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ROSA V. PARK WEST BANK: DO CLOTHES REALLY MAKE THE
MAN?

Introduction

*Katherine M. Franke**

In July of 1998 something rather mundane happened: Lucas Rosa walked into Park West Bank in Holyoke, Massachusetts and asked for a loan application. Since it was a warm summer day, and because she¹ wanted to look credit-worthy, Rosa wore a blousey top over stockings. Suddenly, the mundane transformed into the exceptional: When asked for some identification, Rosa was told that no application would be forthcoming until and unless she went home, changed her clothes and returned attired in more traditionally masculine/male clothing. Rosa, a biological male who identifies herself as female was, it seems, denied a loan application on that ground.

Outraged at such treatment, and convinced that her attire had no relevance to her credit-worthiness, Rosa filed an action in federal court under the Equal Credit Opportunity Act,² claiming that she had been discriminated against on the basis of her sex.³ Was Rosa discriminated against on the basis of his male sex, on the basis of her female gender, or on some other basis that may or may not fall comfortably under the sex discrimination provisions of the ECOA? After all, the ECOA was enacted by Congress in 1974, in large part to curtail the practice among creditors of refusing to grant a wife's credit application without a guaranty from her husband.⁴ Did Rosa's case present some radical interpretation of sex discrimination principles, or threaten to stretch the bounds of the ECOA well beyond the

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1. In this introduction, I will refer to Lucas Rosa with a feminine pronoun, as that is what she prefers, and it is a common practice for referring to a transgender person who self-identifies as female, the advice and guidance of mental health and other professionals who work with TG clients, and the practice followed by most courts. *See, e.g.*, Schwenk v. Harford, 204 F.3d 1187, 1192 (9th Cir. 2000); Murray v. United States Bureau of Prisons, 106 F.3d 401, 401 n.1 (6th Cir. 1997) (unpublished disposition); Meriwether v. Faulkner, 821 F.2d 408, 408 n.1 (7th Cir. 1987).
2. 15 U.S.C. §§ 1691-1691f (hereinafter ECOA).
3. In fact, the complaint was framed using male pronouns for Rosa. The complaint contained other allegations not germane to this discussion.
4. *Mayes v. Chrysler Credit Corp.*, 37 F.3d 9 (1st Cir. 1994).

scope intended by its authors in 1974? I thought not, and to my delight the First Circuit has agreed.

To those of us who work in this area, Rosa's case was far from odd, marginal or hybrid in some exotic way. Instead, her treatment at the hands of the Park West Bank loan officer reflected an everyday occurrence for countless people who fail to conform to rather traditional gender norms, notably, something experienced more often by people who get caught displaying inappropriate femininity.⁵ Rather than understand Rosa's experience as lying well beyond the bounds of laws relating to sex-stereotyping, she is better understood as a sort of canary in the sartorial coal mine: She was simply the most visible victim of systemic gender norms that regulate all of us in the ways in which we coherently present ourselves to the world as "men" or "women." The refusal that Rosa experienced from Park West Bank was merely the sharp edge of the gender-based discipline according to which we all routinely operate in virtually all aspects of our lives.

Rosa and her counsel drew a senior judge in the District Court in Massachusetts to hear the case. In October, 1999, Judge Frank Freedman dismissed Rosa's ECOA claim on the ground that "the issue in this case is not his sex, but rather how he chose to dress when applying for a loan. Because the Act does not prohibit discrimination based on the manner in which someone dresses, Park West's requirement that Rosa change his clothes does not give rise to claims of illegal discrimination."⁶

So what, after all, do clothes have to do with sex discrimination? They are supposed to "make the man," after all. Any connection was totally lost on Judge Freedman. Yet many queer and feminist scholars and activists do not find this a difficult question, indeed many law review articles have been devoted to this topic.⁷ And, of course, it seems obvious that the question is easily resolved by the Supreme Court's decision in *Price Waterhouse v. Hopkins*⁸ wherein the Court held that sex discrimination principles applied

5. This was Mary Anne Case's point in *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1 (1995).

6. Bench Order, *Lucas Rosa v. Park West Bank and Trust Company*, Civ. Action No. 99-30085-FHF, October 18, 1999 at 1-2. The Bench Order is part of the record appendix, which is on file with the *Michigan Journal of Gender & Law*.

7. See, e.g., Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 New Eng. L. Rev. 1395 (1992); Lynne D. Mapes-Riordan, *Sex Discrimination and Employer Weight and Appearance Standards*, 16 Employee Rel. L.J. 493 (1991); Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 Harv. Women's L.J. 73 (1982). For the connection between clothing/hair and race discrimination, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365 (1991).

8. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

to a woman who was denied a promotion because she was believed to act insufficiently feminine.⁹ In *Price Waterhouse*, the Supreme Court clearly held that clothing-based sex stereotyping fell squarely within the sex discrimination protections of federal law. Yet a number of years after the case was decided by the Supreme Court, it has had less effect upon cases, such as Rosa's, than I might have hoped. Indeed, Judge Freedman's opinion in Rosa's case dismissed the relevance of *Price Waterhouse* altogether, holding that: "neither a man nor a woman can change their status from unprotected to protected simply by changing his or her clothing."¹⁰

When Rosa and her counsel, Jennifer Levi, decided to appeal the dismissal of the complaint to the First Circuit, they called me to see if I would be interested in writing an amicus brief on Rosa's behalf. My job, as Levi and I saw it, was to reassure the First Circuit that this case fit comfortably within the scope of well-established sex discrimination jurisprudence that dealt with gender-based stereotypes. Levi, correctly I believe, calculated that an access to credit case presented a better factual situation in which to get a circuit court to affirm *Price Waterhouse* than did employment cases where the employer's desire to fire a man in a dress might intuitively, yet mistakenly, resonate with the court's notion of legitimate business necessity. What, in contrast, could a person's attire have to do with credit-worthiness?

What follows are the principal and amicus briefs to the First Circuit.¹¹ Thereafter, Jennifer Levi provides some reflections on the First Circuit's opinion. Both Levi and I share some reservations about what is otherwise a rather wonderful victory in this case. Not wanting to tip our hand to the detriment of future litigation in this area, you will understand that we will remain rather cryptic about these reservations.

Nevertheless, the collaboration that these two briefs represent was an exceptional opportunity for me, as it offered the chance to translate my more theoretical writing on sex, gender, performance, identity and equality into an argument that courts would understand and accept. Levi and I spent hours discussing theories of the case, notions of gender identity, and ways to win this issue with minimal collateral damage. I truly appreciated

9. "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n 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.'" *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (CA7 1971)." *Price Waterhouse*, 490 U.S. at 251.

10. Bench Order, *supra* note 6, at 2.

11. The First Circuit opinion is available at 214 F.3d 213 (1st Cir. 2000).

the opportunity to work with a sharp and thoughtful litigator who, as a public interest lawyer, has the challenging task of maintaining a dual focus on the interests of her client and the larger issues advanced by her client's claims. We both offer these briefs as an example of the dynamic collaboration that can take place in litigation when theory and practice are brought to bear on difficult questions of equality.

In the end, this and other similar cases raise an interesting set of questions: What is a question of gender discrimination a question of? How is gender-based discrimination to be differentiated from sex-based discrimination? Or is Justice Ruth Bader Ginsburg correct in using these two terms interchangeably?¹² Why are some courts so obstinate in confusing gender bias with sexual orientation bias? What, in the end, do sex, gender and sexual orientation based discrimination have to do with one another?

12. See, e.g., "Parties who seek to defend *gender-based* government action must demonstrate an 'exceedingly persuasive justification' for that action. Today's skeptical scrutiny of official action denying rights or opportunities based on *sex* responds to volumes of history." U.S. v. Virginia, 518 U.S. 515, 531 (1996) (emphasis supplied).

BRIEF FOR THE PLAINTIFF-APPELLANT
LUCAS ROSA

In the UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LUCAS ROSA

V.

PARK WEST BANK AND TRUST COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS†

*Jennifer L. Levi**
*Mary L. Bonauto***

† In publishing this brief, the *Michigan Journal of Gender & Law* has made no editorial changes other than correcting any spelling errors and changing citation form to conform with the *Bluebook* 17th edition.

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Jurisdictional Statement

The United States District Court for the District of Massachusetts (the "District Court") had jurisdiction over this action under 15 U.S.C. § 1691e(f) and 29 U.S.C. § 1331 by reason of Plaintiff's claim under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f ("ECOA") and Massachusetts statutes forbidding discrimination in places of public accommodation, Mass. Gen. Laws ch. 272, § 92A and § 98, and credit, Mass. Gen. Laws ch. 151B, § 4. The United States Court of Appeals for the First Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291 and F.R.A.P. §§ 3, 4. This appeal is from a Final Judgment, entered October 18, 1999, that disposed of all claims in the case. Appellant filed a timely Notice of Appeal in the District Court on November 15, 1999.

Statement of Issue Presented for Review

1. Did the District Court err in dismissing Plaintiff Lucas Rosa's complaint for failure to state any claim for which relief can be granted?

