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.

APPELLANT'S OPENING BRIEF

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Jurisdictional Statement

The United States District Court for the District of Nevada had original subject matter jurisdiction of this matter under 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3) because the case raises federal claims of discrimination on the basis of sex under 42 U.S.C. § 2000e-2(a)(1). The District Court issued two final orders disposing of all claims before it on October 22, 2002 and December 4, 2002. Notice of this appeal as of right was timely filed on December 30, 2002. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues Presented for Review

1) Whether an employer's demand that female bartenders and cocktail servers wear facial makeup including foundation, blush, mascara and lip color, while male employees are told simply to keep their faces clean, imposes a greater burden on female than male employees that discriminates "because of sex" in violation of Title VII.

2) Whether an employer's requirement that female bartenders and cocktail servers wear an extensive amount of facial makeup in accord with an approved "makeover" forces them to conform to restrictive gender stereotypes as a condition of employment in a way that discriminates "because of sex" in violation of Title VII.

Statement of the Case

After appellant Darlene Jespersen had been working as a bartender at Harrah's Casino for over twenty years, her employer instituted a new policy: all women working as bartenders or cocktail waitresses must wear a prescribed palette of makeup, specifically including mascara, blush, foundation, and lipstick, at all times. Men are exempt from the makeup requirement; indeed, they are forbidden from similar vanities. Because she refused to start wearing makeup, Ms. Jespersen was fired, notwithstanding two decades of exemplary service.

Ms. Jespersen challenged her termination as discrimination because of sex, in violation of Title VII. 42 U.S.C. § 2000e-2(a)(1). She exhausted her administrative remedies and filed suit in Federal District Court for the District of Nevada on July 6, 2001, alleging both disparate treatment and disparate impact claims under Title VII, retaliation, and pendent state law torts. The defendant moved for summary judgment on June 17, 2002. By order dated October 22, 2002, the District Court dismissed Ms. Jespersen's Title VII disparate treatment claim and her state law claims, and accepted her voluntary withdrawal of the retaliation claim. Defendant requested reconsideration for the purpose of obtaining a dismissal of the remaining claim of disparate impact, and by order dated December 4, 2002, that request was granted. Ms. Jespersen appeals only the dismissal of her claim regarding disparate

treatment in violation of Title VII.

Statement of Facts

Darlene Jespersen was first hired at Harrah's Casino in Reno, Nevada in 1979 as a dishwasher. Jespersen Deposition ("Jespersen Depo.") 12:2-21, Excerpts of Record ("ER") 114. Within a year, she had moved up to barback and then to bartender, a job she held for over twenty years. *Id.* She worked the sports bar, and received numerous compliments and accolades from guests who took the time to write Harrah's about her friendly service. *See* ER 169-98.

Throughout her life, Darlene has never worn makeup. For some time in the 1980's, Harrah's had a policy of asking that its female employees do so, and sent its female beverage servers to a "makeover" consultant to encourage them. ER 118-120. Darlene tried in good faith to comply, but it made her feel extremely uncomfortable and "degraded" that she had to "cover [her] face and become pretty or feminine" in order to keep her job. Jespersen Depo. 137:1-138:10, ER 121. She testified that 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 stay employed, when it had nothing to do with the making of a drink." Jespersen Depo. 138:18-23, ER 121. After about two weeks of trying, she stopped wearing it and met with no adverse job consequences. Jespersen Depo. 139:12-19, ER 121-22.

Her performance reviews – both before she tried using makeup and after she gave up on the attempt – consistently rated her as meeting or exceeding expectations, including in her appearance. *See* ER 121-22. For example, in 1985, as a six-year "beverage" employee, Ms. Jespersen's supervisor rated her "highly effective" in all areas, including appearance. ER 129-130. He added that "Darlene has progressed into [a] highly effective bartender. Her customer and employee relationships demonstrate Harrahs [sic] high standards. Thanks for a job well done and keep up the good work." ER 130.

Her 1988 evaluation likewise rated her as highly effective or exceptional in all areas, including appearance. Her supervisor that year commented specifically that her "attitude is very positive & exceptional & she is an asset to our dept." ER 135-36 (emphasis in original). He noted that she had no areas needing improvement, and complimented: "Nice job Darlene!" ER 136.

Likewise, in 1996, her then supervisor, Clare Brock, nominated Ms. Jespersen for a special award due to her "outstanding" performance, explaining that she "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.

Indeed, the record below in opposition to Harrah's motion for summary

judgment included letters and notes from many customers who had been motivated to tell Harrah's how much their stay at the casino had been enhanced by Ms. Jespersen's welcoming, gracious and helpful manner. For example, Bev Buchanan wrote that Ms. 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." ER 182. Mrs. Joyce E. Bell wrote with similar enthusiasm to thank Harrah's for "another enjoyable time at the Sports Bar with Darlyne." [sic] ER 170. And yet another happy customer reported that "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.

Harrah's does not dispute that there was only one reason that it fired Ms. Jespersen. In April, 2000 the company instituted a new corporate policy, dubbed the "Personal Best" program, that mandated strict adherence to appearance rules that required use of four types of makeup for women: foundation, blush, mascara and lipstick. Harrah's Statement of Undisputed Facts # 8, 6, ER 19-20; ER 35, 79-86. Men were not required to comply with comparable standards. *See* ER 19, 79, 82, 84, 86. As outlined in materials distributed by Harrah's, the "Personal Best" program required "Appearance and Grooming" as follows:

Overall Guidelines (applied equally to male/female):

- Appearance: Must maintain Personal Best image portrayed at time of hire.
- Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
- No faddish hairstyles or unnatural colors are permitted.

Males:

- Hair must not extend below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type dress style.

Females:

- Hair must be teased, curled or styled every day you work. Hair must be worn down at all times, no exceptions.
- Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
- Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.
- Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.

Exhibit E to Harrah's Motion for Summary Judgment, ER 79-80.

The program required every employee to attend a consultation with an image consultant, which including a makeover for women. At the end of this session, plan materials describe:

> When properly made-up and dressed in their fitted uniform, two "Personal Best" photos (one portrait and one full body) are to be

> taken capturing each employee looking his or her Personal Best. These photos are to be placed in the employee's file and become the Personal Best appearance standard to which the employee will be held. . . . [W]allet size photos are to be maintained in a Rolodex for the Beverage Supervisor's use. . . . ***It is imperative that the department supervisors utilize these photos as an "appearance measurement" tool, and, on a daily basis, hold each employee accountable to look his or her Personal Best.***

Harrah's Exh. E to Motion for Summary Judgment, ER 80 (emphasis in original). Of the twenty-six casinos it operates nationwide (see listing posted at http://www.harrahs.com/our_casinos/index.html), Harrah's instituted this program in only twenty of its locations. Declaration of Greg Kite in Support of Motion for Summary Judgment, ¶ 6, ER 35.

Darlene knew from her prior experience that she could not both do her job effectively and abide by the makeup policy, and therefore did not sign the required pledge to do so. Jespersen Depo. 78:6-12, ER 115. Management continued to pressure her to comply, she continued to decline, and on August 10, 2000, she was terminated. Harrah's Statement of Undisputed Facts, ## 8, 10, ER 20; ER 35-36, 88, 115-17.

On October 18, 2000, Darlene filed a complaint of sex discrimination in violation of Title VII with the Nevada Equal Rights Commission and the EEOC. ER 92-93. She received a notice of right to sue, and filed this action on July 6, 2001. ER 1-2.

Summary of the Argument

Requiring female employees to conform to archaic and burdensome sex-based stereotypes as a condition of their jobs is a violation of Title VII. That basic principle requires reversal of the trial court judgment below.

