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Crash Landing: The Airline Industry's Failing Efforts to Remedy Its Sexist and Discriminatory Practices Towards Flight Attendants

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**CRASH LANDING: THE AIRLINE INDUSTRY'S
FAILING EFFORTS TO REMEDY ITS SEXIST AND
DISCRIMINATORY PRACTICES TOWARDS
FLIGHT ATTENDANTS**

ELISE GONZALEZ*

ABSTRACT

Since the deregulation of the airline industry, flight attendants have become the friendly faces and hallmark of airline brands across the globe. However, airlines went to unconstitutional heights to ensure that flight attendants looked, behaved, and acted in compliance with conservative and outdated notions about gender and sexuality. Piece by piece, the airline industry's strict and misogynist policies that regulated female flight attendants' appearance were declared a violation of Title VII of the Civil Rights Act; however, the sexist policies and attitudes maintain a pervasive and insidious presence in the modern airline industry.

Moreover, the airline industry's dress and appearance policies aim to reinforce traditional and binary gender distinctions. Although Title VII has provided legal protection against workplace discrimination based on sex, courts and legislatures were divided on Title VII's application to individuals who diverged from traditional and binary gender distinctions. However, the Supreme Court's landmark ruling in *Bostock v. Clayton County* ended this split by interpreting Title VII to protect employees against discrimination based on sexuality and gender identity. When paired with society's increasing acceptance of gender fluidity and individual autonomy, *Bostock* has the potential to render gendered dress codes obsolete and unconstitutional.

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The airline industry's sexist history paired with its strict, traditional, and gendered dress and appearance policies makes it a prime defendant in a Title VII suit to test the applicability of *Bostock* to gendered employment policies.

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I. FLIGHT BOARDING: INTRODUCTION

THE ONCE-COVETED PROFESSION of an airline “stewardess” has evolved in name, uniform, and stereotype since commercial airplanes first took flight. Airlines promised passengers a first-class experience by hiring young, female flight attendants who were required to wear miniskirts and maintain a specific weight to achieve the desired allure and sex appeal.¹ However, the passage of Title VII of the Civil Rights Act forced the airline industry to rebrand because it invalidated several airline policies on the basis of sex discrimination.² Thus, the sexualized image of the stewardess descended and the emergence of the flight attendant took off.³

Despite undergoing significant reform, the airline industry continues to hold onto its sexist and discriminatory baggage. Airlines continue to highly regulate the dress and appearance of

¹ See KATHLEEN M. BARRY, *FEMININITY IN FLIGHT: A HISTORY OF FLIGHT ATTENDANTS* 26 (2007).

² See Tammy Julian, *How Title VII Has Affected the Airline Industry*, 11 ST. LOUIS U. PUB. L. REV. 281, 288–96 (1992).

³ See Katherine LaGrave, *From Stewardess to Flight Attendant: 80 Years of Sophistication and Sexism*, *CONDÉ NAST TRAVELER* (Mar. 8, 2017), <https://www.cntraveler.com/story/why-flight-attendant-uniforms-and-airline-beauty-standards-are-still-stuck-in-the-past> [<https://perma.cc/XP6J-XSWC>].

flight attendants through mandatory dress and appearance policies.⁴ This Comment argues that the remnants of the airline industry's overtly sexist and discriminatory past have contributed to the alarming prevalence of sexual harassment of flight attendants today by enforcing dress and appearance policies that work to covertly subordinate flight attendants.

Not only do these outdated policies contribute to increased incidents of sexual harassment, these binary policies illegally harm flight attendants who do not conform to traditional gender stereotypes.⁵ Mandating flight attendants to conform to strict conceptions of gender and sex stereotypes merely functions to perpetuate traditional norms and behaviors that ultimately "devalue women, feminized men, and sexual minorities."⁶ This Comment argues that the Supreme Court's 2020 landmark ruling in *Bostock v. Clayton County* heralds a potential end to sex-differentiated dress and appearance standards by interpreting Title VII to prohibit employer discrimination based on sexuality and gender identity.⁷ In anticipation of litigation, airlines should revise their dress and appearance policies to promote an inclusive workplace that cares about the well-being of flight attendants.

This Comment first delves into the pervasively sexist past of the airline industry in Part II. The following Section discusses the impact that the passage of Title VII had on the airline industry and how it ultimately ushered in the modern era of flight attendants. Part III first analyzes the legal process of asserting a Title VII claim and how those processes apply to airline policies regarding dress and appearance. Further, Part III then discusses the application, or lack thereof, of Title VII to workplace discrimination based on sexuality and gender identity. Part III concludes by summarizing the shortcomings of modern airline dress and appearance standards, both in the United States and abroad. Part IV argues that the airline industry's history of imposing sexist dress and appearance policies contributes to the

⁴ See Katherine LaGrave, *Why Airline Beauty Standards Are Still Stuck in the Past*, CONDÉ NAST TRAVELER (Apr. 10, 2019), <https://www.cntraveler.com/story/why-flight-attendant-uniforms-and-airline-beauty-standards-are-still-stuck-in-the-past> [<https://perma.cc/T2YW-JBZJ>].

⁵ See Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535, 537 (2007).

⁶ *Id.*

⁷ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

alarming rates of sexual harassment in the air. This Comment goes on to argue in Part V that sex-specific dress and appearance standards, which are now unconstitutional under the Supreme Court's interpretation of Title VII in *Bostock v. Clayton County*,⁸ also harm flight attendants who do not conform to conventional gender norms. Finally, this Comment warns employers about the harms of sex-specific employment policies and recommends change.

II. TAKE OFF: THE SEXUALIZATION OF STEWARDESSES

After the federal government initially regulated the airline industry in 1938, and subsequently deregulated the industry in 1978, airline competition hinged on the in-flight experience.⁹ Airlines sought to attract passengers by offering luxurious accommodations served by attractive, attentive, and available stewardesses.¹⁰ Passengers and airlines expected stewardesses to serve drinks and food, attend to the needs of anxious or unruly passengers, and execute safety protocols under time constraints.¹¹ Additionally, airlines required stewardesses to adhere to strict beauty standards while effortlessly performing their official duties.¹² To fulfill customers' expectations, stewardesses attended "charm farms" that sculpted stewardesses into the ideal image of poise and beauty.¹³ In addition to receiving technical training in safety protocols, service routines, and airline information, stewardesses were sculpted into the airline's ideal stewardess in both behavior and appearance.¹⁴

A. GLAMORIZATION AND EXPLOITATION

Airlines carefully devised and advertised the ideal stewardess that struck the perfect balance of sex appeal, poise, and mystique.¹⁵ Sexualized slogans included National Airlines' "Fly Me"

⁸ *See id.*

⁹ *See* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, *repealed by* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; BARRY, *supra* note 1, at 114.

¹⁰ *See* BARRY, *supra* note 1, at 42.

¹¹ *See id.* at 6–7.

¹² *See id.* at 37 ("Glamour, on the other hand, was an ongoing performance that demanded a lot of work to produce, but succeeded ultimately only when the labor was unrecognizable as such to the audience.")

¹³ *Id.* at 46; *see also* Bruce Handy, *Glamour with Altitude*, VANITY FAIR, Oct. 2002, at 215, 218–20.

¹⁴ *See* BARRY, *supra* note 1, at 46.

¹⁵ *See* LaGrave, *supra* note 3; BARRY, *supra* note 1, at 45.

campaign, Continental's hint to "other attractions aboard" accompanied by a photo of a stewardess from the waist below, and United's promise of "extra care" with the possibility of marriage.¹⁶ The survival of Southwest Airlines depended upon its marketing strategy entitled the "love" campaign.¹⁷ This campaign infiltrated every aspect of the business from in-flight cocktails and snacks, its stock exchange abbreviation, and its stewardesses' appearance and behavior.¹⁸ Southwest described the ideal stewardess: "She is charming and goes through life with great flair and exuberance . . . yet she is quite efficient and approaches all her tasks with care and attention."¹⁹

Sexually insinuating marketing campaigns were brought to life by employer-mandated provocative uniforms with plunging necklines, shrinking hemlines, and platform shoes.²⁰ Southwest achieved its "love" image by hiring personable women who were "great-looking in hot pants."²¹ To that end, Southwest recruited stewardesses in their early twenties who weighed between 100 and 135 pounds.²² To complete the look, stewardesses wore bright orange hot-pants, a low-cut top, and go-go boots while serving "love potions" and "love bites" to mostly business class, white men.²³ American Airlines required their stewardesses to embody "American Beauty" by wearing a mini-dress in either red, white, or blue.²⁴ The now-closed Braniff Airline promoted an in-flight "air strip" where stewardesses would change into more revealing uniforms throughout the flight.²⁵

¹⁶ BARRY, *supra* note 1, at 176–79.

¹⁷ See Joseph Guinto, *Hot Pants, Love Potions, and the Go-Go Genesis of Southwest Airlines*, TEX. MONTHLY (July 2021), <https://www.texasmonthly.com/news-politics/southwest-airlines-50-anniversary/> [<https://perma.cc/VHF6-ADDR>]; BARRY, *supra* note 1, at 179.

¹⁸ See Guinto, *supra* note 17.

¹⁹ *Id.*

²⁰ See BARRY, *supra* note 1, at 179.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 16, 179.

²⁴ *Id.* at 181.

²⁵ See *id.* at 180; Gloria Steinem, *Gloria Steinem on How Female Flight Attendants Fought Sexism in the Skies*, CONDÉ NAST TRAVELER (Mar. 25, 2016), <https://www.cntraveler.com/stories/2016-03-25/gloria-steinem-on-how-female-flight-attendants-fought-sexism> [<https://perma.cc/KJ6P-ZHH9>].

The allure of glamour and luxury came at the expense of the respect and autonomy of stewardesses.²⁶ Airlines required stewardesses to perform their professional duties while exuding charm, beauty, and sexiness.²⁷ Airlines ruthlessly controlled the weight of stewardesses, required stewardesses to remain unmarried and childless, forced stewardesses to retire in their early thirties, and rigidly enforced dress and appearance policies.²⁸ Further, these airline policies “amounted to an invitation for unprecedented sexual harassment.”²⁹ Thus, stewardesses had to fend off unwanted physical and verbal advances by passengers to perform their official job duties.³⁰ The airline industry’s sexually charged advertising is a prime example of how male business executives exploit women’s appearance to generate personal profit.³¹

III. TURBULENCE: TITLE VII AND THE EMERGENCE OF THE FLIGHT ATTENDANT

The passage of Title VII of the Civil Rights Act of 1964 provided flight attendants with the legal authority to demand equality in the workplace.³² Title VII broadly prohibits employment practices that “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, *sex*, or national origin.”³³ Although principally passed to combat racial discrimination, Title VII was soon wielded by female flight attendants, who were among the first class of individuals to use it to challenge workplace sex discrimination.³⁴ To successfully challenge the airline industry’s sexist policies, flight attendants

²⁶ See BARRY, *supra* note 1, at 37, 39; see also Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2546 (1994).

²⁷ See BARRY, *supra* note 1, at 45 (“We may well wonder how a stewardess was supposed to lift, bend, and fetch repeatedly and spend hours on her feet, yet never let a hint of sweat soil her uniform, allow her make-up to smudge or her hair to muss.”).

²⁸ See *id.* at 24–25; Handy, *supra* note 13, at 220.

²⁹ BARRY, *supra* note 1, at 174.

³⁰ *Id.* at 45.

³¹ See Edieth Y. Wu, *Cross-Cultural Patriarchal Demands on Women’s Dress-Appearance*, 33 WOMEN’S RTS. L. REP. 169, 175 (2012).

³² BARRY, *supra* note 1, at 145.

