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Jespersen v. Harrah's Operating Co.: Employer Appearance Standards and the Promotion of Gender Stereotypes

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I. INTRODUCTION

In *Jespersen v. Harrah's Operating Co.*, Harrah's Casino (Harrah's) gave Darlene Jespersen (Jespersen), a female employee, thirty days to comply with the new mandatory makeup requirement the business imposed on its female beverage service employees.[1] Jespersen refused, thirty days passed, and Harrah's immediately terminated her.[2] After unsuccessfully seeking administrative relief with the Equal Employment Opportunity Commission (EEOC),[3] Jespersen filed a lawsuit against Harrah's in federal district court.[4] The claim alleged "disparate treatment sex discrimination"[5] by Harrah's in violation of Title VII.[6] Subsequently, Harrah's moved for summary judgment, and the district court granted the motion.[7] The court found that Harrah's employee appearance standards for beverage service employees imposed equal burdens on both its male and female employees.[8] Moreover, the court found that Jespersen was not discriminated against based on any "immutable characteristic" of her sex.[9] Consequently, Jespersen filed a timely appeal to the United States Court of Appeals for the Ninth Circuit.[10] A divided panel of judges upheld the decision of the district court, finding that Jespersen failed to raise any genuine issue of material fact as to whether Harrah's policy violates the umbrella of Title VII protections.[11]

The appeal provided the Ninth Circuit with an opportunity to find Harrah's actions unlawful through the company's imposition of a costly and demeaning makeup policy on its female service employees. Moreover, the appeal provided the Ninth Circuit with a critical opportunity to adopt the progressive decision of the United States Supreme Court in *Price Waterhouse v. Hopkins*.[12] This groundbreaking case held that

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1. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1078 (9th Cir. 2004).
2. *Id.*
3. *Id.* The Equal Employment Opportunity Commission was created by the Civil Rights Act of 1964. 42 U.S.C. § 2000e-4 (2000).

> Under the procedural structures created by the 1972 amendments to the Civil Rights Act of 1964, the EEOC did not function as a vehicle for conducting litigation on behalf of private parties, but was charged with investigating employment discrimination claims and settling them by informal conciliation if possible, and the EEOC was required to refrain from suing until it had discharged its administrative responsibilities.

Ann K. Wooster, Annotation, *Title VII Sex Discrimination in Employment—Supreme Court Cases*, 170 A.L.R. Fed. 219, 249 (2001).

4. Jespersen v. Harrah's Operating Co., 392 F.3d at 1078.
5. *Id.*
6. 42 U.S.C. § 2000e-2(a) (2000).
7. Jespersen v. Harrah's Operating Co., 392 F.3d at 1078-79.
8. *Id.* at 1079.
9. *Id.*
10. *Id.*
11. *Id.* at 1083.
12. 490 U.S. 228 (1989).

an employee could institute a Title VII action against her employer if she could prove she was discriminated against in the form of sexual stereotyping.[13] Although the Ninth Circuit had previously applied *Price Waterhouse* in the context of sexual harassment cases, it refused to extend the case's application to the context of an employer's appearance standards for employees. Overall, the Ninth Circuit, citing to its past decisions, decided the *Jespersen* case in a fashion that requires an employee who has been adversely affected by an employer's appearance standard to produce tangible evidence of an undue burden on her gender. Furthermore, this economic-centered approach frowns upon the use of sex stereotypes to prove a violation of Title VII. The question now becomes: Did the panel of judges on the Ninth Circuit decide this case correctly and produce an appropriate precedent for subsequent similar cases?

This Note considers whether courts should be more liberal in their application of Title VII in the context of employer standards that require employees to conform to a certain mode of appearance on the job, especially when the appearance is rooted in gender stereotypes. Reviewing the sparse history of Title VII's gender provisions and the development of Title VII jurisprudence, this Note examines how courts have created the roadmap for how to apply the very broad and sweeping statute when it comes to employer appearance standards. This Note also considers that the Ninth Circuit has been particularly active in the jurisprudence regarding employer appearance standards, adhering to an unequal burden analysis in reviewing these standards. This Note concludes that the Ninth Circuit's decision in *Jespersen* was based on an outdated unequal burden test that fails to adequately consider the full ramifications of policies like Harrah's. Employer appearance policies based on gender stereotypes, such as one that presumes women should wear makeup, should be evaluated under a more modern policy that recognizes the inherent discrimination in the stereotypes and addresses them directly. As a result of the *Jespersen* case, however, the law in the Ninth Circuit remains in a stagnant position.

II. DEVELOPMENT OF TITLE VII CASE LAW

A. Title VII

Title VII, part of the Civil Rights Act of 1964, is a broad provision that prohibits employers from discriminating against an individual on the basis of her "race, color, religion, sex, or national origin."[14] Historical analysis reveals that Congress primarily

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13. *Id*. at 244.

14. 42 U.S.C. § 2000e-2(a) (2000). The text of this provision provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

created the Act to curb discrimination resulting from racism in America.[15] Moreover, it has been suggested that opponents of the Civil Rights Act added the amendment protecting against sex discrimination in an effort to prevent the statute's passage.[16] Because of its tenuous passage, Title VII leaves little legislative history to aid in its interpretation.[17] As a result, courts have been left to define the scope of protection the statute affords.

Title VII has led to significant improvements for women in the American workplace. For instance, in *Dothard v. Rawlinson*,[18] the United States Supreme Court invalidated, under Title VII, an Alabama correctional facility's imposition of mandatory height and weight requirements for its prison guards that resulted in the disqualification of substantially more female applicants than male applicants.[19] More generally, *Dothard* called into question the use of facially neutral standards by employers to discriminate against females. Furthermore, Title VII has led to protection for women during pregnancy; Title VII has been amended in the Pregnancy Discrimination Act to clarify that pregnancy-based workplace discrimination is also not tolerated under the scope of the statute.[20] The United States Supreme Court applied this amendment in *International Union v. Johnson Controls, Inc.*, holding that it was

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15. James O. Castagnera & Edward S. Mazurek, *Sex Discrimination Based Upon Sexual Stereotyping,* 53 AM. JUR. TRIALS 299, § 1 (2005) [hereinafter *Sex Discrimination*].

16. S. Ashby Williams, Comment, *Long Overdue: The Actionability Of Same-Sex Sexual Harassment Claims Under Title VII*, 35 HOUS. L. REV. 895, 898 (1998). Williams refers to an article written by Francis J. Vaas, stating that the amendment was added by Congressman Smith "in a spirit of satire and ironic cajolery." *Id.* at 898 n.18 (citing Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441 (1966)). Despite the opposition to incorporating gender into the provisions of Title VII, Congress had previously passed progressive legislation for the prevention of gender discrimination. One year prior to the passage of Title VII, "[t]he Congress entered the arena [of women's rights] by amending the Fair Labor Standards Act with the passage of the Equal Pay Act of 1963, which was designed to provide equal pay for equal work and to protect against discrimination on the basis of gender." WILLIAM F. PEPPER & FLORYNCE R. KENNEDY, SEX DISCRIMINATION IN EMPLOYMENT: AN ANALYSIS AND GUIDE FOR PRACTITIONER AND STUDENT 17 (1981) (citations omitted).

