No. 03-15045

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARLENE JESPERSEN,

Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY, INC.

Defendant-Appellee.

On appeal from the United States District Court
for the District of Nevada
Case No. CV-N-01-0401-ECR (VPC)
The Honorable Edward C. Reed, Jr., District Judge

BRIEF OF AMICUS CURIAE HAWAI'I CIVIL RIGHTS COMMISSION IN SUPPORT OF DARLENE JESPERSEN

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I. IDENTITY OF AMICUS CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The Hawai`i Civil Rights Commission ("HCRC") is an agency of the State of Hawai`i responsible for the enforcement of the state's civil rights laws, Haw. Rev. Stat. (hereinafter "HRS") § 368-3, including the employment discrimination law which prohibits discrimination because of sex. HRS §§ 378-1 to 10.

These laws implement the civil rights clause of the Hawai`i Constitution, Article I, Section 5, which provides, *inter alia*, that "no person ... shall be denied the enjoyment of the person's civil rights or be discriminated in the exercise thereof because of ... sex." Hawai`i also has an equal rights amendment which provides that "[e]quality of rights under the law shall not be denied or abridged by the State on account of sex." Haw. Const., Art. I, § 3. Accordingly, the HCRC has a strong mandate to oppose all forms of sex discrimination.

The HCRC is interested in this case because the majority opinion limits and undermines the scope of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Limiting *Price Waterhouse* may have a negative impact upon Hawai`i's civil rights laws because the Hawai`i Supreme Court has acknowledged that federal court interpretations of Title VII are "useful in construing Hawai`i employment discrimination law." *Furukawa v. Honolulu Zoological Society*, 936 P.2d 643, 649 (Haw. 1997). For these reasons, the HCRC wishes to present its views regarding the application of *Price Waterhouse* to the facts of this case.

The HCRC was authorized to file an amicus brief by a vote of the Commissioners of the HCRC at a duly held meeting on June 9, 2005.

II. SUMMARY OF ARGUMENT

A written company policy expressly requiring female bartenders to wear makeup but not requiring similar action by male bartenders is a facially discriminatory policy based upon sex. The belief that women must wear makeup reflects the employer's stereotypes about the proper attire and grooming of women and men. It has no relationship to efficiency or productivity in the workplace.

Price Waterhouse recognizes that employer standards embodying sexual or gender stereotypes constitute evidence of sex discrimination. If there was no written policy and Darlene Jespersen ("Jespersen") was terminated for not wearing makeup, she would have a claim for discrimination due to sexual stereotyping under *Price Waterhouse*. In this case, however, the employer's use of sexual stereotypes is embodied in a written, sex-differentiated appearance and grooming standards policy. Thus, under *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) the policy is facially discriminatory; and it must be justified by a bona fide occupational qualification ("BFOQ").

III. SEX STEREOTYPING IN THE WORKPLACE IS AN ONGOING, REAL PROBLEM FACED BY HAWAI`I'S WORKERS

Throughout Hawai`i's history, large numbers of women have participated in

its workforce. Before statehood in 1959, during the plantation era, women (particularly minority women) were compelled to work in order to supplement family incomes because of the low wages earned by minority men.[1] This is also true of post-statehood Hawai`i, where large numbers of women and minority workers participate in today's service economy,[2] which is driven by the State's heavy reliance upon the tourism industry. Due in part to the large numbers of women in Hawai`i's workforce, sex discrimination is largest category of complaints filed under Hawai`i's employment discrimination law. For example, in FY 2003, 28% of all employment discrimination complaints filed with the HCRC alleged sex discrimination.[3]

In one sex discrimination case involving five employees who were terminated for allegedly failing to comply with their employer's grooming policy,

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1 Edward Schultz, "Introduction: Working Together as a Community," in *Into the Marketplace: Working-Class Women in 20th Century Hawai`i* (Hawai`i Committee for the Humanities 1995).

2 Employment statistics for the year 2000 show that women comprise 55% of the workers in Hawai`i's service and sales industries. Minorities (defined as nonwhite) makeup 79.4% of the workforce in these sectors. State of Hawai`i, Department of Labor and Industrial Relations Research and Statistics Office, Affirmative Action Programs (May 2004), available at: http://www.hiwi.org/admin/uploadedPublications/1207_AAP03PUB.pdf (accessed June 1, 2005).

3 Hawai`i Civil Rights Commission, July 1, 2002 - June 30, 2003, Annual Report (2003), p. 16.

the HCRC issued a declaratory ruling utilizing the sexual stereotyping analysis in *Price Waterhouse* and concluded that sexual stereotyping reflected in an employer's grooming code could constitute sex discrimination under Hawai`i's employment discrimination law. *In re HCRC No. 9951; EEOC No. 37B-A0-0061*, Final Decision and Order Granting Petition for Declaratory Relief, D.R. No. 02-0015, at 8-9 (Haw. Civ. Rts. Comm'n June 28, 2002), *vacated on procedural grounds*, *RGIS Inventory Specialist v. Hawai`i Civil Rights Comm'n*, 86 P.3d 449 (Haw. 2004).