³³ 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

³⁴ See BARRY, *supra* note 1, at 145.

learned how to navigate the judicially created airways of Title VII.³⁵

A. TITLE VII CHALLENGE ON DRESS CODE AND APPEARANCE POLICIES

1. *Flight Attendant's Burden*

There are two distinct approaches to stage a sex discrimination claim under Title VII: disparate impact and disparate treatment.³⁶ Disparate impact applies when the employer implements a facially neutral policy, but the policy disproportionately affects one sex more than the other.³⁷ Disparate treatment applies when the employer explicitly treats employees of one sex differently than members of the opposite sex.³⁸ Challenges to gendered dress code and appearance standards utilize the disparate treatment approach because these employment policies explicitly prescribe different standards for the sexes to abide by in order to receive and maintain employment.³⁹ The flight attendant's *prima facie* case must demonstrate that (1) the flight attendant was a member of a protected class; (2) the flight attendant was qualified for the employment position in question; (3) the flight attendant was rejected or fired from the position; and (4) after the rejection or termination, the position remained open and the employer sought applications from persons with similar qualifications or the employer filled the position with someone of the opposite sex.⁴⁰ Under either approach, the plaintiff bears the ultimate burden of proving that the employment practice is discriminatory by a preponderance of the evidence.⁴¹

The evidence presented to the court will guide the court's analysis of the claim.⁴² In a disparate treatment case, the plain-

³⁵ See *id.* at 172.

³⁶ See Brian P. McCarthy, *Trans Employees and Personal Appearance Standards Under Title VII*, 50 ARIZ. L. REV. 939, 951 (2008).

³⁷ See *id.*

³⁸ See *id.*

³⁹ McCarthy, *supra* note 36, at 952; see generally Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299 (2007) (analyzing the development of appearance-policy litigation under Title VII).

⁴⁰ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353, 375 (2008).

⁴¹ See Jamie Bishop et al., *Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, 22 GEO. J. GENDER & L. 369, 373 (2021).

⁴² See McCarthy, *supra* note 36, at 952–53.

tiff can offer direct or indirect evidence of discriminatory treatment.⁴³ When the plaintiff offers direct evidence of discriminatory practices, courts traditionally concentrate on the individual harm suffered by the plaintiff.⁴⁴ Direct evidence can include overt statements made by the employer or supervisor, employment records, or employment statistics.⁴⁵ In contrast, when the plaintiff has indirect evidence of the employer's discriminatory practices, the court tends to shift the focus to harms suffered by the group as a whole.⁴⁶ Indirect evidence can include inferences of discrimination drawn by timing, ambiguous statements, and comparative evidence.⁴⁷ However, courts have confused the necessity of individual harm versus group harm, which has resulted in an unworkable standard that often undermines the plaintiff's pursuit of equality and Title VII's purpose of providing equal employment opportunities.⁴⁸

2. *Airline Industry's Defenses*

After the plaintiff successfully establishes a prima facie case, the burden of production shifts to the employer to justify its discriminatory employment practice.⁴⁹ An employer can attempt to justify its discriminatory practice by articulating a legitimate, nondiscriminatory reason for the discriminatory impact or asserting Title VII's bona fide occupational qualification (BFOQ) statutory defense to discriminatory treatment.⁵⁰ A legitimate, nondiscriminatory reason may include seniority, education, prior experiences, or performance.⁵¹ If an employer asserts a legitimate, nondiscriminatory reason for the employment practice or decision, the plaintiff must rebut the employer's defense by showing that the employer's explanation is a pretext for discrimination or that discrimination was a motivating factor for the practice.⁵²

If the employer raises Title VII's BFOQ statutory defense, the employer sustains a heavy burden to defend the discriminatory

⁴³ Levi, *supra* note 40, at 376.

⁴⁴ *See id.*

⁴⁵ *See* McCarthy, *supra* note 36, at 952; Bishop et al., *supra* note 41, at 373.

⁴⁶ *See* Levi, *supra* note 40, at 376.

⁴⁷ *See id.*; McCarthy, *supra* note 36, at 952.

⁴⁸ *See* Levi, *supra* note 40, at 376.

⁴⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁵⁰ *See* 42 U.S.C. § 2000e-2(e)(1); *McDonnell Douglas Corp.*, 411 U.S. at 802.

⁵¹ *See* Bishop et al., *supra* note 41, at 378.

⁵² *See* McCarthy, *supra* note 36, at 952–53.

policy because the BFOQ provision is interpreted narrowly.⁵³ To prevail on a BFOQ defense, the employer must prove that the discriminatory practice is strongly connected to the essence of the business and the employee's ability to perform their job duties.⁵⁴ The BFOQ defense is strongest when a privacy interest is involved.⁵⁵ Courts generally reject customer preference of a particular sex as a valid BFOQ.⁵⁶ Further, courts will determine whether the employer had reasonable alternatives to accommodate the employee's request, which can be shown through evidence of comparative treatment of employees of the opposite sex, the employer's reaction to the employee's expression of civil rights, and the employer's "general policy and practice with respect to minority employment."⁵⁷

3. *Initial Judicial Interpretation of Title VII's Application to Employer Appearance Standards and Dress-Code Policies*

Courts generally uphold gendered dress and appearance standards provided that employers implement policies that apply to both sexes, do not impose an unequal burden on one sex, do not apply to an immutable characteristic, and do not perpetuate harmful gender stereotypes.⁵⁸ The Supreme Court "expanded the traditional definition of 'sex'" in *Price Waterhouse v. Hopkins* by holding that "noncompliance with gender stereotypes" constitutes sex discrimination.⁵⁹ In *Price Waterhouse*, the employer denied a promotion to a female employee for being too "macho" and "tough-talking."⁶⁰ Various partners at the firm suggested that the plaintiff take a class in charm school, "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to increase her

⁵³ See 29 C.F.R. § 1604.2(a) (1972) ("[T]he bona fide occupational qualification exception as to sex should be interpreted narrowly."); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971) (stating that the bona fide occupational qualification cannot be applied in a way that permits "the exception to swallow the rule"); *McCarthy*, *supra* note 36, at 954.

⁵⁴ See *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 299 (N.D. Tex. 1981); *Bishop et al.*, *supra* note 41, at 373-74.

⁵⁵ *Bishop et al.*, *supra* note 41, at 374-75.

⁵⁶ See, e.g., *Diaz*, 442 F.2d at 389.

⁵⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973).

⁵⁸ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion); *Herald*, *supra* note 39, at 316-17; *McCarthy*, *supra* note 36, at 960-62; *Levi*, *supra* note 40, at 362-64.

⁵⁹ *Bishop et al.*, *supra* note 41, at 404.

⁶⁰ *Price Waterhouse*, 490 U.S. at 235.

chances of being promoted to partner.⁶¹ The Court found that “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.”⁶²

Moreover, Title VII has also been extended to prohibit sex-plus discrimination.⁶³ Sex-plus discrimination occurs when the employer discriminates against an employee because of sex plus another characteristic.⁶⁴ In *Phillips v. Martin Marietta Corp.*, the employment policy at issue denied employment opportunities to women with preschool-aged children.⁶⁵ The Supreme Court held that the policy contradicted Title VII’s goal of providing equal employment opportunity “irrespective” of sex by applying different employment practices to men and women with preschool-aged children.⁶⁶ In his concurring opinion, Justice Marshall opined that “ancient canards about the proper role of women” and “characterizations of the proper domestic roles of the sexes” are unacceptable reasons to restrict employment opportunities.⁶⁷ Other common scenarios where plaintiffs assert sex-plus discrimination include employment decisions based on sex plus race, marital status, and age.⁶⁸

B. TITLE VII’S APPLICATION TO SEXIST AIRLINE POLICIES

Case by case, Title VII challenges chipped away at the airline industry’s sexist and discriminatory policies. Stewardesses became fed up with airlines controlling their weight, mandating their marital status, disallowing pregnancy, and forcing retirement in their early thirties.⁶⁹ Thus, stewardesses joined together to successfully challenge some of the airline industry’s discriminatory policies in courts all over the country, and began the ongoing process of dismantling the industry’s exploitation of women.⁷⁰

⁶¹ *Id.*

⁶² *Id.* at 250.

⁶³ See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam); *Bishop et al.*, *supra* note 41, at 408.

⁶⁴ See *Bishop et al.*, *supra* note 41, at 408.

⁶⁵ See *Phillips*, 400 U.S. at 544.

⁶⁶ *Id.*

⁶⁷ *Id.* at 545 (Marshall, J., concurring).

⁶⁸ See *Bishop et al.*, *supra* note 41, at 408–10.

⁶⁹ See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 847–48 (9th Cir. 2000); *Julian*, *supra* note 2, at 288–96.

⁷⁰ See *Julian*, *supra* note 2, at 288–96.

1. *From Stewardess to Flight Attendant: Female-Only Policies*

The foremost tactical challenge to combat sexism in the airline industry was to confront the airline industry's insistence that ensuring the care and safety of passengers was an inherently feminine profession.⁷¹ The airline industry's female-only policies took advantage of and perpetuated the idea that women have innate "nurturing instincts and domestic skills to serve."⁷² These portrayals ultimately subordinated women by disregarding their intensive merit training, minimizing their workplace competency, and diminishing the respect stewardesses deserved.⁷³

Courts firmly held that the female-only policies were a prime example of the sex discrimination Title VII aimed to prohibit.⁷⁴ Moreover, courts refused to give credence to the airline industry's reliance on female sexuality in their lucrative marketing campaigns.⁷⁵ The courts reiterated that the BFOQ defense should be interpreted narrowly; thus, discriminatory policies should warrant skepticism and scrutiny.⁷⁶ Courts held that the primary duty of stewardesses was "to transport passengers safely and quickly from one point to another," which was not dependent upon sex.⁷⁷ Thus, an airline could only justify the discriminatory policy by showing that "the essence of the business operation would be undermined by not hiring members of one sex exclusively."⁷⁸

Airlines attempted to justify the female-only policies by persistently arguing that women perform flight attendant duties more efficiently, passengers prefer female flight attendants, and the airline brand depended upon hiring only female flight attendants.⁷⁹ However, the courts found that these justifications were only "tangential" to the essence of the business and would

⁷¹ See Steinem, *supra* note 25.

⁷² BARRY, *supra* note 1, at 12.

⁷³ See Bartlett, *supra* note 26, at 2547; see also Steinem, *supra* note 25 (detailing how flight attendants had to know "first aid, evacuation procedures for as many as seventy-five kinds of planes, underwater rescue, emergency signaling, hijacking precautions . . . not to mention how to handle passengers and fend off some.").

⁷⁴ See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981).

⁷⁵ See *Diaz*, 442 F.2d at 389; *Wilson*, 517 F. Supp. at 303.

⁷⁶ See *Diaz*, 442 F.2d at 387 (citing 29 C.F.R. § 1604.1(a) (1972)).

⁷⁷ *Wilson*, 517 F. Supp. at 302; see also *Diaz*, 442 F.2d at 388.

⁷⁸ *Diaz*, 442 F.2d at 388.

