

FACIAL DISCRIMINATION: DARLENE JESPERSEN'S FIGHT AGAINST THE BARBIE-FICATION OF BARTENDERS

JENNIFER C. PIZER*

I. INTRODUCTION

Darlene Jespersen's struggle against Harrah's Operating Co. is a "Davida and Goliath" story: Jespersen, a determined career bartender, stood up to a mega-corporation's mandate that its female employees conform to a "uniform look"—a look that standardized women's faces to an extreme extent, even for the contrived-glamour world of Nevada gaming. Harrah's so-called "Personal Best" policy "facially" discriminated based on sex: The policy explicitly required female bartenders to "uniform" their faces, while permitting male bartenders to retain their autonomy about this most personal of attributes. By requiring female employees to alter their faces daily to conform to a stylized, company-approved feminine "look," Harrah's policy deprived women like Darlene Jespersen of basic dignity, and imposed on them added burdens of cost and time that had no equivalent counterparts for male employees.

Jespersen wore the Harrah's uniform with pride for more than twenty years. A respectful, loyal employee, she tried in good faith to wear facial makeup as Harrah's directed. But for this nearly six-foot tall, broad-shouldered woman with a down-to-earth persona, having to be "dolled up"¹ and present an artifice of femininity was a humiliating, alienating exercise, and it interfered with her ability to interact effectively with customers, especially unruly ones. Jespersen believed she was entitled to enough respect as a hard-working, dignified employee that she should not have to submit to a demeaning, gender-based contrivance when her male coworkers faced no analogous requirement. Given that the only reason she was instructed to endure a daily "makeover" was "because of [her] sex,"² shouldn't Title VII speak up on her behalf?

This author had the privilege of representing Darlene Jespersen in her appeal to the U.S. Court of Appeals for the Ninth Circuit after the U.S. District Court for the District of Nevada entered summary judgment against her.³ In the Ninth Circuit, a divided three-judge panel affirmed the summary judgment

* Senior Counsel, Lambda Legal Defense and Education Fund, Inc.; J.D., New York University School of Law; B.A., Harvard and Radcliffe Colleges.

1. Corrected Opening Brief of Plaintiff-Appellant at 25, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 WL 22716697.

2. 42 U.S.C. § 2000e(a)(1) (2000). See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241–42 (1989) (plurality opinion) (discussing what it means for disparate treatment to be "because of sex").

3. *Jespersen v. Harrah's Operating Co., Inc.*, 280 F. Supp. 2d 1189 (D. Nev. 2002), *aff'd*, 392 F.3d 1076 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

order.⁴ On rehearing en banc, a multiply divided court again affirmed the grant of summary judgment against Jespersen.⁵ Yet, even as it denied Jespersen her day in court, the en banc majority actually took a legal step forward for which Jespersen had advocated: The court acknowledged that sex-differentiated appearance codes may be challenged under Title VII if they incorporate sex stereotypes that burden workers unequally because of their sex. While it was deeply disappointing—and wrong—that the majority denied Jespersen her day in court to present her case using this framing of the test and to insist that Harrah’s try to justify the unusual burdens of its policy, she takes some measure of satisfaction at the progress that was made by this case, as does this author. We both are deeply grateful to the many people who contributed in invaluable ways to its achievement.⁶

It has been an honor and a pleasure to participate in this symposium and print issue of the *Duke Journal of Gender Law & Policy*. To see the range of questions and perceptions inspired by this case has been a valuable and fascinating experience. It has been gratifying to see the case’s connections to scholarly work in diverse yet interrelated fields—fields in which academics and advocates together are addressing the increasingly complete sacrifice of workers’ personhood to competitive corporate “branding.” As standardization through “branding” becomes the ever-more-dominant business theme, there is a corresponding loss of dignity and growing alienation that should trouble us all.

Lambda Legal took up Darlene Jespersen’s case because restrictive, gender-based rules about personal appearance and deportment can pose particular burdens for anyone whose gender identity or expression varies from conventional stereotypes; lesbian, gay, bisexual, and transgender (“LGBT”) people are disproportionately burdened by such rules.⁷ Many LGBT people

4. *Jespersen*, 392 F.3d 1076 (9th Cir. 2004), *vacated*, 409 F.3d 1061 (9th Cir. 2005), *aff’d en banc*, 444 F.3d 1104 (9th Cir. 2006).

5. *Jespersen*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

6. The amici curiae briefs both to the three-judge panel and to the en banc panel were excellent and, we believe, incredibly important. Our sincerest thanks for that work go to Martha Matthews, Romana Mancini, Janet Belcove-Shalin, Allen Lichtenstein, Kathleen Phair Barnard, Sara Ainsworth, Nancy Solomon, Vicky Barker, Andrew Dwyer, Hilary Meyer, David Cruz, Jeffrey Erdman, Paula Brantner, Shannon Minter, Courtney Joslin, Chris Daley, April Wilson-South, Michelle Williams Court, Marguerite Downing, Patricia Shiu, Elizabeth Kristen, and Claudia Center. This author also is indebted to the generous, thoughtful advocates who participated in the oral argument moots, to former legal intern Paria Kooklan, to Cole Thaler, a remarkable colleague dedicated to the fight for gender equality, and to superb friends who provided critical help along the way: Ruth Borenstein; Nancy Tompkins; Taylor Flynn; and Jill Anderson. Warm thanks go to former colleague Jennifer Middleton, who did terrifically good work on the first round of appellate briefs. Christine Littleton’s perspective, advice, and humor were invaluable throughout. This author is especially grateful to Jon Davidson, Lambda Legal’s extraordinary Legal Director and a treasured friend, whose insight helped to shape each positive aspect of the appellate work in this case. And the deepest appreciation is for Doreena Wong, whose love, friendship, and passion for social justice inspire for this author a vision of “personal best” worth striving a lifetime for.

7. Lambda Legal works nationally to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work. More information about Lambda Legal and its mission is available at <http://www.lambdalegal.org/cgi-bin/iowa/about/index.html>.

cannot readily conform to conventional gender stereotypes.⁸ For others, simply the process of “coming out” as LGBT or “queer” gives rise to a deep critique of the artificially restrictive gender stereotypes that pervade our modern lives and shape corporate marketing campaigns. For many who come to understand themselves as naturally outside conventional gender norms, the unnatural wardrobes and artificial physical shapes of Mattel’s Barbie and Ken dolls are not entirely benign.

Of course, artificial constructions of gender are not only a queer issue. The demeaning sexism at the heart of Harrah’s “Personal Best” policy will matter to any woman who objects to having her natural face deemed unacceptable, especially when male faces are judged to be professional and desirable in their unaltered state. Today’s question of mandated gender conformity may concern facial makeup, but the question arises within a historical continuum of dress and decorum demands that have constrained generations of women.⁹ Yet, as Jespersen’s “facial” challenge to Harrah’s policy contended, there is nothing about women’s faces that requires being “made over” any more than women’s ribcages required whalebone corsets years ago, or women’s feet and legs require stiletto heels today.

Periodically, American women have been blessed with determined visionaries who have put their bodies, jobs, and lives where many just put rhetoric. This Article is written to honor Darlene Jespersen, who is one of those rare and inspiring souls. Darlene is a hero without pretense. She resisted one of the wealthiest companies in America because she believes the law’s promise of equal treatment for working women should mean something, and that her twenty years of exemplary service to Harrah’s Casino likewise should have earned her a measure of loyalty in return. Darlene is not naïve. But she does care about fairness and being treated in a respectful manner. She also believes individuals can make a difference. To this author, Darlene embodies integrity and a centered sense of self like few others. It has been a privilege and pleasure to represent her, and even more so to call her friend.

The *Jespersen* case has inspired extensive press and public interest. Yet, in a consistent and telling manner, pundits have mocked the case openly. Many have said or implied the issue is trivial. Even Judge Kozinski, who confirmed the case’s doctrinal soundness with his signature clarity and wit, said as much.¹⁰ Others have insinuated that Jespersen must have been a slacker, a troublemaker, or an authority-flouting attention-seeker. Only a person itching for a fight, some say, would make a federal case out of makeup.

Jespersen was no troublemaker. As Chief Justice Schroeder noted for the en banc majority, Darlene was an exemplary employee for Harrah’s during her

8. See Brief for the National Center for Lesbian Rights and the Transgender Law Center as Amici Curiae Supporting Plaintiff-Appellant at 3, 11–12, *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (No. 03-15045), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/359.pdf.

9. See Brief of American Civil Liberties Union of Nevada et al. as Amici Curiae Supporting Plaintiff-Appellant at 7–11, *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 WL 24133171.

10. *Jespersen*, 444 F.3d at 1118 (Kozinsky, J., dissenting) (expressing “dismay” at Harrah’s decision to terminate Jespersen “over what, in the end, is a trivial matter”).

twenty-year bartending tenure.¹¹ Her supervisors and Harrah's guests alike volunteered steady praise for her friendly, calm, effective manner behind the Sports Bar. Jespersen just could not stomach the humiliating choice posed by Harrah's new "Personal Best" policy: transform her facial appearance according to the instructions of a consultant on a daily basis, or be deemed "unprofessional", "unacceptable", and "unfit" to tend the bar at Harrah's Reno casino. Despite the extraordinary personal cost of putting her job on the line in what is essentially a company town, Jespersen felt she had no choice. She had tried in good faith to comply when facial makeovers were merely recommended.¹² However, submitting to the artificial "dolling up" made her feel so exposed, demeaned, and alienated that she could not do her job effectively.¹³ With her broad, imposing stature, Jespersen felt absurd attempting to mimic the "Barbie-doll" femininity of her more diminutive coworkers on the cocktail server staff.

Notwithstanding her stature, presence, and effectiveness behind the bar, Harrah's management decided that Jespersen could not just be another bartender among the mostly male Sports Bar crew. She had to be marked with face paint as a "lady" bartender. Henceforth, when women make their way in other male-dominated employment settings, can they analogously be spotlighted as different with pink hard hats and tool belts or pastel trench coats? This issue is trivial only if one believes that women should not expect and seek workplace dignity equal to their male coworkers.

Jespersen was courageous to explain why the critics are wrong, and to spotlight the gratuitous insult of a rigid, heavy-handed policy that was despised by many Harrah's employees—although no others would risk unemployment to challenge it. It is a disappointing statement about the state of Title VII law that Jespersen was denied even the right to insist that Harrah's show a genuine business need for requiring her to be branded according to her sex. As the three different dissenting opinions make manifestly clear, there is no cogent way to reconcile Harrah's treatment of Jespersen with Title VII's command that employment opportunities shall not diminish "because of sex." It is hard not to see the en banc majority opinion as a betrayal of the Supreme Court's clarion proclamation of a quarter century ago that, "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."¹⁴ Indeed, in its last en banc consideration of a sex-based appearance code, the Ninth Circuit itself reiterated this language with approval while striking down an appearance rule of a kind that was commonplace before

11. 444 F.3d at 1107; *see also* 392 F.3d at 1077 (acknowledging that Jespersen's supervisors had described her as "highly effective" and consistently praiseworthy); *id.* at 1083 (Thomas, J., dissenting) ("[T]here is . . . no question that Jespersen's performance was not only competent; it was spectacular. She was consistently given glowing recommendations by numerous customers and supervisors, despite the fact that she did not wear makeup.").

12. 392 F.3d at 1077.

13. *Id.*; *see also Jespersen*, 444 F.3d at 1108.

14. *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir. 1971)); *see also County of Wash. v. Gunther*, 452 U.S. 161, 180 (1981) (same).