17. Williams*, supra* note 16, at 898-99. As a result of its quick passage, Title VII certainly continues to evolve in its enforcement and effect:

> The addition of gender as a forbidden basis of discrimination was offered as a floor amendment to Title VII in the House, *without any prior legislative hearings or debate*, by a southern Congressman who was opposed to the entire Act, who eventually voted against it and whose strategy was apparently to provide another area of opposition so that it would not pass at all. Consequently, the passage of the amendment and its enactment into law occurred without even a minimum of investigation or discussion. The implications of this legislation are only beginning to fully emerge in the American consciousness.

PEPPER & KENNEDY, *supra* note 16, at 18 (emphasis added) (citations omitted).

18. 433 U.S. 321 (1977).

19. *Id.* at 337.

20. 42 U.S.C. § 2000e(k) (2000). The new language reads:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

Id.

discriminatory for an employer to bar women who were able to bear children from jobs which would entail possible exposure to lead.[21] Protection from sexual harassment also finds its roots in Title VII, as the United States Supreme Court has recognized a cause of action under Title VII for quid pro quo and hostile environment sexual harassment, although these words do not appear in Title VII itself.[22] Finally, the Court has recognized that it is sex discrimination for an employer to refuse to promote an employee on the basis of sexual stereotyping.[23] Though far from exhaustive (considering that federal district and circuit courts have also passed voluminous Title VII decisions), the above examples demonstrate the incremental steps towards equality that women have been awarded under Title VII.

In a Title VII case, a plaintiff can utilize the "because of sex" language of the statute to argue that but for her sex, she would have been treated differently by her employer or potential employer.[24] Disadvantageous terms of employment for different genders implicate the "disparate treatment" theory, while sexual harassment claims have also been considered under the "because of sex" language.[25] As previously mentioned,[26] however, Title VII has been applied to situations where an employer's policy did not overtly discriminate against women but the effect of the policy worked heavily against female workers.[27] It does not matter whether the employer intended to discriminate against females; rather, it is the result of the policy that is determinative.[28] This type of treatment has been referred to as "disparate impact" by the courts (as opposed to "disparate treatment" for overt discrimination). If an individual can establish the discriminatory outcome of an employer's policy, then the employer carries the burden of persuasion to demonstrate that its policy is one of business necessity.[29] Indeed, the Supreme Court recognized the disparate treatment and disparate impact theories in *International Brotherhood Of Teamsters v. United States*.[30]

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21. 499 U.S. 187 (1991).

22. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

23. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). *See infra* Part II.C.

24. International Union v. Johnson Controls, Inc., 499 U.S. at 200 (citing Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).

25. Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 72-73 (2000).

26. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

27. *See* Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1, 7 (1990).

28. *See*, *e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

29. *See* Joseph P. Loudon & Timothy D. Loudon, *Applying Disparate Impact to Title VII Comparable Worth Claims: An Incomparable Task*, 61 IND. L.J. 165, 168 (1985-86). The business necessity defense is a judicially created concept, and was established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

30. 431 U.S. 324, 335 n.15 (1997) (holding that a union's seniority system contained in the collective-bargaining agreements did not violate Title VII by promoting racial and ethnic discrimination).

When employers are accused of disparate treatment[31] sex discrimination, Title VII itself creates a statutory exception for the employers. This is called the bona fide occupational qualification (BFOQ) exception.[32] According to the BFOQ exception:

> [I]t shall not be unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[33]

Although the BFOQ exception is arguably applicable only to cases of overt discrimination by employers, "courts have tended to blur the bona fide occupational qualification exception and the business necessity doctrine and [apply] the two of them interchangeably."[34] In any case, employers use the exception to argue that the details of the job require certain qualifications, and that discrimination against one gender is absolutely necessary to enable adequate job performance. This is a strict test and "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex [or other protected category] exclusively."[35]

B. Employer Appearance Standards

Despite the progress encapsulated in the provisions of Title VII, the legislation "does not explicitly deal with the validity of employment appearance codes."[36] What Title VII does provide for employees, however, is that an employer may not "otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."[37] Yet, in many cases, employer appearance standards for employees have been found non-discriminatory.[38] In other cases, employer's discriminatory appearance standards have been exempted under the BFOQ exception.[39] With lack of United States Supreme Court authority on point, what has developed in lower federal courts is a rather nebulous area of law.

The Ninth Circuit has been particularly active in Title VII jurisprudence. For example, in 1974, in *Baker v. California Land Title Co.*, the circuit addressed a situation where a male employee had been fired for not obeying a company policy that

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31. The idea that the exception in Title VII is applicable to disparate treatment cases, rather than disparate income cases is articulated in Gregory G. Sarno, 33 AM. JUR. PROOF OF FACTS 2D *Employer's Discriminatory Appearance Code* 71, § 10 (2004) [hereinafter *Employer's Discriminatory Appearance Code*].

32. 42 U.S.C. § 2000e-2(e) (2000).

33. *Id.* Interestingly, there is no BFOQ for instances in which an employer discriminates on the basis of race, regardless of the needs of the job. *Id.*

34. *Employer's Discriminatory Appearance Code*, *supra* note 31, § 10.

35. Perry, *supra* note 27, at 30 (citing Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971)) (emphasis omitted).

36. *Employer's Discriminatory Appearance Code*, *supra* note 31, § 2.

37. 42 U.S.C. § 2000e-2(a)(1) (2000).

38. *See, e.g.*, Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974).

39. *See, e.g.,* Fagan v. Nat'l Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973); Healy v. Southwood Psychiatric Hosp., 78 F.3d 128 (3rd Cir. 1996).

prohibited long hair on male employees but allowed female employees to have long hair.[40] The court found that employer standards related to grooming and dress of employees were not within the scope of Title VII because the statute prohibits only discrimination based on "immutable characteristics" of an employee's sex i.e., "characteristics which the applicant, otherwise qualified, had no power to alter."[41] Incidentally, *Baker* is representative of federal appellate jurisprudence that has almost entirely upheld differing employer hair length regulations for male and female employees.[42]

Other federal courts in the 1970s adopted the "immutable characteristics" approach, particularly in the cases of *Jahns v. Missouri Pacific Railroad Co.*,[43] and *Fagan v. National Cash Register Co.*,[44] decided in Missouri and the District of Columbia, respectively. Thus, the general standard throughout the circuits was that grooming standards were legal as long as such standards were "reasonable" for the operation of the business. The standard developed because "[c]ourts reason that employees can change their hairstyle, clothing style, and other grooming habits—unlike their immutable characteristics, like race or sex—to conform to workplace standards, and that because the importance of these matters is negligible, employees have no reason not to do so."[45] Provided that an employee was able to conform to the measures of his or her employer, courts in the early 1970s were unlikely to question the policies or their rationales.

