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

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEVADA, NORTHWEST WOMEN'S LAW CENTER, CALIFORNIA WOMEN'S LAW CENTER, AND THE GENDER PUBLIC ADVOCACY COALITION IN SUPPORT OF PLAINTIFF/APPELLANT

ALLEN LICHTENSTEIN
Nevada Bar No. 3992
AMERICAN CIVIL LIBERTIES
UNION OF NEVADA
3315 Russell Road, No. 222
Las Vegas, NV 89120
(702) 433-2666

KATHLEEN PHAIR BARNARD
Wash. Bar No. 17896
SCHWERIN CAMPBELL BARNARD
For: NORTHWEST WOMEN'S
LAW CENTER
3161 Elliot Ave., Suite 101
Seattle, WA 98118
(206) 285-2828

NANCY M. SOLOMON
Calif. Bar No. 192756
CALIFORNIA WOMEN'S
LAW CENTER
3460 Wilshire Boulevard
Suite 1102
Los Angeles, CA 90010
(213) 637-9900

***Attorneys for* Amici Curiae**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Interest of *Amici Curiae*

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Nevada is one of the ACLU's state affiliates. Since its founding in 1920, the ACLU has appeared as counsel or *amicus curiae* in numerous federal and state court cases involving the scope of statutory and constitutional protections against sex discrimination, including cases challenging sex-based rules grounded in sex stereotypes. This case involving sex discrimination and sex stereotyping is a matter of significant concern to the ACLU of Nevada.

The Northwest Women's Law Center ("NWLC") is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, NWLC has been dedicated to protecting and ensuring women's legal rights, including the right to equality in the workplace. Throughout its history, NWLC has been involved in both litigation and legislation aimed at ending all forms of discrimination against women. Toward that end, NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country.

The California Women's Law Center ("CWLC") is a private, non-profit advocacy and support center dedicated to advancing, protecting and securing the civil rights of women and girls through education, litigation, and collaboration. CWLC's issue priority areas are sex discrimination, violence against women, women's health, race and gender, exploitation of women, and women's economic security. CWLC has particular expertise in the area of sex discrimination in employment. CWLC advocates and educates the community, advises the legislature, and joins as amicus in other cases related to this issue, which is so crucial to the lives of women.

The Gender Public Advocacy Coalition ("GenderPAC") is a national tax-exempt non-profit organization founded in 1995 with over 10,000 supporters. Among other things, GenderPAC's mission is to end workplace discrimination stemming from gender stereotyping. This case is of significant concern to GenderPAC which is committed to making clear that the right to be free from sex discrimination in the workplace includes the right to be free from invidious sex stereotypes, such as those imposed by the invasive sex-based makeup requirement at issue in this case.

Introduction and Statement of the Case

Does an employer's requirement that all of its female beverage servers wear makeup—including foundation, rouge, mascara, and lipstick—while male employees are required simply to keep their faces clean, discriminate on the basis of sex in violation of Title VII by imposing an unequal burden on women and reinforcing invidious gender stereotypes? *Amici* respectfully submit that it does.

Plaintiff Darlene Jespersen was a bartender at Harrah's Casino and a faithful employee for over twenty years when she was fired for not complying with Harrah's newly instituted makeup policy for women, despite consistently positive performance reviews. Jespersen has never been comfortable wearing makeup, although when Harrah's adopted a policy in the 1980s of asking (as opposed to requiring) its female beverage servers to go to a makeover consultant, Jespersen complied and wore makeup for about two weeks. However, it made her feel "degraded" and "exposed" and thus prevented her from doing her job. See Jespersen Deposition 138:7-19, in Pl.'s Excerpts of Record ("ER") 121.

Harrah's current "Personal Best" program, however, is mandatory, and imposes a variety of stringent appearance requirements on women, including requiring them to tease, curl or style their hair, as well as requiring them to wear face powder, blush, mascara, and lipstick, "applied neatly in complimentary

colors." Exh. E to Harrah's Mot. for Summ. J., ER 79-80. Men, on the other hand, are required only to keep their hair above their shirt collar, not have ponytails, and keep their faces and nails free from makeup or colored polish. See id.

Because Jespersen knew she could not comply with Harrah's new makeup policy, she did not sign the required pledge to do so. When she continued to decline to wear the specified makeup despite pressure from management, Harrah's fired her.