Statement of the Case

A. *Nature of the Case and the Course of Proceedings Below*

This is an action brought pursuant to the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f and Massachusetts statutes forbidding discrimination in places of public accommodation, Mass. Gen. Laws ch. 272, § 92A and § 98, and credit, Mass. Gen. Laws ch. 151B, § 4, against a bank for refusing to issue and accept a loan application from a bank customer because of the customer's sex.

On August 27, 1998, Plaintiff Lucas Rosa filed a charge of discrimination with the Massachusetts Commission Against Discrimination ("MCAD") alleging Defendant Park West Bank engaged in discriminatory conduct in violation of Mass. Gen. Laws ch. 272 §§ 92A, 98. (App. 7,¹³ Plaintiff's Complaint.) On December 1, 1998, the MCAD dismissed the charge at Rosa's request in order for Rosa to file a civil action, thereby exhausting available administrative remedies. (App. 7, Plaintiff's Complaint.) Rosa filed his

¹³. Citations are to specific pages and items in the record appendix. [The record appendix is on file with the *Michigan Journal of Gender & Law*.]

Complaint in the United States District Court for the District of Massachusetts on April 29, 1999, alleging violations of the ECOA as well as state law claims pursued at the MCAD. (App. 2, Docket Entry 1, App. 4–10, Plaintiff's Complaint.) On August 12, 1999, Defendant Park West Bank filed a Motion to Dismiss. (App. 2, Docket Entry 6, App. 11–12, Defendant's Motion to Dismiss.) A hearing was held on the Motion to Dismiss before District Judge Frank H. Freedman on October 18, 1999. (App. 2, Docket Entry 10.) Judge Freedman granted Defendant's motion in a Bench Order entering Final Judgment in the case on October 18, 1999, finding that Plaintiff failed to state an ECOA claim. (App. 2, Docket Entries 12, 13, App. 14–16, Bench Order.) Finding no merit to the only federal claim in the Complaint, he dismissed the pendant state law claims for want of federal jurisdiction. (App. 15, Bench Order.) Plaintiff filed his timely Notice of Appeal on November 16, 1999. (App. 3, Docket Entry 14, App. 17, Notice of Appeal.)

B. *Statement of Facts*

On July 21, 1998, Plaintiff Lucas Rosa entered Park West Bank to apply for a loan. (App. 4, Plaintiff's Complaint, ¶ 6.) He met with bank employee Norma Brunelle who asked Rosa to present three pieces of identification before she would provide him with the application. (App. 4, Plaintiff's Complaint, ¶ 10.) Rosa produced three pieces of identification, all of which contained his photograph. (App. 4, Plaintiff's Complaint, ¶ 11.) After examining the photo identification, Ms. Brunelle told Plaintiff Rosa that she would not provide him with a loan application until he "went home and changed." (App. 4, Plaintiff's Complaint, ¶ 12.) Lucas was then wearing some clothing that could be considered traditionally female. (App. 4, Plaintiff's Complaint, ¶ 7.) Ms. Brunelle told Rosa that he had to be dressed like one of the identification cards in which his photographic image appeared traditionally male before she would provide Rosa with a loan application. (App. 4, Plaintiff's Complaint, ¶ 13.) The interview ended and the Plaintiff left the Defendant Bank having been refused the service request, i.e. a loan application. (App. 5, Plaintiff's Complaint, ¶¶ 13, 14.) Because Lucas Rosa, a biological male, was dressed in primarily female clothing, Ms. Brunelle refused to provide him a loan application and further process an application for credit.

Summary of the Argument

The District Court erred in granting Defendant's motion to dismiss because Plaintiff states a viable claim of sex discrimination under the ECOA,

15 U.S.C. §§ 1691–1691f. Lucas Rosa proffered two separate theories of sex discrimination supported by the allegations of his complaint. For one, he states a claim of sex discrimination by his allegation that the Defendant Park West Bank discriminated against him for failing to meet a stereotype of masculinity. In addition, his claim that Park West Bank treated him differently than it would treat a similarly situated woman states a separate and distinct, viable claim.

The District Court fundamentally misconceived the law as applicable to the Plaintiff's claim by concluding that there may be no relationship, as a matter of law, between telling a bank customer what to wear and sex discrimination. It also misapplied Rule 12(b)(6) to the extent that it resolved any factual questions beyond the allegations of the Complaint regarding the basis of the Bank's different treatment of the Plaintiff. Finally, because the District Court incorrectly dismissed the single federal claim in Plaintiff's Complaint, it improperly dismissed Plaintiff's pendant state claims for want of federal court jurisdiction.

Argument

I. Applicable Law

A. *Equal Credit Opportunity Act*

The Equal Credit Opportunity Act prohibits a lender from discriminating in any aspect of a credit transaction against an applicant because of the applicant's sex.¹⁴ Among other purposes, Congress passed the ECOA to ensure that "firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex"¹⁵ The Act was originally passed in 1974 to prohibit discrimination on the grounds of sex and marital status.¹⁶ It was amended in 1976 to broaden the scope of its protections to prohibit credit discrimination on the basis of race, color, religion, national origin and age as well.¹⁷ Congressman Annunzio, who recommended expanding the coverage of the ECOA in 1975 explained the original purposes of the Act as ensuring that:

¹⁴. 15 U.S.C. § 1691(a) (1994).

¹⁵. Equal Credit Opportunity Act, Pub. L. No. 93-495 § 502, 88 Stat. 1500, 1521 (1974) (emphasis added).

¹⁶. Equal Credit Opportunity Act, Pub. L. No. 93-495 § 502, 88 Stat. 1500, 1521 (1974).

¹⁷. Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, 1976 U.S.C.C.A.N. (90 Stat. 251) 251.

each individual has a right when he applies for credit, to be evaluated as an individual: to be evaluated on his individual creditworthiness, rather than based on some *generalization or stereotype* Bias is not creditworthiness. Impression is not creditworthiness. An individual's ability and willingness to repay an extension of credit is creditworthiness.¹⁸

The ECOA parallels the prohibition of Title VII that an employer may not take adverse action against an employee because of the employee's sex.¹⁹ This Court has instructed courts to follow Title VII in their enforcement and interpretation of the ECOA.²⁰ Title VII prohibits (1) disparate treatment where sex discrimination is a motivating factor in an employer's adverse employment decision, 42 U.S.C. § 2000e-2(m),²¹ and (2) disparate treatment where a plaintiff shows by direct or indirect evidence that an employer's action more likely than not was motivated by unlawful discrimination and that an articulated business justification for the action is pretext for discrimination.²² Plaintiffs may also prove that an employment policy or practice has an adverse impact on a protected class.²³

Accordingly, applicants for credit may state a claim of sex discrimination under the ECOA according to one or more of these methods of proof developed by courts in employment discrimination cases.

B. *Standard of Review*

¹⁸. 121 Cong. Rec. 16,740 (1975) (emphasis added).

¹⁹. 42 U.S.C. § 2000e (1994).

²⁰. Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 893 (1st Cir. 1992).

²¹. Before the Civil Rights Act of 1991, an employer could disclaim any liability by showing it would have taken the same action absent the impermissible motive. Price-Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989). This standard was modified by the Civil Rights Act of 1991 which now renders a defendant liable for discrimination upon proof that a forbidden criterion "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Where an employer proves that it would have taken the same adverse action against a plaintiff even if it did not consider the forbidden factor, the plaintiff will be precluded from seeking damages or reinstatement, but may still be entitled to declaratory relief, certain injunctive relief, and attorney's fees. 42 U.S.C. § 2000e-5(g)(2)(B)(i); see also Woodson v. Scott Paper Co., 109 F.3d 913, 932 (3d Cir. 1997) (under the 1991 Act, employer no longer has complete defense to liability, as it did under Price Waterhouse).

²². Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Lipsett v. Univ. of P.R., 864 F. 2d 881, 899 (1st Cir. 1988). See also Fernandes v. Costa Bros. Masonry, 199 F.3d 572, 579-80 (1st Cir. 1999) (Title VII plaintiffs may proceed under either mixed motive or pretext approach).

²³. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

Review of the dismissal of Plaintiff's complaint is *de novo*.²⁴ An appellate court may affirm a lower court's dismissal for failure to state a claim only if the plaintiff clearly cannot recover on any viable theory.²⁵ An appellate court must accept the Plaintiff's well-pleaded facts as true and "indulge every reasonable inference in his favor."²⁶

Because, as a matter of law, Rosa alleges a set of facts that, if proven, would permit a reasonable jury to find in his favor on two separate theories of sex discrimination—(1) impermissible sex stereotyping and (2) disparate treatment—the District Court erred in granting Defendant's 12 (b) (6) motion. Where the District Court improperly dismissed the federal claim, it erred in dismissing the state law claims for want of federal court jurisdiction.