In granting summary judgment against Ms. Jespersen, the district court failed to recognize (1) the patently unequal burdens that Harrah's appearance rules impose on its female employees, and (2) the conflicting evidence presented by both sides about the nature and extent of those unequal burdens. Although it acknowledged Ms. Jespersen's testimony and other evidence about the symbolic and practical impacts of the policy on her and other women, the court "balanced" that evidence with its own speculation that "some men may feel the same way with regard to the male makeup policy. ... [P]rohibiting men from wearing makeup may be just as objectionable to some men as forcing women to wear makeup is to Plaintiff." District Court Order at 8, ER 216.

Notwithstanding the district court's factually-unsupported conclusion about men, Harrah's demand that its female employees comply against their will with an appearance standard that conveys a gender-based message of alluring femininity and sexuality, while it deems the male visage acceptable without similar "improvement," differs little from a demand – similarly discriminatory on its face –

that women wear uniforms while men remain free to don their selected professional wardrobe. *Compare Carroll v. Talman Federal Savings and Loan Ass'n,* 604 F.2d 1028 (7th Cir. 1979). Thus, at a minimum, the trial court erred in granting summary judgment against Ms. Jespersen based on its characterization of the policy as even-handed treatment of women and men, while ignoring both the manifestly unequal requirements of the policy itself and the evidence establishing material disputes of fact about the policy's actual effects upon female employees.

Moreover, beyond those material disputed facts and the inferences in Ms. Jespersen's favor they support, the record also contained material factual disputes about whether Harrah's can justify its unequal policy by showing that makeup is a bona fide occupational qualification ("BFOQ") for its female beverage servers. Ms. Jespersen submitted compelling evidence undermining Harrah's assertion of a BFOQ defense, including her more than twenty years of "highly effective" job performance without makeup, and Harrah's admission that it did not implement the sex-based appearance rule in all of its properties. Due appreciation of the different and unjustified burdens the policy imposes on women, and the material factual disputes related to those burdens, is sufficient to warrant reversal of the trial court's summary judgment order.

But further, even if the policy were not more burdensome for women than

for men, it still would violate Title VII due to developments in the law making clear that even so-called "equal" burdens on men and women can be actionable if those burdens rely on harmful gender stereotyping. The district court framed its analysis relying on case law from the 1970s. Its approach cannot be reconciled with this Court's more recent recognition, following the Supreme Court's lead in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that it certainly can be unlawful sex discrimination for an employer to require its employees to conform to antiquated sexual stereotypes that diminish the employees' professional stature or limit their ability to succeed in a particular workplace. *See, e.g., Nichols v. Azteca Restaurants Enterprises, Inc.,* 256 F.3d 864 (9th Cir. 2001).

Although there is no statutory exception to this principle for dress and grooming codes, some trial courts – including the one below – still evaluate appearance rules using the pre-*Price-Waterhouse* case law that does not account for the improperly restrictive effect on both sexes of employer-mandated conformity to archaic ideas about men and women. In light of *Price Waterhouse* and its progeny, however, that approach should be recognized as superceded and erroneous.

Indeed, it should have been easy for the trial court to see the Title VII violation in this case because Harrah's makeup policy so obviously imposes

requirements that extend far beyond what society generally requires of women in their professional appearance, insisting instead on a stylized, ultra-feminine look that significantly impeded Ms. Jespersen's ability to do her job, and that a finder of fact readily could conclude would undermine women's status as competent professionals at work. Accordingly, the trial court erred when it held that Harrah's may incorporate whatever outmoded stereotypes it wishes into its job requirements – no matter how extreme, antiquated or physically uncomfortable – as long as it ensures that its sex-based rules are equally oppressive for female and male employees.

For all these reasons, the decision below granting summary judgment to Harrah's should be reversed and the case remanded for further proceedings on Ms. Jespersen's disparate treatment Title VII claim.

Standard of Review

The standard of review on this appeal is de novo. *Frank v. United Airlines*, 216 F.3d 845, 849 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001). "Viewing the evidence in the light most favorable to plaintiffs we must determine whether genuine issues of material fact preclude summary judgment and whether the district court correctly applied the relevant substantive law." *Id.* In addition to viewing the facts from the perspective of the party opposing a motion for summary judgment, the

trial court also must draw all reasonable inferences in that party's favor. *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992) (the version of the facts of the party opposing summary judgment "is presumed correct"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("the evidence of [parties opposing summary judgment] is to be believed, and all justifiable inferences are to be drawn in [their] favor."); *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc) ("[We] must determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact."). Indeed, even where the basic facts are undisputed, if reasonable minds could differ on the inferences to be drawn from those facts, summary judgment is to be denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

ARGUMENT

I. The District Court Erroneously Granted Summary Judgment By Incorrectly Concluding That Discriminatory Workplace Appearance Requirements Are Not Actionable Under Title VII.

A sex-differentiated appearance standard such as the one that Harrah's imposed – which explicitly imposes unequal rules on men and women in their appearance requirements – is subject to challenge under Title VII. Decades of case law make clear that dress and grooming standards are subject to review and will be

struck down if – as here – they impose unequal burdens on woman and men. See *Frank v. United Airlines*, 216 F.3d at 845; *Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982) (*en banc*) (discussing cases); *Carroll v. Talman Federal Savings and Loan Ass'n*, 604 F.2d at 1028. The district court therefore erred when it concluded that "an employer's sex-differentiated regulation of dress, cosmetic or grooming practices which do not discriminate on the basis of immutable characteristics or intrude upon a person's fundamental rights, do not fall within the purview of Title VII." District Court Order at 6, ER 214.

A. The Supreme Court Has Made Clear That Title VII Reaches The Entire Spectrum Of Different Treatment Of Men And Women In Employment.

It is by now long established that the United States Supreme Court interprets Title VII's prohibition on sex discrimination broadly, tolerating no disparate treatment of men and women except where justified as a bona fide occupational qualification. *See International Union, UAW v. Johnson Controls*, 499 U.S. 187, 199-200 (1991); *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). Time and again, the Supreme Court has emphasized that, in Title VII, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57,

64 (1986), as quoted in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Indeed, just last year the Court stressed the point, stating, "We have repeatedly made clear that although Title VII mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to economic or tangible discrimination." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002). "[I]t covers more than 'terms' and 'conditions' in the narrow contractual sense." *Id.*

This broad mandate makes no exception for personal presentation standards. Rather, both the Supreme Court and this Court have applied Title VII directly to limit what an employer may require of employees in their dress, appearance, and mannerisms. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. at 228 (serious question of sex discrimination under Title VII was presented when employer's judgment of female employee's candidacy for partnership was tainted by remarks that a "soft hued suit" or new shade of lipstick could help her succeed); *Nichols v. Azteca Restaurants*, 256 F.3d at 873 (finding that employer's acquiescence in a "campaign of taunts" against waiter teased about his "feminine mannerisms" constituted discrimination because of sex under Title VII); *Frank v. United Airlines,* 216 F.3d at 845 (striking down sex-based weight restrictions for flight attendants).

Instead of relying on these well-established principles, the district court initially premised its grant of summary judgment in Harrah's favor on two cases from the Fifth and Ninth Circuits that date back nearly thirty years: *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975), and *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974). These two cases took a very narrow view of Congress' proscription of sex discrimination in Title VII, finding that the statute reached only those characteristics that were outside the plaintiff's control or protected as fundamental rights. *Willingham*, for instance, addressed a hair length restriction for men and surmised that "Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications." 507 F.2d at 1090. This conjecture underlay *Willingham*'s conclusion that the statute's requirements should be limited to hiring policies that involved immutable characteristics or fundamental rights. *Id.* at 1090-91. *Baker* concluded the same. *Baker,* 507 F.2d at 897.

