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TO WHAT EXTENT DOES THE LAW NEED TO DO MORE TO ADDRESS GENDERED DISCRIMINATION IN EMPLOYEE DRESS CODES?

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ABSTRACT

This paper advocates reform to address discriminatory attitudes to dress, focusing on the adverse effect on women. It agrees with the conclusions of the High Heels and Workplace Dress Codes Inquiry that compensation should be awarded in the interim, with serious reconsideration of the Equality Act 2010 (EA) in parliamentary debates in March 2017. Nevertheless, the high threshold tools for reform, through notions such as 'direct discrimination', fail to tackle the nuances of the problem; not least that 'sex sells' (Chapter Three), and debates surround 'what woman is' (Chapter Four). An element of scepticism is needed for a law that has at least perpetuated, and at most created, rigid gender binaries seen as relevant when establishing dress code policies. A holistic socio-legal analysis of why gender distinctions are relevant is more appropriate than law alone in providing sustainable reform in this area.

Keywords: Gender equality, Dress Codes, Discrimination, High Heels Inquiry

INTRODUCTION

The *de jure* 'glass ceiling', operating through unequal treatment of women in dress discrimination, is symptomatic of outmoded patriarchal attitudes, restricts true equality and operates as a significant anomaly to otherwise progressive EA motives. The Parliamentary Inquiry has significant strength to take the unacceptable practices seriously, and overdue legal reform is now suggested to be on the horizon. Legal tools cannot operate in a vacuum, however, and the deeply-entrenched views underpinning society must also change. Blanket legal reform is made more difficult by two problems: i) objectifying women through their sex has tangible commercial benefits (a 'sex sells' argument), and ii) society's discrepancies in gender identity are ill-addressed (a 'femininities' argument). To be effective, reform should not be used politically to quieten feminist thinkers, if these two strands remain operative considerations for employers. Reformists must borrow from socio-legal, psychological and philosophical thought to see law's interaction with societal perceptions as the only way to achieve significant reform.

Aims

The year 2016 was a significant year for dress, from the French 'burkini' prohibition to Theresa May's 'glass cliff' ministership being overshadowed in the media by her loud footwear (Ryan et al., 2014). One case had a particularly high profile—Nicola Thorp sent home from Pricewaterhouse Coopers for refusing to wear high heels. Media attention, online petitions and a subsequent parliamentary inquiry brought this issue to the forefront of numerous other legal debates, defining discrimination/equality, individuality in law, perceptions of femininity, formal and substantive equality and the masculine bias of law creation/enforcement. Thorp's plight caught my attention and I decided to locate the legality of 'reasonable and conventional' standards of dress, before analysing its compatibility with wider societal views. In pursuing this objective, I will be one of the first to engage in academic, extended research related to the inquiry.

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This paper attempts to raise awareness of an issue that may only offend a number of feminist theorists and fall on deaf ears in our particular socio-political climate, still out of reach of the patriarchal system. Reflecting on these aims, the increased political interest in the issue has also led to a conservative backlash, forcing me to regroup and further justify the worth of the research. Tabloid-style rhetoric could not disguise some valid opposing arguments, including freedom of contract, the dangers of paternalistic intervention in capitalist societies, and that dress ranks low in a hierarchy of political problems facing a 'Brexiting' Britain. This has prompted much of the 'macro' outlook adopted throughout: the law must do more to address discrimination in dress because of its symbolic and thematic relevance.

During preparation, the conscious decision to focus on women's discrimination has been made; acknowledging discrimination based on race, disability and age, their inter-sectionalities and the marginalisation of the transgender individual, probes linked and relevant questions but falls beyond the scope of this thesis. It is hoped that others will ask whether legal reform is needed to overcome these problems.

Methodology

This paper combines a black-letter analysis of English and Welsh law with socio-legal understandings and feminist theory to form a relevant, modern analysis rooted heavily in its 2016 context. The frequented legal position forms only the 'undergarments' of the suggested importance of this thesis, and it has been necessary to directly apply the fast-moving discourse to abstract law through non-traditional sources: Thorp's website, the Twitter hashtag #highheelsinquiry, evidential podcasts, news sources and blogs.

LEGAL CRITIQUE: 'A PWC V THORP [2017]?'

