No. 03-15045

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARLENE JESPERSEN,

Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY, INC.,

Defendant-Appellee.

On appeal from the United States District Court
for the District of Nevada
Case No. CV-N-01-0401-ECR (VPC)
The Honorable Edward C. Reed, Jr., District Judge.

REPLY BRIEF OF APPELLANT DARLENE JESPERSEN

JENNIFER C. PIZER
Calif. Bar No. 152327
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
3325 Wilshire Boulevard
Suite 1300
Los Angeles, California 90010
(213) 382-7600

JENNIFER MIDDLETON
Calif. Bar No. 178546
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

KENNETH J. MCKENNA
Nevada Bar No. 1676
544 West First Street
Reno, Nevada 89503
(775) 329-6373

Attorneys for Plaintiff-Appellant

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> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *quoting City of Los Angeles v. Manhart*, 435 U.S. 702, 708 n.13 (1978).

I. Introduction

Darlene Jespersen was a successful bartender at Harrah's for twenty-one years. According to one loyal customer,

> [Darlene Jespersen] always greets us with a smile and a friendly word. We all look forward to seeing her each time we are in Reno, which is four or five times a year. All the people that work at Harrah's are great, but I feel Darlene diserves [sic] extra recognition.

Excerpts of Record ("ER") 182. Another regular customer agreed: "My friends and I always do lotsa video poker at the sports bar. We call it "Darlene's Bar" 'cause she's great!" ER 181, 183-84.

Thus, nominating Jespersen for a special award in 1996 due to her "outstanding individual performance," her supervisor reported:

> [Darlene Jespersen] makes a lot of Harrahs [sic] guests

> feel good and this is proven by her guest comments. Darlene has a subtle manner that makes a positive impression on our guests.

ER 185.

But then the casino changed its policy from merely requesting that women beverage servers wear elaborate makeup according to expert instructions to making this a non-negotiable demand. Having submitted to the exacting makeup regimen previously in a good faith effort to follow company policy, as she had done regarding the other aspects of her employment, Jespersen knew she would not be able to comply on a permanent basis. In her words:

> [The makeup] prohibited me from doing my job. I felt exposed. I actually felt like I was naked. . . . forced to be feminine to do that job, to say employed, when it had nothing to do with the making of a drink.

ER 121. And thus, notwithstanding her twenty-one years of loyal, "outstanding" service, Harrah's terminated Jespersen's employment. Nothing else mattered if she declined to paint her face.

It is telling how much of Harrah's Answering Brief (and the *amicus* brief Harrah's counsel has filed for some industry groups) is devoted to setting up and knocking down straw men. Harrah's systematically mischaracterizes Jespersen's discrimination claim as a demand that all women be forbidden from wearing makeup. Elsewhere, the casino mischaracterizes it as a demand that all employees

comply with the opposite of Harrah's current policy – a hypothetical mandate of universal androgyny rather than one imposing polarized sexual stereotypes.

A relatively small amount of Harrah's ink addresses Jespersen's actual claim, which is that Harrah's women-only makeup requirement violates Title VII by imposing an unequal burden on female employees based on their sex; that a factfinder should have had the chance to assess that burden in its context; and that an important aspect of the burden on women comes from the social meaning of makeup and the resulting way the policy codifies certain stereotypes about women that historically have had limited their professional opportunities, contrary to Title VII. As explained below, Harrah's does not provide any basis for upholding the district court's order.

The case is before this Court on de novo review of an erroneously granted summary judgment order. *See Frank v. United Airlines,* 216 F.3d 845, 849 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001). The trial court here considered imaginary evidence, weighed it against what was actually in the record and improperly resolved factual disputes. The court also failed to appreciate that – for both women and men – Title VII prohibits employers from conditioning employment or workplace success on an employee's conformity with limiting, harmful sex stereotypes, unless the employer proves a particular sex-specific rule is a bona fide occupational qualification ("BFOQ"), which is an "extremely

narrow exception to the general prohibition of discrimination on the basis of sex." *Id. at* 855, *citing International Union, UAW v. Johnson Controls,* 499 U.S. 187 (1991). Consequently, the judgment below should be reversed.

II. Summary Judgment Should Be Reversed Because Jespersen Presented A Classic Sex Discrimination Claim Supported By Ample Evidence, And The Court Made Improper Factual Findings.

This is a classic Title VII case about the firing of a high-performing, long-term female employee based on a burdensome appearance rule that required only women to wear makeup. Were Darlene Jespersen male, she still would be employed at Harrah's, and doubtless still receiving the customer compliments and good job reviews that marked her tenure there. Just like the airlines' consistently futile efforts to defend their sexist rules for "stewardesses," *see Frank*, 216 F.3d at 845; *Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982); *Diaz v. Pan American World Airways, Inc.,* 442 F.2d 385 (5th Cir. 1971), Harrah's protests that customers will not buy drinks and gamble if some female employees are allowed to work with less or no makeup, are unpersuasive and invalid as defenses of the company's facially discriminatory policy.

A. The Ninth Circuit's Title VII Case Law Applies To Sex-Based Appearance Policies Like The One At Issue Here Without Regard For "Immutable" Characteristics.