Jespersen filed a complaint of sex discrimination in violation of Title VII with the Nevada Equal Rights Commission, received a notice of right to sue, and filed this lawsuit. On a motion for summary judgment, the district court dismissed Jespersen's claim of sex discrimination, from which dismissal she now appeals.

SUMMARY OF ARGUMENT

The personal appearance policy adopted by Defendant Harrah's in this case, which requires its female employees to style their hair and wear elaborate makeup but imposes no equivalent burdens on its male employees, constitutes disparate treatment sex discrimination under Title VII of the Civil Rights Act of 1964.

In light of the historical background and social meanings of makeup for women, forcing them to wear it as a condition of employment imposes a substantial and unequal burden on women. Appearance policies that reflect and reinforce

invidious gender stereotypes—such as the one at issue in this case—are forbidden under U.S. Supreme Court and Ninth Circuit case law interpreting Title VII. The reasoning of Ninth Circuit and other courts in a line of cases originating in the 1970s—largely upholding grooming standards that required men, but not women, to keep their hair short, or to wear ties, etc.—has been abrogated by more recent U.S. Supreme Court and Ninth Circuit cases holding that Title VII forbids employment decisions based on sex stereotyping. Thus, those precedents, to the extent that they allow employers to impose inherently unequal or sex-stereotyped appearance standards on their male and female employees, are no longer good law.

Instead, as the Ninth Circuit has made clear, appearance standards that have the effect of burdening one sex more than the other or of reinforcing harmful stereotypes about how men and women should appear or behave, are unlawful under Title VII. Moreover, because social conventions about male and female appearance often are asymmetrical in their meanings and burdens, courts must apply the "equal burden" analysis set forth in recent Ninth Circuit case law very carefully to determine whether the burdens are truly equal and do not reinforce deeply-rooted notions of male competence and female inferiority.

Because the court below erred in making a factual determination that Harrah's policy of requiring all female beverage servers to wear extensive,

elaborate facial makeup as a condition of maintaining their employment does not impose a sex-based unequal burden on them, this Court should reverse the trial court's judgment and remand the case for further proceedings on Jespersen's Title VII disparate treatment claim.

ARGUMENT

I. An employer's personal appearance rule that requires female but not male employees to wear makeup imposes a substantial and inherently unequal burden on female employees in light of the social and cultural significance of makeup for women.

Under Title VII of the Civil Rights Act of 1964, it is "an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-(2)(a)(1) (2003). By now it is well-settled that "'[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.'" City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)); see also Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (noting that the Court has "repeatedly made clear that although the statute mentions specific

employment decisions with immediate consequences, the scope of the prohibition is not limited to economic or tangible discrimination, and that it covers more than terms and conditions in the narrow contractual sense") (citations and quotation marks omitted).

Thus, the Court has held that Title VII prohibits a wide range of sex-based employment practices that impede women's ability to participate and succeed in the workforce. For example, the Court has held that it is unlawful to require female employees to make larger contributions to a pension fund than male employees based on life expectancy, see Manhart, 435 U.S. 702, to bar fertile women from working in a battery factory in order to protect potential fetuses from lead exposure, see Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991), to fail to reasonably protect a female employee from hostile environment sexual harassment, see Faragher, 524 U.S. 775, and to fail to promote a female accountant because she was not sufficiently feminine in her appearance or manners, see Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Similarly, the serious burden imposed on female employees when an employer *forces* them—but not men—to paint their faces as a condition of employment is a cognizable harm under Title VII, especially given the historical and cultural significance of makeup for women. Early in American history, social

and religious leaders promoted the view that a woman's unadorned face was a sign of inner spiritual beauty and goodness, and railed against "painted women"; makeup was seen as a sign of dishonesty and immorality. See Kathy Peiss, Making Up, Making Over: Cosmetics, Consumer Culture, and Women's Identity, in The Sex of Things: Gender and Consumption in Historical Perspective 311, 313-15 (Victoria de Grazia et al. eds., 1996) [hereafter, "Peiss, Making Up"]. Makeup was also associated with sexual licentiousness because it involved the "use of signifiers of sexual arousal such as red lips, dilated eyes, and reddened cheeks." Jennifer Craik, The Face of Fashion: Cultural Studies in Fashion 158 (1994).

