCHRL severely curtails the ability of courts to neutralize the overtly discriminatory policies mentioned in this article. Makeup, jewelry, hairstyle, shoes, and clothing can all express gender identity. Neither the courts nor employers would be justified in enforcing different dress codes for different categories of people, and certainly not based on sex alone. A purely subjective policy, such as one that called for business appropriate appearance and allowed individuals to wear suitably professional clothing

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41 NYCHRL
without regard to the gender norms associated with that clothing\textsuperscript{42}, would probably be legal. So
would an individualized policy, which, under the broad reading of the NYC HRL, is what a
policy such as “sex, orientation, and gender appropriate attire” amounts to.

7 Conclusion

In this paper I attempted to do two things. First, to remind readers that current exceptions to
anti-discrimination law as applied to dress codes exist because courts find sexual orientation and
gender to be outside the scope of Title VII and because courts have ruled that many dress codes
that distinguish between men and women do not do so in an objectively harmful way. Second, to
show that laws specifically prohibiting sexual orientation and gender discrimination effectively
vitiate the ability of the courts to apply normative stereotype exceptions.

There are number of ways to take forward the ideas expressed in this paper. It would be
useful to compile a list of state and local ordinances that are similar to the NYCHRL and to
investigate how courts have construed such laws. Empirical or theoretical research into the
existence and form of some of the normative stereotypes alluded to in the paper might indicate
what, if any, facially discriminatory dress codes courts would continue to treat as neutral under
the legal regime I describe. Existing dress code decisions could be revisited, accompanied with
speculation as to how they would be resolved under gender-protecting anti-discrimination laws.

It should be clear that laws such as the NYCHRL should change the legal status of many
dress codes. Whether or not they do remains to be seen.

Next Steps
• Search for applications of existing state and municipal laws
  o http://www.hrc.org/Template.cfm?Section=Get_Informed2&Template=/TaggedPage/
    TaggedPageDisplay.cfm&TPLID=66&ContentID=20650
  o New York State (sexual orientation)
  o New York City (gender)
  o California (orientation + gender identity)
      • “Gender" means sex, and includes a person’s gender identity and
        gender related appearance and behavior whether or not stereotypically
        associated with the person’s assigned sex at birth.” West’s
        Ann.Cal.Penal Code § 422.56(c)
          o In context of definition of hate crimes
          o But specifically used by 12926(p)
    • Sex, gender, and transgender: The present and future of employment
discrimination law. Marvin Dunson III, 22 Berkeley J. Emp. & Lab. L.
  465 (2001)
    • 12949: “Nothing in this part relating to gender-based discrimination
      affects the ability of an employer to require an employee to adhere to
      reasonable workplace appearance, grooming, and dress standards not
      precluded by other provisions of state or federal law, provided that an
\textsuperscript{42} So a feminine male attorney could wear a skirt suit, for example.
employer shall allow an employee to appear or dress consistently with the employee’s gender identity.”

- Seems to leave open what I want open
- CAJUR LABOR § 72
  - Nothing useful
- CAEMPL CH. 7-A
  - (c) [7:262] Transsexuals: Title VII’s reference to “sex” includes discrimination based on failure to conform to gender stereotypes, and transsexuality is an element of gender discrimination. Thus, a Title VII claim was shown by allegations that:
    - although born a male, the employee suffers from a gender identity disorder; and
    - the employee was discriminated against because of behavior and appearance that the employer felt were inappropriate for a male, or simply because the employee identified himself as a transsexual. [Smith v. City of Salem, Ohio (6th Cir. 2004) 378 F3d 566, 569; see also Schwenk v. Hartford (9th Cir. 2000) 204 F3d 1187, 2000; but see Vickers v. Fairfield Med. Ctr. (6th Cir. 2006) 453 F3d 757, 764—gender stereotyping “should not be used to bootstrap protection for sexual orientation” (emphasis added) (see ¶ 7:281)]

Under the FEHA, “sex” includes a person’s “gender,” which means either his or her actual gender or a defendant's “perception” of that person's gender based on an identity, appearance or behavior different from that traditionally associated with the person's gender at birth. [See Gov.C. § 12926(p); Pen.C. § 422.76]