After speculating about the possible burden on male employees, the district court dismissed Jespersen's claim on the alternative ground that "the makeup

requirement involves a mutable characteristic, which does not infringe on equal employment opportunities due to one's sex." ER 217. Harrah's attempts to defend the district court's ruling by discussing at length the 1970s cases holding that Congress did not intend Title VII to apply to "mutable" aspects of dress or grooming over which an employee can exercise control. Appellee's Answering Brief ("Ans.Br.") at 12-13, 14-16. The casino argues that the district court was correct to rely on those cases as "equally applicable to this case." *Id.* at 17.

But in the analysis this Court has used in more recent decades, questions of "immutability" have played no role. Indeed, in the leading cases, both of which address company demands that female employees adjust their weight, the women's wish not to change, despite their ability to do so, was precisely the issue. *See, e.g., Frank*, 216 F.3d at 845; *Gerdom*, 692 F.2d at 602.

Furthermore, contrary to the early cases' cursory dismissal of claims challenging requirements that men wear ties and keep their hair short, this Court has adopted the more searching approach used in *Carroll v. Talman Federal Savings & Loan Ass'n*, 604 F.2d 1028, 1032-33 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980), which examined how a sex-specific rule operated in context to ascertain whether it created or enforced an improper subordination or trivialization of workers based on sex. *Gerdom*, 692 F.2d at 606, *also citing Allen v. Lovejoy*, 553

F.2d 522, 524 (6th Cir. 1977) ("A rule which applies only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment."). Harrah's emphasis on outdated Title VII analysis is misplaced. The court below rightly noted that the precise question in this case is an open one legally, acknowledging "we have yet to encounter a decision that deals directly with a policy that requires one sex to wear makeup and forbids the other from doing so." ER 215.

Harrah's next tries to shore up the district court's findings on what were, at the very least, disputed questions of fact regarding the relative burdens of the challenged policy. Ans.Br. at 23-25. Harrah's effort necessarily fails, however, because it submitted no evidence to support the notion that there may be male bartenders wishing to wear makeup and what burdens, if any, they would suffer from Harrah's prohibitory policy. There was and remains nothing to give evidentiary substance to the district court's speculation in this regard, upon which the court made a factual finding that the makeup policy's relative burdens are equal.

Harrah's likewise tries to recast Jespersen's challenge to the makeup policy as a test of the casino's appearance requirements as a whole, much as the trial court did. But Jespersen has challenged only one aspect of the policy, the makeup

requirement, and has no quarrel with its other elements. The makeup requirement has a parallel demand for men – no makeup – and that is the appropriate comparitor in this case. To claim that the policy is legal not because its companion provisions impose equal burdens but because a separate provision that is not even at issue in this case imposes some other burden on men, is to misapply the "unequal burdens" test.

In *Gerdom*, for instance, Continental Airlines maintained weight requirements and a set of general appearance standards for its flight attendants, but this Court considered only the weight requirements, since that was all the plaintiffs challenged. *Gerdom,* 692 F.2d at 604. The *en banc* panel did not reach out to compare the weight requirements imposed on women to some other appearance standard that Continental imposed on men; it compared only those elements of the policy that lent themselves to meaningful comparison: a weight requirement for women versus no weight requirement for men. Likewise, this Court should compare Harrah's makeup requirement for women to its "no makeup" requirement for men. Whatever Harrah's demands with regard to hairstyles simply is not at issue, nor can it be meaningfully compared to its makeup policy. Any attempt to determine the "equality" of such fundamentally different rules can only devolve into hopeless subjectivity, turning the "unequal burdens" test into little more than a poll of relative

judicial facility with a powder puff versus hair clippers.

B. Harrah's Attempts To Recast Jespersen's Complaint As Novel, Sweeping Or Bizarre Should Not Prevent Analysis Of the Sex Discrimination Claim She Actually Pleaded.

Jespersen's claim is specific, fact-based and rests squarely within Ninth Circuit sex-discrimination law. Harrah's repeatedly misstates and trivializes Jespersen's objection to the fact that she was fired, treating it as an eccentric complaint about an important, industry-standard requirement. The casino and its *amici* contend that vindication of her claim would disable employers from setting any standards at all, and would mire society in litigation. But the claim she set out is clear and only will invalidate those requirements that are neither trivial nor within proper scope of employer authority because they demean, burden or otherwise harm employees in ways that discriminate because of sex.

Harrah's *amici* suggest that if Jespersen succeeds, their customers will be subjected to service from "employees who sport jewelry like Mr. T, wear makeup like Gene Simmons of Kiss, dress like Dennis Rodman, have hair like Fabio or beards like a member of ZZ Top." CELE *Amici* Brief at 23. While their imagery is colorful, it bears no relationship to this claim. Jespersen has never objected to neutral, professional standards such as Harrah's "good grooming and a professional appearance" standard which would bar the ghoulish parade of

beverage servers predicted by *amici*. Ans.Br. at 33. Jespersen has no objection to uniforms identifying an employee with his or her employer. Nor would Jespersen's standard require topless lifeguards or abolition of urinals. Certainly, urinals relate to no demeaning stereotype. And a gender-neutral rule requiring that lifeguards not wear revealing swimsuits – or even that they merely obey local ordinances regarding public nudity – would satisfy Title VII's requirements as well as *amici*'s concerns.

