Case No. 03-15045

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARLENE JESPERSEN,

Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY, INC.,

Defendant-Appellee.

En banc rehearing
On appeal from the United States District Court for the District of Nevada

BRIEF OF *AMICI CURIAE* THE NATIONAL CENTER FOR LESBIAN RIGHTS AND THE TRANSGENDER LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

Shannon Minter (Cal. SBN 168907)
National Center for Lesbian Rights
870 Market St., Ste. 370
San Francisco, CA 94102
(415) 392-6257

Christopher Daley (Cal. SBN 219054)
Transgender Law Center
160 14th Street
San Francisco, CA 94103
(415) 865-0176

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STATEMENTS OF INTEREST

The National Center for Lesbian Rights (NCLR) is a national non-profit law firm with headquarters in San Francisco and regional offices in St. Petersburg, Florida and Washington, D.C. NCLR seeks legal protections for lesbian, gay, bisexual, and transgender people through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other social justice organizations and activists. Each year NCLR serves more than 4,500 clients in all fifty states.

The Transgender Law Center (TLC) is a civil rights organization based in San Francisco that advocates for transgender communities through direct legal services, public policy advocacy, and public education. TLC connects transgender people and their families to technically sound and culturally competent legal services, increases acceptance and enforcement of laws and policies that support transgender communities, and works to change laws and systems that fail to incorporate the needs and experiences of transgender people.

INTRODUCTION

The Transgender Law Center and the National Center for Lesbian Rights respectfully submit this brief as *amici curiae* in support of Appellant Darlene Jespersen. We write in support of Ms. Jespersen because the panel

decision created an exception to Title VII – permitting employers to discriminate on the basis of sex in dress and appearance requirements – that will harm many people who already face daunting levels of bias in the workplace.

This case involves the ability of employers to require workers to conform their appearance to outdated gender stereotypes that are completely irrelevant to work performance. The United States Supreme Court recognized that such requirements may constitute prohibited sex discrimination under Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989). The panel's decision turns the clock back to an era when employers could impose rigid, sex-based expectations in the workplace at will. Permitting employers to mandate stereotypical dress codes will be especially harmful for transgender people and others who already face discrimination because of their actual or perceived failure to conform to gender stereotypes. If Title VII is to retain its effectiveness and vitality in contemporary society, it must prohibit employers from imposing sex-based policies and rules that are unrelated to a person's ability to do the job. In this case, nothing about Darlene Jespersen's job required her to undergo a complete overhaul of her appearance to look more stereotypically feminine. *Amici* ask the Court to acknowledge that by requiring Ms. Jespersen to go to

great lengths (and expense) to present an ultra-feminine appearance simply because it preferred its female employees to conform to an exaggerated gender stereotype, Harrah's discriminated on the basis of sex.

ARGUMENT

I. Discrimination on the Basis of Sex Stereotypes Has Devastating Economic Consequences for Transgender People and Others Who Do Not Conform To Those Stereotypes.

Discriminatory dress and appearance requirements do not affect all people equally. For people whose appearance happens to correspond to stereotypical notions of femininity and masculinity, complying with such requirements may impose no significant hardships or barriers at all. For others, however, compliance may be impossible or so difficult that it amounts to an outright exclusion from a particular job. That is particularly likely to be true for transgender people[1] and others who already face pervasive workplace discrimination because they are seen as not fitting into stereotypical gender norms.

Transgender people are disproportionately likely to face discrimination at work. Studies show that transgender people frequently

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[1] A transgender person is an individual whose innate sense of being male or female differs from the sex they were born. *See* Stedman's Medical Dictionary 1865 (27th ed. 2000) (defining a transsexual person as "[a] person with the external genitalia and secondary sex characteristics of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex").

experience negative employment consequences because they have – or are perceived to have – characteristics that differ from stereotypical expectations about how men and women should behave and appear. The economic impact of this discrimination is severe.