⁷⁹ See *id.*; *Wilson*, 517 F. Supp. at 293.

have no effect on the primary operation of airlines.⁸⁰ Furthermore, the courts refused to defer to the airlines' business reliance on exploiting female sexuality.⁸¹ For example, Southwest Airlines defended its sex discrimination on the grounds that "attractive female flight attendants and ticket agents personify the airline's sexy image and fulfill its public promise to take passengers skyward with 'love.'"⁸² Southwest's argument was unavailing, and the court held that "sex does not become a BFOQ merely because an employer chooses to exploit female sexuality as a marketing tool, or to better insure profitability."⁸³

The airline industry also focused on placing blame upon passengers for its discriminatory practices, but the courts did not view alleged customer preference for female flight attendants as a valid excuse.⁸⁴ In *Diaz*, the airline argued that customers preferred female flight attendants because women were better able to provide the "non-mechanical aspects of the job," such as soothing passengers.⁸⁵ However, courts only take customer preference into account when the preference "is based on the company's inability to perform the primary function or service it offers."⁸⁶ Because non-mechanical aspects of the job are not essential to a flight attendant's duties, the preferences of customers did not alter the court's analysis.⁸⁷ In sum, these cases demonstrate that courts have historically declined to give effect to the preferences and prejudices of private individuals.⁸⁸ Further, the preferences and prejudices of private individuals cannot vindicate the airlines' continuing discriminatory policies based on sex and sex stereotypes.⁸⁹ Thus, the era of the sexy stewardess concluded, and the gender-neutral era of the flight

⁸⁰ *Diaz*, 442 F.2d at 388 ("No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.").

⁸¹ See *Wilson*, 517 F. Supp. at 303.

⁸² See *id.* at 293; see also discussion *supra* Part II regarding Southwest's love campaign.

⁸³ *Wilson*, 517 F. Supp. at 303.

⁸⁴ See *Diaz*, 442 F.2d at 389.

⁸⁵ *Id.* at 388.

⁸⁶ *Id.* at 389.

⁸⁷ See *id.*

⁸⁸ *Id.*; *Wilson*, 517 F. Supp. at 303.

⁸⁹ See *Diaz*, 442 F.2d at 389 ("While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.").

attendant emerged.⁹⁰ Although Title VII allowed flight attendants to invalidate sexist female-only policies, the airline industry continued to enforce other employment policies that disadvantaged women.⁹¹

2. *Appearance of Availability: No-Marriage and No-Children Policies*

Airlines nurtured the image of sexually available female flight attendants by imposing no-marriage policies and routinely grounding flight attendants upon pregnancy.⁹² The airline industry's reliance on female flight attendants' sexual availability inhibited female flight attendants from advancing in their careers by guaranteeing that "few stewardesses would fly long enough to expect promotions, significant raises, or other longer-term job benefits."⁹³ These impediments led to *Sprogis v. United Air Lines, Inc.*⁹⁴ and *Burwell v. Eastern Air Lines, Inc.*⁹⁵

In *Sprogis*, the Seventh Circuit struck down United's no-marriage rule by deciding that the policy targeted female flight attendants because of their sex.⁹⁶ The court adopted the Equal Employment Opportunity Commission's (EEOC) interpretation of Title VII by stating: "It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex."⁹⁷ Further, the court was unpersuaded by the airline's assertion that marital status was a valid BFOQ.⁹⁸ The court found that sexist reasonings of the industry and passengers underpinned the policy rather than reasonable requirements needed to fulfill work duties.⁹⁹ The court concluded that the policy wrongly excluded and "punishe[d] a large class of prospective, otherwise

⁹⁰ See LaGrave, *supra* note 3.

⁹¹ See LaGrave, *supra* note 4.

⁹² See BARRY, *supra* note 1, at 205 ("A visibly pregnant flight attendant, however, obviously undermined the fantasy of stewardesses' sexual availability that the airlines worked so hard to promote . . .").

⁹³ *Id.* at 26.

⁹⁴ See 444 F.2d 1194, 1196 (7th Cir. 1971).

⁹⁵ See 633 F.2d 361, 363 (4th Cir. 1980) (per curiam).

⁹⁶ See *Sprogis*, 444 F.2d at 1198.

⁹⁷ *Id.* (quoting 29 C.F.R. § 1604.4(a) (1972)).

⁹⁸ See *id.*

⁹⁹ See *id.* at 1199 ("United was led to impose the requirement after it received complaints from husbands about their wives' working schedules and the irregularity of their working hours.").

qualified and competent employees where an individualized response could adequately dispose of any real employment conflicts.”¹⁰⁰

In *Burwell v. Eastern Air Lines, Inc.*, flight attendants tackled airline pregnancy policies mandating a flight attendant to take pregnancy leave upon learning of her pregnancy, removing a flight attendant’s seniority status upon being transferred to ground positions, and stipulating different treatment of pregnancy under the employer’s medical insurance plans.¹⁰¹ Although the court noted that the policy appeared facially neutral, the policy targeted a single class of employees and harshly restricted a subset of employees’ employment opportunities.¹⁰² Similar to the court in *Sprogis*, the court held that the policy denied pregnant flight attendants individualized treatment.¹⁰³ Although these cases represent another win for flight attendants and gender equality, the airline industry continued to enforce other employment policies that fostered a sexist workplace.¹⁰⁴

3. *Embodiment of Sex Appeal: Weight Policies*

In addition to dress codes, the airline industry crafted an unhealthy standard of beauty that dictated who the airline employed and how flight attendants lived their private lives.¹⁰⁵ Airlines made certain that passengers were served by “thin, attractive women” by forcing flight attendants to abide by weight regulations.¹⁰⁶ The Ninth Circuit in *Gerdom v. Continental Airlines, Inc.* found that an airline’s stringent weight requirement merely “typifie[d] the . . . prevailing pattern in the airline industry of restricting job opportunities and imposing special conditions on the basis of gender stereotypes.”¹⁰⁷

Further, the Ninth Circuit in *Frank v. United Airlines, Inc.* solidified this ruling by dismissing the airline industry’s weak justifications for harmful weight policies—even though the airline imposed weight requirements for both female and male flight

¹⁰⁰ *Id.*

¹⁰¹ *See* 633 F.2d 361, 363 (4th Cir. 1980) (per curiam).

¹⁰² *See id.* at 369.

¹⁰³ *See id.* at 375 (“[P]regnant stewardesses can and should be evaluated on an individual basis.”).

¹⁰⁴ *See* BARRY, *supra* note 1, at 172–73.

¹⁰⁵ *See id.*

¹⁰⁶ *Gerdom v. Cont’l Airlines, Inc.* 692 F.2d 602, 603 (9th Cir. 2014). For example, a stewardess that stood at five feet, two inches was not permitted to weigh more than 114 pounds. *See id.* at 604.

¹⁰⁷ *Id.* at 606.

attendants.¹⁰⁸ However, the airline's policy required female flight attendants to weigh between fourteen and twenty-five pounds less than male flight attendants of the same age and height.¹⁰⁹ The court noted that women represented 85% of flight attendants; therefore, the consistent and widespread difference in treatment between men and women amounted to facial sex discrimination.¹¹⁰ Further, the court held that the policy could not be upheld as a BFOQ because the airline defendant made no showing that "disproportionately thinner female than male flight attendants bears a relation to flight attendants' ability" to perform their job duties, but that if anything, the policy "inhibited the job performance of female flight attendants."¹¹¹ Thus, the airline industry could not legally justify different weight requirements for men and women because the policy did not relate to any legitimate employment duty.¹¹²

4. *A White Appearance: Intersection of Sex and Race*

Moreover, the role of flight attendant was exclusively a profession for white women until growing public pressure forced the airline industry to hire women of color.¹¹³ The airline industry did not explicitly exclude black women from the flight attendant profession, but it integrated racial biases in hiring practices.¹¹⁴ For example, flight attendant applicants were asked whether their hands were "soft and white" during the interview screening process.¹¹⁵ After being subjected to heightened pressure from politicians, civil rights groups, and lawsuits, the U.S. commercial airline industry employed Ruth Carol Taylor as the first black female flight attendant in 1957.¹¹⁶ A survey conducted in 1971 revealed that only 6% of flight attendants were non-

¹⁰⁸ See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 848 (9th Cir. 2000) (noting that female flight attendants often tried to comply with the weight requirements by "severely restricting their caloric intake, using diuretics, and purging").

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 848, 853–54.

¹¹¹ *Id.* at 855.

¹¹² See *id.*

¹¹³ See BARRY, *supra* note 1, at 115 ("Only under persistent pressure from aspiring African American stewardesses, national civil rights groups, government officials, and a few high-profile politicians did airlines even begin to consider hiring black women.").

¹¹⁴ See *id.* at 114.

¹¹⁵ *Id.* at 115.

¹¹⁶ See *id.* at 115–16.

white,¹¹⁷ but today racial minorities make up almost 40% of flight attendants.¹¹⁸

Although racial minorities are now given an equal opportunity to become flight attendants, employers are legally permitted to create appearance standards that require women of color to abide by white beauty standards. For example, in *Rogers v. American Airlines, Inc.*, a female flight attendant challenged American Airlines' policy banning braided hairstyles as discrimination against black women.¹¹⁹ The court held that a policy that equally prohibits a hairstyle for members of all races and sexes does not violate Title VII even if the style is more often adorned by members of a specific group.¹²⁰ Although some courts fail to recognize the intersection between race and sex in appearance standards, many states have passed laws that prohibit discrimination based on an individual's hair texture or hairstyle if it is associated with a particular race or ethnicity.¹²¹ Further, Congress has introduced the Creating a Respectful and Open World for Natural Hair Act of 2021 (CROWN Act), which if passed, would broadly prohibit discrimination based on "the person's hair texture or hairstyle."¹²² This disturbing intersection between sexism and racism in the airline industry indicates that the airline industry must seriously reconsider and reform appearance policies to achieve a more inclusive work environment.

C. TITLE VII'S PROTECTION FOR LGBTQ+ FLIGHT ATTENDANTS

Although Title VII enabled female flight attendants to cabin a portion of the widespread sex discrimination in the airline industry, flight attendants who experience discrimination based on sexual orientation or gender identity continue to endure an ongoing battle to achieve workplace equality under Title VII.¹²³

1. *Judicial Shortcomings*

The unequal burdens test, initially introduced by the Ninth Circuit in *Frank v. United Airlines, Inc.*, has become the promi-

¹¹⁷ *Id.* at 119–20.

¹¹⁸ See *Flight Attendants*, DATA USA, <https://datausa.io/profile/soc/flight-attendants> [<https://perma.cc/M74B-D7WG>].

¹¹⁹ See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

¹²⁰ See *id.* at 231–32.

¹²¹ See, e.g., N.J. STAT. ANN. § 10:5-5(vv)–(ww) (West 2021).

¹²² Creating a Respectful and Open World for Natural Hair Act of 2021, H.R. 2116, 117th Cong. § 7(a) (2021).

¹²³ See BARRY, *supra* note 1, at 217–18.

ment approach to analyzing sex-differentiated appearance policies and highlights the judicial shortcomings that hinder workplace equality.¹²⁴ The case of *Jespersen v. Harrah's Operating Co.* best exemplifies the judicial limits of Title VII regarding dress codes and appearance policies.¹²⁵ Although the employer in that case implemented a gender-neutral dress code, a female bartender challenged the employer's "Personal Best" appearance policy that she found personally burdensome and demeaning to her identity.¹²⁶ The employer required female bartenders to be "well groomed, appealing to the eye, [and] be firm and body toned."¹²⁷ The female bartenders achieved this image by wearing face powder, blush, mascara, and lipstick "worn at all times," in addition to meeting the requirement that their hair must be "teased, curled, or styled every day."¹²⁸ In contrast, the employer required male bartenders to maintain short hair and prohibited male bartenders from wearing facial makeup and nail polish.¹²⁹

Despite the fact that the appearance policy resulted in more time and costs for female bartenders, the court found that the policy applied equal burdens to both sexes and thus did not violate Title VII.¹³⁰ The court also insisted that the plaintiff show the presence of a group harm rather than the plaintiff's personal objections to the "Personal Best" policy.¹³¹ The court found the complaint to be merely the "subjective reaction of a single employee," and essentially required the plaintiff to show that the employer's policy created a harm affecting all female bartenders.¹³² Thus, the court allowed an individual employee to be discriminated against for her failure to conform to gender stereotypes because the court found that the appearance policy did not harm all employees.¹³³

¹²⁴ See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000); *Zalesne*, *supra* note 5, at 536–37.