II. Plaintiff Has Stated a Viable Claim of Sex Discrimination Based on Impermissible Sex Stereotyping

Taking the facts in Rosa's Complaint as true, as the Court must, loan officer Norma Brunelle reacted to Rosa's appearance because Rosa is a man, and told Rosa that the reason for her refusal to provide him a loan application was his failure to meet a stereotype of masculinity. In other words, in Norma Brunelle's eyes, Lucas Rosa did not look the way a "real man" should. Because acting on sex stereotypes is impermissible sex discrimination,²⁷ and because every applicant for credit has a right to be "evaluated on his individual creditworthiness, rather than based on some generalization or stereotype,"²⁸ Rosa states a viable claim.

In *Price Waterhouse*, the United States Supreme Court determined as a legal matter that a female associate had been discriminated against as a matter of law "because she was a woman" where members of her accounting firm had acted on sex stereotypes in denying her partnership.²⁹ The Court affirmed the district court's decision in Ann Hopkins's favor, holding, *inter alia*, that the district court properly determined that sex stereotyping had played a part in Price Waterhouse's partners' evaluations.

²⁴. Cooperman v. Individual Inc., 171 F.3d 43, 46 (1st Cir. 1999).

²⁵. Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (reversing the dismissal of African-American employees' complaints that sufficiently alleged their union's breach of the union's duty to fairly represent them without hostile discrimination); Langadinos v. Am. Airlines Inc., 199 F.3d 68, 69 (1st Cir. 2000) (vacating lower court's dismissal of plaintiff's complaint).

²⁶. Langadinos, 199 F.3d at 69.

²⁷. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

²⁸. 121 Cong. Rec. 16,740 (1975).

²⁹. Price Waterhouse, 490 U.S. at 258 (1989).

According to the Supreme Court, one of the critical comments evidencing the role that sex stereotyping had played in the discriminatory process was the comment made by the partner who ultimately explained to Hopkins the reason for the Policy Board's decision. Summarizing the reasons for the refusal to make her a partner, he explained that in order to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."³⁰ Simply put, Ann Hopkins did not exhibit her femininity in a way that met the other partners' perceptions of how a "real woman" should look and act at Price Waterhouse.

This Court has recently affirmed the strength and significance of the *Price Waterhouse* analysis. In *Higgins v. New Balance Athletic Shoe, Inc.*,³¹ this Court reviewed a district court's grant of summary judgment for an employer in a case in which a former New Balance employee alleged hostile environment sex discrimination. As this Court recognized, the record proffered by Higgins made manifest that Higgins "toiled in a wretchedly hostile environment," but one that Higgins alleged in the trial court was triggered not by Higgins's sex but by his sexual orientation.³² Despite its scorn for the co-workers' bad behavior, this Court held that, as litigated by Higgins, it could not factually find his action within Title VII because its prohibitions do not stretch that far, proscribing harassment because of sex, not necessarily of sexual orientation.³³

Only on appeal did Higgins argue that "he was harassed because he failed to meet his co-workers' stereotyped standards of masculinity. . . ."³⁴ Unable to accept Higgins's eleventh hour attempt to present a new theory of sex discrimination, this Court affirmed the summary judgment for the defendant. However, this Court made clear that, just as a woman can ground a claim of sex discrimination on evidence that she was discriminated against for a failure to meet stereotyped expectations of femininity,³⁵ so too could a man ground a claim on evidence that he was discriminated against "because he did not meet stereotyped expectations of masculinity."³⁶

³⁰ . *Price Waterhouse*, 490 U.S. at 235.

³¹ . 194 F.3d 252, 259 (1st Cir. 1999).

³² . *Higgins*, 194 F.3d at 258, 260.

³³ . *Higgins*, 194 F.3d at 259-60.

³⁴ . *Higgins*, 194 F.3d at 259.

³⁵ . *Price Waterhouse v. Hopkins*, 490 U.S. at 250-51.

³⁶ . *Higgins*, 194 F.3d at 261 n.4. *See also* Schmedding v. Tnemec Co., Inc., 187 F.3d 862, 865 (8th Cir. 1999) (allegations that co-workers harassed employee "to debase his masculinity" states a Title VII claim of sex discrimination); *EEOC v. Trugreen Ltd. P'ship*, 1999 U.S. Dist. LEXIS 9368, at *23 (W.D. Wis. Mar. 23, 1999) (plaintiff could succeed on a theory that employer treated employee adversely because employee "did not exhibit his mascu-

Taking the facts as Rosa has alleged them, the comparison to *Price Waterhouse* and (the sex stereotyping argument this Court endorsed in) *Higgins* is striking. In telling Rosa to “go home and change” in order to look more like a photograph in which he looked stereotypically masculine, it is reasonable to infer based on the allegations of the Complaint that the lender told Rosa he would not be given an application because he failed to meet the bank’s “stereotyped standards of masculinity.”³⁷ It is also reasonable to infer based on the allegations that the bank told Rosa that in order to receive a loan application he should, just as Hopkins’s evaluators had told her in the employment context, meet the bank’s perception of how a “real man” should look and act when applying for a loan.³⁸ Thus, Plaintiff has alleged that his creditworthiness was determined by Park West Bank according to an “impression” based on some “generalization or stereotype” of masculinity, rather than his “ability and willingness to repay an extension of credit.”³⁹

Under either reasonable construction of the facts, the lender acted on sex stereotypes in denying Rosa an application. In other words, in the language of *Price Waterhouse*, Park West Bank treated Lucas Rosa adversely because Rosa did not exhibit his masculinity in a way that met Park West Bank’s conception of how a man should look. As the United States Supreme Court has now long held, “we are beyond the day” when employers (and banks, by analogy) may insist that employees (which, as the district court judge noted are the equivalent in this case to loan applicants, App. 15) “match[] the stereotype associated with their group.”⁴⁰

Although seemingly tautological, it bears mention that sex stereotyping includes enforcing gendered norms of appearance, that is, making sure that men look like men and women look like women. As this Court recently explained, the concept of stereotyping includes a host of “subtle cognitive phenomena which can skew perceptions and judgments.”⁴¹ Acting on stereotypes based on appearance is squarely within this construct.⁴²

linity in a way that met [employer’s] conception of how a man should behave”); Spearman v. Ford Motor Co., 1999 WL 754568, at *6 (N.D. Ill. Sept. 9, 1999) (facts that an employee was targeted for harassment because of how “he projected his gender, or how his gender was perceived by co-workers” supported a claim of sex discrimination).

³⁷. *Higgins*, 194 F.3d. at 259.

³⁸. Compare *Price Waterhouse*, 490 U.S. at 235.

³⁹. See 121 Cong. Rec. 16,740 (1975).

⁴⁰. *Price Waterhouse*, 490 U.S. at 251 (citing *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

⁴¹. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999).

⁴². Social science literature is replete with affirmation that presumptions about appearance form a central component of stereotyping. See, e.g., Kay Deaux & Laurie L. Lewis, *Structure of Gender Stereotypes: Interrelationships Among Components and Gender Label*, 46

This point is underscored by considering that Merriam Webster defines stereotype as “a standardized *mental picture* that is held in common by members of a group and that represents an over-simplified opinion, affective attitude, or uncritical judgment.”⁴³ Nearly every case involving stereotypes focuses in some way on perceptions based on appearance.⁴⁴ The advice given to Ann Hopkins that she take a course in charm school is an obvious example of this, along with the counsel that she “dress more femininely, wear make-up, have her hair styled, and wear jewelry,” comments the Court characterized as the “coup de grace.”⁴⁵ Indeed, dismissing the need for expert testimony to prove that sex stereotyping had played a role in Hopkins’s case, Justice Brennan commented, it requires no expertise in psychology to know that if an employee’s abilities can be “corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not” her abilities that has drawn criticism.⁴⁶ As one legal commentator has explained, in *Price Waterhouse* the Court did not find as a matter of fact that “Hopkins’s appearance was appropriate for her sex; it held as a

J. Personality & Soc. Psychol. 991, 992 (1984). Consider, too, the conclusions drawn in a study analyzing how people’s views of employees were skewed by perceptions of attractiveness. In their study, Heilman and Stopeck found that attractive men were viewed as more capable than unattractive ones, whereas attractive women were viewed as less capable than unattractive ones. Moreover, the study found a relationship between perceptions of masculinity and competence. Madeline F. Heilman & Melanie H. Stopeck, *Attractiveness and Corporate Success: Different Causal Attributions for Males and Females*, 70 J. of Applied Psychol. 379 (1985). It is hard to imagine a more central component of stereotyping than those drawn around appearance.

⁴³. *Webster’s Ninth New Collegiate Dictionary* 1156 (9th ed. 1986) (emphasis added).

⁴⁴. In an Eighth Circuit case in which Judge Aldrich sat by designation, that court held that the Fourteenth Amendment Due Process Clause protects a student’s personal freedom to govern one’s appearance. Striking a public high school’s sex-specific hair length regulation, Judge Aldrich commented on the baselessness of stereotypes about boys with long hair. He commented:

The area of judicial notice is circumscribed, but I cannot help but observe that the city employee who collects my rubbish has shoulder-length hair. So do a number of our nationally famous Boston Bruins. Barrel tossing and puck chasing are honorable pursuits, not to be associated with effeteness on the one hand, or aimlessness or indolence on the other. If these activities be thought not of high intellectual calibre, I turn to the recent successful candidates for Rhodes Scholarships A number of these, according to their photographs, wear hair that outdoes even the hockey players. It is proverbial that these young men are chosen not only for their scholastic attainments, but for their outstanding character and accomplishments. . . . It is bromidic to say that times change, but perhaps this is a case where bromide is in order.