Title VII was brought to bear against the entrenched sexism of the airline industry.¹⁵

Moreover, en route to striking down Continental Airline's differential weight requirements for female flight attendants, the Ninth Circuit articulated numerous, clear principles that one would have expected to guide the analysis in *Jespersen's* case. As one key example, the *Gerdom* court explained that, "[b]ecause [the employer's] facially discriminatory policy itself supplies the requisite elements of a prima facie case, we must look to [the employer's] efforts to rebut it."¹⁶ But in *Jespersen*, the Ninth Circuit, again en banc, held instead that the sex-differentiated policy did not suffice and that the plaintiff should have submitted multiple other types of evidence to quantify the greater burdens on women and to confirm that reasonable women in *Jespersen's* position similarly would have objected, before the burden of production would shift to her former employer.¹⁷ The inconsistency is undeniable.

What might account for the differences in approach? Do the authors of the two opinions have notably different judicial philosophies? Or was the *Jespersen* court bound by an intervening en banc decision? Neither of these explains it, as Chief Judge Mary Schroeder wrote the opinions in both *Gerdom* and *Jespersen*, and in both cases she wrote for the en banc court.

By its own terms at least, the *Jespersen* decision also is not explained by any specific needs of the gaming business in which it arose; the court did not consider the needs a casino might assert because it held that *Jespersen* did not make out a prima facie case of sex-based disparate treatment and, therefore, the burden never shifted to Harrah's to justify its appearance policy.¹⁸

Based in part on questions posed during the arguments held before the three-judge panel and the en banc court, this Article concludes that the changed composition of the federal bench probably accounts for at least some part of the *Jespersen* result. In the years since Congress enacted Title VII, employment discrimination cases have come to make up a considerable portion of the federal courts' dockets, to the distress of some over-burdened judges and many employers. At the same time, social attitudes about how women and men should present themselves continue to evolve. Education about gender diversity and the harms of narrow stereotypes—to which the *Jespersen* case continues to add—is helping to accelerate that evolution. This Article is written to add modestly to that process by sharing some of our strategic thinking, a few observations about the *Jespersen* decision, and two core themes for the future.

15. *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 607 (9th Cir. 1982) (en banc) (quoting *Gunter*, 452 U.S. at 180), *cert. denied*, 460 U.S. 1074 (1983). See also *Frank v. United Airlines*, 216 F.3d 845 (9th Cir. 2000).

16. *Gerdom*, 692 F.2d at 608.

17. 444 F.3d at 1110–11, 1112–13.

18. Title VII's ban on disparate treatment of employees because of sex contains an exception for circumstances in which the differences are "reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (alteration added). Such a distinction is deemed a bona fide occupational qualification ("BFOQ"). To constitute a BFOQ, the standard must concern "the 'essence' of the particular business." *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

The result in this case makes a painfully simple point about the persistence of sex discrimination and the ambivalence of some judges about enforcing the federal employment discrimination statute as written. If Darlene Jespersen were male, she still would be working behind Harrah's Sports Bar. "Because of [her] sex,"¹⁹ her employment ended. To those of us who agree with Darlene that Title VII should mean what it says, Harrah's at least should have been required to show a genuine business need for showing her the door.

II. WHY THE *JESPersen* CASE HAS MATTERED FOR LGBT EQUALITY

Lambda Legal Defense and Education Fund engages in impact litigation on behalf of lesbians, gay men, bisexuals, and transgender people. Through carefully selected cases, we aim, among other things, to push society to recognize what guarantees of equality must require for LGBT individuals in a particular context. Notwithstanding the advances of modern equality jurisprudence with respect to many forms of invidious discrimination, it frequently remains the case that LGBT people are denied the legal rights and opportunities that others take for granted. This denial often is based on archaic notions of gender and sexuality rooted in Victorian-era concepts of women and men as "complementary" polar opposites.²⁰ Sex discrimination doctrine says much that can be helpful for challenging legal barriers based on such notions; the challenge is to plan forward steps that will prompt decision-makers to recognize and accept these principles.²¹

Impact litigation can be a powerful tool for social change. To understand fully the goals and contributions of particular cases, it helps to consider (1) why the cases were selected for litigation and (2) the social and legal context in which each was selected. Rarely are the cases we select isolated events. When they are studied after the fact, the range of potential goals sometimes is not recognized because the larger landscape collapses into one narrative—one morality tale. The fuller picture, by contrast, can reveal the aspiration to reduce a systemic problem over time, through education as well as legal reform.

In the case of Lambda Legal's representation of Darlene Jespersen, the context included the pre-existing goal of increasing legal and public

19. 42 U.S.C. § 2000e-2(a)(1) (2000).

20. As one example of this problem, opponents of same-sex civil marriage sometimes contend that marriage must remain a different-sex-only institution because of the "essential complementarity" of women and men. They consider women and men to be incomplete as individuals and argue accordingly that each requires a mate of the "opposite" sex. See Brief for Women's Organizations as Amici Curiae Supporting Respondents at 15–17, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc) (No. 75934-1), 2005 WL 901985 (discussing implications of testimony given by conservative religious leaders and others in support of state law excluding same-sex couples from marriage in order to maintain prescribed gender roles of women and men in marriage).

21. Compare *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (finding, *inter alia*, that gay student stated a claim against his school for sex discrimination in violation of federal Constitution based on school's failure to protect him against peer abuse that school would have protected a female student against in the same position), and *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 165 (N.D. Cal. 2000) (applying Title IX in a similar manner), with *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (rejecting claim that state marriage law discriminates unconstitutionally based on sex against same-sex couples), and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (same).

understanding of the similarities and distinctions between sex, gender identity, and sexual orientation. This goal included advancing the concept that discrimination on any of these grounds is inappropriate because none of them relates to one's ability to perform at work or otherwise to contribute to society. Given the continuing lack of federal statutory protection against sexual orientation discrimination, advocates for LGBT civil rights have been mindful that the prohibitions of Title VII and Title IX against sex discrimination—including discrimination based on gender nonconformity—can be invoked against at least some of the discrimination routinely visited on LGBT people. Harrah's rigid judgment that all women bartenders must conform to a prescribed "look" exemplifies this kind of barrier to equal employment opportunities, which can ruin careers irrespective of an employee's actual or perceived sexual orientation.

In considering ways to use Title VII appropriately, advocates also have been conscious of the problem illustrated by *DeSantis v. Pacific Telephone & Telegraph Co.*²² In *DeSantis*, the Ninth Circuit rejected the plaintiff's sex discrimination in employment claim, concluding that the gravamen of the case was sexual orientation discrimination rather than sex discrimination, apparently based on information about the plaintiff's earring and ostensibly effeminate manner.²³ The court refused to take at face value the plaintiff's sex-stereotyping claim—that allegedly he had been fired because his superiors considered him insufficiently masculine—evidently assuming from his jewelry and manner that Mr. DeSantis must have been gay and that his sexual orientation must have been the overriding factor in his dismissal from employment.²⁴ Many civil rights litigators have taken a negative lesson in pleading from the disappointing result in *DeSantis*.

The split of authority that developed concerning male-on-male sexual harassment created an analogous and similarly troubling problem for civil rights litigators. Many courts presented with complaints of such harassment seemed to become confused and irrecoverably distracted from the usual sexual harassment analysis under Title VII if either the alleged perpetrator or the alleged target of the harassment was identified as not heterosexual. As conflicting decisions proliferated, male plaintiffs often were permitted to maintain a Title VII claim for same-sex sexual harassment if they were heterosexual—or were perceived to be heterosexual—and their harasser was perceived to be gay. But if the target of the abuse was gay—or was perceived to be gay—then a claim based on the same conduct often was rejected as really a sexual orientation discrimination claim falling outside the bounds of Title VII, as in *DeSantis*.²⁵ Eventually, *Oncale v.*

22. 608 F.2d 327, 329–30 (9th Cir. 1979).

23. *Id.*

24. Given the current popularity of ostentatious earrings among professional male athletes, rap music performers, and other icons of successful men and ultra-masculinity, the *DeSantis* decision seems both dated and a telling example of how fashions shift with time and often do not relate to anatomy, how meaning is contextual, and how harshly individuals can be judged for failure to conform to what ultimately are arbitrary rules about what is appropriate and what is unacceptable.

25. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998) (comparing *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), with *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138 (4th Cir. 1996)).

*Sundowner Offshore Services*²⁶ provided a partial resolution to the untenable division of authority, confirming that a gay person's sexual orientation does not deprive him or her of statutory protections that others enjoy. It may be noted, however, that the plaintiff in the case was not identified as gay.

Another strand of Title VII case law that LGBT civil rights advocates generally saw as warranting further development and reform was the line of authority rejecting sex discrimination claims brought by transgender employees who had been fired when it became known that they were transsexual. In these cases, the dismissal often occurred when the employees informed their employers that they were to undergo, or had undergone, sex reassignment and would be presenting henceforward as a different sex. During the 1970s and 1980s, cases brought pursuant to Title VII on behalf of such employees were rejected consistently as outside the scope of what Congress had envisioned when including "sex" within the federal statute.²⁷ But as no less a liberal than Justice Scalia observed in *Oncale*, it is the plain language of statutes that controls, and enactment conceptions should not thwart the text itself.²⁸ In the years since Frances Ulane lost her fight to retain her job as an Eastern Airlines pilot, many who have reviewed the *Ulane v. Eastern Airlines* decision have concluded that it hardly could have been more obvious that she was fired "because of sex" because her sex was the only thing that had changed between when she was considered to be well-qualified as a male and then deemed unqualified for the same job upon transitioning to female.²⁹

Given the courts' resolute rejection of claims like Ulane's and DeSantis's, *Price Waterhouse v. Hopkins* was a breakthrough in its recognition that the statute's plain language should control over presumptions about congressional intent, and that adverse treatment based on failure to conform to stereotypes about gender-appropriate behavior and appearance can constitute impermissible discrimination "because of sex" under Title VII.³⁰ We can wonder whether the difference in outcomes of *Price Waterhouse* and *DeSantis* was due to the difference in the sexes of the plaintiffs. Perhaps it was easier for courts to recognize a new category of sex discrimination against women than against men because men usually are the dominant social group. Alternatively, maybe the difference simply was due to the passage of time and changed social perceptions about gender norms. Perhaps Ann Hopkins' case was analytically simpler for the court because it contained no information suggesting she may have been

26. *Oncale*, 523 U.S. at 75.

27. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977). But see *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (discussing reasoning of prior cases brought by transgender people and concluding that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), has superseded them).

28. *Oncale*, 523 U.S. at 75.

29. *Ulane*, 742 F.2d at 1085–86.

30. *Price Waterhouse*, 490 U.S. at 250 ("In the 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."). The Court emphasized, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251.

anything other than heterosexual. Or maybe the difference in result was a function of sexist, if not misogynistic, attitudes that allow greater acceptance of women who adopt masculine traits than men who adopt feminine ones.³¹ Unfortunately for Darlene Jespersen, Harrah's did not share that attitude with respect to its bartenders.

Despite the Supreme Court's repeated affirmation that Title VII prohibits all disparate treatment of employees "because of sex,"³² the question remained after *Price Waterhouse* whether the decision should be read somewhat narrowly as a clarification that employees should not be put in an unfair "catch-22" in which they are penalized for displaying the very traits that lead to success on the job, or read more broadly as confirming that adverse treatment based on sex stereotypes can be actionable sex discrimination. Then, after *Oncale*, more courts began applying the principle that Title VII does not permit an employee to be persecuted by coworkers based on gender nonconformity in cases in which male employees had been harassed, usually sexually, by other men because they were perceived as not conforming to the harassers' notions of proper masculine appearance and behavior, even when the male plaintiff had been identified as gay, or was suspected to be so.³³ These cases marked our entry into the next chapter of this work, as the courts proved themselves newly able to distinguish between actionable sexual harassment and non-actionable sexual orientation discrimination.³⁴

There are multiple possible explanations for this shift. Surely widespread education and community organizing by the LGBT community played a part. In addition, it appears that cases addressing claims of sexual harassment and other forms of workplace abuse helped courts see the parallels to established harassment law and, after *Oncale*,³⁵ to afford gay people the same protections under Title VII that are enjoyed by heterosexuals.