¹²⁵ See *Levi*, *supra* note 40, at 356 (referring to the judicial application of Title VII to sex-differentiated dress codes as the "Title VII blind spot").

¹²⁶ *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1107–08 (9th Cir. 2006).

¹²⁷ *Id.* at 1107.

¹²⁸ *Id.*

¹²⁹ See *id.*

¹³⁰ See *id.* at 1111.

¹³¹ See *id.* at 1113.

¹³² *Id.*

¹³³ See *id.*; *Levi*, *supra* note 40, at 357 ("Title VII . . . does not require a showing of group harm. It only requires that an individual be able to demonstrate that he

The judicial presumption that gendered dress codes are permissible under Title VII places an onerous burden upon the plaintiff to show “beyond the mere fact of differential treatment, some additional disparity or harm.”¹³⁴ The judicial focus on unequal burdens and community standards ignores the antiquated notions that gendered dress codes and appearance standards are founded upon, and the humiliation and feeling of inferiority that can result from forcing individuals to conform to a false identity.¹³⁵ The community standards and unequal burdens test that courts purport to apply in the name of equality actually reflects the “discriminatory” and “prejudicial” nature of gender stereotypes.¹³⁶ Gender-differentiated dress codes and appearance standards reflect “by definition an employer’s insistence on conformity to sex stereotypes,” but courts remain comfortable with validating the legality of gendered employment policies.¹³⁷

2. *Diverging Paths Among State Legislatures and Courts*

Almost every state has enacted an antidiscrimination statute mimicking Title VII that prohibits employers from discriminating because of sex.¹³⁸ Additionally, a growing number of states have enacted statutes prohibiting employers from discriminating because of sexuality or gender identity.¹³⁹ Although some states extended protections to trans employees, antidiscrimination laws proved limited and provided trans employees with “scant power to fight appearance standards under the law.”¹⁴⁰

or she has been affected *personally* on the basis of gender—not that all men or all women are similarly affected by differential treatment.”).

¹³⁴ Levi, *supra* note 40, at 353.

¹³⁵ *See id.* at 363.

¹³⁶ *Id.*

¹³⁷ Rebekah Hanley & Malcolm MacWilliamson, *Model Dress Code: Promoting Genderless Attire Rules to Foster an Inclusive Legal Profession*, 34 J.C.R. & ECON. DEV. 125, 134 (2021); *see* Levi, *supra* note 40, at 385.

¹³⁸ A state that does not include a general prohibition of sex discrimination is Georgia, the home of Delta Airlines; it only prohibits sex discrimination in regard to pay. *See* GA. CODE ANN. § 34-5-3 (West 2022).

¹³⁹ Illinois, the home of United Airlines, prohibits discrimination based on sex and sexual orientation, which encompasses gender identity. *See* 775 ILL. COMP. STAT. ANN. 5/1-103 (O)–(O-1) (West 2022). Texas, the home of American Airlines and Southwest Airlines, only prohibits discrimination on the basis of sex. *See* TEX. LAB. CODE ANN. § 21.051 (West 2021). Washington, the home of Alaska Airlines, prohibits discrimination based on sex and sexual orientation. *See* WASH. REV. CODE § 49.60.030(1) (2020).

¹⁴⁰ McCarthy, *supra* note 36, at 942.

Before the Supreme Court interpreted Title VII to include discrimination based on sexual orientation and gender identity, courts were divided on whether Title VII protected trans individuals from workplace discrimination.¹⁴¹ Courts reasoned that the plain meaning of “sex” precluded Title VII from protecting trans employees.¹⁴² In *Ulane v. Eastern Airlines, Inc.*, the Seventh Circuit overturned the lower court’s expansion of Title VII that protected a pilot—a decorated military veteran, ranking officer at the airline, and flight instructor—who was fired after completing sex-confirmation surgery.¹⁴³ The court ruled that “a prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born.”¹⁴⁴ Thus, the court in *Ulane*, like many other courts, effectively legalized discrimination against employees because of gender identity.¹⁴⁵

Nevertheless, LGBTQ+ employees did receive some success by utilizing *Price Waterhouse’s* sex-stereotyping argument.¹⁴⁶ Some courts articulated that Title VII’s reference to sex implicitly includes discrimination based on an employee’s failure to conform to gender norms associated with their perceived gender.¹⁴⁷ Additionally, the EEOC’s acceptance of employment discrimination complaints based on sexual orientation or gender identity in 2013 gave employees the power to challenge discriminatory practices.¹⁴⁸ The change in the EEOC’s policy, occurring seven years before the Supreme Court’s ruling in *Bostock*, resulted in ten times more complaints alleging employment discrimination based on sexual orientation or gender identity in states without antidiscrimination protections for sexual orientation or gender

¹⁴¹ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

¹⁴² See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (“Title VII is not so expansive in scope as to prohibit discrimination against transsexuals . . .”).

¹⁴³ See *id.* at 1082–83.

¹⁴⁴ *Id.* at 1085.

¹⁴⁵ See *id.*; see also *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam).

¹⁴⁶ See discussion *supra* Part III for *Price Waterhouse’s* sex-stereotyping argument.

¹⁴⁷ See *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

¹⁴⁸ See Amanda K. Baumle, M.V. Lee Badgett & Steven Boutcher, *New Research on Sexual Orientation and Gender Identity Discrimination: Effect of State Policy on Charges Filed at the EEOC*, 67 J. HOMOSEXUALITY 1135, 1135 (2020).

identity, and two times more complaints in states with antidiscrimination statutes in place.¹⁴⁹

3. *The Powerful Implication of Bostock v. Clayton County*

Despite the fact that workplace harassment and discriminatory discharge are cited in nearly half of all issues alleged in sexual orientation and gender identity complaints filed with the EEOC in recent years, Title VII noticeably lacked comprehensive and uniform protection for LGBTQ+ employees.¹⁵⁰ Further, the varying and restrictive interpretations of Title VII by lower courts likely discouraged LGBTQ+ employees from filing complaints to challenge discriminatory workplace policies.¹⁵¹ However, the Supreme Court's landmark ruling in *Bostock* erased the judicially imposed limits on Title VII and changed the landscape of Title VII claims for LGBTQ+ employees.¹⁵²

Bostock extended Title VII to protect employees from workplace discrimination based on their sexual orientation and gender identity.¹⁵³ The Supreme Court in *Bostock* emphatically stated: "An individual's homosexuality or transgender status is not relevant to employment decisions."¹⁵⁴ The Court supported its decision by highlighting that when an employer discriminates against an individual based on gender identity or sexual orientation, the employer inescapably and impermissibly discriminates because of sex.¹⁵⁵ The Court went on to state that employment decisions that discriminate against employees because of sexual orientation and gender identity enforce sex-based rules.¹⁵⁶ For example, an employer who discriminates based on gender identity "unavoidably discriminates against persons with one sex identified at birth and another today."¹⁵⁷

Therefore, after *Bostock*, an employer who treats an employee less favorably because of the employee's sex, sexual orientation,

¹⁴⁹ See *id.* at 1138.

¹⁵⁰ See *id.* at 1140–41; Timothy Parrington, *Title VII & LGBTQ Employment Discrimination: An Argument for a Modern Updated Approach to Title VII Claims*, 60 WASH. U. J.L. & POL'Y 293, 301 (2019).

¹⁵¹ See McCarthy, *supra* note 36, at 964.

¹⁵² See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020); see also Herald, *supra* note 39, at 310.

¹⁵³ See *Bostock*, 140 S. Ct. at 1754.

¹⁵⁴ *Id.* at 1741.

¹⁵⁵ See *id.* at 1741–42.

¹⁵⁶ See *id.* at 1745.

¹⁵⁷ *Id.* at 1746.

or gender identity is liable under Title VII.¹⁵⁸ Most importantly, this ruling provides LGBTQ+ employees a legal tool to secure workplace equality and live their authentic lives.¹⁵⁹ Additionally, *Bostock*, along with the increase of EEOC complaints regarding workplace discrimination based on sexual orientation and gender identity, suggests that employers will be held accountable for workplace discrimination and are now legally obligated to create more-inclusive workplace environments to comply with Title VII.¹⁶⁰

D. MODERN AIRLINE STANDARDS

1. *Airline Standards in the United States*

Although the passage of Title VII forced the airline industry to undergo significant reform, the airline industry continues to impose sex stereotypes on flight attendants through dress and appearance policies.¹⁶¹ All major airlines in the United States aim to convey a clean and professional image through required uniforms and appearance standards.¹⁶² United proclaims the importance of conveying “a professional and positive image each day” because the flight attendant’s appearance is “one of the first things noticed by customers and . . . leaves a lasting impression.”¹⁶³ However, these appearance and uniform policies disproportionately burden flight attendants who do not conform to normative sex stereotypes and consequently perpetuate workplace inequality.¹⁶⁴

Airlines continue to place more stringent standards upon female flight attendants than male flight attendants. The unequal burden airlines impose upon female flight attendants is evidenced by the sheer length of the dress code and appearance policies for females as compared with males. For example,

¹⁵⁸ See *id.* at 1744 (“[A]n employer who intentionally fires an individual homosexual or transgender employee in part because of that individual’s sex violates the law [Title VII] . . .”).

¹⁵⁹ See *id.*

¹⁶⁰ See Baumle et al., *supra* note 148, at 1143 (“Our preliminary results suggest that a more visible federal enforcement of Title VII laws . . . could result in more favorable workplace environments for LGBT individuals residing in states without state-level protection.”).

¹⁶¹ See LaGrave, *supra* note 4.

¹⁶² See *id.*

¹⁶³ *Flight Attendant Uniform Appearance Standards*, UNITED, https://unitedafa.org/docs/uniforms/appearance_standards.pdf [<https://perma.cc/3PQG-9U8W>] (“Your image is the United brand.”).

¹⁶⁴ See Levi, *supra* note 40, at 364.

American Airlines' uniform and appearance standards for female flight attendants are twice the length of men's standards, and United's standards for female flight attendants are four pages longer than its standards for male flight attendants.¹⁶⁵ These dress and appearance policies minimize "women's self-presentation according to someone else's judgment about when women should be sexy or businesslike and what sexy and businesslike, for women, mean."¹⁶⁶ These policies require women to exert more time, effort, and money on their appearance to keep their job, which ultimately objectifies and subordinates women in the workplace by perpetuating the characterization of female flight attendants as sexual objects.¹⁶⁷

Moreover, airline dress and appearance standards unduly restrict flight attendants' individuality and gender expression.¹⁶⁸ As a general matter, flight attendants are not allowed to adorn visible tattoos; body piercings besides ear piercings; "extreme" nail polish colors, nail art, or chipped nail polish; "[e]ccentric, exaggerated or trendy" makeup; unnatural hair colors; or excessive jewelry.¹⁶⁹ Further, male flight attendants are generally not permitted to wear nail polish, and Southwest allows male flight attendants to wear only bronzer or concealer if makeup is worn at all.¹⁷⁰

Although airlines, such as American Airlines, permit flight attendants to wear the gender uniform collection in which they identify, airlines do not allow flight attendants to mix female and male dress standards.¹⁷¹ Also, American Airlines states that the name displayed on the flight attendant's name tag must be derived from the flight attendant's legal name or must receive preapproval from a manager for a different name.¹⁷² Although

¹⁶⁵ AM. AIRLINES, FLIGHT SERVICE UNIFORM AND IMAGE STANDARDS (2020), <https://viewfromthewing.com/wp-content/uploads/2020/02/AA-2020-Uniform-Standards.pdf> [<https://perma.cc/HJ8L-2YNN>]; UNITED, *supra* note 163.

¹⁶⁶ Bartlett, *supra* note 26, at 2547.