Rather, Jespersen seeks only to enforce Title VII's mandate that women may not be subjected to archaic and overbroad generalizations about their appearance or demeanor that burden them professionally as women. For instance, a rule requiring that women wear silk uniforms needing dry cleaning, and that men wear machine-washable synthetics, might pose a problem, as might a requirement that women wear revealing clothing while men appear modest. But a benign distinction such as green uniforms for women and yellow ones for men ordinarily should have no adverse effect on either group. This follows the Seventh Circuit's analysis in *Carroll* (adopted by this Circuit in *Gerdom*), which incorporates consideration of the context in which a particular policy operates and its social meaning to the public. Of course, where yellow uniforms may be benign way of identifying male employees, it would not be benign if restricted to Asian-American workers.

Context matters, and all Jespersen challenges in this case is the fact that she was fired for failure to wear makeup when tending bar.

In similar fashion, Harrah's repeated mischaracterization of Jespersen's position as insisting upon mandatory androgyny in the workplace turns her position upside-down. Though such a policy might allow her to be employed, Jespersen would object to mandatory androgyny just as she objected to mandatory femininity, because any such policy improperly restricts job opportunities because of sex. Thus, contrary to Harrah's caricature, Jespersen has no wish to restrict her more-feminine female co-workers or her more-masculine male co-workers, with whom she worked well during her years at Harrah's. Jespersen's concerns about gender stereotyping only arose when the casino declared that the degree of androgyny she displays as a neat, clean, professionally-dressed woman renders her unfit to tend bar.

III. Because Jespersen Submitted Sufficient Evidence And Arguments To Support A Determination In Her Favor Below, The Trial Court Erred in Granting Summary Judgment to Harrah's.

A. Jespersen Submitted Ample Evidence From Which A Reasonable Jury Could Have Found In Her Favor That The Casino's Women-Only Makeup Requirement Imposes Unequal, Unjustified Burdens on Female Employees.

Contrary to Harrah's assertion that Jespersen's claim was unsupported, the policy itself, her own testimony, personnel records and other documents all were

admissible, relevant evidence. That evidence showed that the policy was discriminatory on its face, and that Jespersen's job performance had been "highly effective" for years despite her lack of makeup. The evidence also was undisputed that the sole reason for her termination was the makeup policy. The sole remaining question for the trial court was the relative burdens of the policy on women and on men – a question about which Jespersen raised material disputes of fact for the jury to decide, and one that was improper to resolve on summary judgment.[1]

On the question of the relative burdens, Jespersen presented ample, competent evidence that the makeup requirement imposes a burden on women workers by virtue of its onerous demands as well as its invocation of limiting stereotypes. This burden exists without regard to the preference of any individual women to wear, or not wear, makeup. *See, e.g., Carroll*, 604 F.2d at 1028 (finding required uniform for women and not men was burdensome for women as a group

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[1] Though the point is neither part of Jespersen's prima facie case, nor relevant to any defense available to Harrah's, the company repeatedly implies that Jespersen's claim is diminished because she did not find a way to transfer to another job within the casino. The suggestion seems to be that she simply was not interested in working. Of course, her glowing performance evaluations attest instead to her diligent, loyal work ethic. Harrah's focus is odd for the additional reason that, as Jespersen testified, although the company may have had positions open when it fired her, she was not aware of any for which she was qualified that would have paid comparably to her bartending job, and the casino did not offer her one. Thus, even were it relevant to her legal claim, the most Harrah's could make of this point would be factual disputes precluding summary judgment.

without regard to whether some individual women liked or disliked it). The fact that the policy imposes unequal burdens does not mean, of course, that Harrah's must *forbid* makeup for its female employees; only that it may not require it of them.

Harrah's complains that Jespersen did not submit evidence of the gender stereotypes at work in its makeup policy. Facing the same argument from the employer in *Price Waterhouse*, the Supreme Court concluded that "[i]t takes no special training to discern sex stereotyping" in a supervisor's remarks suggesting that a soft-hued suit or new shade of lipstick would improve Hopkins' job performance. *Price Waterhouse*, 490 U.S. at 256. Nor does it take expert testimony or other evidence to see the same stereotyping here, and to see that it is burdensome for women. As explained at greater length in the ACLU *amici* brief, a requirement that women workers look ultra-feminine imposes a different type of burden than a requirement to look unequivocally masculine, because the feminine stereotype is to be subordinate, deferential, attractive and non-threatening, whereas the masculine stereotype is to be competent, dignified, and to command respect.