But decades of Supreme Court interpretation of Title VII have rejected *Willingham*'s narrow view and made clear, to the contrary, that the statute's mandate is extremely broad. *See, e.g., Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); *Harris,* 510 U.S. at 17; *Johnson Controls,* 499 U.S. at 187; *Meritor,* 477 U.S. at 57; *Manhart,* 435 U.S. at 702.

Courts therefore have applied Title VII's prohibitions to all manner of policies that do not involve fundamental rights. *See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1272 (9th Cir. 1998) (concluding, in challenge to pre-employment medical exam imposed on women, that, "even if the intrusions did not rise to the level of unconstitutionality, they would still be a 'term' or 'condition' based on an illicit category as described by the statute and thus a proper basis for a Title VII action"); *see also DeClue v. Central Illinois Light Co.* 223 F.3d 434, 437 (7th Cir. 2000) (holding that inadequate toilet facilities could give rise to a claim of disparate impact sex discrimination); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514 (8th Cir. 1977) (exclusion from firefighter's supper club violated Title VII); *Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal.1972) (extended rest breaks for female employees violated Title VII).

These courts were correct to do so. As Justice Scalia wrote for the Court in *Oncale v. Sundowner Offshore Services, Inc.*: "statutory prohibitions often go beyond the principal evil to cover reasonable comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S.75, 79-80 (1998). The *Oncale* Court emphasized that its "holding that [the phrase 'terms' and 'conditions' of

employment] includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." *Id.* The same is true here. Title VII covers all terms and conditions of employment, including employer demands about employee appearances. There simply is no general exception for dress and grooming codes from the otherwise-applicable rules.

B. The Ninth Circuit Firmly Has Rejected The Argument That Sex-Differentiated Appearance Standards Are Exempt From Title VII's Mandates.

Appropriately, since 1977 – even before the Supreme Court made clear the broad scope of the statute's equality mandate in *Manhart* and other cases – the Ninth Circuit has not upheld *any* sex-differentiated appearance standard. *Compare Fountain v. Safeway Stores*, 555 F.2d 753 (9th Cir. 1977) (upholding rule that men but not women must wear ties) *with Gerdom v. Continental Airlines*, 692 F.2d at 602 (striking down employer's appearance standard applicable to women only), and *Frank v. United Airlines,* 216 F.3d at 845 (striking down weight restrictions applied to both men and women, where limits on women's appearance were stricter than those on men's). *Frank* and *Gerdom* both involved airline weight restrictions for flight attendants, and establish conclusively that employer-mandated appearance

standards are well within the purview of Title VII.[1]

Under these Ninth Circuit cases, the "key consideration" for dress and grooming standards has been whether "a significantly greater burden of compliance [is] imposed on either sex." *Gerdom*, 692 F.2d at 606 (striking down weight restrictions that applied to women only). Where "special appearance rules [are] imposed on members of only one sex," Title VII clearly is violated. *Id.* Even imposing strict weight limits on both sexes discriminates when an employer places more onerous demands on women, because "a sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ." *Frank v. United Airlines*, 216 F.3d at 855. Thus, while the restrictions struck down in *Frank* imposed the same basic demand on both sexes – each had to keep their weight down – they still were unlawful when women faced harsher standards than men. *Id.*

The district court acknowledged this test but, as discussed below,

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[1] *Barrett v. American Medical Responses*, 230 F. Supp. 2d 1160 (D. Or. 2001) (upholding a no-beard rule for paramedics wearing anti-contaminate masks), which the court below cited, was wrong when it concluded (without support) that hair length and grooming standards are not within the purview of Title VII in the Ninth Circuit. It quoted, and then flatly ignored, the standard discussed in *Frank* that grooming standards that impose a differential burden on one sex or another violate the statute unless justified as a BFOQ. *See Barrett* at 1166. Instead of engaging in the inquiry set out by *Frank*, the *Barrett* court mistakenly relied on cases from outside the circuit – cases that based their rationale in *Willingham* and did not reconsider its holding in light of the Supreme Court's opinions in *Harris, Price-Waterhouse* or *Oncale* – to dismiss the plaintiff's claim. *See Barrett* at 1163 (relying on *Harper v. Blockbuster*, 139 F.3d 1385 (11th Cir. 1998), and *Tavora v. New York Mercantile Exch.*, 101 F.3d 907 (2d Cir.1996)).

misapplied it in two ways. First, it overlooked basic tenets of Title VII law from which the analysis employed in *Frank* developed. It therefore failed to recognize the unequal burdens the policy imposes because it did not adequately consider the impacts on women of the different requirements for them. Second, it mistakenly resolved material disputes of fact about the burdens the policy imposes.

II. The District Court Erred In Granting Summary Judgment By Improperly Deciding That Harrah's Makeup Policy Imposes Equal Burdens On Male And Female Employees.

The "unequal burdens" rule articulated in *Frank* and *Gerdom* builds on other cases that explored more fully the problems posed by sex-differentiated dress and grooming codes, and emphasized that, under Title VII, sex-differentiated dress codes may not employ demeaning sex-based stereotypes that adversely affect employees' professional status or ability to succeed at work. In *Gerdom*, for instance, this Court cited with approval the Seventh Circuit's decision in *Carroll v. Talman*, 604 F.2d at 1032-33, which held that a requirement that female employees wear uniforms while men wear self-selected professional attire was "demeaning to women . . . [and] based on offensive stereotypes prohibited by Title VII." *Gerdom*, 692 F.2d at 606. In *Carroll*, even though there was nothing objectionable *per se* about the particular outfit required of female employees, the court recognized that requiring it of women alone conveyed the impression that they

occupied a lesser status than their male counterparts. *Carroll* 604 F.2d at 1033. Because the unequal requirement was driven by the employer's belief that women, unlike men, could not exercise appropriate judgment and taste about professional attire – a rationale that rested heavily on stereotypical assumptions that demean women – the court struck down the policy as prohibited disparate treatment based on sex. *Id.* at 1033.

Likewise, in *O'Donnell v. Burlington Coat Factory Warehouse*, 656 F. Supp. 263 (S.D. Ohio 1987), an employer policy that required female clerks to wear a smock, while men wore a shirt and tie, was found to violate Title VII. Though the employer had expressed no overtly stereotyped motive, the court found that the smock had the "blatant effect" of perpetuating sex-based stereotypes in a manner harmful to the female employees. *Id.* at 266.

These courts properly have recognized that, even where both men and women are subject to a general standard governing professional dress, singling women out with a discrete, sex-based marker diminishes their professional stature in the workplace in a way that violates Title VII. Moreover, there is nothing in these opinions to suggest that this result would be any different if the employer had a policy that expressly *prohibited* men from donning the badge required of women; nor could it be – the stigmatizing effect of the policy on female employees would

remain the same. As explained below, Harrah's policy stigmatizes and burdens its female beverage servers in multiple obvious ways that the district court should have recognized.

A. Harrah's Policy Reinforces Demeaning Stereotypes About Women's Professional Roles, But Not Men's.

While purporting to apply the standards of *Frank* and *Gerdom*, the court below mistakenly overlooked basic differences between the requirements at issue in *Frank* and those involved here. Unlike a generally-applicable demand that all employees remain slender (albeit one that was unequally imposed), Harrah's policy places different demands on men and women. Women must don a "uniform" consisting of a facial makeover applied with exacting detail to present an approved image of feminine attractiveness, while men are deemed sufficiently professional and attractive in their natural state. Harrah's policy would be akin to an airline mandate that women stay below a restrictive threshold of 115 pounds (requiring most to expend constant effort), while men must stay above it (requiring no change) – hardly a standard that can be considered "equal" in its impact or its message.

