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* THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE ALLIANCE FOR WORKERS' RIGHTS AND THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

ANDREW DWYER
DWYER & DUNNIGAN, L.L.C
17 Academy Street, Suite 1010
Newark, New Jersey 07102
(973) 242-3636

JEFFREY W. ERDMAN
Calif. Bar No. 179669
BENNETT & ERDMAN
5670 Wilshire Blvd., Suite 1400
Los Angeles, CA 90036
(323) 935-0041

DAVID B. CRUZ
New York Bar No. 2746584
UNIV. OF SOUTHERN
CALIFORNIA LAW SCHOOL
699 Exposition Boulevard
Los Angeles, CA 90089
(213) 740-2551

Attorneys for Amici Curiae

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* THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE ALLIANCE FOR WORKERS' RIGHTS AND THE LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

REGULATIONS

LEGISLATIVE HISTORY

INTERESTS OF *AMICI CURIAE*

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been victims of unlawful employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Alliance for Workers' Rights ("Alliance") is a Nevada-based advocacy organization with a current membership of about 300 people. This organization operates in several capacities to ensure that employers maintain safe, equal, and nondiscriminatory working conditions for all of Nevada workers. The Alliance asserts that the issues of this case affect working women across the nation. Harrah's policy holds women employees to an unfairly strict dress code that requires them to fit extremely burdensome stereotypes and ultra-feminine appearance standards as compared to similarly-situated male employees.

The Legal Aid Society – Employment Law Center ("LAS-ELC") is a private, non-profit, public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented employees in cases involving enforcement of their workplace rights. The LAS-ELC's work has focused particularly on cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor. The LAS-ELC specializes in, among other areas of the law, sex discrimination.

The LAS-ELC has appeared before this and other courts on numerous occasions, both as counsel for plaintiffs as well as in an *amicus curiae* capacity, to advocate for the interests of those individuals and communities. The LAS-ELC's interest in preserving the protections afforded under federal and state law is longstanding.

For example, the LAS-ELC has participated as *amicus curiae* in many discrimination cases before the U.S. Supreme Court, including *Wygant v. Jackson Bd. of Education* 476 U.S. 267 (1986), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), *United States v. Virginia*, 518 U.S. 515 (1996), *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629 (1999), *United States v. Morrison*, 529

U.S. 598 (2000), and *Ragdale v. Wolverine,* 535 U.S. 81 (2002).

In addition, the LAS-ELC was counsel of record for Kathleen Vinson in *Vinson v. Superior Court*, 43 Cal.3d 833, (1987), in which the California Supreme Court ruled that a mental examination is not warranted in a sexual harassment case where the claimant seeks compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal.

Prior to the *Vinson* case, the LAS-ELC was counsel of record in *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983), a sexual harassment case in which the Court denied discovery of detailed information about plaintiff's sexual history, including the name of each person with whom she had sexual relations in the ten years prior to the defendants' discovery request.

The LAS-ELC represented Lillian Garland in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 which upheld California Government Code Section 12945(b)(2), a state law which provides up to four months of pregnancy disability leave and a right to return to the same or similar job.

The LAS-ELC also represented Queen Foster in *Johnson Controls, Inc. v. Fair Employment & Housing Comm'n*, 218 Cal.App.3d 517 (1990), where the California Court of Appeal ruled that the employer's gender-based exclusionary "fetal protection" policy violated the Fair Employment and Housing Act. The

LAS-ELC subsequently appeared as *amicus curiae* in the United States Supreme Court in *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991), in which the Court held that the employer's "fetal protection" policy constituted sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.

The *Amici Curiae* file this brief in support of Plaintiff/Appellant's position that customer preference can turn otherwise discriminatory sex-based conditions of employment into a bona fide occupational qualification under Title VII.

SUMMARY OF ARGUMENT

Appellant Darlene Jespersen worked as a bartender at Harrah's Casino for over twenty years before Harrah's implemented its "Personal Best" Program in 2000, imposing detailed make-up requirements only upon female employees, for whom:

> [m]ake up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.