Harrah's further claims Jespersen lacked evidence for her argument about the cost of makeup. But she did not need specific evidence to confirm that the cost of buying four types of makeup for use daily is greater than the cost of NOT buying makeup. *United States v. Seschillie*, 310 F.3d 1208 (9th Cir. 2002) (holding that a

jury may make determinations requiring simple common sense without specific supporting evidence). In the same vein, the time spent applying four types of makeup exactly the right way everyday – according to instructions so exacting that employees had to be trained how to do it and then compared to their professional photographs daily – is greater than the time spent NOT doing so. That conclusion is similarly obvious, and a factfinder needs no special evidence to understand it. A jury certainly could have concluded that Jespersen was more credible than Harrah's witnesses regarding the time and difficulty of having to look just like your official photograph every day.

Of course Jespersen did not submit evidence that she was sexually harassed, as she declined to comply with the policy that would have sexualized her against her will. And she likewise does not claim that all women who choose to wear makeup are either grossly sexualized or routinely harassed sexually. Instead, she has pointed out that numerous courts have found Title VII violations when an employer has imposed an appearance policy that *requires* female employees to be sexy or alluring in ways that men are not, and the women have been made uncomfortable and vulnerable to harassment as a result. Jespersen's objection to being made into a "sexual object" presents just this type of concern. ER 121.

At the same time, Harrah's submitted no evidence contradicting Jespersen's

testimony that wearing makeup made Jespersen feel personally objectified, sexualized and physically distressed to a degree that interfered with her work. *See* ER 121-22. Nor did Harrah's introduce evidence to show its "no makeup" rule for men was comparably distressing or limiting for male bartenders. Instead, Harrah's attempts to justify the trial court's shift of focus to the burdens ostensibly imposed on men of being required to keep their hair comparatively short. Ans.Br. at 25. Yet, despite the trial court's willingness to speculate here as well (ER 216), Harrah's again has no evidence to substantiate the point and permit a coherent comparison with Jespersen's evidence, so as to show there was no genuine factual dispute and that Harrah's should prevail as a matter of law. Although Harrah's invited the trial court to speculate about hypothetical burdens on male employees, that speculation in no way negates the admissible, probative character of Jespersen's testimony that the makeup policy imposed a real, non-trivial burden on women workers generally that was greater than that imposed on their male counterparts, and that it imposed a burden on her that interfered with her ability to do her job.

Jespersen submitted competent evidence on all elements of her prima facie case, including her own testimony about how the policy affected her ability to work. In addition, as the party opposing the motion for summary judgment, she

was entitled to all permissible inferences in her favor from the evidence before the court. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

That said, Harrah's does not even dispute that Jespersen was fired based on a women-only rule, and that her male coworkers who performed the same job just as she did – efficiently and well, but without makeup – retained their jobs. Given Harrah's lack of evidence concerning any burden whatsoever on male employees, the district court's factual finding that the burdens on women and men were equal was improper.

B. Jespersen Presented and Preserved Her Legal Arguments Below.

Harrah's asserts that the trial court was correct to deny Jespersen her day in court because she purportedly did not preserve her sex-stereotyping claim below and otherwise lacked sufficient evidence to prove her case. These assertions are manifestly wrong. To begin with, Jespersen's memorandum opposing summary judgment explained in detail that:

> the requirement that female employees wear makeup while male employees are not required to do so . . . is based on the idea that the women must be beautiful and men can just be men. This was the same idea when it was determined that an airline can require all flight attendants to wear contacts rather than glasses, but it could not require only its female flight attendants to do so. [citation omitted] . . . Plaintiff believes Harrah's subtly represents its women employees as sex objects. . . . Women should

> be treated equally as any [man] working on the same or similar job at Harrah's and not like a "Barbie" doll.

ER 102-03, *discussing Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), which is cited in *Gerdom*, and also *Price Waterhouse*, 490 U.S. at 228, *Nichols v. Azteca Restaurants Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001), and other cases examining how sex stereotyping in certain contexts can be evidence of impermissible sex discrimination. *See also* ER 105-06. She likewise did assert that the burdens on women and men are unequal, explaining how the policy burdened her as a female employee and that her male coworkers were not similarly burdened. ER 101, *discussing Frank*, 216 F.3d 845. There is nothing unusual or improper about an appeal brief discussing the applicable law and explaining a party's legal theories in greater detail than was done in the trial court. Indeed, when a party disagrees with how the trial court has applied the law, that is precisely the opportunity offered by the appellate process.

C. Harrah's Argument That This Court Should Uphold The Trial Court's Inappropriate Resolutions of Factual Disputes Misperceives the Nature of De Novo Review of a Summary Judgment Order.

Jespersen solely challenged her termination for noncompliance with the makeup policy, and the evidence and argument she submitted concerning the policy's unique burdens on women are sufficient for a reasonable jury to find in her

favor, precluding summary judgment. *See Anderson v. Liberty Lobby*, 477 U.S. at 255. It cannot seriously be disputed that the time and cost of wearing makeup is greater than the time and cost of not doing so. Harrah's, however, characterizes the requirement as permissible under Title VII as a matter of law, because in the view of the company and its paid consultant, the requirement is "reasonable." But to Jespersen, who experienced the requirement personally, it was deeply distressing, and *unreasonably* discriminatory, to be forced to appear "dolled up" and made into "a sexual object" as a condition of her employment. ER 121.