Enforcing Title VII's protections against coworker abuse is consistent with basic notions of what constitutes intolerable conditions in a workplace. Yet,

31. Cf. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 235–57 (May 1994) (discussing the tendency of Americans to impute homosexuality to men perceived as effeminate, and the violent reactions of some men to effeminate men and gay men, and their less-violent reactions to "mannish" women and lesbians).

32. *Price Waterhouse*, 490 U.S. at 251 (citing *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)). See also *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1079 (9th Cir. 2004) (citing *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991)).

33. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (approving discrimination claim for coworker harassment based on failure to conform to gender stereotypes), *cert. denied*, 538 U.S. 922 (2003); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (harassment "based upon the perception that [the plaintiff] is effeminate" is discrimination because of sex); see also *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that abuse of transgender prisoner was actionable under the Gender Motivated Violence Act).

34. And more recently, the courts have begun to repudiate *Ulane* and *Holloway* in cases brought by employees who were fired because they were undergoing sex reassignment, holding that such adverse treatment can be actionable under Title VII as discrimination "because of sex." See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem (Ohio)*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

35. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

these decisions led to the incongruous notion that Title VII might forbid enforcement of gender stereotypes by coworker harassment, but would permit employers to enforce those same stereotypes officially and more harshly with pink slips.³⁶ The *Jespersen* panel majority's acceptance that *Price Waterhouse* should bar coworker harassment, while refusing to apply the decision to prevent termination based on a sexist dress code,³⁷ suggested a peculiar gulf in understanding. The panel seemed to recognize that it is wrong to subject an employee to obnoxious harassment based on the employee's gender-variant deportment, but rejected the idea that it is similarly wrong to enforce gender conformity with rigidly stereotypical personal grooming rules. Perhaps this gulf arises from an assumption that abusive coworkers are not authorized to police their fellows' appearance, whereas employers *do* have authority to set and to enforce appearance rules. But that difference in authority does not explain why the courts should express respect for an employee's gender expression in the former cases and not in the latter. Perhaps the judges have assumed that employees who have been targeted for harassment must be unable to conform their appearance or behavior and would do so if they could because no one would remain the subject of such abuse if they could avoid it; by contrast, perhaps it seems that all employees can comply with dress code requirements if they wish, and that an employee who objects is simply uncooperative and undeserving of judicial concern. Whatever underlying assumptions there may be about employees' ability to conform, the question remains why employers should be entitled to require gender conformity absent a showing of business necessity.³⁸ Put another way, what gender-based appearance "standards" may an employer impose without violating Title VII?

Given the burdens that gender stereotyping can impose on our constituents, LGBT civil rights advocates have placed a priority over the years on cases that illustrate the need for, and feasibility of, protecting gender-variant people from rigid appearance rules. A goal has been to show in more contexts that sex discrimination doctrine *does* set limits on institutions' authority to police gender conformity and—what has proved to be the harder point—that courts should ascertain and enforce those limits because failure to do so inflicts substantial harm. Where a sex-based appearance policy creates a problem because it is especially onerous for a particular group—or because an individual has a particular, gender-based need not to comply—the challenge has been how to show that the dignitary harm inflicted is sufficient to create a cognizable discrimination claim,³⁹ and that the institution has no legitimate grounds for insisting upon gender conformity to the extent required by the policy.

36. See Petition of Darlene Jespersen for Rehearing and Rehearing En Banc at 9–12, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (No. 03-15045), available at http://www.lambda.legal.org/binary-data/LAMBDA_PDF/pdf/362.pdf [hereinafter Rehearing Petition].

37. *Jespersen*, 392 F.3d at 1083.

38. See *supra* note 18.

39. *Gedom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 606 (9th Cir. 1982) (a sex-based differentiation is actionable if it creates a "significantly greater burden of compliance" on the complaining employee) (citing, *inter alia*, *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756 (9th Cir. 1977) (holding that the requirement that male Safeway employees wear ties was "not overly

Youngblood v. School Board of Hillsborough County, Florida, illustrates the difficulty of trying to convey the seriousness of the dignitary harm inflicted by a rigid rule mandating conformity to a conventional gender stereotype.⁴⁰ Nikki Youngblood was a high school senior who was excluded from her high school's yearbook because she balked at wearing the black cloth drape that all female students were required to wear for their official school photograph.⁴¹ Boys, by contrast, were to wear a shirt, tie and sport jacket of their choice. Because Youngblood found the feminine drape humiliating and refused to wear it, she was excluded entirely from the yearbook. The district court rejected her invocation of *Carroll v. Talman Federal Savings and Loan Ass'n of Chicago*,⁴² and held that the school was entitled to impose sex-specific appearance rules and that exclusion from the yearbook was not a serious enough injury to create an actionable sex discrimination claim.⁴³

Oiler v. Winn-Dixie La., Inc., which was litigated contemporaneously with *Youngblood*, illustrated related challenges in the employment context.⁴⁴ Peter Oiler was a married, heterosexual man who had driven a grocery truck for the Winn-Dixie company for twenty years.⁴⁵ He was fired after he informed his supervisor that he periodically appeared in public during his non-work time dressed and groomed as a woman, going by the name "Donna," which he did for reasons related to a gender identity disorder.⁴⁶ The president of Winn-Dixie took the position that the company might lose business if any of its customers were to learn that one of its truck drivers cross-dresses during his leisure time.⁴⁷ As in *Youngblood*, the district court in *Oiler* read the protections against sex discrimination narrowly and in a manner that offers only limited protection to gender-variant people. The court did not require Winn-Dixie to substantiate its concern about potential loss of business and to explain how such a concern could be valid despite the cases rejecting "customer preference" as an excuse for otherwise prohibited discrimination.⁴⁸ Instead, the court followed *Ulane* and

burdensome"); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (holding there is no claim where the sex differences had "negligible effect" on plaintiff's opportunities)).

40. *Youngblood v. Sch. Bd. of Hillsborough County, Fla.*, No. 8:02-cv-1089-T-24MAP (M.D. Fla. Sept. 24, 2002) (dismissing complaint of plaintiff), *appeal dismissed per stipulation*, No. 02-15924-CC (11th Cir.). The case took place in an educational setting rather than employment, and thus involved a claim under Title IX rather than Title VII; however, the arguments were very similar to those made in employment cases. For additional information, see Press Release, National Center for Lesbian Rights, Discriminatory Policy Excludes Senior from Yearbook, June 19, 2002, <http://www.nclrights.org/releases/students061902.htm>; Legal Momentum, In The Courts: *Youngblood*, http://legalmomentum.org/legalmomentum/inthecourts/2006/03/youngblood_v_school_bd_of_hill.php (last visited Dec. 16, 2006).

41. See Press Release, National Center for Lesbian Rights, *supra* note 40; Legal Momentum, *supra* note 40.

42. 604 F.2d 1028 (1979).

43. *Youngblood's* complaint also included a constitutional equal protection claim, which the court also rejected. See Press Release, National Center for Lesbian Rights, *supra* note 40.

44. *Oiler v. Winn-Dixie La., Inc.*, 89 Fair Empl. Prac. Cas. (BNA) 1832 (E.D. La. 2002).

45. *Id.* at *4.

46. *Id.* at *6–*10.

47. *Id.* at *10–*12.

48. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting BFOQ defense even where defendant claimed its business would be destroyed if it was required to defy its

held that Peter Oiler was fired for impersonating a woman, which the court held is not covered by Title VII, rather than for engaging in conduct that the company deemed proper for women but improper for men based on sex stereotypes.

Despite the evident challenges of these cases, LGBT civil rights advocates have retained it as a priority to develop ways to confront arbitrary, sex-based appearance rules to secure greater freedom and protection for individuals who have limited ability to conform, and also for those who can conform but should not be required to do so because sex—including one's gender expression—should be irrelevant in employment and education, absent a legitimate institutional necessity. And cases such as *Youngblood* and *Oiler* provided certain lessons. For example, they indicated that it would be wise in the future to prioritize cases in which the appearance policy at issue is more rigid and severe than policies imposed by comparable institutions, in which the harm to a complaining plaintiff is substantial and obvious, and in which the plaintiff is a person to whom many people are likely to relate. Darlene Jespersen's case appeared without question to satisfy these threshold criteria. Harrah's written policy was far more detailed, heavy-handed, and inflexible than those of other casinos. Jespersen had testified poignantly about why she found the makeup requirement humiliating and demeaning. She does not identify as transgender and could not be accused of trying to pass as a gender different from her own. In addition, Harrah's never attempted to argue that their firing of her had anything to do with her sexual orientation. Moreover, because Jespersen had been a long-time, model employee, her undisputedly excellent job performance would weigh heavily against any arguments Harrah's might offer that makeup is a bona fide occupational qualification ("BFOQ") for its female bartenders.⁴⁹ Her case truly was a classic *Price Waterhouse* case, as both Judge Pregerson and Judge Thomas observed in their respective dissenting opinions.⁵⁰ She was a woman working in a male-dominated field who was treated adversely for not conforming to her employer's stereotypes of how women should present themselves, even though conformity with such expectations impaired her job performance in the way aptly described in *Price Waterhouse* as a catch-22.⁵¹

Furthermore, given her expressed inability to comply with the makeup rule, Jespersen's case presented a constellation of issues that appeared well timed to follow *Nichols* and *Rene*. Whether she had been required to wear stockings and high heels behind the bar rather than makeup, the core questions on summary judgment would have been the same: (1) what was the employee's job; and (2) given that job description, could a reasonable jury find that the

customers' preference for male employees); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (holding that assumed preferences of male business customers for attractive female stewardesses did not justify refusal to hire men as flight attendants); *Olsen v. Marriott*, 75 F. Supp. 2d 1052, 1065 (D. Ariz. 1999) (same); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 304 (N.D. TX 1981) (same; admonishing that "the BFOQ exception should not be permitted to 'swallow the rule'") (quoting *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring)).

49. See *supra* note 11 and accompanying text.

50. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1116–17 (9th Cir. 2006) (en banc) (Pregerson, J., dissenting); see also *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1085 (9th Cir. 2004) (Thomas, J., dissenting).

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

appearance rule was *not* a BFOQ, and instead was imposed to cater illicitly to customer preferences or otherwise to discriminate improperly because of sex.⁵² The straightforward opinions of the dissenting judges in this case confirmed that our analytical approach was sound and that summary judgment should not have been granted. Their opinions were in keeping with past, settled case law that Title VII should not be understood and enforced only when doing so is likely to provide fairness just to a minimum number of people, and when there is minimal objection by employers.

Whether it is ironic or simply a measure of how we progress along multiple paths toward the goal of equality, in the years during which the *Jespersen* case was being litigated several legal changes have occurred: *Ulane* has been deemed superseded by *Price Waterhouse* and courts increasingly are recognizing that gender discrimination is a form of sex discrimination covered by Title VII, and that transgender people are entitled to that protection, including in connection with gender reassignment.⁵³ As noted above, this conclusion is fitting not only because, in reassignment cases, changes to an employee's sex and gender expression are what transform a successful employment relationship into an unsuccessful one, but also because the hostility toward transgender people can be so intense and the protection so needed.⁵⁴ It remains a challenge to protect gender-variant individuals, and to secure more room for gender diversity, despite these recent good decisions.⁵⁵ Yet, given the protective decisions, it may be easier now to protect an individual who transitions—conforming with one stereotype and then with another—than individuals like Peter Oiler who, like Ann Hopkins, asked to be judged as an individual, based on job performance, without reference to gender conformity.