Excerpt of Record ("ER") 84. Deeply uncomfortable when wearing cosmetics, Jespersen was fired for failing to comply with these requirements.

Harrah's mandatory make-up regimen facially discriminates on the basis of sex, applying only to female bartenders and cocktail servers and not to Harrah's male beverage servers. This discrimination with respect to a term or condition of

employment violates Title VII's prohibition on employment discrimination on the basis of sex. 42 U.S.C. § 2000e-2(a)(1) (2002). It saddles female employees with the burden of conforming to stereotypical images of femininity if they are to retain their jobs. In so doing, Harrah's subjects women to the very kind of discriminatory burdens that Title VII was enacted to forbid.

Noting that Title VII contains a narrow exemption allowing employers to discriminate where sex is a bona fide occupational qualification ("BFOQ"), 42 U.S.C. § 2000e-2(e)(1), Harrah's defends its make-up requirements for female beverage servers as a BFOQ. ER 24; ER 37-38. Its women-only make-up requirements, however, cannot meet the statutory standard. The notion that the customers whom bartenders such as Darlene Jespersen serve might like to see women appearing "appealing to the eye," ER 61, ER 79, cannot ground a BFOQ defense. Simply put, customer preference is an impermissible basis for a BFOQ, as the EEOC, courts including this Court, and the Congress that adopted Title VII have all recognized. This consensus of the executive, judicial, and legislative branches of the federal government concerning the interpretation of Title VII is controlling here. Moreover, forcing female bartenders and cocktail servers to wear make-up cannot constitute a BFOQ because it is not required by the "essence" of the business in which Jesperson was engaged for Harrah's: the courteous,

professional, and competent provision of beverages to casino customers.

ARGUMENT

I. HARRAH'S WOMEN-ONLY MAKE-UP REQUIREMENT IS UNLAWFUL SEX DISCRIMINATION THAT CANNOT BE JUSTIFIED BY AN ALLEGATION OF CUSTOMER PREFERENCE BECAUSE THE EEOC, JUDICIAL PRECEDENTS, AND TITLE VII'S LEGISLATIVE HISTORY CONFIRM THAT CUSTOMER PREFERENCE IS AN IMPERMISSIBLE BASIS FOR TREATING SEX AS A BFOQ.

Title VII provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (2002). *See Int'l Union, United Auto., Aerospace, and Agric. Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201, 206 (1991). This prohibition is subject to a narrow exception allowing employers to discriminate on the basis of, *inter alia*, sex where sex constitutes 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). *See also Johnson Controls*, 499 U.S. at 206; *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000).

Evidence from all three branches of the federal government shows that this BFOQ exception cannot be established on the basis of customer preference. To

hold otherwise would be to undermine the basic purposes of Title VII.

A. BOTH EEOC AND JUDICIAL INTERPRETATIONS OF TITLE VII CONFIRM THAT CUSTOMER PREFERENCE CANNOT JUSTIFY A SEX-BASED BFOQ.

The conclusions of the Equal Employment Opportunity Commission ("EEOC") confirm that customer preferences cannot justify a sex-based BFOQ. The EEOC is the agency charged with interpreting and enforcing the nation's employment nondiscrimination laws. As such, it is entitled to broad deference for its interpretations of Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

The EEOC has published explicit guidelines interpreting Title VII. In particular, EEOC regulations state that customer preference cannot warrant a BFOQ defense. According to the EEOC,

> the following situations *do not* warrant the application[] of the [BFOQ] exception:
>
> .....
>
> (iii) the refusal to hire an individual because of the *preferences of* co-workers, the employer, *clients or customers.*

29 C.F.R. § 1604.2(a)(1)(iii)(2003)(emphasis added). Nowhere do the EEOC regulations suggest that customer preference is any more legitimate with respect to terms or conditions of employment.[1] Thus, the persuasive interpretation of Title

[1] Indeed, quite arguably the BFOQ defense should be completely unavailable

VII by the Executive branch supports the conclusion that customer preference cannot ground a claim that sex is a BFOQ.