Bishop v. Colaw, 450 F.2d 1069, 1077–1078 (8th Cir. 1971) (Aldrich, J., concurring).

⁴⁵. *Price Waterhouse*, 490 U.S. at 235.

⁴⁶. *Price Waterhouse*, 490 U.S. at 256.

matter of law that it constituted sex discrimination for her employer to require that it be so."⁴⁷

For the simple and straightforward reasoning that sex stereotyping is sex discrimination, plaintiff has set forth a viable claim which survives a motion to dismiss.

III. Plaintiff Has Stated a Viable Claim of Sex Discrimination Based on Disparate Treatment of Men and Women

Plaintiff's Complaint also states a claim of sex discrimination because the Defendant bank denied Rosa a loan application when it would have provided one to a similarly situated woman. Taking the facts alleged in Rosa's complaint to be true, the loan officer refused to give Rosa, a biological male, a loan application because he did not appear stereotypically masculine. It is reasonable to assume that the Bank would not have refused to provide a loan application to a female customer dressed in traditionally female clothing. In fact, it is hard to conceive, based on contemporary fashions that Park West Bank would deny any woman a loan application because of the gendered nature (masculine or feminine) of her appearance.⁴⁸

Simply stated, Lucas Rosa was denied the opportunity to apply for a loan when a similarly situated woman would not have been denied. This difference in treatment of men and women, in the most elemental of ways, is what constitutes unlawful sex discrimination.⁴⁹

Plaintiff can certainly seek to show, based on the allegations in his complaint, that Park West Bank never declines to provide loan applications to women regardless of whether their appearance matches stereotypes of

⁴⁷. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 49 (1995).

⁴⁸. See, e.g., Case, *supra* note 47, at 22 n.60.

⁴⁹. See *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (pension plan that required women to make larger contributions than men violated Title VII prohibition against sex discrimination); *Laffey v. Northwest Airlines*, 366 F. Supp. 763 (D.D.C. 1973) (practice of restricting purser jobs at airline to men only was impermissible sex discrimination under Title VII); *Burkey v. Marshall Cty. Bd. of Ed.*, 513 F. Supp. 1084 (N.D.W. Va. 1983) (policy of restricting coaching positions for boys' sports to male teachers constitutes illegal discrimination under Title VII on the basis of sex). See also *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi v. Hogan*, 458 U.S. 718 (1982) (stereotypical views of men and women insufficient to justify different treatment in admission to nursing school); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (insufficient justification for different treatment of sexes); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (same).

femininity. At the same time, a developed record may show that the Defendant Park West Bank only permits men who look stereotypically masculine to apply for credit. At its heart, this states a claim of disparate treatment.

Even if Park West Bank's clothing requirement simply follows conventional norms of "appropriate" gender expression, Rosa may show that it allows a narrower range of permissible gender expression for men than for women. For example, it is hard to conceive, based on contemporary fashions that Park West Bank would deny any woman a loan application because of the gendered appearance of her dress—whether too masculine or too feminine—proving that there is neither facial nor formal equality with regard to permissible gender expression for men and women at Park West Bank. If women customers are not denied loan applications for their failure to meet a gendered stereotype, neither should Plaintiff.

Apart from the obviousness of the argument, significant social science data supports the conclusion that the range of permissible gender expression for men is narrower than it is for women.⁵⁰ A relaxing of gender norms for women, but not for men, has taken place throughout the workplace, including the legal profession.⁵¹ It would be unsurprising to be able to show that a similar relaxing of gender norms for women has taken place in places of public accommodation and as part of credit transactions. While it might be noted that a different range of acceptable gender expression for men and women is fairly ubiquitous, that does not obviate its impermissibility as a legal matter where a statute squarely forbids sex discrimination.

Because Plaintiff has alleged a difference in treatment of men and women by the Defendant, Plaintiff has set forth a viable claim adequate to withstand a motion to dismiss.

IV. The District Court Fundamentally Misconceived Both the Law as Applicable to the Plaintiff's Claim and the Proper Application of Rule 12(B)(6)

The District Court's Order incorrectly states that a requirement that "Rosa change his clothes [can] not give rise to claims of illegal discrimina-

⁵⁰. See Eleanor Emmons Macoby and Carol Nagy Jacklin, *The Psychology of Sex Differences* 284, 328 (1974) (parents much more tolerant of girls who exhibit "boy-like" behavior than they are of boys who exhibit "girl-like" behavior); Case, *supra* note 47, at 2–3; Donald R. McCreary, *The Male Role and Avoiding Femininity*, 31 *Sex Roles* 517, 518 (1994).

⁵¹. See, e.g., Martin Fox, *Bar Panel Tackles Sticky Issue of Appropriate Garb for Women*, N.Y.L.J., Dec. 23, 1991, at 1 (the wearing of "tailored pants suits" by women lawyers determined not to violate the Code of Professional Responsibility).

tion.” (App. 15, Judge’s Order.) This facile distinction between dress, on the one hand, and unlawful sex discrimination, on the other, as if, by definition, the two are necessarily separate and unrelated, is simply wrong both as a matter of law and fact. To the extent the Court is drawing a legal conclusion that claims grounded in dress requirements can never state a claim of sex discrimination, its ruling is simply wrong. Dress requirements have regularly been found to constitute prohibited sex discrimination. Moreover, this is true even in the employment context where it is less difficult to justify a sex-specific dress requirement than it is in the credit context before this Court.⁵² Alternatively, to the extent the Court is drawing a factual inference regarding the Bank’s motive in telling Rosa to go home and change, i.e., that the reason was dress and not sex, it may not do so consistent with Rule 12(b)(6).

A. *The District Court Erred in Holding That a Requirement That Rosa Change His Clothes to Conform to Gender Stereotypes Cannot Give Rise to a Claim of Illegal Sex Discrimination*

Dress codes and sex discrimination are not mutually exclusive categories. Courts have long recognized that dress requirements may constitute impermissible sex discrimination in the employment context for a variety of reasons.

Some courts have struck dress codes or appearance requirements because they were applied differently for men and women and were not supported by any permissible justification.⁵³ Others have said that a discriminatory application of even a sex-neutral dress code evidences bias.⁵⁴

⁵². It bears mention that there are no facts in the record to support an inference that Park West Bank’s refusal to provide Rosa a loan application was in any way connected to enforcing a dress code or appearance requirement. No suggestion that Park West Bank was acting in conformity with a dress code or appearance requirement, sex-specific or otherwise, was ever made by the Defendant either at argument or in the record below. Rosa addresses it here, nevertheless, as the District Court’s Order suggests that it may have been guided by a presumption the bank was acting consistent with some unarticulated dress requirement.

⁵³. See, e.g., *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (Continental’s desire to compete by featuring attractive female cabin attendants insufficient to support discriminatory weight requirement).

⁵⁴. See, e.g., *Tamimi v. Howard Johnson Co.*, 807 F.2d 1550, 1554 (11th Cir. 1987) (creation of facially neutral makeup rule evidence of pretext for sex discrimination); *Harding v. Good-year Tire and Rubber Co.*, 929 F. Supp. 1402, 1406 (D. Kan. 1996) (evidence that a “no tank tops” requirement only applied to female employee could support inference of sex discrimination).

Still others have found sex-specific dress code or appearance requirements discriminatory because they created a special disadvantage for an employee based on sex.⁵⁵ Finally, some courts have found sex-specific dress codes or appearance requirements impermissible because of the particular hardship that falls on one sex as a result.⁵⁶

In short, invocation of a “dress code” defense (should Defendant ever make one) does not immunize Park West Bank’s conduct from the structure of Title VII. Moreover, even in those cases where courts have upheld even sex-specific dress codes, they have done so because the dress or appearance requirement, though sex discriminatory, can be justified by business justifications reasonably related to the job.⁵⁷ Even assuming, *arguendo*, that an employer might be able to justify a dress code according to business needs in the employment context, there can be no plausible justification for basing creditworthiness determinations upon a person’s gendered appearance. Indeed, this is the precise evil that the ECOA was designed to address.

There is no relationship between creditworthiness and appearance. Sex stereotypical appearance bears no relationship to creditworthiness. Therefore, a requirement that Rosa appear in a sex stereotypical fashion before he can receive a loan application fits squarely within discriminatory conduct prohibited by the ECOA.⁵⁸

B. *The District Court Erred to the Extent It Resolved Questions of Fact About the Bank’s Reasons for Refusing to Provide Rosa With a Loan Application*

In circumventing Rosa’s straightforward sex discrimination claim, the District Court’s Order attempts either to dissociate dress from sex (*see Sec-*

⁵⁵. See, e.g., *Carroll v. Talman Fed. Sav. & Loan*, 604 F.2d 1028, 1030 (7th Cir. 1979) (striking dress code that required women to wear a uniform but allowing men to wear business suits); *O’Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263, 266 (S.D. Ohio 1987) (dress code requiring female sales clerks to wear “smock” while allowing male sales clerks to wear shirt and tie impermissible, even absent discriminatory motive, because it perpetuated sex stereotypes).