Since the population of transgender people—at least the number likely to transition from one sex to another—is not large, and the discrimination inflicted on them often is flagrant and cruel, providing protection can seem to address a severe problem without threatening wide-spread change. This, of course, is a critical advance for transgender people. But, individuals like Nikki Youngblood may pose harder questions for the courts. Though cases like hers draw directly from *Price Waterhouse*, if the plaintiff does not have a gender dysphoria diagnosis—or other means by which to narrow the impact of the court's decision—some judges apparently just reject the notion that sex discrimination laws protect one's right to express one's gender in a manner that others

52. See *supra* note 48 and accompanying text.

53. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem (Ohio)*, 378 F.3d 566, 573 (6th Cir. 2004); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

54. See Brief for National Center for Lesbian Rights and the Transgender Law Center, *supra* note 8, at 3–7 (discussing pervasive, economically devastating employment discrimination against transgender people).

55. See, e.g., *Etsitty v. Utah Transit Auth.*, 95 Fair Empl. Prac. Cas. (BNA) 1836 (D. Utah 2005) (granting summary judgment against transgender employee who was fired during sex reassignment; disagreeing with *Barnes* and *Smith v. Salem* about whether *Price Waterhouse* has changed the analysis of sex discrimination claims brought by transgender people; and agreeing with *Ulane* that Congress intended no such protection), *appeal pending*, No. 05-4193 (10th Cir.); *Sturchio v. Ridge*, 86 Empl. Prac. Dec. (CCH) P42,067 (E.D. Wash. 2005) (following bench trial, dismissing Title VII claims brought against Border Patrol by transgender employee after sex reassignment asserting gender-based hostile work environment and retaliation).

disapprove. Other judges seem perplexed about how to find an appropriate limiting principle.⁵⁶ In the absence of an obvious “catch-22” to which they can relate, some appear likely to continue to favor employers’ authority to set employment terms and to insist on obedience. As Judge Posner put it colorfully in *Schroeder v. Hamilton School District*,⁵⁷ a case that rejected the discrimination claim of a gay public school teacher:

The administration of the public schools of this country in the current climate of rancid identity politics, pervasive challenges to authority, and mounting litigiousness is an undertaking at once daunting and thankless. We judges should not make it even more daunting by injecting our own social and educational values⁵⁸

Being all too aware of the increasing prominence of such views among those selected for the federal bench, and given the losses in cases like *Oiler* and *Youngblood*, we were very conscious when considering Darlene Jespersen’s case of how difficult it can be to inspire judges to relate to individuals with non-stereotypical gender expression and to take their dignitary concerns seriously. The losses underscored the need for both education and law reform, as well as the need to be extra careful in selecting cases to present these issues.

III. THE THEORIES: TWO DISTINCT APPROACHES AND A PRINCIPLED LINE

The *Jespersen* case was an attractive one in part because it was unusually clear and straightforward factually, as confirmed by the multiple dissenting opinions on appeal. This remains true notwithstanding the majority decisions at each stage holding that Jespersen’s undisputed evidence was insufficient to substantiate the discriminatory burdens on her, or even to make out a prima facie case of sex discrimination to shift the burden of production to Harrah’s.

For twenty years, Jespersen had been a loyal, hardworking employee with an exemplary employment record. It is rare indeed in employment discrimination cases that an employer never suggests even once that the plaintiff was less than stellar in job performance. In Jespersen’s case, the positive annual reviews by her supervisors and copious unsolicited “guest comments” over the years showed that Harrah’s Sports Bar patrons were more than pleased to buy their drinks from her and to enjoy the warm, friendly atmosphere she inspired at the bar, despite her lack of makeup.⁵⁹ As Jespersen became an experienced bartender, she learned how important it can be to command the respect of customers, especially those inclined to drink too much and to become unruly. For her, interacting well with her guests required her to have self-confidence from being comfortable in her own skin. When she submitted to a full facial makeover at the company’s urging sometime in the mid-1980s, when Harrah’s merely recommended that its female employees wear makeup, she felt it made her look ridiculous and transformed her into an object of male scrutiny in a humiliating manner. In addition to making her feel uncomfortable, the makeup

56. See *infra* pp. 306–07 (discussing questions raised during *Jespersen* oral arguments).

57. 282 F.3d 946 (7th Cir. 2002) (Posner, J., concurring).

58. *Id.* at 959.

59. See *supra* note 11 and accompanying text.

interfered with Jespersen's ability to interact well with her customers because it placed her in a different social role; male guests and bartenders alike saw her differently, and she saw herself differently, too. After a couple of weeks of making a good faith attempt to become accustomed to the makeup, Jespersen gave up and tossed the remaining products into the trash, vowing not to endure it any longer.⁶⁰

The makeup requirement Harrah's imposed in 2000 via the "Personal Best" policy was significantly more detailed, rigid, and intrusive than its prior recommendation.⁶¹ In addition to requiring full facial makeup at all times, the

60. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1077 (9th Cir. 2004). *See also* Petition of Darlene Jespersen for Rehearing and Rehearing En Banc, *supra* note 36, Ex. 3, at 121–22, available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/365.pdf. Jespersen is not alone in her perception that full facial makeup can change a woman's appearance in ways that alter others' perceptions of her, and can be seen as shifting her social role from that of competent actor, to one of passive object. Feminist activist Dana Densmore succinctly captured Jespersen's experience with her rhetorical question: "How can anyone take a manikin seriously?" DANA DENSMORE, *ON THE TEMPTATION TO BE A BEAUTIFUL OBJECT* (1968), *as quoted in*, KATHY PEISS, *HOPE IN A JAR: THE MAKING OF AMERICA'S BEAUTY CULTURE* 261 (1998). *See generally* NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (2d ed. 2002).

61. The "Personal Best" policy stated, in relevant part:

All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. 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.

* * *

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

- Overall Guidelines (applied equally to male/ female):
 - Appearance: Must maintain Personal Best image portrayed at time of hire.
 - Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
 - No faddish hairstyles or unnatural colors are permitted.
- Males:
 - Hair must not extend below top of shirt collar. Ponytails are prohibited.
 - Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
 - Eye and facial makeup is not permitted.
 - Shoes will be solid black leather or leather type with rubber (non skid) soles.
- Females:
 - Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
 - Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
 - Nail polish can be clear, white, pink or red color only. No exotic nail art or length.

policy required employees to recreate the “look” chosen for them by a consultant and provided that supervisors were to monitor female employees daily, using photographs taken after the consultants had performed each woman’s “makeover.”⁶² The policy thus robbed female employees of any discretion about their facial appearance. By contrast, it left men doing the same jobs free to design their own “look.” For example, men could be clean-shaven or wear sideburns, moustache, or beard (in any combination), and could change their appearance however they wished and as often as they wished, as long as they went without long hair, facial makeup, and colored fingernail polish.⁶³

Given the sex-based lack of discretion, the greater uniformity of appearance demanded of women, and the demeaning message that women cannot look professional and appealing unless “improved” in a company-dictated way, the parallel to *Carroll v. Talman Savings*⁶⁴ seemed unmistakable. The Ninth Circuit had cited *Carroll* with approval in its en banc decision in *Gerdorn v. Continental Airlines*,⁶⁵ which two decades earlier had laid out the analysis for appearance code cases within the Ninth Circuit, noting in particular that the plaintiff’s burden to make out a prima facie showing of disparate treatment because of sex is “not onerous” when an employer’s policy explicitly imposes different requirements for male and female employees.⁶⁶ *Gerdorn* stated expressly that a plaintiff carries her burden, and shifts the burden to the employer to show a legitimate business need for the sex-based rules, when the plaintiff shows that

-
- O Shoes will be solid black leather or leather type with rubber (non skid) soles.
 - O *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary [sic] colors. Lip color must be worn at all times.* (emphasis added).

Jespersen v. Harrah’s Operating Co., 444 F.3d 1104, 1107 (9th Cir. 2006) (emphasis added by court). See also Rehearing Petition, *supra* note 36, Ex. 2, at 83–84, available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/364.pdf (appearance and grooming rules; beverage server, bartender, and barback position descriptions and appearance rules) [hereinafter Rehearing Petition Ex. 2].

62. Rehearing Petition Ex. 2, *supra* note 61, at 80. The policy provided for mandatory training by the company’s retained image consultants and required daily monitoring by reference to the employee’s “post-makeover” photograph:

When properly made-up and dressed in their fitted uniform, two “Personal Best” photos (one portrait and one full body) are to be taken capturing each employee looking his or her Personal Best. These photos are to be placed in the employee’s file and become the Personal Best appearance standard to which that employee will be held. . . . *It is imperative that the department supervisors utilize these photos as an “appearance measurement” tool, and, on a daily basis, hold each employee accountable to look his or her Personal Best.*

Id. (emphasis in original).

63. To impose more comparable burdens on male and female employees, the policy would have had to require something similarly transformative and burdensome for men, such as requiring men to wear a full beard with prescribed contours. This requirement would alter each man’s appearance by concealing his face, cause the men to resemble each other to a far greater extent, and require daily maintenance and supervisors’ inspections.

64. 604 F.2d 1028 (7th Cir. 1979).

65. 692 F.2d 602, 606 (9th Cir. 1982).

66. *Id.* at 608.

the employer's policy contains different appearance requirements for female and male employees.⁶⁷

In response to Jespersen's showing, all that Harrah's submitted to justify its makeup rule was the cursory declaration of an "image consultant," who opined that makeup "completes the uniformed" look for female employees, and that women's faces benefit from makeup due to the purported rigors of casino lighting.⁶⁸ The consultant offered no explanation for why or how the casino's lighting might fall differently on the faces of Harrah's male bartenders.⁶⁹

The district court evaluated Jespersen's sex discrimination claim using the "equal burdens" test.⁷⁰ The court rejected Jespersen's claim by relying, in part, on a concept employed in early appearance code cases—that Title VII only protects employees against discrimination based on immutable traits. In doing so, the court did not acknowledge that the early cases limiting protection based on immutability have long been superseded by decisions such as *Carroll*, *Gerdum*, *Frank*, and others.⁷¹ The district court then engaged in a blatantly speculative balancing of the various different burdens Harrah's imposed on its female and male employees with its sex-differentiated grooming requirements.⁷² Despite the obvious incongruities of the burdens in the comparison, and the court's recognition that individual employees of either sex may differ in their experiences of burden (for example, some men may want to wear makeup, while most do not object to that prohibition), the court then concluded there were no material factual issues requiring further discovery or trial, and that Jespersen had failed to show unequal treatment because of sex in violation of Title VII.⁷³

The following sections address three major strategy issues we considered when deciding to undertake and then preparing the appeal, and some key areas of concern highlighted by the judges' questions at oral argument.

A. Offering Multiple Rationales for an Appellate Reversal

In preparing the appeal, we anticipated that the time was right to urge the court to reconsider the "equal burdens" test in light of *Price Waterhouse*, and to recognize that requiring male and female employees to conform to rigid sex-based stereotypes is inconsistent with Title VII's rule that each employee is to be judged as an individual, without differential treatment based on sex.⁷⁴ This is the key underlying principle in decisions rejecting the notion that the "equal

67. *Id.* ("Because Continental's facially discriminatory policy itself supplies the requisite elements of a prima facie case, we must look to Continental's efforts to rebut it").