In 1994, the San Francisco Human Rights Commission published a report summarizing its investigation into discrimination against transgender people.[2] Many of these individuals faced severe discrimination every day in almost every facet of their lives, including housing, medical care, government benefits and employment.[3] Of all those hardships, the Human Rights Commission's report found that employment discrimination was one of the most destructive. The Commission found that "the economic hardship imposed on some transgender (particularly male-to-female) persons due to discrimination in employment and in medical and insurance services frequently forces them to live in poverty or to turn to sex work to survive."[4] A more recent study by the Commission entitled *Economic Empowerment for the Lesbian Gay Bisexual Transgender Communities* found that employment discrimination against transgender people remains rampant;

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[2] *Investigation Into Discrimination Against Transgendered People*, San Francisco Human Rights Comm'n, LGBT & HIV Div. 9 (Sept. 1994), available at: http://www.ci.sf.ca.us/sfhumanrights.

[3] Transgender people also were highly likely to become victims of harassment and hate violence. *Id.*

[4] *Id.* at 43.

among some segments of the community the study found that the rate of unemployment was "an astronomical 70%."[5]

Our own research corroborates the Commission's findings. A joint investigation conducted by the Transgender Law Center and the National Center for Lesbian Rights in 2003 found that the problems documented by the San Francisco Human Rights Commission in 1992 still plague the city's transgender population.[6] The study found that nearly one of every two respondents had experienced gender-based employment discrimination and that the transgender population was significantly under-employed.[7] For example, 64% of our survey respondents made less than $25,000 a year, and a full 79% made less than $50,000.[8] As a result of employment problems, over 40% lacked health insurance and nearly 20% did not have stable housing.[9] Given these dire circumstances, it was not surprising that 67% of

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[5] *Economic Empowerment for the Lesbian Gay Bisexual Transgender Communities*, San Francisco Human Rights Comm'n, LGBT & HIV Div., (Nov. 2000), available at http://www.sfgov.org/site/uploadedfiles/sfhumanrights/docs/econ.htm.

[6] Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities* (2003) (a joint publication of the National Center for Lesbian Rights and the Transgender Law Center), available at http://www.transgenderlawcenter.org.

[7] *Id.* at sec. I-A, "Executive Summary."

[8] *Id.* at sec., II-A-4, "Employment."

[9] *Id.*

our respondents ranked employment discrimination as the issue that most concerned them.[10]

Many individuals who are not transgender are also vulnerable to workplace harassment and discrimination because they do not conform to gender stereotypes. In particular, as evidenced by some of this Court's recent opinions, including *Nichols v. Azteca Res. Enter., Inc.*, 256 F.3d 864, 874 - 75 (9th Cir. 2001) and *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), *cert. denied*, 538 U.S. 922 (2003), men who are seen as insufficiently "masculine"[11] and women who are perceived as violating gender stereotypes because they work in traditionally male jobs or because their appearance is considered insufficiently "feminine" are likely to face significant harassment and discrimination.[12]

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[10] *Id.* at "Appendix B: Data Summary – General."

[11] *See, e.g., Nichols v. Azteca Res. Enter., Inc.*, 256 F.3d at 874 -75 ("[T]he systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray 'like a woman'--i.e., for having feminine mannerisms"); *Rene*, 305 F.3d at 1068 (Pregerson, J., concurring) ("Rene testified in his deposition that his co-workers teased him about the way he walked and whistled at him '[l]ike a man does to a woman.' Rene also testified that his co-workers would 'caress my butt, caress my shoulders' and blow kisses at him 'the way ... a man would treat a woman,' hugged him from behind 'like a man hugs a woman,' and would 'touch my body like they would to a woman, touch my face.' Rene further testified that his co-workers called him 'sweetheart' and 'muñeca' ('doll'), 'a word that Spanish men will say to Spanish women.'").