⁵⁶. See, e.g., *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (sexually provocative uniform requirement impermissible); *Marentette v. Michigan Host Inc.*, 506 F. Supp. 909, 912 (E.D. Mich. 1980) (sexually provocative dress code unreasonable).

⁵⁷. See *Carroll*, 604 F.2d at 1033 (some courts have permissibly upheld sex-specific dress codes where reasonably related to “employer’s business needs.”).

⁵⁸. Pub. L. No. 93-495 § 502, 88 Stat. 1500, 1521 (1974) (one of the purposes of the ECOA was to ensure that credit would be available to all creditworthy customers without regard to sex).

tion IV.A., above) or to remove the Plaintiff's sex from the Defendant's basis for its action. In the words of the District Court, "the issue in this case is not [Plaintiff's] sex, but rather how he chose to dress when applying for a loan." (App. 14, Judge's Order.) In short, the Order makes a factual determination that Lucas Rosa's case merely involved the Bank's telling him what to wear and nothing more. This is only possible by looking past the allegations of the Complaint and improperly resolving the factual question of whether sex was a factor behind the lender's decision not to provide Rosa with a loan application—e.g. whether the appearance requirement was a sex-based one.

Regardless of whether the court ultimately credits the allegation that sex was a motivating factor, (App. 6, Plaintiff's Complaint ¶ 20), the appellant's complaint states a claim. The District Court's Order improperly rejected Rosa's characterization of the Bank's reason for denying him a loan application, a logical factual inference to be drawn from the allegation that the loan officer refused to provide him a loan application until he "went home and changed" to appear more traditionally masculine. (App. 5, Plaintiff's Complaint ¶¶ 12, 13.) While it will certainly be the province of the factfinder (later on) to decide if Rosa can sufficiently support his allegations, it would be improper on a motion to dismiss to discredit a properly plead allegation of the reason for the Bank's refusal.⁵⁹

V. The District Court Erred in Dismissing the State Law Claims for Want of Jurisdiction

The only ground for dismissing the state law claims, according to the District Court's Bench Order, (App. 15, Judge's Order), was "for want of jurisdiction" where the court dismissed the only federal question in the case. Once it is clear that the federal claim properly survives a Rule 12(b)(6) motion to dismiss, (see Sections II, III, and IV, above) the District Court's justification for dismissing the state law claims dissolves. Accordingly, because the District Court improperly dismissed the ECOA claim, it improperly dismissed the state law claims.

Conclusion

⁵⁹. See *Moore v. U.S. Dep't of Agriculture*, 993 F.2d 1222, 1224 (5th Cir. 1993) (plaintiff stated a race discrimination claim where FMHA refused to process requests from white applicants regardless of what facts might be later shown regarding qualifications or effect of discrimination).

For the foregoing reasons, this Court should determine that Lucas Rosa has stated a valid claim under the ECOA, vacate the District Court order dismissing the claim, reinstate the ECOA and state law claims and remand for further proceedings.

Date: 1/28/00

Amicus Curiae Brief Of Now Legal Defense And Education
Fund And Equal Rights
Advocates In Support Of Plaintiff-Appellant And In Support Of
Reversal

in the UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

LUCAS ROSA

V.

PARK WEST BANK AND TRUST COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF MASSACHUSETTS†

Katherine M. Franke

† In publishing this brief, the *Michigan Journal of Gender & Law* has made no editorial changes other than correcting any spelling errors and changing citation form to conform with the *Bluebook* 17th edition.

I. Identity of the Amici

NOW Legal Defense and Education Fund (“NOW LDEF”) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women as a separate organization. NOW LDEF has appeared as amicus in numerous cases involving sex stereotyping as a form of sex discrimination, including *Price Waterhouse v. Hopkins*,⁶⁰ and *Fisher v. Vassar College*.⁶¹

Equal Rights Advocates (“ERA”) is one of the oldest public interest law firms specializing in educational and litigation efforts to eliminate gender discrimination and secure equal rights. Begun in 1974 as a teaching law firm focused on sex-based discrimination, ERA has evolved into a legal organization with a multi-faceted approach to addressing issues of gender discrimination. Its current work includes impact litigation, advice and counseling, public education, and public policy initiatives. ERA’s interest in this case is based on the organization’s commitment to fighting discrimination on the basis of sex stereotyping. ERA’s amicus work in the area of sex stereotyping discrimination includes *Price Waterhouse v. Hopkins*,⁶² and *Fisher v. Vassar College*.⁶³

II. Summary of the Argument

By dismissing the plaintiff’s complaint under the Equal Credit Opportunity Act (“ECOA”) on the ground that “the issue in this case is not [Rosa’s] sex, but rather how he chose to dress when applying for a loan” (Bench Order at 1), the lower court erroneously established that there are no set of facts in which clothing-based sex stereotyping can form the basis of a legitimate claim of sex discrimination in access to credit. This view of the meaning and scope of the ECOA runs contrary to well-established Supreme Court precedent which prohibits, *inter alia*, the adverse treatment of a man or a woman for his or her failure to conform to traditional sex stereotypes—whether it be the expectation that men should be breadwinners, or that women should be feminine.⁶⁴

60. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

61. *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).

62. *Price Waterhouse*, 490 U.S. at 228.

63. *Fisher*, 114 F.3d at 1332.

64. See *e.g.*, *Price Waterhouse*, 490 U.S. at 228 (employer may not refuse partnership to a woman who was considered to be too masculine); *Weinberger v. Wiesenfeld*, 420 U.S.

Further, to rule, as did the lower court, that stereotypes associated with proper “men’s” and “women’s” clothing is a matter separate and apart from sex discrimination, is to ignore the significant role that dress reform has played in efforts to achieve gender equality for women—from rejecting the wearing of corsets to demands to be permitted to wear trousers in the workplace. Further, the lower court’s ruling denies a large body of psychological research that demonstrates the cognitive role that clothing plays in the use of sex stereotypes in the workplace and other market settings.

Thus, the lower court erred in holding, as a matter of law, that there can be no relation between clothing-based sex stereotypes and sex discrimination under the ECOA.

III. Argument

A. *The District Court Erred in Rejecting Plaintiff’s Claim of Sex-Based Disparate Treatment*

The trial court in the instant case dismissed the plaintiff’s claim of sex discrimination in access to credit on the ground that “the issue in this case is not [Rosa’s] sex, but rather how he chose to dress when applying for a loan.” (Bench order at 1.) Yet time and again the Supreme Court has interpreted sex discrimination prohibitions to apply to men and women who do not conform to traditional norms with respect to how the different sexes are “supposed to” look or behave. In case after case the Court has held that federal law prohibits disparate treatment of men or women on the basis of stereotypic assumptions about who is or should be the breadwinner in the family, who is or should be the primary caretaker for children, and how a person should dress in conformance with gender norms that dictate feminine dress for women and masculine dress for men. The Supreme Court’s ruling in *Price Waterhouse v. Hopkins*,⁶⁵ represents the culmination of a long line of Supreme Court cases in which principles of sex discrimination were grounded in a prohibition against sex stereotyping.

The Supreme Court’s sex equality jurisprudence has progressed through a number of stages. Initially, the Court sanctioned the separate spheres doctrine, turning away challenges to state laws that prohibited

636 (1975) (improper to set award of public benefits on the automatic presumption that wives are economically dependent upon their husbands, and husbands are not so dependent upon their wives).

65. *Price Waterhouse*, 490 U.S. at 228.

women from practicing law,⁶⁶ and denying them licenses to serve alcohol unless they were employed by their husbands or fathers.⁶⁷ In the 1970s the Court began to take a different tack in its approach to sex discrimination claims. Having previously endorsed policies grounded in sexual stereotypes regarding the proper roles, abilities and positions of women and men in the home and in public, in 1973 the Court began to question the legitimacy of these same stereotypes. Numerous cases established the Court's view that the legal wrong of sex discrimination lay in the problem of the illegitimacy of decisions based upon gender stereotypes.⁶⁸

In these cases, the Court established a rule that it was unfair to judge the qualifications, merits or traits of an individual based upon gross generalizations or stereotypes about the class—male or female—to which that person belonged. This was the case even if the application of those generalizations might hold true for some or many members of the class, and the use of the generalization was, therefore, a relatively efficient or administratively convenient way of allocating resources, or resolving disputes.⁶⁹

66. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

67. See *Goesaert v. Cleary*, 335 U.S. 464 (1948).

68. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (reasoning that maternal and paternal roles are not invariably different in importance and holding that the Equal Protection Clause was violated by the sex-based *distinction between* unmarried mothers and unmarried fathers in New York domestic relations law); *Orr v. Orr*, 440 U.S. 268, 279 (1979) (holding that gender-based alimony statute violated equal protection and could not be validated on basis of state's preference for allocation of family responsibilities in which wife plays a dependent role); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (holding that Social Security Act's gender-based distinction between widows and widowers violated due process and equal protection and discriminated against covered female wage earners); *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975) (disparate treatment of men and women in Naval promotion schedules does not reflect "archaic and overbroad generalizations" about the relative abilities of men and women); *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (statutory distinction between males and females, which resulted in appellee's liability for child support for a daughter only to age 18 but for a son to age 21, found unconstitutional); *Weinberger*, 420 U.S. at 645 (Social Security Act provision that granted survivors' benefits to widows, but not widowers, was grounded in the impermissible gender-based generalization that men are more likely than women to be the primary supporters of their spouses and children); *Kahn v. Shevin*, 416 U.S. 351, 352 (1974) (challenge to Florida statute giving widows but not widowers a \$500 exemption from property taxation); *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973) (striking down statutes that granted automatic presumption that wives of male uniformed service members were economically dependent upon their husbands for purposes of obtaining increased quarters allowances and medical, and dental benefits, but that spouses of female members were not so dependent); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (invalidating Idaho probate statute which granted preference to males over equally qualified females in the administration of estates).

