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Hair Makes the Man: Federal Appellate Court Says Short-Hair Requirement for Male Athletes Is Sex Discrimination

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Verdict

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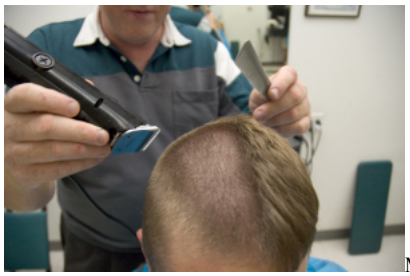

My son Ben, an eleven-year-old who is devoted in equal parts to soccer and his long and shaggy hair, can rest easy tonight. A boy in Indiana (who just happens to share his last name) has sued for and won the right for male athletes to wear their hair long during the season—or at least for the right not to be forced to cut their hair while female athletes are allowed to wear theirs long.

In *Hayden v. Greensburg Community School Corp.*, the Seventh Circuit Court of Appeals ruled that A.H., a boy who was repeatedly cut from the basketball team because of his refusal to cut his hair short—"above the ears, eyebrows, and collar," per the policy of the boys' basketball coach—was the victim of illegal sex discrimination. In this column, I'll discuss the ruling and why, although it corrects some of the missteps of other federal courts in grooming code cases, it does not go far enough to eliminate the gross stereotyping implicit in many sex-specific appearance codes.

Grooming Codes for Athletes in Greensburg, Indiana Public Schools

This case arises out of the policies of the public middle and high schools in Greensburg, Indiana. The school district maintains a "dress and grooming" policy that directs the superintendent to "establish such grooming guidelines as are necessary to promote discipline, maintain order, secure the safety of students, and provide a healthy environment conductive to academic purposes." District guidelines, in turn, defer to individual principals to develop appropriate codes.

Athletes in this district are subject to a general rule on hair styles, which prohibits any style that might "create problems of health and sanitation, obstruct vision, or call undue attention to the athlete are not acceptable." Specifically prohibited are styles that include or reflect "insignias, numbers, initials, or extremes in differing lengths;" mohawks and hair coloring are also not permitted.

The general policy does not specify hair length, but instead dictates that each varsity head coach will determine the "acceptable length of hair for a particular sport," and athletes are warned to "ask a coach before trying out for a team if you have a question regarding hair styles."

The plaintiff in this case, A.H., sought to play basketball in the high school. The head coach, Stacy Meyer, maintains an unwritten policy that his male athletes must wear their hair short in order to promote a "clean-cut" image. (In the court's words, "Coach Meyer's policy prohibits far more than an Age-of-Aquarius, Tiny-Tim, hair-crawling-past-the-shoulders sort of hair style—it compels all male basketball players to wear genuinely short hair.") The boys' baseball team is subject to a similar policy, but the male athletes who play football and run track are not. Female athletes are not subjected to a short-hair policy for any sport.

Like my son, A.H. is committed to his long hair, so much so that he moved in with his grandparents for one season in the hopes of playing for a different school and got cut from his home school's team one season because he refused to cut his hair. In seventh grade, he did cut his hair so he could play basketball, but he says he "didn't like himself" and wasn't willing to make that sacrifice again.

The Claims in *Hayden v. Greensburg Community School Corporation*

In his lawsuit, A.H. claimed that the short-hair policy was unlawful under the Due Process and Equal Protection Clauses of the federal constitution, as well as under Title IX, the federal law banning sex discrimination by educational institutions. Regardless of the legal theory, the remedy sought was the same: a ruling that would allow him to play basketball without first cutting his hair.

The court considered A.H.'s due process claim with some sympathy, but ultimately rejected it. Although there are cases suggesting that the right to choose one's hair length and style is an aspect of liberty protected by the Fourteenth Amendment, the court concluded that the choice of hair style could not, given other Supreme Court precedents, rise to the level of a fundamental right. The government (in this case, the public school) is thus allowed to restrict hairstyles unless it has no rational reason for doing so. But given that A.H. did not make any concerted effort to prove that the policy lacked a rational basis, the court concluded that it did not violate the Due Process Clause.

