No. 03-15045

Heard By Circuit Judges A. Wallace Tashima,
Sidney R. Thomas and Barry G. Silverman.
Opinion by Judge Tashima; Dissent by Judge Thomas.
Filed December 28, 2004.

**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.

PETITION OF DARLENE JESPERSEN FOR REHEARING AND REHEARING EN BANC

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

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

Attorneys for Plaintiff-Appellant

No. 03-15045

Heard By Circuit Judges A. Wallace Tashima,
Sidney R. Thomas and Barry G. Silverman.
Opinion by Judge Tashima; Dissent by Judge Thomas.
Filed December 28, 2004.

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.

PETITION OF DARLENE JESPERSEN FOR REHEARING AND REHEARING EN BANC

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

I. Introduction and Summary of the Grounds for Rehearing and Rehearing En Banc 1

II. Facts 4

A. Harrah's Appearance Policy Facially Differentiates Based On Sex 5

B. Jespersen Testified About the Significant Burden On Her As A Female Employee; Her Testimony Was Admissible, Relevant, Direct Evidence 5

III. The Panel Majority Has Created Conflict With Controlling Authority 7

A. The Majority's Decision Misapplies Existing Law And Creates Conflicts With Supreme Court and Prior Ninth Circuit Decisions Forbidding Discrimination On the Basis of Gender Stereotypes 7

B. The "Equal Burdens" Test Is Inconsistent With More Recent Decisions Concerning Sex Stereotyping, and Fails To Address The Harms Caused By Appearance Rules That Discriminate "Equally" Though Differently Against Both Male and Female Employees "Because Of Sex." . . . 13

IV. The Majority Has Created Questions of Exceptional Importance By Curtailing and Causing Confusion Regarding Title VII's Protections Against Sex Discrimination 16

V. Conclusion 17

Certificate of Compliance 18

Exhibit 1 (Panel Majority Opinion and Dissenting Opinion)

Exhibit 2 (Harrah's Appearance and Grooming Policy)

Exhibit 3 (Excerpts of the Deposition Testimony of Darlene Jespersen)

Proof of Service

TABLE OF AUTHORITIES

Page

CASES

Carroll v. Talman Federal Savings and Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979) 7, 10, 12, 14

City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) 13

County of Washington v. Gunther, 452 U.S. 161 (1981) 1

Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001) . . . . *passim*

Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) . . . . *passim*

Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058 (7th Cir. 2003) 16

International Union, UAW v. Johnson Controls, 499 U.S. 187 (1991) 13

Jespersen v. Harrah's Operating Company, Inc., 280 F. Supp. 2d 1189 (D. Nev. 2002) 2

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 9, 10

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003) 15

Nichols v. Azteca Restaurants Enterprises, Inc.,
256 F.3d 864 (9th Cir. 2001) 11, 15, 16

Pavon v. Swift Transp. Co.,
192 F.3d 902 (9th Cir.1999) 14, 15

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) . . . . *passim*

Rene v. MGM Grand Hotel, Inc.,
305 F.3d 1061 (9th Cir. 2002),
cert. denied, 538 U.S. 922 (2003) 10, 11, 16

Schwenk v. Hartford,
204 F.3d 1187 (9th Cir. 2000) 16

Smith v. Salem,
378 F.3d 566 (6th Cir. 2004) 11, 16

Steiner v. Showboat Operating Company,
25 F.3d 1459 (9th Cir. 1994) 14

STATUTES

42 U.S.C. § 2000e-2(a)(1) 13

SECONDARY AUTHORITIES

Taub, Nadine, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*,
21 B.C. L. Rev. 345 (1980) 10

> "In 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."

> – *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 607 (9th Cir. 1982) (en banc) (quoting *County of Washington v. Gunther*, 452 U.S. 161 (1981)), *cert. dismissed*, 460 U.S. 1074 (1983).

I. INTRODUCTION AND SUMMARY OF THE GROUNDS FOR REHEARING AND REHEARING EN BANC.

Plaintiff-Appellant Darlene Jespersen ("Jespersen") petitions for rehearing and rehearing en banc of the panel majority's decision affirming the order granting summary judgment against her on her Title VII claim against Harrah's Operating Company, Inc. ("Harrah's") for firing her after nearly twenty years of exemplary service as a casino bartender.[1] Despite her outstanding performance reviews and glowing comments from her customers at the Sports Bar, Harrah's ended Jespersen's employment because she did not comply when management imposed a new requirement that all female beverage servers wear elaborate facial makeup at all times while working, as instructed by company make-over consultants. By contrast, male bartenders simply were instructed not to wear makeup.[2]

Jespersen had tried to comply with Harrah's make-over rules, but had found

---

[1] The panel majority's Opinion and the Dissent are attached hereto as Exhibit 1.