69. See *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) ("Even a true generalization about the class is an insufficient reason for disqualifying an

According to the Court, the abilities and needs of each person must be assessed on an individualized basis, not by resort to group-based generalizations or stereotypes.

Most interesting, for present purposes, is the fact that a great many of the cases through which the Supreme Court chose to develop its modern sex discrimination jurisprudence involved claims in which men were the victims of sex-based stereotypic thinking. Thus, in *Weinberger*,⁷⁰ the Court invalidated a federal Social Security death benefit policy that paid benefits only to surviving widows/mothers, but not to widowers/fathers, on the grounds that the gender-based classification illegitimately frustrated the desires of fathers, such as Stephen Wiesenfeld, to stay home and care for their dependent children since

[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the “companionship, care, custody, and management” of “the children he has sired and raised” . . .⁷¹

The Court applied similar reasoning in *Califano*,⁷² when a widower challenged a Social Security rule that extended survivors’ benefits to widows but not widowers on the assumption that widowers, as a rule, were not likely to have been dependent upon their wives, whereas it was fair to assume that widows have been so dependent upon their former husbands. The statute was held unconstitutional because it was “supported by no more substantial justification than ‘archaic and overbroad’ generalizations . . . or ‘old notions,’ . . . such as ‘assumptions as to dependency,’ . . . that are more consistent with ‘the role-typing society has long imposed. . . .’”⁷³

*Mississippi University for Women v. Hogan*⁷⁴ represented the culmination of the Supreme Court’s jurisprudence of sex equality articulated through claims brought by men. In *Hogan*, the Court struck down the admissions policies of a state-run nursing school that refused to admit men

individual to whom the generalization does not apply.”); *Reed*, 404 U.S. at 76 (“To give a mandatory preference to members of either sex over members of the other, merely [on the grounds of administrative convenience] is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. . . .”).

70. *Weinberger*, 420 U.S. at 652–53.

71. *Weinberger*, 420 U.S. at 652.

72. *Califano*, 430 U.S. at 199–206.

73. *Califano*, 430 U.S. at 207 (citations omitted). See also *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 152 (1980) (Missouri workers’ compensation death benefit paid to widows but not widowers held to discriminate on the basis of sex).

74. 458 U.S. 718 (1982).

on the ground that such a policy perpetuates “the stereotyped view of nursing as an exclusively woman’s job.”⁷⁵

The Supreme Court treated each of these cases in which male plaintiffs successfully challenged policies that discriminated against them on the basis of their non-conformance with gender stereotypes, not as strange outliers that pushed the boundaries of the sex equality norm, but rather as central cases in which the Court articulated its core commitments to sex-based equality. “The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny.”⁷⁶

What is more, the normative force of these cases lay in the manner in which the policies at issue punished men who chose to defy larger cultural expectations with respect to *parenting* responsibilities.⁷⁷ Indeed, in *Orr*, Justice Brennan was troubled by a rule that failed to recognize “family units [that] defied the stereotype and left the husband dependent on the wife.”⁷⁸

The Supreme Court’s modern sex discrimination jurisprudence has primarily taken aim at two forms of sex stereotyping: policies and practices that reward conformance to certain over-broad and unfounded class-based assumptions about the relative strengths and weaknesses of men and women, and policies and practices that punish men and women for their failure to conform to stereotypic expectations about who men and women are or should be. Thus, by 1978 the Court was comfortable concluding that “[i]t is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”⁷⁹

The Court’s stereotyping jurisprudence reached its most mature stage in *Price Waterhouse v. Hopkins*,⁸⁰ in which Ann Hopkins was denied partnership at a prominent accounting firm because the firm’s male partners considered her to be too masculine. In fact, Price Waterhouse’s partners placed Hopkins in an impossible double bind: “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22.”⁸¹ Thus the Court

75. *Hogan*, 458 U.S. at 729.

76. *Orr v. Orr*, 440 U.S. 268, 279 (1978) (citations omitted). “[G]ender-based discriminations against men have been invalidated when they do not ‘serve important governmental objectives and (are not) substantially related to the achievement of those objectives.’” *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (citations omitted).

77. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 389 (1978); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1974). Regarding who should be the “breadwinner” in the family, see, e.g., *Orr*, 440 U.S. at 282–84; *Califano*, 430 U.S. at 199.

78. *Orr*, 440 U.S. at 282.

79. *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

80. 490 U.S. 228 (1989).

81. *Price Waterhouse*, 490 U.S. at 251.

held that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁸² Here, as in the Court’s earlier sex discrimination cases, sex stereotyping lay at the core of the discriminatory wrong: “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . . .”⁸³

In light of this well-established precedent, the trial court’s holding in this case fails to appreciate the nature of the wrong of sex discrimination as articulated by the Supreme Court over the last three decades. Rosa’s claim that he was discriminated against on the basis of his sex when he was refused a loan application by defendant Park West Bank raises an issue of sex-based disparate treatment no less central to anti-discrimination law than that raised by Joseph Frontiero and Leon Goldfarb, men who were economically dependent upon their wives; Stephen Wiesenfeld, a man who wanted to be the primary caretaker for his children; Joe Hogan, a man who wanted to be a nurse; or Ann Hopkins, a woman who was told she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁸⁴ In essence, Mr. Rosa was told that he would be given a loan application from Park West Bank if, and only if, he would walk more masculinely, dress more masculinely, remove his makeup, have his hair cut, and wear no jewelry. In other words, if he conformed to traditional stereotypes about what a man is supposed to look like and how he is supposed to behave.⁸⁵

Indeed, it is well-settled in the First Circuit that prohibitions against sex discrimination include improper sex stereotyping. In *Higgins v. New Balance Athletic Shoe, Inc.*,⁸⁶ Judge Selya wrote that, “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity,⁸⁷ a man can

82. *Price Waterhouse*, 490 U.S. at 250.

83. *Price Waterhouse*, 490 U.S. at 251.

84. *Price Waterhouse*, 490 U.S. at 235 (internal quotations omitted).

85. See Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *Yale L.J.* 1, 47 (1995). See also *Flynn v. Goldman, Sachs & Co.*, No. 91 Civ. 0035 (KMW), 1993 WL 336957, at *4 (S.D.N.Y. Sept. 2, 1993) (defendant’s summary judgment motion denied where female plaintiff who had been demoted and then terminated from employment “has produced sufficient evidence for a rational factfinder to infer that Scott’s rejection of plaintiff was motivated by a male coworker’s belief that plaintiff was too aggressive.”).

86. 194 F.3d 252 (1st Cir. 1999).

87. See *Price Waterhouse*, 490 U.S. at 250–51.

ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”⁸⁸

For a man to be denied access to credit on the basis of traits that would have been welcome if found in a woman is sex discrimination, plain and simple. Judge Freedman’s ruling below i) that “the issue in this case is not his sex,” (Bench Order at I), and ii) that there is no set of facts upon which the gender non-conformance of a man might constitute sex discrimination, ignores the Supreme Court’s and First Circuit’s repeated insistence that sex discrimination laws are designed to “‘strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’”⁸⁹ Whatever its ultimate strength on the facts, this claim is not amenable to dismissal as a matter of law on a 12(b)(6) motion.

B. *There Is a Close Relationship Between Clothing and Sex Discrimination*

As *amici* have shown above, Rosa has stated a claim of sex discrimination that comfortably fits within the Supreme Court’s sex-stereotyping jurisprudence. In addition, the District Court’s holding that the ECOA “does not prohibit discrimination based on the manner in which someone dresses,” (Bench Order at 1–2), ignores both the role of dress reform in the history of struggles for women’s equality, as well as social science research documenting the close link between clothing and sex stereotypes.

1. Clothing Has Always Played a Role In Struggles For Women’s Equality

Laws requiring women and men to wear particular clothing, or prohibiting men and women from wearing the “wrong” clothing, find their

88. *Higgins*, 194 F.3d at 261 n.4. See also Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev. 1, 96 (1995) (“If a woman cannot be punished or harassed for failing to demonstrate her femininity in accordance with some acceptable norm, then the same can and must be said about men and masculinity.”)