Consistent with the EEOC's interpretation of Title VII and its narrow BFOQ exemption, numerous precedents, including cases from this Court, have ruled that customer preference is an invalid justification for a BFOQ. *E.g. Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 604 (9th Cir. 1982); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir. 1971); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1065 (D. Ariz. 1999).

In one of the leading cases in this area, the Fifth Circuit concluded that

---

to employers who discriminate in terms or conditions of employment. In pertinent part, Title VII provides that:

> it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his [sic] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2(e)(1). The lack of authorization here for discrimination with respect to "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), expressly prohibited by Title VII, suggests that the Act allows hiring of persons of only one sex for certain occupational positions, but that an employer who hires both men and women for a position must treat them the same. Since Jespersen was fired for failure to comply with Harrah's make-up requirements for women, they clearly amount to a "condition" of employment, and thus should not be the subject of sex discrimination, at least according to a plain

customer preferences cannot justify treating sex as a BFOQ. In *Diaz v. Pan Am. World Airways*, the Court ruled in favor of a male job applicant who had sought a flight attendant position but was rejected because of his sex. *Diaz*, 442 F.2d at 389. Although Pan Am's customers overwhelmingly preferred being served by female flight attendants, the Court concluded that Pan Am had no valid BFOQ defense. *Id.* at 387-90. The Court reasoned:

> [I]t would be totally anomalous if we were to allow the preference and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.

Id. at 389.

Similarly, this Court rejected the customer preference defense in *Fernandez v. Wynn Oil Co.*, 653 F.2d at 1276-77. In *Fernandez,* the female plaintiff had been denied a promotion in part because the company owners felt that some international customers would be offended in dealing with a woman in a professional context. *Id.* at 1275. Agreeing with the plaintiff's understanding of Title VII, this Court held:

> [S]tereotypic impressions of male and female roles do not qualify gender as a BFOQ. ... Nor does stereotyped customer preference justify a sexually discriminatory practice.

Id. at 1276-77.

---

reading of the statute's prohibitions and exceptions.

Likewise, in *Gerdom*, this Court rejected Continental Airlines' attempt to defend the weight restrictions it imposed only on women on the ground that customers preferred female flight attendants to be thin. 692 F.2d at 609. Commenting on *Fernandez,* the Court stated:

> This court has recently held gender-based discrimination cannot be upheld on the basis of customer preferences unrelated to abilities to perform the job ... It has long been established in the airline industry that *passengers' preference for attendants to conform to a traditional image cannot justify discriminatory airline hiring.*

Id. (citation omitted)(emphasis added).

More recently, in *Olsen* the District Court for Arizona ruled that a male massage therapist could not be denied a job based on his sex. 75 F. Supp. 2d at 1068. *Olsen* rejected the defendant's attempt to invoke privacy as a basis for treating sex as a BFOQ. *Id.* at 1063-65. Rather than automatically assigning a masseur of the same sex as the customer, the defendant actually gave the customer the choice. *Id.* at 1064. The court therefore denied the otherwise available privacy-based BFOQ defense on the ground that the defendant's policy was impermissibly based on customer preference. *Id.* at 1065.[2] The *Olsen* court confirmed that

---

[2] Courts have ruled that in some situations, a sufficiently legitimate concern for a client's or patient's bodily privacy can ground a valid BFOQ defense to a charge of sex discrimination. *E.g. Jennings v. N.Y. State Office of Mental Health,* 786 F. Supp. 376, 380 (S.D.N.Y.), *aff'd*, 977 F.2d 731 (2d Cir. 1992) (holding that in situations where intimate personal attention is required for patients, such as

customer preference is never a valid BFOQ defense. *Id.* at 1065-66.

The EEOC, and many courts, including the Ninth Circuit, have definitively established that customer preference is not a valid basis for treating sex as a BFOQ. Executive and judicial branch interpretations of Title VII and its narrow BFOQ exception support the conclusion that Harrah's women-only make-up requirements cannot be justified by appealing to customers' actual or presumed preferences. Although neat and professional dress is certainly appropriate for a business setting, forcing women alone to comply with a detailed make-up regimen that creates an artificial, ultra-feminine appearance in order to "complete the uniformed look" is discriminatory and unlawful under Title VII.