More importantly, the court failed to consider a foundational premise of Title VII dress code doctrine that appearance rules may not employ archaic gender stereotypes in a manner that limits women's status in the workplace. *See Carroll v.*

Talman, 604 F.2d at 1028. Harrah's emphatic purpose of "improving" women's facial appearance – but not men's – unavoidably reinforces the idea that women are valued primarily for their beauty, not their job ability. The makeup requirement of the "Personal Best" policy thus is particularly objectionable because it reinforces the idea that a woman's adherence to traditional assumptions about feminine beauty is an essential component of her ability to do her job effectively, while a man can be (indeed, must be) effective at his job without expending energy or money to recast his features. The policy relies on archaic notions that among women's most important social functions is to create and maintain an artifice of feminine beauty, while men are suited to direct their concerns to the weightier demands of the marketplace, politics, or the world of ideas. Within this gender-segregated world, makeup has even been touted as the key to defining the very possibilities for a woman's life. Professor Kathy Peiss of the University of Pennsylvania, a social historian of makeup in American culture, cites the "before and after" imagery of early cosmetics advertisements as she traces the genesis of the idea that by "coloring and contouring of facial surfaces, a woman could not only change her look but remake herself and her life chances. . . . [Thus] the metamorphosis known as the *makeover* was born." Kathy Peiss, Hope in a Jar: The Making of America's Beauty Culture 144 (1998). By contrast, American men early on spurned the use

of powder and grooming aids fashionable among the European aristocratic class. "Republican ideals of manly citizenship reinforced the idea: Men need not display their authority, since their virtue was inherent." Peiss at 23. Businessmen in particular, Professor Peiss notes, "avoided artificiality in appearance in an effort to gain trust in the marketplace." Peiss at 23.

Certainly, a demand that women must wear makeup while men must not perpetuates these historic assumptions about appropriate gender roles that confined women to the decorative and domestic and limited their participation in the serious matters of the public sphere. In this world view, women are seen as delicate, fragile objects prized for their appearance, who must not be sullied by commercial pursuits. *See, e.g., Bradwell v. Illinois*, 83 U.S. 130 (1873) (Bradley, J., concurring) (denying woman entry to the bar of Illinois because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

Indeed, these notions once operated to prohibit women from the very occupation Ms. Jespersen practiced well for two decades, bartending. *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding legislature's power to prohibit women from tending bar because of the "moral and social problems" that could result), *overruled by Craig v. Boren*, 429 U.S. 190 (1976). And their discriminatory power

continues today, limiting opportunities for women who do not measure up to men's expectations of beauty, notwithstanding how successful they may be at their particular jobs. *See Yanowitz v. L'Oreal, USA, Inc.* 131 Cal. Rptr. 2d 575, 582 (Cal. App. 2003) (upholding claim of sex discrimination where plaintiff alleged retaliation for her refusal to fire top-performing makeup saleswoman for being "not good looking enough," and to replace her with "somebody hot.").

The district court should have recognized that Harrah's policy imposes unequal burdens on women and men because the requirements it places on men do not carry the same social valence as those it imposes on women. Men have experienced no comparable history whereby they have been valued principally for their appearance – whether it be a stereotypically manly, unvarnished appearance or otherwise. Unlike the limiting assumptions that men should not be nurses (*cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982)) or that they are necessarily the principal breadwinner for the home (*see Frontiero v. Richardson*, 411 U.S. 677 (1973)), nothing about Harrah's policy reinforces old-fashioned notions that historically have restricted men in their life's options.

To demand that women perpetuate daily, in the most intimate lines and furrows of their faces, stereotypes about their proper roles cannot but affect the way that their customers and their coworkers perceive them. The historic baggage

of centuries in which women were kept out of the workplace ostensibly in deference to their beauty still impedes their prospects at Harrah's, diminishing their professional autonomy and respectability in the workplace. As Ms. Jespersen put it, she had to be "dolled up." ER 121. "It affected [her] self-dignity. . . . [She] wasn't taken seriously . . . [Her] job performance was based on how [she] look[ed] and not on how [she] did [her] work." ER 122. The district court erred because it failed to recognize that men labor under no similar detriment.

B. Harrah's Policy Reinforces Stereotypes That Make Women And Not Men More Subject To Sexual Advances And Harassment.

In addition to the duty not to impose demeaning stereotypes that reduce women's professional stature, a second principle underlies several Title VII dress code cases: employers may not impose standards that accentuate the sexuality of female employees in a way that invites sexualized attention from the public. In *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981), for example, the court found Title VII to be violated where an employer required its female lobby attendants in a Manhattan building to sport a short, revealing costume of stars and stripes designed to mark the nation's bicentennial. Acknowledging that employers in general may impose "reasonable" dress and grooming standards, the court emphasized that they do not have "unfettered discretion" and that it is *not* reasonable to require a uniform that interferes with a woman's ability to do her job

because it is sexually provocative. *Id.* at 608-09, 611.

Numerous courts have ruled similarly upon reviewing employer policies that require female employees to present an appearance of sexual availability or allure, and the problem has proven especially prevalent in the particular context of cocktail servers and bars. *See, e.g., EEOC v. Newtown Inn Associates*, 647 F. Supp. 957 (E.D. Va. 1986) (challenging employer's demand that cocktail waitresses "project an air of sexual availability to customers" through revealing costumes, flirting with customers, and dancing in suggestive fashion); *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986) (finding Title VII violation where employer transferred waitress out of cocktail lounge because she refused to wear sexually revealing clothing); *Marentette v. Michigan Host, Inc.*, 506 F. Supp. 909 (E.D. Mich. 1980) (considering class action by cocktail waitresses alleging that "sexually provocative" outfits required for women subjected them to harassment).

These cases highlight a particular way that Harrah's sex-specific makeup requirements impose greater burdens on its female beverage servers than on its male servers because those requirements powerfully reinforce "one of the most insidious of the old myths about women – that women, wittingly or not, are seductive sexual objects." *Dothard v. Rawlinson*, 433 U.S. 321, 345 (1977) (Marshall, J., concurring in part and dissenting in part). Through the ages, a

woman's appearance has been thought to hold a seductive sexual power over men that men cannot control. Thus, women have been blamed for "provoking" rapes and harassment through their choice of clothing or style.[2] And more specifically, heavy makeup in particular has been considered in some social contexts to be a sign of a "loose woman," harking back to a time when rouge and darkened eyes were the markers of the "painted Jezebels" who advertised their availability.[3]

Ms. Jespersen testified that being forced to wear makeup raised precisely this sort of concern for her. When she tried to comply with the earlier version of Harrah's policy, not only did it make her feel like "a sexual object," but, as she explained, "I felt exposed. I actually felt like I was naked . . . ." ER 121. As she experienced it, the multiple layers of makeup were not merely annoying or uncomfortable; rather, they made her feel so profoundly awkward and vulnerable that they "prohibited [her] from doing [her] job." *Id.* The trial court erred in failing to appreciate the way makeup can be understood to sexualize women's appearance, and how such an appearance often alters how customers perceive and

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[2] *See, e.g., Simonson v. United Press Int'l, Inc.*, 654 F.2d 478, 481 n.6 (7th Cir. 1981) (involving judge who remarked that 15-year-old boy's rape of a schoolgirl was a 'normal[ ]' reaction to 'provocative' clothing worn by women in the area); *Meritor Savings Bank v. Vinson*, 477 U.S. at 69 (noting that plaintiff's appearance and demeanor may contribute to a finding that sexual harassment was welcome).

[3] Peiss, Hope in a Jar at 27.

treat female employees and how those employees perceive themselves.