Later in the nineteenth century, however, makeup became a socially acceptable means of female adornment, and women began to be pressured to enhance their beauty and to wear elaborate, impractical clothing to signal the social and economic status of their households. See Peiss, Making Up, supra, at 320. Thorstein Veblen, the originator of the theory of conspicuous consumption, analyzed the commodification of women in the Victorian era in his classic 1899 study, The Theory of the Leisure Class. "By virtue of its descent from a patriarchal past, our social system makes it the woman's function in an especial degree to put in evidence her household's ability to pay." Thorstein Veblen, The Theory of the Leisure Class 180 (1899). Thus, prevailing nineteenth century conventions

regarding women's appearance signaled that women were expensive and useless:

> [T]he high heel, the skirt, the impracticable bonnet, the corset, and the general disregard of the wearer's comfort which is an obvious feature of all civilized women's apparel, are so many items of evidence to the effect that in the modern civilized scheme of life the woman is still, in theory, the economic dependent of the man,—that, perhaps in a highly idealized sense, she still is the man's chattel. The homely reason for all this conspicuous leisure and attire on the part of women lies in the fact that they are servants to whom, in the differentiation of economic functions, has been delegated the office of putting in evidence their master's ability to pay.

Id. at 181-82. Early feminists, in turn, recognized and rebelled against this social pressure: "It is very little to me . . . to have the right to vote, to own property, etcetera, if I may not keep my body, and its uses, in my absolute right." Lucy Stone, quoted in Naomi Wolf, The Beauty Myth 11 (1991); see also Kathy Peiss, Feminism and the History of the Face, in The Social and Political Body 161 (Theodore R. Schatzki et al. eds., 1996) [hereafter, "Peiss, History of the Face"].

Social pressure on women to conform their faces and bodies to prevailing social conventions, and some women's resistance to this pressure, has continued unabated into the twenty-first century, especially at times when traditional sex roles are being challenged or eroded by political or economic pressures. During World War II, for example, women employed in traditionally male jobs were encouraged to wear makeup to maintain their femininity. Kate De Castelbajac, The Face of the

Century: 100 Years of Makeup and Style 89-90 (1995).

Feminist writers in the 1960s and 1970s analyzed the intense pressure put on women to conform to conventional standards of beauty as a form of political oppression commensurate with racism. See Peiss, History of the Face, supra, at 162. In The Feminine Mystique, Betty Friedan wrote that "the entire apparatus of mass culture—women's magazines, advertising, popular psychology, the fashion and beauty industries—deflected women's aspirations for achievement . . . ." Betty Friedan, The Feminine Mystique (1963). Dana Densmore argued that "the more women achieved beauty and admiration, 'the less reality our personality and intellect will have. . . . How can anyone take a manikin seriously?'" Dana Densmore, On the Temptation to Be a Beautiful Object, in Female Liberation 204, 207 (Roberta Salter ed., 1972). Another author observed that although engagement with the beauty culture "appeared to be a woman's greatest desire and glory, it was in fact 'the stigma of her inferiority,' her beauty practices a consequence of male power and desire." Una Stannard, The Mask of Beauty, in Woman in Sexist Society 187, 200-01 (Vivian Gornick & Barbara K. Moran eds., 1971).

In recent years, some feminist writers have argued that the more progress women have made towards equality in the workplace, "the more strictly and heavily and cruelly images of female beauty have come to weigh upon us." Naomi Wolf,

The Beauty Myth 10 (1991). Wolf asserts that "[w]e are in the midst of a violent backlash against feminism that uses images of female beauty as a political weapon against women's advancement: the beauty myth." Id.

Thus, far from being a *de minimis* workplace requirement with no substantial impact on women's employment opportunities, being forced to wear makeup at work has a long-standing social and historical significance that is specifically sex-linked and is deeply offensive and disempowering to many women. While of course some women *like* wearing makeup and feel more comfortable with it on, the issue here is the significant harm and social message about women's roles in the workplace and society when an employer can *force* them—but not men—to wear it in order to keep their jobs. *Amici* submit that, consistent with Title VII, that is something that employers cannot be permitted to do.

II. Appearance policies which require strict adherence to stereotyped sex-specific grooming, such as the one at issue here, perpetuate the discrimination Title VII forbids.

A. U.S. Supreme Court cases holding that employment decisions based on sex stereotyping is discrimination "because of sex" in violation of Title VII have abrogated the precedential value of the early line of appearance standard cases upholding sex-based grooming policies.