[2] A copy of Harrah's employee appearance policy, as included in Appellant's Excerpts of Record ("ER"), is attached hereto as Exhibit 2.

the results so demeaning that they prevented her from performing her job effectively.[3] Harrah's disputed neither the sex-differentiation explicit in the policy, nor the adverse impact the policy had on Jespersen. Nonetheless, it contends it may require its female employees to adhere to a multi-step, daily make-over because its customers appreciate that appearance.

Applying a legal test that dates from the 1970's, the district court judge granted Harrah's motion for summary judgment, holding that the sex-specific rules do not constitute discrimination "because of sex" because, as a matter of law, they impose equal – though different – burdens on female and male employees. *Jespersen v. Harrah's Operating Company,* 280 F. Supp. 2d 1189 (D. Nev. 2002).

On Jespersen's appeal, the panel was to review the decision *de novo* to determine whether the district court had applied the law correctly and, viewing the evidence in the light most favorable to Jespersen, whether genuine issues of material fact precluded entry of summary judgment against her. *Frank v. United Airlines*, 216 F.3d 845, 849 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001). As the dissent explains, the panel majority erred as to both aspects of its review.

First, the majority mistakenly concluded that it was bound by a recent, *en banc* decision of this Court to reject one of Jespersen's main legal arguments,

---

3 Excerpts from Jespersen's deposition testimony concerning the effect on her of the makeup requirement, as included in her Excerpts of Record, are attached hereto as Exhibit 3.

namely, that the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), requires this Court to adjust its decades-old "equal burdens" test by incorporating the more recently enunciated principle that employers may not treat employees adversely based on stereotyped notions of proper gender presentation and deportment. *See* Opinion at *20. In fact, the Circuit's *en banc* decision adopting the so-called "equal burdens" test for sex-differentiated appearance codes predated *Price Waterhouse* by seven years. *Gerdom v. Continental*, 692 F.2d at 602. The post-*Price Waterhouse* decision to which the majority inaccurately refers, *Frank v. United Airlines*, actually was merely a panel decision applying *Gerdom*. Moreover, *Frank* hardly can be read as rejecting *Price Waterhouse*'s critique of sex stereotyping, because the *Frank* panel explicitly stated that it was *not* considering whether imposing different appearance standards on women and men is a *per se* violation of Title VII, since the sex-specific rule at issue in *Frank* failed even the "equal burdens" test. 216 F.3d at 855.

Second, by "declining" to apply *Price Waterhouse* in this context (Opinion at *19), the majority has created inconsistencies with *Price Waterhouse* and other Supreme Court decisions as well as prior decisions of this Court. For example, the majority appears to have created an exception to the general rule established in *Price Waterhouse*, that working women are to be judged based on their job performance, rather than their gender conformity.

Third, contrary to prior Ninth Circuit cases, the majority erroneously discounted the probative value of Jespersen's testimony as evidence of the policy's weighty burden on women, and illogically faulted her for lacking evidence to prove a negative, that is, the non-existence of comparable burdens on men. *See* Dissent at *29-30. In doing so, the majority improperly took from the finder of fact the central, disputed factual question in this case, that is, whether Harrah's appearance policy (either taken as a whole or considering just the makeup requirements imposed only on women) imposes greater burdens on female bartenders than on male ones.

Each of these categories of error created conflict with settled law and confusion for future cases. Accordingly, further review is necessary.

II. FACTS

There is no dispute that Jespersen was an exemplary employee.[4] She received repeated commendations from her supervisors and unsolicited praise from her customers. ER at 124-99. Her outstanding performance for roughly twenty years proves that elaborate facial makeup is not necessary for a woman to be a top-notch bartender in a casino sports bar.

---

[4] Given the consistency between the factual descriptions in the panel Opinion and the Dissent, only a brief summary is set out here. Jespersen's opening and reply briefs to the panel contain more detailed presentations. For convenience, true copies of those briefs are available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1614>. Copies of the *amicus curiae* briefs by the ACLU of Nevada, et al., and the National Employment Lawyers Association, et al., in support of Jespersen are available there for convenient reference as well.