[12] *See, e.g.*, Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational*

While this Court has held that harassment based on a person's actual or perceived failure to conform to gender stereotypes violates Title VII, the panel's decision effectively holds that employers may discriminate on the basis of those same stereotypes in setting workplace dress and appearance requirements. In addition to creating an unprincipled exception to Title VII, the panel's decision will have a particularly destructive impact on transgender people and others who do not and in many cases can not conform to sex stereotypes. Title VII is a remedial statute and is to be construed liberally to achieve it purpose. "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.'" *Price Waterhouse*, 490 U.S. at 251 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). It should not be construed narrowly to create a safe harbor for discriminatory dress codes or to exclude those who most need its protections.

Segregation and Economic Analysis of Law, 27 Harv. Women's L.J. 1, 31-35 (2004) ("The fewer women in workplace, the more likely it is that the work environment will be hostile to women."); Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749, 1815-39, 1834 (1990) ("Harassment is . . . driving the small number of women in nontraditional jobs away.").

II. Title VII Jurisprudence Prohibits Workplace Discrimination on the Basis of Sex Stereotypes.

In the wake of *Price Waterhouse*, courts across the country have recognized that employers who enforce sex stereotypes, and who condition employment on compliance with such stereotypes, violate Title VII. *See Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) ("Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination" under Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (Title VII protects individuals who fail "'to act like a woman' – that is, to conform to socially-constructed gender expectations"); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (discrimination due to "failure to adhere to sex stereotypes" constitutes "a sexual stereotyping claim permissible under Title VII"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity"); *Doe v. Belleville*, 119 F.3d 563, 580 (7th Cir. 1997),

vacated and remanded on other grounds, 523 U.S. 1001 (1998) ("Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles"); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (holding that Title VII prohibits discrimination based on a perception that a person does not conform with ideas "about what 'real' men should look or act like").

These and other similar decisions reflect a growing judicial recognition that discrimination on the basis of sex stereotypes implicates a fundamental aspect of human dignity and selfhood. This is perhaps most clearly apparent in cases involving transgender people. Numerous studies have shown that a person's core psychological identity as male or female is innate and cannot be changed through therapy or any other form of treatment.[13] Rather, it is a deep-seated, fundamental aspect of a person's identity.

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[13] *See, e.g., Kosilek v. Maloney*, 221 F. Supp. 2d 156, 163 (D. Mass. 2002) ("The consensus of medical professionals is that transsexualism is biological and innate."); *Doe v. McConn*, 489 F. Supp. 76, 78 (S.D. Tex. 1980) ("Most, if not all, specialists in gender identity are agreed that the transsexual condition establishes itself very early, before the child is capable of elective choice in the matter, probably in the first two years of life; some say even earlier, before birth during the fetal period."); *In re Heilig*, 816 A.2d 68, 78 (Md. Ct. App. 2003) ("Because transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in 'curing' the patient.").

In recognition of that fact, courts increasingly have held that sex discrimination statutes must be construed broadly to protect transgender people. For example, in *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super., 2000), the court held that a Massachusetts statute prohibiting sex discrimination in public schools prevented a school from requiring a transgender student to suppress her female gender identity. The court recognized that "[the] plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being." *Id.* at *3. The court further held that the plaintiff:

> is not merely engaging in rebellious acts to demonstrate a willingness to violate community norms; plaintiff is expressing her personal identity, which cannot be suppressed by the school merely because it departs from community standards....This court cannot allow *the stifling of plaintiff's selfhood* merely because it causes some members of the community discomfort....Defendants are essentially prohibiting the plaintiff from expressing her gender identity and, thus, *her quintessence.*

Id. at *6-7 (emphasis added). *See also Smith*, 378 F.3d at 22-23 (holding that discrimination against transsexual employee constituted impermissible sex discrimination); *Schwenk*, 204 F.3d at 1201-02 (noting that Title VII prohibits "discrimination because one fails to act in the way expected of a man or a woman"); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reinstating claim on behalf of transgender plaintiff who was denied an opportunity to apply for a loan due to not being dressed in

sufficiently "masculine attire"); *Enriquez v. West Jersey Health Systems*, 777 A.2d 365 (N.J. Super. Ct. 2001) (holding that discrimination against transsexual employee constituted impermissible sex discrimination); *See, e.g., Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (holding that transgender foster youth was protected from discrimination on the basis of sex under New York Human Rights Law); *Lie v. Sky Publ'g Corp.*, 15 Mass. L. Rptr. 412 (Mass. Super. 2002) (holding that transsexual plaintiff had established a prima facie case of discrimination based on sex under state law prohibiting employment discrimination).