¹⁶⁷ *See id.* ("Substantively, women's dress and appearance expectations objectify women and construct them as inferior, submissive, and less competent than men.").

¹⁶⁸ *Id.* at 2546.

¹⁶⁹ *See* AM. AIRLINES, *supra* note 165, at 9–10; UNITED, *supra* note 163; *External Flight Attendant Candidate Questions and Answers*, SW., <https://cdn.phenompeople.com/CareerConnectResources/SOUTUS/documents/FAQExternalOct2021-1637088210969.pdf> [<https://perma.cc/EHT4-JLUC>] (Oct. 2021).

¹⁷⁰ *See* AM. AIRLINES, *supra* note 165, at 10; UNITED, *supra* note 163; SW., *supra* note 169.

¹⁷¹ *See* AM. AIRLINES, *supra* note 165, at 5.

¹⁷² *Id.* at 7.

some airlines have promised to revise their appearance and dress-code policies to be more modernized and gender inclusive, most promises have proved meaningless.¹⁷³ For example, Alaska Airlines claims that giving flight attendants the opportunity to order their uniforms online will give employees greater ease in conforming to gender stereotypes that do not match their gender identity.¹⁷⁴ These dress and appearance policies demonstrate how the airline industry “perpetuates the existence of traditional gender identity and behavioral norms” and punishes those who deviate from those outdated stereotypes.¹⁷⁵

2. *International Airline Standards*

Foreign airlines are slowly catching up to modern and inclusive dress and appearance standards but largely remain stuck in a sexist past.¹⁷⁶ Historically, foreign airlines also created and relied upon sexualized marketing campaigns, such as Air France’s “Have You Ever Done It the French Way?” campaign and Air Jamaica’s “We Make You Feel Good All Over” campaign.¹⁷⁷ Flight attendants all over the world complain about provocative and uncomfortable uniforms, such as Qantas Airline’s uniforms that were revealed via fashion runway on a Victoria’s Secret model.¹⁷⁸ British Airways did not allow female flight attendants on certain crews to wear pants until 2016, and several other foreign airlines continue to require female flight attendants to wear skirts.¹⁷⁹ Further, a number of foreign airlines, such as Vir-

¹⁷³ Cf. Nexstar Media Wire, *United Airlines to Update Dress Code for Flight Attendants, Relax Rules on Tattoos, Makeup, Nose Piercings*, NEWS 10 ABC (June 19, 2021, 5:14 AM), <https://www.news10.com/news/united-airlines-to-update-dress-code-for-flight-attendants-relax-rules-on-tattoos-makeup-nose-piercings/> [<https://perma.cc/5GC2-JH6W>] (stating that the airline planned to revise flight attendant dress codes, but did not release new guidelines).

¹⁷⁴ See *Our Statement on ACLU Letter*, ALASKA AIRLINES (June 4, 2021), <https://newsroom.alaskaair.com/2021-06-04-Our-Statement-on-ACLU-Letter> [<https://perma.cc/73AV-SR3T>].

¹⁷⁵ Zalesne, *supra* note 5, at 537.

¹⁷⁶ LaGrave, *supra* note 4.

¹⁷⁷ BARRY, *supra* note 1, at 178.

¹⁷⁸ See Martha de Lacey, ‘But We Don’t All Look Like Miranda Kerr!’ Qantas Staff Upset by Airline’s ‘Sexy, Tight and Impractical’ New Uniforms, DAILY MAIL, <https://www.dailymail.co.uk/femail/article-2520734/Qantas-staff-upset-sexy-new-uniform-modelled-Miranda-Kerr.html> [<https://perma.cc/7XM5-N423>] (Dec. 10, 2013, 12:05 PM).

¹⁷⁹ See Alexandra Ilyashov, *British Airways’ Female Crew Members Can Finally Wear Pants*, REFINERY29 (Feb. 9, 2016, 9:30 AM), <https://www.refinery29.com/en-us/2016/02/102874/british-airways-flight-attendant-uniform> [<https://perma.cc/K3CT-TJPC>].

gin Australia, require female flight attendants to wear high heels and makeup while working.¹⁸⁰

Some foreign airlines' strict dress and appearance standards reflect regional or cultural ideals about femininity.¹⁸¹ For example, Singapore Airlines' brand revolves around the "Singapore Girl," who reflects "timeless beauty," dresses in a traditional Asian sarong kebaya, and wears one of five preapproved hairstyles.¹⁸² Emirates, a Dubai-based airline, requires female flight attendants to wear "Emirates red" lipstick and a red hat adorned with a white scarf, which is "reminiscent of a veil, worn by many Muslim women for religious purposes."¹⁸³ In 2015, Air India grounded 130 flight attendants, mostly female, for exceeding the airline's weight requirement after being given only six months to lose weight.¹⁸⁴

However, some foreign airlines are setting new trends for flight attendant dress and appearance policies. Virgin Atlantic became the first major British airline to retire its makeup requirement for female flight attendants to give them "more choice over how they express themselves at work."¹⁸⁵ A Ukrainian airline sought to "divert from the conventional 'skirt and heels' uniform of female flight attendants in favor of comfort."¹⁸⁶ The airline allows flight attendants to wear loose-fitting pantsuits with Nike sneakers, which "inspires the idea of comfort

¹⁸⁰ See Annabel Fenwick Elliott, *Norwegian Air Dress Code Orders Female Flight Attendants to Wear High Heels*, TRAVELLER (Apr. 30, 2019), <https://www.traveller.com.au/norwegian-air-dress-code-orders-female-flight-attendants-to-wear-high-heels-h1dw8c> [<https://perma.cc/K3CU-2A8A>].

¹⁸¹ See LaGrave, *supra* note 4.

¹⁸² *Id.*; *The Singapore Girl*, SING. AIRLINES, https://www.singaporeair.com/en_UK/us/flying-withus/our-story/singapore-girl/?affiliate_id=11001&affc=7e975c15-88c8-4132-9b66-eaceb23ade28 [<https://perma.cc/8EDV-X3JW>].

¹⁸³ LaGrave, *supra* note 4.

¹⁸⁴ See Michael E. Miller, *Too Fat to Fly? Air India Grounds 130 Flight Attendants for Being Overweight*, WASH. POST (Sept. 15, 2015, 4:11 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/15/too-fat-to-fly-air-india-grounds-130-flight-attendants-for-being-overweight/> [<https://perma.cc/YE53-NTCM>].

¹⁸⁵ Ceylan Yeginsu, *Virgin Atlantic Won't Make Female Flight Attendants Wear Makeup or Skirts Anymore*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/business/virgin-atlantic-flight-attendants-makeup.html> [<https://perma.cc/ASD8-VNE9>].

¹⁸⁶ Khoulood Haskouri, *Ukraine's SkyUp Changes Flight Attendant Uniform, Sets New Standard*, MOROCCO WORLD NEWS (Aug. 3, 2021, 3:18 PM), <https://www.moroccoworldnews.com/2021/08/343738/airline-favors-pant-suits-and-sneakers-for-flight-attendants-in-ukraine> [<https://perma.cc/EF27-CV5S>].

and movement.”¹⁸⁷ Thus, redesigning flight attendants’ uniforms may be the first step to shifting attitudes towards gender stereotypes and workplace equality in airlines all over the world in a positive direction.¹⁸⁸

IV. COFFEE, TEA OR ME: THE PREVALENCE OF THE SEXUAL HARASSMENT OF FLIGHT ATTENDANTS

The sexually charged depiction of flight attendants promoted and disseminated by airlines resulted in a proliferation of unrealistic sexual fantasies starring flight attendants.¹⁸⁹ However, these sexualized depictions throughout history have had pervasive and concrete effects on flight attendants.¹⁹⁰ The harsh consequences of the airline industry’s sexualization and exploitation of female flight attendants are illuminated in the disturbing accounts of flight attendants experiencing sexual harassment while at work and the alarming rates of sexual harassment in the flight attendant profession.¹⁹¹

A. SEXUAL HARASSMENT IN THE WORKPLACE

The EEOC defines workplace sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct . . . is used as the basis for employment decisions . . . or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.¹⁹²

¹⁸⁷ *Id.*

¹⁸⁸ *See id.*; LaGrave, *supra* note 4.

¹⁸⁹ *See, e.g.*, TRUDY BAKER & RACHEL JONES, COFFEE, TEA OR ME? THE UNINHIBITED MEMOIRS OF TWO AIRLINE STEWARDESSES (1967). This book depicted the romantic adventures of two stewardesses in the 1960s; however, the book’s ghost writer was revealed as Donald Bain. Kellar Ellsworth, *The Sexy Stewardess Stories of ‘Coffee, Tea or Me?’ Wouldn’t Fly Today*, GROOVY HIST. (May 4, 2019), <https://groovyhistory.com/coffee-tea-or-me-remembering-a-salacious-story-of-the-60s> [<https://perma.cc/CT2Q-DYG6>]; *see also* BARRY, *supra* note 1, at 173.

¹⁹⁰ *See* Ellsworth, *supra* note 189; BARRY, *supra* note 1, at 174.

¹⁹¹ *See* Press Release, Ass’n of Flight Attendants, Survey Reveals Widespread Harassment of Flight Attendants (May 10, 2018), https://www.afacwa.org/survey_reveals_widespread_harassment_of_flight_attendants [<https://perma.cc/SE37-BMRM>].

¹⁹² 29 C.F.R. § 1604.11(a) (2022) (emphasis added).

Further, the Supreme Court has confirmed that Title VII guarantees “employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”¹⁹³

However, the Court in *Meritor Savings Bank, FSB v. Vinson* also held that the “gravamen” of a sexual harassment claim is proving that the sexual conduct is “unwelcome.”¹⁹⁴ When determining whether sexual conduct is unwelcome, the Court held that the complainant’s speech and dress are “obviously relevant” to the determination of unwelcomeness.¹⁹⁵ Thus, a complainant’s dress and speech can be weaponized against the complainant to rationalize the wrongful conduct of others. The *Meritor* Court failed to recognize that sexual harassment is not about how a victim is dressed but is instead about the harasser asserting control over the victim.¹⁹⁶ Thus, employer-mandated, sexualized uniforms can be weaponized in court to prove that female employees somehow assent to sexual harassment by abiding by their employer’s policies.

The Court also ignored the interactions between employees and employers in specific workplace conditions.¹⁹⁷ “Workplace environments in which sexualized images, comments, and behavior toward women are tolerated” create an environment that is more likely to subject employees to sexual harassment.¹⁹⁸ Thus, employers who foster workplaces where employees are subjected to sexualization produce a safe place for harassers because the harassers feel as though the employer’s exploitation and sexualization of female employees condones and even encourages customers to sexually harass employees.¹⁹⁹

B. THE PREVALENCE OF THE SEXUAL HARASSMENT OF FLIGHT ATTENDANTS

Flight attendants are a class of employees who experience high rates of sexual harassment while on the job.²⁰⁰ Women represent 80% of flight attendants across the United States.²⁰¹ In

¹⁹³ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

¹⁹⁴ *Id.* at 68 (citing 29 CFR § 1604.11(a) (1985)).

¹⁹⁵ *Id.* at 69.

¹⁹⁶ See Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?*, 14 DUKE J. GENDER L. & POL’Y 125, 148 (2007).

¹⁹⁷ See *id.* at 150.

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* at 151.

²⁰⁰ Ass’n of Flight Attendants, *supra* note 191.

²⁰¹ *Current Statistics of Women in Aviation Careers in U.S.*, WOMEN IN AVIATION INT’L, <https://www.wai.org/resources/waistats> [<https://perma.cc/QD5E-299Q>].