A. Harrah's Appearance Policy Facially Differentiates Based On Sex.

By its terms, Harrah's policy treats male and female employees differently "because of sex." *See* Exh. 2. Under its prior appearance policy, Harrah's had encouraged its female employees to wear facial makeup. Exh. 3, ER at 121. The new policy changed that request into a non-negotiable demand, and established a specific regimen of face powder, blush, and mascara, with lip color to be worn "at all times." *See* Exh. 2, ER at 79. According to the new rules, a company "image consultant" decides the details of each female employee's "look," which is captured by photograph after the employee's "make-over." Each day, the female employee must duplicate that look exactly, without deviation. *Id.* at 80. In addition to the loss of freedom and dignity to determine and periodically vary one's professional appearance, each day Harrah's female employees also lose the money and time needed to comply. By contrast, Harrah's male employees incur no analogous financial and temporal costs, and they retain free choice about whether to appear clean-shaven or with facial hair of any style, as long as they stay clean and tidy.

B. Jespersen Testified About The Significant Burden On Her As A Female Employee; Her Testimony Was Admissible, Relevant, Direct Evidence.

Years before Harrah's imposed these appearance rules, Jespersen had tried

in good faith to wear makeup in response to a supervisor's request. To her distress, she found it made her terribly uncomfortable and alienated. She testified that she had felt "degraded" that she had to "cover [her] face and become pretty or feminine" as a requirement of her bartending job. Exh. 3, ER at 121.

Jespersen made a serious effort to comply, however, and wore the makeup for a number of weeks. During that time, she realized that the makeup impeded her ability to work. It seemed to invite her customers to perceive and interact with her differently. It also made her feel self-conscious and humiliated. In her words:

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

Exh. 3, ER at 121.

Thus, when the casino changed its policy from merely requesting that its female beverage servers wear makeup to requiring it, Jespersen knew she would not be able comply on a permanent basis. She declined to agree to employment terms with which she could not comply, and Harrah's fired her.[5]

---

[5] As Jespersen testified, Harrah's presented her with a list of open positions with the company and urged her to apply for another job. But the company did not arrange for her to transfer laterally to a comparable job for a comparable wage. Instead, despite her twenty-year tenure, she was in the same pool with new applicants. Further, she was not qualified for a great many of the positions, and many were entry-level jobs for minimal pay. Exh. 3, ER at 115-17.

III. THE PANEL MAJORITY HAS CREATED CONFLICT WITH CONTROLLING AUTHORITY.

A. The Majority's Decision Misapplies Existing Law and Creates Conflicts With Supreme Court and Prior Ninth Circuit Decisions Forbidding Discrimination on the Basis of Gender Stereotypes.

Since 1989, the Supreme Court's *Price Waterhouse v. Hopkins* decision has protected working women from being judged based on their degree of conformity with gender stereotypes rather than their job performance. Within the Ninth Circuit, prior case law consistently has condemned employers that have claimed their businesses will wither unless they can require their female employees to present an "appealing" feminine look that their customers allegedly prefer. On challenges to those feminine appearance rules, this Court – like other federal circuits – has found the policies to be facially discriminatory, employing gender stereotypes that send a harmful, subordinating message, and that hinder women's ability to succeed professionally. *See Frank*, 216 F.3d at 845; *Gerdom*, 692 F.2d at 607 (discussing cases); *see also Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979) (holding that, although there may be nothing discriminatory about uniforms *per se*, if only women must wear them, while men are deemed to have sufficient judgment to chose their own professional attire, the rule sends an impermissible message of gender subordination).

Because the airlines in *Gerdom* and *Frank* could not show that their sex-based rules were reasonably necessary to their businesses – as Title VII requires –

the discriminatory policies had to give way. *Frank*, 216 F.3d at 855; *Gerdom*, 692 F.2d at 609. The airlines now employ both women and men as flight attendants, without sex-specific, oppressive appearance rules. By contrast here, despite the settled law placing on *employers* the burden to justify policies that burden differentially by sex, the majority panel erroneously relieved Harrah's of any burden to show why its female bartenders must "uniform" their faces as well as their bodies, while their male counterparts – with the exact same job description – need only uniform their bodies.

Mistakenly construing the *Frank* decision as barring consideration of sex-stereotypes in appearance code cases, and also mistaking *Frank* as an *en banc* ruling, the majority panel concluded it lacked authority to harmonize the Circuit's earlier *en banc* analysis of *Gerdom* with the later *Price Waterhouse* decision. The majority thus improperly rejected Jespersen's claim that Harrah's woman-only makeup rule is suspect specifically because it imposes harmful, gender-based stereotypes, irrespective of whether those stereotypes can be weighed and found to be "equally" oppressive to women and men.