68. Corrected Opening Brief, *supra* note 1, at 31–33.

69. *Id.*

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

71. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1080 (9th Cir. 2004).

72. Corrected Opening Brief, *supra* note 1, at 8–9, 29.

73. 392 F.2d at 1083.

74. *See City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

opportunity harasser” does not discriminate,⁷⁵ a principle that many people intuitively grasp as correct.

Thinking pragmatically, however, it seemed wise to offer the appeals court multiple analytical routes. Notwithstanding our hope of advancing the law, the top priority always remained winning the reversal and reinstatement of Jespersen’s case in the district court. Anticipating that the appellate court might not be prepared substantially to revise the decades-old “equal burdens” test based on *Price Waterhouse*, we therefore also argued the case under the old rule, explaining why a reasonable jury easily could conclude from the evidence submitted—including very prominently the plain language of the policy itself—that the policy was more burdensome for women and its overall message was subordinating to women.⁷⁶

Thus, we drew directly from *Carroll v. Talman Federal Savings and Loan Association*⁷⁷ as we explained that Harrah’s policy unavoidably conveys a message that women’s faces—and not men’s faces—are inadequate in their natural state, and that women—and not men—are incapable of making appropriate decisions about how to prepare their faces in the morning. In addition to the discriminatory messages inherent in the makeup rule, Jespersen testified about the policy’s harmful impact on her personally, including the humiliation, alienation, and interference with work that she experienced. Hence, even if the casino had been well intentioned in fashioning such a rule, benign intent would not save it.⁷⁸

Recall that, on summary judgment, all reasonable inferences must be drawn in favor of the nonmoving party and the motion may not be granted if a reasonable jury could find in the nonmoving party’s favor.⁷⁹ Despite the en banc majority’s surprising, contrary view, reasonable jurors should need neither an expert witness nor a pile of receipts to know, in Judge Kozinski’s words, that cosmetics “don’t grow on trees.”⁸⁰ Likewise, the point that it takes more time to perform a “makeover”—especially to do so properly—than to not perform it could hardly be more obvious.

75. See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463–64 (9th Cir. 1994) (rejecting defense that harassment directed at woman was “cured” by fact that harasser also referred to men as “assholes”); *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 908 (9th Cir. 1999) (“To suggest, as Potomac does, that it might escape liability because it equally harassed whites and blacks would give new meaning to equal opportunity. Potomac’s status as a purported ‘equal opportunity harasser’ provides no escape hatch for liability.”).

76. Judge Thomas agreed, dissenting from the panel majority decision, *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1085–87 (9th Cir. 2004), as did Judges Kozinski, Graber, and William Fletcher, dissenting from the en banc majority decision, *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1117 (9th Cir. 2006).

77. 604 F.2d 1028 (7th Cir. 1979), cited with approval in *Gerdorn v. Cont’l Airlines, Inc.*, 692 F.2d 602, 606 (9th Cir. 1982).

78. *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003); *United States v. Virginia*, 518 U.S. 515, 536 (1996) (holding invalid the males-only admissions policy of the Virginia Military Institute); *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982).

79. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

80. *Jespersen*, 444 F.3d at 1117.

Yet, the more we considered the “equal burdens” test, the more the exercise of comparing very different “burdens” seemed illogical and incoherent. Is it not a bizarre, apples-to-oranges comparison to weigh the burden of periodic haircuts against that of daily facial makeovers? In addition, as Jespersen’s testimony illustrated, not every woman experiences the same burden if required to wear full facial makeup; likewise, men do not all feel the same way about haircuts. How can such an analysis fail to violate Title VII’s command that employees must be treated equally as individuals, and not be treated differently “because of sex”?

More importantly, it seems inconsistent with *Price Waterhouse* and the harassment cases to say that a sex-based burden on one person can be offset by a different sex-based burden on someone else. Such an analysis would be laughable if offered to justify that approach to other group-based, discriminatory conditions of employment. Consider, for example, a company that required its female employees to work in rooms without heat, but answered their sex discrimination complaint by pointing to the unsanitary conditions it inflicted on its male employees. Even in the context of grooming and fashion, with their admittedly irrational elements, why would two discriminatory wrongs make a legal right?

B. Drawing a Principled Line from the Case Law

We anticipated the court might have at least two principle concerns in deciding this case. First, the judges might view Jespersen’s claim as requesting, or inevitably leading to, a rule that generally would preclude any differentiation by sex in dress codes, something many judges would consider socially unacceptable and beyond with Congress could have intended.⁸¹ The second concern, a prominent variant of the first, would be a fear that any decision in Jespersen’s favor, if not clearly limited, would invite the ostensibly commerce-threatening specter of men in dresses⁸²—a result that would invite ridicule of the court. Since few employers actually have rules explicitly forbidding men to wear feminine attire to work—and yet, due to social enforcement of gender expectations, such sights are rare indeed outside certain nightclubs—it is strange how much preoccupation there is with whether employers might lose the ability to impose such a rule.

But the concern persists that allowing women greater freedom inevitably will loosen the ties on men—literally. And the concern finds some support in the spate of cases brought by men mostly during the 1970s to challenge rules requiring that they keep their hair short, their cheeks shaved, and their ties

81. Despite the evidently common view that such a position is reasonable, Title VII has no exemption for appearance rules. And given the text of Title VII, why should employers generally be able to mandate gender conformity as a term of employment absent a specific need? Yet the *Jespersen* case required no such general principle. Thus, in light of the strength of social conventions regarding dress and grooming, an important goal was to take on only as much as necessary for the case. It therefore was critical to offer a workable and doctrinally sound limiting principle.

82. See *generally* *Oiler v. Winn-Dixie La., Inc.*, 89 Fair Empl. Prac. Cas. (BNA) 1832 (E.D. La. 2002).

knotted.⁸³ These cases played a significant role in shaping the “equal burdens” test. Recognizing that courts were not receptive to those claims in large part because they did not see the male employees as harmed in a meaningful way, we drew directly from the statute and prior dress code cases in proposing the limiting principle that a Title VII claim only is cognizable when a gender-specific appearance rule tends to subordinate or limit professional opportunities to a meaningful extent.⁸⁴ In most circumstances, rules about men’s hair length and neckties do not correlate to class-based subordination by gender,⁸⁵ though the problematic implications for transgender employees remain important.⁸⁶

Case law explaining that an unequal job term or condition fails to give rise to a Title VII cause of action unless it has substantial effect—which logically should apply to differences in appearance requirements—offers another limiting principle. In dictum in *Nichols v. Azteca Restaurant Enterprises, Inc.*,⁸⁷ for example, the Ninth Circuit commented that the decision’s protection of gender-variant employees from coworker harassment should not be taken as prohibiting “reasonable” appearance codes. This left open the question of how the “reasonableness” of particular dress codes might be ascertained in future cases, including whether there must be an “objective” assessment to confirm the reasonableness of the offense an employee might claim, as per the test in harassment cases. The question is especially intriguing because, unlike obnoxious or threatening harassment to which reasonable people by definition object, individual reactions to gender-specific appearance rules tend to vary depending on individual gender identity and custom. However, the purpose of Title VII is to end discrimination, even when it is customary. Thus, the tension between the law’s promise to end gender distinctions and judges’ reluctance to get too far ahead of social norms was obvious, and it underscored the strategic need to offer a limiting principle.

At the same time, it seemed clear that, regardless of how the analysis might be done in harder cases, Harrah’s extraordinarily intrusive makeup policy was a good place to start. With its stringent requirements—including training by a

83. See, e.g., *Fountain v. Safeway Stores*, 555 F.2d 753 (9th Cir. 1977); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249 (8th Cir. 1975); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975); *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir. 1974).

84. 42 U.S.C. § 2000e-2(a)(1) (2000) (“It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” (alteration added)); *Gerdorf v. Cont’l Airlines, Inc.*, 692 F.2d 602, 606 (9th Cir. 1982) (explaining that 42 U.S.C. § 2000e-2(a)(1) is violated when there is a “significantly greater burden” imposed by sex and such a burden alters the terms or conditions of employment), cert. denied, 460 U.S. 1074 (1983).

85. See *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1086 (9th Cir. 2004) (Thomas, J., dissenting) (“[W]hat violates Title VII are those [appearance requirements] that rest upon a message of gender subordination. . . . When early challenges to requirements that men keep their hair short arose in the federal courts, those requirements stemmed not from gender subordination, but from fear of a youth counterculture.” (alteration added)).

86. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem (Ohio)*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

87. 256 F.3d 864, 875 n.7 (9th Cir. 2001).

consultant to apply just-so the mandatory four types of makeup daily without exception, and supervisors charged to adjudge each female employee against her photograph—the policy was heavy-handed and controlling to an extreme degree, even for the unrelentingly competitive world of Nevada casinos.

C. The BFOQ Analysis That Should Have Been

The number of cases addressing what can, and what cannot, constitute a bona fide occupational qualification is somewhat limited,⁸⁸ but the rule they follow has been honored consistently: Customer preferences do not legitimate otherwise discriminatory company policies.⁸⁹ This is not to say that Title VII should prevent a company from altering or enhancing its “brand image” with new themes or snazzier uniforms. Rather, the statute simply should limit an employer’s ability to impose policies that burden employees selectively along lines forbidden by the civil rights law. Thus, no casino should be free to “freshen its brand” by dictating that its female employees undergo a stylized, ultra-feminine “makeover,” while males remain free to determine their own facial appearance as they please, advised merely to be clean and neat. If a company chooses to impose a one-sided, sex-based change, it should be prepared to prove why doing so is essential to its business.⁹⁰

Just as in *Frank*, *Gerdorn*, and *Carroll*, courts considering a gender-specific rule should inquire into what the actual jobs at issue entail. Dress code analysis necessarily varies with the job in question. Thus, a court should both ascertain the nature of the job and then consider any legitimate reasons for marking the employees who do the job as male or female with sex-specific attire or grooming rules. For example, being female or male and dressing (or undressing) in particular ways certainly could be BFOQs for certain adult entertainment jobs. Anyone who accepts a job as an erotic dancer cannot be heard to object to the sexy costume and related job duties. Likewise, women who seek to work as a “Hooter’s girl” must be prepared to wear the tight-T-shirt uniform for which that restaurant chain is known.⁹¹

In Jespersen’s case, Harrah’s purported to justify its makeup rule by comparing its casinos to Disneyland.⁹² But that comparison only underscores the distinction that must be made between actors and sales clerks. Not all Disney

88. See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981); see also Brief of the National Employment Lawyers Association et al. as Amici Curiae Supporting Plaintiff-Appellant, *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 U.S. 9th Cir. Briefs LEXIS 30.

89. In this case, it is fair to say that the customers’ actual preferences were conveyed in Jespersen’s copious, effusive “guest comments” attesting that Harrah’s customers appreciated Jespersen as she was, without makeup.

90. See Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2565–68 (1994).

91. *Id.* at 2578.

92. Answering Brief for the Appellee-Defendant at 33, *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 WL 22716702; see also Brief for the Council for Employment Law Equity et al. as Amici Curiae Supporting Defendant-Appellee, *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 U.S. 9th Cir. Briefs LEXIS 250.

employees are entertainers. Harrah's references do not acknowledge the difference between cartoon-costumed performers portraying Goofy or Sleeping Beauty and those selling food and souvenirs. True, Disney's sales clerks wear uniforms and must "act" perky, but no reasonable juror would confuse those clerks with the cartoon-costumed actors, let alone see the clerks as actors with sex-specific roles.