B. THE LEGISLATIVE HISTORY OF TITLE VII SHOWS CONGRESS REJECTED CUSTOMER PREFERENCE AS A JUSTIFICATION FOR DISCRIMINATION.

Although not expressly addressing sex as a BFOQ, the legislative history of Title VII also supports the conclusion that customer preference cannot justify as a BFOQ otherwise unlawful discrimination. During the 1964 congressional debates over the proposed Title VII, Congress considered *and rejected* at least two amendments that would have permitted customer preferences as a justification for

---

toileting and bathing, a privacy-based sex BFOQ defense may exist). In the instant case, however, the duties of beverage servers in a casino open to the public clearly implicate no bodily privacy interests.

treating race as a BFOQ. *See* 110 Cong. Rec. 2550-2563 (1964); *id.* at 13,825 (documenting debates and votes on Representative John Williams's and Senator John McClellan's proposals). Senator McClellan's amendment, for example, would have allowed employers to hire based on race if:

> the employer believe[d] ... that the hiring of such an individual would not be in the best interests of the particular business ... [and it] will be more beneficial to the normal operation of the particular business or enterprise involved *or to the good will thereof* than the hiring of an individual without consideration of his race.

Id. at 13,825 (emphasis added). The debates over these amendments show that Congress understood discriminatory customer preference to be antithetical to the remedial anti-discrimination purposes of Title VII.

Proponents of these amendments argued that "black businesses" would suffer economically and be forced into bankruptcy if they were obligated to hire white employees. *Id.* at 2550. The idea proposed was that black customers would have been less inclined to patronize businesses primarily employing black persons if those businesses were forced to hire white employees.

Opponents articulated obvious concerns that the proposed amendments would invalidate the entire purpose of Title VII. As one Congressman stated:

> [T]he basic purpose of [T]itle VII is to prohibit discrimination in employment on the basis of race or color. Now the ... amendment ... would destroy this principle. It would permit discrimination on the basis of race or color. It would establish a loophole that would gut this

[T]itle.

Id. at 2556. Indeed, the challengers stated that the amendments were an attempt to perpetuate the discriminatory notion that "only white people could serve white customers." *Id.* at 2563. Both amendments were defeated, demonstrating that Congress believed that the efficacy of Title VII of the Civil Rights Act would be destroyed had either amendment passed. *Id.* at 13,825.

Harrah's women-only make-up requirements perpetuate deeply-rooted sex stereotypes -- prescriptive visions of "proper" feminine workers of the sort that Title VII was meant to eliminate. As the Supreme Court has reiterated, Title VII's prohibition on sex-based discrimination was "inten[ded] 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). Harrah's women-only make-up requirements fall afoul of that prohibition, for they maintain that the more stereotypically feminine a woman appears, the better a worker she is.

Indeed, Ms. Marden, the hired Image Consultant who supervised Harrah's Beverage Department Image Transformation Program, asserted:

> It is my professional opinion ... that good grooming and a professional appearance is required of employees in the ... casino industry.... For example, female employees in guest service positions should apply makeup that compliments their natural coloring and defines their facial

> expressions to compensate for lighting conditions. The application of makeup completes the uniformed look.

ER 38. This statement epitomizes gender stereotyping, for Harrah's certainly does not expect men to "compensate for lighting conditions" by applying makeup. Indeed, they are prohibited from doing so. ER 79.

Harrah's policy thus facially discriminates on the basis of sex. These gender stereotypes about men and women bear no relation to an individual's ability to perform the duties of casino beverage servers. Instead, Harrah's discriminatory policy merely perpetuates the actual or presumed prejudices of its customers. Congress expressly refused to allow such prejudice to authorize employment discrimination. Allowing customer preference to excuse discrimination is thus contrary to Congress's intent in passing Title VII.