2018 alone, one in three flight attendants experienced verbal sexual harassment, while one in five flight attendants suffered physical sexual harassment.²⁰² Flight attendants have described the verbal sexual harassment they have been subjected to as “nasty, unwanted, lewd, crude, inappropriate, uncomfortable, sexual, suggestive, and dirty.”²⁰³ Further, flight attendants report being subjected to “explicit sexual fantasies, propositions, request[s] for sexual ‘favors’ and pornographic videos and pictures.”²⁰⁴ Flight attendants also complain of being inappropriately touched both above and under their uniform, being cornered, and receiving unwanted hugs and kisses.²⁰⁵

Not only do flight attendants experience sexual harassment by passengers, flight attendants are also sexually harassed by their coworkers who take advantage of the power imbalance created by the airline industry’s history of sexism.²⁰⁶ Although women represent 80% of flight attendants, women represent less than 10% of pilots in the United States.²⁰⁷ There are countless stories of male pilots sexually harassing flight attendants.²⁰⁸ In several accounts by flight attendants with American Airlines, flight attendants reported pilots sending inappropriate messages, forcing themselves into their hotel rooms during layovers, drugging and raping flight attendants while on layovers, and threatening the flight attendants when they fought back.²⁰⁹ After reporting their sexual assaults, American Airlines flight attendants reported experiencing retaliation, intimidation, and complete lack of action by their employers.²¹⁰

²⁰² Ass’n of Flight Attendants, *supra* note 191.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See Press Release, Barbara Comstock, Rep., House of Representatives, Frankel, Comstock Request Action to Combat Sexual Harassment in Airline Industry, (May 24, 2018) (on file with author) (“It is perhaps not surprising that sexual harassment is prevalent given the industry’s past objectification of flight attendants.”).

²⁰⁷ WOMEN IN AVIATION INT’L, *supra* note 201.

²⁰⁸ See, e.g., Kate Beckman, *12 Flight Attendants Open Up About Being Harassed by Pilots and Other Coworkers*, COSMOPOLITAN (Feb. 8, 2018), <https://www.cosmopolitan.com/career/a16639463/flight-attendants-sexually-harassed-by-pilots/> [<https://perma.cc/6TUM-9VXG>].

²⁰⁹ See Kaley Johnson, *American Airlines’ Cover-up Culture Needs to Change, Women Who Allege Sexual Assault Say*, AVIATION PROS (June 3, 2021), <https://www.aviationpros.com/airlines/news/21225300/american-airlines-coverup-culture-needs-to-change-women-who-allege-sexual-assault-say> [<https://perma.cc/SP64-D6T5>].

²¹⁰ See *id.*

In another account, a United Airlines pilot posted inappropriate photos of a flight attendant to the internet without her consent, captioning the photos with references to the airline's tagline stating "a new reason to 'Fly the Friendly Skies!'"²¹¹ Although the flight attendant informed the airline of the pilot's conduct by verbally complaining, filing formal human-resource complaints, and providing evidence of the pilot's actions, the airline took no measures to discipline the pilot, which led the flight attendant to take a leave of absence from work.²¹² Despite the fact that the pilot was eventually criminally convicted of stalking the flight attendant, United Airlines allowed the pilot to retire with full benefits while he serves his prison sentence.²¹³

Notwithstanding the startling statistics and accounts of sexual harassment in the airline industry, only 7% of flight attendants who experience verbal or physical sexual harassment report the incident to their employer or authorities.²¹⁴ The lack of reporting is likely due to the difficulty of reporting incidents of sexual harassment while in the air and the perceived lack of action and accountability of airline employers.²¹⁵ If an incident of sexual harassment occurs in-flight, the flight crew is notified, law enforcement on the ground is contacted, the plane may be grounded due to the severity of the assault, and the ground law enforcement awaits to respond to the report when the plane lands.²¹⁶ Therefore, the potentiality of delays and the burdensome process of reporting assault often deters flight attendants from speaking out.²¹⁷ There is no federal law mandating the reporting and recording of sexual harassment incidents that occur in the air, which also contributes to the estimated 90% of sexual harassment cases that go unreported.²¹⁸

²¹¹ Sarah Mervosh, *Airline Failed to Act After Pilot Posted Racy Photos of United Flight Attendant*, *U.S. Says*, N.Y. TIMES (Aug. 11, 2018), <https://www.nytimes.com/2018/08/11/business/united-lawsuit-nude-photos.html> [<https://perma.cc/GZ4V-UFLC>].

²¹² *See id.*

²¹³ *See id.*

²¹⁴ *See* Johnson, *supra* note 209; Ass'n of Flight Attendants, *supra* note 191.

²¹⁵ *See* Caroline Bullock, *What Dress Codes Really Mean for Cabin Crew*, BBC (Feb. 19, 2018), <https://www.bbc.com/worklife/article/20180219-what-dress-codes-really-mean-for-cabin-crew> [<https://perma.cc/D8UM-LBGQ>].

²¹⁶ *See id.*; *Sexual Assault Aboard Aircraft*, FBI (Apr. 26, 2018), <https://www.fbi.gov/news/stories/raising-awareness-about-sexual-assault-aboard-aircraft-042618> [<https://perma.cc/24CH-DLFA>].

²¹⁷ *See* Bullock, *supra* note 215.

²¹⁸ Justin Bachman, *Sexual Misconduct on Airlines Gets Its #MeToo Moment—or Does It?*, BLOOMBERG (May 10, 2019, 2:00 AM), <https://www.bloomberg.com/>

Further, 68% of flight attendants believe that the airline industry has failed to adequately address sexual harassment.²¹⁹ Flight attendants embraced the #MeToo Movement and garnered attention from Congress, resulting in the establishment of the National In-Flight Sexual Assault Task Force.²²⁰ This Task Force has the responsibility to “provide recommendations . . . on best practices and protocols for air carriers relating to training, reporting, and data collection” concerning sexual harassment.²²¹ Congress also passed a Resolution requiring airlines to implement policies and procedures to address sexual misconduct, train personnel on appropriate and effective responses to sexual harassment, and hold individuals who perpetuate sexual misconduct accountable.²²² However, Congress has faced criticism from the flight attendant community for “putting the task force squarely in the pocket of airline management” instead of the hands of flight attendants themselves.²²³

C. THE AIRLINE INDUSTRY’S SEXIST PAST CONTRIBUTES TO THE PREVALENCE OF SEXUAL HARASSMENT

The airline industry’s ceaseless regulation of flight attendants’ dress and appearance, from its overt sexist history to its seemingly harmless contemporary policies, perpetuates the objectification and inferiority of flight attendants, and thus contributes to the prevalence of sexual harassment. Although the airline industry’s dress and appearance standards have evolved from miniskirts and go-go boots, current dress-code policies represent the sexist past of the airline industry and reinforce the inferiority and objectification of women.²²⁴ This characterization of flight attendants as an inferior sexual object results in alarming

news/articles/2019-05-10/sexual-misconduct-on-airlines-gets-its-metoo-moment-or-does-it [https://perma.cc/NV6Y-3FEM].

²¹⁹ Ass’n of Flight Attendants, *supra* note 191.

²²⁰ See Bachman, *supra* note 218; *National In-Flight Sexual Misconduct Task Force*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/airconsumer/ACPAC/in-flight-sexual-misconduct-task-force> [https://perma.cc/TD3Z-YKQD] (Mar. 16, 2020).

²²¹ S. REP. NO. 115-138, at 11 (2017).

²²² See H.R. 302, 115th Cong. § 338(1)–(2) (2017) (enacted).

²²³ Bachman, *supra* note 218.

²²⁴ Levi, *supra* note 40, at 361.

rates of sexual harassment, which is a direct legacy of the industry's sexist history.²²⁵

As demonstrated in this Comment, the airline industry historically and continually offers flight attendants as an attraction to passengers through dress and appearance policies.²²⁶ These dress-code policies are merely another mechanism to control women's bodies, police gender stereotypes, and financially benefit those exerting the control.²²⁷ Dress and appearance standards are utilized by airline employers to exert control over flight attendants in ways that "belittle, stymie, or totally impede women's ability to make their own decisions."²²⁸ These restrictions over flight attendants' dress and appearance prevent employees from asserting power in the workplace, which would otherwise threaten the employer's control and associated financial benefits.²²⁹

The airline industry's tolerance of sexual harassment also undermines flight attendants' ability to perform their job duties and ensure the safety of passengers.²³⁰ Workplace sexual harassment undermines the authoritative legitimacy of women in the workplace, which affects their ability to demand respect and enforce airline policies during emergencies.²³¹ Flight attendants—and women in general—are forced to fight back continually against discrimination and misogyny in the workplace while also fending off harassers, sexist employment policies, and systems that fail to provide flight attendants adequate protection.²³²

²²⁵ See Rhonda Werner, *Exposing Employers in the Hostile Work Environment: Appearance Standards That Lead to Sexual Harassment*, 15 *HAMLIN J. PUB. L. & POL'Y* 145, 167 (1994).

²²⁶ See 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, 313 (1997).

²²⁷ See Wu, *supra* note 31, at 175.

²²⁸ *Id.* at 169.

²²⁹ See *id.* at 170; Beiner, *supra* note 196, at 150.

²³⁰ See Bullock, *supra* note 215.

²³¹ See Beiner, *supra* note 196, at 151; Sara Nelson, Opinion, *The One Best Idea for Ending Sexual Harassment*, *WASH. POST: POST PARTISAN* (Dec. 8, 2017, 4:28 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2017/12/08/the-one-best-idea-for-ending-sexual-harassment/> [<https://perma.cc/8PM5-W8EF>] ("It is absurd to think that a group of people frequently harassed for decades can effectively become enforcers during emergencies without this level of clarity about the respect we deserve.").

²³² See Nelson, *supra* note 231 ("Our union was formed to give women a voice and to beat back discrimination and misogyny faced on the job.").

The airline industry's dress and appearance policies are incompatible with Title VII by relying on antiquated stereotypes of female sexuality and placing flight attendants at direct risk of being sexually harassed.²³³ By initially crafting flight attendants as sexually available and subsequently fostering that image through mandatory and overt dress and appearance policies, the airline industry has proved that it is tolerant of sexual harassment and sex discrimination, in spite of empty press statements to the contrary.²³⁴ Despite the stark differences between stewardesses and flight attendants, the modern airline industry's subtle and unspoken sex discrimination is "easily ignored or rationalized" by employers, passengers, and courts and thus more difficult to uncover and address.²³⁵

V. SWITCHING FLIGHTS: AIRLINE INDUSTRY DRESS-CODE POLICIES POST-*BOSTOCK*

The airline industry's sex-differentiated dress and appearance policies not only contribute to high rates of sexual harassment, but also cause harm to flight attendants who do not conform to conventional gender norms and stereotypes.²³⁶ Although courts have differed on the application of Title VII to sexuality and gender identity, the Supreme Court's ruling in *Bostock v. Clayton County* guaranteed employees protection from employment discrimination because of sexuality and gender identity.²³⁷ A nonbinary flight attendant's complaint regarding Alaska Airlines' sex-specific dress and appearance policies highlights the harms of sex-specific dress codes to trans and nonbinary individ-

²³³ See Werner, *supra* note 225, at 167 ("These standards defy the true intent of Title VII by forcing employees to carry on sexual stereotypes which subject them to sexual harassment.").

²³⁴ See Beiner, *supra* note 196, at 150 ("Workplace environments in which sexualized images, comments, and behavior toward women are tolerated are more likely to be those in which women are sexually harassed."); see, e.g., Leslie Josephs, *United Airlines CEO Calls For 'Zero Tolerance' of Sexual Harassment*, CNBC, <https://www.cnbc.com/2017/12/11/united-airlines-ceo-calls-for-zero-tolerance-of-sexual-harassment.html> [<https://perma.cc/SB66-TFQD>] (Dec. 11, 2017, 2:37 PM); *Making Respect Real: Continued Work to Prevent and Address Sexual Misconduct*, ALASKA AIRLINES (Nov. 9, 2018), <https://blog.alaskaair.com/values/people/sexual-harassment-prevention/> [<https://perma.cc/8QPQ-S8XN>].