But *Frank* is not the barrier for which it was taken. Not an *en banc* decision at all, *Frank* simply applies *Gerdom*'s early 1980's analysis to another airline's similar treatment of female flight attendants, without considering how the test enunciated in *Gerdom* might apply to a policy like Harrah's that imposes

conformity with multiple stereotypes for male and female employees.

And nothing in *Gerdom* bars the analysis Jespersen advances. In fact, in holding that Continental's differential weight rule violated Title VII, the *Gerdom* court stressed that stereotypical notions of feminine attractiveness had motivated the restrictive rule in the first place. The court faulted the airlines for "restricting job opportunities and *imposing special conditions on the basis of gender stereotypes*," 692 F.2d at 606 (emphasis added), and invoked the Supreme Court's condemnation of "[t]he harmful effects of occupational cliches." 692 F.2d at 607 (citing *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)).[6]

Thus, *Frank* and *Gerdom* do not preclude application of *Price Waterhouse* in a case like this. Indeed, as the dissent explained, this is a classic *Price Waterhouse* case. *See* Dissent at *24. Like Ann Hopkins, Darlene Jespersen successfully made her way in a traditionally male-dominated occupation. Like Hopkins, she was a strong performer when measured by gender-neutral standards.[7] Yet, although the job duties for Harrah's male and female bartenders were exactly

---

[6] *Gerdom* noted the discussion in *Hogan* of the historical exclusion of women from certain professions, including law and bartending. How ironic and troubling that the majority's decision here, two decades later, accepts that women may be bartenders, but finds no discrimination in a rule that allows them that occupation only if they conform to a stereotype more commonly imposed on cocktail waitresses. *Id.*

[7] Indeed, where Hopkins' performance reviews were a mix of legitimate and discriminatory critique, Jespersen's were unequivocal in their praise. ER at 124-99.

the same,[8] Jespersen – like Hopkins – was deemed unacceptable because she was seen as insufficiently feminine.

As in *Price Waterhouse*, the femininity requirement created a "Catch-22" for Jespersen, whose less-feminine attributes appear to have contributed to her success, especially when it came to managing unruly bar patrons. Opinion at *3; *see* 490 U.S. at 251. Thus whether a woman is a business executive or a bartender, requiring her to look and/or act stereotypically feminine may make it considerably more difficult for her to succeed.

Thus, *Price Waterhouse* is not limited just to particular occupations, but applies with equal force in circumstances like those addressed by *Carroll*, *Frank*, and *Gerdom*, involving historically female occupations in which women-only appearance rules serve improperly to reinforce the "feminine" nature of that domain. *See* Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. Rev. 345, 387 (1980), *cited in Frank*, 216 F.3d at 855; *see also Hogan*, 458 U.S. at 718.[9]

---

[8] A copy of the bartenders' job duties is in Exhibit 2, at 83. Although Harrah's proffered business necessity defense is not in issue on this appeal, it is notable that Harrah's has argued that its female bartenders need makeup because their duties include an element of performance and they must be visible under the casino lighting, despite the fact that Jespersen's job description contains nothing about performing any kind of role. And Harrah's inapposite various references in its briefing to Disneyland – where male and female staff appear as costumed characters – do not explain what about the casino's lighting or sports bar services requires that the women bartenders – and only the women – "costume" their faces.

[9] *Price Waterhouse* of course protects men similarly, as multiple decisions of this Court have held. *See, e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002)

Thus, as the dissent explains, *Frank* and *Gerdom* easily can be harmonized with the Supreme Court's precedents regarding gender stereotyping. *See* Dissent at *26; *see also Smith v. Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex.").

The majority seems improperly to attempt to limit *Price Waterhouse*'s sex stereotyping rule to harassment cases. But as the dissent points out, *Price Waterhouse* itself was not a harassment case; rather, like the present action, it was an adverse job action case. *See* Dissent at * 24.[10] In addition, as the dissent observes, there is no logic – nor any textual support – for a rule that Title VII protects employees perceived to be gender-nonconforming against harassment, but not against termination for the same reason. *See* Dissent at *25.