In considering a '*PwC v Thorp* [2017]' should her dismissal be litigated, this section will apply and evaluate the four types of discrimination under the EA – direct (s.13), indirect (s.19), harassment (s.26) and victimisation (s.27).

Direct Discrimination

The nature of binary gendered dress codes is often alarmingly simple: 'men wear X, women wear Y.' Thorp's case is likely to fall under this heading of direct discrimination (discrimination 'because of gender'), as the firm's Code stated women must wear heels, with no corresponding requirement for men. This would, however, likely be another frequented example of 'demeaning' discriminatory women's uniforms,[2] which are not treated judicially as less favourable to an 'actual or hypothetical' man (s.13 EA). If women's polyester uniforms while men wore suits[3] or women-only 'little hats'[4] did not lead to a legal remedy, why should high heels (which many see as conveying authority or power) do so?

Furthermore, 'women must wear nail varnish' rules returned the verdict of *de minimis*[5]— the requirement that women alone paint their bodies to display a version of their gender identity being so insignificant as to destroy the likelihood of a claim, even though the elements of direct discrimination were made out (Zalesne, 2007, p. 2). This suggests that even if Thorp's heels could be found to be more onerous than the men's dress code and thus satisfied the test, it could be struck out by unsympathetic 'judicial laissez-faire' (Levi, 2008, p. 5). Highly offensive to the proposed significance of dress discrimination, obiter judicial statements to 'restrict a culture of hypersensitivity' (Richmond Pharmacology v Dhaliwal, 2011) reflect a potential prevailing view explaining inaction and ambivalence from the Bench. Highlighted as out of touch with the progress of other sex discrimination claims (Levi, 2008, p. 3), dress law interpreted on

[2] *Burrett v West Birmingham Health Authority* [1994] IRLR 7.
[3] *Cootes v John Lewis Plc* [2001] All ER (D) 395.
[4] *Burrett v West Birmingham Health Authority* [1994] IRLR 7.
[5] *Murphy and Davidson v Stakis Leisure Ltd ET* (1989) S/0534/89.

'conventional sex differences'[6] is seen to rebut the underlying rationale of the legislation to challenge discriminatory assumptions.[7] Alarmingly, this has led to commonplace attempts to strengthen cases through supplementary considerations encompassing some of the worst discriminatory elements: psychiatric damage,[8] gender dysphoria[9] or the contention that dress codes perpetuate stereotyped views of women as inferior or as sexual objects. The legal approach therefore remains one of a large margin of appreciation to employers,[10] with 'accessories' to law needed for substantive legal benefit.

It could be argued that the judiciary, themselves wearing archaic wigs and gowns (Robson, 2013, p. 48), remain immune to these problems. Judges often represent masculine viewpoints, even if they are not all male. They see their wives applying make-up, or apply it themselves, so struggle to empathise with those bringing claims (Levi, 2007, p. 20). Female judges put on high heels to gain status in the courtroom (ACAS, 2016, 38). The privileging of the 'ornamental' woman (Crane, 2000, p. 16) through appearance codes is seen as sensible, competitive and not illegal. Dress codes instigating specific and different rules for women and men are commonplace, 'conformity' with societal gender norms encouraged, and the professional projection of companies successfully used to justify[11] an apparently non-derogable obligation.[12] It is apparent that in this area the views that high heels should be a 'choice not requirement', and that an obligation to wear them 'reeks of sexism' (Bates and Parkinson, 2016), remain unique to the abstract commentators lobbying for reform. Conclusively, until this position is debated, the law would respect the innocence of PricewaterhouseCoopers in looking to 'common practice' within the industry and 'professional appearances', without analysing whether this could be achieved in a less onerous way.

Lemes (2009) highlighted *obiter* that many women feel uncomfortable, objectified and prostituted when forced to wear heels. The College of Podiatry's Inquiry responses, however, highlight genuine health concerns from permanent back, posture, ankle and foot problems through to pain tolerance averaging only around 40 minutes. These show that the aesthetic reason compelling heels is not taken lightly, and is engrained and normalised among many fashion choices that impede health. Opponents arguing the fragility of the symbolic argument would surely struggle to rebut proven medical harm caused by heels. Furthermore, in a 'compensation culture', we would question why high heels on shiny marble floors are not prohibited rather than mandated to avoid employer liability, following trends elsewhere.