Yes, Harrah's is an entertainment venue. But, according to its bartenders' job description—the contents of which were undisputed—the casino's staff are not performers of any kind. They do not portray any role other than themselves. More importantly, there are no gender-based distinctions in the bartenders' job duties that would explain why women could be considered performers who require makeup when men are not.⁹³ The extreme, unjustifiable nature of Harrah's policy was even more evident in the fact that the company required all female beverage service employees to wear the complete makeup regimen whether they were tending bar or working as "bar backs," hauling crates of bottles, glasses, and ice. The notion that Harrah's business success depends on its female employees wearing full makeup to lug supplies in the back room is just plain silly, and certainly speaks for itself without requiring expert testimony to disprove it.

In the end, accepting a corporate claim that service personnel are performers without any substantiation—especially when job descriptions indicate to the contrary—is dangerous. It does real damage to the longstanding, important "no customer preference" rule—a rule that Congress recognized is essential for Title VII to act as a meaningful check on business owners' ability to impose any rules that they believe will enhance their bottom line, no matter how discriminatory and demeaning for employees.⁹⁴

D. Some Apparent Concerns and Priorities of the Federal Bench

Preparing for the oral argument before the three-judge panel, we expected hypothetical questions about other types of employee gender nonconformity. Given how strongly some people object to gender-variant men (a social phenomenon with which we are very familiar at Lambda Legal), we presumed there would be special interest in male employee gender nonconformity. Interestingly, questions posed during oral argument actually focused much more on limited divergence from conventional—if not downright old-fashioned—grooming norms for women. For example, there were questions about female employees who might decline to shave their legs and wear stockings. I also was asked whether Title VII limits a law firm's right to fire a female attorney who will not wear skirted suits.⁹⁵ The extensive hypotheticals about gender nonconformity never came close to addressing the possibility of men in skirts, or women in ties, or other more notable gender-bending. Rather, it was evident that two members of the panel were troubled enough at the thought

93. Rehearing Petition Ex. 2, *supra* note 61, at 83–84.

94. See *generally* Brief for the National Employment Lawyers Association et al., *supra* note 88.

95. As someone who routinely wore pants suits to court while employed by a large private law firm, has not worn a skirted suit for a decade, and was wearing a pinstripe pants suit while responding to the question, I suspected my equivocal response may have seemed disingenuous.

of even moderately freer gender expression in the workplace. And it seemed not to assuage those worries that Title VII decisions have reiterated consistently for decades that the statute's core inquiry is whether, "but for" an employee's sex, he or she would have been treated differently.⁹⁶ In Jespersen's case, that inquiry is poignant indeed; no one questions that were Darlene male she still would be tending Harrah's Sports Bar and receiving steady praise from her supervisors and guests alike.

During the en banc argument, the focus was different, with questions probing whether, if our theory were accepted, future challenges to sex-specific appearance rules could not be disposed of easily on summary judgment and, instead, all such cases would require trials. One answer is that there is no claim, and thus no need for trial, except where an employee shows that a sex-specific rule demeans the employee's professional stature, or curtails her opportunities to a cognizable degree. As noted above, the text of Title VII supports the threshold requirement that the appearance rule must have sufficient impact to change the terms or conditions of employment.⁹⁷ Plaintiffs do not necessarily need experts to make that showing in harassment cases, and frivolous harassment cases often are rejected on summary judgment. At the same time, it is the quintessential role of jurors to decide whether a reasonable person in a plaintiff's position would find particular treatment trivial or intolerable. Why should appearance rules require such a different analysis? Are there truly doctrinal reasons to assess these cases differently, as distinct from the recognized judicial concerns about docket management and the less sympathetic business concerns about litigation costs?

The threshold requirement also means that appearance rules to which individual employees object, but which tend to enhance their professional look or stature—such as suits and ties rather than casual wear—are less subject to challenge.⁹⁸ This approach provides for a careful check of rules that differentiate by sex, rather than of rules that simply require a standardized appearance at which an iconoclast may balk. This is in keeping with Title VII's duty to reduce differential treatment based on sex, pursuant to the statute's overarching purpose of eradicating *discrimination*. Thus, there *should* be a meaningful test of any rule that requires women to express their gender in a specified, feminine way, especially if it marks them as different from their male coworkers in a way that may be subordinating, and interferes with their ability to do their jobs and to blend in, as Darlene Jespersen wanted to do.

Consequently, this critique of rigid, sex-based rules does not impugn employer rules against provocative dress, outlandish hairstyles, unusual body

96. See, e.g., *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

97. See *supra* note 39 and accompanying text.

98. This principle distinguishes the cases in which men objected unsuccessfully to rules requiring them to cut their hair short and wear ties. See *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1086 (9th Cir. 2004) (Thomas, J., dissenting). We argued that the competent professional role for men often is not comparable to the gender stereotypes for women, including professional women. The expectation is not to be notably sexual, and yet the conventions for women—baring one's legs, wearing heels that make one less stable on one's feet than flat shoes, and decorating oneself with makeup—connote a role that is more decorative, more objectified, and less dignified. See Bartlett, *supra* note 90, at 2547.

piercings, visible tattoos, distracting jewelry, or other self-presentation that causes an individual to stand out. It may be that our laws should protect employees' liberty to a greater extent in this regard. Title VII does so to a certain extent when there are religious or cultural reasons for an individual's non-conforming appearance. But Jespersen's goal was the opposite. She wanted to blend in with her coworkers, rather than be marked as different. Her wish was consistent with Harrah's rule against "garish" nail polish and "faddish" hairstyles.⁹⁹ And to be clear, contrary to Harrah's characterization of Jespersen's position,¹⁰⁰ Darlene never sought a ban on makeup. She never sought to impose a unisex rule, nor did she object to the Harrah's uniform.¹⁰¹ Indeed, she wore it proudly for twenty years. As a dignified, hard-working bartender, she simply sought the same basic respect as was accorded to her male coworkers, because there is nothing wrong with her face, notwithstanding her gender. If the male bartenders were deemed "professional" when neat, clean, and uniformed, then she should have been as well. Title VII should promise this much to America's working women. Therefore, just as Ann Hopkins was entitled to argue to a jury that Price Waterhouse's partners had no valid reasons for suggesting that she alter her appearance to look more conventionally feminine, and as the female bank clerks of the Talman Federal Savings and Loan had substantiated their discrimination claim amply by submitting the bank's own policy (with its unmistakably subordinating message communicated by its plain language), Jespersen should have had her day in court. Given the undisputed terms of the casino's policy, Harrah's at least should have been required to substantiate its claimed business need to insist that only its female bartenders wear company-dictated uniforms on their faces, along with the tuxedo-style uniforms all the bartenders wore—male and female alike.¹⁰²

IV. THE EN BANC DECISION: A BREAKTHROUGH AND MANY NEW QUESTIONS

The majority opinion authored by Chief Judge Schroeder affirmed the grant of summary judgment against Darlene Jespersen, concluding that Jespersen had not submitted enough evidence to show that there was a triable issue regarding the burdens allegedly imposed on women by Harrah's makeup requirement.¹⁰³ Judge Schroeder first determined that Harrah's entire appearance

99. See *supra* note 61 and accompanying text.

100. Answering Brief for the Appellee-Defendant, *supra* note 92, at 36.

101. Reply Brief of Appellant-Plaintiff at 8–10, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004) (No. 03-15045), 2003 WL 22716706.

102. Indeed, with reference to the gender stereotypes that infuse America's playrooms, this particular sex-specific appearance rule seems particularly incongruous in that it required Darlene to emulate Barbie's face though her uniform came from Ken's wardrobe. For educational reasons, we decided to post Darlene's "Personal Best" photographs on the web, together with a recent photograph, in part to allow those following the case to see this incongruity, and also to see that there is nothing odd or unusual about Darlene's appearance. She is a friendly-looking person whose face looks pleasant and welcoming in its natural state.

103. Although the ultimate conclusion of the majority opinion was the same as the three-judge panel and the district court before it, the decision employs different reasoning and suggests that it might have reached another result had evidence been submitted: (1) to show the costs of purchasing makeup and the time required to apply it; (2) to confirm Harrah's management's discriminatory

policy must be considered as a whole.¹⁰⁴ This approach seems inconsistent, however, with the approach she took when authoring the Ninth Circuit's 1982 en banc decision in *Gerdorn*, in which the court found that Continental Airlines' weight policy violated Title VII without considering all the other elements of the airlines' appearance rules. But considering the appearance requirements as a whole may highlight sensibly the greater discrimination inherent in Harrah's requirement that female cocktail servers wear not only full makeup (like the bartenders), but also skirts and high heels, while balancing their trays among tipsy, randy casino guests. It is notable, however, that the decision strangely fails to inquire into the cocktail servers' job description when making the comparison between the two jobs.

Although the decision's analysis is somewhat cursory, it is remarkable in at least two positive respects. First, the comment that there may be more actionable discrimination in the appearance rules applicable to the female-dominated cocktail server job—for which female employees must wear much more restrictive, stereotypical attire—indicates that the catch-22 element discussed in *Price Waterhouse*¹⁰⁵ is not essential. According to this decision, the more restrictive, uncomfortable, or otherwise problematic the sex-specific requirement, the more vulnerable it will be to challenge. This notion is consistent with *Carroll*, *Gerdorn*, and *Frank*, in which the plaintiffs were performing “women's jobs.” It is consistent in particular with *Carroll*, which predated *Price Waterhouse* by ten years, and did not address—let alone require—a showing that the female bank employees faced any catch-22. Judge Schroeder's confirmation that plaintiffs need not demonstrate a catch-22 element underscores that the most entrenched, oppressive rules may be the most vulnerable to challenge, as they should be.

Second, in an explicit and important step forward, the majority holds “that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping”¹⁰⁶ Prior case law had tested appearance codes only to ascertain whether they imposed unequal burdens on men and women, and had held that there is no sex discrimination in sex-differentiated dress policies so long as female and male employees are constrained by stereotypes to an equal extent.¹⁰⁷ These cases did not, however,

intent to impose sex stereotypes; (3) to provide an objective measure of the physical and psychological burdens on female employees; (4) to illustrate how the required makeup tends to lead to sexual harassment; or (5) to demonstrate more fully how the makeup interferes with female bartenders' ability to do the job.

104. Thus, in this case, one must compare the “Personal Best” requirements of full makeup and teased/styled/curled hair for women against the washed face and clipped hair for men, and also consider the bartenders' uniform, which is largely, using Judge Schroeder's word, “unisex.”

105. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

106. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc).

107. See, e.g., *Frank v. United Airlines*, 216 F.3d 845, 849 (9th Cir. 2000) (striking down differential weight rule), *cert. denied*, 532 U.S. 914 (2001); *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (en banc) (same); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977) (upholding hair length restriction for male employees held to be equally burdensome as applicable rule for female employees); *Barker v. Taft Broad. Co.*, 549 F.2d 400 (6th Cir. 1977) (same); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249 (8th Cir. 1975) (same); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (same); *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) (same); *Sprogis v. United Air*

involve policies that imposed very different requirements on women and men. Differential weight rules can be balanced. So, too, can a requirement that female flight attendants wear contact lenses, when male attendants have the choice to wear glasses. Again, as noted above, there is something odd and incoherent about the “apples-to-oranges” comparison Judge Schroeder’s analysis seems to endorse. It also seems inconsistent with the decisions rejecting the “equal opportunity” harasser defense.¹⁰⁸

Despite the unpersuasiveness of this approach, Judge Schroeder’s opinion takes an important step by recognizing that dress and grooming stereotypes can be burdensome. Hence, forcing compliance with them can violate Title VII if the burden is heavy enough. Under this clarified analysis, an employer should no longer be able to avoid Title VII liability simply by “balancing” the burden on one gender with an “equally” restrictive stereotype for employees of a different gender.