Jespersen also submitted evidence and argument to show that the sex-differentiating requirement imposes unequal burdens on the sexes. Her testimony is the only direct evidence in the record of the impact the policy actually had on real employees. Moreover, as discussed in the amicus brief of the ACLU and other experts in sex discrimination law, Jespersen's belief that the women-only makeup rule diminished the professional stature of women employees by sending a message to customers and employees that these workers were valued disproportionately for their physical allure is consistent with the considerable body of scholarship concerning sex-specific makeup and dress requirements. Given the details of the policy itself, Jespersen's testimony about how it made her feel, and the social meaning of makeup for many women, Ms. Marden's declaration can serve, at

most, only to create a factual dispute about how burdensome the policy is for Harrah's women beverage servers. At best, Harrah's evidence creates disputes of material fact.

D. Jespersen Has Shown That Harrah's Allegations About "Customer Preferences" Are Insufficient Both Legally And Factually To Justify Its Facially Discriminatory Makeup Policy As A BFOQ.

Despite Harrah's protests (*see* Ans.Br. at 32-33), it is entirely proper for Jespersen to argue on this appeal that makeup is not a BFOQ for women bartenders. Harrah's asserted the defense below as an alternate grounds for granting summary judgment in its favor in the event the district court concluded Jespersen had substantiated all the elements of her discrimination claim. Summary Judgment Motion at 9, ER 24; Harrah's Reply at 5, ER 203. And on this appeal, Harrah's devotes much of its briefing to attempting to persuade that, somehow, serving drinks to those engaged in gaming should be seen as fundamentally different from serving drinks to those engaged in air travel. *Compare Frank*, 216 F.3d at 845; *Gerdom*, 692 F.2d at 602; *Diaz*, 442 F.2d at 385.

Yet, as explained in Jespersen's Opening Brief ("Op.Br.," at 34-35), and in the NELA *amicus* brief (at 11-13), Congress considered and rejected the core argument Harrah's makes in this case because "the basic purpose of [T]itle VII is to prohibit discrimination," and it was clear even then that allowing employers to

cater to customers' discriminatory preferences "would establish a loophole that would gut this [T]itle." 110 Cong. Rec. 2550- 2556 (1964).

In addition to the fact that Harrah's may not establish a BFOQ defense based on allegations of customer preference, the casino utterly fails to carry its burden of proof on a BFOQ defense. As this Court reminded the employer-defendant in *Frank*, BFOQ is an "extremely narrow exception to the general prohibition of discrimination on the basis of sex," 216 F.3d at 855 (citing *Johnson Controls,* 499 U.S. at 200). Yet Harrah's principal evidence is the declaration of its paid "image consultant," who merely attests that makeup is a good idea for women employees, though not necessary, due to unspecified qualities of casino lighting, without explaining why this is not equally true for men. *See also* Op.Br. at 31-33.

Seemingly realizing it did not carry its burden below, Harrah's answering brief, and the notably similar brief of its supporting *amici*, include many pages asserting that the Nevada gaming and tourism businesses have flourished due to efforts to improve their "professionalism" and image. While it seems highly plausible that marketing a "family friendly" image, and reducing "unsavory" associations (presumably about organized crime), would increase casino business noticeably, any financial impacts at all from a burdensome, women-only makeup rule are not so plausible (even if the policy were permissible under Title VII). But,

whether or not these are plausible appellate arguments, they do not supply the evidence Harrah's needed below to prove that the "essence" of the gaming business requires each woman employee to maintain her precise "best" look every day with all four types of makeup, just as the makeover expert instructed. *See Johnson Controls*, 499 U.S. at 206, as cited in *Gerdom*, 692 F.2d at 608-09.[2]

IV. Enforcement Of Gender Stereotypes In The Workplace, Whether Against Women Or Men Or Both, Has Long Been Accepted As Evidence of Discrimination Prohibited By Title VII.

A. *Price Waterhouse* Squarely Applies Here.[3]

Harrah's argues that the U.S. Supreme Court's holding in *Price Waterhouse*, that evidence an employer acted on the basis of sex stereotypes can show discrimination because of sex in violation of Title VII, does not apply here.

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[2] If the inadequacy of Harrah's BFOQ evidence wasn't already manifest, the casino makes it so with the odd, unexplained mention of Disney employees. Ans.Br. at 33. This uncontextualized reference repeats in Harrah's *amici*'s brief, CELE Am.Br. at 8, and only highlights the range of BFOQ questions for which Harrah's presents no evidence.

[3] Harrah's is bluntly misleading with its recurring suggestion (echoed in the industry *amici* brief) that the relevant holding of *Price Waterhouse* was superceded by statute. But, Congress only addressed the mixed-motive aspect of the case, *see Stender v. Lucky Stores, Inc.*, 780 F.Supp. 1302, 1306 n.9 (N.D. Cal. 1992), and has done nothing to disturb its holding on gender stereotyping. In the years since *Price Waterhouse* was decided, it has become well-settled in this circuit that evidence of sexual stereotyping most certainly is relevant in cases charging unlawful discrimination based on sex. *See, e.g., Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, ___ U.S. ___, 155 L.Ed.2d 313 (2003); *Nichols*, 256 F.3d at 864; *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

Ans.Br. at 39-41. This cannot be correct.