Other Grounds

The peculiar situation is that many unsuccessful direct discrimination cases are squeezed into indirect discrimination, which provides for gender-neutral rules with the effect of differential treatment through a 'policy, criterion or practice' (PCP). Albeit incorrect, use of indirect discrimination is more favourable to employers, as it rebuts *prima facie* illegality by allowing justification: business conventionality and perhaps even brand image akin to aesthetic labour (Chapter Three) become engaged. A genuine indirect gender claim could be the PCP of a blanket prohibition of earrings, which adversely impact women, as they tend to have pierced ears more often (ACAS, 2016). Ultimately, however, the majority of dress codes bypass this discussion as they have nothing to hide; the law allows gendered distinctions, so common practice is to have two dress codes. They are not caught out because they fall short of the 'bolted on' tests for favourability of treatment that legal direct discrimination has developed to protect

[6] *Fuller v Mastercare Service and Distribution* [2001] All ER (D) 189.
[7] *Smith v Safeway plc* [1996] IRLR 4656 CA.
[8] *Lemes v Spring and Greene Ltd* (2009) ET 2201943/08.
[9] *Kara v London Borough of Hackney* [1996] UKEAT 325_95_2802.
[10] *Schmidt v Austicks Bookshop Ltd* [1978] ICR 85.
[11] *Kara v United Kingdom* (1999) 27 EHRR CD272.
[12] *Department for Work and Pensions v Thompson* [2004] IRLR 348.

current practice (Wadham, 2012, p. 55). The utility of indirect discrimination lies beyond the scope of this paper in the religious parallel (in not allowing head coverings[13] or jewellery[14]), which adversely affect demonstration of faith (skewed towards women), perhaps reflecting unaddressed cultural insensitivities in the UK, or—worse—using the shield of derogable obligations to discriminate. Victimisation and harassment also have some limited utility, such as cases where skimpy clothing encourages unwanted attention, and are prevalent for their value in pre- and post-employment claims. The frequency of all four being claimed despite direct discrimination being obvious in gender cases, however, reflects the lack of certainty/confidence in success in these cases and reflects further why the law should be reformed.

Suitable?

Media attention has raised the profile of dress in the last six months. Legislation from 2010 (Equality Act 2010), however, is unlikely to be wholly inaccurate or unsafe in the 2016/7 context. Reform proposals must acknowledge that the law reflects extensive domestic review and conclusions regarding what non-discrimination looks like constitutionally. Without explicit legislative comment on dress discrimination, it remains 'good law.' I do not believe there is value in upholding discrimination, but the opposing view may represent the oft-criticised masculine lens of law, which struggles with the nuances of women's advancement position. Moreover, some viewed the Equality Act 2010 as 'political correctness gone too far', summarised as 'white men need not apply' (Wadham, 2012, p. x). Law's ambivalence can therefore demonstrate that, for many, the legal position is still suitable or even overly generous.

Thorp's case would undoubtedly run all four types of discrimination, as well as health and safety concerns to strengthen the case. In a culture without legal aid, this creativity necessary for successful application of law is unsuitable. The masculine-lensed ambivalence of the judiciary in implementing law prohibit true efficiency through legal reform alone, and notions of gender normality in society, need to be outlined in some form for any intended consequence to trickle down to individualised justice in employment tribunals. Further probing of the roots of discrimination in law are needed.

THE 'OCCUPATIONAL QUALIFICATION' OF SEXISM: LESSONS FROM THE USA?

Within 'sex' discrimination, the central consideration premising differential treatment is the objectification of women for the purposes of sex. The idea of 'privileging of the ornamental' (Crane, 2000) across western societies must be developed, most notably comparing the domestic situation with the explicit American legislation through Title VII Civil Rights Act 1964 to draw attention to the prevalence of sexualisation in the dress code discourse. Despite consideration, this analysis is confined to 'forgetting lessons from the USA', arguing that the US exemption for discrimination when 'selling sex' (Assiter et al., 1999), jars with a satisfactory resolution of the autonomy/equality discourse.