- [7:262.1] The employer must allow an employee “to appear or dress consistently with the employee's gender identity.” [Gov.C. § 12949]
  - Uses “touchstone is reasonableness” language from Jespersen
    - San Francisco
    - Connecticut
      - Conn. Gen. Stat. § 46a - 81c-m.
        - “For the purposes of sections 4a-60a, 45a-726a and 46a-81b to 46a-81r, inclusive, "sexual orientation" means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such
preference or being identified with such preference, but excludes any behavior which constitutes a violation of part VI of chapter 952.”
  - C.G.S.A. § 46a-81a
- 14 Connecticut Practice Series § 7:14, Sexual Orientation.
- BK: Does not seem to be a gender law
  - But see…
    - I don’t have access to those rulings on westlaw!
- D.C.
  - D.C. CODE §2-1401.01, 02, §2-1402.11, 21, 31, 41, 71, 73
  - It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, and place of residence or business. DC ST § 2-1401.01
    - Effective only in 8 March 2006
- Hawaii
    - 'Gender identity or expression' includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth. HI ST § 515-2
      - Effective 11 July 2005
- Illinois
  - 775 ILCS 5/1-102
    - BK: doesn’t seem to cover gender…
      - But: “(O-1) Sexual orientation. "Sexual orientation" means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. "Sexual orientation" does not include a physical or sexual attraction to a minor by an adult.” 775 ILCS 5/1-103
      - Effective 1 Jan 2006
Maine

- ME. REV. STAT. ANN. tit. 5, §4553
- 9-C. Sexual orientation. “‘Sexual orientation’ means a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.” 5 M.R.S.A. § 4553
  - Added in 2005

Massachusetts

  - “Throughout its papers, the defendant refers to the plaintiff as a “cross-dresser” or “transvestite,” whereas she refers to herself as a “transgendered individual” or “transsexual.” As this distinction goes to the heart of at least one of the counts of the complaint, it is worth taking a moment to clarify the point.”
  - Good case!
  - “The court nevertheless recognizes that those who transgress traditional gender roles and defy stereotypes associated with their biological sex are less likely to be perceived as heterosexual than the general population. See Millet at n. 3. The conflation of one's appearance with one's sexual orientation in this fashion may lead to discrimination actionable under the second prong of Chapter 151B’s definition of sexual orientation discrimination, that is, discrimination due to being identified as having an orientation for heterosexuality, bisexuality, or homosexuality, regardless of the person's actual orientation. See, e.g., Rosa at 214 (“It is ... reasonable to infer ... that [the teller] refused to give [the plaintiff] the loan application because she thought he was gay, confusing sexual orientation with cross-dressing”).” Lie v. Sky Pub. Corp. 2002 WL 31492397, *8 (Mass.Super.) (Mass.Super.,2002)
  - School dress code case
  - MASS. GEN. LAWS ANN. ch. 151B, §§ 3-4
    - Not much in here explicitly?
- Minnesota
  - MINN. STAT. §363A.01 to §363A.41
- New Jersey
  - N.J. STAT. ANN. § 10:2-1; 10:5-1 - 49.
- New Mexico
- New York
- Rhode Island
- Vermont
  - AG letter of 2004
- Washington
  - Executive Order 85-09 (1985)
  - WASH. REV. CODE. § 49.60.130-175, 176, 178, 180, 190, 200, 215, 222-225, 300
  - Wash. Admin. Code § 356-09-020

- Explicit test bed and application
  - go with some putative ‘stereotypical’ and ‘astereotypical’ behaviors

Westlaw trail: courts assume that attire can indicate sexual orientation… perhaps they mean that attire can indicate gender, and if that gender is not the one commonly associated with an individual’s sex then we assume the individual is homosexual. But they may mean what they say: attire can, to the satisfaction of a court, indicate sexual orientation.

Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000)
Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d 313, 319–20, 1 Cal. Rptr. 494, 347 P.2d 909 (1959)
SEXORIENT § 11:7

14 LSEX 149
13 LSEX 605
11 Cardozo Women's L.J. 631
80 Ind. L.J. 391

Jorge soto vega v. Ashcroft/Gonzales (“look gay”) 9th cir
Rosa v. Park West Bank & Trust, 214 F.3d 213 (2000).

321 F.Supp.2d 559