Since the Ninth Circuit set forth the "immutable characteristics" standard and the determination that employer appearance standards are outside the purview of Title VII,[46] other courts of appeals have modified this standard. For example, in the crucial case of *Carroll v. Talman Federal Savings & Loan Association of Chicago*,[47] the Seventh Circuit found that sex-differentiated appearance standards could indeed be reviewed under Title VII if the standards imposed an unequal burden on only one sex. In *Carroll*, the defendant-employer imposed a dress code on all of its employees;

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40. 507 F.2d at 896. *Baker v. California Land Title Co.* followed two very progressive California district court cases, *Donohue v. Shoe Corp. of America*, 337 F. Supp. 1357 (C.D. Cal. 1972), and *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661 (C.D. Cal. 1972). Both cases attacked hair-length provisions, similar to those in *Baker*, on the basis that they reinforced superficial sex stereotypes. These cases were perhaps ahead of their time, and the stereotype discussion from these cases would re-emerge later in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), discussed *infra*.

41. Baker v. California Land Title Co., 507 F.2d at 897.

42. *Employer's Discriminatory Appearance Code*, *supra* note 31, § 2 n.20 (collecting cases). *See* Barker v. Taft Broad. Co., 549 F.2d 400 (6th Cir. 1977); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Earwood v. Continental Se. Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975); Knott v. Missouri Pac. Ry. Co., 527 F.2d 1249 (8th Cir. 1975).

43. 391 F. Supp. 761 (D. Mo. 1975) (upholding grooming standards imposed on an employer's male employees, finding that the distinction between men and women in the policy was not based on immutable characteristics of the male sex, and thus not discriminatory on the basis of sex).

44. 481 F.2d 1115 (D.C. Cir. 1973) (finding that reasonable grooming requirements are necessary to an employer's success in a business environment, and that Title VII only prohibits discrimination on the basis of immutable sex characteristics).

45. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2557 (1994).

46. *See also* Fountain v. Safeway Stores Inc., 555 F.2d 753 (9th Cir. 1977) (holding that an employer dress code requiring men to wear a necktie to work did not constitute sex discrimination under Title VII).

47. 604 F.2d 1028 (7th Cir. 1979).

however, although male employees were only required to wear business-type suits of their own choosing, or "customary business attire," women were required to dress in a uniform.[48] Furthermore, the defendant included the cost of the uniform purchased for female employees as part of their income and required female employees to cover the cost of uniform maintenance and replacement.[49] In finding the uniform requirement unlawful, the *Carroll* court reasoned that: "Title VII does not require that uniforms be abolished but that defendant's similarly situated employees be treated in an equal manner."[50] Thus, the *Carroll* court indicated that while appearance standards are not always unlawful, they are also not *per se* valid—they must be similarly imposed on both sexes. The court noted that if the employer required men to wear uniforms or, likewise, women were required to wear "customary business attire," the standard would have been upheld.[51]

Applying *Carroll*, the Ninth Circuit adopted the unequal burden test, particularly in the context of examining controversial weight restrictions on flight attendants. In *Gerdom v. Continental Airlines, Inc.*[52] and *Frank v. United Airlines, Inc.*,[53] the Ninth Circuit invalidated two such weight restrictions as violative of Title VII. In *Gerdom*, Continental Airlines instituted a weight policy for its all-female flight attendants in the 1960s.[54] This policy, running until 1973, required flight attendants who exceeded a fixed weight to meet a weight loss schedule; if the attendant did not meet the schedule, she was suspended and then terminated.[55] The *Gerdom* court found this policy unlawful, adopting the reasoning of previous cases that impositions on employee dress and appearance standards must be "even-handedly applied to employees of both sexes."[56] More specifically, the *Gerdom* court noted that, like in *Carroll*, appearance rules imposed on only one sex violate Title VII.[57]

In 2000, the Ninth Circuit solidified the unequal burden analysis in *Frank*. The plaintiffs in *Frank* challenged, under Title VII, a United Airlines policy imposing maximum weight requirements on both male and female flight attendants.[58] Although maximum weight requirements applied to both genders employed by United, they were applied unequally. Men and women of the same age and height were not only

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48. "[T]he uniforms that females must wear consist of five basic items: a color-coordinated skirt or slacks and a choice of a jacket, tunic or vest." *Id.* at 1029.

49. *Id.* at 1030.

50. *Id.* at 1031.

51. *Id.*

52. 692 F.2d 602 (9th Cir. 1982).

53. 216 F.3d 845 (9th Cir. 2000).

54. Gerdom v. Cont'l Airlines, Inc., 692 F.2d at 604.

55. *Id.* After the decision of *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), the *Gerdom* court held that airlines could not classify "in-flight service personnel classifications based on gender." Continental began to hire male employees, and it altered its weight restrictions. Gerdom v. Cont'l Airlines, Inc., 692 F.2d at 604. The weight standards imposed prior to 1973, however, are the ones at issue in this case, as the plaintiff filed her complaint in 1972. *Id.* at 604.

56. Gerdom v. Cont'l Airlines, Inc., 692 F.2d at 605.

57. *Id.* at 606.

58. Frank v. United Airlines, Inc., 216 F.3d at 847-48. "The named plaintiffs attempted to lose weight by various means, including severely restricting their caloric intake, using diuretics, and purging. Ultimately, however, plaintiffs were each disciplined and/or terminated for failing to comply with United's maximum weight requirements." *Id.* at 848.

subjected to differing maximum weights under the imposed system, but the weight standard allowed men to reach a large body frame while the weight standard only allowed women to reach a medium body frame.[59] The court clearly stated that unequally burdensome appearance standards are facially discriminatory in nature.[60] Thus, such policies are only allowable to the extent justified by a BFOQ.[61] The court refused to determine whether separate weight standards for men and women, in and of themselves, violate Title VII, but opined that "[e]ven assuming that United may impose different weight standards on female and male flight attendants, United may not impose different *and more burdensome* weight standards without justifying those standards as BFOQs."[62]

In *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit found that the refusal to hire male flight attendants could not be justified on the basis that male customers preferred female flight attendants.[63] In other words, the customer preference was insufficient to rise to the level of a BFOQ.[64] The Ninth Circuit similarly found that an employer did not have a BFOQ defense when customers preferred male employees, even if significant economic damage resulted to the employer.[65] As such, employers have been largely unsuccessful in asserting a BFOQ claim when their company appearance policies are facially discriminatory. A BFOQ must relate to an employee's ability to do her job, not the success of the business as determined by customer preferences.

C. Sex Stereotyping and Price Waterhouse

As with employer appearance codes, the use of stereotypes in employer practices is not explicitly prohibited by Title VII. Several cases, however, have found Title VII violations where employers engaged in sexual stereotyping. In *Sprogis v. United Air Lines, Inc.*,[66] the Seventh Circuit declared that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[67] The Seventh Circuit has also gone so far as to say that "stereotypical assumptions . . . [are] anathema to the maturing state of Title VII analysis."[68] The Seventh Circuit, in *Carroll*, recognized that employer appearance codes justified by "offensive stereotypes [are] prohibited by Title VII."[69]

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59. *Id.*

60. *Id.* at 854.