In addition to confirming that the sex stereotyping doctrine is not restricted to harassment cases, the opinion also offers multiple suggestions for how future cases may show that impermissible sexual stereotyping has occurred. Thus, in future cases, plaintiffs may be well advised to develop evidence detailing burdens of cost, time, and physical restriction. It also may be helpful to try to provide an “objective” assessment of an appearance rule’s burdens on female (or male) employees generally in order to confirm the reasonableness of a particular plaintiff’s testimony about the subjective impact upon her.

The suggestion that a plaintiff should show that her objection is reasonable may seem to draw unremarkably from the common discrimination question about what is reasonable in the context. Yet, how should this objective confirmation be obtained as to stereotypes that many people take for granted and do not contemplate resisting? Unlike harassment, which is generally unpleasant for anyone subjected to it, some people like wearing makeup and very gender-specific clothing. Others find such appearance expectations extremely oppressive. Often, one’s reaction will be determined by one’s gender identity and usual gender expression. A very feminine cocktail server may delight in daily access to a makeup trainer, while an androgynous person like Darlene Jespersen may despise the idea. How should courts select the “reasonable person” for a particular comparison? If one sex or another historically has dominated a job, should that influence the selection of the gender identity of the “reasonable person” used as a comparator? It would have been consistent with *Price Waterhouse* had the *Jespersen* court used a “reasonable person” with a masculine or androgynous gender identity to test the reasonableness of Harrah’s rules for bartenders, and it probably would have vindicated Darlene’s discrimination claim. But that approach would undermine Title VII’s effectiveness in challenges to sex-based rules that are common in a field, but burdensome and unjustifiable, as in the cases against the airlines.

Lines, Inc., 444 F.2d 1197 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971); *Laffey v. Nw. Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973) (finding discriminatory the airline’s policy requiring female flight attendants to wear contact lenses while permitting male attendants to wear glasses).

108. See discussion *supra* note 75 and accompanying text.

In addition, why is it preferable to rely on an “expert” voice rather than just having the jury do the assessment as in harassment cases? Is it likely that experts actually will be required in most future cases? Such an understanding would be inconsistent with prior case law. Ann Hopkins was not required to submit evidence that other Price Waterhouse female account managers objected to wearing makeup, jewelry, and pastel suits. She did not need an expert to give an “objective” assessment as to what was deemed acceptable for women, as opposed to men, in similar business contexts. The comparator in *Price Waterhouse* was what the men doing Ann Hopkins’ same job were doing, *not* what businesswomen elsewhere were doing.

Some of the majority’s suggestions seem odd indeed. For example, as Judge Kozinski points out in his dissent, it seems manifestly incorrect that expert testimony would be required to confirm what members of any jury are perfectly capable of perceiving on their own. Most people called to serve on a jury will have either applied makeup personally or watched others do so—at least enough to know that it takes time to do it properly. Judge Kozinski also pointed out that, although some women are sufficiently accustomed to wearing makeup to consider it inoffensive and nonremarkable, his exposure leads him to conclude that reasonable jurors easily could agree with Jespersen (and him) that those not accustomed to makeup could find a makeup mandate demeaning to an extent that would impair one’s ability to work.

It is curious also that the majority faulted Darlene’s case for not presenting more evidence “that the challenged policy was part of a policy motivated by sex stereotyping.”¹⁰⁹ While it might have been helpful to have more evidence of what Harrah’s executives had in mind when they decided to require makeup for women (like the evidence Ann Hopkins had from the reviews of her work performance by her former Price Waterhouse colleagues), the details of Harrah’s sex-based rule are plain in the text of the policy and Harrah’s stated its intention both in its policy and through its expert. Per the “Personal Best” policy, servers must be “body toned and appealing to the eye.”¹¹⁰ The company has expressed openly its view that its female beverage servers cannot look professional and “appealing” unless they alter their faces to achieve the company-approved, multi-element “look.” There is no secret motive to ferret out and introduce into evidence.

Therefore, what purpose would it serve to obtain more evidence of the employer’s intent when the appearance code already explicitly requires conformity with stereotypes? In other words, the intent to treat employees differently “because of sex” is stated directly. That by itself is contrary to the statute and requires justification. In contrast, direct evidence of discriminatory intent is relevant in mixed-motive cases and when the facial distinction is permissible but the plaintiff believes the distinction was used as pretext to accomplish an impermissible, discriminatory end. As with race, religion, and other characteristics enumerated in Title VII, different treatment based on sex

109. *Jespersen*, 444 F.3d at 1106.

110. *See supra* note 61 and accompanying text.

must be justified with a legitimate reason, and it is no answer that the employer lacked any intent to cause harm or distress.¹¹¹

Again, in *Price Waterhouse*, the evidence of discriminatory intent was relevant because it was a mixed-motive case in which the plaintiff's job performance had been impugned. On the disputed question of whether Ann Hopkins had been denied partnership based on her job performance or her gender performance, evidence of the partners' intent was critical. But in *Jespersen*, there was no question what the company was trying to accomplish and why it fired Darlene. As noted above, her performance had been exemplary. The casino simply was making assumptions about the preferences of its customers.¹¹²

So was the en banc majority confused? Or were those judges just unwilling to give Jespersen and others with similar complaints the right to a jury trial, unless they can show that a challenged rule presents a bigger problem. In future cases, perhaps plaintiffs will try to show broad, class-based resistance to the rule in question (as in the airline cases), or present some kind of objective basis for concluding that a "reasonable person in the plaintiff's position" would find the requirement unreasonable.

It is helpful to have the en banc majority's exploration of the types of evidence that may be used in future cases to show actionable different treatment through a dress code that imposes sex stereotypes. Of course, Darlene's trial counsel would have benefited from having this guidance when he was opposing the summary judgment motion in the district court. But, as it had not been established that the sex stereotyping doctrine could be applied against an oppressive dress code, it was even less clear what evidence would be deemed important to prove the claim.¹¹³

111. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003); Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982).

112. The case law has been explicit that customer preference, without more, is *not* an excuse for otherwise discriminatory treatment of employees. See *supra* notes 48, 88, 90 and accompanying text. So to the extent that catering to customers was Harrah's goal, that purpose should not insulate the sex-based treatment of bartenders from review under Title VII. The court seems simply to have assumed that the makeup requirement is a BFOQ, and then to have reasoned backwards to inquire whether that presumptively legitimate business reason should be deemed illegitimate due to an impermissible discriminatory motive.

113. At the same time, neither of Darlene Jespersen's trial lawyers can be accused of over-preparation. Like many plaintiff-side employment lawyers who work on a contingency, Jespersen's initial counsel filed the case and then conducted minimal discovery. He negotiated a settlement for Jespersen that he apparently believed she should have embraced, and lost interest when she did not. Jespersen was unsatisfied with the settlement proposal because it would not have made her whole financially, and in exempting her—but only her—from the makeup rule, Harrah's would have singled her out in a problematic way. Consequently, she found herself heading into her deposition without counsel, and with the period for affirmative discovery drawing to a close. Her second trial counsel entered the case in time to defend her deposition and oppose the summary judgment motion. Jespersen had gathered information about the cost of makeup necessary to comply with the "Personal Best" policy. However, for reasons that are unclear, this material was not submitted with the summary judgment opposition. As for the other types of evidence that Chief Judge Schroeder opined might substantiate a Title VII claim against an oppressively sexist appearance rule, even if trial counsel had had the benefit of that hindsight advice, there was limited time to develop any such evidence before the close of discovery.

With that said, the far clearer analysis comes in the two dissents that concluded Jespersen offered ample evidence to shift the burden to Harrah's to show the business necessity for insisting that women wear all that makeup. First is the straightforward dissenting opinion of Judge Pregerson (joined by Judges Kozinski, Graber, and Fletcher) agreeing us that the terms of the policy itself, as well as Jespersen's testimony, were ample to show that the policy imposed a sex stereotype of a sort that can violate Title VII.

Then comes the pointed and humorous dissent by Judge Kozinski (joined by Judges Graber and Fletcher), who agreed with us that summary judgment was improper on both the sex stereotyping theory and the unequal burden argument. In addition to joining Judge Pregerson's opinion, he wrote separately that it does not require an expert to know that it costs more money and time to use makeup than to not use makeup, and that each of Harrah's grooming requirements manifestly was equally or more burdensome for women, amounting to an unmistakably more burdensome policy overall, or at least one that reasonable jurors could find to be so.

Given the majority's evidentiary roadmap for future cases, and the dissents' explanations of why the record showed clearly a sex-based burden that requires company justification, the opinions taken together have moved the law forward in ways that may make future challenges to stereotypical dress and grooming rules easier to win. This is especially important for the millions of women in service-sector jobs where sex-specific uniforms are common; women routinely are required to wear heels and skirts and otherwise to present themselves in ways that can make it physically harder to do their jobs. Such uniforms also mark women as members of the female class of workers—separate from the male class—with all the restrictive, subordinating effects that may bring. It will be for lawyers preparing future cases to develop ways to document those negative effects.

Note that the *Oncale* decision similarly gave examples of how to prove in subsequent cases that same-sex sexual harassment was “because of sex,” rather than because of sexual orientation (or something else not covered by Title VII). It has been important in some cases since *Oncale* to emphasize that the Supreme Court in *Oncale* did not purport to be exhaustive of the ways one might prove a violation.¹¹⁴ Here too, the majority's various suggestions should be understood as options for future cases, not as mandatory elements of a new, multi-part test.

Lambda Legal, through a former staff attorney, actually was prepared to represent Jespersen at the outset of the case, but, for reasons that are not clear, Darlene was discouraged from accepting public interest representation. This author came to know her a couple of years later, toward the end of the district court proceedings. As Jespersen's experience illustrates, it was hard enough already for someone like her to find counsel to challenge this type of discrimination, especially when it involves a novel question of law and there is limited likelihood of recovering sizable damages. Although it advances the law in important respects, the en banc decision's procedural “suggestions” may well make the situation worse in some respects, to the detriment of working people.

114. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066–67 (9th Cir. 2002) (en banc) (relying on *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), and approving same-sex sexual harassment claim); 305 F.3d at 1068–69 (Pregerson, J., concurring) (relying on *Oncale*, 523 U.S. 75, and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion), and approving gender stereotyping claim); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (discussing *Oncale*, 523 U.S. 75, and permitting “based on sex” element of same-sex sexual harassment claim to

V. MOVING FORWARD: TWO GUIDING THEMES

As we anticipate the work to come in this still important area, two themes deserve special emphasis. First, we should anticipate that corporate marketing planners and image-makers will continue to attempt to standardize the appearance of their companies' workers in sex-specific ways, along lines believed to appeal to customers. Although some contexts may present hard questions of when such policies really are legitimate, in many more, the marketers' concepts will deserve resistance because they will incorporate gratuitously restrictive or burdensome gender stereotypes that are seen as having appeal. The *Jespersen* decision offers a road map to those advocates who wish to tackle other, sex-based assumptions about the proper roles—and rules—for workers in particular fields. To be sure, the case law is not a model of clarity. But, it invites further development and does offer tools. Equally important to such future efforts, however, will be a federal bench comprised of independent jurists who approach such cases with open minds, and with as much concern for workers as for employers and for judicial efficiency. Twenty-five years of conservative activism—which have included aggressive focus on judicial selection and relentless attacks on courts that enforce civil rights laws—have altered both the personnel of the federal judiciary and many judges' sense of the role they have been appointed to serve. It is long past time for voices to be amplified in defense of strict civil rights enforcement by judges who reflect and aim to serve the full diversity of our society. This section addresses these two themes in turn.