When seeking a comparator for Chapter Two's compulsory heels for organisational professionalism, we draw an uneasy parallel with the same requirement alongside 'tight-fitting, sexy, uncomfortable costumes' in the 'Babes and Beefcakes' of the American literature (McGinley, 2007). The US Title VII prohibition against sex discrimination allows employers to hire women for sex appeal, if the 'central mission' of the business is to sell sex (Rafaeli and Pratt, 1993, p. 3) —a 'bona fide occupational qualification' (BFOQ) (s.703(e) Title VII Civil Rights Act 1964). Perhaps counterintuitively, this means that the highly-legislated, constitutional 'protection' (Shin, 2007) that we could be calling on for UK reform advice would

[13] *Azmi v Kirklees Metropolitan Council* [2007] IRLR 343.
[14] *Eweida v British Airways plc* [2010] EWCA Civ 80.

allow exotic dancer clubs (McGinley, 2007, p. 17) and perhaps Hooters or the Playboy mansion (Williamson, 2006, p. 16) to rebut sex discrimination claims by invoking that their business model necessitates scantily-clad women.

Autonomy?

If the link of sexuality in Thorp's case was inexplicit, an additional element of the BFOQ test springs from another, albeit relatively archived, Price-Waterhouse litigation: discrimination must adversely affect the claimant's ability to her job.[15] The law's utility is therefore demarcated by the idea of 'willingness to serve' (Watt, 2013, p. 184), and it should be considered that many women feel empowered, in control, valued for their sexuality and autonomous due to the same dress codes that others would find discriminatory. The argument could be invoked that women have earned the right to dress in a provocative manner and be proud of their sexuality (Keenan, 2001, p. 45), and if the sex-based industry is a reality, the US law would be paternalistic in not respecting the proven effectiveness of sex to drive up business among willing participants. This, however, goes to the heart of the feminist debate of the right to choose to be sexually attractive vs. protecting equal treatment for men and women.

Virgin

The dangers of justifying sex discrimination through Title VII have led to its narrow successful application by courts in the case study of airlines. *Diaz v Pan American World Airway* (1972)[16] and *Wilson* (1982) highlighting BFOQ failure where 'safe transportation of passengers' was the business purpose, with 'the sex appeal portion of the job tangential to its duties' (McGinley, 2007, p. 9). Airborne Collision Avoidance System (ACAS), however, moots Virgin Atlantic as having one of the worst offending dress codes. Falling short of the US 'BFOQ' test should not prevent us from noting that air hostesses' appearance is seen as relevant to their role, despite and perhaps above their performance. While we could see that the 'extremely feminine silhouette' of professionally-styled Vivienne Westwood uniforms are a genuine ode to power-dressing (Friedman, 2016), and admit there is truth in Sir Richard Branson's 'If you dress in clothes that make you feel you look good … [you] do your job a lot better' (Nicholson, 2014), this mirrors the direct gendered discrimination of Chapter Two, as such comments are targeted at the 'erotic capital' of women in exclusive hiring.

Abercrombie

As an all-American 'tweenaged' brand, explicit sexuality would no doubt be age-inappropriate in the case of Abercrombie. Nonetheless, perpetuating a 'cool' brand has seen much of the aforementioned law applied—their business aims aligned with strict application of appearance codes and the aestheticisation of labour. From prosthetic arms[17] to headscarves (Basin and Fairchild, 2013), a number of litigations have led Abercrombie to 'overhaul' its distinctive exclusive hiring policy, under which 'models' were previously weighed at interview and selected when shopping in store rather than through direct applications. They have also reviewed their 'sexualised marketing' featuring semi-nude models on gift cards and shopping bags (Goode, 2015). However, while official statements reassure customers of the hardly novel or forward-thinking approach that Abercrombie will not 'discriminate based on body type or physical attractiveness', the real motive behind the change can be summarised in plans 'to cater for more shoppers' and remedy a 39% fall in shares (Kasperkevic, 2015). Using the language of BFOQ defence in its public statements, it is clear that the 'famously preppy, rumpled, hormonally charged aesthetic' in its Look Policy is at the 'very heart of its business model.'