II. HARRAH'S WOMEN-ONLY MAKE-UP REQUIREMENTS DO NOT SERVE THE ESSENCE OF THE CASINO BEVERAGE SERVICES BUSINESS AND THEREFORE CANNOT JUSTIFY TREATING SEX AS A BFOQ.

The Supreme Court has held that a BFOQ defense may be successfully established only in narrow circumstances. *Johnson Controls*, 499 U.S. at 201, 206. There the Court ruled that the Johnson Controls battery manufacturing plant violated Title VII by denying female employees able to bear children jobs that risked high levels of lead exposure. *Id.* at 206. The Court specified that the

language of 42 U.S.C. § 2000e-2(e)(1) "suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job." *Id.* at 204. The Court explained:

> [A]n employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the 'essence' of the particular business.

Id. Therefore, because childbearing did not relate to the "essence of the business," which was manufacturing batteries, Johnson Controls had no valid BFOQ defense. *Id.* at 206.

The Fifth Circuit took a similar narrow view of the BFOQ defense in the *Diaz* case. *Diaz v. Pan Am. World Airways,* 442 F.2d at 385. There the Court rejected the BFOQ defense Pan Am asserted after it had denied a male job applicant a flight attendant position because of his sex. *Id.* at 389. The Court held that although Pan Am's customers overwhelmingly preferred being served by female flight attendants, the primary purpose, or the "essence of the business," of the airline was to safely transport its passengers. *Id.* at 387-88. Because men were equally capable of performing those duties by serving as flight attendants, there was no valid BFOQ defense. *Id.* at 389-90.

In explaining the BFOQ defense, this Court has stressed that "[t]he burden is

on [the employer] to show that its policy ... fits in this '*extremely narrow exception* to the general prohibition of discrimination on the basis of sex.'" *Frank v. United Airlines*, 216 F.3d at 855 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)) (emphasis added). For example, in *Gerdom v. Continental Airlines,* 692 F.2d at 604, this Court ruled that an airline's policy that female, but not male, flight attendants must follow a weight maintenance program was facially discriminatory. In addressing the employer's proffered BFOQ defense, this Court stated:

> [Continental] concedes that the weight program did not improve the ability of attendants to perform their duties ... Continental's policy would be defensible if Continental could show that being a thin female was a bona fide occupational qualification for serving passengers on an airplane.

Id. at 608-09. Because the flight attendants' weight was not part of the "essence of the business," however, Continental's BFOQ defense failed. *Id.*

For Harrah's, the "essence of the [beverage service] business" includes maintaining a courteous, professional relationship with customers and co-workers, as well as making drinks effectively and efficiently. ER 83. The make-up regimen imposed on women by the "Personal Best" program thus cannot be regarded as a "reasonable necessity" in the casino beverage service industry. As in *Gerdom*, 692 F.2d 602, where being thin was not essential for women to serve as flight attendants, neither is wearing make-up necessary

for women working as bartenders.

Ms. Jespersen earned twenty years worth of commendable evaluations from supervisors, during which time she had worn makeup for only a couple of weeks. ER 121; ER 122, 129-130. Not only is wearing makeup nonessential, but in Ms. Jespersen's case, it *negatively* affected her bartending ability. ER 121 ("[Wearing makeup] prohibited me from doing my job. I felt exposed."). Based on similar evidence, this Court invalidated sex discriminatory weight requirements for flight attendants.

> Far from being "reasonably necessary" to the "normal operation" of United's business, the evidence suggests that, if anything, United's discriminatory weight requirements may have inhibited the job performance of female flight attendants.

Frank v. United Airlines, Inc., 216 F.3d at 855.

As in *Johnson Controls, Diaz, Gerdom* and *Frank*, the "essence of the business" of being a bartender does not demand that women alone wear prescribed make-up and present a contrived, ultra-feminine appearance at all times. Harrah's facially discriminatory policy cannot be justified as a BFOQ.