In light of the significant social harms to women of being required to present themselves in the workplace wearing elaborate makeup, *amici* urge this Court to

analyze critically the line of Title VII cases originating in the early 1970s and largely involving challenges by men to employer policies that required them—but not women—to keep their hair short. The reasoning of many of these cases conflicts with more recent Supreme Court decisions and decisions of this Court interpreting Title VII. Thus, these cases should be seen as superceded and as an unsound foundation for present-day analysis of sex discrimination claims. Accordingly, this Court should clarify that, at least to the extent that the reasoning of these cases would seem to allow employers to impose rules on their employees that reinforce harmful sex stereotypes that demean employees or limit their ability to perform well at work, they are no longer good law.

The EEOC originally interpreted Title VII to prohibit sex-specific grooming and appearance rules, and some early district court cases also adopted this straightforward interpretation of Title VII's prohibition of sex discrimination in the workplace. See, e.g., Aros v. McDonnell Douglas Corp., 348 F. Supp. 661, 666 (C.D. Cal. 1972) (holding that a hair-length rule for male employees alone is discrimination on the basis of sex) ("[A] dress and grooming code . . . must be applied equally to everyone. It may not establish different standards for males and females; it may not discriminate on the basis of sex.").

Nonetheless, the majority of federal court decisions in the 1970s rejected

Title VII challenges to employer policies restricting male employees' hair length, requiring male employees to wear ties, etc. By 1980, many courts, including this one, had embraced the notion that sex-specific dress codes and grooming standards are not prohibited by Title VII. See, e.g., Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755 (9th Cir. 1977) (holding that employer rules that "require male employees to conform to different grooming and dress standards than female employees [are] not sex discrimination within the meaning of Title VII"); Baker v. Cal. Land Title Co., 507 F.2d 895, 897 (9th Cir. 1974) (holding that a hair-length rule for male employees does not violate Title VII because "sex discrimination" refers to discrimination on the basis of immutable characteristics rather than "personal modes of dress and cosmetic effects"); see also Barrett v. Amer. Med. Response, N.W., Inc., 230 F. Supp. 2d 1160, 1163-65 (D. Or. 2001) (summarizing cases).

Once this principle had been established in "the haircut cases," courts began citing those cases to dismiss female employees' challenges to dress codes and grooming standards. See, e.g., Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1391-92 (W.D. Mo. 1979) (holding that a rule prohibiting female employees from wearing pants does not violate Title VII because employees' clothes are not an immutable characteristic and wearing pants to work is not a fundamental right;

plaintiff's "contention that the policies perpetuate a stereotype is simply a matter of opinion").

The rationales for these early decisions vary. Some state or imply that grooming standards are simply too trivial to constitute a Title VII violation, or that Title VII was not intended to take away employers' prerogatives to regulate employees' appearance. Others assert that sex-specific rules regarding hair length, clothing, etc., do not concern "immutable characteristics" and/or do not implicate any "fundamental rights," and therefore do not create real barriers to employment opportunity because employees can readily conform to the rules.

The inadequacy of the reasoning of these early decisions has been widely acknowledged. The distinction between mutable and immutable characteristics has come to be viewed as a relic of early Title VII case law, and this Court has avoided any reliance on such distinctions in more recent Title VII cases. See Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (en banc) and Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000). Consistent with the Manhart Court's emphasis on Title VII's protection of individuals—rather than groups—from discrimination,[1] commentators have pointed out that "the fact that dress and

---

[1] See Manhart, 435 U.S. at 708 ("The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.").

appearance are alterable does not mean they are not critical to an individual's sense of dignity and self." Katharine Bartlett, Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality, 92 Mich. L. Rev. 2541, 2558 & n.82 (1994); see also Peter B. Bayer, Mutable Characteristics and the Definition of Discrimination Under Title VII, 20 U.C. Davis L. Rev. 769, 839 (1987). They also have criticized the inconsistency of courts treating *employees'* challenges to workplace appearance rules as "trivial," while simultaneously accepting *employers'* assertions about the crucial importance of the same rules:

> There is, on the one hand, a tendency to denigrate and demean appearance claims, a faint suggestion that courts have better things to do with their time than adjudicate grooming standards. Suddenly, the tone becomes somber . . . when judges get to the part of their opinion where they uphold, as they usually do, the power of employers . . . to visit severe penalties on people who wear nonconforming dress or hairstyles . . . . [J]udges create a peculiar dissonance by trivializing appearance claims while at the same time asserting the need for the authorities to possess vast powers to enforce conventional attitudes and prejudices.