²³⁵ Michelle L.D. Hanlon, *Sexual Hostility a Mile High*, 28 HASTINGS WOMEN'S L.J. 181, 188 (2017).

²³⁶ See Levi, *supra* note 40, at 365.

²³⁷ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1763 (2020).

uals, and also foreshadows the fragility of sex-specific employment policies under *Bostock's* interpretation of Title VII.²³⁸

A. LGBTQ+ FLIGHT ATTENDANT'S DRESS CODE AND APPEARANCE POLICY COMPLAINT

On June 4, 2021, the American Civil Liberties Union (ACLU) raised concerns about the legality of Alaska Airlines' uniform policy.²³⁹ The ACLU sent a letter on behalf of a nonbinary flight attendant who was forced to wear either the male or female uniform kit while on duty, which did not reflect the flight attendant's gender identity.²⁴⁰ At the heart of the complaint, the flight attendant shared: "I don't want to be forced into a binary uniform that excludes me and leads to me being misgendered at work."²⁴¹ By being forced to present as a specific gender at work, the flight attendant experienced anxiety, insomnia, depression, and panic attacks, which often resulted in the flight attendant being unable to work.²⁴²

Alaska Airlines' uniform policy "demeans employees who do not conform to gender stereotypes and materially interferes with their ability to do their jobs under equal terms and conditions as other employees."²⁴³ The uniform policy forces flight attendants to conform to "rigid gender stereotypes" by prescribing male and female uniform kits that contain significant differences and cannot be combined.²⁴⁴ The letter highlighted that "people wearing the 'male' uniform are not allowed to wear pieces from the 'female' uniform, such as the scarf or skirt," and vice versa.²⁴⁵ The letter also highlighted the variances between the male and female uniform kits, such as: only permitting concealer for those choosing the male uniform kit, requiring men

²³⁸ *ACLU Tells Alaska Airlines to Stop Discriminating Against Non-Binary And Gender Non-Conforming Flight Attendants*, ACLU (June 4, 2021), <https://www.aclu-wa.org/news/aclu-tells-alaska-airlines-stop-discriminating-against-non-binary-and-gender-non-conforming> [<https://perma.cc/XAD8-BH5X>].

²³⁹ See Letter from Joshua A. Block, Galen Leigh Sherwin & Lisa Nowlin, Staff Att'ys, ACLU, to Kyle Levine, Senior Vice President of Legal & Gen. Couns., Alaska Airlines 1 (June 4, 2021) [hereinafter ACLU Letter], https://www.aclu.org/sites/default/files/field_document/alaska_airlines_letter_on_behalf_of_justin_wetherell_-_june_4_2021.pdf [<https://perma.cc/ZSU8-96YS>].

²⁴⁰ *Id.*

²⁴¹ ACLU, *supra* note 238.

²⁴² ACLU Letter, *supra* note 239, at 2.

²⁴³ *Id.*

²⁴⁴ *Id.* at 1.

²⁴⁵ *Id.*

with long hair to pull their hair back at all times while females can wear long hair down, and allowing women to wear more jewelry than men.²⁴⁶

In addition to state antidiscrimination claims, the ACLU argued that the uniform policy discriminates on the basis of sex in violation of Title VII because the uniform policy applies different rules to different sexes.²⁴⁷ Relying on *Bostock* and *Price Waterhouse*, the ACLU contended that the uniform policy's rigid gender classifications reflect "stereotypical notions regarding masculinity and femininity," which is impermissible under Title VII.²⁴⁸ The letter acknowledged that *Bostock* abrogates prior precedent regarding gender-differentiated dress and appearance standards, such as *Jespersen*, and plainly disallows employers from imposing gender stereotypes on employees.²⁴⁹

Alaska Airlines responded to the ACLU complaint by reiterating the airline's support for the LGBTQ+ community and diversity.²⁵⁰ In response to the letter, Alaska Airlines shared that employees will now be able to order uniforms online, which will allegedly give employees more ease in uniform choice, and announced a gender-neutral hair policy that permits all flight attendants to wear their hair down.²⁵¹ The airline also emphasized that flight attendants can choose to wear the uniform kit that aligns with their gender identity.²⁵² However, the airline's brief response blatantly ignored the ACLU's point that the binary uniform policy rigidly forces employees to conform to gender stereotypes about masculinity and femininity and the fact that some flight attendants may not neatly identify as either male or female.²⁵³ Without modification, Alaska Airlines' dress and appearance policies may be found in violation of Title VII under *Bostock's* interpretation.²⁵⁴

B. LIKELIHOOD OF SUCCESS UNDER TITLE VII POST-*Bostock*

If Alaska Airlines' dress and appearance policy is challenged in court, it is likely that the dress-code policy will be found un-

²⁴⁶ See *id.* at 2.

²⁴⁷ See *id.* at 5.

²⁴⁸ *Id.* at 6.

²⁴⁹ See *id.* at 5 n.3; see also discussion *supra* Part III.

²⁵⁰ See ALASKA AIRLINES, *supra* note 174.

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See ACLU Letter, *supra* note 239, at 4–5.

²⁵⁴ *Id.* at 6.

constitutional and could signal the end of employer-mandated, sex-differentiated dress and appearance policies.²⁵⁵ After *Bostock*, forcing employees to dress in accordance with gender stereotypes is not only harmful to individual workers, but also violates federal law under Title VII.²⁵⁶ Sex-differentiated dress and appearance policies facially treat employees differently based on sex and punish employees for not following the policies assigned to a specific sex.²⁵⁷ Thus, the policies discriminate based on sex because the employee's sex is the determinative factor in the employment decision.²⁵⁸

1. *The Flight Attendant's Burden*

In establishing a *prima facie* case, the flight attendant will likely assert that the employer's sex-differentiated dress and appearance policies constitute disparate treatment under Title VII.²⁵⁹ A disparate treatment claim is appropriate because the policy explicitly classifies employees and imposes different standards on employees based on sex.²⁶⁰ When demonstrating the harm the policies impose on the employee, *Bostock* seemingly shifted the judicial focus away from group-based harms and focused on individual harms.²⁶¹ The Court stated:

Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII.²⁶²

Thus, *Bostock* simplified the flight attendant's burden by only requiring the flight attendant to prove that the sex-differentiated policy harms the flight attendant as an individual.²⁶³

²⁵⁵ *See id.*

²⁵⁶ *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020); discussion *supra* Part III.

²⁵⁷ *See* ACLU Letter, *supra* note 239, at 5 ("Policies such as the Alaska Airlines uniform policy, under which a woman faces discipline or disadvantage for dressing in a manner that would be permitted if she were a man . . . discriminate 'but for' the employee's sex within the meaning of Title VII.")

²⁵⁸ *See* Justin Blount, *Sex-Differentiated Appearance Standards Post-Bostock*, 31 GEO. MASON U. C.R.L.J. 217, 237 (2021).

²⁵⁹ *See* McCarthy, *supra* note 36, at 952.

²⁶⁰ *See id.*; Herald, *supra* note 39, at 317.

²⁶¹ *See Bostock*, 140 S. Ct. at 1741.

²⁶² *Id.* at 1742.

²⁶³ *See id.*

2. *The Airline's Defenses*

In response to the flight attendant's disparate treatment claim, the airline must prove that the sex-differentiated dress and appearance policies are justified as a BFOQ.²⁶⁴ However, the employer will face a steep uphill battle to justify its discriminatory policies. Courts have repeatedly agreed with the EEOC that the BFOQ exception to Title VII's prohibition of sex discrimination should be construed narrowly.²⁶⁵ Thus, the employer must prove that the sex-differentiated dress and appearance policies are necessary to the essence of the airline business and a flight attendant's ability to perform their duties.²⁶⁶

Courts have determined that a flight attendant's primary job duty is to transport passengers safely from one destination to another.²⁶⁷ A flight attendant's ability to assist passengers, instruct on airline safety, and serve food and drinks is in no way correlated to whether the flight attendant is wearing pants or makeup.²⁶⁸ In truth, the dress and appearance policies inhibit the flight attendants from doing their jobs because some feel uncomfortable conforming to a gender stereotype they do not identify with or they are being harassed while working.²⁶⁹ Further, courts have held that the appearance of flight attendants is not connected to the essence of the business, but is instead merely "tangential" to the essence of the business and does not jeopardize the airline's primary business function of safely and quickly transporting passengers.²⁷⁰ Thus, dress and appearance standards are not correlated to flight attendants' ability to perform their job, but are instead correlated to the employer's insistence on flight attendants conforming to stereotypes about how men and women should appear.²⁷¹

The airline will likely argue that the dress and appearance standards are justified because airline customers prefer flight at-

²⁶⁴ Bishop et al., *supra* note 41, at 373.

²⁶⁵ See 29 C.F.R. § 1604.2(a) (1972); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971).

²⁶⁶ See *Wilson v. Sw. Airlines*, 517 F. Supp. 292, 299 (N.D. Tex. 1981).

²⁶⁷ See *id.* at 302; *Diaz*, 442 F.2d 385 at 388.

²⁶⁸ See *Wilson*, 517 F. Supp. at 302.

²⁶⁹ See ACLU Letter, *supra* note 239, at 2 (detailing how the flight attendant "often faces panic attacks leading up to a scheduled shift as a flight attendant, which has resulted in them trading out of a shift or calling out sick on multiple occasions"); discussion *supra* Part IV.

²⁷⁰ See *Wilson*, 517 F. Supp. at 302.

²⁷¹ See Blount, *supra* note 258, at 244-45.

tendants to look a specific way.²⁷² However, courts have repeatedly rejected customer preference as a valid BFOQ unless a valid privacy interest is involved.²⁷³ Further, EEOC regulations provide that customer or employer preferences are generally not valid BFOQ defenses under Title VII.²⁷⁴ Allowing airlines to justify sex-differentiated dress and appearance standards because of the possible prejudices of customers and employers cannot be accepted by courts because it would result in “no principled limit” of the BFOQ defense by allowing employers “freely to discriminate” against employees based on gender identity, which contradicts Title VII.²⁷⁵

3. *Potential Judicial Application of Title VII to Dress and Appearance Policies Post-Bostock*

The status of the unequal burdens test after *Bostock* is questionable. Although courts have tended to focus on group-based harms, such as in *Jespersen*, *Bostock* expressly focuses on harms suffered by the individual.²⁷⁶ Therefore, it appears that *Bostock* compels courts to focus on the harm suffered by the individual rather than harms suffered by the group as a whole, which defeats the purpose of the unequal burdens test employed by some courts.²⁷⁷ *Bostock* also undermines the unequal burdens test because the Court held that “an employer cannot escape liability by demonstrating that it treats males and females comparably as groups.”²⁷⁸ Thus, *Bostock* renders previous judicial analyses of dress and appearance standards obsolete because *Bostock* highlights individual harm rather than comparing group harms.²⁷⁹ Under *Bostock*, courts should simply determine whether the policy differentiates employees based on sex, whether the employee bringing the action has suffered harm from the policy, and then finally, whether the policy is unconstitutional under Title VII.

When a court applies this analysis to the ACLU letter concerning Alaska Airlines, the flight attendant should prevail. Alaska Airlines’ dress and appearance policy creates a clear and inflexi-

²⁷² See *Wilson*, 517 F. Supp. at 302.

²⁷³ See Bishop et al., *supra* note 41, at 374.

²⁷⁴ See 29 C.F.R. § 1604.2(a)(1)(iii) (1972).