Likewise, the *Price Waterhouse* court hardly would have come to a different conclusion and left Anne Hopkins unprotected had the accounting firm codified

---

(Pregerson, , J., conc.), *cert. denied*, 538 U.S. 922 (2003); *Nichols v. Azteca Restaurants Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

[10] In addition to that error, the panel also seemed to see itself constrained by the dictum in a footnote in *Nichols*, 256 F.3d at 875 n.7. *See* Opinion at *19. But the *Nichols* court gave no analysis to explain why Title VII would forbid co-worker harassment based on an employee's gender variance, but not termination or other adverse action by the employer.

into an official policy its requirement that its female account executives wear makeup, jewelry and "soft-hued suits." 490 U.S. at 256.

The majority panel further misconstrued existing law in holding that Harrah's makeup rule cannot be considered on its own, but must be weighed together with Harrah's other personal appearance rules. None of the relevant precedents conducted an "apples and oranges" comparison like the one the majority purports to undertake in this case. *Frank*, *Gerdom*, and *Carroll*, for example, all simply assessed the relative burdens on women and men of the single restriction being challenged by the female plaintiffs.

Moreover, even assessing Harrah's policy as a whole, it is obvious – as the dissent notes – given the plain sex-differentiated language about hair styles and fingernail grooming – that a reasonable jury easily could find the daily hair styling and elaborate facial makeup requirements for women more burdensome than the far more limited requirements for men. Considering the policy's differing terms, together with the common knowledge of personal grooming that a jury would be charged to apply, it was manifest error for the panel majority to make a factual determination as to the relative burdens of these requirements, and then hold as a matter of law that no reasonable jury could find the demands on women to be more onerous. *See* Dissent at *31-32.

In sum, the panel majority has misapplied numerous applicable precedents. In so doing, it has created inconsistencies that promise confusion for future cases. Perhaps most worrisome, it appears to have created a two-tier standard that deprives women in service industries of the protections previously available to all workers under *Price Waterhouse*. These errors warrant reconsideration.

B. The "Equal Burdens" Test Is Inconsistent With More Recent Decisions Concerning Sex Stereotyping, and Fails To Address The Harms Caused By Appearance Rules That Discriminate "Equally" Though Differently Against Both Male and Female Employees "Because Of Sex."

By its terms, Title VII protects "individuals." 42 U.S.C. § 2000e-2(a)(1). As the Supreme Court has explained, "[T]he 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." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). The panel majority is correct to highlight that "on a Title VII disparate treatment sex discrimination claim, an employee need only establish that, but for his or her sex, he or she would have been treated differently." Opinion at *8-9 (citing *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-200 (1991) and *Manhart*, 435 U.S. at 711). That rule *should* dictate a favorable result

for Jespersen here because, had she been treated the same as her male coworkers, she still would be making her living tending Harrah's Sports Bar.

But since the 1970's, the courts have not applied this simple principle to sex-differentiated appearance codes. Instead, as the dissent observes, they crafted the "equal burdens" exception to the statutory language for sex-specific appearance codes that were designed to restrain the youth subculture, not to subordinate men based on gender. As the majority panel acknowledged, the "equal burdens" cases do not "define [its] exact parameters," and it remains "undefined" today. Opinion at *14, fn.4. Yet it has become increasingly anachronistic with time.

Cases like *Carroll*, *Gerdom* and *Frank* show that this test has been useful – if at all – only to assess policies that treat male and female employees differently as to one requirement (such as weight or a uniform). But, as the dissent points out, the test becomes unworkable when a policy – like Harrah's here – contains multiple, different requirements because it offers no method for "balancing" unrelated burdens. Faced with such a policy, the test becomes incoherent.

In other contexts, courts wisely have rejected the "different but equal" idea. Thus, employers may not defend 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). The same is true in the context of race. *Pavon v. Swift*

Transp. Co., 192 F.3d 902, 908 (9th Cir.1999). In both circumstances, where harassment of an individual gained its potency due to the sex or race of the victim, it was prohibited – regardless of additional violations that may have been inflicted upon others.[11] Consequently, if a male employee is subjected to pervasive harassment because he is seen as too effeminate, as in *Nichols*, that violation will not be cured if his coworkers subject a "mannish" female coworker to different, but equally abusive, treatment. *Cf. Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 736 (2003) (Rehnquist, J.) (condemning "parallel stereotypes" of women and men that are "mutually reinforcing" and create "a self-fulfilling cycle of discrimination").