Karl Klare, Power/Dressing: Regulation of Employee Appearance, 26 New Eng. L. Rev. 1395, 1400-01 (1992) (citations omitted). Moreover, as one commentator has pointed out, "[p]rejudgements about what is trivial and what is important . . . take for granted the very habits Title VII should be used to scrutinize, and thereby

undermine the Act." Bartlett, supra, at 2559. See also Price Waterhouse, 490 U.S. at 256 ("if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism").

Most importantly, the narrow reading of Title VII prohibitions adopted in the male haircut cases has since been rejected by the U.S. Supreme Court. The Court has made clear that requiring individuals to conform to gender stereotypes, even when those stereotypes do not implicate immutable characteristics or infringe on fundamental rights, falls within the prohibitions in Title VII. See Manhart, 435 U.S. at 707 n.13 (Section 703(a)(1) of Title VII was "'intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes'") (quoting Sprogis v. United Air Lines, 444 F.2d 1194, 1198 (7th Cir. 1971)); Price Waterhouse, 490 U.S. 228.

The Supreme Court provided its most extensive analysis of sex stereotyping under Title VII in Price Waterhouse, holding that the statute prohibits employers from making employment decisions based on sex stereotypes about the ways men and women should behave or appear. The plaintiff in that case, Ann Hopkins, was passed over for partnership at an accounting firm, despite an outstandingly productive work record and excellent reviews by clients, because she was viewed as

not acting in a sufficiently feminine manner. The partners who evaluated and ultimately rejected Hopkins described her as "macho," suggested that she "overcompensated for being a woman," and advised her to take "a course at charm school." Id. at 235. Several partners criticized her for using profanity; in response, one suggested that those partners objected to her swearing only "because it's a lady using foul language." Id. Another supporter of Hopkins explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate." Id. Finally, the man who delivered the news to Hopkins that her candidacy for partnership would be placed on hold advised her that in order to improve her chances for partnership, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. The Court held that this conduct—treating an employee differently because of the employee's failure to conform to sex stereotypes—is sex discrimination under Title VII. See id. at 251 ("[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.").

The Court reached this conclusion despite the fact that the characteristics upon which Hopkins was judged—e.g., her lack of makeup and jewelry, her hair-

style, her swearing, and her mannerisms—are not immutable and do not implicate fundamental rights—aside from, of course, the right to be treated equally on the basis of gender. The holding of Price Waterhouse thus did not turn on whether there was a fundamental right not to wear makeup, or on whether Hopkins' mannerisms were immutable. In ruling in favor of Hopkins, the Court relied instead on the bedrock principle underlying Title VII that every individual has the right to be treated *equally*, without regard to gender. The Court correctly recognized that this right would be meaningless if employers could circumvent the prohibition on sex discrimination by excluding persons on the basis of non-conformity with gender stereotypes, regardless of whether the characteristics upon which those stereotypes were based were fundamental or immutable.

Thus, it is clear under Manhart, Price Waterhouse, and their progeny that the reasoning of the "haircut cases" has been abrogated and that the discrimination "because of sex" prohibited by Title VII includes discrimination both because of biological sex and because of gender stereotyping. Hence, *amici* urge this Court to disregard the reasoning in the pre-Manhart and Price Waterhouse "grooming standards" cases in deciding the issues before it here.

B. Under current Ninth Circuit law, personal appearance policies which require conformity to gender stereotyped images unrelated to performance violate Title VII by imposing an unequal burden on employees on the basis of their sex.

In Manhart, 435 U.S. at 707 n.13, the Supreme Court declared that "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." It followed that decision with its holding in Price Waterhouse: employers cannot fire or refuse to hire or promote a female employee simply because she does not meet the employers' stereotypical gender expectations. More recently, this Court applied the rule of Price Waterhouse to hold that sexual harassment of a male employee because of his harasser's perception that he did not meet their stereotypical gender expectations violated Title VII. Nichols v. Azteca Rest., 256 F.3d 864, 875 n.7 (9th Cir. 2001). Moreover, the holding in Nichols is consistent with other Ninth Circuit case law, including its appearance standard cases, decided since the Supreme Court made clear that Title VII prohibits sex-differentiated conditions of work which are premised on sex stereotypes. See, e.g., Gerdom, 692 F.2d 602; Frank, 216 F.3d 845 (discussed below).