²⁷⁵ *Wilson*, 517 F. Supp. at 304.

²⁷⁶ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020).

²⁷⁷ See Blount, *supra* note 258, at 238–39.

²⁷⁸ See *Bostock*, 140 S. Ct. at 1744.

²⁷⁹ See *id.* at 1741.

ble division between male and female flight attendants.²⁸⁰ The nonbinary flight attendant is disadvantaged for not conforming to the employer's binary dress and appearance policies, which constitutes sex discrimination under *Bostock's* interpretation of Title VII.²⁸¹ Next, the flight attendant should be able to provide evidence of individual harm because the ACLU letter stated that the flight attendant feels that "their gender identity and expression aren't valued or accepted, and as a result feel[s] forced to present as 'male' at work."²⁸² The letter further stated that the flight attendant's mental health deteriorated as a result of the dress and appearance policies, and they purposefully missed work due to the distress the policy caused.²⁸³

Although Alaska Airlines touts to be a "leader" in diversity and inclusivity, the airline clearly has more progress to make.²⁸⁴ The airline has dismissed the flight attendant's request to provide accommodations for nonbinary flight attendants in dress and appearance policies, and while the airline permits the flight attendant to dress in accordance with their gender identity while acting as a flight attendant instructor, the airline continually rejects the request to extend the accommodation to flight attendants while in-flight.²⁸⁵ As illustrated above, the employer will most likely be unsuccessful in asserting a BFOQ defense because an alleged customer preference on the appearance of employees is not permissible under Title VII.²⁸⁶ Alaska Airlines should not, and legally cannot, force its flight attendants to conform to gender stereotypes, and courts should agree.²⁸⁷

VI. LANDING: CONCLUSION

A. WHY AIRLINES SHOULD CARE ABOUT THE EFFECTS OF GENDERED DRESS CODE AND APPEARANCE POLICIES

Although employer-mandated dress and appearance policies may appear trivial, the policies have a substantial impact on individual autonomy and gender equality.²⁸⁸ Many individuals may not find dress and appearance standards objectionable because

²⁸⁰ See ACLU Letter, *supra* note 239, at 1–2.

²⁸¹ See *id.* at 5.

²⁸² *Id.* at 2.

²⁸³ See *id.*

²⁸⁴ ALASKA AIRLINES, *supra* note 174.

²⁸⁵ See ACLU Letter, *supra* note 239, at 1–3.

²⁸⁶ See *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981).

²⁸⁷ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1743 (2020).

²⁸⁸ See Zalesne, *supra* note 5, at 536.

many individuals naturally conform to gender norms.²⁸⁹ Yet for some individuals, sex-specific dress codes have detrimental effects on their identity and future.²⁹⁰ Some individuals continue to conform to gender stereotypes out of fear of “being marginalized . . . or being totally rejected and ostracized for failing to conform.”²⁹¹ However, forced conformity through sex-specific dress and appearance policies has gradual and harmful effects on marginalized individuals by barring them from expressing their true identity.²⁹²

The trans community in particular has high rates of unemployment and income disparities.²⁹³ Further, a lower socioeconomic class and high rate of unemployment increase the likelihood of suicidal ideation and attempts in the trans community.²⁹⁴ Gender-related discrimination, such as feeling unsafe in gendered spaces and nonaffirmation of an individual’s gender identity, further increases the likelihood of suicidal ideation and attempts in the trans community.²⁹⁵ Thus, studies show that individuals whose gender identity or appearance is “less congruent with established social norms may face ostracization and/or victimization . . . and these experiences may leave them at increased risk of suicide.”²⁹⁶ These studies prove that gendered workplace policies are not trivial but instead could have devastating and irreversible effects on an individual’s life.²⁹⁷ Employers can help prevent these devastating effects of gendered dress and appearance policies by simply showing meaningful support, which is proved to decrease suicidal ideation and attempts.²⁹⁸

Gendered dress and appearance policies also inhibit societal progress by reinforcing sex stereotypes and prejudices.²⁹⁹ The goal of gendered dress and appearance policies is to dictate the way employees act and dress in the workplace, while at the same

²⁸⁹ See Levi, *supra* note 40, at 365.

²⁹⁰ See Zalesne, *supra* note 5, at 559.

²⁹¹ Wu, *supra* note 31, at 171.

²⁹² See Levi, *supra* note 40, at 364–65.

²⁹³ See M.V. Lee Badgett, Brad Sears, Holning Lau & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 CHI-KENT L. REV. 559, 594 (2009).

²⁹⁴ See Jay McNeil, Sonja J. Ellis & Fiona J.R. Eccles, *Suicide in Trans Populations: A Systematic Review of Prevalence and Correlates*, 4 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 341, 344 (2017).

²⁹⁵ See *id.* at 342.

²⁹⁶ *Id.* at 349.

²⁹⁷ *Id.* at 350.

²⁹⁸ See *id.* at 348.

²⁹⁹ See Zalesne, *supra* note 5, at 536; Wu, *supra* note 31, at 172.

time perpetuating outdated stereotypes about masculinity and femininity.³⁰⁰ Gendered dress and appearance policies inhibit social equality by forcing individuals to live inauthentic lives and portraying women as subordinate.³⁰¹ Thus, gendered dress and appearance standards “perpetuate[] a set of gender norms that feminize women and masculinize men, thereby punishing men for displaying devalued characteristics of femaleness and femininity.”³⁰² The repetitive enforcement of biased gender stereotypes triggers larger biases, which “grind out the substantial distinctions between genders over time.”³⁰³

Further, future airline passengers are moving past distinctions between the sexes and instead care about how employers treat employees.³⁰⁴ Generation Z comprises a third of the population, has hundreds of billions of dollars in spending power, and is adapted to a gender-fluid world.³⁰⁵ Dress that may have once been deemed offensive is now common and unobjectionable because notions about gender have changed, the law has progressed to provide more protection for individuality, and people increasingly acknowledge the importance of living an authentic life.³⁰⁶ Therefore, employers should change employment policies and put the well-being and individual abilities of their employees above the insistence of conforming to antiquated gender norms because society as a whole has changed and continues to progress.³⁰⁷

B. HOW AIRLINES CAN CREATE AN INCLUSIVE AND NONDISCRIMINATORY WORKPLACE ENVIRONMENT

The airline industry should strive to create gender-neutral dress and appearance policies that promote diversity, inclusivity, and professionalism. It is entirely possible for employers to create a gender-neutral dress and appearance policy in which employees can “comfortably, capably, competently, and confidently

³⁰⁰ See Wu, *supra* note 31, at 191.

³⁰¹ See Hanley & MacWilliamson, *supra* note 137, at 128–29; Zalesne, *supra* note 5, at 556–57 (detailing how “gender regulation perpetuates patterns of male domination and gender-based exclusion”).

³⁰² Zalesne, *supra* note 5, at 556 (internal citation omitted).

³⁰³ Herald, *supra* note 39, at 331.

³⁰⁴ See Obi Anyanwu, *Fluid Project Founder on Genderless Fashion and Business*, WWD, Dec. 4, 2019, at 13.

³⁰⁵ See *id.*

³⁰⁶ See Bartlett, *supra* note 26, at 2579–80.

³⁰⁷ See Wu, *supra* note 31, at 195–96.

perform their duties.”³⁰⁸ Employers should strive to be aware of the gender stereotypes they are enforcing through dress and appearance policies, understand the harm gender stereotypes cause, enact meaningful change, and continually revisit their policies.³⁰⁹ If airlines do not make the required changes to their employment policies, airlines may eventually be obligated to change their policies by courts. Until then, employers should prepare for litigation, policies being declared in violation of Title VII, and flight attendants leaving the profession.³¹⁰ A redesign of airlines’ dress and appearance policies symbolizes more than a rebrand; it could symbolize flight attendants feeling safe at work by cleansing the flight cabin of sexism and discrimination.

Airlines should create genderless dress and appearance policies that erase binary divisions between the sexes, thus creating an inclusive and supportive workplace that cherishes the individual merits and autonomy of flight attendants.³¹¹ First and foremost, airlines must eliminate binary policies by creating one comprehensive policy that applies to all employees and utilizes gender-neutral language.³¹² Instead of crafting sex-specific uniform kits, airlines could offer a policy for in-flight standards and another section for off-duty standards. The in-flight standards can list all the clothing items that are currently permitted, but instead of mandating what pieces may be worn together, simply state that the in-flight uniform should consist of a button-down shirt, sweater, or dress; a jacket or vest; a pair of slacks or a skirt; and loafers or heels.³¹³ The off-duty standards could simply state that the employee must maintain a business-casual appearance

³⁰⁸ Hanley & MacWilliamson, *supra* note 137, at 147.

³⁰⁹ See Herald, *supra* note 39, at 302.

³¹⁰ See Levi, *supra* note 40, at 365.

³¹¹ See Hanley & MacWilliamson, *supra* note 137, at 148 (“A genderless dress code confirms that all employees, no matter their gender, are held to the same standards and equally permitted to professionally express their identity in their workplace.”).

³¹² See Mirande Valbrune, *Gender-Based Dress Codes: Human Resources, Diversity and Legal Impact*, FORBES (Sept. 28, 2018, 8:00 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/09/28/gender-based-dress-codes-human-resources-diversity-and-legal-impact/?sh=1da0297e4f53> [https://perma.cc/GZ8K-V4LQ].

³¹³ See *id.*; Hanley & MacWilliamson, *supra* note 137, at 149; *Inclusive Dress Codes Make Work Better for LGBTQ+ People—and Everyone Else*, INCLUDED HEALTH (Aug. 5, 2021), <https://lgbtq.includedhealth.com/news/inclusivedresscodes> [https://perma.cc/2ZCR-M47N] (“Create rules that focus on articles of clothing . . . that could be applied to any employee.”).

and not wear clothing with “offensive language or inappropriate designs.”³¹⁴ The policy can also mandate that uniforms be well-tailored and clean to maintain a professional image.³¹⁵

In regards to appearance standards, the airlines should only require that flight attendants maintain clean personal hygiene, long hair be tied back during service, and dangle jewelry not exceed a certain length.³¹⁶ Finally, the policy can state that the employee should “exercise good judgment and dress in a manner consistent with the company’s professional standards.”³¹⁷ These genderless and broad standards will ensure that employees can express their authentic identity; allow employees to be comfortable and empowered while performing their job duties; facilitate a trusting relationship between employers and employees; and eliminate the possibility of discrimination on the basis of gender identity, race, religion, and disability.³¹⁸ With these guidelines, airlines can simultaneously achieve a professional appearance and maintain a successful business while also valuing the individual autonomy, well-being, and legal rights of flight attendants. Without change, flight attendants will continue to face sexual harassment at alarming rates, feel uncomfortable and unsupported in their work environment, and be compelled to bring Title VII suits against the airline industry for its unconstitutional insistence that flight attendants conform to outdated gender stereotypes.

³¹⁴ See Lauren Pope, *How to Create a Non-Biased Dress Code Policy for Employees*, G2 (Aug. 3, 2021), <https://www.g2.com/articles/dress-code-policy> [https://perma.cc/MN3S-GGGW].

³¹⁵ See Hanley & MacWilliamson, *supra* note 137, at 149–50.

³¹⁶ See *Workplace Dress Codes and Transgender and Non-Binary Employees*, HUM. RTS. CAMPAIGN FOUND., <https://www.thehrfoundation.org/professional-resources/workplace-dress-codes-and-transgender-employees> [https://perma.cc/64QQ-83QX].

³¹⁷ Valbrune, *supra* note 312; see also INCLUDED HEALTH, *supra* note 313 (“Place trust in their employee’s sense of judgement (which empowers employees and leads to better collaboration and work!)”).

³¹⁸ See Pope, *supra* note 314.