C. Harrah's Policy Is More Costly, Time-Consuming, And Restrictive For Women Than For Men.

In addition to reinforcing limiting and sexually-charged attitudes about women, Harrah's policy also imposes real financial and time constraints on them, while men confront no similar burdens. To begin with, maintaining a consistent veneer of foundation, blush, mascara and lipstick is not inexpensive; high quality cosmetics can cost employees hundreds of dollars per year.[4] What is more, applying and reapplying makeup throughout the day can require a significant investment of time – time that an employee either steals from her unpaid, personal hours before work or during breaks, or that she loses from on-the-clock hours when she would otherwise be serving customers and earning tips. The clean-face policy imposes no similar quantifiable losses on men.[5]

And while it may be true – as the trial court speculated – that some men would like to wear certain forms of makeup, Harrah's policy does not define nearly so rigidly the permissible boundaries of male presentation as it does those for

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[4] *See* Naomi Wolf, *The Beauty Myth* 120-121 (1991) (discussing the expense of cosmetics).

[5] Although Ms. Jespersen primarily objects to the policy's makeup requirements, the hair styling requirements similarly necessitate that many women expend time and money sculpting their natural hair into a "teased curled, or styled" look. The short length hair policy that applies to men is obviously simpler and cheaper, and requires less daily maintenance.

females. Under the terms of this policy, men might display a variety of facial hair appearances, from waxed to handle-bar moustaches, from bushy to trimmed beards, from goatees to mutton chops, from Van Dykes to "Elvis" or "Mr. Spock" sideburns. Men even may display a degree of gender non-conformity by complementing their look with tasteful jewelry including an earring or necklace and clear finger nail polish. Women, by contrast, must craft their appearance in ways that not only bar them from expressing their own personal brand of femininity (unless it is precisely that approved by the company), but also siphon them into a tunnel of feminine conformity that is far narrower than the range of women's professional appearance standards that society generally accepts. In sum, the district court erred by failing to recognize that Harrah's makeup requirement imposes numerous tangible, day-to-day burdens on women that men do not similarly share.

D. Harrah's Did Not And Cannot Prove That Wearing Makeup Is A Bona Fide Occupational Qualification For Female Beverage Servers.

As shown above, Harrah's makeup policy imposes greater burdens on women than on men and therefore constitutes disparate treatment in violation of Title VII. Such treatment only is permissible if justified as a bona fide occupational qualification (BFOQ). Answering Ms. Jespersen's discrimination claim below,

Harrah's asserted the defense that its four-part regimen of foundation, blush, mascara and lip color is indeed a BFOQ for female beverage servers [Harrah's Brief in Support of Motion for Summary Judgment at 9, ER 24; Declaration of Reimi Marden, ER 37-38], and that any makeup at all is an occupational "disqualification" for male servers. ER 11, 12, 79-80. This defense is so lacking in support that it should fail as a matter of law,[6] or at least the question should be remanded for consideration of Ms. Jespersen's considerable evidence that lavish makeup is far from "essential" for female bartenders.

Title VII's ban on differential treatment of employees based on sex contains an exception for circumstances in which the differences are "reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). This is a narrow exception, however, and the employer bears the burden of proving that the "distinctions based on sex [] relate to ability to perform the duties of the job." *Johnson Controls*, 499 U.S. at 201, 206. This principle applies to sex-based dress and grooming codes. As this Court has explained, "a sex-differentiated appearance standard that imposes unequal burdens on men and

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[6] Recognizing the parties' conflicting evidence regarding the makeup policy's relative burdens, Ms. Jespersen did not cross-move for summary judgment. Had she requested partial summary judgment regarding Harrah's BFOQ defense, however, Harrah's lack of factual support for it – as discussed here – would permit a ruling now that the defense must fail as a matter of law, in light of the exacting standard the Supreme Court requires for a BFOQ per *Johnson Controls, supra.*

women is disparate treatment that must be justified as a BFOQ." *Frank*, 216 F.3d at 854-55. But, to constitute a BFOQ, the standard must concern "the 'essence' of the particular business." *Johnson Controls*, 499 U.S. at 206, as cited in *Gerdom v. Continental*, 692 F.2d at 608-09.

Harrah's supported its BFOQ defense with a declaration from Reimi Marden, a self-described image consultant and trainer, who offered the "professional opinion ... that good grooming and a professional appearance is required of employees in the hotel and casino industry." Declaration of Reimi Marden, ¶ 4, ER 37-38. Without explaining what men must do to meet this requirement, Ms. Marden stated that "female employees ... should apply makeup that compliments [sic] their natural coloring and defines their facial expressions to compensate for lighting conditions." *Id.*

Ms. Jespersen did not dispute that "good grooming and a professional appearance" are essential for "guest service" employees. She did, however, contest the notion that women cannot achieve "good grooming and a professional appearance" without makeup (let alone the exacting regimen dictated by Harrah's), and she introduced ample competent evidence that demonstrated her "ability to perform the duties of the job" quite well for more than twenty years, despite her

lack of makeup. *Johnson Controls*, at 206.[7]

Harrah's did not dispute that it rated Ms. Jespersen's performance "highly effective" year after year. *See* ER 124-167. Harrah's likewise did not dispute that her loyal, satisfied customers confirmed those favorable reviews with their own copious, laudatory comments. Finally, it did not even attempt to explain why, if it considered this policy essential for the successful operation of its facilities, it did not implement the rule in all of its properties. *See* Kite Decl., ¶ 6, ER 35.

Instead, Harrah's submitted nothing more than the Marden Declaration, which is patently deficient to prove its BFOQ defense. Even Ms. Marden does not claim that women "must" wear makeup in order to "achieve good grooming and a professional appearance." Rather, she stated merely that "female employees in guest service positions *should* apply makeup." Marden Decl., ¶ 4, ER 38 (emphasis added). Harrah's has failed to explain why its business requires female employees to "define their facial expressions" while men must avoid doing so. *Id.* Nor has it explained how its lighting conditions could operate differently on the

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[7] It is important to note that, in challenging the policy in this case, Ms. Jespersen does not contend that all makeup requirements for employees are unlawful. The context of the specific workplace is salient when considering the burdens of any employer policy. Where that workplace legitimately requires the use of makeup for effective presentation, such as under television cameras or on stage, its reasonable use for both men and women is amply justified. *See, e.g. Craft v. Metromedia*, 766 F.2d 1205 (8th Cir. 1985) (finding no Title VII violation where both men and women were subject to makeup demand as part of television anchor position, and employer enforced standards equally based on individual factors).

faces of male and female employees. *See id.* Finally, Harrah's utterly fails to address how the "essence" of its business would be compromised if it could not impose its policy.

In addition to Ms. Marden's declaration, Harrah's also supported its defense by citing the appearance policy itself. Harrah's proclaims the policy's requirements will cause employees to do a better job because they are "looking and feeling [their] best." Letter from Brent F. Skidmore, Food and Beverage Manager, to Harrah's Reno Beverage Employees, ER 61. Yet, the company's unyielding application of the policy even when an employee explains that she will, on the contrary, be made so miserable that her job performance will suffer,[8] at least provides the basis for a reasonable inference that Harrah's true motive is not pleasing employees, but rather pleasing customers.

The details of the "image transformation" policy itself reinforce this concern. *See* ER 77-87. Harrah's explains, "we are looking at all of the elements that make up our guests' overall experience." Skidmore Letter, ER 61. It continues, "we

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[8] As Ms. Jespersen testified:

> I felt very degraded . . . I actually felt ill and I felt violated . . . it prohibited me from doing my job. I felt exposed. I actually felt like I was naked. I mean, I – I felt that I – that I was being pushed into having to be revealed . . . that I was a sexual object.