[15] *Price Waterhouse v Hopkins* (1989) 490 US 228.
[16] *Diaz v Pan American World Airways* (1972) 346 F Supp 1301.
[17] *Dean v Abercrombie and Fitch* (2009) 2203221/2008

As the law mobilises to address gendered discrimination, it must have open and frank discussions about exclusive hiring arrangements and the commoditisation of female sexuality leading to tolerance of discrimination. Directly skewed against the interests of equality for women, the US approach to Title VII is inappropriate for its purpose—to allow equal access to job opportunities, not to abolish every sex dependent practice from the workplace in the abstract (Willingham, 1972). While acknowledging the differential context, not least in the European influence on our equality laws, it is evident that our messy, judicially-created law should not draw inspiration from the American situation, which considers employee protection last. Suing for $35 million from Abercrombie's flagship store (Showalter, 2016), the tale of a transgender employee forced to ascribe to the already-criticised gendered dress as what 'customers wants to see' provides an ideal bridge between 'selling sex' (Chapter Three) and gender identities (Chapter Four).

GENDER IDENTITIES: 'WOMEN ARE FROM VENUS'

A legal framework no more nuanced than direct gender distinctions (Chapter Two) presents further problems when we consider that notions of 'what woman is' are not homogenous. Beyond the realms of Human Rights campaigns urging that transgender employees be able to dress consistently with full-time gender presentation, a 'conventional standards' approach means that even now it would be almost impossible for a man to claim for not being able to wear the same high heels that are a requirement for women.[18] There will be no domestic or European remedy in the absence of an intention for gender reassignment surgery following Kara, and judicial anachronism can be highlighted in that sex and gender terminology is still used interchangeably in court judgements (Lemes, 2009). Despite prevailing views that one is biological and one reflects gender identity, conventionality is so engrained as to ignore their severance. This paper considers one facet of an artificially binary system—not the impact of dress for trans individuals, but this extreme end of a continuum where gender identity jars with required 'conventional' dress, illuminating the struggles of an individualistic element of femininity mapped far from what dress codes consider uncontentious.

Fair treatment is premised on these binary assumptions: women wearing skirts,[19] men wearing suits.[20] Some 'unwritten' dress codes expect the socialisation of individuals to second-guess the subjective employer expectations of conventionality, or 'learn the dress norms', using phrasing like 'no unconventional hairstyles.' This suggests that even for professionals, cautious of litigation scrutiny and refraining from explicit codes, dress conventionality has relevance. Three feminist viewpoints challenge this artificiality; Butler's view that gender is communicated through social performances via appearance, not the other way around, with no concrete, inherently feminine or masculine self (Butler, 2000); Davis' view that hegemonic femininities are patriarchal, emphasising sexuality and appearance for control (Davis, 1999); and Heckman that feminism is no longer based on a universal concept of womanhood (Heckman, 1999). This 'new conventionality' is making an impact.

Judicial reasoning, however, represents the polar opposite. A waitress's refusal to wear a short red dress was 'vehement', her views about modesty and decency 'unusual in Britain in the 21st century' (Lemes, 2009). One questions which feminist theorists, or even women, were consulted to get this homogenous view of conventional femininity and their attitudes towards modesty. With the unilateral modification of dress, without consultation, making the claimant 'constitutionally unable' to work, we question why this does not form precedent as a good example of constructive dismissal: sexualised dress only justified anywhere if it is relevant to the performed role (Title VII), unlike waitressing. The answer is that conventionality is

[18] *Ryder Barratt v Alpha Training ET* (1991) No. 43377/91.
[19] *Schmidt v Austicks Bookshop Ltd* [1978] ICR 85.
[20] *Department for Work and Pensions v Thompson* [2004] IRLR 348.

perceived by the judiciary with no objective analysis, meaning a dress which most women regardless of their politicisation would class as inappropriate. This is not anomalous, or *Stevenson*'s non-conformity misunderstood and justified—'the image of a stereotypical heterosexual female is a female wearing a dress, heels and make-up. … The claimant normally wears trousers, flat shoes and no make-up. She dresses well, would normally wear a trouser-suit for work', her above average performance ignored.[21] Short of a 'lesbians ignite' badge,[22] reflecting a freedom of expression case but jarring with standard notions of appropriate dress, these claimants were still dressing conventionally in business dress, simply refusing elements of a dress code they found grossly offensive, and could not find legal remedy.