What happened to Ann Hopkins in her quest for partnership at the accounting firm bears a striking resemblance to what happened to Darlene Jespersen at Harrah's. In both cases, women who had been performing their jobs successfully were summarily denied the opportunity to continue in their careers because they failed to match the feminine stereotype their employers imposed on women. As Justice O'Connor noted in concurrence in *Price Waterhouse*, evidence that decisionmakers "referred to [Hopkins'] failure to conform to certain gender stereotypes" – including their expressed wish that she would "wear makeup, have her hair styled, and wear jewelry" – as "a factor militating against her," amounted to direct evidence that Hopkins was denied partnership because of her sex. 490 U.S. at 272. Just so here. If Darlene Jespersen could have kept her job by applying "a new shade of lipstick, [blush, mascara, and foundation]," then, as the Supreme Court observed, "perhaps it is [Jespersen's] sex . . . that has drawn the criticism." *Id.* at 256. There is no principled distinction between Price Waterhouse's imposition of traditional notions of femininity on Hopkins, and Harrah's imposition of the same stereotypes on Jespersen.[4]

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[4] If anything, Jespersen's claim may be as stronger, as Hopkins merely lost a promotion based upon mixed reviews of her work as well as her appearance, while Jespersen was terminated despite years of consistently positive reviews.

Indeed, Harrah's does not even attempt to distinguish *Price Waterhouse*, arguing instead only that Title VII somehow contains an escape hatch if the gender stereotypes are written down and labelled an "appearance standard."[5] Harrah's points to a footnote in *Nichols v. Azteca Restaurant Enterprises*, in support of this assertion. That footnote, appended to a discussion holding that "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes," states:

> We do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards.

Nichols, 256 F.3d at 874, n. 7. This dicta provides no general exemption from Title VII to allow employers to do as they will with grooming codes, nor does it bar

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[5] Harrah's *amici* attempt to distinguish *Price Waterhouse* by arguing that it involved unfeminine behavior, rather than appearance. Not only is this incorrect, because *Price-Waterhouse* clearly involved both (to the extent the two can be disentangled), but it is a distinction without a difference. Title VII is no less offended by adverse action against an employee for failing to don a new shade of lipstick, wear a feminine suit or style her hair (*Price Waterhouse*), than based on the way he walks or carries his serving tray (*Nichols*). Besides, this Circuit has already held that a plaintiff's feminine or masculine *appearance*, including her use of make-up, can show that adverse actions against her occurred because of sex. *See Schwenk*, 204 F.3d at 1202 (evidence that defendant offered plaintiff make-up "in order to enhance the femininity of her appearance," and that plaintiff assumed "a feminine rather than a typically masculine *appearance* and demeanor," showed that defendant's attack occurred because of plaintiff's sex) (emphasis added).

Jespersen's arguments here.

As discussed above in Section II.B., Jespersen has never claimed that *all* sex differentiation in the workplace is actionable under Title VII; benign differentiation that does not reinforce harmful stereotypes is unobjectionable. But *Price Waterhouse* makes clear that, when an employer's grooming standard relies upon and reinforces limiting stereotypes about women, and the employer invokes that standard to take adverse action against an employee, then that employee has shown discrimination because of sex. Such a standard must necessarily fall outside the bounds of a "reasonable" and non-discriminatory regulation of the sort envisioned in *Nichols*.

Harrah's also tries to dismiss the clear agreement of the majority of an *en banc* panel of this Court in *Rene v. MGM Grand Hotel*, 305 F.3d at 1060, that enforcement of gender stereotypes can show discrimination because of sex in violation of Title VII. Harrah's asserts that the panel did not credit a theory of gender stereotyping as a violation of Title VII, but it failed to count the votes. *See* Ans.Br. at 40-41. *Price Waterhouse*'s holding was clearly embraced by a majority of eight judges on *Rene*'s panel of eleven, and the other three simply did not address it.[6] Indeed, *Rene* only confirms that this Court has not hesitated to enforce

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[6] Three judges concurred in an opinion written by Judge Pregerson that applied *Price Waterhouse*'s proscription on gender stereotyping (*Rene*, 305 F.3d

firmly *Price Waterhouse*'s holding on sex stereotyping, applying it in a range of contexts where individuals suffered discrimination because they did not conform to their employers' expectations of how a woman or man should appear or behave. *See, e.g.*, *Nichols*, 256 F.3d at 864; *Schwenk*, 204 F.3d at 1187. Harrah's claim that this Court has granted a blanket exemption from its otherwise-applicable rules on stereotyping, allowing employers to enforce these archaic ideas so long as they appear in the form of a dress or grooming standard, flies in the face of this Court's strong enforcement of *Price Waterhouse* throughout Title VII case law and in cases construing analogous provisions of other laws. *Id.*[7]

Nor is Harrah's correct in claiming that Jespersen is asserting "a broad independent cause of action for gender stereotyping" under Title VII. Ans.Br. at 39. Jespersen has asserted a straightforward claim of disparate treatment based on

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at 1069); Judge Fisher wrote his own concurring opinion in which he agreed (*id.* at 1070); and four dissenting judges acknowledged that "[d]iscrimination because of sex (gender) can extend to sexual stereotyping on the job," but concluded that the plaintiff had failed to preserve this argument. *Id.* at 1072.