Jespersen Depo 138, ER 121.

require that you look your absolute best on the floor." *Id.* This means being "appealing to the eye" which, for women, demands lip color "at all times," as well as powder, blush and mascara. ER 79. From this language and the policy's context, a reasonable fact-finder readily could infer that the "image transformation" required of female beverage servers was designed to enhance the "overall experience" of Harrah's customers by ensuring that its female servers appear "appealing" in a consistent, ultra-feminine manner.

Yet it is long-settled that the assumed preference of customers for pretty female servers does *not* create a BFOQ justification for employment practices that otherwise would violate Title VII. *See, e.g., Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (holding that assumed preferences of male business customers for attractive female stewardesses did not justify refusal to hire men as flight attendants). As the Fifth Circuit explained shortly after Title VII became law, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." *Id.* at 389. This Circuit agrees. *See, e.g., Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting BFOQ defense even where defendant claimed its business would be destroyed if it was required to defy its customers' preference for male employees); *Olsen v. Marriott*, 75 F. Supp. 2d 1052, 1065 (D.

Ariz. 1999) (same).

In sum, Ms. Jespersen submitted ample evidence from which a jury could find that makeup cannot be a BFOQ for female bartenders at Harrah's because she herself successfully performed that job for over twenty years without wearing makeup, obviating any claim that lipstick, foundation, mascara and blush are "reasonably necessary to the normal operation of" a casino bar by female employees. 42 U.S.C. § 2000e-2(e)(1), as cited in *Johnson Controls*, 499 U.S. at 204. Thus, if the Court decides it should consider Harrah's defense on this appeal because Ms. Jespersen has established her prima facie case of sex discrimination by showing that Harrah's policy imposes unequal burdens based on sex, this Court should decide either that the defense is so lacking in factual support that it fails as a matter of law, or that Ms. Jespersen's evidence suffices to establish material disputes of fact requiring remand for further proceedings below.

III. Even If Harrah's Makeup Policy Could Be Found To Impose Equal Burdens On Male And Female Employees, Summary Judgment Still Would Have Been Improper Because The Policy Violates Title VII By Improperly Penalizing Employees Who Do Not Conform To Archaic, Restrictive Gender Stereotypes.

As set forth above, Ms. Jespersen should prevail on her claim of sex discrimination under a proper application of existing precedent regarding workplace appearance standards. Even so, language in the case law approving different

appearance standards for men and women is in tension with basic principles of Title VII prohibiting employment practices that perpetuate demeaning gender-based stereotypes. These principles require that, in determining whether an employer's sex-differentiated appearance standard discriminates under Title VII, courts also must consider the harmful impact of employer-mandated conformity to gender stereotypes that affect women's or men's professional standing and ability to thrive in the workplace. At the very least, Title VII prohibits employers from imposing dress and appearance standards that demand that women or men conform to highly stylized, sex-based appearance standards that are not followed generally in society, and therefore reinvoke obsolete and limiting myths about women or men. Here, the demand that Ms. Jespersen conform to a rigid, ultra-feminine appearance standard – one long since discarded outside Harrah's – sent the message to patrons and employees alike that beauty and sexual allure, not professionalism and job skills, are the *sine qua non* for Harrah's working women. As a result, requiring that Ms. Jespersen acquiesce in exaggerated stereotypes should be understood to violate Title VII without regard to what other conditions were placed on men.

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A. Title VII Is Now Correctly Understood To Prohibit Employers From Inappropriately Requiring Compliance With Gender Stereotypes.

That Title VII limits an employer's power to employ gender stereotypes when setting its terms and conditions of employment is a fundamental principle of Title VII. As early as 1978, the Supreme Court wrote: "[i]t is by now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," because "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Manhart*, 435 U.S. at 707, 708 n. 13 .

Accordingly, to demand that an employee conform to popular stereotypes about his or her sex, in dress, mannerisms, or otherwise, amounts to illegal disparate treatment under the statute. As the Supreme Court ruled more than a decade ago, "[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*, 490 U.S. at 251, quoting *Manhart*, 435 U.S. at 708 n.13. As noted in Section I, above, the Court in *Price Waterhouse* made no exception in its sweeping statement

for sex-differentiated appearance standards. In fact, the Court did just the opposite – it relied heavily on evidence that the employer pressured Ms. Hopkins to dress and act "more femininely" to hold that the decision to deny her promotion relied on impermissible stereotyping. *Id.* at 235.

Price Waterhouse involved a female associate in the accounting firm who was denied partnership in large part because she did not conform to the partners' notions of proper femininity. "In the specific context of sex stereotyping," the Court wrote, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse*, 490 U.S. at 250. The Court had no trouble discerning the sex stereotypes that undermined Ms. Hopkins' candidacy. It noted that "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," *id.* at 256, and characterized as the "*coup de grace*" the defendant's suggestion to Ms. Hopkins that she "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." *Id.* at 235. Denying promotion to an otherwise highly successful and productive employee because of a perception that her appearance, though professional, was not sufficiently feminine is discrimination because of sex under

Title VII. *Id.*

This case is no different. Like Ms. Hopkins, Ms. Jespersen failed to conform to her employer's idea of proper appearance for women. Harrah's took away the bartending job she had held successfully for twenty years not because of any complaints about her speed and skill at mixing drinks, her friendly manner with customers, or the respect she paid her supervisors. Instead, the sole issue that derailed her career was that, like Ms. Hopkins, she did not don the accouterments of stereotypical feminine beauty: a rosy cheek, a darkened eyelash, a fair complexion, a captivating lip color. That Harrah's "evaluate[d]" Jespersen by "insisting that [she] matched the stereotype associated with [her] group," *Price Waterhouse*, 490 U.S. at 251, could hardly be more apparent.

Price-Waterhouse's holding has been a firm guidepost in this Court's interpretation of Title VII. Most recently, for instance, an *en banc* panel of this Court considered the claim of a gay man who had been sexually harassed in an all-male workplace. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, __U.S.__, 155 L. Ed. 2d 313 (2003). A majority of the *en banc* panel judges hearing the case relied on *Price Waterhouse* in agreeing that "[d]iscrimination because of sex (gender) can extend to sexual stereotyping on the job," *Rene*, 305 F.3d at 1072 (Hug, J., dissenting, joined by three judges),

including through sexual harassment. *See also* 305 F.3d at 1068-69 (Pregerson, J., concurring, joined by two judges). That conclusion followed an earlier holding of this Court in *Nichols v. Azteca* that abuse leveled at a man "because he did not conform to [coworkers'] gender-based stereotypes" was discrimination "because of sex" in violation of Title VII. *Nichols*, 256 F.3d at 874-75. Numerous other federal circuits agree that *Price Waterhouse's* principles forbid enforcement of gender-based stereotypes against women or men throughout terms and conditions of work, including sex-based harassment.[9] As explained below, the statute similarly limits an employer's power to enforce through dress codes what it cannot enforce through other terms and conditions of work.

B. Prior Ninth Circuit Suggestions That Appearance Requirements That Impose "Equal Burdens" On Men And Women Do Not Violate Title VII Either Predate *Price Waterhouse v. Hopkins* And Its Progeny Or Are Dicta.

Despite the widespread acceptance of the principle that failure to conform to gender stereotypes may not be the basis for adverse employment action, decades-old case law on appearance codes fails to incorporate this principle and thus should be considered no longer viable. *E.g. Willingham,* 507 F.2d at 1084*; Baker*,

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[9] *See Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 262-64 (3d Cir. 2001) *cert. denied,* 534 U.S. 1155 (2002); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085-86 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001); *Simonton v. Runyon*, 232 F.3d 33, 37-38 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir. 1999).

