

June 4, 2021

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Via email to kyle.levine@alaskaair.com

Dear Mr. Levine:



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aclu.org

Deborah N. Archer
President

Anthony D. Romero
Executive Director

We write to raise serious legal concerns about Alaska Airlines' uniform policy for flight attendants. As discussed below, we urge Alaska Airlines to take prompt corrective action to bring its policy into compliance with the Washington Law Against Discrimination ("WLAD") and Title VII of the Civil Rights Act of 1964 ("Title VII").

Background

We represent Justin Wetherell, a flight-attendant and flight-attendant instructor based in Seattle. Justin's gender identity is non-binary, and Justin's gender expression is fluid. When Justin attends work as a flight-attendant *instructor* and is not subject to Alaska Airlines' uniform policy, Justin dresses for work in appropriate business attire while dressing and grooming in a manner that is neither typically male nor female. But when Justin attends work for shifts as a *flight attendant*, Alaska Airlines requires Justin to adhere to an inflexible uniform policy that forces employees to conform to rigid gender stereotypes.

The uniform policy (enclosed for your reference) has one set of "male" dress and grooming requirements and another set of "female" dress and grooming requirements. Although the uniform policy allows transgender men and transgender women to adhere to the uniform standards that match their gender identity, Alaska Airlines requires all employees to conform to either the "male" or "female" category.¹

Each uniform is made up of several pieces of clothing that flight attendants can choose from, but flight attendants cannot mix and match "male" uniform pieces and "female" uniform pieces. For example, people wearing the "male" uniform are not allowed to wear pieces from the "female" uniform, such as the scarf or skirt. And people wearing the "female" uniform are not allowed to wear pieces

¹ It is our understanding that the applicable uniform is determined by the flight attendant's gender marker in their Human Resources file. It is our further understanding that an individual may change their gender with Human Resources no more than once in any one-year time period. The uniform policy does not have a uniform for non-binary people, and non-binary people are required to select the "male" or "female" uniform.

from the “male” uniform, such as a tie. This also applies to articles of clothing that exist in both uniform lines, but in different cuts or styles. People wearing the “male” uniform must wear the “male” uniform’s pants, shirts, and cardigan, and cannot wear the “female” uniform’s pants, shirts, or cardigan.

In addition to the clothing requirements, there are several differences in the uniform policy’s grooming requirements, such as hair (“female” uniform allows for hair to be worn down except during service; male uniform requires long hair to be pulled back at all times), facial hair (not permitted in “female” uniform; certain styles permitted in “male” uniform), makeup (certain makeups allowed in “female” uniform; only concealer or tinted moisturizer allowed in “male” uniform), earrings (“female” uniform allowed two earrings per ear; “male” uniform allowed one stud per an ear), and the rolling up of sleeves (“female” uniform may cuff the sleeve only once; “male” uniform may roll up sleeves).



Other differences between the “male” and “female” uniforms include: the different cut of the clothing items, e.g. “male” and “female” button-down shirts and cardigans (“female” uniform pieces are more form-fitting and lower in cut, and therefore more revealing), the type of shoes permitted (“female” uniform required to wear a shoe with at least a 0.5 inch heel except while in flight), the type of neck adornment permitted (“female” uniform generally required to wear scarves but not permitted to wear “men’s ties”), and the type of jewelry and nail polish permitted (“male” uniform options strictly limited while the “female” uniform is afforded more freedom). These differences reflect nothing more than stereotypical notions regarding masculinity and femininity.

These rigid, binary uniform requirements are more than a mere inconvenience. By forcing our client and countless other employees to adhere to Alaska Airlines’ preferred vision of how men and women should appear, the 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.

For example, when Justin works a shift as a flight attendant and must adhere to the uniform policy, Justin faces constant misgendering. They feel their gender identity and expression aren’t valued or accepted, and as a result feel forced to present as “male” at work. The struggle Justin feels to be accepted while working as a flight attendant has exacerbated their anxiety, insomnia, and depression. Justin 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. Justin frequently avoids working as a flight attendant due to extreme discomfort with the uniform standards, choosing instead to work extra shifts as a flight attendant instructor where their identity is embraced.