[7] Harrah's also cites to *Doe and Doe v. City of Belleville, Ill.*, 119 F.3d 563, 582 (7th Cir. 1997) for the proposition that *Price Waterhouse* "*is inapposite to appearance standards cases.*" Ans.Br. at 41 (emphasis in original). This is an utter mischaracterization of *Doe*. The passage Harrah's cites actually affirms the relevance of *Price Waterhouse* to appearance standard cases, noting that the Seventh Circuit "recognized ten years in advance of *Price Waterhouse* that workplace dress codes founded on cultural stereotypes are not permissible under Title VII." *Id.*

the fact that she was fired. *See* Op.Br. at 2-3. Her evidence in support of that claim is the policy under which she was fired, which incorporates and enforces limiting gender stereotypes as it subjects women and men to different rules. Even Harrah's concedes that sex stereotypes are relevant to proving discrimination under Title VII (Ans.Br. at 40), which is all Jespersen argues here.

Nor would Jespersen's claim lead to the fanciful results that Judge Posner mockingly hypothesized in his solo concurrence in *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003). Rather, this case fits squarely within Judge Posner's paradigmatic example of an appropriate consideration of sex stereotyping under Title VII: "using evidence of the plaintiff's failure to wear nail polish, [here, lipstick, rouge, mascara or foundation,] (or, if the plaintiff is a man, his using nail polish) to show that her sex played a role in the adverse employment action of which she complains." *Id.* Harrah's attempt to characterize Jespersen's argument as something it is not only highlights the company's lack of a persuasive response to her actual claim.

B. Far From Mandating Androgyny, Title VII Protects Employees' Right *Not* To Conform To Rigid Expectations Based On Gender.

Contrary to Harrah's misreading, Title VII's mandate that employees may not be forced to conform to archaic gender stereotypes as a condition of their jobs is a rule that *prohibits* enforced conformity – not one that substitutes mandatory

androgyny for mandatory ultra-femininity.

The U.S. Supreme Court and this Court have recognized time and again that gender-based stereotypes are harmful and discriminatory when they reinforce limiting notions about the appropriate roles for men and women, whether in the workplace or in other realms of public life. *See, e.g., Nevada Dep't of Hum. Res. v. Hibbs,* __ U.S. __, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (summarizing history of many state laws that relied on gender stereotypes to limit women's employment opportunities); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 140 (1994) (because gender-based stereotypes "have wreaked injustice in so many other spheres of our country's public life," their invocation in jury selection invites cynicism because of the "impression that the judicial system has acquiesced in suppressing full participation by one gender"); *Thorne v. City of El Segundo*, 726 F.2d 459, 465-66 (9th Cir. 1983) (decisionmakers' belief that plaintiff was "a very feminine type person" and therefore could not be a police officer, and their application of different moral standards to her than to men, showed invidious discrimination in violation of Title VII).

That is not to say that men and women must be the same. It is instead to say that men and women must each be permitted the opportunity to achieve in the workplace and the public sphere on terms that are that not unjustifiably

circumscribed by their sex, and that allow for individual deviation from the "norm" for their sex. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (that most women might not prefer the adversative training offered by VMI does not justify foreclosing those who do).

This basic principle is true for both men and women: neither can be forced to labor under gender stereotypes that limit their professional options. *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 729 (1982) (women-only admissions policy "perpetuate[s] the stereotyped view of nursing as an exclusively woman's job" and "lends credibility to the old view that women, not men, should become nurses). It is true even where the stereotypes placed on women and on men are "parallel" and "mutually reinforcing." *Hibbs*, 123 S.Ct. at 1982. This is why the "equal burdens" standard may be inadequate. Comparing the relative burdens placed on each sex by age-old gender stereotypes to determine if they are "equal" is an inherently incoherent exercise that cannot meet Title VII's underlying purpose of eliminating sex-based barriers to equal employment rights for *both* women and men.

Unlike a policy that imposes similar demands on men and women, and thereby permits an objective comparison – for instance, the weight policy in *Frank* – the policy at issue in this case enforces stereotypes that are not alike and do not

lend themselves to a meaningful comparison. Where an "unequal burden" test may be appropriate in the former circumstance, it loses its usefulness when applied to fundamentally dissimilar employer demands. Instead, an employer's appearance standard that incorporates limiting gender stereotypes suffices as evidence of discrimination because of sex without regard to what rules the employer may have imposed on men. *See Price Waterhouse*, 490 U.S. at 256-58 (plaintiff can prove discrimination because of sex with evidence showing reliance on gender stereotypes about women's appearance, without inquiry into appearance expectations for men).