Just as a person's core gender identity as male or female is innate, a person's relative degree of masculinity or femininity is also deep-seated and generally impervious to manipulation or change.[14] While individuals can alter the way they dress and can change their appearance to some degree through the use of make-up and other accessories, there is a core aspect of gender identity and gender expression that is deeply rooted and that cannot be changed. *See, e.g., Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000) (noting that plaintiff, a gay man with a feminine appearance and demeanor, was not able to alter his feminine characteristics even when he

[14] Suzanne J. Kessler & Wendy McKenna, *Gender: An Ethnomethodological Approach* 8-11 (1978); John Money, *Gender Role, Gender Identity, Core Gender Identity: Usage and Definition of Terms*, 1 Journal of the American Academy of Psychoanalysis 397-403 (1973).

underwent aversion therapy to try to make him more stereotypically masculine).

In short, workplace rules affecting a person's core gender identity and outward expression of masculinity or femininity are not trivial, but rather touch on profound and fundamental aspects of the self. For an employer to require a person to adopt a gendered appearance that conflicts with the person's core identity is intrusive and humiliating and may seriously impair a person's well-being and ability to function. For example, in her deposition, Darlene Jespersen testified that being forced to adopt a more stereotypically feminine appearance to comply with her employer's new dress code requirements made her feel so awkward, "exposed," and humiliated that it impeded her ability to perform her job effectively. Some may dismiss such requirements as trivial. In truth, however, being required to conform one's appearance to an exaggerated gender stereotype – especially where doing so is deeply contrary to one's own innate identity and sense of self – is a serious, invasive, and demeaning experience and may be as debilitating to an individual as being subjected to sexual or gender-based harassment.[15]

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[15] *See, e.g.*, Daphne Scholinski, *The Last Time I Wore Dress* (1998) (describing author's severe psychological trauma at being pressured to present a more stereotypically feminine appearance and demeanor).

The precise contours of an employer's ability to impose permissible gender-based dress codes may be hard to draw and may depend in part upon the type of workplace and other contextual factors, just as is true for determining when workplace conduct crosses the line into unlawful harassment. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) ("In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."). Surely, however, Title VII should not permit an employer to require workers to adopt an extreme, burdensome stereotypical appearance when doing so is gratuitous and has no bearing on the employee's ability to perform the job.[16] Moreover, it is important to ensure that this protection is not available only to employees in corporate or professional settings, but extends equally to those in blue (and pink) collar settings.

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[16] In prior cases, this Court has held that employers are entitled to try to demonstrate that imposing different dress and personal appearance requirements for men and women is a bona fide occupational qualification (BFOQ) and is not simply based on impermissible stereotypes or customer preference. *See, e.g., Frank v. United Airlines, Inc.*, 216 F.3d 845, 854-55 (9th Cir. 2000) (holding that dress code requirements that discriminate on the basis of sex must meet the standard for a BFOQ). In this case, if Harrah's wishes to argue that its requirements meet the criteria for a BFOQ, that is an issue for the trial court on remand.