A. “Branding” and achieving a “professional look” should not be equated with narrow stereotypes unless they are BFOQs.

The *Jespersen* en banc majority confused three distinct categories of appearance rules: (1) legitimate rules forbidding idiosyncratic behavior or appearance that would detract from the company brand or otherwise causes business problems, which are neutral as to sex, race, color, national origin and religion; (2) illegitimate rules that impose restrictions based on sex or another characteristic covered by Title VII, without business necessity; and (3) rules that vary based on sex or another characteristic covered by Title VII, which are legitimate because they are BFOQs. In a great many instances, valid and invalid rules can be distinguished easily if considered in context. Thus, employers

be proven through evidence that employee was harassed based on a perception that he had “feminine mannerisms” and a belief that he “did not act as a man should act”); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865, n.4 (8th Cir. 1999) (rejecting argument that same-sex sexual harassment cases fail if they do not allege facts falling within one of the three scenarios mentioned in *Oncale*, 523 U.S. 75, explaining: “We think this reading of *Oncale* is misguided. While *Oncale* does recite these three methods of proving sexual harassment, it refers to them as examples of ‘evidentiary routes’ a plaintiff might ‘choose[] to follow’ in establishing his case.”); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999); *Jones v. Pac. Rail Servs.*, 2001 U.S. Dist. LEXIS 1549, *4–*7 (N.D. Ill. 2001) (following *Shepherd*, 168 F.3d 998, in concluding that the examples in *Oncale*, 523 U.S. 75, were “not exhaustive,” and allowing plaintiff to proceed on theory of “same-sex harassment based on his perceived non-conformance to gender-based stereotypes”); *Spearman v. Ford Motor Co.*, 1999 U.S. Dist. LEXIS 14852, at *15–*19 (N.D. Ill. 1999), *aff’d*, 231 F.3d 1080 (7th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001).

should not worry about insisting upon the modesty, neatness, and cleanliness of their employees; no sensible person would argue against a rule that employees should be clean, neat, and covered sufficiently to avoid being an annoyance or distraction to their coworkers.¹¹⁵ As another illustration, consider a restaurant in West Hollywood, California—a city known for its large, image-conscious gay community. The establishment would not run afoul of Title VII if it prohibits its wait staff from wearing facial jewelry and gaudy hair colors. But if it requires its male waiters to use an artificial suntan lotion or to wear very tight pants, while women doing the same job may wear loose trousers or forego the fake tan, then the men are on display and the women are not, though both are doing the same job.

It may be more obvious that an artificial tan is not a BFOQ if one considers bank tellers rather than waiters. At any rate, gender differentiation is suspect under Title VII in all cases and requires company justification. Yet, again, a shift in burden to the employer does not always mean a trial will be required. Note that the question on summary judgment is whether a reasonable jury could find in the nonmoving party's favor. If the employer were a Chippendales nightclub, for example, it should be obvious to even the most sheltered juror that tight pants will be de rigueur for male employees who perform for that audience, and may not be so for female employees.

B. Enforcement of civil rights and other workers' rights laws requires a fair and independent judiciary.

While appreciating all that has been achieved through this inspiring symposium and other enlightening academic work, it also is useful to acknowledge how this case illustrates the real-world results of the federal judicial selection process of recent decades. From the questions Chief Judge Schroeder asked during the en banc oral argument in *Jespersen*, among other reasons, it seems highly unlikely that she has shifted radically in her judicial philosophy and has repudiated the straightforward analysis she articulated so clearly twenty years ago in *Gerdorn*. Thus, when reading the *Gerdorn* decision side-by-side with the one she just authored in *Jespersen*, the suspicion inevitably arises that she simply no longer had the votes to apply the *McDonnell Douglas-Burdine* analysis this time as she did before.¹¹⁶

115. Yet, there is a need for greater public education about what Title VII requires in this area. When consulting on these issues with organizations that serve Human Resources professionals who develop or enforce employee appearance codes, this author has been surprised to encounter widespread confusion between rules that disallow sexually provocative or otherwise inappropriate workplace attire, and rules aimed at the same problems that go much further and needlessly mandate sex-specific stereotypes. Some of this confusion is understandable given the still evolving, ambivalent, and sometimes-inconsistent state of the law. See Bartlett *supra* note 90, at 2579.

116. See, e.g., *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602, 608 (9th Cir. 1982) (en banc).

Where a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender, this court has held that the plaintiff need not otherwise establish the presence of discriminatory intent. . . . Because Continental's facially discriminatory policy itself supplies the requisite elements of a prima facie case, we must look to Continental's efforts to rebut it. A prima facie showing of discrimination is rebutted by raising a genuine issue of fact as to the existence of a legitimate nondiscriminatory reason for the challenged practice.

Accordingly, in addition to scholarly work analyzing the decisions being rendered by a dramatically more conservative federal bench, those desiring to make positive contributions to the law affecting workers and other vulnerable populations would do well also to participate in the discussions and processes that affect judicial selection. The questions posed during the *Jespersen* en banc appellate argument by a number of the more recently appointed judges seemed to reveal a common belief that companies usually should be able to dispense with dress code challenges on summary judgment. From that, it is hard not to conclude that some members of the bench are more aware of the “burdens” on employers than those on workers. Because life experience shapes judicial philosophy, it is critical that these appointed judges reflect the full diversity of our society and legal practice.

The importance of more liberal scholars and opinion leaders joining the effort to educate the public about society’s need for a fair and independent judiciary, and about the shift in power within our society and government that has occurred through scores of reactionary judicial appointments, cannot be overstated.¹¹⁷ Many years of well-funded attacks on judicial independence have taken a toll. The rhetoric that the courts are arrogant, elitist, suspect, and anti-democratic has taken root to a very troubling degree. Although most Americans still would agree that the courts have played an indispensable role as an independent branch—able and responsible to strike down terrible injustices such as racial segregation and other forms of group-based labeling and subordination now recognized to be egregious—reporters and pundits in mainstream media habitually use terms like “activist judges” without definition or acknowledgement of the political assumptions and goals embedded in that term. And both corporate and social conservative voices alike rail against any court decision with which they disagree, feeding popular misperceptions that our courts frequently overstep their role irresponsibly in radical, harmful ways. Notwithstanding the tremendous educational value of symposia, law review articles, and other scholarly work about legal theories for challenging injustice, if those who wish to see workers’ rights and civil rights laws enforced do not participate more vigorously in the educational and political processes concerning judicial selection and the proper role of the courts, these liberal ideas increasingly will be relevant only as history and Utopian social philosophy.

VI. CONCLUSION: RESPECTING THE FACE VALUE OF WORKING WOMEN

Darlene Jespersen remained courageous and determined throughout her struggle with Harrah’s. I do not know anyone else who would have been steadfast through the hardships she endured to press the case. Individuals like

Id. (applying the tests developed in *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–55 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); also citing *Norris v. Arizona Governing Comm.*, 671 F.2d 330, 333 (9th Cir.), *cert. granted*, 459 U.S. 904 (1982), and *Douglas v. Anderson*, 656 F.2d 528, 531 n.2 (9th Cir. 1981)).

117. Lambda Legal has an education campaign underway called “Courting Justice,” which aims to educate and engage those who otherwise would not know how to make their voices heard on federal judicial nominations and related issues of judicial independence. For more information, see http://www.lambdalegal.org/cgi-bin/iowa/courtingjustice/index.html?page=justice_index.

Darlene make it possible for impact litigation to take place for the benefit of entire classes of vulnerable people. It is gratifying to have clarified successfully that dress codes are not exempt from the law against sex discrimination by imposition of gender stereotypes and that reasonableness—the quintessential jury question—is a key part of the analysis. Darlene’s personal sacrifice already has made a difference. Yet, it is frustrating and just plain wrong—both legally and morally—that the en banc majority denied Darlene Jespersen the day in court she should have had under the very rule the en banc majority set forth.

Harrah’s has taken every opportunity to proclaim that the company offered Darlene her job back, with an exemption from the makeup requirement. But, they never acknowledge how rudely inadequate that offer was for Darlene financially. Unlike Harrah’s, which is part of a massively wealthy corporate empire, Darlene suffered severe economic hardship from Harrah’s treatment of her. As the company knew, their financial offer would not have made Darlene whole. Having been on sound financial ground her entire working life, Darlene suddenly found herself unemployed and, seemingly, unemployable in Reno, which is something of a “company town.” Jespersen’s objection to Harrah’s makeup rule evidently made her persona non grata for the other casinos, clubs, and bars in town. After a prolonged period of unemployment, Darlene eventually came to support herself by working three part-time jobs, none of which provides benefits.

Harrah’s management has never acknowledged how much other women despised the makeup rule, or why Jespersen feared being resented by her peers. No mention has ever been made of the essential esprit de corps that she would have lost if the company continued to enforce the “Personal Best” policy against her peers, while giving her special treatment in settlement of her lawsuit.

Moreover, and contrary to Harrah’s many public statements about the casino’s purportedly friendly relations with the unions who represent its employees in Las Vegas, that situation does not exist at its Reno facility, where efforts to unionize repeatedly have been derailed and defeated. It is telling that no unions representing Harrah’s employees would join an amicus curiae brief on Jespersen’s behalf. From the outside, it is difficult to know whether this was because the unions have been concerned less about the grooming rules imposed on female workers and more about wages and other terms that apply to all union members, or because workers in the non-unionized Reno facility do not receive active support, or due to something else; in any event, the fact that Harrah’s employees in Reno lack union representation does reveal that it is a stretch on Harrah’s part to suggest that there was union acquiescence in the casino’s treatment of Jespersen.

Harrah’s has won this battle. And yet the result hardly can be considered a vindication of this sex-discriminatory policy, or of the casino’s authority to promulgate more such policies. Instead, companies nationwide are now on notice that dress codes incorporating gender stereotypes *can* be challenged. Just as *Oncale* opened the door for *Nichols* and *Rene*, and *Smith* and *Schoer* have confirmed that *Ulane* and *Holloway* have been consigned to history, the stage has been set for the coming cases that will continue to champion the dignity and worth of working people generally, and the need to respect gender diversity in particular.

This issue remains important because women workers continue to be taken less seriously; they are disproportionately represented in lower-wage jobs, usually with less job security and often without benefits.¹¹⁸ As Judge Thomas emphasized in his dissent from the panel majority, it would have been a travesty had *Price Waterhouse* been construed as applying only to white-collar job settings, leaving unprotected those in blue-, pink-, and no-collar jobs where uniforms, standardization, and limited individual bargaining power are the norms. Thus, it is a triumph that the en banc majority opened the door for future cases challenging appearance rules that enforce burdensome gender stereotypes. But, the majority also may have imposed strange new hurdles that will make such cases more complicated, more expensive, and thus more difficult for employees to pursue. Accordingly, we all must do our best to reduce this possibility.

In America today, women need to be able to work, to receive a fair wage, and to retain a measure of personal dignity, just as men do. Toward this end, Title VII must continue to be a vital tool, as it has been, in fits and starts, since its enactment. Each succeeding generation experiences greater employment opportunities only when we nurture a shared vision of workplace equality. Absent a proven business necessity, each worker should be judged based on her job performance, not her gender performance. From the step forward accomplished in this case, the next steps must be taken to insist that this will be true.

118. See generally EVELYN MURPHY & E.J. GRAFF, *GETTING EVEN: WHY WOMEN DON'T GET PAID LIKE MEN—AND WHAT TO DO ABOUT IT* (2006); BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001).