61. *Id*.

62. *Id.* at 855.

63. 442 F.2d at 389.

64. See *infra* Part II.C for discussion of the strict standard an employer must meet in establishing that an employee appearance code constitutes a BFOQ.

65. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981).

66. 444 F.2d 1194 (7th Cir. 1971).

67. *Id.* at 1198.

68. *In re* Consol. Pretrial Proceedings in the Airlines Cases, 582 F.2d 1142, 1146 (7th Cir. 1978) (finding a violation of Title VII where airline employers terminated flight attendants who became mothers either by childbirth or by adoption, unless those employees would accept alternative positions on the ground). This provision did not apply to male flight attendants, who could remain in their positions even after becoming parents.

69. 604 F.2d at 1033.

In 1989, the United States Supreme Court decided *Price Waterhouse v. Hopkins*.[70] In this landmark Title VII case, a majority of Justices condemned the use of sex stereotypes by employers in their hiring and employing decisions.[71] In *Price Waterhouse*, Ann Hopkins worked as a senior manager in the Office of Government Services in Washington, D.C.[72] In 1982, her fifth year with the company, she was one of eighty-eight people nominated for partnership.[73] Hopkins was also the only woman in the nominated pool.[74] In the outcome, Hopkins was one of twenty nominated people who were neither advanced to partnership nor denied partnership; rather, the partnership consideration for each was postponed for reconsideration until the next year.[75] In peer reviews submitted as part of her partnership consideration,[76] though some employees described Hopkins as an outstanding professional, other employees described Hopkins in a more harsh manner.[77] For instance, one partner recommended that Hopkins take "a course at charm school," and another partner thought that she was too "macho."[78] Indeed, the Price Waterhouse employee who described the holding decision to Hopkins explained that her chances for partnership might increase if she would "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[79]

Although the Court granted certiorari to determine the nature of the parties' burdens of proof,[80] the Justices also addressed the role sex stereotyping played in this case. Justice Brennan, writing for the plurality of the Court, recognized that an assertion of adverse employment treatment based on sex stereotypes is actionable under Title VII: "In the specific context of sex stereotyping, 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."[81] In other words, the Court found that there is "legal rele-

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70. 490 U.S. 228 (1989).
71. *Id*.
72. *Id.* at 231.
73. *Id*. at 233.
74. *Id.*
75. *Id.*
76. *Id.* at 232.
77. *Id.* at 234-35.
78. *Id.* at 235.
79. *Id. (*quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).
80. *Id.* at 232. Specifically, the Court sought to resolve a circuit court conflict regarding the burdens of proof of the parties in a Title VII suit in 'mixed-motive' cases; that is, cases where the employer had both legitimate and illegitimate motives for its employment decision. *Id.* In this case, Price Waterhouse argued that it had the legitimate motive to postpone Hopkins' partnership consideration because partners complained she lacked sufficient interpersonal skills. *Id.* at 234-35. The Court held that, in mixed-motive cases, when an employee establishes that gender played a part in the employer's decision, the employer must show that the employment decision would have been the same regardless of the improper motive. *Id.* at 244-45. This mixed-motive decision was overruled by the passage of the Civil Rights Act of 1991. The relevant portion of the amendment states 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 also motivated the practice." 42 U.S.C. § 2000e-2(m) (2000). Nonetheless, *Price Waterhouse* "remains the seminal Supreme Court decision regarding sexual stereotyping." *Sex Discrimination*, *supra* note 15, §8.
81. Price Waterhouse v. Hopkins, 490 U.S. at 250.

vance" when employers engage in gender stereotyping in employment decisions.[82] By establishing that gender stereotypes played a role in the company postponing her advancement to partnership, Hopkins was able to demonstrate gender-motivated employment action under Title VII.[83]

Courts have not clearly defined what constitutes sex stereotypes.[84] The *Price Waterhouse* Court failed to define the term; rather, it relied on a 'we-know-it-when-we-see-it' standard: "It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring a course at charm school."[85] Clearly, the issue of sex stereotyping in the context of Title VII lacks any clear definition. One legal scholar suggests that as a result of Ms. Hopkins' law suit against Price Waterhouse, the issue of sex stereotyping "prompts a serious look at judicial handling of an issue that is as complex as has been suggested."[86]

III. THE *JESPERSEN* DECISION

On appeal to the Ninth Circuit, neither party in *Jespersen v. Harrah's Operating Co.* disputed the facts of the case.[87] Thus, Harrah's did not dispute that in the twenty years Darlene Jespersen was employed by the casino in Reno, Nevada, she was an "outstanding employee."[88] Jespersen received continual praise by customers on comment cards, who labeled her as a "highly effective" bartender at the sports bar in the casino, and one that would bring them back to the bar in the future.[89] In February of 2000, Harrah's started its "Beverage Department Image Transformation,"[90] dubbed the "Personal Best" program.[91] Harrah's claimed that the policy "create[d] a brand standard of excellence throughout Harrah's operations, with an emphasis on guest service positions."[92] The policy applied to twenty Harrah's casinos, including the Reno casino where Jespersen worked.[93] For beverage servers, such as Jespersen, the rules were particularly strict. The policy required that beverage servers be "well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this

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82. *Id.*

83. Justice Kennedy sharply dissented to the plurality's recognition that sex stereotypes can give rise to a Title VII action. He argued: "Title VII creates no independent cause of action for sex stereotyping." *Id.* at 294. He further frowned on the plurality's seeming need to "turn Title VII from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts." *Id.* (citing Hopkins v. Price Waterhouse, 825 F.2d 458, 477 (D.C. Cir. 1987)) (Williams, J., dissenting) (internal citations omitted).

84. Legal scholar Anita Cava asserts that "[c]ourt opinions use the word [stereotype] without defining it." Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 28 (1990). In her research, Cava found only one court that has attempted to define the term. *Id.* at 28 n.5.

85. Price Waterhouse v. Hopkins, 490 U.S. at 256 (internal citations omitted).

86. Cava, *supra* note 84, at 36.

87. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077 (9th Cir. 2004).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1078.

92. *Id.* at 1077 (internal quotation marks omitted).