507 F.2d at 895; *Fountain*, 555 F.2d at 753. Likewise, suggestions in dicta from this Circuit that "different but equal" or "reasonable" dress and appearance codes are permissible (*e.g., Frank*, 216 F.3d at 845; *Nichols*, 256 F.3d at 864) do not account for the case law's developed appreciation of Title VII's requirements.

By definition, sex classifications in appearance standards impose different rules on women in the workplace than they impose on men. They are not facially neutral. In most any other context, it would now be axiomatic that any sex-specific condition of employment must be justified as a BFOQ. *See Johnson Controls,* 499 U.S. at 187; *Frank v. United Airlines*, 216 F.3d at 853-54 ("An employer's policy amounts to disparate treatment if it treats men and women differently on its face. . . . A justification for overt discrimination may exist if the disparate treatment is based on a BFOQ.").

When it comes to appearance rules, however, some courts have persisted in applying a special exception that appears nowhere in the statute. *Frank* states this anomalous notion in its dictum that, "An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment." *Frank*, 216 F.3d at 854-55. The remark was repeated in *Nichols*, where this Court included a footnote to qualify the scope of its holding on gender stereotyping, commenting: "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 875 n. 7. In both cases, the remarks regarding Title VII's limitations were entirely dicta. *Frank* involved a policy that imposed unequal burdens, necessitating no decision on the legality of "equal" ones. *Nichols* did not concern grooming standards at all.

The idea that "equal burdens" could save an appearance rule that otherwise discriminates developed from cases that long predated *Price Waterhouse* and have not been reconsidered in light of its holding. *See, e.g., Gerdom*, 692 F.2d at 605 (tracing the genesis of the notion that permissible grooming rules are those which "do not significantly deprive either sex of employment opportunities, and which are evenhandedly applied to employees of both sexes."). *Frank* reformulated that notion into its remark that "equal burdens" would not violate Title VII, without mentioning *Price Waterhouse.* Instead, *Frank* relied on *Fountain v. Safeway Stores*, 555 F.2d at 753, which upheld a necktie policy for men but not women. *Fountain* was one of a series of cases from the 1970s addressing grooming standards; the vast majority of these cases upheld hair length restrictions for men, some over strong dissents. All of them relied, directly or indirectly, on the fundamental rights/immutable characteristics rationale of *Willingham* to hold that

grooming standards are not within Title VII's mandate – a conclusion that has long been repudiated (*see* § I. A., *supra*).[10] These cases, and corresponding dicta in *Frank* and *Nichols*, are thus neither controlling nor viable precedent.

This Court has recognized on more than one occasion, however, that *Price Waterhouse* effectively has overruled a variety of early conclusions relating to gender-based appearance and behavior standards. Thus, in *Nichols v. Azteca*, this court held that *Price Waterhouse* had overruled the holding of *DeSantis v. Pacific Telephone & Telegraph Co.,* 608 F.2d 327 (9th Cir. 1979), that "discrimination based on a stereotype that a man 'should have a virile rather than an effeminate appearance' does not fall within Title VII's purview." *Nichols,* 256 F.3d at 875. Likewise, in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), this Court found that "[t]he initial judicial approach taken in cases such as *Holloway* [*v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977),]" which denied Title VII protection to a transsexual woman, "has been overruled by the logic and language of *Price*

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[10] *See, e.g., Willingham, supra* (hair length restriction for men did not violate Title VII because the statute reaches only immutable characteristics or fundamental rights; Judge Wisdom, joined by three others, dissenting); *Baker, supra* (same); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976) (same; Judge Winter dissenting); *Dodge v. Giant Foods, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973) (same); *Fagan v. National Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973) (same; Judge Wright dissenting); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977) (relying on *Willingham*; Judge McRee dissenting); *Knott v. Missouri Pacific Railroad Co.*, 527 F.2d 1249 (8th Cir. 1975) (relying on *Willingham*); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976) (relying on *Willingham*).

Waterhouse." *Id.* at 1201-02. This Court correctly concluded that Title VII bars discrimination based on one's failure "to conform to socially-constructed gender expectations," including a man's failure to appear as masculine as his coworkers believe he should. *Id.*

It is time for the Court to reach a similar conclusion regarding appearance standards because the *Frank* "equal burdens" dictum fails to account for the harm occasioned by employer-enforced conformity to gender-based stereotypes in grooming codes, as required by *Price Waterhouse* and other cases. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. at 724-25 (reiterating that the constitutional test for gender-based classifications "must be applied free of fixed notions concerning the roles and abilities of males and females."). As *Price Waterhouse* makes clear, the touchstone for evaluating any employer-enforced appearance or behavior norm is the degree to which, in that particular workplace, it relies on and reinforces prejudicial ideas about men or women as a group. *Accord Carroll v. Talman*, 604 F.2d at 1032-33. Thus, it should be recognized that Harrah's policy communicates that female employees by definition cannot present an appropriate professional appearance without substantial, formulaic facial alteration. At the same time, a male employee who is self-conscious in his interactions with customers due to an unusual facial birthmark or severe acne scars

is forbidden from muting or concealing that condition with foundation, simply and solely because Harrah's believes "real men don't wear makeup." While the impact on women is greater, the policy has a harmful effect on individual women *and* individual men by its insistence upon rigid stereotypes. Where those stereotypes inhibit employees' work performance or demean their professional stature, they alter the terms and conditions of employment because of sex and violate Title VII.

C. Because Reciprocal Gender Stereotypes Exacerbate Discrimination, An "Equal Burdens" Test Fails To Satisfy Title VII's Requirements.

The "rule" articulated in dicta in *Frank* cannot be considered viable for another reason, as well. *Frank* would permit a facially discriminatory appearance standard to survive so long as the burdens it placed on each sex, though different, were "equal" by some measure. Thus, the lower court reasoned here that a requirement that women wear makeup is a limitation on women that is "equal" to the prohibition against men from doing the same. But in evaluating the degree to which a sex-differentiated appearance code reinforces harmful gender stereotypes, it is no defense that each sex is made to suffer under its own set of socially-constructed burdens. *See, e.g.*, *Carroll*, 604 F.2d at 1034 (dissent) (lamenting the "nest of uniformity" in men's business fashions). The fact that men also may be oppressed by limiting stereotypes has never been accepted by this Court or the

Supreme Court as a reason that an employer may escape liability for subjecting women to them. Indeed, only weeks ago, the Supreme Court addressed this very issue and – in an opinion authored by Chief Justice Rehnquist – emphasized that reciprocal gender stereotypes imposed on each sex do not resolve but rather *exacerbate* the problem of workplace discrimination. Upholding the application of the Family and Medical Leave Act against the states, the Chief Justice noted that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . These mutually reinforcing stereotypes create[ ] a self-fulfilling cycle of discrimination." *Hibbs v. Nevada Dep't of Hum. Res.*, ___ U.S. ___, 2003 U.S. LEXIS 4272 at *27, 2003 WL 21210426 at *10 (May 27, 2003).