Hawai`i's employment discrimination law is grounded in the principle that individuals should be considered on the basis of their individual capacities, not upon any stereotypical notions attributable to a particular group. The sole test upon which to base employment decisions is an applicant's or employee's qualification for the job, not their sex or any other protected basis covered under Chapter 378, HRS.[4]

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[4] This bill does not give minority group members any special privileges in obtaining employment, but afford all persons equal opportunities in employment regardless of ...sex ..., with the qualifications of the applicants being the sole test in selecting employees.

Stand. Comm. Rep. 573, 1963 Haw. Senate Journal at 866.

IV. THE MAJORITY OPINION ERRONEOUSLY LIMITS THE SCOPE OF THE SUPREME COURT'S DECISIONS CONCERNING SEX AND GENDER STEREOTYPING

The purpose of any Title VII proof scheme is to provide a framework for the analysis of evidence in order to determine whether discrimination has occurred. The majority opinion in the instant case, *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir. 2004), *rehearing en banc granted*, 2005 WL 1189658 (9th Cir., May 15, 2005), which excludes appearance and grooming standards from scrutiny for gender and sex stereotyping, is contrary to *Price Waterhouse* and Title VII's goal of eliminating the entire spectrum of sex discrimination in employment. *Price Waterhouse*, 490 U.S. at 251. When an employer's grooming standards require that only women employees conform to stereotypical expectations about their appearance, *Price Waterhouse* requires a conclusion that the employer has discriminated on the basis of sex.[5]

In *Price Waterhouse* the decision-makers relied upon Ann Hopkins' failure to "dress more femininely, wear make-up, have her hair styled, and wear jewelry," 490 U.S. at 235, which are, in effect, appearance and grooming standards. Virtually the same grooming standards are at issue here. In this case, not only does

[5] The Civil Rights Act of 1991 adopted *Price Waterhouse's* plurality reasoning that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors motivated the practice." 42 U.S.C. § 2000e-2(m).

the employer's policy directly discriminate on the basis of sex (by requiring particular grooming standards only for female workers), but it is also based upon stereotypical expectations regarding the decorative role of its female employees.

Price Waterhouse is but one in a long line of Supreme Court cases recognizing that gender or sexual stereotyping can be used as proof of sex discrimination. *See, Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (recognizing that states had used gender stereotypes in providing leave benefits); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 & 136-37 (1994) (rejecting use of peremptory challenges based on gender stereotypes); *Johnson Controls, supra*, (company's policy barring women with childbearing capacity from certain jobs constituted sex discrimination); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978) (use of sex stereotypes as basis to require women to make larger pension contributions--*viz.*, the assumption that women live longer than men--constituted sex discrimination); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (company policy excluding women with pre-school children constitutes sex discrimination). Collectively, these cases demonstrate that the Supreme Court continues to view gender or sexual stereotyping as a form of sex discrimination regardless of the context in which it arises.

Despite the Supreme Court's expansive application of sexual stereotyping

analysis, the *Jespersen* majority's opinion carves an exception out of thin air:

> In short, although we have applied the reasoning of *Price Waterhouse* to sexual harassment cases, we have not done so in the context of appearance and grooming standards cases, and we decline to do so here.

Jespersen. 392 F.3d at 1083. The majority's limitation of *Price Waterhouse* to only sexual harassment cases is erroneous because it ignores the similar concerns motivated the employers in both cases; and it allows Harrah's Operating Co. Inc. ("Harrah's") to treat all women "as simply components of a racial, religious, sexual, or national class." *Manhart*, 435 U.S. at 708.[6]

By rejecting application of *Price Waterhouse*, the majority opinion imperils a comprehensive web of developed case law protecting all employees from sex

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6 In *Manhart*, the Court relied in part upon the phrase "any individual" in Title VII as the basis for striking the use of sex stereotypes.

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. *It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.* If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

435 U.S. at 708 (emphasis added).

discrimination. Had there been no written policy and Jespersen lost her job for not wearing makeup, she would have a claim under *Price Waterhouse* for sexual stereotyping. It would be contrary to the legal principles of *Price Waterhouse* and *Johnson Controls* for the law to hold that discrimination exists where mere statements reflecting a decision-maker's thought-processes are affected by sex stereotypes, but then conclude there is no discrimination where those same stereotypes are explicitly written into an employer's grooming policy. Accordingly, the majority's limitation of the scope of *Price Waterhouse* must be reversed.