93. *Id.* The policy was broad in nature, stating that instead of just the general grooming standard, "additional factors to be considered include, *but are not limited to*, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform." *Id.* at 1077 n.1 (emphasis added).

look while wearing the specified uniform."[94] In addition to this general requirement, female beverage servers had to wear nylons, don colored nail polish, and style their hair.[95] Men, also subject to a few specific requirements, could not wear makeup or nail polish, and they were to keep their hair and fingernails neatly trimmed.[96]

Jespersen agreed to adhere to the "Personal Best" program in March of 2000.[97] The problem, however, arose when Harrah's amended its policy to require female beverage servers, including bartenders, to wear makeup on the job.[98] Harrah's had previously only "encouraged" its female service employees to wear makeup through the 1980s and 1990s.[99] In the 1980s, Jespersen had tried wearing makeup for a short period of time.[100] She stopped wearing the makeup because it made her feel "sick, degraded, exposed, and violated."[101] Furthermore, she felt that it compromised her ability to interact with customers, because the makeup took away her "credibility as an individual."[102] Because of this experience, Jespersen refused to wear makeup under the amended "Personal Best" program.[103] She received a warning from Harrah's in July 2000, informing Jespersen that the makeup requirement was mandatory.[104] Harrah's gave Jespersen thirty days to apply for another position that did not require makeup, which Jespersen did not do, and at the end of the thirty-day period Harrah's terminated her.[105]

Jespersen went to the Equal Employment Opportunity Commission, seeking administrative relief.[106] After unsuccessfully invoking the help of the EEOC, Jespersen filed a complaint in the United States District Court for the District of Nevada, alleging that Harrah's "Personal Best" makeup requirement violated Title VII, as encapsulated in 42 U.S.C. § 2000e-2(a).[107] Harrah's moved for summary judgment and the district court granted the motion, finding that the policy did not discriminate against Jespersen on the basis of immutable characteristics of her sex and that the policy imposed equal burdens on both sexes.[108] Jespersen filed a timely appeal to the Court of Appeals for the Ninth Circuit.

Jespersen advanced dual arguments on appeal. First, she argued that Harrah's makeup policy violated Title VII because of the unequal burden it placed on the female

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94. *Id*. at 1077.

95. *Id.*

96. *Id.*

97. *Id*. at 1078. All Harrah's employees were required to attend "Image Training." *Id*. At the end of such training, two photographs were taken of each employee and placed in his or her file to demonstrate what constituted that employee's "personal best." *Id.*

98. *Id.* Male employees were likewise prohibited from wearing makeup on the job under the policy. *Id.*

99. *Id.* at 1077.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1078.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1079. For the complete text of the district court decision, see *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189 (D. Nev. 2002).

beverage servers.[109] Specifically, she argued that "the makeup requirement imposes 'innumerable' tangible burdens on women that men do not share because cosmetics can cost hundreds of dollars per year and putting on makeup requires a significant investment in time."[110] In the alternative, Jespersen argued that if the court found that the makeup policy passed the unequal burden test, then the policy was still invalid because it forced an employee to conform to sex stereotypes as a condition of employment.[111] Jespersen argued that *Price Waterhouse* prohibited this exact type of employer action.[112] Thus, "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."[113]

Harrah's arguments were not delineated in the *Jespersen* decision; however, the Appellee's Answering Brief focused negatively on the progressive nature of Jespersen's argument. Harrah's argued that Jespersen failed to "focus on the prima facie elements of her case, but rather advocates a change in the law, [and thus] fails to demonstrate genuine issues of material fact."[114] Harrah's further argued that the Ninth Circuit should adhere to its history of jurisprudence, which "has consistently held for nearly three decades that reasonable appearance standards that impose equal burdens on both sexes is not disparate treatment."[115] In turn, Harrah's maintained that the analysis in determining the relative burdens on the sexes should focus on "tangible" factors.[116] Finally, Harrah's responded to Jespersen's stereotype argument by arguing that "Jespersen could not meet the hypothetical burdens of demonstrating what is a stereotype, and what is accepted as professional in contemporary society."[117] Harrah's interpreted Jespersen's claim as one aiming for a "perfect world, [where] men and women should be treated absolutely the same."[118] Jespersen fails, in the words of Harrah's, to realize that "the record demonstrates that the application of makeup for professional women is the social norm."[119]

Reviewing the district court's grant of summary judgment *de novo*,[120] the Ninth Circuit panel rejected both of Jespersen's arguments, and affirmed the decision.[121] First, the Court recognized that the appropriate standard to evaluate Harrah's grooming

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109. *Id.* at 1081.

110. *Id.* Jespersen added, "[d]ecades 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 [sic] and men." Corrected Opening Brief for Appellant at 13, Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045). *See* discussion *supra* Part II.B.

111. Jespersen v. Harrah's Operating Co., 392 F.3d at 1082.

112. *Id.*

113. Corrected Opening Brief for Appellant, *supra* note 110, at 37.

114. Appellee's Answering Brief at 7, Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045).

115. *Id.* at 8.

116. *Id.* "Jespersen argues, without a shred of evidence, that Harrah's appearance standards are more costly, time-consuming, and restrictive for women than for men." *Id.* at 31.

117. *Id.* at 9.

118. *Id.* at 36.

119. *Id.* at 45.

120. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1079 (9th Cir. 2004).

121. *Id.* at 1083.

standard was outlined in *Frank*:[122] "Although employers are free to adopt different appearance standards for each sex, they may not adopt standards that impose a greater burden on one sex than the other."[123] The court adopted Harrah's contention that the burden of its makeup policy imposed solely on female employees is no greater than the burden of other appearance requirements imposed solely on male employees, such as short haircut and trimmed nail requirements.[124] The court found that Jespersen had failed to enumerate the greater "tangible burden[]" that the purchase and application of makeup creates for women.[125]

The court likewise rejected Jespersen's alternative argument—that even if Harrah's policy did not impose an unequal burden on female employees, the policy is unlawful under the Supreme Court precedent in *Price Waterhouse*.[126] The court acknowledged that *Price Waterhouse* "held that an employer may not force its employees to conform to the sex stereotype associated with their gender as a condition of employment."[127] The judges limited, however, the holding of *Price Waterhouse*, finding that "it did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees."[128] The court stated that the case of *Nichols v. Azteca Restaurant Entertainment, Inc.,* decided in its circuit, refused to extend the doctrine of *Price Waterhouse* to the issue of employer appearance standards.[129] Rather, the court limited the doctrine to cases of "sexual harassment," and it claimed the *Jespersen* case was not such a case.[130] According to the court, Jespersen "ha[d] presented no evidence that she or any other employee has been sexually harassed as a result of the [makeup] policy."[131] The court failed to define what it considers to constitute sexual harassment.

On the contrary, the one judge dissent asserted that "Jespersen has articulated a classic case of *Price Waterhouse* discrimination and has tendered sufficient undisputed, material facts to avoid summary judgment."[132] The dissent argued for a broader interpretation of *Price Waterhouse* and failed to find any "grounding whatsoever in Title VII for the notion that harassing an employee because he or she fails to conform to a sex stereotype is illegitimate, while firing them for the same reason is acceptable."[133] The dissent remained particularly troubled at the majority's decision to refuse to protect the men and women of the service industries, while white-collar employees remain protected under *Price Waterhouse*.[134]

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122. *See* discussion *supra* Part II.B.

123. Jespersen v. Harrah's Operating Co., 392 F.3d at 1080 (citing Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir. 2000)).

124. *Id.* at 1081.

125. *Id.*

126. *Id.* at 1083.

127. *Id.* at 1082 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989)).