Thorp falls into this category: she would have looked smart, if not smarter, in flat shoes with a business suit. Yet she was dismissed. In Thorp's case, *de minimis* and conventionality arguments make it likely that her discrimination claim would have failed without the current scrutiny of high heels. Regarding identity, Nicola herself in the parliamentary inquiry offers that if she had identified as 'Nicholas', her case would have been stronger (Petitions Committee, 2016). Ultimately, this shows that, despite the prevalence of marginalising trans discourse in law, they are seen as significant in the ranking of dress code violations and prioritised over the inherent problems with conventional femininity, which rank last and are accepted and justified in law.

Disparate identities make a law premised on 'reasonableness and conventionality' difficult. The nuances of why female dress code conventionality sustained on patriarchal norms is absurd, and the increasing range of individualistic notions of identity, are not understood or enforced by the current judiciary. This must be addressed during reform considerations.

'COVERING UP'

This research has identified gendered discrimination in dress codes, viewed through the lens of the current High Heels Inquiry. The expected conclusion of EA reform has, however, been tempered by societal barriers, suggesting that removing the law as it currently operates without addressing *why* our constitutional protection of discrimination was so limited in the first place would lead to foundational flaws. In providing effective reform, consultation and democratic consideration of the issue is needed, for example in analysing why we distinguish between genders *ab initio*.

The narrow focus of this paper may also be unsuitable moving forward. In tackling dress discrimination, we must acknowledge that, in granting intermittent equality protection for minority groups, we send a discriminatory message. Reform proposals should go beyond 'high heels, skirts and make-up', not least in addressing the societal ignorance of dress customs of religious groups that are not catered for in contemporary dress codes. Furthermore, the law's approach could be too juvenile to deal with linked discourses surrounding how the EA has focused its 'protected characteristics', and whether discrimination falling outside of the scope of the current law (such as against tattoos and piercings in the workplace) should be considered.

There is no way of predicting the outcome of the current inquiry; there are precedents for upholding the minimum level of formal equality to suit political desires, without necessarily engaging with the disparate views on the issue. Disquiet on other gendered issues has not led to complete reform as proposed, and indeed we may question whether the law wants to get involved, or change its inherent attitudes. A conscious effort should therefore be made perhaps even to re-route the likely legal solution concentrating on high heels, of limited protection against a backdrop 'hypersensitivity' viewpoint, and locate the relevance of the debate with macro approaches. Law can provide an element of 'stick' through effective legal enforcement

[21] *Stevenson v Avon Cosmetics* [2014] WL 8663532.
[22] *LM Boychuk v HJ Symons Holdings Ltd* [1977] IRLR 395.

of new rules and punishment and 'carrot' through raising awareness to change attitudes, which has already taken place to an extent through media and social media attention.

This paper has contributed the formal literature on the legal reform position—'law must do more'—proposing reform of discrimination generally, acknowledging the pitfalls of the legal control and trying to use legislation and law enforcement procedures to ensure an effective, sustainable mechanism. The problems with dress discrimination are symptomatic of discrimination generally, and narrow legislation or badly addressing the outmoded views of tribunals and employers could lead to discrimination change rather than eradication. This research could therefore act as a springboard for further analysis opportunities into judicial training and appeal procedures, for example, which could contribute to an extensive consultation process.

In explaining *why* discrimination exists, however, political contexts have been important. Sex sells, and in a capitalist society, over-intervention may challenge business growth; regulation and legislation must be justifiably important to retract from a *laissez-faire* approach otherwise. Similarly, law's utility in prompting change in this issue is restricted as the vehicle of historic perpetuation of binary genders and patriarchal control. The predominant approach is one of 'separate but equal', 'different but not less favourable', rather than seeking true equality and the opinions of those affected. Law does not operate in a vacuum, and in a turbulent post-Brexit climate, the political insight required to challenge this issue is unlikely to materialise. While perhaps tempering the likelihood of wholescale reform, law-makers' ignorance demonstrates the need for the accountability of media, the value of the parliamentary petition and, not least, the importance of academic theorising in an area that perhaps might otherwise have escaped scrutiny.

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