CONCLUSION

Title VII's legislative history, the EEOC's regulations, and the body of modern case law all demonstrate that customer preference cannot be a valid

justification for treating sex or sex-based requirements as a BFOQ. Harrah's "Personal Best" Program mandates stereotypical gender conformity for women for no reason other than the claim that "makeup ... compliments [women's] natural coloring and defines their facial expressions." ER 38. To find that these sex-discriminatory requirements are anything but unlawful would undermine Title VII's prohibition of sex discrimination. Like men, women can work successfully as bartenders without makeup. Harrah's requirements should be found discriminatory on the basis of sex in violation of Title VII.

Dated: June 23, 2003

Respectfully submitted,

JEFFREY W. ERDMAN
BENNETT & ERDMAN

ANDREW DWYER
DWYER & DUNNIGAN, L.L.C.

DAVID B. CRUZ
UNIVERSITY OF SOUTHERN
CALIFORNIA LAW SCHOOL

By: _____
Jeffrey W. Erdman

Attorneys for *Amici Curiae

* Attorneys for Amici Curiae acknowledge and thank Hilary Meyer of Rutgers Law School – Newark, Class of 2005, for her invaluable contributions to this brief.

CERTIFICATE OF COMPLIANCE

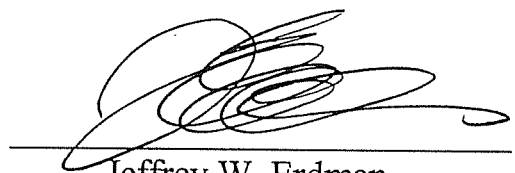
The accompanying Brief of *Amici Curiae* The National Employment Lawyers' Association, The Alliance For Workers' Rights, and The Legal Aid Society – Employment Law Center In Support of Plaintiff-Appellant complies with the specifications of Rule 32 of the Federal Rules of Appellate Procedure, as follows:

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 3,590 words, excluding the cover, tables and certificates of counsel, 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 23rd day of June, 2003, at Los Angeles, California.



Jeffrey W. Erdman

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *Amici Curiae* The National Employment Lawyers Association, The Alliance for Workers' Rights and The Legal Aid Society – Employment Law Center (collectively "*Amici*") state that they are all non-profit corporations; that none of *Amici* has any parent corporations; and that no publicly held company owns any stock in any of *Amici*.

PROOF OF SERVICE BY FEDERAL EXPRESS OVERNIGHT MAIL

I, ESTAIRE R. PRESS, 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 5670 Wilshire Boulevard, Suite 1400, Los Angeles, CA 90036.

On June 23, 2003, I served a copy of the attached document, described as **Brief of *Amici Curiae* The National Employment Lawyers Association, The Alliance for Workers' Rights and The Legal Aid Society - Employment Law Center In Support of Plaintiff-Appellant**, on the parties of record in the matter of *Jespersen v. Harrah's Operating Company, Inc.*, Case Number 03-15045, by placing true and correct copies thereof enclosed in sealed envelopes addressed and delivered as follows:

JENNIFER C. PIZER, ESQ.
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
3325 WILSHIRE BLVD., SUITE 1300
LOS ANGELES, CA 90010
Attorney for Plaintiff/Appellant
BY HAND DELIVERY

JENNIFER MIDDLETON, ESQ.
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 WALL STREET, SUITE 1500
NEW YORK, NY 10005
Attorney for Plaintiff/Appellant
BY FEDERAL EXPRESS OVERNIGHT

KENNETH J. MCKENNA, ESQ.
544 WEST FIRST STREET
RENO, NEVADA 89503
Attorney for Plaintiff/Appellant
BY FEDERAL EXPRESS OVERNIGHT

PATRICK HICKS, ESQ.
VERONICA ARECHEDERRA HALL, ESQ.
LITTLER MENDELSON
3930 HOWARD HUGHES PARKWAY
SUITE 200
LAS VEGAS, NEVADA 89109
Attorneys for Defendant/Appellee
BY FEDERAL EXPRESS OVERNIGHT

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

Dated: June 23, 2003.

ESTAIRE R. PRESS