The court agreed, however, with A.H. that the policy violated both the Equal Protection Clause and Title IX because it singled out at least some boys for a grooming requirement from which all girls were exempt. The court's reasoning is discussed below, but it comes against a backdrop of a general law of dress and grooming codes that should be discussed first.

The Law of Dress and Grooming Codes

Sex-specific dress and grooming codes—like the type challenged in *Hayden*—have been brought primarily under Title VII, which bans all forms of sex discrimination by employers. But the same principles are often relevant to claims under the Equal Protection Clause, which applies only to governmental entities, and Title IX, which applies only to educational institutions.

There has been a longstanding anomaly in Title VII case law that permits employers to maintain sex-specific dress and grooming codes. Courts, for example, have allowed employers to require men to wear business suits and ties, while requiring women to wear dresses. They have also allowed employers to impose requirements that women wear makeup, while prohibiting men from doing the same thing.

Decisions upholding these kinds of rules are anomalous because they seemingly permit precisely what Title VII clearly forbids: treating employees differently on the basis of sex. Not surprisingly, the reasoning of these decisions is generally unconvincing.

To justify the dress and grooming codes at issue, courts have at times resorted to platitudes about employers having the prerogative to run their business the way they see fit. But, of course, there are lots of ways employers might see fit to run their business that we do not allow. We do not allow employers to hire only white employees, nor do we allow employers to fire older workers and replace them with "new blood."

Other courts have attempted to claim that dress and grooming codes are not really discriminatory but are actually gender-neutral, because they require that men and women alike adhere to generally accepted community standards. That these standards are different for men and women, and themselves largely the product of sex stereotypes, is conveniently ignored in this analysis.

There is an exception to the general rule that sex-specific grooming codes are permissible: they cannot impose an undue burden on one sex, but not the other. So, for example, an employer cannot require women to wear uniforms, while allowing men to choose their own dress. But employers can force men and women to wear different uniforms, as long as they are deemed "comparable."

Some of the first dress and grooming code cases preceded the Supreme Court's 1989 decision in ***Price Waterhouse v. Hopkins*** **(http://supreme.justia.com/us/490/228/)**, in which the Court held that sex stereotyping is a form of illegal sex discrimination. One might have expected courts to look more closely, after that ruling, to ensure that sex-specific codes were not reinforcing or perpetuating gender stereotypes. But beyond cases brought by transgender individuals, who have found some success in challenging policies forcing them to align their dress with their anatomical sex, sex-specific dress and grooming codes are still generally upheld despite obviously being rooted in gender stereotyping. A shocking example of this oversight is ***Jespersen v. Harrah's Operating Co.*** **(http://law.justia.com/cases/federal/appellate-courts/F3/444/1104/546333/)**, in which an *en banc* panel of the Ninth Circuit Court of Appeals upheld a grooming code that required female bartenders to wear teased hair, a full face of makeup, and painted fingernails, while requiring of male bartenders only that they have short hair and be clean.

The Ruling in *Hayden v. Greensburg Community School Corp.*: An Outlier, but Still Modest in Its Reach

The court in this case raised, but did not decide, the question whether the long line of dress-code cases survived the ruling in *Price Waterhouse*. It assumed that they did, and went on to consider the legality of the school athletic policies regarding hair length.

The court first disposed of two silly arguments by the school district. First, the court concluded, the hair-length policy is not immune to a sex-discrimination challenge simply because male athletes in some sports were allowed to have long hair. *Only* boys were subjected to the short-hair rule, which is sufficient to constitute a sex-based classification. Second, contrary to the school district's argument, the plaintiff did *not* have the burden of proving that the policy constituted intentional discrimination. A facial classification is, by definition, intentional disparate treatment. The district's reasons for enacting it are irrelevant.

The court moved then to the heart of the case: Is a school justified in restricting the hair length of male athletes, but not female ones? The answer was a resounding "No."

Central to the court's ruling was its reading of the trial record. The parties, according to the court, litigated this case as revolving solely around the gender-differentiated hair-length policy. The school district did not make the argument before the trial court that the rule regarding hair length was just one piece of a broader grooming code that imposed restrictions on male and female athletes alike. Had the school district done so, the court suggests, the policy may have been defended as imposing different, but comparable grooming requirements on male and female athletes. The court thus indicates that it might have fallen prey to the specious reasoning of many other courts that have allowed virtually any type of sex-specific grooming code as long as both men and women are subjected to equally burdensome rules.