Justin feels especially devalued and disrespected by Alaska Airlines’ executive management. When Justin brought forward concerns about appearance and

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grooming standards for flight attendant instructors, Justin's direct supervisors worked with Justin to quickly implement changes ensuring Justin felt accepted. The resulting standards are not divided into gender- or sex-specific categories. They provide equal standards and treatment for all instructors regardless of gender-identity or gender-expression. In contrast, Justin has repeatedly been refused the opportunity to meet and discuss flight attendant standards with executive management, and Justin's perspective as a non-binary individual and complaints of discrimination have been summarily dismissed.

After repeated unsuccessful attempts to convince Alaska Airlines to change the uniform policy, Justin requested an accommodation allowing them to dress and groom in a manner consistent with their non-binary identity and fluid gender expression. Specifically, Justin sought permission to wear pieces from both the "male" and "female" uniforms; to adhere to "female" grooming standard for makeup, earrings, and nail polish; and to wear their hair down except during in-flight service in accordance with the "female" uniform standard.

Although the uniform policy guide purports to allow employees to seek accommodations for reasons relating to "gender," Justin's request was summarily rejected. In a letter dated January 22, 2021 (enclosed for your reference), Alaska Airlines responded:

After a careful review of your request, we have determined that we are unable to permit the requested changes to the uniform policy at this time. Alaska Airlines' uniform policy and grooming standards are a component of the company's branding and intended to maintain a consistent image for customers. Your requests are inconsistent with this business purpose. Alaska Airlines continues to permit employees to dress in a manner that is consistent with their gender identity or expression, while still complying with its uniform policy and grooming standards.

Alaska Airlines' position has been particularly troubling for Justin because Alaska Airlines has repeatedly represented to Justin and the general public that it strives to create an inclusive environment. For example, Alaska Airgroups' People Policies states:

Alaska Airlines is committed to diversity and inclusion. People from all walks of life fly on Alaska Airlines, so it only makes sense that our workforce reflects our guests. We encourage our employees to bring their best selves to work. By being yourself, you make Alaska Airlines a stronger company.

Of course, the people "from all walks of life" who "fly on Alaska Airlines" include non-binary people. But while extolling the benefits of "being yourself,"



Alaska Airlines continues to enforce a rigid uniform policy that prevents Justin and countless other employees from doing so.

Legal Discussion

Alaska Airlines' uniform policy is not only harmful. It is also illegal. As discussed below, Alaska Airlines' uniform policy discriminates based on "gender identity, self-image, appearance, behavior, or expression" in violation of the Washington Law Against Discrimination ("WLAD"), and discriminates based on "sex" in violation of both the WLAD and Title VII.

Discrimination based on gender identity, self-image, appearance, behavior, or expression.

Under the WLAD, employers may not "discriminate against any person in compensation or in other terms or conditions of employment because of" that person's "gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth." Wash. Rev. Code Ann. §§ 49.60.180; 49.60.040(27).² It is well-settled that dress and grooming standards set by employers are "terms and conditions" of employment.

Alaska Airlines' uniform policy discriminates against any employee whose gender expression does not conform to Alaska Airlines' preferred vision of how men and women should appear. Employees who fail to adhere to Alaska Airlines' standards for "male" and "female" dress and grooming are subject to removal without pay and eventually termination based on their gender-related "appearance, behavior, or expression" in violation of the WLAD's plain terms.

Alaska Airlines' uniform policy places a particularly heavy burden on employees who are non-binary. Washington law explicitly recognizes that some individuals have a "non-binary gender identity that is not exclusively male or female." Wash. Admin. Code 246-490-075 (authorizing an "X" gender marker for birth certificates of non-binary people). But Alaska Airlines' uniform policy penalizes non-binary employees for having a gender identity and gender-related "appearance, behavior, or expression" that is not categorized by Alaska Airlines

² Under the WLAD, employers may not "discriminate against any person in compensation or in other terms or conditions of employment because of," *inter alia*, "sex" or "sexual orientation." Wash. Rev. Code Ann. § 49.60.180 (West). The WLAD defines "sexual orientation" to include "gender expression or identity." Wash. Rev. Code Ann. § 49.60.040 (27). And the WLAD further defines "gender expression or identity" as "having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth." *Id.*



as either “male” or “female.” They must either conform to Alaska Airlines’ branding for a “male” or “female” image, or lose their jobs.