128. *Id.*

129. *Id.* (referring to 256 F.3d 864 (9th Cir. 2001)). *Nichols* is discussed *infra* Part IV.

130. *Id.*

131. *Id.* at 1082-83.

132. *Id.* at 1084 (Thomas, J., dissenting).

133. *Id.*

134. *Id.* at 1085.

The dissent also found that Jespersen raised a genuine issue of material fact as to the unequal burden imposed by the makeup policy on Harrah's female employees. Disagreeing with the method of comparison employed by the majority, the dissent felt that the appropriate test was one that "compare[s] individual sex-differentiated appearance requirements that correspond to each other," rather than a balancing of all discrimination for males and females.[135] If this test were applied, there would clearly be a question whether the full makeup requirement for women was more burdensome than the clear face requirement for men.[136] The dissent cited Ninth Circuit precedent, the *Gerdom* case, for support: "A rule which applies only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment."[137] The dissent also disagreed with the majority that time and money are the only considerations that go into determining an equal burden.[138] Ultimately, the dissent recommended that the case be tried by a jury.[139]

IV. DISCUSSION

A. The Inadequate Unequal Burden Test

As applied in the *Jespersen* case, the undue burden test constitutes an inappropriate mechanism for determining whether employer appearance standards violate Title VII. As one legal scholar notes, "we should be skeptical of courts' ability or willingness to discern uncomparable burdens, particularly because the burdens may actually be incommensurable."[140] In this case, the judges erred in failing to consider the intangible burdens of the makeup policy on Harrah's female employees.

The Ninth Circuit evaluated the relative burdens imposed on male and female beverage servers at Harrah's by considering *only* "the cost and time necessary for employees of each sex to comply with" the Casino's entire "Personal Best" policy.[141] The court's focus was very pragmatic, much like a traditional economic 'costs and benefits' analysis. The court's interest involved questions centering around the cost of makeup for women as compared to the cost of, for instance, shaving materials for men, and the time it takes women to apply makeup as compared to the time it takes men to shave.[142]

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135. *Id.*

136. *Id.* at 1085-86.

137. *Id.* at 1086 (citing Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 606 (9th Cir. 1982)).

138. *Id.*

139. *Id.* at 1087.

140. David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 247 (2004).

141. Jespersen v. Harrah's Operating Co., 392 F.3d at 1081.

142. *Id.* at 1081. Jespersen did present evidence of the costs of makeup, referring the court to a contemporary scholarly work by Naomi Wolf discussing the expense of makeup. Corrected Opening Brief for Appellant, *supra* note 110, at 28 (citing NAOMI WOLF, THE BEAUTY MYTH 120-21 (Morrow 1991)). The court, however, found the evidence inadequate, stating: "Jespersen cites to academic literature discussing the cost and time burdens of cosmetics generally, but she presents no evidence as to the cost or time burdens that must be borne by female bartenders in order to comply with the makeup requirement." Jespersen v. Harrah's Operating Co., 392 F.3d at 1081. Troubled by the lack of specificity of Jespersen's contention, the court found that there simply was not enough evidence on which a jury could deliberate.

The court, however, refused to acknowledge that the burden imposed by the makeup policy on female beverage servers at Harrah's could extend beyond the "tangible."[143] Mandatory makeup policies have the potential to leave women feeling nothing less than "ornamental, objects of beauty to be contemplated, [and] not agents with talents to be esteemed."[144] The court, therefore, should have factored into its analysis the psychological detriment that women like Jespersen suffer as a result of these policies. In the past, Jespersen tried to wear makeup at Harrah's, as suggested before the mandatory policy took effect. She found that "it made her feel extremely uncomfortable and 'degraded.'"[145] Furthermore, she found that the makeup made her feel "exposed."[146] As a direct result of the makeup policy, Jespersen felt the heavy weight of having to comply with stereotypical notions of femininity.

Jespersen carried the severe burden of "don[ning] 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."[147] Because the way that one chooses to present herself physically can be "critical to [her] sense of dignity and self,"[148] judges should consider these described intangible effects of employer appearance codes before 'weighing' the burden it imposes on an employee. As a result of the makeup policy, Jespersen suffered the extremely negative burden of feeling inferior and disenfranchised,[149] but this burden was unfairly overlooked by the panel of judges who reviewed the case.

Missing from the court's determination, however, was mention of the policy itself. Female beverage servers at Harrah's are required to wear an exorbitant amount of makeup, including foundation and/or face powder, blush, mascara, and lip color. *Id.* at 1078 n.2.

In addition, all colors of the makeup needed to be "complimentary." *Id.* Coupled with general information regarding the cost of makeup, the details of the policy certainly seem to raise an issue of material fact regarding the costliness of maintaining such a "veneer." Corrected Opening Brief for Appellant, *supra* note 110, at 28.

143. The court, therefore, accepted Harrah's argument that the "fatal flaw in Jespersen's opposition to summary judgment [was that] she failed to demonstrate through admissible evidence that there are *tangible*, unequal burdens on women that are imposed by Harrah's appearance standards." Appellee's Answering Brief, *supra* note 114, at 31 (emphasis added).

144. Cruz, *supra* note 140, at 248.

145. Corrected Opening Brief for Appellant, *supra* note 110 at 3.

146. *Id.*

147. *Id.* at 23.

148. Bartlett, *supra* note 45, at 2558.

149. In a recent article, law professor David B. Cruz describes the nature of the inferiority that can burden women compelled to wear makeup:

> For some women, the prescribed makeup regimen might be largely inconsequential . . . . For some other women, however, "chafe" is too mild a word to capture how they might react to Harrah's makeup policy. Consider for example Daphne Scholinski, institutionalized as a teenager for "rebelliousness" and inadequate femininity. Here's some of what she had to say about compulsory cosmetics: Every morning I lowered my eyelids and let Donna [a roommate] make me up. If I didn't emerge from room with foundation, lip gloss, mascara, eyeliner, eyeshadow and feathered hair, I lost points . . . . This was how I learned what it means to be a woman . . . . I stared in the mirror at the girl who was me, and not me: the girl I was supposed to be . . . . Ever lied to save yourself? "I love looking pretty." Ever been so false your own skin is your enemy?

Cruz, *supra* note 140, at 241-42 (quoting DAPHNE SCHOLINSKI WITH JANE MEREDITH ADAMS, THE LAST TIME I WORE A DRESS x (1997)).