Courts have considered the "different but equal" idea in other contexts as well and wisely have rejected it. Under Title VII, employers may not defend their sexual harassment of women by subjecting men to like treatment. *See Steiner v. Showboat Operating Company*, 25 F.3d 1459, 1463 - 64 (9th Cir.1994) (rejecting defense that harassment directed at woman was "cured" by fact that harasser also referred to men as "assholes."). The same is true in the context of race. *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 908 (9th Cir.1999) ("To suggest, as Potomac does, that it might escape liability because it equally harassed whites and blacks

would give new meaning to equal opportunity. Potomac's status as a purported 'equal opportunity harasser' provides no escape hatch for liability."). In both cases, where harassment of one individual traded on the currency of sex or race to gain its potency, it was prohibited – regardless of additional violations that may have been directed at others.[11]

An attempt to compare whether women or men in any particular workplace are more severely constricted by what remains of a long and sorry history of sexist appearance expectations is, ultimately, a fruitless exercise. Nor should such a ranking of oppressions determine the legality of an employer's rule. The appropriate inquiry under Title VII is appropriately limited simply to whether a particular appearance requirement in and of itself "ratif[ies] and reinforce[s]" stereotypical views about one sex or both, limiting employees' opportunities and ability to flourish in the particular workplace on equal terms. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994). An employer's demand that a woman

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[11] Analogously, a reliance on sex stereotypes to limit the participation of men or women on juries violates the Constitution, notwithstanding the fact that both sexes suffer exclusion by reason of such biases. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) ("When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. . . . All persons . . have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."); *see also United States v. Virginia*, 518 U.S. 515 (1996) (state attempt to grant men and women equal, but different, military education had the effect of perpetuating stereotypes about the relative abilities of the sexes, in violation of the Constitution).

conform to outdated, burdensome and demeaning stereotypes about how women as a group are to appear – stereotypes no longer prevalent even in social settings – is, standing alone, an adverse "term or condition" of work that occurs "because of sex," (42 U.S.C. § 2000e(a)(1)), no matter what conditions might be placed on coworkers. "[T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes," because "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Manhart*, 435 U.S. at 709.

D. Title VII Prohibits Workplace Appearance Rules That Require Employees To Conform To Archaic Gender Stereotypes That Diminish Their Professional Status Or Ability To Work And Are Not Based On Bona Fide Occupational Qualifications.

Dress and grooming practices always have incorporated powerful, socially-constructed gender signals, and can be a core means of establishing gender norms.[12] The boundaries of these gender norms can be policed by, among other things, the enforcement of sex stereotypes in the workplace – whether through

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[12] *See, e.g.*, Judith Butler, *Gender Trouble* 140 (1990) ("The effect of gender is produced through the stylization of the body and, hence, must be understood as the mundane way in which bodily gestures, movements, and styles of various kinds constitute the illusion of an abiding gendered self."); Susan Brownmiller, *Femininity* 82 (1984) ("In a clothed culture the eye depends on artificial externals for its visual cues. . . . A blurring of sartorial signposts can inspire hostility and rage. To mistake a man for a woman, or vice versa, is dangerous.").

offensive, sex-based harassment (*see, e.g. Nichols*), or through denying job opportunities to individuals deemed insufficiently feminine or masculine for the particular job (*see, e.g., Price Waterhouse*). Title VII correctly is now understood to bar employment practices that discriminate on the basis of those sex stereotypes. Because sex-differentiated dress and grooming practices have played a foundational role in delineating and reinforcing stereotypes about "appropriate" presentation and conduct for men and for women,[13] Title VII's mandate to strike at the "entire spectrum of disparate treatment of men and women in employment" must limit an employer's power to enforce those stereotypes through dress codes.

This is not to say, however, that all regulations requiring any differences in dress and grooming standards *necessarily* violate Title VII. Requirements that do

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[13] For instance, Susan Brownmiller notes that, "Feminine clothing has never been designed to be functional for that would be a contradiction in terms. Functional clothing is a masculine privilege and practicality is a masculine virtue. To be truly feminine is to accept the handicap of restraint and restriction, and to come to adore it." Brownmiller, *supra*, at 86. Simone de Beauvior addresses makeup specifically, noting its role in depicting women as objects:

> Makeup and jewelry also further this petrification of face and body. The function of ornamental attire is very complex; . . . often its purpose is to transform woman into idol. . . . She paints her mouth and cheeks to give them the solid fixity of a mask; her mouth she imprisons deep in kohl and mascara, it is no more than the iridescent ornament of her eyes; her hair, braided, curled, shaped, loses its disquieting plantlike mystery. In women dressed and adorned, nature is present but under restraint, by human will remolded nearer to man's desire.

Simone de Beauvoir, *The Second Sex* 179 (1952) (New York: Vintage Books ed. 1974). *See also* Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 Harv. Women's L. J. 73 (1982).

not incorporate limiting sex stereotypes, and that do not have adverse impacts on employees' workplace status or performance, should pose no problem under the statute.[14] Thus, generally-applicable requirements that all employees wear dignified attire appropriate to their occupation would not constitute disparate treatment under the statute – notwithstanding the reality that such a standard is likely to incorporate to some degree social conventions that continue to classify by sex – as long as the particular requirement in the context of the particular work environment does not employ stereotypes to demean or restrict employees because of their sex.[15]

But certainly – and all that is necessary to decide this case – an employer may not demand conformity to sex-based stereotypes that are *more* exaggerated and restrictive than the range of sex-based grooming practices that are accepted as professional in contemporary society. Where, as here, gender stereotypes are patently in evidence, have tangible adverse effects, and extend *significantly beyond* the bounds ordinarily considered professionally acceptable, the sex-differentiated standard cannot survive scrutiny under Title VII. The violation is not lessened by

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[14] An example of such a standard might be a policy requiring female employees to wear green shirts and male employees to wear yellow.

[15] *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 Mich. L. Rev. 2541, 2568 (1994) ("[T]he problem with the caselaw in this area is not that it fails to transcend community norms – an impossible goal – but that the law fails to look critically enough at the extent to which these norms incorporate the types of attitudes and stereotypes about women that Title VII is meant to combat.").

the fact that Harrah's may employ a large number of women who enjoy wearing makeup and feel it enhances their appearance, and many men who would feel – like Ms. Jespersen – awkward, demeaned, self-conscious and sexualized if required to wear it. "Socially-constructed gender expectations" may be widespread, *see Schwenk v. Hartford* at 1201-02, but Title VII prohibits employers from using pink slips to enforce them.

While Title VII "requires neither asexuality nor androgyny in the workplace," *Oncale v. Sundowner Offshore Services*, 523 U.S. at 81, it does place reasonable limits on an employer's ability to mandate rigid conformity with gender norms that perpetuate historic biases and alter the terms and conditions of employment. *See Price Waterhouse*, 490 U.S. at 228. The rule set forth in *Frank* to describe the permissible scope of sex-differentiated appearance codes under Title VII should be revised to account for this basic statutory premise.

Conclusion

For all the foregoing reasons, Plaintiff-Appellant Darlene Jespersen respectfully requests that this Court reverse the decision below and remand the case for further proceedings below with instructions as to the correct legal

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standards for evaluating Ms. Jespersen's claim that Harrah's sex-differentiated appearance standards violate Title VII.

DATE: June 16, 2003

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

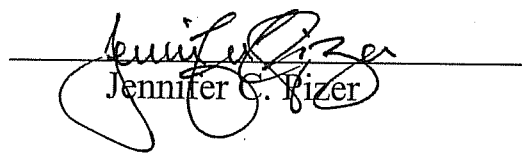
The accompanying Appellants' Opening Brief complies with the specifications of Rule 32 of the Federal Rules of Appellate Procedure, as follows:

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 12,189 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 16th day of June, 2003, at Los Angeles, California.



Jennifer C. Pizer

PROOF OF SERVICE BY FEDERAL EXPRESS OVERNIGHT 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 Blvd., Suite 1300, Los Angeles, CA 90010.

On June 16, 2003, I served a copy of the attached document, described as APPELLANT'S OPENING BRIEF, 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 by placing true and correct copies thereof enclosed in a sealed envelope addressed as follows:

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

Dated: June 16, 2003.

Tito Gomez

TITO GOMEZ