V. HARRAH'S POLICY IS A FACIALLY DISCRIMINATORY POLICY AND CONSTITUTES DIRECT EVIDENCE OF SEX DISCRIMINATION

Harrah's sex-differentiated policy is no different from the one in *Johnson Controls*, where the company had a written policy which allowed men to perform certain jobs but excluded similarly-situated women "who are pregnant or who are capable of bearing children[.]" 499 U.S. at 192. In the instant appeal, Harrah's policy creates a facial classification based on sex that requires only female employees to wear makeup. When Jespersen did not wear makeup she was terminated. A male bartender would not be fired for that reason. Because Harrah's policy is facially discriminatory (like the policy in *Johnson Controls*), it is

forbidden under Title VII unless Harrah's can establish that "sex is a bona fide occupational qualification." *Id.* at 200.

VI. GROOMING STANDARDS BASED ON SEX STEREOTYPES SHOULD NOT BE EVALUATED UNDER THE UNEQUAL BURDENS TEST BECAUSE IT IS CONTRARY TO *JOHNSON CONTROLS*

In *Johnson Controls*, the Supreme Court has recognized the limited scope of the BFOQ defense.

> The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits the situations in which discrimination is permissible to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each one of these terms--certain, normal, particular--prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.

499 U.S. at 201. Thus, the "unequal burdens test" must at a minimum be measured against the BFOQ standard and based upon job-related skills and aptitudes.

The "unequal burdens" test cannot be used as a proxy for the BFOQ defense in grooming standard cases. The test does not consider whether the grooming standard reflects "job-related skills and aptitudes." Jespersen's glowing performance reports, despite her not wearing makeup, demonstrate that Harrah's

grooming standards did not concern "job-related skills and aptitudes."[7] Although Harrah's should be allowed to establish a BFOQ on remand, it is unlikely to do so.

Continued adherence to the "unequal burdens" test would have a particularly devastating impact on workforces like Hawai`i's, which are comprised of largely low-paying, service sector positions.[8] As noted by the dissent,

> The distinction created by the majority opinion *leaves men and women in service industries*, who are more likely to be subject to policies like Harrah's ..., *without the protection that white-collar professionals receive.*
>
> Title VII does not make exceptions for particular industries, nor should we write them in. Pervasive discrimination often persists within an industry with exceptional tenancy, and the force of law is sometimes required to overcome it.

Jespersen, 392 F.3d at 1085 (Thomas, J., dissenting) (emphasis added and citation omitted).

As applied by the majority, the "unequal burdens" test could result in women in service positions being forced to conform to every imaginable variation of demeaning stereotype, through grooming codes requiring overly feminine or overly sexualized presentations. Every woman working in a service position may henceforth be required, under threat of termination, to wear full face makeup.

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[7] Another reason to reject the test is that it hides the subordinating stereotypes that underpin Harrah's grooming standards. *Cf.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (repudiating the doctrine of "equal discrimination" or "equal application" under the Fourteenth Amendment to the U.S. Constitution).

[8] *See* footnote 2, *supra*.

Allowing employers to require compliance with such grooming codes is clearly degrading to working women, because it permits female employees to be judged not by the quality of their work but by their appearance.[9]

VII. CONCLUSION

Amicus Curiae Hawai`i Civil Rights Commission urges this Court to reject application of the "unequal burdens" test and, instead, apply settled Supreme Court precedent to hold that enforcement of grooming standards based on gender or sexual stereotyping constitutes sex discrimination. Accordingly, the district court's grant of summary judgment should be reversed.

Dated: June 9, 2005.

Respectfully submitted,

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[9] This outcome will be further exaggerated by the fact that low-wage, service workers generally lack the financial resources to oppose or challenge an employer's imposition of such stereotypes in the workplace.

PROOF OF SERVICE BY U.S. MAIL

I, JOHN ISHIHARA, declare:

That I am a resident of the City and County of Honolulu, Hawai`i, that I am over eighteen (18) years of age and not a party to this action; that I am employed in the City and County of Honolulu, Hawai`i and that my business address is 830 Punchbowl Street, Room 411, Honolulu, Hawai`i 96813.

On June 9, 2005, I served a copy of the attached documents, described as **BRIEF OF HAWAI`I CIVIL RIGHTS COMMISSION AS AMICUS 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 as follows:

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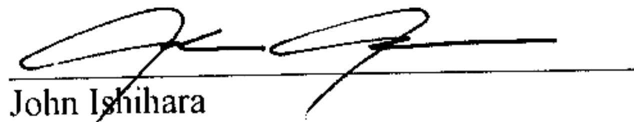
I declare under penalty of perjury under the laws of the State of Hawai`i that the foregoing is true and correct.

Dated: June 9, 2005



John Ishihara

CERTIFICATE OF COMPLIANCE

The accompanying Brief of *Amicus Curiae* Hawai`i Civil Rights Commission complies with the specifications of Rule 32 of the 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 2428 words, excluding the cover, tables and certificates of counsel, based on the count of the word processing system used to prepare the Brief.

I certify that the foregoing is true and correct.

Dated June 9, 2005, at Honolulu, Hawai`i.

JOHN ISHIHARA