B. Extending Price Waterhouse

The unequal burden test tends to be "dangerous, rooted in a normative gender stereotype."[150] The more progressive solution to determine whether a violation to Title VII has occurred in cases involving employer appearance standards would be for courts to cut further into employer action, attacking the gender stereotypes themselves. The United States Supreme Court established in *Price Waterhouse*: "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[151]

The *Jespersen* court, however, went to great lengths to distinguish the very progressive *Price Waterhouse* case from *Jespersen*,[152] narrowing the holding of *Price Waterhouse* to only those cases involving sexual harassment. According to the judges of the *Jespersen* decision, *Price Waterhouse* "did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees."[153] How different, however, is the *Price Waterhouse* case from the *Jespersen* case? Both cases involve a female employee, terminated or held back from advancement based on her failure to comply with stereotypes associated with her sex. Plaintiff Hopkins in *Price Waterhouse* failed to dress and act femininely enough, while Plaintiff Jespersen failed to wear makeup as a 'proper woman' should.[154]

The *Jespersen* court should have extended the *Price Waterhouse* stereotype analysis to evaluating employers' appearance standards. There is precedent to support this suggestion. In 1979, the Ninth Circuit decided *Carrol v. Talman*.[155] The court applied the unequal burden test, while also considering that "offensive stereotypes [are] prohibited by Title VII."[156] The court recognized the demeaning nature of requiring female employees to wear a uniform while imposing no similar measure on male employees: "there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes."[157] Likewise, Harrah's required Jespersen to wear a 'uniform' of feminine makeup in order to perform her job, which left her feeling exposed and fake.

Furthermore, in *Nichols v. Azteca*,[158] the Ninth Circuit applied the *Price Waterhouse* precedent. This case involved a restaurant that terminated its male host of four years because he left work in the middle of a shift.[159] During the host's four years of employment, however, co-workers subjected him to a "campaign of insults,

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150. *Id.* at 248.

151. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

152. *See supra* notes 126-130 and accompanying text.

153. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1082 (9th Cir. 2004).

154. According to the dissent: "In *Price Waterhouse v. Hopkins*, the plaintiff was denied partnership at a prestigious accounting firm where she had excelled because she didn't act femininely enough, and was specifically faulted for not wearing makeup. Jespersen was fired from a job she also excelled at, for exactly the same reason." *Id*. at 1085 (Thomas, J., dissenting) (citations omitted).

155. 604 F.2d 1028. *See supra* notes 47-51 and accompanying text.

156. Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago, 604 F.2d at 1033.

157. *Id.*

158. 256 F.3d 864 (9th Cir. 2001).

159. *Id.* at 871.

name-calling and vulgarities."[160] In particular, male co-workers regularly mocked and tormented him with homophobic slurs.[161] Relying on *Price Waterhouse* as precedent, the employee contended "that he was harassed because he failed to conform to a male stereotype."[162] The court found that such harassment was actionable under Title VII, adopting the rule from *Price Waterhouse* "that bars discrimination on the basis of sex stereotypes."[163] The court did limit the holding in a footnote, saying: "[w]e do not imply that all gender-based distinctions [such as dress and grooming requirements] are actionable under Title VII."[164] The court, however, did not go so far as to completely preclude such action, thus leaving an opening for the court to act later.

Relying on this footnote in *Nichols*, the *Jespersen* court refused to extend the *Price Waterhouse* doctrine. Harrah's and the court ultimately stood staunchly by the unequal burden test because of the test's extensive history since established in *Frank*: "[W]e are . . . bound to follow our en banc decision in *Frank*, in which we adopted the unequal burdens test. *Price Waterhouse* predates *Frank* by more than a decade, and presumably, the *Frank* en banc court was aware of it when it adopted the unequal burdens test."[165] Besides a blatant disregard for the supremacy of United States Supreme Court law,[166] the court demonstrated a stubborn adherence to precedent. The law in the Ninth Circuit pertaining to employer appearance standards, therefore, remains stagnant.

C. Reliance on Social Norms

In the Ninth Circuit, employer appearance standards are constantly upheld as long as they do not impose an 'undue burden.' The court's great efforts[167] to distinguish *Price Waterhouse* as applicable to only cases of sexual harassment beg the question: What is the underlying rationale of the *Jespersen* decision? In her article, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, law professor Katherine T. Bartlett theorizes that:

> [C]ourts have rationalized dress and appearance requirements by reference, directly or indirectly, to community norms. Based on these norms, courts may excuse dress and appearance requirements they deem *trivial* in their impact on employees, or neutral in affecting men and women alike, or essential to the employer's lawful business objectives.[168]

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160. *Id.* at 870.

161. *Id.*

162. *Id.* at 874.

163. *Id.*

164. *Id.* at 875 n.7.

165. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1083 (9th Cir. 2004).

166. In other words, the notion that *Frank*, a Ninth Circuit case, trumps *Price Waterhouse*, a United States Supreme Court case, raises problems of supremacy.

167. It is quite obvious to the reader of the decision that the *Jespersen* court puts incredible effort into distinguishing the *Price Waterhouse* case. "Instead of giving Title VII the grand effect its language would seem to command, courts resort to baroque and linguistically implausible interpretations of what it is to 'discriminate' within the meaning of Title VII . . . ." Cruz, *supra* note 140, at 246.

168. Bartlett, *supra* note 45, at 2544 (emphasis added).

In other words, it is easy to rationalize employer appearance standards, such as a makeup policy, on the fact that our society deems it 'normal' for the genders to act a certain way.

Yet the trouble with basing decisions on what is 'normal' in our society is that conceptions of normalcy are continually changing, and what is considered the 'right way' is not always inherently right. As perhaps the most extreme example, for many decades in the United States, African Americans were socially regarded as an inferior race,[169] literally not as competent or intellectually developed as the white race, and the law reflected this notion. Likewise, there was also a day when women were considered chattel.[170] Today, however, the majority of our citizens would ostracize anyone maintaining that such characterizations are 'normal.' Additionally, there are many less obvious stereotypes operating in our day, such as modern conceptions of female beauty. Even if wearing makeup is what is considered appropriate for a female in American society, Jespersen should not be fired for being different. Courts should not base decisions on society's conception (i.e., the majority's conception) at any given time of what is 'correct' behavior and what is subsequently 'deviant' behavior, nor should they use these norms to justify their decisions.

By finding for Harrah's, the court indirectly adopted the viewpoint of one of their Amici: "Do employers have the right to impose reasonable dress and grooming standards on employees if male and female employees are subjected to different standards based on societal norms? Amici respectfully submit that they do."[171] This adoption is incredibly problematic. What results from reliance on community norms is a vicious cycle; by relying on community norms and stereotypes in a decision, the court in fact reinforces them. Rather than challenging conceptions of normalcy in society, courts have instead "resisted the application of Title VII to dress and appearance requirements, following a variety of approaches that incorporate and thus, in effect, legitimate the community norms on which such requirements are based."[172] In the process, the minority, such as Jespersen, remain disenfranchised.

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169. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law In the Twentieth Century*, 100 MICH. L. REV. 2062, 2073 (2002).

170. *See, e.g.,* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 20 (2002).

171. Brief of Amici Curiae Council for Employment Law Equity, American Hotel & Lodging Association, and California Hotel & Lodging Association in Support of Defendant-Appellee, Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 WL 22340442, *3 (emphasis added).