As noted above, Alaska Airlines has taken the position that its uniform and grooming standards are a component of the company’s branding and are intended to maintain a consistent image for customers. Alaska Airlines is free to adopt dress and grooming standards that present a consistent image for customers in terms of colors and style as long as the standards are not based on characteristics protected by the WLAD. But Alaska Airlines may not use employees’ gender-related “appearance, behavior, or expression” as part of its corporate branding. It is no defense to discrimination for an employer to argue that the discrimination is part of the company’s brand.



Discrimination based on sex

Alaska Airlines’ uniform policy also discriminates on the basis of “sex” under both the WLAD and under Title VII, because it establishes facially different rules based on sex. 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, (or a man faces discipline or disadvantage for dressing in a manner that would be permitted if he were a woman) discriminate “but for” the employee’s sex within the meaning of Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020).³

³ Although some outdated cases have erroneously held that “companies may differentiate between men and women in appearance and grooming policies” without discriminating based on “sex” under Title VII, those cases were wrongly decided and have since been abrogated by the Supreme Court’s recent decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1753 (2020). *See, e.g., Jespersen*, 444 F.3d 1104, 1110 (9th Cir. 2006); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974) (“Congress was not prompted to add ‘sex’ to Title VII on account of regulations by employers of dress or cosmetic or grooming practices which an employer might think his particular business required.”); *Rohaly v. Rainbow Playground Depot, Inc.*, 134 Wash. App. 1051 (2006) (interpreting WLAD’s prohibition on sex discrimination in accordance with federal precedent interpreting Title VII). *Bostock* clarified that “an employer cannot escape liability by demonstrating that it treats males and females comparably as groups”—essentially rejecting the central reasoning in *Jespersen* and similar cases. *See Bostock*, 140 S. Ct. at 1753. And *Bostock* further made plain that an employer does not escape liability merely by asserting that it would impose equal though different gender stereotypes on both men and on women. *Id.* Finally, *Bostock* rejected policy arguments that Title VII should be interpreted narrowly based on the assumption in *Jespersen* and similar cases that Congress did not intend for the statute to reach so broadly. *See, e.g. Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (reasoning that “Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications”). The Court made clear that “the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.” *Bostock*, 140 S. Ct. at 1753. Because *Bostock* abrogated the reasoning underlying *Jespersen* and similar cases, they are no longer good law.

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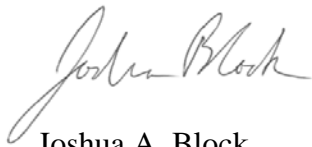
As discussed above, the Alaska Airlines uniform policy includes numerous differences between male and female dress and grooming that reflect nothing more than stereotypical notions regarding masculinity and femininity. This form of discrimination has long been considered unlawful under Title VII. *See Price Waterhouse*, 490 U.S. 228; *Phillips v. Martin Marietta*, 400 U.S. 542 (1971).

Conclusion

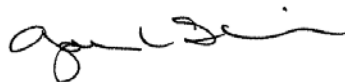
It is difficult to understand how a company that professes to be committed to diversity and inclusion can take the position that enforcing gender stereotypes on its employees is an expression of its corporate “brand.” We urge Alaska Airlines to take corrective action to remove gender-based distinctions and restrictions from your uniform policy, in accordance with your employees’ rights under the WLAD and Title VII.

If any of the information contained in this letter regarding the Alaska Airlines’ uniform policy is incorrect or has recently changed, please let us know as soon as possible. Otherwise, we will plan to follow up with you within two weeks of the mailing date of this letter.

Sincerely,



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Enclosures