The undue burden approach, however, has an obvious flaw. It builds in a safe harbor for sexism by conflating the question whether men and women are both subjected to some restrictions, with the separate question of what is the nature of the restrictions. Are the rules for women designed to reinforce femininity, or to push girls into the roles for which society deems them best suited? Are the rules for men designed to reinforce masculinity, or to push them into roles for which society deems them best suited? One might successfully defend the "equality" of the traditional model of marriage, for example, by pointing out that men were just as burdened by the duty of breadwinning, as women were by the duties of domestic work and childcare. But the state's insistence on this model would never survive modern equal protection principles, which protect the right of the individual to choose a path that may or may not comport with the expectations of gender. So why should a public entity ever be allowed to dictate behavior or dress, or anything else, based on nothing other than a person's gender?

The other standard defense of sex-specific grooming codes, which the *Hayden* court also suggests that it might accept if the record below were different, is that they are valid as long as they are consistent with generally-accepted social norms. But this defense presents the same problem—if generally accepted social norms are themselves the product of stereotyping, why should they be allowed to justify an obviously discriminatory law? (In the court's defense, it does say that it would have to consider whether these defenses, if raised, were consistent with *Price Waterhouse,* but its language strongly suggests that it finds these defenses plausible.) The court also points out that social norms change, and, in 2014, "it is not obvious that any and all hair worn over the ears, collar, or eyebrows would be out of the mainstream among males in the Greensburg community at large, among the student body, or among school athletes."

Because the court took the parties on their stipulated facts—including the fact that the only difference for male and female athletes was the hair-length rule—it didn't have to grapple with this question. It focused, instead, on a relatively simple instance of sex discrimination. Sex-based classifications, in traditional equal protection analysis, can only survive if the state offers an exceedingly persuasive justification—a high standard that typically results in the law's invalidation.

Here, the school district offered little by way of a defense of the policy, other than its desire to promote team unity and to project a "clean cut" image for its athletes. It fails to explain why girls' teams do not need such "unity," or why boys cannot be "clean cut" with longer hair. In any event, neither of the proffered reasons is sufficient to validate a law under a heightened level of scrutiny. Nor are they sufficient to validate a law under Title IX, which bans all forms of sex discrimination by educational institutions. A.H. must be allowed to play basketball with hair longer than the policy allows.

Conclusion

The court got this one right, but it did not go far enough. It should have put an end to the kind of stereotyped thinking that forces people to look at their sex. Stereotyped thinking begets stereotyped thinking—by the people who make the policy, the people who are subjected to that policy, the people who see its results, and the decisionmakers who evaluate its legality.

The dissenting opinion displays just how deeply our stereotyped assumptions about dress and grooming are engrained. "It is no surprise," the dissenting judge writes, "that there is no hair-length requirement for the girls. Female athletes usually compete with their hair worn up in a ponytail, bun, or "knot top" so that it does not obstruct their vision or get snagged or tangled during encounters such as scrambling for a loose ball or a rebound." Moreover, the judge writes, the applicable regulations "anticipate the reality of hair being worn up by providing that '[r]ubber, cloth or elastic bands may be used to control hair.'" But the judge never considers the possibility that a male athlete with long hair could make use of the same devices to control his hair during a game. Has the judge, who sits on a court in Chicago, never seen Bulls player **Joakim Noah (https://www.google.com/search?q=images+joakim+noah&client=safari&rls=en&tbm=isch&imgil=JbshIQX7PNo8uM%3A%3Bhttps%3A%2F%2Fencrypted-tbn1.gstatic.com%2Fimages%3Fq%3Dtbn%3AANd9GcQutvMFoRjma0kS5XB_mSG2jZzxCZ4jEavLLpo3nBZ1DTyMJwOtgA%3B1749%3B2653%3BQWjrIj6LX_HKMM%3Bnoah-stats-for-2012.php%3B1749%3B2653)**?

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