172. Bartlett, *supra* note 45, at 2556. The fact that the judges in the *Jespersen* case fail to challenge citizens to look at how women should act is particularly troubling because of the extent to which the media is responsible for perpetuating these stereotypes:

> Dress and appearance expectations are pervasive and persist even in the absence of mandatory codes. These constraints are popularly attributed both to the advertising images with which the society constantly is bombarded, in association with products as diverse as cars, beer, household detergents, makeup, and diet aids, and to the assumptions and values of the patriarchal culture in which this kind of commercialism actually works.

Id. at 2551.

D. A More Powerful Title VII

There are competing ideologies at play in this area of the law. Employees charge discrimination where employers claim business strategy.[173] Currently, the employers are winning. The judges of the *Jespersen* majority clearly stated in their opinion that *Price Waterhouse* could have been extended to prohibit the use of sexual stereotyping in employer grooming and appearance standards. The court, however, "decline[d] to do so" in *Jespersen*[174] because of a lack of precedent. Yet, the *Jespersen* court could have just as easily found the other way. *Jespersen* represents a line of cases where "courts again have tended to apply highly formal reasoning that accepts and builds upon prevailing community norms rather than challenging them."[175]

In 1998, the United States Supreme Court decided *Oncale v. Sundowner Offshore Services, Inc.*[176] The Court broadened the scope of Title VII protection to cover same-sex sexual harassment.[177] This case, however, was also significant for providing a broad interpretation of Title VII. Writing for the Court, Justice Scalia opined: "We have held that [Title VII] not only covers 'terms' and 'conditions' [of employment] in the narrow contractual sense, but 'evinces a congressional intent to strike at the *entire spectrum* of disparate treatment of men and women in employment.'"[178] The *Jespersen* majority opinion lacked any discussion of *Oncale*'s very progressive language, demonstrating a blatant disregard for binding United States Supreme Court precedent.

The *Oncale* case demonstrates the discretion that justices of the Court have in determining the scope of civil rights legislation. Justice Scalia stated in his opinion: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[179] Title VII may not have been passed in order to directly combat same-sex discrimination or employer appearance standards based on stereotypical assumptions; however, that does not mean

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173. Amici for Harrah's argue:

> Employee's appearance and professionalism directly affect an employer's image and reputation. Imposing reasonable dress and grooming standards is a legitimate way for employers to protect their right to manage and maintain their public image. Such policies are based on established cultural norms and public expectation. Without such policies, many employers would lose business. Nowhere is this likely as important as in the industry of gaming resorts.

Brief of Amici Curiae Council for Employment Law Equity, American Hotel & Lodging Association, and California Hotel & Lodging Association in Support of Defendant-Appellee, *supra* note 171, at *4.

Scholars have taken issue with employers' ability to play upon cultural stereotypes: "[D]o not use your economic power as an employer to reinforce those divisions and the hierarchies that have accompanied them. Any sex-specific term or condition of employment—something by definition one is willing to fire, demote, or otherwise penalize someone for—does reinforce such divisions." *See e.g.*, Cruz, *supra* note 140, at 253.

174. Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1083 (9th Cir. 2004).

175. Bartlett, *supra* note 45, at 2560.

176. 523 U.S. 75 (1998) (holding that a male employee had a valid Title VII claim against his employer when he felt forced to leave his job after significant verbal and physical abuse by male coworkers).

177. *Id.* at 82.

178. *Id.* at 78 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)) (emphasis added).

179. *Id.* at 79. Jespersen also raised this issue. Corrected Opening Brief for Appellant, *supra* note 110, at 16-17.

that judges are powerless to act when a "comparable evil" can be rectified through that very statute. Indeed, judges are powerful figures, capable of promoting significant social change. As role-models to the public, judges must embrace their power to help society welcome social progress and to make change more palatable. This concept is perhaps best demonstrated in the historic case of *Brown v. Board of Education*.[180] The judges of the *Jespersen* decision had the chance to affect significant progress in the law of sex discrimination, and they declined the opportunity.[181]

V. CONCLUSION

Despite the progress resulting from Title VII legislation, women and men are still far from equal.[182] In order to close the gap between the sexes in the employment arena, Title VII must be given broader effect: "[T]he Act has never kept up with the expectations many have had for it. At any given time, there seems to be a significant gap between what the law finds unacceptable under Title VII and what scholars and advocates contend the Act should prohibit."[183] Gender equality will never manifest in a society that entrenches members of both sexes in stereotypes; however this is an argument that has yet to be embraced by courts in the area of employer appearance standards.

If anything is clear from the *Jespersen* decision, it is that Harrah's lost a stellar employee as a result of the casino's involuntary policy requiring female beverage servers to wear makeup on the job. Before her dismissal, her supervisor described Jespersen's performance as outstanding because she "makes a lot of Harrahs [sic] guests feel good and this is proven by her guest comments."[184] According to one happy

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180. 347 U.S. 483 (1954).

181. Since the initial drafting of this article, it has been determined that the Ninth Circuit Court of Appeals will rehear this case *en banc*. Jespersen v. Harrah's Operating Co., 409 F.3d 1061 (9th Cir. 2005). The author doubts, however, that the outcome of this case will change given the circuit's continual adherence to its "unequal burden" test as used in precedent. Hopefully she will stand corrected.

182. In support of this point, consider the following excerpt:

> Gender inequality at work is pervasive. Women earn about 70 percent what men do, on average. Occupations remain substantially segregated by sex, with women concentrated in lower-paying occupations. Women also earn less than men without every occupation. Cultural expectations still require more of mothers than fathers in responsibility for childrearing and the home, even when most women are employed. Although the amount of segregation and the pay gap are smaller than they were several decades ago, they remain large. Few norms or laws encourage employers to make accommodations for workers' family roles, despite the fact that fewer husbands have full-time wives at home and virtually no women have a full-time homemaker partner tending the home fires. Most people claim to support equal opportunity for the sexes, and yet parents and schools, in ways subtle and overt, provide very different encouragement to boys and girls regarding their future roles as paid workers and as family members. While the law now prohibits sex discrimination in hiring or discrimination in the sense of lack of equal pay for equal work in the same job, enforcement is by no means perfect. Equally important, few changes have been legally required or voluntarily undertaken by employers in many other practices that perpetuate gender inequality at work.

Paula England, *Foreward*, in WORKPLACE/WOMEN'S PLACE: AN ANTHOLOGY viii-ix (Ed. Dana Dunn ed., PUBLISHER 1997).

183. Bartlett, *supra* note 45, at 2542.

184. Corrected Opening Brief for Appellant, *supra* note 110, at 4.

customer, she "always greets us with a smile and a friendly word."[185] Darlene Jespersen represented the qualities of a stellar employee—dedicated, efficient, and warm; her infectious attitude drew customers to Harrah's. Makeup alone could never accomplish such an effect. Harrah's fired Jespersen as a direct result of her refusal to comply with modern notions of femininity incorporated into its policy. Unfortunately, her dismissal illustrates that our society has yet to reach the day where employees are judged solely by their competence, and in this sense, Title VII must be expanded to promote equality between the sexes in the American workplace by directly denying the validity of gendered stereotypes.

Hillary J. Bouchard

185. *Id.* at 5.