89. *Price Waterhouse*, 490 U.S. at 251, (citing *Manhart*, 435 U.S. at 707 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))). See also *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999).

origins in Elizabethan sumptuary laws,⁹⁰ and were reflected in the first sets of laws enacted by early settlers in North America. Indeed, the governors of the Massachusetts Bay colony considered it essential to the public order that colonists' dress be strictly regulated, and a Boston judge held in 1638 that "the elders' wives were themselves party to the general disorder of apparel."⁹¹

The reform of gendered clothing norms has always figured centrally in movements for women's equality in the United States. Antebellum feminists explicitly and consistently connected demands for women's equality to reform of oppressive clothing norms for women.⁹²

In the 1890s a group of women in Massachusetts interested in advancing dress reform formed an organization called the Dress Reform Club of Boston, and staged various public demonstrations to illustrate the need for more practical clothing for women.⁹³ The significance of clothing reform to women has persisted in 20th Century struggles for women's equality in challenges to workplace rules that prohibited women from wearing pants,⁹⁴ forced them to wear sexually suggestive attire,⁹⁵ or demanded that they wear high heels.⁹⁶

Thus, the District Court's order, severing clothing norms from the subject of sex discrimination, denies a history in which dress reform has played a key role in the struggles for women's equality.

90. See Alan Hunt, *Governance of the Consuming Passion: A History of Sumptuary Law* 17–41 (1996). Hunt convincingly demonstrates that laws regulating clothing have always been based in status distinctions. Originally adopted as a means of enforcing social and economic class-based distinctions by prohibiting one from "dressing above one's rank," *id.* at 39, toward the end of the thirteenth century the law began to enforce sharp sexual distinctions in clothes. *Id.* at 217.

91. David Flaherty, *Privacy in Colonial New England 185* (1972); Nathaniel Shurtleff, *The Records of the Governor and Company of the Massachusetts Bay Company [1853]* (1968); Alan Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* 38–39 (1996).

92. See, e.g., Sarah M. Grimké, *Letters on Equality of the Sexes, and the Condition of Woman* (1838) (Characterizing women's clothing as "absurd" and "degrading," commentators in the 1850's observed that "your dress movement involves the whole Woman's Rights Cause.") Gerrit Smith, *The Sibyl: A Review of The Tastes, Errors, and Fashions of Society, Devoted to Dress Reform* 178 (June 1, 1857); Robert E. Riegel, *Women's Clothes and Women's Rights*, 15 *Am. Q.* 390, 390 (1963).

93. See Riegel, *supra* note 92, at 398.

94. See *Lanigan v. Bartlett and Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979).

95. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981); *Priest v. Rotary*, 624 F. Supp. 571, 581 (N.D. Cal. 1986).

96. See, e.g., Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 *J. Corp. L.* 295 (1997).

2. Psychological Research Has Demonstrated a Clear Link Between Clothing and Gender Stereotypes

Quite frequently, courts have turned to social science research in order to identify exactly the nature and scope of the “entire spectrum” of sex-stereotyping.⁹⁷ For present purposes, ample psychological research has documented the manner in which masculine clothing communicates competence; femininity communicates incompetence; men have less freedom than women to dress in gender non-conforming ways; and men who do not wear “appropriately masculine” attire suffer considerable discrimination in a spectrum of settings. All of this research demonstrates the manner in which gendered clothing norms reflect and perpetuate sex-stereotyping of the type proscribed by federal sex discrimination laws, and recognized by the Supreme Court in *Price Waterhouse*.⁹⁸

Current research by cognitive psychologists is helpful in illuminating the ways in which gender-based stereotypes are activated immediately upon meeting a person, through a process termed “implicit stereotyping.”⁹⁹ These seemingly automatic cognitive shortcuts allow us to perceive other people by grouping them into preexisting social categories—by sex, race, or age for instance—and, then treating category members alike, thus “avoid[ing] the effort involved in perceiving each person as a wholly new stimulus about whom they know nothing.”¹⁰⁰

“Implicit stereotyping” allows us to engage in this kind of category-based perception by applying, *inter alia*, gender-based schemas to the interpretation of other people’s behavior or physical demeanor. We use these gender-based schemas unless there is some reason to believe oth-

97. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *Harper v. Southeast Alabama Med. Ctr.*, 998 F. Supp. 1289, 1296–97 (M.D. Ala. 1998); *Butler v. Home Depot*, 984 F. Supp. 1257, 1259 (N.D. Cal. 1997); *Mann v. Montgomery*, No. 84 C 11020, 1994 WL 383905, at *3 (N.D. Ill. July 19, 1994); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1257, 1486, 1502–09 (M.D. Fla. 1991); *Namenwirth v. Bd. of Regents*, 769 F.2d 1235, 1239 n.2 (7th Cir. 1985).

98. *Price Waterhouse*, 490 U.S. at 250–52.

99. See generally Mahzarin Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 *Psychol. Sci.* 136 (1996); Mahzarin R. Banaji, Curtis D. Hardin & Alexander J. Rothman, *Implicit Stereotyping in Personal Judgement*, 65 *J. of Personality and Soc. Psychol.* 272 (1993).

100. Peter Glick & Susan T. Fiske, *Gender, Power Dynamics, and Social Interaction*, in *Revisiting Gender* 365, 371 (Myra Marx Ferree, Judith Lorber & Beth B. Hess eds., 1999).

erwise: people act “as if the *burden of proof* lies on showing that the [gender] characteristics are not relevant to their task.”¹⁰¹

Thus, these cognitive short cuts operate as a kind of “labor-saving device,”¹⁰² that both reflect and perpetuate gender stereotypes particularly where, as here, the parties’ encounter is both short and relatively superficial.

There are particular dangers at risk when gender-based schemas are used to determine loan-worthiness, managerial abilities, or other business-related criteria in the workplace and financial or other market-based contexts. This is the case because masculinity and femininity are not regarded as symmetrical social statuses. To be interpreted according to a masculine schema is to be attributed a higher status than if one were assigned the traits associated with feminine schema. Masculinity typically denotes dominance, autonomy, aggressiveness, competence, objectivity, competitiveness, dependability and leadership, whereas femininity typically translates as deference, nurturance, passivity, cooperativeness and incompetence.¹⁰³ Thus, as cognitive psychologists have found, those people who are “read” as feminine are treated as lower status, while those people “read” as masculine are treated as higher status.¹⁰⁴

These “facts” of social cognition have been born out in a number of different contexts, and have formed the basis of more complex studies of the ways in which asymmetrical gender norms operate in market-based interactions. For instance, banking executives and marketing managers were shown to perceive applicants for management positions as more forceful, aggressive, dynamic, and decisive in direct proportion to how masculinely the applicant dressed. *This was true regardless of the sex of the interviewer.*¹⁰⁵ Similarly, in *Gender Trials*, Jennifer L. Pierce undertook an in-depth study of the ways in which gender stereotypes work in large law firms. She found that masculine behavior, understood as aggressiveness, adversarialness, machoness, dominance, and “Rambo” litigation

101. Joseph Berger, D.G. Wagner & Morris Zelditch, *Introduction: Expectation States Theory: Review and Assessment*, in *Status, Rewards, and Influence: How Expectations Organize Behavior* (Joseph Berger & Morris Zelditch, Jr., eds., 1985).

102. See Glick & Fiske, *Gender, Power Dynamics, and Social Interaction*, *supra* note 100, at 371.

103. See, e.g., Deborah L. Best and John E. Williams, *A Cross-Cultural Viewpoint*, in *The Psychology of Gender* 215 (Anne E. Beall & Robert J. Sternberg, eds., 1993); Virginia Ellen Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics*, 57 *J. of Applied Psychol.* 95, 98 (1973).

104. See, e.g., Michael Conway, et al., *Status, Communalty, and Agency: Implications for Stereotypes of Gender and Other Groups*, 71 *J. of Personality and Soc. Psychol.* 25 (1996).

105. Sandra M. Forsythe, *Effect of Applicant's Clothing on Interviewer's Decision to Hire*, 20 *J. of Applied Soc. Psychol.* 1579 (1990).

style was rewarded in both male and female attorneys, and that those who exhibited feminine behavior enjoyed lower status and positions within most firms.¹⁰⁶ Indeed, those men who failed to “do dominance” according to the gender-based expectations at work in the firms were feminized in the process,¹⁰⁷ and thereby enjoyed lower status in their firm.