It is true that the Ninth Circuit adopted the analytically unsound "equal burdens" test *en banc* in *Gerdom*, but in that case it had no need to consider the full implications of that test because Continental's policy failed it. 692 F.2d at 605-06. *Frank* then followed *Gerdom*, also without needing to reconsider the test – such as to reconcile it with *Price Waterhouse* – because United's policy likewise failed it. 216 F.3d at 854-55.

---

[11] To apply this reasoning by analogy to Harrah's policy, consider a race-based "make-over" that requires Asian American women to wear eye make up to exaggerate the shape of their eyes, African-American women to wear their hair in corn-rows, and Iranian-American women to cover their hair completely "at all times," while prohibiting Caucasian women from doing any of these things. The statutory violation is unmistakable.

This Court's recent decisions applying *Price Waterhouse* to protect individuals from abuse based on gender stereotypes reveal the paucity of the remaining doctrinal support for the older Ninth Circuit opinions. *See Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir. 2000); *Nichols*, 256 F.3d at 864; *Rene*, 305 F.3d at 1061. Yet, while the result in *Rene v. MGM Grand* makes plain the lack of foundation under the old cases, its fractured opinions leave important questions unanswered. *See* 305 F.3d at 1061, 1068, 1069, 1070, 1071. Though some other circuits understand this circuit's law to offer sound protection against adverse treatment because of non-adherence to sex stereotypes, *e.g. Smith v. Salem*, 378 F.3d at 566, others disagree. *See, e.g., Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003) (Posner, J., conc.). In sum, the present inconsistency within Ninth Circuit law impairs the protections to which individuals are entitled under one of the nation's most important civil rights statutes. The Court should address this problem by granting rehearing in this case.

IV. THE MAJORITY HAS CREATED QUESTIONS OF EXCEPTIONAL IMPORTANCE BY CURTAILING AND CAUSING CONFUSION REGARDING TITLE VII'S PROTECTIONS AGAINST SEX DISCRIMINATION.

Rehearing of this matter is necessary to resolve the inconsistencies between applicable sex discrimination decisions of the Supreme Court, past decisions of this Circuit concerning employer-imposed, sex-differentiated appearance codes for

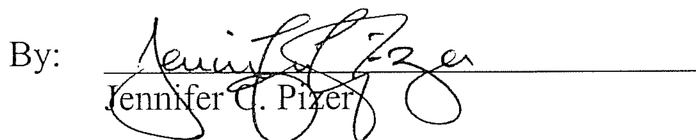
workers, and the panel majority's decision in this case. These inconsistencies present questions of exceptional importance that warrant consideration immediately because they are likely to generate confusion in the lower courts, and an increase in oppressive, sex-based workplace rules. In particular, the Court's apparent retreat from the pragmatic approach used in the airline cases over the years invites an increase in sex discrimination. These seeming changes in the law, if not reevaluated, promise frustration for employees and employers alike, as well as unwarranted barriers to enforcement of the protections guaranteed by Title VII.

V. CONCLUSION

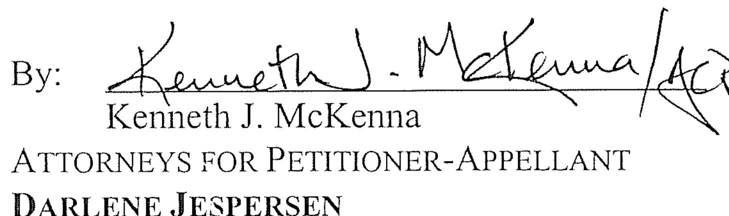
For the foregoing reasons, plaintiff-appellant Darlene Jespersen petitions for panel rehearing and rehearing en banc.

DATE: January 17, 2005 Respectfully submitted,

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

By: 
Jennifer C. Pizer

KENNETH JAMES MCKENNA, INC.

By: 
Kenneth J. McKenna
ATTORNEYS FOR PETITIONER-APPELLANT
DARLENE JESPERSEN

Form 11. **Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1**

Form Must be Signed by Attorney or Unrepresented Litigant and Attached to the Back of Each Copy of the Petition or Answer

(signature block below)

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

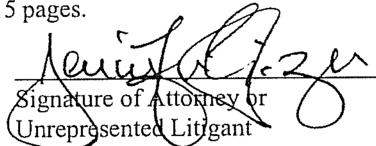
_✓_ Proportionately spaced, has a typeface of 14 points or more and contains _4125_ words (petitions and answers must not exceed 4,200 words).

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _______ words or ________ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.



Signature of Attorney or Unrepresented Litigant

(New Form 7/1/2000)