CONCLUSION

In this day and age, an employer should not be permitted to condition employment on a person's adherence to a highly stereotyped notion of how a woman should appear. In the years since it was decided, the *Price Waterhouse* decision has provided critical protection to employees who perform well at their jobs but are vulnerable to discrimination because others object to their non-stereotypical appearance, demeanor, or characteristics. Given our experience providing assistance to hundreds of such individuals every year, we urge the Court to reverse the panel's holding that *Price Waterhouse* does not apply to an employer's personal appearance requirements as long as they are formalized into a company policy, rather than being left unwritten. To paraphrase the Court in *Price Waterhouse*, it takes no special training to discern unlawful sex stereotyping in a rule that requires a female bartender to wear make-up and curls to be her "personal best," or forfeit her job. Nor does it require any specialized knowledge to know that if an employee's performance can be enhanced requiring that "face powder, blush and mascara . . . must be worn and applied in complimentary colors," as Harrah's policy required, perhaps it is the

employee's sex and not her performance that is at issue.[17] Amici ask this Court to reverse the panel's decision and to reaffirm the basic principle that, under Title VII, an employer can not condition employment on adherence to sex stereotypes.

DATE: 6/7/05

Respectfully submitted,

The National Center for Lesbian Rights

Shannon Minter, Esq.
870 Market Street, Ste. 370
San Francisco, CA 94102
(415) 392-6257

The Transgender Law Center
Christopher Daley, Esq.
160 14th Street
San Francisco, CA 94103
(415) 865-0176

Attorneys for Amici

[17] *Price Waterhouse*, 490 U.S. at 256 ("It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' Nor, . . . does it require expertise in psychology to know 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.").

CERTIFICATE OF COMPLIANCE

The accompanying amicus brief complies with the specifications of Rule 32(a)(7)(B) as follows:

1. The word count of the Brief is 3,380 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 7th day June, 2005 at San Francisco, California.

Shannon Minter

PROOF OF SERVICE BY U.S. MAIL

I declare that I am a resident of the County of San Francisco California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of San Francisco, California; and that my business address is 870 Market St., Ste. 370, San Francisco, CA 94102.

On June 8, 2005, I served a copy of the attached documents, described as **MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE***, by U.S. Mail, on the parties of record by placing true and correct copies thereof in sealed envelopes, with first-class postage thereon fully prepaid, addressed to:

Patrick Hicks, Esq. Veronica Arechederra Hall, Esq. Littler Mendelson 3960 Howard Hughes Parkway, Suite 300 Las Vegas, Nevada 89109 ***Attorneys for Appellee***	Allen Lichtenstein, Esq. American Civil Liberties Union of Nevada 3315 Russell Road, No. 222 Las Vegas, Nevada 89120 ***Attorney for Amici Curiae***	James O. Abrams 414 29th Street P.O. Box 160405 Sacramento, California 95816 ***Attorney for Amici Curiae***
Andrew Dwyer, Esq. Dwyer & Dunnigan, L.L.C 17 Academy Street, Suite 1010 Newark, New Jersey 07102 ***Attorney for Amici Curiae***	Kathleen Phair Barnard, Esq. Schwerin Campbell Barnard 3161 Elliot Ave., Suite 101 Seattle, Washington 98118 ***Attorney for Amici Curiae***	Vicky Barker, Esq. California Women's Law Center 3460 Wilshire Boulevard Suite 1102 Los Angeles, CA 90010 ***Attorney for Amici Curiae***
Jeffrey Erdman, Esq. Bennett & Erdman 5670 Wilshire Boulevard Suite 1400 Los Angeles, CA 90036 ***Attorney for Amici Curiae***	Joseph E. Schuler, Esq. Mark A. De Bernardo, Esq. Katherine E. Bierma, Esq. Littler Mendelson, P.C. 1225 I Street, N.W. Suite 100 Washington, D.C. 20005 ***Attorneys for Amici Curiae***	
David Cruz, Esq. University of Southern California Law School 699 Exposition Boulevard Los Angeles, CA 90089 ***Attorney for Amici Curiae***	Banks Brown, Esq. McDermott, Will & Emery 50 Rockefeller Plaza New York, New York 10020 ***Attorney for Amici Curiae***	

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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 8, 2005