After Manhart and Price Waterhouse, in determining whether sex-differentiated dress and grooming requirements violate Title VII, this Court has been vigilant to ensure that burdens imposed on men and women are truly equal and

do not reinforce invidious sex stereotypes, unless the employer can prove that the distinction is a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-(2)(e)(1) (2003).

In Gerdom, 692 F.2d 602, the Court held that a weight restriction applied to female flight attendants but not to male directors of passenger service who had somewhat similar duties[1] violated Title VII. The Court agreed with previous cases in other circuits "defining permissible grooming rules for male and female employees as those which do not significantly deprive either sex of employment opportunities, and which are even-handedly applied to employees of both sexes." Id. at 605-06; see also id. at 606 (the "key consideration" is whether a "significantly greater burden of compliance was imposed on either sex . . . .").

In Gerdom, Continental justified its weight requirement by asserting the competitive advantage it felt would be gained "by featuring attractive female cabin attendants." Id. at 609. In holding that the weight limit impermissibly burdened female employees, the Court warned against "gender-based classifications based on stereotypical notions of the roles of men and women." Id. at 607. The Gerdom Court relied on Carroll v. Talman Federal Savings & Loan Ass'n, 604 F.2d 1028

---

[1] At that time, the standard practice among large commercial airlines was to

(7th Cir. 1979), which held that a requirement that female employees wear uniforms while male employees get to wear their own professional attire was "disparate treatment . . . demeaning to women . . . based on offensive stereotypes prohibited by Title VII." Id. at 1032-33. As the Gerdom Court observed, the Seventh Circuit in Carroll held that while there is nothing offensive about uniforms *per se*, requiring only female employees to wear them was impermissible stereotyping. Gerdom, 692 F.2d at 607.

Turning to Continental's BFOQ defense for the weight restriction, that "attractive" hostesses would give it a competitive edge, the Gerdom Court observed that "[s]ubsumed in [Continental's] assertion is the view that, to be attractive, a female may not exceed a fixed weight." Id. at 609. The Court, however, rejected Continental's BFOQ defense, holding that "[t]o the extent it suggests a justification based on consumer preference for female hostesses, such a justification must fail. . . . [G]ender-based discrimination cannot be upheld on the basis of customer preferences unrelated to abilities to perform the job." Id.; see also id. ("passengers' preference for attendants who conform to a traditional image cannot justify discriminatory airline hiring policies").

In Frank, 216 F.3d 845, the Ninth Circuit again addressed weight standards

---

hire only women as flight attendants. Frank, 216 F.3d at 847-48.

in the airline industry. In that case, the airline had both male and female flight attendants and imposed maximum weight restrictions on both, but the maximum weight restrictions for women were stricter than those for men. United defended its weight restrictions as merely sex-differentiated appearance standards. The Court held that the policy violated Title VII because "[o]n its face, United's weight policy 'applie[d] less favorably to one gender'" by imposing a more onerous restriction on females. Id. at 854. Moreover, the Court rejected United's BFOQ defense which was based on its view that customers would prefer attractive flight attendants, and that women had to be proportionally thinner than men to be attractive. As in Gerdom, the Court held that this was impermissible stereotyping that discriminated against women. See id. at 855.

Since deciding Frank, the Ninth Circuit has adhered to its holding that working conditions that require employees to conform to sexual stereotypes violate Title VII. For example, in Nichols, the Court found a violation of Title VII where a male employee was harassed because he did not meet his harasser's expectations of how men should behave. 256 F.3d at 874-875 (citing Price Waterhouse, 490 U.S. 228 and Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (comparing the scope of the Gender Motivated Violence Act with the scope of Title VII, which similarly forbids "[d]iscrimination because one fails to act in the way expected of a

man or woman")). See also Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc) (plurality) (agreeing that harassment based on non-conformity with gender stereotypes is actionable, but disagreeing about whether plaintiff had adduced evidence of stereotyping harassment).

In so holding, the Nichols court overruled DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327 (9th Cir. 1979), which had held that an employer did not violate Title VII by prohibiting a male plaintiff employee from wearing an earring to work because the employer could lawfully require a male employer to "have a virile rather than an effeminate appearance." Id. at 331-32. This holding, the Nichols court noted, "predates and conflicts with the Supreme Court's decision in Price Waterhouse" and is "no longer good law." 256 F.3d at 875.