Finally, Jespersen does not claim, as Harrah's contends, that Title VII requires polling of each employee to determine individualized comfort with any given appearance rule. Personal preference for one style over another is not the issue. Jespersen has challenged, on its face, a policy that incorporates stereotypes that negatively impact women's professional standing in the workplace, and that applies across the board to every female beverage server working alongside her. She does not ask for a special exemption from the policy, but for a determination that it is unlawful to enforce such a policy against *any* woman, whatever her personal preferences. This is not to say, of course, that if the standard is found to be unlawful, no woman may wear makeup at Harrah's – of course they remain free

to do so. But there is a vast difference between a woman choosing to wear makeup because she believes it enhances her ability to do the job, and an employer demanding that all women in the workplace conform to a stylized, made-up, feminine stereotype, even when it impedes the ability to work. The difference is the message that the makeup requirement sends to customers and to employees about what Harrah's values in a female worker: that her conformity to traditional notions of feminine attractiveness matters more than whether she is an excellent worker. Just as Price Waterhouse could not enforce its sexist notions against Hopkins, nor may Harrah's enforce them against Jespersen. The U.S. Supreme Court has removed all doubt that to do so indicates discrimination because of sex in violation of Title VII.

V. Conclusion

For all the foregoing reasons, Darlene Jespersen respectfully requests that this Court reverse the decision below and remand the case with instructions concerning the correct legal standards for evaluating Jespersen's claim that

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Harrah's violated Title VII by firing her for not complying with the casino's women-only makeup requirement.

DATE: August 13, 2003

Respectfully submitted,

Jennifer C. Pizer
Jennifer Middleton
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

By: _____
Jennifer C. Pizer

KENNETH JAMES MCKENNA, INC.

By: _____
Kenneth J. McKenna

ATTORNEYS FOR PLAINTIFF-APPELLANT
DARLENE JESPERSEN

CERTIFICATE OF COMPLIANCE

The accompanying Reply Brief of Appellant Darlene Jespersen complies with the specifications of Rule 32 of the Federal Rules of Appellate Procedure, as follows:

1. The text of the Brief is double spaced. Headings, footnotes, and most quotations more than two lines are single spaced.

2. The Brief is proportionately spaced. The typeface is Times New Roman in 14 point size.

3. The word count of the Brief is 6962 words, based on the count of the word processing system used to prepare the Brief.

I certify that the foregoing is true and correct. Dated this 13th day of August, 2003, at Los Angeles, California.

Jennifer C. Pizer

PROOF OF SERVICE BY FEDERAL EXPRESS OVERNIGHT OR U.S. MAIL

I, TITO GOMEZ, declare:

that I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to the within-entitled cause of action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Boulevard, Suite 1300, Los Angeles, CA 90010.

On August 13, 2003, I served copies of the attached document, described as REPLY BRIEF OF APPELLANT DARLENE JESPERSEN, on the parties of record in the matter of *Jespersen v. Harrah's Operating Company, Inc.*, Case Number 03-15045, by Federal Express overnight mail service or U.S. mail, as indicated, by placing true and correct copies thereof in sealed envelopes addressed as follows:

By Fed Ex Overnight Mail
Patrick Hicks, Esq.
Veronica Arechederra Hall, Esq.
Littler Mendelson
3930 Howard Hughes Parkway,
Suite 200
Las Vegas, Nevada 89109
Attorneys for Appellee

By U.S. Mail
Andrew Dwyer, Esq.
Dwyer & Dunnigan, L.L.C
17 Academy Street, Suite 1010
Newark, New Jersey 07102
Attorney for Amici Curiae

By U.S. Mail
Jeffrey Erdman, Esq.
Bennett & Erdman
5670 Wilshire Boulevard
Suite 1400
Los Angeles, CA 90036
Attorney for Amici Curiae

By U.S. Mail
David Cruz, Esq.
University of Southern California
Law School
699 Exposition Boulevard
Los Angeles, CA 90089
Attorney for Amici Curiae

By U.S. Mail
Allen Lichtenstein, Esq.
American Civil Liberties Union of
Nevada
3315 Russell Road, No. 222
Las Vegas, Nevada 89120
Attorney for Amici Curiae

By U.S. Mail
Kathleen Phair Barnard, Esq.
Schwerin Campbell Barnard
3161 Elliot Ave., Suite 101
Seattle, Washington 98118
Attorney for Amici Curiae

By U.S. Mail
Joseph E. Schuler, Esq.
Mark A. De Bernardo, Esq.
Katherine E. Bierma, Esq.
Littler Mendelson, P.C.
1225 I Street, N.W. Suite 100
Washington, D.C. 20005
Attorneys for Amici Curiae

By U.S. Mail
Banks Brown, Esq.
McDermott, Will & Emery
50 Rockefeller Plaza
New York, New York
Attorney for Amici Curiae

By U.S. Mail
James O. Abrams
414 29th Street
P.O. Box 160405
Sacramento, California 95816
Attorney for Amici Curiae

By U.S. Mail
Nancy Solomon, Esq.
California Women's Law Center
3460 Wilshire Boulevard
Suite 1102
Los Angeles, CA 90010
Attorney for Amici Curiae

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Dated: August 13, 2003.

Tito Gomez
TITO GOMEZ