In roughly twenty-five years, many workplaces and other market contexts have evolved in the enforcement of gender norms from regimes that required women to wear dresses, to laws making it illegal to refuse to permit an employee to wear pants.¹⁰⁸ As women have entered the wage labor market in greater numbers, they have been encouraged to present themselves in more masculine demeanor, given that competence and success are defined in masculine terms.¹⁰⁹ Indeed, these principles have been brought into the courtroom as well—surely a domain that demands decorum, professionalism and appropriate attire of the counsel who appear therein.¹¹⁰

Thus, robust enforcement of sex discrimination laws in various aspects of public life have afforded women a broader range of acceptable attire. A case filed today similar to *Lanigan v. Bartlett & Co. Grain*,¹¹¹ in which a female employee was fired for wearing pants to work, would surely be viewed by almost any court as presenting an easy case of sex discrimination. Yet men have not similarly benefitted from the victories of sex discrimination litigation over the last quarter century. While it is acceptable for women to perform what has been traditionally regarded as men’s work (e.g., practicing medicine or law) as well as women’s work (e.g., nursing or childcare), and women have the option of dressing in more feminine or masculine clothing, men continue to confront rigid gen-

106. See Jennifer L. Pierce, *Gender Trials* 50–82 (1995).

107. Pierce, *supra* note 106, at 52.

108. Compare *Lanigan v. Bartlett and Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979) (employer permitted to refuse women the right to wear pants in the workplace) with Cal. Gov’t Code § 12947.5 (West 1994) (“[i]t shall be an unlawful employment practice for an employer to refuse to permit an employee to wear pants on account of the sex of the employee.”).

109. Yet, there is a limit to the extent to which decision-makers will tolerate masculinity in women. Ann Hopkins encountered that limit. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

110. See *In re De Carlo*, 357 A.2d 273, 274–75 (1976) (reversal of contempt order issued against female attorney who appeared in court in slacks [and a sweater]); NYCLA Eth. Op. 688, 1991 WL 755944, at *3 (N.Y. Cty. Law. Assn. Comm. Prof. Eth.) (“The Code of Professional Responsibility does not prohibit a female lawyer from wearing appropriately tailored pant suits or other pant-based outfits in a court appearance”).

111. *Lanigan*, 466 F. Supp. at 1388.

der norms that form the basis of chastisement or disapprobation when they perform women's work or dress in more feminine manners.¹¹²

Again, the social science literature has documented an asymmetry in the ways gender norms are enforced against women and men. Saul Fineman has shown how and why boys who perform cross-sex-role behavior receive more disapproval than do girls.¹¹³ First, his results indicate that boys pay a much higher price when they act "like girls," than do girls when they act "like boys"; "it is worse to be a sissy than a tomboy."¹¹⁴ But he also found that "male-role behavior is more highly approved than female-role behavior for male and female actors."¹¹⁵ His findings revealed that when females acted femininely they were regarded as enacting female-role *behavior*, and when they acted masculinely they were seen as enacting *person-role behavior*. However, for males, performance of masculine behavior satisfied the person-role and the male-role, yet the performance of feminine behavior satisfied no role behavior expectations.¹¹⁶ In other words, masculine-behaving females were understood to be acting like a person, and feminine-behaving males were understood to be strange.

Thus, Judge Freedman's characterization of Rosa's complaint as having nothing to do with sex discrimination, but merely addressing "discrimination on the basis of the manner in which someone dresses," (Bench Order at 1-2), is to overlook, if not to deny, the cultural significance of the clothes Rosa was wearing when he was summarily rejected for a loan application. The notion that there is proper men's clothing and proper women's clothing is, without question, grounded in cultural gender norms.¹¹⁷ These norms operate differently for men than they do for women, in so far as women are given greater latitude to dress in either masculine or feminine attire, and femininity has been shown to represent lower status and lower competence. As such, this Court should reject an interpretation of the ECOA that denies any connection between sex discrimination, gender norms and clothing. If Judge Freedman were correct that distinctions based upon clothing or other attire are irrelevant to sex discrimination prohibitions, then a loan officer would be free to deny a loan to a woman because she looked too "frilly," on the assumption that women who dress in an extremely feminine manner most likely have not had experience

112. See, e.g., Susan Hesselbart, *Women Doctors Win and Male Nurses Lose: A Study of Sex Role and Occupational Stereotypes*, 4 Soc. of Work and Occupations 49 (1977).

113. See Saul Fineman, *Why Is Cross-Sex-Role Behavior More Approved for Girls than for Boys? A Status Characteristic Approach*, 7 Sex Roles 289 (1981).

114. Fineman, *supra* note 113, at 297.

115. Fineman, *supra* note 113, at 297.

116. See Fineman, *supra* note 113, at 297.

117. See Franke, *supra* note 88, at 58-69.

managing financial matters, or to prefer extending credit to men who wear masculine business attire, since that business attire might indicate greater experience handling financial affairs. In either of these cases, the loan officer would be making credit-worthiness determinations based on gendered stereotypes, the precise evil the ECOA was enacted to prevent.

Conclusion

For the foregoing reasons, this Court should determine that the plaintiff has stated a valid claim of sex discrimination under the ECOA and remand the case to the District Court for further proceedings.

Date: February 3, 2000

EPILOGUE

Jennifer L. Levi

The First Circuit reversed the district court's order dismissing Lucas Rosa's claim against Park West Bank.¹¹⁸ The appeals court's reversal seems to be part of an emerging nationwide rejection of cases from the 1970s and 1980s¹¹⁹ in which courts summarily dismissed sex discrimination claims brought by transgender plaintiffs, no matter how squarely the facts appeared to present a clear-cut case of discrimination based on sex.¹²⁰ Creating what appeared to be a "transgender" exception to sex discrimination law, those earlier courts ignored what the First Circuit recognized here—that a bank officer who tells an applicant to go home, change, and return presenting a more masculine appearance may very well have engaged in sex discrimination, even where the applicant may fairly be characterized as transgender or "cross-dressing."¹²¹

If anything useful can be gleaned from earlier cases excluding transgender people from any protection under sex discrimination laws, it is that as hard as it may be for judges to understand the harms caused by sex discrimination, it is even harder for them to do so when it is a transgender person who is being harmed. One of the most disturbing aspects of early exclusionary cases is the lengths to which courts went to explain away the discriminatory and adverse treatment experienced by transgender plaintiffs, many of whom were male-to-female transsexual women.

Fortunately, as Katherine Franke explained in her *Rosa* amicus brief, as sex discrimination jurisprudence has matured, more courts have moved beyond the simplistic, biologicistic model of sex discrimination on which early cases relied. As the amicus brief detailed, over time courts have recognized the harm of sex discrimination whether experienced by men or women. As part of this evolution in understanding, courts also came to

¹¹⁸. Lucas Rosa v. Park West Bank and Trust Co., 214 F.3d 213 (1st Cir. 2000).

¹¹⁹. See, e.g., Holloway v. Arthur Anderson & Company, 566 F.2d 659, 662–63 (9th Cir. 1977); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).

¹²⁰. See, e.g., Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that *Price Waterhouse* overruled "cases like Holloway" and that under *Price Waterhouse*, "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."); Doe v. Yunits (C.A. No. 00-1060-A (Superior Court of Commonwealth of Massachusetts), No. 2000-J-638 (Appeals Court of the Commonwealth of Massachusetts)); State of Connecticut Commission on Human Rights and Opportunities (CHRO) Declaratory Ruling on Behalf of John/Jane Doe (November 9, 2000).

¹²¹. For a discussion of those "cases like Holloway," *Schwenk*, 204 F.2d at 1202, see article by Minter and Currah in forthcoming *William & Mary Journal of Gender*, volume 7.

recognize the harm of not just disfavoring females but also in disfavoring feminine roles. It is perhaps this broader understanding of the specific harms of sex discrimination as including the disfavoring of femininity (and masculinity by extension) that has enabled courts to see the harms of sex discrimination even when suffered by transgender people.

Rosa's case is important both because it continues to challenge our understanding of the harms caused by devaluing and disfavoring characteristics associated with femininity and because it recognizes that a person fairly characterized as transgender may have a claim of sex discrimination where it is her gender that is at the root of the different treatment. Rosa's case is challenging in a context in which many people still hold fast to unquestioned stereotypes—that is, in the context of gendered prescriptions about “appropriate” modes of dress and appearance. While society has shifted its understanding about the “appropriate” roles of women (and men) in employment,¹²² post-secondary education,¹²³ and family life,¹²⁴ it has been slower to recognize the related and often equally damaging harms caused by enforcing gendered stereotypes about appearance—e.g. men should look like men and women should look like women.¹²⁵

Fortunately for Rosa and other visibly gender nonconforming plaintiffs, the First Circuit was able to see past courts' previously limited views to recognize that sex discrimination on the basis of clothing and appearance is just as discriminatory and may be just as harmful as other, more widely recognized forms of discrimination. Sex discrimination is harmful to both women and men. Sending a female applicant home because she is perceived to be “too” feminine would be no less harmful to the loan applicant, also perceived to be “too” feminine, who turned out not to be biologically female or otherwise fit into the narrowly prescribed box of individuals who are deemed female. In other words, neither the facts (nor history) of one's biology can transform the experience or the effect of discrimination. What is surprising then is not the result in this case but that it has taken courts so long to understand something so simple.

¹²². Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

¹²³. U.S. v. Virginia, 518 U.S. 515 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

¹²⁴. Orr v. Orr, 440 U.S. 268, 279 (1982).

¹²⁵. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998).