Despite overruling DeSantis, an appearance standards case, the Nichols Court stated in *dicta*: "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." Id. at 875 n.7. This *dicta* should be interpreted in light of Manhart, Price Waterhouse, and their progeny, and in light of Rene, which was decided after Nichols. That precedent requires the employer to prove a BFOQ to defend a sex-based appearance

policy which requires conformance to harmful gender stereotypes.

Every case decided by the Ninth Circuit since Manhart, with the exception of the overruled DeSantis, has held that sex-differentiated appearance policies which require conformity to gender stereotypes violate Title VII. The Nichols Court's reference to "reasonable regulations" must be understood to comport with this precedent. Where a sex-differentiated policy reflects and reinforces sex-stereotyping, the employer can prevail only by proving that "its discriminatory [policy is] 'reasonably necessary' to the 'normal operation' of its 'particular business,' and that [it] concern[s] job-related skills and aptitudes" in order to make out a BFOQ defense. Frank, 216 F.3d at 855. Thus, the Nichols court's reference to reasonable policies must be read in light of the requirement that those policies be reasonably necessary to the skills needed to carry on the "particular business" of the employer. That case cannot be made out here, where the plaintiff performed her duties in an exemplary fashion for over 20 years without the "benefit" of an image consultant or a make-over.

Similarly, courts in other jurisdictions have held that workplace dress codes *do* violate Title VII if they impose an unequal burden on employees of one sex, especially where the burden is that of carrying forward the employer's stereotypical view of the appropriate image for male and female employees, respectively. See,

e.g., Carroll, 604 F.2d at 1033 (holding that an employer violated Title VII by requiring female employees to wear uniforms, while allowing male employees to wear business suits); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (holding that a requirement that only female employees wear smocks over their street clothes violates Title VII because the "blatant effect of such a rule is to perpetuate sexual stereotypes"); Marentette v. Mich. Host, Inc., 506 F. Supp. 909, 911-12 (E.D. Mich. 1980) (holding that a waitress who was required to wear a sexually provocative uniform could state a Title VII claim); EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) (holding that forcing a female employee to wear a skimpy and revealing "bicentennial" uniform violated Title VII).

While an improvement on the analytically flawed early "haircut" cases, the "unequal burden" approach must be applied carefully to grooming and appearance requirements to ensure that the burdens are truly equal; courts should not lightly dismiss employee claims simply because the employer imposes *some* grooming standard upon members of each sex.

In this case, the district court held that forcing women to wear a complicated palette of makeup while prohibiting men from wearing any imposed "equal but different burdens on both sexes." See Order at 9, ER 216. While there may be

some men who wish to wear makeup, that cannot mean that the burdens on men and women imposed by the "Personal Best" program are equal. Women must devote time and money to covering their faces with makeup; there is no equivalent burden on men. Furthermore, given the burden to women's psyches inherent in the suggestion that they must put makeup on their faces in order to look professional—let alone comply with the artificial, exacting and extensive requirements of an "image consultant's" contrived standard as to acceptable makeup—whereas men are perfectly acceptable without any adornment, a reasonable factfinder certainly could conclude that Harrah's "Personal Best" program cannot pass the "equal burden" test, and thus violates Title VII.

C. Because of social conventions about the need for women to appear beautiful and ornamental, rather than competent, a policy that requires female employees' rigid conformity with a prescribed, stereotypical and ornamental appearance is intrinsically unequal.

In addition to the inconsistency with other Title VII case law of allowing employers to impose "equal burdens" of demanding rigid conformity with gender stereotypes on both sexes, there is a more fundamental problem: the burdens of conforming to stereotypes about male and female appearance are inherently unequal in many ways.

Social conventions about male and female grooming and appearance are asymmetrical; they do not have the same impact on male and female workers.

Conventions about male appearance and grooming, e.g., that men should have short hair, and not wear makeup or jewelry, serve to reinforce stereotypes of men as functional, efficient and competent, rather than ornamental. In contrast, conventions about female appearance and grooming—for example, that women should wear makeup and style their hair carefully—serve to reinforce stereotypes of women as decorative and ornamental. While all gender stereotypes are, to some extent, limiting and harmful, the latter set of stereotypes obviously poses particular problems for women seeking to be taken seriously in the workplace. Thus, even when courts appear to engage in a detailed inquiry as to whether sex-differentiated rules impose equal or unequal burdens, their analysis is likely to be flawed if they fail to recognize the sex biases implicit in the underlying social conventions about male and female appearance.

For example, in Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985), the Eighth Circuit rejected a television anchorwoman's Title VII claim because it concluded that "[the employer] enforced its appearance standards equally as to males and females." Id. at 1213. The court rejected the plaintiff's argument that those standards themselves were discriminatory in that they reinforced gender stereotypes, upholding the district court's finding that the standards were based on "permissible factors" such as the need for "consistency of appearance, proper

coordination of colors and textures, the effects of studio lighting on clothing and makeup, and the greater degree of conservatism thought necessary in the Kansas City market." Id. at 1215 & n.12; see also Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1175 (3rd Cir. 1996) (although "imposing special appearance rules on members of only one sex may violate Title VII," plaintiff's claim failed because she did not prove that male employees were not also required to "dress up" for work).

The Craft case "exemplifies the difficulty of establishing, in individual cases, the extent to which a female plaintiff's appearance has been judged by more extreme standards than those used to judge men." Bartlett, supra, at 2564. Thus,

> [a]s an equality issue, the problem is that dress and appearance expectations subordinate women to men. For example, women's dress and appearance demands are much more complex than men's, involving more frequent changes in fashion, more time and effort to assemble . . . Women's standards are harder to attain than men's and matter more. Substantively, women's dress and appearance expectations objectify women and construct them as inferior, submissive, and less competent than men. . . .
>
> Employer dress requirements codify these inequities, channeling women's self-presentation according to someone else's judgment about when women should be sexy or businesslike and what sexy and businesslike, for women, mean. . . . A woman can be neither too much like a woman nor not enough like one; she must appear competent—and thus formal, covered, and neutered—but not too assertive or manly—and thus soft, frilly, and ornamental. She must not distract others with her sexiness . . . but she cannot be too independent, and thus should be appropriately exposed (legs), painted (eyes, lips,

> cheeks, hair), elevated (high-heeled shoes), and vulnerable (clothes that prevent easy movement or escape).
>
> * * *
>
> It is a sign of the pervasiveness of gender coding in the symbolic system of dress and appearance that few female-associated dress or appearance conventions exist that are not linked with stereotypes about women that emerged from or have become interwoven with their historically inferior status. Courts should find all such conventions discriminatory "on the basis of sex.". . .

Bartlett, supra, at 2547-48.

For this reason, *amici* urge this court to apply the "equal burden" analysis in Title VII grooming standards cases very carefully, to determine whether the burdens are truly equal and to ensure that they do not reinforce harmful sex stereotypes. Courts should not conclude that an employer's sex-specific appearance rules impose "equal burdens" on male and female employees when those rules are based on social conventions that express deeply-rooted notions of male competence and female inferiority.

Conclusion

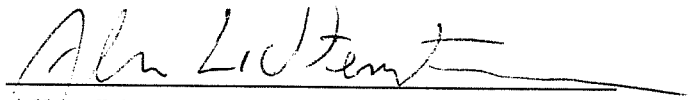
Amici urge this Court to clarify that workplace appearance rules that reinforce—rather than protect employees from—harmful and demeaning gender stereotypes are unlawful under Title VII and that sex-specific appearance rules must be critically examined to ensure that the burdens placed on each sex are truly equal

and do not perpetuate or reinforce harmful sex stereotypes. Consistent with those principles, the district court's grant of summary judgment in this case should be reversed.

Dated: June 23, 2003

Respectfully submitted,

ALLEN LICHTENSTEIN
AMERICAN CIVIL LIBERTIES UNION OF NEVADA

By: 
Allen Lichtenstein

KATHLEEN PHAIR BARNARD
SCHWERIN CAMPBELL BARNARD
For: NORTHWEST WOMEN'S LAW CENTER

NANCY M. SOLOMON
CALIFORNIA WOMEN'S LAW CENTER

Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the attached brief uses proportionately spaced, has a typeface of 14 points or more and contains 6,684 words.

Dated: June 23rd 2003

Allen Lichtenstein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief has been furnished by Federal Express to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, CA 94103-1526, that one copy of the foregoing has been furnished by Federal Express to Counsel for Defendant, Patrick Hicks, Esq., and Veronica Arechederra Hall, Esq., Littler Mendelson, 3930 Howard Hughes Parkway, Suite 200, Las Vegas, NV 89109, and that that one copy of the foregoing has been furnished by Federal Express to counsel for Plaintiff, Kenneth J. McKenna, 544 West First Street, Reno, NV 89503, this 23rd day of June, 2003.

Allen Lichtenstein
Attorney for *Amici Curiae*